

OR FOR POORER? HOW SAME-SEX MARRIAGE THREATENS RELIGIOUS LIBERTY

ROGER SEVERINO*

I. INTRODUCTION.....	941
II. THE EVOLUTION OF SAME-SEX MARRIAGE IN LAW	946
A. The Decades-Long Effort to Strike Down Traditional Marriage Laws Has Been a Consistently Losing One, Until Recently	946
B. By Firmly Establishing Same-Sex Marriage in Law, the Goodridge Decision Opened the Floodgates of Gay Marriage Litigation Across the Country	948
C. The Federal Defense of Marriage Act, Coupled With a Popular Backlash, Has Slowed the Spread of Same-Sex Marriage, For Now	952
1. DOMA Protects the Traditional Definition of Marriage in Federal Law and Guarantees that the Question of Marriage Is Left to Individual States....	952
2. <i>Lawrence v. Texas</i> Calls the Constitutionality of Federal and State DOMAs into Question	956
III. THE LEGALIZATION OF SAME-SEX MARRIAGE IS GENERATING A MULTIPLICITY OF SERIOUS RISKS FOR RELIGIOUS INSTITUTIONS	957

* The author is legal counsel for the Becket Fund for Religious Liberty, a non-partisan, interfaith, public-interest law firm and NGO dedicated to protecting the free expression of all religious traditions. In its first decade, the Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, Unitarians, Zoroastrians, and others. Some of the Becket Fund's clients support both theological and legal recognition of same-sex marriage, while others oppose such recognition.

A. Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Civil Liability	957
1. Religious Institutions that Disapprove of Employees Entering into Same-Sex Marriages Risk Suits Under Employment Anti-discrimination Laws	958
2. Religious Institutions that Disapprove of Same-Sex Cohabitation Risk Suits Under Fair Housing Laws.....	962
3. Religious Institutions that Refuse to Extend Their Services or Facilities to Same-Sex Couples on the Same Terms as Married Men and Women Risk Suits Under Public Accommodation Laws	964
4. Religious Institutions that Express Their Religious Disapproval of Same-Sex Marriage Publicly Face Potential “Hate Crimes” or “Hate Speech” Liability	970
B. Religious Institutions that Refuse to Treat Legally Married Same-Sex Couples as Identical to Traditionally Married Men and Women Risk Losing Equal Access to a Variety of Government Benefits and Privileges	972
1. Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Losing Their Traditional Tax-Exempt Status	973
2. Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from Competition for Government-Funded Social Service Contracts	974
3. Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from Government Facilities and Fora.....	976
4. Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from the State Function of Licensing Marriages	977
IV. CONCLUSION	979

APPENDIX A: SELECT FAILED CHALLENGES TO
TRADITIONAL MARRIAGE.....980
APPENDIX B: SELECT STATE RELIGIOUS EXEMPTIONS
TO CERTAIN CATEGORIES OF DISCRIMINATION ...980
APPENDIX C: SELECT STATE ANTI-DISCRIMINATION
STATUTES WITHOUT RELIGIOUS EXEMPTIONS.....981

“[T]he right to same-sex marriage conferred by the proposed legisla-
tion may potentially conflict with the right to freedom of religion”
Supreme Court of Canada, December 9, 2004.¹

I. INTRODUCTION

On May 17, 2004, same-sex marriage became a legal reality in America. One hundred and eighty days earlier, the Massachusetts Supreme Judicial Court had mandated this result in the case of *Goodridge v. Department of Public Health*,² and in so doing, unleashed a nationwide wave of litigation and political controversy that has yet to subside. In *Goodridge*, the court decreed that the state’s traditional definition of marriage, which consisted exclusively of one man and one woman, was “irrational” and discriminated against gays and lesbians so invidiously that it violated state equal protection guarantees.³ Although the decision carried with it profound implications for religious liberty,⁴ the *Goodridge* court dismissed any religious freedom concerns with the following conclusory footnote:

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.⁵

1. Reference re Same-Sex Marriage, [2004] S.C.R. 698, 700 (advisory opinion holding proposed national same-sex marriage legislation consistent with *Canadian Charter of Rights and Freedoms*).

2. 798 N.E.2d 941, 967–70 (Mass. 2003) (ordering the Massachusetts state legislature to amend its marriage statutes within 180 days to allow for same-sex marriage).

3. See *id.* at 961 (“[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.”).

4. See *infra* Part III.

5. *Goodridge*, 798 N.E.2d. at 965 n.29.

Simply put, the Massachusetts Supreme Judicial Court's confidence is misplaced. The movement for gay marriage is on a collision course with religious liberty. This Article explores the coming clash.

The conflict between gay rights and religious liberty over marriage seems inevitable because of four concurrent phenomena. First, marriage, as a uniform concept, pervades the law;⁶ second, religious institutions are regulated, both directly and indirectly, by laws that turn on the definition of marriage; third, religion has a historic public relationship with marriage that resists radical change as a deep matter of conscience; and fourth, gay marriage proponents are similarly resistant to compromise since many believe, with the *Goodridge* concurrence, that "[s]imple principles of decency dictate that we extend to [same-sex couples], and to their new status, full acceptance, tolerance, and respect."⁷

Although it is difficult to predict with certainty the long-term effects of this profound change in the law, it is clear that the effects will be far-reaching. The legal definition of marriage does not exist in isolation; changing it alters many areas of the law. For example, the definition of marriage plays an important role in the law of adoption, education, employee benefits, employment discrimination, government contracts and subsidies, taxation, tort law, and trusts and estates. In turn, these legal regimes directly govern the ongoing daily operations of religious organizations of all stripes, including parishes, schools, temples, hospitals, orphanages, retreat centers, soup kitchens, and universities. Moreover, current law provides little room for non-uniform definitions of marriage within a state and even across states because of difficult questions like child custody.⁸ The high stakes reinforce the uncompromising posture of the contending sides.

6. See, e.g., Memorandum from Barry R. Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Hon. Henry J. Hyde, Chairman, H. Comm. on the Judiciary (Jan. 31, 1997), available at <http://www.lmaw.org/freedom/docs/GAOREpt-1,049FederalLaws.pdf> (citing 1,049 federal laws that are contingent on marital status).

7. See *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring).

8. See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006) (full faith and credit must be given to the custody and visitation orders of the Vermont court), recognizing *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006) (ruling that a former partner in a Vermont civil union entitled to "parent-child" contact and visitation rights over child in Virginia notwithstanding lack of biological parentage).

Changes in marriage law impact religious institutions disproportionately because their role is so deeply intertwined with the institution of marriage. Indeed, religious institutions have been regulating marriage since time immemorial.⁹ Civil and common law marriage in the West evolved through adopting and accommodating religious conventions.¹⁰ This history is reflected today; a solid majority of *civil* marriages are still legally solemnized by *religious* institutions.¹¹ Because of the undeniable centrality of marriage to civic and religious life, conflicts will inevitably arise where the legal definition of marriage differs dramatically from the religious definition. As this Article explains, recent trends in gay rights and anti-discrimination law make it anything but clear that this conflict will be resolved in favor of religious liberty.

The specific consequences that will likely flow from legalizing same-sex marriage include both government compulsion of religious institutions to provide financial or other support for same-sex married couples and government withdrawal of public benefits from those institutions that oppose same-sex marriage. In other words, wherever religious institutions provide preferential treatment to traditionally married couples, state laws will likely require them to either extend identical benefits to same-sex married couples or withdraw the benefits altogether. Correspondingly, as courts elevate same-sex marriage in the hierarchy of constitutional rights, state actors will be induced if not required to treat opposition to same-sex marriage as “invidious discrimination,” “irrational,” or “motivated by

9. See *Leviticus* 18:6–18 (setting forth requirements for valid marriages).

10. See Marriage Act, 32 Hcn. 8 c. 38 (Eng.) (“No Reservation or Prohibition, God’s law except, shall trouble or impeach any Marriage without the Levitical Degrees.”) (recognizing as lawful all marriages not prohibited by consanguinity rules specified by the Book of *Leviticus*); see also *Clandestine Marriages Act*, 1753, 26 Geo. 2. c. 33 (Eng.) (abolishing English common law marriage and requiring civil marriages “be solemnized in . . . Parish Churches or Chapels . . . and in no other Place whatsoever”). Henry VIII’s infamous dispute with the Catholic Church over marriage turned precisely on its religious, not civil, definition. When he disagreed with the Church’s ecclesiastical verdict binding him to his first marriage, which produced no children, the King did not turn to civil law for a divorce. He instead achieved his goal by founding the Church of England and declaring himself its Supreme Head.

11. Daniel DeVise, *More Couples Choose to Wed Their Way*, WASH. POST, July 2, 2006, at C1 (noting that “clergy still perform most weddings,” rather than purely secular civil authorities, although the gap has narrowed since the 1970s). For example, in 2005, 84.7% of marriages in the District of Columbia and 56.4% of marriages in Maryland were solemnized in religious rather than civil ceremonies. *Id.*

animus." Thus, religious bodies retaining such "discriminatory" beliefs will be subject to a wide range of legal impediments precisely because their policies reflect those beliefs.¹² In short, governments would be prone to sanction uncooperative religious institutions both directly and indirectly—by imposing outright civil liability and by excluding the institutions from government programs and benefits.

Religious institutions will be able to assert a wide range of substantial First Amendment defenses against these kinds of sanctions.¹³ The Free Exercise Clause ought to apply, at least *prima facie*, to prohibit the government from targeting religious institutions for special disfavor based on their religious beliefs.¹⁴ The Free Exercise Clause also prevents government from imposing substantial burdens on religious expression using laws that embody discretion and allow for individualized assessment and application.¹⁵ The Free Exercise Clause and the Establishment Clause together operate to prohibit the government from interfering with the internal doctrine, discipline, and governance of religious institutions, including interference with decisions to hire or fire those who teach the faith.¹⁶ The Free Speech Clause has worked to prohibit the government from discriminating against a religious institution's viewpoint on sexuality in certain fora,¹⁷ and also to protect the right of re-

12. It is no answer to say that *personal* freedom of belief is preserved if one cannot reflect those beliefs through his religious institution's policies. For millions of Americans, faith is far more than an internal mental exercise—it is an overarching guide for proper living in private, group, and public life.

13. To be sure, there are many constitutional and statutory defenses for religious liberty, and these defenses are based on substantial legal precedents, but an in-depth analysis of the this body of law is beyond the scope of this Article.

14. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

15. See generally *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

16. See *McClure v. Salvation Army*, 460 F.2d 553, 559–61 (5th Cir. 1972) (reviewing cases in which the U.S. Supreme Court had placed matters of church government and administration beyond regulation of civil authorities, and holding that application of Title VII of the Civil Rights Act of 1964 to employment relationships between ministers and houses of worship involves prohibited intrusion into matters of ecclesiastical concern); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding that entertaining a professor's sex discrimination claim against a religious university would require the court to excessively entangle itself with religion).

17. See generally *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

ligious institutions to retain their expressive character through their own membership policies.¹⁸

It is difficult, however, to predict the ultimate effectiveness of these constitutional defenses after several years of precedents eroding religious liberty. Since the Supreme Court's decisions in *Employment Division v. Smith*¹⁹ and *Locke v. Davey*²⁰ narrowed long-standing religious liberty protections, courts have been increasingly hostile to claims under the Free Exercise Clause. Simultaneously, courts have become increasingly sympathetic to the notion of same-sex marriage as a protected right that may override other constitutionally important concerns.²¹ The movement for same-sex marriage has been driven overwhelmingly by courts, not legislatures, and courts have been demonstrably willing to set aside even substantial precedent in the context of gay rights. In fact, after *Lawrence v. Texas*,²² the U.S. Supreme Court has cast doubt on the survivability of *any* statute that appears to put homosexual relationships on less than equal footing with heterosexual ones—making the Defense of Marriage Act (“DOMA”) particularly vulnerable to attack.²³

Religious institutions will soon face serious legal risks that include the substantial possibility of civil liability and targeted exclusion from government benefits. Whether that risk translates into legal penalties will depend upon the outcome of a whole cascade of litigation; this Article aims merely to point out the contours of the emerging conflicts rather than predict the prevailing parties in each particular case. But, after much careful

18. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that the First Amendment prevents New Jersey's public accommodation law from forcing the Boy Scouts to accept homosexual Scout leaders over the Scouts' moral objections).

19. 494 U.S. 872 (1990) (finding government-imposed “substantial burdens” on religious expression need not be justified by compelling interests if arising from “neutral” and “generally applicable” laws).

20. 540 U.S. 712 (2004) (holding that the state's targeted exclusion of devotional theology majors from an otherwise inclusive scholarship program does not violate the Constitution).

21. See *infra* Part II.B.

22. 539 U.S. 558 (2003).

23. Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3a, 110 Stat. 2419, (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)). DOMA defines marriage for federal purposes as being between only one man and one woman; it seeks to prevent the automatic spread of same-sex marriage to unwilling states by way of “married” same-sex couples moving to another state and then seeking legal recognition of their union under the Constitution's Full Faith and Credit Clause. See 28 U.S.C. § 1738C (2000).

study, two results seem certain if same-sex marriage becomes generally accepted in law. First, neither side should be so confident of its legal position as to expect victory in every or almost every category of litigation described in this Article. Second, the inevitable litigation will be protracted, costly, and result in widespread legal confusion resulting in pervasive church-state conflict and a substantial chilling of religious expression.

II. THE EVOLUTION OF SAME-SEX MARRIAGE IN LAW

A. *The Decades-Long Effort to Strike Down Traditional Marriage Laws Has Been a Consistently Losing One, Until Recently*

Early efforts to redefine marriage through direct legal challenge began a decades-long record of complete failure.²⁴ Even oblique attempts to recognize same-sex marriage by litigants who underwent hormonal and surgical "sex change" procedures were routinely rebuffed by courts.²⁵ Judicial trends, however, have shifted. Beginning with Hawaii in 1993,²⁶ courts began to question the traditional conception of marriage and reinterpreted state constitutional provisions regarding equal protection, privacy, and "privileges and immunities" (among others) to strike down marriage statutes as applied to same-sex partners.²⁷ The Hawaii court was followed by Alaska in 1998²⁸ and Vermont in 1999²⁹ in overturning marriage statutes.

24. See *infra* Appendix A.

25. See, e.g., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500-01 (N.Y. Sup. Ct. 1971) (finding a marriage between two males null, notwithstanding that one male partner believed the other was a female at time of ceremony and that "she" subsequently had a sex-change operation); *In re Estate of Gardiner*, 42 P.3d 120, 136-37 (Kan. 2002) (holding that a marriage between a post-operative male-to-female transsexual and a man is void as against public policy). But see *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976) (holding as valid a marriage between a male and a transsexual who had surgically changed his external sexual anatomy from male to female).

26. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (concluding that a marriage statute implicated Hawaii Constitution's Equal Protection Clause), *remanded sub nom. Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *18 (Haw. Cir. Ct. 1996) ("The sex-based classification in [Hawaii's marriage statute], on its face and as applied, is unconstitutional and in violation of the Equal Protection Clause of article I, section 5 of the Hawaii Constitution."), *aff'd*, 950 P.2d 1234 (Haw. 1997), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

27. See *infra* Part II.B.

28. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) (concluding opposite-sex marriage statute

Hawaii's judicial imposition of same-sex marriage caused widespread alarm and uncertainty around the country, prompting the federal government to adopt DOMA and motivating states to amend their constitutions to protect traditional marriage. The fear centered on two issues. First, as to the federal government, people feared that a drastic state redefinition of marriage would effectively redefine marriage for federal purposes as well since the government traditionally deferred to state law on these matters.³⁰ Second, as to the states, they feared the Constitution's Full Faith and Credit Clause³¹ would require them to honor marriage licenses issued in same-sex marriage states as equivalent to their own.³² Attempting to cure these twin risks, Congress passed DOMA in 1996, providing that states need not recognize same-sex marriages entered into under the laws of sister states, and defining "marriage" and "spouse" to mean for federal purposes a union of one man and one woman.³³ At the state level, the reaction was similarly swift as Hawaii and then Alaska quickly amended their constitutions to restore the traditional conception of marriage and preserve it from further judicial attack.³⁴

violated right to privacy provision in Alaska Constitution), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999).

29. See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (concluding opposite-sex marriage statute violated the Vermont Constitution's common benefits clause).

30. See, e.g., THE JUDGE ADVOCATE GEN. SCH., U.S. ARMY, 263, LEGAL ASSISTANCE FAMILY LAW GUIDE ch.1 at 3-4 (1998) ("[T]he [military] generally follow[s] the [Department of Defense] practice of recognizing a marriage that is valid under the laws of the jurisdiction where it was contracted. Ceremonial marriages are presumed valid [T]he military will defer to state law on whether a valid marriage exists").

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

32. Conceptual problems with this state of affairs are legion. Consider the case where a same-sex spouse dies in a car accident after moving to a traditional marriage state; can the surviving same-sex partner claim the body and inheritance rights? If the accident was due to negligence, can the surviving partner sue for loss of consortium? Conversely, consider the case of a same-sex partner who moves to a traditional marriage state, not to claim marriage benefits, but to *avoid* marital obligations after a separation. Will that former spouse be required to pay alimony? Will that former spouse be required to pay child support if she is not the biological mother of a child of a same-sex marriage?

33. See 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7 (2000).

34. See HAW. CONST. art. I, § 23 (amended 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."); ALASKA CONST. art. I, § 25 (amended 1999) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

The Vermont case differs from the experience in Hawaii and Alaska in one key respect. Although the Vermont courts forced the state legislature to confer all the substantive privileges of marriage to same-sex couples, it left the legislature the option to choose its own *name* for the arrangement.³⁵ The Vermont legislature complied with the order and exercised its option by dubbing these newly legally-sanctioned same-sex unions "civil unions," thereby effectively preserving the name (if not the substance) of traditional "marriage."³⁶ As expected, much confusion and litigation has resulted over what marriage-like obligations and benefits if any attach to persons who enter Vermont civil unions and permanently relocate to other states.³⁷ Yet as controversial as the Vermont experiment was, it proved merely a preview of things to come.

B. *By Firmly Establishing Same-Sex Marriage in Law,
the Goodridge Decision Opened the Floodgates of
Gay Marriage Litigation Across the Country*

On November 18, 2003, the Massachusetts Supreme Judicial Court released the remaining genie in the bottle in *Goodridge v. Department of Public Health*. The *Goodridge* court held that Vermont's nominal distinction between same-sex civil unions and traditional marriage was irrational at best and invidious discrimination at worst.³⁸ Only opening marriage in substance *and* name to same-sex partners would satisfy the court.³⁹ Activists,

35. See *Baker*, 744 A.2d at 224–25 ("We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate.").

36. An Act Relating to Civil Unions, Pub. Act No. 91, § 3 (2000), Vt. Acts and Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2001)).

37. Litigation stemming from Vermont's early experiences with civil unions (and civil dissolutions) should be illustrative of the litigation to come. See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (described *supra* note 8); see also *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002) (finding that because Connecticut did not recognize civil unions from Vermont, it had no authority to dissolve one); *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411, 413, 422 (Sup. Ct. 2003) (allowing surviving member of a same-sex couple to sue for wrongful death because they had "lived together as spouses . . . and were joined legally as lawful spouses" through a civil union in Vermont).

38. See *Goodridge*, 798 N.E.2d at 968 ("The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."); *id.* at 958 ("[H]istory must yield to a more fully developed understanding of the invidious quality of the discrimination.").

39. The court's remedial discussion, *id.* at 968–70, "refined the common law meaning of marriage" to mean "the voluntary union of two persons as spouses, to

emboldened by *Goodridge*, quickly challenged traditional marriage laws in California,⁴⁰ Connecticut,⁴¹ Florida,⁴² Indiana,⁴³ Iowa,⁴⁴ Louisiana,⁴⁵ Maryland,⁴⁶ Michigan,⁴⁷ Nebraska,⁴⁸ New Jersey,⁴⁹ New York,⁵⁰ Oklahoma,⁵¹ Oregon,⁵² Washington,⁵³ fed-

the exclusion of all others" without expressly retaining any option for the state legislature to adopt a nominally different scheme, on the model of civil unions.

40. There have been at least seven California cases. Six were consolidated and decided in *In re Marriage Cases*, JCCP No. 4365, 2005 WL 583129 (Cal. Super. Ct. 2005) (holding that California's traditional marriage definition, adopted by public referendum, violates California's Equal Protection Clause), *aff'd in part, rev'd in part*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *cert. granted*, 149 P.3d 737 (Cal. 2006).

41. See *Rosengarten*, 802 A.2d at 184; *Lane v. Albanese*, No. FA044002128S, 2005 WL 896129, at *1, 5 (Conn. Super. Ct. Mar. 18, 2005) (holding that the court lacks subject matter jurisdiction to annul civil, same-sex marriage between couple who, as Connecticut residents, participated in a civil marriage in Massachusetts). In 2005, the Connecticut legislature passed a statute granting same-sex couples "civil union" status while reserving the term "marriage" for the union of couples of the opposite sex. See An Act Concerning Civil Unions, Pub. Act No. 05-10, 2005 Conn. Acts 13 Reg. Sess. (codified as amended at 46 CONN. GEN. STATE ANN. §§ 38aa-ii (West Supp. 2006)), *upheld in* *Kerrigan v. State*, 909 A.2d 89 (Conn. 2006).

42. See *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding Florida's traditional marriage laws and the federal DOMA).

43. See *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. App. 2005) ("[T]he Indiana Constitution does not require the governmental recognition of same-sex marriage.").

44. See *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Dec. 13, 2005), *available at* <http://www.domawatch.org/stateissues/iowa/varnumvbrien.html> (follow "Complaint" hyperlink) (challenging denial of marriage licenses to same-sex couples).

45. See *Forum for Equality PAC v. McKeithen*, 893 So.2d 715, 716 (La. 2005) (upholding state constitution's "Defense of Marriage" amendment).

46. See *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (holding that statute allowing only heterosexual marriage violates Equal Rights Amendment).

47. See *Nat'l Pride at Work, Inc. v. Governor of Mich.*, No. 265870, 2007 WL 313582, at *1, *11 (Mich. App. Feb. 1, 2007) (holding state marriage amendment precluded public employers from extending same-sex domestic partnership benefits).

48. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 995, 1002 (D. Neb. 2005) (holding that Nebraska's marriage amendment "imposes significant burdens on both the expressive and intimate associational rights of plaintiffs' members . . . [and] has no rational relationship to any legitimate state interest"), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

49. *Lewis v. Harris*, 908 A.2d 196, 220-21 (N.J. 2006) (finding that New Jersey's opposite-sex marriage laws violate the equal protection guarantee of the New Jersey Constitution and ordering same-sex marriage or its equivalent within 180 days). The New Jersey legislature subsequently adopted Vermont-style "civil unions," stopping short of calling the arrangement marriage. N.J. STAT. ANN. § 37:1-31 (West 2007). The *Lewis* court, however, had already signaled that this option may yet be found unconstitutional in a subsequent suit. See *Lewis*, 908 A.2d at 221.

50. See *Hernandez v. Robles*, 794 N.Y.S.2d 579, 604 (Sup. Ct. 2005) (finding "no legitimate State purpose that is rationally served by a bar to same-sex marriage"),

eral bankruptcy court,⁵⁴ and even on tribal lands.⁵⁵ This flurry of litigation resulted in something really quite remarkable. After decades of abject failure, arguments for same-sex marriage are not only being taken seriously, they are winning in court. Although only three out of the sixteen lawsuits mentioned above represent gay rights victories that have survived appeal, this figure is misleading. More important than the raw number of victories is where they have taken place: Maryland, California, and New Jersey.

The New Jersey Supreme Court's decision in *Lewis v. Harris* is likely the most significant gay rights case since *Goodridge*, largely because it was decided by the supreme court of a major state. In *Lewis*, the court gave the state legislature 180 days either to allow same-sex couples to legally marry, or provide for full marriage equivalents by some other name, such as civil union.⁵⁶ But as significant a decision as *Lewis*

rev'd, 805 N.Y.S.2d 354 (App. Div. 2005); *cf.* *Samuels v. N.Y. State Dep't of Health*, 811 N.Y.S.2d 136 (App. Div. 2006) (holding that a statute limiting marriage to members of the opposite sex does not discriminate on the basis of gender or violate equal protection or free speech rights); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (Sup. Ct. 1996).

51. *See* *Bishop v. Oklahoma*, 447 F. Supp. 2d 1239, 1258–59 (N.D. Okla. 2006) (ruling that plaintiffs lack standing to challenge certain provisions of DOMA and Oklahoma marriage amendment, though equal protection and substantive due process challenges were permitted to go forward to summary judgment stage).

52. *See* *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004) (holding that Oregon's opposite-sex marriage statutes violate the Rights and Privileges Clause of the Oregon Constitution and that "all [same-sex] marriages that have been performed must be recorded" (emphasis omitted)), *rev'd*, 110 P.3d 91 (Or. 2005).

53. *See* *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Sup. Ct. Aug. 4, 2004) (finding that a prohibition on marriage between same-sex individuals violated the privileges and immunities clause and equal protection clause of the Washington Constitution because "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been" (quoting *Goodridge*, 798 N.E.2d at 961 n.23)); *see also* *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (holding that DOMA violated privileges or immunities clause of state constitution).

54. *See In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) (dismissing same-sex couple's petition in bankruptcy and holding that "DOMA does not violate the principles of comity, or the Fourth, Fifth, or Tenth Amendments to the U.S. Constitution").

55. *See* *Anglen v. McKinley*, No. JAT-05-11, (Jud. App. Trib. Cherokee Nation 2005), available at <http://www.lmaw.org/freedom/docs/US%20-%20CherkeeDismissal.pdf> (finding that private citizens had no standing to void a same-sex marriage license issued by clerk but not registered by the tribal court).

56. *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006).

was, it may soon be eclipsed by a pending ruling by the California Supreme Court on same-sex marriage.⁵⁷ With a population of over 36 million people and its status as one of the states most sympathetic to gay rights, California is poised to hand down a watershed same-sex marriage decision in terms of cultural impact. To put this scenario in perspective, if California adopts same-sex marriage, approximately 14% of the American population will be living in same-sex marriage states.⁵⁸ When one includes the population of states with same-sex marriage equivalents such as New Jersey, Vermont, and Connecticut,⁵⁹ the total figure rises to 18.6% of the population.⁶⁰

In addition to California, same-sex marriage challenges await resolution before the Maryland and Connecticut high courts and before lower courts in Iowa and Oklahoma.⁶¹ As described *infra* Part II.C., the absence of many lower court cases reflects a general slowing of same-sex marriage litigation, but this is likely only temporary. At bottom, same-sex marriage litigation is driven by long-term legal trends that are difficult to reverse since they have been shaped in significant part by firmly-established precedents expanding gay rights at the U.S. Supreme Court⁶² and in foreign jurisdictions.⁶³

57. See *In re Marriage Cases*, JCCP No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005) (holding that California's traditional marriage definition, adopted by public referendum, violates California's Equal Protection Clause), *aff'd in part, rev'd in part*, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *cert. granted*, 149 P.3d 737 (Cal. 2006).

58. See U.S. Census Bureau, Population Division, "Table 1: Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006 (NST-EST2006-01)," <http://www.census.gov/popest/states/NST-ann-est.html>. The population estimates show California's population as approximately 12.18% of the national population; adding Massachusetts with 2.15% of the national population yields a total of 14.33%.

59. Connecticut was the first state to create the functional equivalent of marriage through civil unions without judicial intervention, see CONN. GEN. STAT. §§ 46b-38aa-gg (2005), and remains the only state to do so. Even so, Connecticut still faces a same-sex marriage challenge. See *Deane v. Conaway*, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006).

60. See U.S. Census Bureau, *supra* note 58.

61. See *supra* notes 41, 44, 46, 51.

62. The *Goodridge* court relied most heavily on *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down all laws criminalizing homosexual sodomy for lack of rational justification). See also *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment prohibiting the definition of a specially-protected class based on sexual orientation as a violation of equal protection).

C. *The Federal Defense of Marriage Act, Coupled With a Popular Backlash, Has Slowed the Spread of Same-Sex Marriage, For Now*

1. *DOMA Protects the Traditional Definition of Marriage in Federal Law and Guarantees that the Question of Marriage Is Left to Individual States*

Some same-sex marriage advocates, fearing a backlash from moving too quickly, preferred an indirect or “incremental strategy” for overcoming traditional marriage laws piece by piece through targeted litigation⁶⁴ and lobbying state and municipal legislative bodies.⁶⁵ This approach, however, was sidelined by the Hawaii Supreme Court decision, the Vermont civil union controversy, and the *Goodridge* case. Finally, the spectacle of municipal officials across the country

63. The Netherlands, Belgium, Spain, Canada, and South Africa have legalized same-sex marriage, while Croatia, Denmark, England, Finland, France, Germany, Hungary, Iceland, New Zealand, Norway, Portugal, Scotland, Sweden, and Wales provide the functional equivalent of marriage to same-sex couples. See Int'l Gay & Lesbian Human Rights Commission, *Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws* (Nov. 2003), <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91>. But see *French High Court Rejects Gay Marriage*, GUARDIAN UNLIMITED (London), Mar. 14, 2007, available at <http://www.guardian.co.uk/world/latest/story/0,,-6478741,00.html>.

64. Same-sex marriage “incrementalists” have used a variety of approaches to erode resistance to same-sex marriage. Most notably, they have petitioned for legal recognition of their unions as legal “families” fully equivalent to heterosexual ones. See, e.g., *Elisa B. v. Emily B.*, 117 P.3d 660, 666 (Cal. 2005) (holding that a lesbian who helped raise partner’s children, but did not adopt, is considered a parent to the children and stating that “[w]e perceive no reason why both parents of a child cannot be women.”); *In re the Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (“[H]enceforth in Washington, a de facto [same-sex] parent stands in legal parity with an otherwise legal parent, whether biological, adoptive or otherwise.”); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (finding that a former domestic partner, who was not a biological parent, to be a “psychological parent” and entitled to child visitation rights). But see *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (concluding that a cohabiting same-sex partner of biological mother was not a parent).

65. Legislatively, incrementalists have lobbied municipal and state government to provide an array of partner benefits approaching marriage through “domestic partner” laws which grant, for example, government employee health insurance benefits and inheritance rights. See *Maine Domestic Partner Registry*, 22 M.R.S.A. § 2710; *New York City Domestic Partners Law*, NYC Admin. Code § 3-240 *et seq.*; *DC Health Care Benefits Expansion Act*, DC Law 9-114 (codified at D.C. CODE § 32-701 *et seq.* (2001)). The most notable examples are Connecticut, which grants full civil union status, see *supra* note 59, and California, which granted domestic partners all the benefits of marriage excepting joint tax filing and state solemnizing of partnerships. See CAL. FAMILY CODE § 297.5a (Deering 2006). Maryland’s proposed domestic partner law was vetoed. See John Wagner, *Ehrlich Vetoes Bill Extending Rights to Gay Couples*, WASH. POST, May 21, 2005, at A1.

issuing same-sex marriage licenses in defiance of state law signaled the death knell of the incrementalist strategy.⁶⁶ The response from legislatures and voters to these successive events has been impressive and swift. As of this writing, 44 states have protected the traditional definition of marriage by state statute, state constitutional amendment, or both. Of these 44 states, 26 have adopted constitutional amendments reserving marriage exclusively to opposite-sex couples, while 17 states took the extra step of banning civil unions or domestic partnerships as well.⁶⁷

The federal government responded quickly in the wake of the Hawaii Supreme Court's 1993 legalization of same-sex marriage with DOMA in 1996. With DOMA, the federal government abandoned its traditional deference to the states on marriage questions and explicitly defined marriage for federal purposes as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.⁶⁸

DOMA also sought to protect the states from a court-led imposition of same-sex marriage through expansive judicial in-

66. See *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004) (issuing a writ of mandate against San Francisco's mayor preventing issuance of additional same-sex marriage licenses and voiding 4,000 already issued); *Hebel v. West*, 803 N.Y.S.2d 242 (App. Div. 2005) (enjoining mayor of New Paltz, New York from issuing any additional marriage licenses to homosexual partners); *Li v. State*, 110 P.3d 91 (Or. 2005) (holding that officials in Multnomah County, Oregon, did not have the authority to issue marriage licenses for 3,000 same-sex couples); T.R. Reid, *Glad to Be Wed, If Only One Day; Opposing Edicts Leave N.M. Gays' Nuptials in Legal Limbo*, WASH. POST, Feb. 22, 2004, at A13 (noting the issuance of same-sex marriage licenses by Sandoval County, New Mexico); *San Jose Recognizes Gay Marriage*, CHICAGO TRIB., Mar. 10, 2004, § 1, at 16 (noting that San Jose would recognize gay marriages performed in other jurisdictions).

67. For a continuously updated catalog of same-sex marriage laws by state, see The Heritage Foundation, *Marriage in the 50 States*, <http://www.heritage.org/Research/Family/Marriage50States.cfm> (last visited on Mar. 15, 2007); see also Stateline.org, *State Policies on Same-Sex Marriage*, http://www.stateline.org/live/digitalAssets/310_GayMarriageChart.pdf (last visited on Mar. 15, 2007). These two statutes or constitutional amendments are sometimes called "state DOMAs."

68. 1 U.S.C. § 7 (1996).

terpretations of the Constitution's Full Faith and Credit clause:⁶⁹

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁷⁰

Although DOMA on its face appears to shield states from an undemocratic proliferation of same-sex marriage,⁷¹ its long-term viability is in doubt.⁷² Still, DOMA has survived its first court challenges⁷³ and same-sex marriage advocates have been

69. Congress fears that judges will find that the U.S. Constitution's Full Faith and Credit Clause requires states to recognize same-sex marriages contracted out of state even if such marriages cannot be contracted in state. *Cf. generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage . . .").

70. 28 U.S.C. § 1738C (1996).

71. *See, e.g.,* *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 187 (Tax Ct. 2005) ("New Jersey cannot be mandated to accept more of another state's law [Vermont], with regard to same-sex relationships, than New Jersey's Legislature intended. To hold otherwise would offend the spirit, intent, and substance of DOMA."). *But see* *Godfrey v. Spano*, No. 16894/06, 2007 WL 749692, 2007 N.Y. Slip Op. 27105 (Sup. Ct. Mar. 12, 2007) (dismissing taxpayer suit against a New York County Executive who issued an executive order officially "recognizing" same-sex marriages contracted out of state).

72. *See, e.g.,* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1247 n.49 (3d ed. 2000) (arguing that DOMA violates the Full Faith and Credit Clause); Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that the Full Faith and Credit and Due Process Clauses preclude the enactment of DOMA and prevent states from refusing to recognize marriages validly entered into in other states); *see also* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. L. & POL'Y 301 (2003).

73. *See In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (dismissing constitutional challenge of DOMA by a lesbian couple married in Canada seeking federal spousal bankruptcy rights); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (finding DOMA "constitutionally valid" where a same-sex couple that married in Massachusetts challenged DOMA's constitutionality in their home state of Florida); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) ("DOMA [defining 'marriage' as 'a legal union between one man and one

forced to reconsider waging an immediate frontal assault on the Act. The focus of same-sex marriage litigation has therefore shifted to first redefining marriage state by state and then, after reaching a critical mass of success, finally taking on DOMA.⁷⁴ As discussed in Part II.B., these advocates have been surprisingly successful in spreading the *Goodridge* precedent around the country through the lower state courts. If high courts follow Massachusetts' lead and firmly establish same-sex marriage in various parts of the nation—especially in large states like California—gay rights advocates will more plausibly argue that striking down DOMA would merely work an incremental change.⁷⁵

In addition, the emigration of married same-sex couples from Massachusetts, or any future same-sex marriage state, will force courts around the country to make new and tough decisions in a politically charged environment.⁷⁶ Under these conditions, it is highly unlikely that every court considering the issue will uphold state provisions preserving traditional marriage.⁷⁷ But even if one ignores the potential for more states to join Massachusetts, the U.S. Supreme Court will eventually decide the constitutionality of federal and state gay marriage bans if for no other reason than the issue's national prominence. Few

woman'] does not violate the equal protection or due process guarantees of the Fifth Amendment."), *aff'd in part, rev'd in part*, 447 F.3d 673 (9th Cir. 2006).

74. Elaine Silvestrini, *Appeals Dropped On Gay Marriage*, TAMPA TRIB., Jan 26, 2005, at 1 (noting voluntary dismissals of challenges to the federal DOMA and quoting an activist as saying, "We are all trying to avoid being in federal court . . . Now does that mean forever? No . . . we've got to do the work to get ready for a case to be a win . . ."); see also *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2004–27 (2003).

75. Anti-death penalty advocates successfully followed an analogous "states first" strategy which recently culminated in a significant victory against the juvenile death penalty. See *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005). In examining the new "trend" against the juvenile death penalty, the *Roper* Court opined that "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 566 (citing *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

76. See *supra* note 37 (discussing several such "hard cases").

77. Indeed, there may be no limit to a court's creativity on this issue if it seeks a particular result. See, e.g., *United States v. Costigan*, 2000 WL 898455, at *4 n.10 (D. Me. June 16, 2000) ("Through the passage of the Defense of Marriage Act ('DOMA'), Congress has defined the term spouse to refer only to persons of the opposite sex. Thus, a gay partner is not a 'spouse or former spouse.' However, Congress' definition does not clearly foreclose the finding that a member of a same sex couple may be cohabiting 'as a spouse.'") (citations omitted) (emphasis added).

doubt that, once review is granted, *Lawrence v. Texas* will be the controlling precedent. It may be several years, however, before this federal question is resolved because gay rights advocates have shrewdly shifted litigation efforts exclusively to the state court system, while at the same time steadfastly refusing to add federal claims.

2. *Lawrence v. Texas Calls the Constitutionality of Federal and State DOMAs into Question*

The Supreme Court's dramatic expansion of homosexual rights in *Lawrence v. Texas*,⁷⁸ acutely calls DOMA's constitutionality into question. In *Lawrence*, the Court held that the Due Process Clause of the Constitution protects the autonomy of individuals to engage in private homosexual sex acts, and struck down Texas's anti-sodomy laws.⁷⁹ Although the *Lawrence* Court expressly disclaimed implicating the legality of traditional marriage statutes,⁸⁰ Justice Scalia noted in dissent:

Do not believe it. More illuminating than [the Court's] bald, unreasoned disclaimer is the [Court's] progression of thought Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. . . . This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.⁸¹

It is no coincidence that the *Goodridge* court chose *Lawrence* as its first and primary citation to authority.⁸² The sweeping pronouncements of the *Lawrence* opinion are difficult, if not out-

78. 539 U.S. 558 (2003); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996) (using the Equal Protection Clause to strike down a state constitutional amendment deemed "born of animosity" for prospectively removing homosexuality as a protected class under state law).

79. *Lawrence*, 539 U.S. at 578-79. Interestingly, the Court hesitated to establish a fundamental right to homosexual conduct, but instead struck down the statute for failing rational basis review. See *id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right'").

80. *Id.* at 578 (majority opinion) ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

81. *Id.* at 604-05 (Scalia, J., dissenting) (citations omitted).

82. See *Goodridge*, 798 N.E.2d at 948.

right impossible to limit to homosexual sodomy statutes.⁸³ Specifically, the *Lawrence* Court invited constitutional challenge of DOMA when it held that individual decisions “concerning the intimacies of . . . physical relationship[s], even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”⁸⁴ Of course, by “unmarried persons,” the Court in this instance was referring to unmarried persons *of the same sex*. Furthermore, the Court revealed its beliefs about the social benefit of same-sex relations by characterizing them as “but one element in a personal bond that is more enduring.”⁸⁵ Anyone seeking to strike down DOMA and establish same-sex marriage nationwide will find plenty of ammunition in *Lawrence*.

The foregoing analysis of the legal history, litigation strategy, and general trajectory of same-sex marriage marks how thoroughly the definition of marriage is likely to change and the extent to which religious institutions might someday fall within same-sex marriage jurisdictions. Building on this foundation, we can now examine the several ways in which the ascension of same-sex marriage specifically threatens religious liberty.

III. THE LEGALIZATION OF SAME-SEX MARRIAGE IS GENERATING A MULTIPLICITY OF SERIOUS RISKS FOR RELIGIOUS INSTITUTIONS

A. *Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Civil Liability*

Threats to religious liberty, as with all threats, can come both directly and indirectly. The following Sections explore the most direct of legal threats—the prospect of a court ordered injunction or fine in retaliation for following one’s religious beliefs. Here I refer specifically to punishment for violating anti-discrimination laws in employment, housing, public accommodations, or even with regard to hate speech, due to an or-

83. See, e.g., *Lawrence*, 539 U.S. at 574 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

84. *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

85. *Id.* at 567.

ganization following its conscience regarding same-sex marriage. This is not to say that religious institutions cannot live with anti-discrimination laws; they can and do. Rather, antidiscrimination regulations that would attend the widespread recognition of same-sex marriage threaten to erode the traditional deference to religious sensibilities, thus creating traction for such lawsuits.

1. *Religious Institutions that Disapprove of Employees Entering into Same-Sex Marriages Risk Suits Under Employment Anti-discrimination Laws*

If current trends persist, religious institutions that oppose same-sex marriage will soon confront situations where one of their employees enters into a legal same-sex marriage in defiance of religious teaching. For many religious institutions, such an act would be tantamount to a public repudiation of the institution's core religious beliefs.⁸⁶ In certain contexts—*e.g.*, in religious elementary schools—these employers may seek to terminate employees who reject their moral and religious teachings in such an open and enduring way, either because they sincerely believe they must for the good of the religious community, for the ultimate good of the same-sex couple, or both.⁸⁷ For their part, terminated employees might respond with a federal or state employment discrimination lawsuit relying on any of at least four theories.

First, and probably least likely to succeed, an employee may allege discrimination based on *religion* by arguing that the dismissal was due to the employee expressing a protected personal religious belief that happens to differ from or contradict the institution's faith teachings. Second, an employee may allege discrimination based on *sexual orientation*. Federal employment discrimination law currently does not provide a

86. See, *e.g.*, United States Conference of Catholic Bishops, *Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions* (Nov. 12, 2003), <http://www.nccbuscc.org/laity/manandwoman.shtml> ("Marriage, whose nature and purposes are established by God, can only be the union of a man and a woman and must remain such in law.").

87. See *id.* ("To uphold God's intent for marriage, in which sexual relations have their proper and exclusive place, is not to offend the dignity of homosexual persons. Christians must give witness to the whole moral truth and oppose as immoral both homosexual acts and unjust discrimination against homosexual persons.").

cause of action for sexual orientation discrimination⁸⁸ but at least seventeen states do.⁸⁹ Third, an employee may allege *sex* discrimination under state or federal law on the theory that the employee would not have been fired for marrying the person of their choice had the employee been a member of the opposite sex.⁹⁰ Fourth, an employee may allege discrimination based on *marital status*. Although federal employment discrimination law currently does not provide a cause of action for marital status discrimination, at least twenty states do.⁹¹ Similarly, at least twenty-three states ban marital status discrimination in housing.⁹² At first blush, this would appear to be the strongest type of discrimination claim, as the employee will have been fired precisely for obtaining a legal marriage.

The principal weakness of the first potential claim is that both federal and state law specifically exempt religious institutions from prohibitions on religious discrimination. Thus religiously-affiliated employers are free to take religion into account in hiring, firing, and other employment decisions.⁹³ Although this form of statutory protection is the most common, other, broader

88. Proposals to ban such sexual orientation discrimination under Title VII have been rejected by Congress repeatedly. See Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong., 1st Sess. (2002); Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H.R. 5452, 94th Cong., 1st Sess. (1975).

89. See HUMAN RIGHTS CAMPAIGN, STATE OF THE WORKPLACE REPORT 2005–2006, at 12 (2006), available at http://www.hrc.org/Template.cfm?Section=Get_Informed2&CONTENTID=32936&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

90. The argument, put simply, is that if Cindy and Bill both seek to marry Jane, only Cindy would face dismissal for actually marrying her on account of Cindy's sex. Cf. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (finding that the city police department violated a homosexual transvestite officer's rights under Title VII by demoting officer on the basis of *sexual stereotyping*; the city was ordered to pay the employee \$320,000 in addition to \$550,000 in attorney fees and costs), *cert. denied*, 126 S. Ct. 624 (2005).

91. For citations to all 20 statutes, see Unmarried America, State Statutes Prohibiting Marital Status Discrimination in Employment, <http://www.unmarriedamerica.org/ms-employment-laws.htm> (last visited Mar. 15, 2007).

92. See *id.*

93. See 42 U.S.C. § 2000e-1(a) (2000) (creating a statutory exemption to Title VII permitting religious organizations to define their religious character through their employment practices). This exemption was upheld in *Lown v. Salvation Army*, 393 F. Supp. 2d 223, 246 (S.D.N.Y. 2005) ("The broad language of the federal exception bars all of plaintiffs' Title VII claims. The narrower language of the state and city exceptions precludes plaintiffs' discrimination claims, but not their retaliation claims. Application of none of the exceptions runs afoul of the Constitution.").

exemptions exist which may provide some protection from all four types of employment discrimination claims mentioned above.⁹⁴ Thus, in many states the Roman Catholic Church may for religious reasons continue to employ *only* Catholic, celibate, unmarried males as priests and still qualify for statutory exemptions from employment discrimination suits.⁹⁵ But because these protections are statutory, they vary by state and can be revised or revoked by legislatures at their pleasure.⁹⁶ As state legislatures increasingly grant protection for sexual orientation through anti-discrimination laws, these traditional religious exemptions may be modified or omitted by legislatures⁹⁷ or narrowed by courts to the point of vanishing.⁹⁸

Employees who legally marry their same-sex partners will likely request that their employers extend all available spousal health and retirement benefits to their legal "spouses" as well, whether or not the employer is religiously affiliated or a religious institution. Of course, some religious employers may ac-

94. See, e.g., MASS. GEN. LAWS ch. 151B § 1(5) (2004) ("[N]othing [in these anti-discrimination laws] shall be construed to bar any religious or denominational institution or organization . . . from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, [or] internal organization . . . which [is] calculated by such organization to promote the religious principles for which it is established or maintained."); N.Y. EXEC. LAW § 296(11) (McKinney 2005) ("Nothing contained in this [anti-discrimination law] shall be construed to bar any religious or denominational institution or organization . . . from limiting employment . . . to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained."); CITY OF N.Y., N.Y. ADMIN. CODE & CHARTER § 8-107(12) (2003) (same).

95. For a comprehensive list of state-by-state employment anti-discrimination statutes and their applicable religious exemptions, see Religious Institutions Practice Group, Sidley Austin Brown & Wood, Religious Employer Exemptions: A State by State Guide, http://www.sidley.com/db30/cgi-bin/pubs/final_religious%20institutions%20practice%20group.pdf (last visited Mar. 15, 2007).

96. Of course, state legislatures cannot repeal federal constitutional protections for religious freedom; but, as stated earlier, a full analysis of federal constitutional law is beyond the scope of this Article.

97. For example North Carolina and Virginia have no religious exemptions to their anti-discrimination statutes at all. See Equal Employment Practices Act (codified at N.C. GEN. STAT. §§ 143-416.1-422.2 (2006)); Virginia Human Rights Act (codified at VA. CODE ANN. § 2.2-2639 (2006)).

98. See, e.g., McClure v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985) (holding employer liable for marital status discrimination for refusing to hire cohabiting job applicants due to sincere religious beliefs despite statutory religious exemption).

cept or overlook an employee's same-sex marriage, but others may refuse on religious grounds to treat it as the equivalent of traditional marriage, much less subsidize it. Before *Goodridge*, courts generally did not require employers to extend benefits to same-sex partners absent specific language in state and municipal anti-discrimination statutes. But the reasoning of these cases suggests that the results are likely to change with the redefinition of marriage.

For example, in *Lilly v. City of Minneapolis*,⁹⁹ a lesbian couple alleged that they were impermissibly discriminated against by the city's failure to provide health benefits to same-sex domestic partners.¹⁰⁰ Although the court found that the extension of such benefits was not required under the relevant anti-discrimination statutes, it noted that the question of marriage was at the heart of the dispute:

Employers are particularly interested in whether the protection against [sexual orientation] discrimination in the workplace would change the marital status classification. Such a change would have a great impact on employer benefit plans, which might have to cover homosexual partners.¹⁰¹

Likewise, in *Phillips v. Wisconsin Personnel Commission*,¹⁰² a state appeals court faced a near identical dispute over same-sex benefits but dismissed the claim because the denial was not designed to discriminate; rather, it was legitimately "keyed to marriage."¹⁰³ Put another way, the legal determinant of whether benefits may be denied is keyed to the *current definition* of marriage. Thus, wherever the definition of marriage changes to include same-sex couples, employers may *automatically* be required to provide insurance and benefits to all legal "spouses"—both traditional and same-sex—to comply with state and municipal anti-discrimination laws.

Since *Goodridge*, courts have become increasingly likely to entertain claims of unlawful discrimination concerning employee benefits for same-sex couples, even in states that ban same-sex

99. No. MC 93-21375, 1994 WL 315620 (Minn. Dist. Ct. June 3, 1994), *aff'd* 527 N.W.2d 107 (Minn. Ct. App. 1995).

100. *Id.* at *5.

101. *Id.* at *9.

102. 482 N.W.2d 121 (Wis. Ct. App. 1992).

103. *Id.* at 123 (rejecting a lesbian's claim that her employer unlawfully discriminated against her for failing to extend spousal benefits to her lesbian partner).

marriage. For example, in 2005 the Alaska high court found that same-sex couples are entitled to identical "spousal" benefits under the state constitution, despite the state's marriage amendment.¹⁰⁴ Similarly, the California Supreme Court in 2005 held that denying spousal benefits to registered domestic partners in a *private club* amounted to marital status discrimination, despite the state's DOMA defining marriage as between one man and one woman.¹⁰⁵ Most troublingly for religious liberty, a federal court in Maine in 2004 found that certain anti-discrimination laws required even religious institutions to provide identical health and employee benefits to registered same-sex couples as traditionally married spouses *notwithstanding* any religious freedom objections.¹⁰⁶

In short, before *Goodridge*, employers were largely free to withhold benefits from same-sex couples and could justify their actions by merely relying on state marriage statutes. However, with the arrival of legal same-sex marriage, courts are increasingly likely to hold that equal protection principles and anti-discrimination statutes require *every* employer to extend spousal benefits to same-sex couples if they provide spousal benefits at all.

2. *Religious Institutions that Disapprove of Same-Sex Cohabitation Risk Suits Under Fair Housing Laws*

Just as same-sex couples will likely seek employee spousal benefits from their religious employers, they will likely seek marriage benefits wherever else they are offered, such as at religious colleges and universities. Because most religious colleges and universities offer subsidized student housing to married couples, conflict looms at those schools that oppose same-sex sexual conduct and so would refuse in conscience to subsi-

104. *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (holding that a state employer's exclusion of same-sex couples from "spousal" health insurance benefits violates Alaska's Equal Protection Clause despite that 1998 marriage amendment); *see also* *Tumco v. Univ. of Alaska*, No. 4FA-94-43 Cir., 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995) (finding "marital status discrimination" in university's denial of health insurance coverage for same-sex partners), *aff'd sub nom* *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

105. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212 (Cal. 2005).

106. *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (forcing religious charity to extend employee spousal benefit programs not preempted by ERISA to registered same-sex couples or else lose access to all city housing and community development funds).

dize or condone homosexual cohabitation on their campuses, whatever the legal status of the same-sex unions.

In a handful of states, courts have forced landlords to accept unmarried cohabitating couples as tenants despite strong religious objections.¹⁰⁷ If *unmarried* couples enjoy legal protection from marital status discrimination, legally *married* couples even of the same-sex would be at least as protected.¹⁰⁸ *Levin v. Yeshiva University* provides a clear example of what may lie in store for religious schools that refuse to accept homosexual cohabitation.¹⁰⁹ *Levin* held that two lesbian students had stated a valid "disparate impact" claim of sexual orientation discrimination when the university refused to provide married student housing benefits to unmarried same-sex couples.¹¹⁰

Since universities that gave priority to married opposite-sex students were already exposed to charges of illegal discrimination before *Goodridge*, any court that follows *Goodridge* will be all the more likely to use state marital status and sexual orientation anti-discrimination laws to require religious schools to rent to married homosexual couples.¹¹¹

107. See *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) (finding no substantial burden on religion in forcing landlord to rent to unmarried couples despite sincere religious objections because the landlord could avoid the burden by exiting the rental business); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282 (Alaska 1994) (per curiam) (holding that compelling state interests support the prohibitions on marital status discrimination in housing over federal and state Free Exercise objections). But see *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (stressing that state constitutional protection of religious conscience exempted landlord from ban on marital status discrimination in housing); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994) (clarifying that state's prohibition of marital status discrimination in housing could not, by itself, overcome "the substantial burden on the defendants' free exercise of religion" where defendants refused to rent to an unmarried couple, but leaving open the possibility of such a finding in particular cases).

108. In fact, married couples would seem to merit stronger protection since public policy generally favors marriage as an institution.

109. 96 N.E.2d 1099 (N.Y. 2001).

110. *Id.* at 1101-02. The students' marital status discrimination claim was dismissed. *Id.* at 1101. Curiously, it does not appear that Yeshiva University, a Jewish school, raised any religious liberty defenses. See *id.* at 1101 n.1.

111. Courts could not turn to federal law as no federal remedy exists for marital status or sexual orientation discrimination in housing. See 42 U.S.C. §§ 3602(k), 3604; see also *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of cert.) ("[T]he federal Fair Housing Act does not prohibit people from making housing decisions based on marital status.").

3. *Religious Institutions that Refuse to Extend Their Services or Facilities to Same-Sex Couples on the Same Terms as Married Men and Women Risk Suits under Public Accommodation Laws*

From soup kitchens, to hospitals, to schools, to counseling, to marriage services, religious institutions provide an extensive array of services and facilities to their members and to the general public. Traditionally, religious institutions have enjoyed wide latitude in choosing which religiously motivated services and facilities to provide and to whom they will be provided. The changing civil status of sexual orientation, however, may require a reassessment of that traditional freedom for three reasons. First, more states are adding sexual orientation as a protected category in anti-discrimination laws through statutes or judicial determinations.¹¹² Second, houses of worship are facing increased risk of being declared places of public accommodation and treated no differently than secular businesses.¹¹³ Finally, the advent of legal same-sex marriage sets the stage for widespread litigation against religious institutions that refuse to treat married same-sex couples as equal to married men and women.

Although nearly all states ban discrimination by non-state actors in public accommodations in some form,¹¹⁴ a growing minority of states (currently 15) have included prohibitions on sexual orientation discrimination.¹¹⁵ While some states exempt religious organizations from their anti-discrimination statutes generally,¹¹⁶ more limit that exemption to only certain kinds of

112. See, e.g., *supra* note 89.

113. See *infra* notes 119–25.

114. For an extended list of state antidiscrimination codes, see Brief for Becket Fund for Religious Liberty et al. as Amici Curiae Supporting Petitioners at 4 n.5; *Boy Scouts v. Wyman*, 541 U.S. 903 (2004) (No. 03-956), available at <http://www.becketfund.org/litigate/boyscoutsvwyman-amicus.pdf>.

115. The minority includes California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia. See Human Rights Campaign Foundation, Non-Discrimination Laws: State by State, http://www.hrc.org/Template.cfm?Section=Get_In-formed2&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=20650 (last visited Mar. 20, 2007).

116. See, e.g., ARIZ. REV. STAT. ANN. § 41-1492.07 (2004); IDAHO CODE ANN. § 67-5910(1) (2006); KAN. STAT. ANN. § 44-1002(h) (2000); N.Y. EXEC. LAW § 292(9) (McKinney 2005 and Supp. 2007) (“[A] corporation incorporated under . . . the religious corporations law shall be deemed to be in its nature distinctly private.”); *Id.* § 296(11) (McKinney 2005 and Supp. 2007) (“Nothing contained in this section

accommodations,¹¹⁷ or to only certain categories of discrimination.¹¹⁸ Several states provide no religious exemptions at all to one or more of their anti-discrimination statutes.¹¹⁹ Furthermore, any protection granted by statute can be revoked by statute, and the current trend is to grant greater protection to sexual orientation.¹²⁰

The risk of being regulated by public accommodations laws is especially acute for those religious institutions with very open policies concerning membership and provision of services. Specifically, the more a service or facility is made available to persons without regard to religion and the more that particular aspects of the service or facility can be separated away from "religious worship," the greater the risk that the institution will be regulated under public accommodation statutes. Some of the many religiously-motivated services that potentially fall under this rubric include counseling services, soup kitchens, job training programs, health care services, day care services, schooling, adoption services, and even the use of wedding reception facilities.¹²¹

shall be construed to bar any religious or denominational institution or organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.").

117. See, e.g., CONN. GEN. STAT. § 46a-64(b)(4) (2005) (exempting nursing homes "owned, operated by or affiliated with a religious organization"); IOWA CODE § 216.12(1) (2000) (exempting housing); ME. REV. STAT. ANN. tit. 5, § 4573-A (2002) (stating that the anti-discrimination statute does not prohibit any "religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion"); N.J. STAT. ANN. § 10:5-5(l) (West Supp. 2006) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution"); UTAH CODE ANN. § 13-7-2 (2005) (exempting "any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public"); WASH. REV. CODE § 49.60.040(10) (2006) (exempting "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution").

118. See *infra* Appendix B. For a comprehensive list of state-by-state employment anti-discrimination statutes and their applicable religious exemptions, see Sidley Austin Brown & Wood, *supra* note 95.

119. See *infra* Appendix C.

120. See *supra* note 113.

121. See World Net Daily, *Lesbians Target Innkeeper Over Same-sex Wedding* (June 30, 2005), http://worldnetdaily.com/news/article.asp?ARTICLE_ID=45073 (noting a lesbian couple's use of Vermont's public accommodations law to sue the owners of a small inn for expressing concern that, as Roman Catholics, they would have moral difficulty hosting a same-sex civil union on their premises); see also, *Smith v. Knights of Columbus*, 2005 BCHRT 544 (B.C. Human Rights Trib.

The experience of the Boy Scouts of America is a prominent example of how private organizations which appear "open to the public" can face a great risk of being declared a public accommodation for the purposes of anti-discrimination statutes. The Boy Scouts are a private membership-based organization with affiliates in every state that exist to inculcate moral values in young people. To this end, the Boy Scouts open membership to all believers in God and exclude open homosexuals from leadership positions. Many religious institutions have, at least in part, similar mission statements and similarly open membership policies. These religious institutions should take note that the Boy Scouts of America have been declared by some courts to be a place of public accommodation.¹²²

In *Dale v. Boy Scouts*, the New Jersey Supreme opined that "[b]road public solicitation has consistently been a principal characteristic of public accommodations. Our courts have repeatedly held that when an entity invites the public to join, attend, or participate in some way, that entity is a public accommodation . . ." ¹²³ The court then reflected on the fact that the Boy Scout troops "take part in perhaps the most powerful invitation of all, albeit an implied one: the symbolic invitation extended by a Boy Scout each time he wears his uniform in public."¹²⁴ As a result, the court found that the Boy Scouts were a place of public accommodation subject to New Jersey anti-discrimination statutes and ordered that they accept homosex-

2005) (fining Catholic fraternal organization for refusing to rent a hall for use for a same-sex couple's wedding reception).

122. See *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999) (clarifying that the Boy Scouts are sufficiently open to the public to qualify as a place of public accommodation), *rev'd on other grounds*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); see also *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759, 769 (Ill. App. Ct. 2001) (finding that narrowly tailored injunction based on public accommodations law may issue if applicants are denied "nonexpressive" positions in the Boy Scouts because of homosexuality). *But see* *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993) (holding that the Boy Scouts are *not* a place of public accommodation); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998) (same); *Scabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (same); *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976) (same); see also *Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1193-94 (D.C. 2002) (finding that *Boy Scouts v. Dale* prevented the District of Columbia from requiring the Boy Scouts to grant avowed homosexuals memberships, obviating the need to determine if the Scouts qualified as a public accommodation).

123. 734 A.2d at 1210.

124. *Id.* at 1211.

ual members. Although the U.S. Supreme Court later prevented New Jersey from interfering with the Boy Scouts' membership policies on appeal,¹²⁵ a close reading of that opinion reveals that New Jersey's designation of the Boy Scouts as a place of public accommodation was left untouched. The Supreme Court merely prevented those state law findings from burdening the Boy Scouts' core expressive association rights through forced membership.¹²⁶

On this reasoning, a religious institution that "broadly solicits members" or whose members extend "symbolic invitations" through dress—perhaps, for example, when nuns wear habits in public—may be subject to public accommodations restrictions if other states follow New Jersey's lead.¹²⁷ The critical question, of course, is which restrictions might be imposed.¹²⁸ Forced inclusion of homosexuals, married or otherwise, in positions of organizational leadership is clearly foreclosed by the Supreme Court's decision in *Boy Scouts v. Dale*. However, once exposed as a place of public accommodation, religious institutions could face a flood of litigation attempting to regulate any *services or facilities* deemed "open to the public," so long as the organization's membership policies and core associational rights are not implicated in the regulation.

An example of this risk is furnished by *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*¹²⁹ where the D.C. Court of Appeals held that:

While the [D.C.] Human Rights Act does not seek to compel uniformity in philosophical *attitudes* by force of law, it does require equal *treatment*. . . . Georgetown's refusal to provide tangible benefits without regard to sexual orientation violated the Human Rights Act. To that extent only, we consider the merits of Georgetown's free exercise defense. On that issue we hold that the District of Columbia's compelling

125. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

126. See *id.* at 656 (stating that application of public accommodations law "runs afoul of the Scouts' freedom of expressive association").

127. Cf. *Nathanson v. MCAD*, 16 Mass. L. Rptr. 761, 765 (Super. Ct. 2003) (holding that an ostensibly "private" law firm fell under public accommodations regulations notwithstanding the firm's free speech concerns).

128. New Jersey specifically exempts religious educational facilities, but not religious institutions generally, from its public accommodations law. Many other jurisdictions do not even go that far in exempting religious institutions. See *supra* note 114.

129. 536 A.2d 1 (D.C. 1987) (en banc).

interest in the eradication of sexual orientation discrimination outweighs any burden imposed upon Georgetown's exercise of religion¹³⁰

According to the court, while the D.C. Human Rights Act, a public accommodations statute, did not require the university to give homosexual groups "university recognition," it nevertheless required the university to allow them access to *all* university facilities as if they were recognized student groups, such as printing facilities, e-mail use, auditorium use, and the like.¹³¹ The court reasoned that the right of the university, a private religious actor, to *hold* certain beliefs regarding homosexuality was absolute; thus, it could not be compelled to give the groups "official" recognition.¹³² The ability to *act* consistently with those religious beliefs, however, was considered a different matter altogether. Although the university objected to being forced to use its property to subsidize speech repugnant to its religious beliefs, the court dismissed these concerns by finding that the goal of "eradicating sexual orientation discrimination" represented a more important government interest than protecting religious liberty.¹³³

Courts may seek to sidestep the problematic issue of balancing religious liberty against competing interests by simply declaring that no religious liberty interests exist. Religious institutions that provide religiously-motivated services face this risk to the extent that their activities can be conceptually distinguished from what a court perceives to be traditional worship activities. For example, in the case of *Pines v. Tomson*, a publisher of a "Christian Yellow Pages" was found liable for religious discrimination under state statutes regulating "businesses" despite the fact that the publisher was a non-profit organization and the publication itself was undertaken "for the purpose of mobilizing Christians to declare and propagate their faith."¹³⁴

A more recent example of this phenomenon occurred in the case of *Catholic Charities of Sacramento v. Superior Court*.¹³⁵ There, the California Supreme Court found that Catholic Charities of

130. *Id.* at 5.

131. *See id.* at 39.

132. *See id.* at 21.

133. *See id.* at 38.

134. 206 Cal. Rptr. 866, 877 (Ct. App. 1984).

135. 85 P.3d 67 (Cal. 2004) (denying a religious charity a "religious employer" exemption from employment discrimination laws).

Sacramento, a social service arm of the Catholic Church, did not qualify for a religious exemption as a “religious employer” under the Women’s Contraceptive Equity Act (“WCEA”); the court therefore required Catholic Charities to either violate its religious beliefs and provide contraceptive coverage to its female employees or provide no benefits at all. The court analyzed and disposed of the issue by stating that

The [WCEA] defines a “religious employer” as “an entity for which each of the following is true:” (A) The inculcation of religious values is the purpose of the entity. (B) The entity primarily employs persons who share the religious tenets of the entity. (C) The entity serves primarily persons who share the religious tenets of the entity. (D) The entity is a nonprofit organization” Catholic Charities does not qualify as a “religious employer” under the WCEA because it does not meet *any* of the definition’s four criteria.¹³⁶

According to the California Supreme Court, Catholic Charities was simply not religious enough.

Moreover, the California Supreme Court added that even if Catholic Charities experienced a substantial burden on its religious exercise, such a hardship would be fully justified because “[t]he WCEA serves the compelling state interest of eliminating gender discrimination.”¹³⁷ Trapped by that compelling state interest, Catholic Charities in California will be forced to choose between its religious duty to provide for its social service workers’ physical well being, and its duty to provide for their spiritual well-being by following Church teaching. The California Supreme Court refused to recognize Catholic Charities’ dual obligation, instead opting to put it to the Hobson’s choice: “We do not doubt Catholic Charities’ assertion that to offer insurance coverage for prescription contraceptives to its employees would be religiously unacceptable Catholic Charities may, however, avoid this conflict with its religious beliefs simply by not offering coverage for prescription drugs.”¹³⁸ The risk of a similar decision looms large in Massachusetts¹³⁹ and New York,¹⁴⁰ which have also enacted laws mandating coverage of prescription contraceptives.

136. *Id.* at 292 (emphasis added) (quoting CAL. HEALTH & SAFETY CODE § 1367.25(b)).

137. *Id.* at 313.

138. *Id.* at 312.

139. See MASS. GEN. LAWS ch. 176B, § 4W(b) (2002).

If other courts follow the Massachusetts Supreme Judicial Court's lead and declare a right to same-sex marriage,¹⁴¹ laws prohibiting discrimination based on sexual orientation or marital status will have new power. Courts will be much more likely to find severe burdens on religious expression justified by a new compelling reason—the eliminating of sexual orientation discrimination. It will then be much more likely that religious institutions will be required by law to extend many of the benefits and services listed above to homosexual “spouses,” or lose the ability to provide them at all.

4. *Religious Institutions that Express Their Religious Disapproval of Same-Sex Marriage Publicly Face Potential “Hate Crimes” or “Hate Speech” Liability*

Suits under state hate crimes laws are also potential avenues of civil or criminal liability for religious institutions that actively preach against homosexual marriage. General hate crime statutes exist in at least 46 states.¹⁴² Of those, currently 31 states have hate crimes laws referencing sexual orientation¹⁴³—a number that has risen steadily in recent years. Some states also include a ban on hate *speech* regarding sexual orientation in some form as well, such as in Massachusetts and Pennsylvania.¹⁴⁴ Since no religious speaker has yet been convicted of a hate crime for publicly opposing gay rights, although arrests have been made,¹⁴⁵ it is tempting to

140. See *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

141. *Goodridge*, 798 N.E.2d at 959–69.

142. See Christopher Chorba, *The Danger of Federalizing Hate Crimes*, 87 U. VA. L. REV. 319, 347–48 nn.130–32 (cataloging hate crimes statutes and penalty enhancements in 46 states).

143. See Human Rights Campaign, *Statewide Hate Crimes Laws*, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19445 (last visited on Mar. 15, 2007).

144. Pennsylvania's hate crimes statute, 18 PA. CONS. STAT. § 2710, bans “ethnic intimidation” (that is, hate speech) on the basis of sexual orientation if the message is “motivated by hatred;” Massachusetts' hate speech law, MASS. GEN. LAWS 151B § 4(4)(A), makes it unlawful to “intimidate” another person in the “exercise or enjoyment” of the right to be free from sexual orientation discrimination in employment and housing, but currently exempts religious institutions. See MASS. GEN. LAWS 151B §§ 1(5), 4(18).

145. In 2004, an organized group of Christians was *arrested* for “ethnic intimidation” under hate crimes laws for peacefully protesting at a Philadelphia gay pride event even though the event was open to the public and held on city streets and

think that a conviction might never happen. But foreign democracies have already demonstrated that such action is possible, and given the increasing reliance of American courts on foreign precedents, its domestic application is an increasing risk. Civil and criminal bans on “objectionable” religious speech already exist in Canada,¹⁴⁶ Britain,¹⁴⁷ Australia,¹⁴⁸ and Sweden.¹⁴⁹

Yet even without statutory hate speech prohibitions, suits over religious speech are no longer strictly conjectural in the United States. In *Bryce v. Episcopal Church in the Diocese of Colorado*, a plaintiff youth minister sued her church for sexual harassment for stating that homosexuality is a sin, idolatrous, and incompatible with Scripture; the church statements were made in the context of a parish meeting called in response to discovery of the youth minister’s recent civil commitment ceremony with her homosexual partner.¹⁵⁰ The day is fast approaching where religiously-motivated speech against gay and lesbian conduct that is deemed “hateful” or otherwise offensive may not be tolerated in law.¹⁵¹

sidewalks. Although the criminal hate crime charges against the protesters were eventually dismissed, the protesters’ subsequent civil suit against the city for violations of their civil rights was also dismissed. See *Startzell v. City of Philadelphia*, No. 05-05287, 2007 WL 172400, at *6 (E.D. Pa. Jan. 18, 2007) (slip op.) (finding that “once the City issued a permit to Philly Pride for OutFest, it was empowered to enforce the permit by excluding persons expressing contrary messages”).

146. See *Stacey v. Campbell et al.*, 2002 BCHRT 35 (B.C. Human Rights Trib. 2002) (permitting a suit under hate crimes law against a pastor who was brought before the British Columbia Human Rights Tribunal for “express[ing] his view of religious teachings concerning homosexuality” in a paid newspaper ad).

147. Racial and Religious Hatred Act, 2006, c. 1 (Gr. Brit.) (outlawing “stirring up hatred against a person” on religious or racial grounds), available at <http://www.opsi.gov.uk/acts/acts2006/20060001.htm>.

148. See *Islamic Council of Victoria v. Catch the Fire Ministries*, VCAT No. A392/2002 (Vict. Civ. Adm. Trib. Dec. 17, 2004) (finding pastor liable for “vilify[ing]” Islam during a religious seminar), vacated and remanded by *Catch the Fire Ministries, Inc. v. Islamic Council of Victoria, Inc.*, [2006] VSCA 284 (Dec. 14, 2006), available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>.

149. See *Riksåklagaren v. ÅG*, No. B-1050-05, [HD] [Supreme Court], Nov. 29, 2005 (Sweden). (overturning Swedish Pentecostal minister’s sentence to prison for “inciting hatred” against homosexuals after reciting Biblical condemnations of homosexuality in a sermon).

150. 289 F.3d 648 (10th Cir. 2002).

151. See e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179–80 (2006) (holding that a student’s religious speech opposing school support of homosexuality could be banned as such “injurious remarks” “intrude[] upon . . . the rights of other students”), appeal dismissed as moot and decision vacated by 2007 WL 632768 (U.S. Mar. 5, 2007).

B. *Religious Institutions that Refuse to Treat Legally Married Same-Sex Couples as Identical to Traditionally Married Men and Women Risk Losing Equal Access to a Variety of Government Benefits and Privileges*

As long as statutory religious exemptions to anti-discrimination laws exist, at least some religious institutions will avoid direct regulation or prosecution for refusing to treat same-sex married couples the same as opposite-sex spouses. A separate question, however, is whether governments must provide equal funding and access to programs to otherwise “discriminatory” religious organizations. Governments may argue that they cannot be associated with *any* discriminatory organizations when providing government services, and consequently move to ban such subsidies and cooperation. Additionally, many government-funded programs require that the recipients be organized “for the public good” or that they not operate “contrary to public policy.” Thus, religious institutions that refuse to approve, subsidize, or perform constitutionally-protected same-sex marriages could quickly lose their access to public fora, government funding, or tax exemptions. The potential losses of current government benefits are daunting enough without considering how much the increased cooperation between faith-based organizations and state and federal governments—through health, education, and “charitable choice” programs—has raised the stakes.¹⁵² If courts and legislatures cannot force religious groups to accept same-sex marriage outright, indirect coercion may prove just as effective.

152. Charitable choice is now part of at least three federal social service programs. See Welfare Reform Act of 1996, 42 U.S.C. § 604 (2000); Community Services Block Grant Act of 1998, 42 U.S.C. § 9920 (2000); and the Children’s Health Act of 2000, 42 U.S.C. 300x-65 (2006). Additionally, President George W. Bush has issued supplemental Executive Orders. See Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001) (creating the White House Office of Faith-Based & Community Initiatives); Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002) (requiring equal protection for faith-based and community organizations in the distribution or reception of federal financial assistance in social service programs); see also Lambda Legal, *The Continuing Push to Give Tax Dollars to Religious Organizations: Why It’s So Dangerous* (May 3, 2004), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31989074>.

1. *Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Losing Their Traditional Tax-Exempt Status*

Religious institutions that refuse to treat same-sex spouses as equivalent to traditional spouses may face staggering financial losses if state or federal authorities revoke their tax exemption because of their “discrimination.” Such a case is not unprecedented. In *Bob Jones University v. United States*, a religious university that banned interracial dating and marriage as part of its admissions policy lost its tax exemption, even though the policy stemmed directly from sincerely held religious beliefs.¹⁵³ In affirming the IRS decision, the Supreme Court reasoned that

[T]he Government has a *fundamental*, overriding interest in eradicating racial *discrimination* in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s *history*. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.¹⁵⁴

The *Goodridge* court’s language and reasoning were strikingly similar:

In this case, as in *Perez* and *Loving* [which overturned interracial marriage bans], a statute deprives individuals of access to an institution of *fundamental* legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, *history* must yield to a more fully developed understanding of the invidious quality of the *discrimination*.¹⁵⁵

These similarities cannot be ignored. The *Goodridge* court’s choice of similar words and analysis is too striking to be mere coincidence. The critical difference between the two opinions is that, while the *Goodridge* court equated sexual orientation discrimination with racial discrimination in vigorous terms,¹⁵⁶ it did not take the final step of *Bob Jones* in specifically endorsing the government’s power and obligation to eradicate sexual ori-

153. 461 U.S. 574 (1983).

154. *Id.* at 604 (emphasis added).

155. *Goodridge*, 798 N.E.2d at 958 (emphasis added).

156. The court even went so far as to say that government sanction of discrimination by sexual orientation “demeans basic human dignity.” See *id.* at 958 n.17.

entation discrimination, even when at the price of substantially burdening religious exercise.¹⁵⁷

However, it is likely that suits will soon arise arguing that houses of worship that hold fast to traditional marriage are, as in *Bob Jones*, "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred," and must, like Bob Jones University, have their state and federal tax exemptions revoked.¹⁵⁸ State and federal taxing authorities, of course, need not necessarily take overt action. In many cases, the mere potential of losing tax-exempt status may force religious institutions to conform to government norms of anti-discrimination rather than risk losing their ability to provide desperately needed social and spiritual services.¹⁵⁹

2. *Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from Competition for Government-Funded Social Service Contracts*

Advocates of same-sex marriage are likely to target not only religious institutions as such, but also their religiously affiliated social service organizations. As it stands, religious universities, charities, and hospitals receive significant government funding, but that funding may one day be revoked by the courts or activist regulatory bodies.

In *Grove City College v. Bell*, a religious college was stripped of all federal student financial aid for refusing as a matter of conscience to affirm in writing as mandated by Title IX that it did not discriminate by sex, even though it was undisputed that the school never actually engaged in sex discrimination.¹⁶⁰

157. This omission is unsurprising since this precise question was not before the *Goodridge* court.

158. See *Bob Jones Univ.*, 461 U.S. at 592; cf. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (affirming the IRS's revocation of a church's tax exempt status due to intervention in a political campaign through paid newspaper advertising).

159. Richard A. Epstein, Letter to the Editor, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13 ("[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left against which I warned.").

160. 465 U.S. 555 (1984); see also *id.* at 579 (Powell, J., concurring) ("[T]he Department [of Education] has prevailed, having taken this small independent college, which it acknowledges has engaged in no discrimination whatever, through six years of litigation with the full weight of the federal government opposing it. I cannot believe that the Department will rejoice in its 'victory.'"). The U.S. Congress has since provided a legislative correction to the Department of Education's

Congress, however, has banned sexual orientation discrimination in “federally conducted” education programs.¹⁶¹ Religious universities are also open to attacks against their state education funding,¹⁶² as states are demonstrably more likely to include sexual orientation in their anti-discrimination statutes.¹⁶³

Funding for religious hospitals which include teaching facilities may be readily challenged for sex discrimination under 42 U.S.C. § 295m which states that “[t]he Secretary [of Health and Human Services] may not make a grant . . . unless the application for the grant . . . contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex.” Because many religious medical facilities include teaching components, not recognizing same-sex “spouses” as equivalent to opposite-sex spouses at hospitals may attract sex discrimination suits and a concomitant loss of funding.

Religious institutions face related concerns in the adoption context. The question of whether state governments will force religious institutions to place orphaned children under their care with same-sex couples has already been answered in Massachusetts. In that case, Catholic Charities of Boston has been required either to place foster children into the homes of homosexual couples in violation of its religious convictions, or lose its license to place any children at all.¹⁶⁴ Catholic Charities of Boston has chosen to follow its religious convictions and is now out of the adoption business.¹⁶⁵

and the Supreme Court’s interpretation of Title IX. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687).

161. Exec. Order No. 13, 160, § 1-102, 65 Fed. Reg. 39,775 (June 23, 2000) (“No individual, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity.”).

162. See *Locke v. Davey*, 540 U.S. 712 (2004) (permitting state to revoke a student’s educational scholarships after the student beneficiary chose devotional theology as a major).

163. See *supra* notes 97–98 and accompanying text.

164. See Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays*, BOSTON GLOBE, Oct. 22, 2005, at A1 (reporting on Catholic Charities being forced to “choose between its mission of helping the maximum number of foster children possible and conforming to the Vatican’s position on homosexuality”).

165. See Maggie Gallagher, *Banned in Boston, The Coming Conflict between Same-sex Marriage and Religious Liberty*, WKLY. STANDARD, May 15, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

Finally, homosexual rights advocates have successfully used city laws that require outsourced government service providers not to discriminate because of sexual orientation.¹⁶⁶ Cooperation with government service agencies, through or on the premises of houses of worship, religious hospitals, or religious schools, may run afoul of these local anti-discrimination laws if the religious institutions receive government funding and can be cast as government "contractors." Recently, in *Lown v. Salvation Army*, the Salvation Army of New York was attacked for requiring its employees to abide by the Christian faith while at the same time receiving government social service contracts.¹⁶⁷ Although the statutory religious organization exemption to the relevant anti-discrimination law protected the Salvation Army from the direct discrimination claims, the court allowed claims of unlawful retaliation to go forward.¹⁶⁸

3. *Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from Government Facilities and Fora*

Religious institutions will likely face challenges to their equal right to a diverse array of public subsidies on the one hand, and access to fora where they may freely discuss their religious beliefs on the other. Again, the Boy Scouts of America provide an illuminating example in the retaliation they have faced in response to their morality-based membership criteria. The Boy Scouts' unwavering requirement that members believe in God and not advocate for or engage in homosexual conduct has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora. For example, the Boy Scouts have lost long-standing leases of city campgrounds,¹⁶⁹

166. See *Under 21 v. City of New York*, 481 N.Y.S.2d 632, 643 (Sup. Ct. 1984) (noting that, in the context of private government service providers, government cannot provide funds to support or encourage the discriminatory conduct of others, including discrimination against homosexuality).

167. 393 F. Supp. 2d 223 (S.D.N.Y. 2005) ("The broad language of the federal exception bars all of plaintiffs' Title VII claims. The narrower language of the state and city exceptions precludes plaintiffs' discrimination claims, but not their retaliation claims. Application of none of the exceptions runs afoul of the Constitution.").

168. See Title VII § 702, 42 U.S.C. § 2000e-1(a) (2000) (the "federal exception"); N.Y. EXEC. LAW § 296(11) (1995) (the "state exception"); N.Y.C. ADMIN. CODE 8-107(12) (1991) (the "city exception").

169. See *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (revoking use of publicly leased park land to avoid violating the Establishment Clause based on the Scouts' required belief in God).

berthing rights for “public interest” groups at a city marina,¹⁷⁰ equal access to public after-school facilities,¹⁷¹ and the right to participate in state charitable fundraising programs.¹⁷² The escalating litigation confronting the Boy Scouts is merely a foretaste of what awaits religious organizations that take similar stands against homosexual conduct and same-sex marriage. These religious organizations will either change their policies and messages concerning same-sex issues or will face series of lawsuits seeking to exclude them from public privileges and benefits.¹⁷³

4. *Religious Institutions that Refuse to Recognize Same-Sex Marriages Risk Exclusion from the State Function of Licensing Marriages*

Religious institutions may soon face another stark choice: either abandon their religious principles regarding marriage or be deprived of the ability to perform *legally recognized* marriages altogether. The *Goodridge* court facilitated this dilemma by doing a very curious and wholly unnecessary thing in its decision: stating that religion has nothing at all to do with civil marriage.¹⁷⁴ But the *Goodridge* opinion notwithstanding, clergy currently

170. See *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Ct. App. 2002) (affirming revocation of a boat berth subsidy at public marina due to Scouts’ exclusion of atheists and homosexuals), *aff’d*, 129 P.3d 394 (Cal. 2006).

171. See *Boy Scouts of Am., S. Fa. Council v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (preliminarily enjoining a school board from continuing to exclude the Boy Scouts from school facilities based on their anti-gay viewpoint).

172. See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state’s workplace charitable contributions campaign for denying membership to homosexuals).

173. At least in the public school context, the Boy Scouts and religious groups have secured some legislative protection for facilities access. See *Boy Scouts of America Equal Access Act*, 20 U.S.C.A. § 7905 (2000); *Equal Access Act*, 20 U.S.C.A. §§ 4071–4074 (2000); see also *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 859 (2d Cir. 1996) (holding that a school district could not bar access to after-school facilities to a Bible club for limiting their leadership to Christians only, for “the [Equal Access] Act contains an implicit right of expressive association when the goal of that association is to meet for a purpose protected by the Act”); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (clarifying that the government could not withhold funds from university student groups that express overtly religious viewpoints).

174. “We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage . . . a wholly secular institution.” *Goodridge*, 798 N.E.2d at 954. According to the court, “there are three partners to every civil marriage: two willing spouses and an approving State.” *Id.* “In short, for all the joy and solemnity that normally attend a marriage, governing entrance to marriage, is a *licensing law*.” *Id.* at 952 (emphasis added and internal citations omitted).

have an authority they have possessed since the Founding:¹⁷⁵ the legal authority to solemnize civil marriages through purely religious ceremonies, commonly known as weddings.¹⁷⁶ This practice reflects the historical, but now weakened understanding of marriage as primarily a religious union that is also worthy of the highest civil recognition. Purely non-religious marriage solemnization is still the exception to the rule, but this may change if the *Goodridge* court's hyper-secularized view of the meaning of civil marriage gains currency. As courts mold the civil definition of marriage into a form that more greatly conflicts with its historical religious definition, controversy will follow over exactly *how* a civil marriage is solemnized and *who* can do the solemnizing.

If clergy act "in the place of" civil servants when legally marrying couples, they may be regulated by the state in the performance of their duties just as vigorously as any other civil servant.¹⁷⁷ Vermont has already held that the state constitutional free exercise rights of town clerks are not violated when they are fired for refusing to participate in the issuance of civil union licenses to same-sex couples for religious reasons.¹⁷⁸ Already, at least twelve dissenting Massachusetts justices of the peace have been forced to resign for refusing to perform same-sex marriages, despite their willingness to perform traditional marriages.¹⁷⁹ Because clergy fulfill an impor-

175. See, e.g., *Gould v. Gould*, 61 A. 604, 610 (Conn. 1905) (Hammersley, J., concurring) (noting that clergymen were first authorized to join persons in marriage for civil law purposes in Connecticut in 1694 and that the policy had remained unchanged).

176. See, e.g., MASS. GEN. LAWS ch. 207 § 45 (2004) ("The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, . . . shall be prima facie evidence of such marriage."); MASS. GEN. LAWS ch. 207 § 38 (2004) (requiring that civil marriage be solemnized only by priests, deacons, rabbis, imams, ministers of the Gospel, various other religious officiants, and justices of the peace).

177. Some state legislation prohibits officials conducting marriage ceremonies from discriminating in certain ways. The Texas Family Code, for example, forbids persons authorized to conduct a marriage ceremony—including religious officials—"from discriminating on the basis of race, religion, or national origin." See TEX. FAM. CODE ANN. § 2.205 (2006). Marriage codes such as Texas' could easily be amended to include a prohibition on discrimination based on sex or sexual orientation and made to apply to *all* persons authorized to solemnize civil marriage.

178. *Brady v. Dean*, 790 A.2d 428, 435 (Vt. 2001).

179. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

tant civil role when solemnizing marriages, there may be a strong movement to strip non-conforming clergy of their civil marriage functions despite free exercise objections on the Vermont and Massachusetts pattern. Alternatively, some commentators advocate a complete separation between the civil and religious aspects of marriage.¹⁸⁰ In either case, clergy that object to same sex marriage would no longer be allowed to solemnize marriages according to their religious practices and retain any legal effect.¹⁸¹

IV. CONCLUSION

Religious institutions face a variety of grave risks in the wake of legalized same-sex marriage. Some exposure to liability is almost certain to arise, yet some may never materialize. Similarly, courts will receive the constitutional defenses to these risks with varying levels of respect.

Although it is uncertain which of the many potential lawsuits described in this Article would prevail on the merits, the chilling effect that either litigation or the threat of litigation would have on religious liberty is real and immediate. Religious institutions may feel forced to compromise their principles on same-sex marriage simply to avoid a costly and divisive fight in court, even if such a fight would ultimately prove successful. They will also be pressured to compromise their beliefs or face losing equal access to a wide array of government benefit programs and licensing regimes.

The American legal tradition of accommodating diverse religious beliefs and expression has proven remarkably successful at ensuring both peace and liberty. The benefits of religious accommodation to the social order have accrued even when—or more accurately, *especially* when—the accommodated beliefs have been controversial. Thus, when weighing the benefits and

180. See Alan Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15 (advocating complete separation of civil and religious aspects of marriage).

181. A lawsuit requesting that a court directly order an unwilling religious institution to perform a same-sex marriage is almost certain to fail under the Free Exercise Clause. However, lawsuits alleging improper application of religious law and doctrine are not unprecedented. In *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), for example, a pastor sued his church for “improperly appl[ying] provisions of *The Discipline of the United Methodist Church*, governing the appointment and placement of ministers.”

cost of adopting as fundamental social change as same-sex marriage, particularly close consideration must be given to its impact on religious freedom.¹⁸² This Article has attempted to illuminate that special piece of the equation and has found that the likely cost to religious liberty is a high one indeed.

APPENDIX A: SELECT FAILED CHALLENGES
TO TRADITIONAL MARRIAGE

- Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).
 Standhardt v. Super. Ct., 77 P.3d 451 (Ariz. Ct. App. 2003).
 Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).
 In re Estate of Hall, 707 N.E.2d 201 (Ill. App. Ct. 1998).
 Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973).
 Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
 Lilly v. City of Minneapolis, No. MC 93-21375, 1994 WL 315620 (Minn. Dist. Ct. June 3, 1994).
 Rutgers Council of AAUP Chapters v. Rutgers Univ., 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997).
 Storrs v. Holcomb, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996).
 In re Estate of Cooper, 564 N.Y.S.2d 684 (N.Y. Surr. Ct. 1990).
 De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984).
 Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

APPENDIX B: SELECT STATE RELIGIOUS EXEMPTIONS
TO CERTAIN CATEGORIES OF DISCRIMINATION

IND. CODE ANN. § 22-9-1-3(q)(3) (1998) (“[I]t shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only.”).

IOWA CODE § 216.7(2) (2000) (“This section shall not apply to: (a) Any bona fide religious institution with respect to any qualifications the institution may impose based on religion . . .”).

182. “This generation does not have a monopoly on either knowledge or wisdom. Before abandoning fundamental values and institutions, we must pause and take stock of our present social order.” State by Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990).

LA. REV. STAT. ANN. § 49:146(A)(5) (2003) (“The provisions of this Section shall not prohibit any religious or private institution of elementary, secondary, or higher education from denying access to any area, accommodation, or facility on the basis of religion or sex.”).

MINN. STAT. § 363A.26 (2004) (“Nothing in this chapter prohibits any religious association, . . . from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities.”).

NEB. REV. STAT. § 20-137 (1997) (“Any place of public accommodation owned by or operated on behalf of a religious corporation, association, or society which gives preference in the use of such place to members of the same faith as that of the administering body shall not be guilty of discriminatory practice.”).

N.H. REV. STAT. ANN. § 354-A:18 (1995) (“Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, . . . from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

N.M. STAT. § 28-1-9(B) (2006) (“Nothing contained in the Human Rights Act shall . . . bar any religious or denominational institution . . . from limiting admission to or giving preference to persons of the same religion or denomination . . .”).

APPENDIX C: SELECT STATE ANTI-DISCRIMINATION
STATUTES WITHOUT RELIGIOUS EXEMPTIONS

- Alaska: ALASKA STAT. § 18.80.230 (2006)
- California: CAL. CIV. CODE § 51 (Deering Supp. 2007)
- Colorado: COLO. REV. STAT. § 24-34-601 (2006)
- Delaware: DEL. CODE ANN. tit. 6, § 4502 (1999)
- District of Columbia: D.C. CODE § 2-1402.31 (Supp. 2006)
- Florida: FLA. STAT. § 760.07 (2006)
- Hawaii: HAW. REV. STAT. § 489-2 (1993)
- Illinois: 775 ILL. COMP. STAT. 5/5-103 (2004)
- Kentucky: KY. REV. STAT. ANN. § 344.130 (West 2006)

- Maryland: MD. CODE ANN., Human Relations Commission § 5 (LexisNexis 2003)
- Massachusetts: MASS. GEN. LAWS ch. 272, §§ 92(A), 98 (2004)
- Montana: MONT. CODE ANN. § 49-2-101(20) (2005)
- Nevada: NEV. REV. STAT. § 651.050(2) (2005)
- North Dakota: N.D. CENTURY CODE § 14-02.4.-14 (2004)
- Ohio: OHIO REV. CODE ANN. § 4112.02(G) (West Supp. 2006)
- Oklahoma: OKLA. STAT. tit. 25, § 1401 (2001)
- Oregon: OR. REV. STAT. § 659A.403 (2005)
- Pennsylvania: 43 PA. CONS. STAT. ANN. § 954(l) (West Supp. 2006)
- Rhode Island: R.I. GEN. LAWS § 11-24-3 (2002)
- South Carolina: S.C. CODE ANN. § 45-9-10 (Supp. 2006)
- South Dakota: S.D. CODIFIED LAWS § 20-13-1(12) (1995)
- Tennessee: TENN. CODE ANN. § 4-21-102(15) (2005)
- Vermont: VT. STAT. ANN. tit. 9, § 4501(8) (1993)
- West Virginia: W. VA. CODE ANN. § 5-11-3(j) (2006)
- Wyoming: WYO. STAT. ANN. § 6-9-101 (2005)