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Noah's Curse and Paul's Admonition: Civil Rights, Religious Liberty, Gay Equality

William Eskridge, Jr.
Yale Law School

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NOAH'S CURSE: HOW RELIGION OFTEN CONFLATES STATUS, BELIEF, AND CONDUCT TO RESIST ANTIDISCRIMINATION NORMS

William N. Eskridge Jr.[*]

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[*] John A. Garver Professor of Jurisprudence, Yale Law School. This Article is a revised and annotated version of the John A. Sibley Lecture, delivered at the University of Georgia School of Law on March 18, 2010; I presented earlier versions at Princeton University, Washington and Lee University, and the Yale Law School. I appreciate the excellent questions and comments from faculty and students at these presentations, as well as specific comments on this Article from Stephen Carter, Gerard Bradley, Mary Anne Case, Holly Hay, Andy Koppelman, Paul Kurtz, Vicki Schultz, Robin Wilson, and Gareth Young. I greatly appreciate the excellent research assistance provided by my students Jayme Herschkopf and Brian Richardson, both Yale Law School Class of 2011.

In *Christian Legal Society v. Martinez*,[1] the Supreme Court recently decided the challenge of a religion-based student group denied recognition by the Hastings College of Law, a state-run law school in California. The Christian Legal Society (CLS) refuses full membership and officer eligibility to "unrepentant homosexual[s]," in violation of the law school's ban on discrimination based on sexual orientation and other forms of discrimination by any program or group officially recognized and funded by the law school.[2] CLS argued that its exclusion from state recognition and publicly funded benefits violates the First Amendment's protection of associational and religious liberty.[3] At oral argument on April 19, 2010, Justice Sonia Sotomayor asked whether the First Amendment ever protects associations that exclude students based on their race, sex, or disability.[4] "Not at all," replied Professor Michael McConnell for CLS.[5] "Race, any other *status* basis Hastings is able to enforce."[6] CLS, however, was only excluding unrepentant gay people based upon their conduct and, by inference from their unrepentant conduct, their *beliefs*, the core area protected by the First Amendment.[7] Justice John Paul Stevens then asked, "What if the *belief* is that African Americans are inferior?"[8] McConnell answered that such an organization might have that *belief*, but they could not then exclude students of color based on their *status*.[9]

In an increasing array of cases, many sponsored by CLS, religious fundamentalists or traditionalists maintain that *equal rights* for sexual minorities ought to be rejected or compromised to

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[1] 130 S. Ct. 2971 (2010), *aff'g* 542 F.3d 634 (9th Cir. 2008).

[2] *See id.* at 2979 (discussing the scope of the law school's nondiscrimination policy and its similarity to the policies at other law schools).

[3] *Id.* at 2981. As a matter of First Amendment doctrine, the parties agreed that Hastings has created a "limited public forum," and the question is whether its restrictions on that forum were reasonable. *Id.* at 2984 n.12.

[4] Transcript of Oral Argument at 9, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371).

[5] *Id.*

[6] *Id.* (emphasis added).

[7] *See id.* at 9–10 (recording McConnell's assertion of the difference between discrimination based on "status" (illegal), and discrimination based on "belief," which CLS argued was protected by the First Amendment).

[8] *Id.* at 10 (emphasis added).

[9] *Id.*

accommodate the *fundamental liberties* of religious minorities.[10] There are three ways equal rights for historically persecuted sexual minorities can be understood to impinge on religious liberties. First, state recognition of equality rights for gay people can be perceived as "promoting homosexuality," at the expense of a religious philosophy valorizing compulsory heterosexuality as the basis for a healthy society in which God's Plan can flourish.[11] Second, laws barring sexual orientation discrimination by employers and other institutions might be understood to "force" religious persons or organizations to associate with people they consider impure, predatory, or polluting, the position taken by CLS in *Christian Legal Society*.[12] Third, antidiscrimination policies can "censor" antigay but religiously motivated expression, and this might be a serious constitutional issue when it occurs within state programs.[13] If a CLS student or cluster of students attended a Hastings College of Law assembly on the rights of lesbian and gay persons and unfurled a banner saying "Leviticus 20:13: Homosexuality Is an Abomination," could law school officials take down the banner or discipline the students?[14]

There is nothing new about civil equality–religious liberty clashes, for they proliferated over the issue of race. Part I of this Article shows how racial equality and religious liberty have been at loggerheads throughout American history. Religious

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[10] *See, e.g.*, Andrew Koppelman & George W. Dent, Jr., Must Gay Rights Conflict with Religious Liberty? (unpublished manuscript) (on file with author).

[11] *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1329 (2000) (outlining the standard argument against a state's adoption of pro-gay policy).

[12] *See, e.g.*, Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioner at 4–5, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039) (describing amici's concern regarding autonomy of religious organizations). The Supreme Court previously accepted a version of this argument. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (concluding that the forced inclusion of a homosexual scoutmaster would significantly affect the Boy Scouts' expressiveness).

[13] *See* Brief for United States Conference of Catholic Bishops as Amicus Curiae Supporting Petitioner at 25, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371) (noting that if government deems an objection to homosexuality as bigotry, then it may create a flood of First Amendment litigation).

[14] *Cf.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1179–80 (9th Cir. 2006), *vacated and remanded*, 549 U.S. 1262 (2007) (upholding discipline of a student wearing an antigay T-shirt).

fundamentalists long objected that equality rights for blacks would promote "racial mixing," impose an unwanted association upon whites, or censor white people's expression.[15] Social conservatives today shy away from constitutional claims that religious institutions or persons can be exempted from legal obligations not to discriminate because of race.[16] McConnell (the attorney representing CLS) and other advocates for religious fundamentalists reject the race analogy on the ground that racial equality does not implicate sincere religious belief in the same way as sexual orientation.[17] In fact, in *Christian Legal Society*, Chief Justice John Roberts lectured counsel for Hastings that "[r]eligious belief—it has to be based on the fundamental notion that we are not open to everybody."[18] But on what basis can CLS exclude the many "homosexuals" who consider themselves Christians? The answer appears to be that "unrepentant homosexuals," who continue to engage in "homosexual activities" that CLS condemns, cannot be "genuine" Christians. FIGURE 1 illustrates the CLS position in this case.

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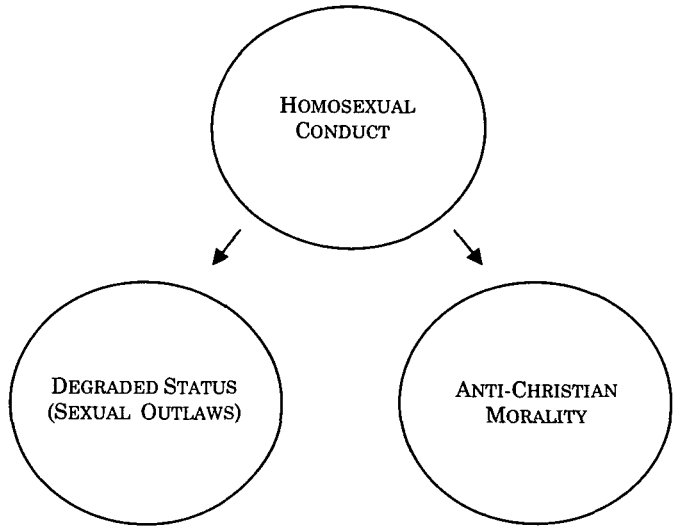
[15] *See* Virginia v. Black, 538 U.S. 343, 348, 367 (2003) (striking down cross burning statute aimed at preventing racially motivated crimes as a violation of freedom of expression); Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 629–30 (discussing beliefs about the results of "racial mixing" that contributed to segregation).

[16] *See, e.g.*, *infra* notes 150–51 and accompanying text.

[17] *See* Brief for Petitioner at 43, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371) (arguing that it would be unlawful discrimination for a religious group to exclude people of color, but not unlawful discrimination to exclude people with different beliefs, unrepentant gay people for example); S. BAPTIST CONVENTION, RESOLUTION ON HOMOSEXUALITY, MILITARY SERVICE AND CIVIL RIGHTS (2010), http://www.sbc.net/resolutions/amResolution.asp?ID=613 (describing "[h]omosexual politics" as "masquerading" as civil rights and having nothing in common with discrimination based on race and gender).

[18] Transcript of Oral Argument, *supra* note 4, at 46–47.

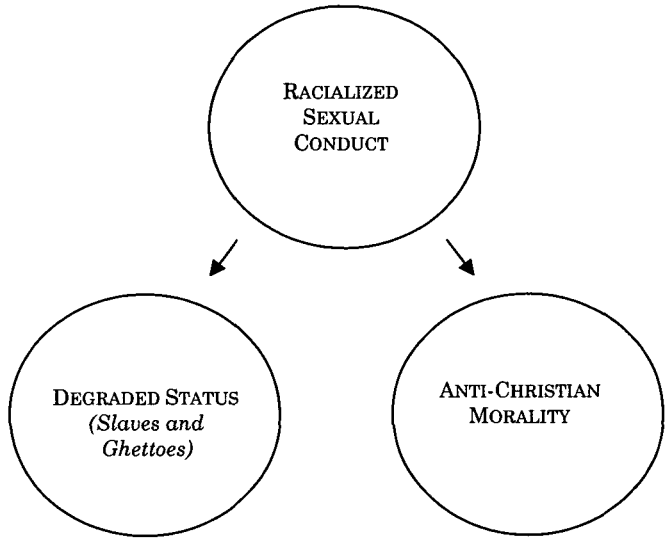
FIGURE 1: TRADITIONALIST UNDERSTANDING OF HOMOSEXUAL CONDUCT, STATUS, AND BELIEF



In *Christian Legal Society*, Professor McConnell was asking the Court to accept the idea that CLS was not really discriminating based upon status; it was merely discriminating based upon beliefs and, implicitly, upon ongoing conduct revealing beliefs.[19] Part I of this Article demonstrates that religion-based discrimination against African-Americans was premised upon the same kind of thinking, diagrammed in FIGURE 2.

[19] *See supra* notes 6–7 and accompanying text.

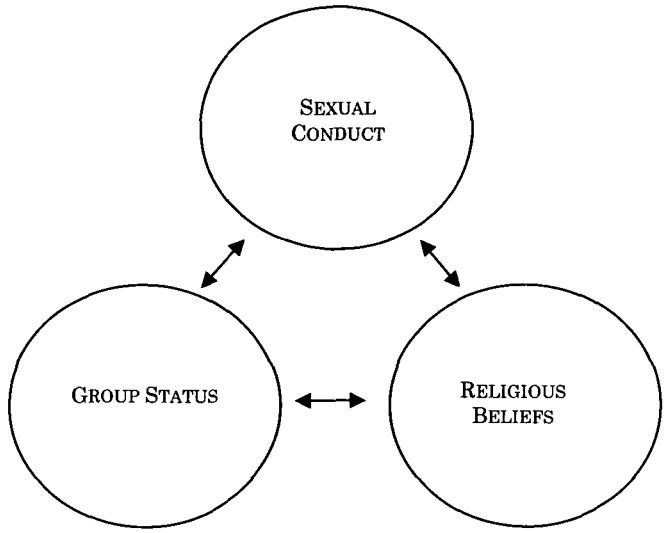
FIGURE 2: TRADITIONALIST UNDERSTANDING OF RACIAL CONDUCT, STATUS, AND BELIEF



Many readers will find the mindset underlying FIGURE 2 unimaginable, but it saturated American history. Part I also demonstrates that, as the status of Americans of color improved, religious doctrine regarding racialized sexuality changed. For example, the civil rights revolution altered the belief structure of Christianity in America, especially the South. Part II of this Article demonstrates that the relationship between gay people and Christian faith has been going through the same progression—from demonization toward tolerance and, ultimately, toward acceptance.

My primary descriptive theme is that religious belief validates deeply felt emotions (including prejudices) and precepts (including stereotypes). But religious belief changes as the surrounding culture changes and can contribute to that change by validating more inclusive emotions and precepts that undermine prejudices and stereotypes. Religion, society, and law are mutually constitutive: each affects the others. FIGURE 3 captures this relationship.

FIGURE 3: A HISTORIAN'S UNDERSTANDING OF THE RELATIONSHIP AMONG STATUS, CONDUCT, AND BELIEF (BOTH BLACKS AND GAYS)



The double role of religion—as both engine of prejudice and bearer of redemption—suggests that civil rights advocates ought to follow a double strategy, both confronting discriminatory policies endorsed by religions and accommodating the faithful where possible. My advice for the U.S. Supreme Court is to avoid raising the stakes of these equality–liberty clashes, especially during what appears to be a transition period between the post-1945 "homosexual terror" and the soon-to-be-achieved future where gay people and their families are considered normal. During the transition period, the Court not only ought to ensure that core religious institutions retain freedom to exclude, but also ought to allow the states ample room to insist on gay tolerance within public programs. At the end of the Article, I praise Justice Ruth Bader Ginsburg's narrowly constructed decision resolving the *Christian Legal Society* case.

I. RELIGIOUS LIBERTY AND EQUALITY FOR BLACKS

For most of American history, the law uncontroversially denied racial minorities equal treatment wherever religious majorities believed as a matter of faith that racial variation from "whiteness" was malignant. Fundamentalist (Bible-based) theology, especially in the South, posited that the immoral *conduct* of African-Americans generated for them a degraded *status* as a matter of Christian *belief*.[20] After the end of slavery, segregation of and violence against blacks were tied to blacks' supposed sexual appetite for congress with whites, which was offensive to Christian belief. The twentieth century witnessed a civil rights campaign for racial equality within society, within legal circles, and within churches. As Americans gradually came to accept the notion that racial variation is *tolerable* and, ultimately, *benign*, the moral objections to racial integration and miscegenation abated, and American Christianity underwent its own conceptual revolution.

A. MALIGNANT RACIAL VARIATION: RELIGIOUS ARGUMENTS SUPPORTING SLAVERY AND, LATER, APARTHEID FOR BLACK PERSONS

During the colonial period, the three great English religions—Anglican, Puritan-Calvinist, and Roman Catholic—accepted slavery with few qualms; only the Quakers consistently raised moral objections to slavery.[21] Accompanied by much egalitarian rhetoric, the American Revolution stirred religion-based opposition to slavery among Methodists, Baptists, and Presbyterians.[22] But after 1818 these same religions moved decisively toward a stance either tolerating or supporting slavery.[23] As my colleague Stephen

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[20] *See supra* FIGURE 2; *see also infra* notes 26–31 and accompanying text.

[21] *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 194–95 (1968) (discussing origination of antislavery doctrine among Quakers); H. SHELDON SMITH, IN HIS IMAGE, BUT . . . : RACISM IN SOUTHERN RELIGION, 1780–1910, at 4–15 (1972) (surveying the slavery views of the colonial religions).

[22] *See* SMITH, *supra* note 21, at 36–38 (highlighting opposition to slavery within the Methodist Church); *id.* at 47–51 (discussing the antislavery movement within the Baptist Church); *id.* at 55–57 (presenting the increasingly abolitionist view of the Presbyterian Church after the American Revolution).

[23] *See id.* at 43–47 (explaining the change in the Methodist Church that resulted in the move toward support for slavery); *id.* at 79–81, 93–94 (discussing proslavery trends in the

Carter has argued, religious leaders often justified slavery as part of the social order to which religion should defer,[24] but they also deployed Bible-based arguments to support the notion that the Word of God sanctioned the slavery of Africans.[25]

The primary biblical argument was *Noah's Curse*.[26] Noah had three sons, which Christian tradition associated with the three great races: Japheth (European races), Shem (Asian races), and Ham (African races).[27] After rescuing humanity from the Great Flood, Noah planted a vineyard, the fruits of which rendered him drunk.[28] Ham, the father of Canaan, saw his unconscious father naked and reported it to his brothers, who covered Noah with a garment.[29] Then comes the curse:

> [24] And Noah awoke from his wine and knew what his younger son had done unto him.
>
> [25] And he said, Cursed be Canaan; a servant of servants shall he be unto his brethren.
>
> [26] And he said, Blessed be the LORD God of Shem; and Canaan shall be his servant.

Presbyterian Church); *id.* at 54–55, 116–17 (exploring the Baptist Church's move toward support of slavery).

[24] *See* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 92–93 (2000) (reporting sermons to this effect).

[25] *See* MITCHELL SNAY, GOSPEL OF DISUNION: RELIGION AND SEPARATION IN THE ANTEBELLUM SOUTH 54–57 (1993) (noting that the scriptural justification of slavery was a "central pillar" in the proslavery argument); FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY 43–47 (1990) (exploring biblical arguments in support of slavery). *See generally* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002) (discussing Noah's curse of his son Ham as a biblical justification for slavery).

[26] *See generally* HAYNES, *supra* note 25 (outlining background and history of Noah's Curse).

[27] *See id.* at 4–5 (discussing dispersion of the races through Noah's three sons).

[28] *Genesis* 9:20–21 (King James). Except where otherwise noted, all Old Testament quotations shall be from the King James version of the Bible.

[29] *Genesis* 9:22–23.

> [27] God shall enlarge Japheth, and he shall dwell in the tents of Shem; and Canaan shall be his servant.[30]

Medieval and early modern Christian tradition read verse 24 as suggesting that Ham committed a lewd or sexual act on his father and associated Noah's Curse as a general indictment of the Hamite race, namely, persons of African descent. Thus understood, Noah's Curse provided an authorization for the enslavement of the descendants of Ham (Africans taken to the American colonies) to the descendants of Japheth (the English colonists).[31]

A second argument was founded upon the fact that slavery was commonplace in the Old Testament.[32] Apologists for slavery noted that God's Chosen (Abraham, Isaac, and Jacob) owned slaves[33] and that Leviticus required the Israelites to secure "bondsmen" from among the "heathen" surrounding Israel.[34] "[T]hey shall be your possession,"[35] and "ye shall take them as an inheritance for your children after you, to inherit them for a possession; they shall be your bondmen for ever."[36] Although the Gospels of Jesus Christ provided no support for slavery, St. Paul's letters endorsed the Christian validity of servitude through positive commands of fidelity to slave masters.[37] "Servants, be obedient to them that are your masters according to the flesh."[38]

These biblical references were the basis for schism and secession within the leading Protestant denominations before the

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[30] *Genesis* 9:24–27.

[31] *See* HAYNES, *supra* note 25, at 8 (describing the Curse as acquiring an increasingly formalized role in the American defense of slavery); *see also* Randy J. Sparks, *Mississippi's Apostle of Slavery: James Smylie and the Biblical Defense of Slavery*, 51 J. MISS. HIST. 89, 100 (1989) (positing the predominance of the biblical defense).

[32] *See, e.g.*, SNAY, *supra* note 25, at 56–57 (discussing the Old Testament's sanction of slavery in the Mosaic law and on account of the prophets who owned slaves).

[33] *Id.* at 57.

[34] *Leviticus* 25:44–46.

[35] *Leviticus* 25:45.

[36] *Leviticus* 25:46.

[37] SMITH, *supra* note 21, at 133–36; WOOD, *supra* note 25, at 67.

[38] *Ephesians* 6:5; *see also Titus* 2:9 ("[E]xhort Servants to be obedient unto their own masters . . . .").

Civil War.[39] Notwithstanding the Methodist Episcopal Church's increasing accommodation of slaveholders, in 1844–1845 the Southerners seceded and formed the Southern Methodist Church, which affirmatively supported slavery.[40] Also in 1845 the Southern Baptist Convention (SBC) was founded upon the proposition that slaveholding was endorsed by Scripture.[41] The Presbyterian Church split twice—first in 1837 over theological issues (with slavery in the background) and then in 1857–1861 over the issue of slavery.[42] The Roman Catholic Church did not formally divide over the issue, but its southern parishes supported slavery and included slaveholders among their notable parishioners.[43] The Church of Jesus Christ of Latter-day Saints (LDS) accepted Noah's Curse and other Scripture as a ground for denigrating the descendants of Ham and Canaan.[44] In 1852, Utah's territorial legislature authorized slavery, making Utah the only American jurisdiction to do so outside the South.[45]

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[39] *See* C.C. GOEN, BROKEN CHURCHES, BROKEN NATION: DENOMINATIONAL SCHISMS AND THE COMING OF THE AMERICAN CIVIL WAR 4–5 (1985) (outlining the role of slavery in the development of schisms in the Protestant denomination); SNAY, *supra* note 25, at 149 (describing the connection between denominational schisms and the coming of the Civil War).

[40] *See* JOHN NELSON NORWOOD, THE SCHISM IN THE METHODIST EPISCOPAL CHURCH, 1844: A STUDY OF SLAVERY AND ECCLESIASTICAL POLITICS 96–97 (1923) (noting that the slaveholding conferences met a year after the General Conference of 1844 to finalize a plan of separation); WOOD, *supra* note 25, at 314 (discussing the events surrounding the secession of slaveholding churches in 1844–1845).

[41] WOOD, *supra* note 25, at 325.

[42] *See id.* at 301–03 (tracing splits in the Presbyterian Church and formation of "the United Synod of the Presbyterian Church" in 1857); Edmund A. Moore, *Robert J. Breckinridge and the Slavery Aspect of the Presbyterian Schism of 1837*, 4 CHURCH HIST.: STUD. IN CHRISTIANITY AND CULTURE 282, 294 (1935) (noting slavery was "inextricably bound up" in the Presbyterian schism of 1837).

[43] *See* MADELEINE H. RICE, AMERICAN CATHOLIC OPINION IN THE SLAVERY CONTROVERSY 139, 143 (1944) (describing sentiments of southern Catholic slaveholders). *See generally* AMERICAN CATHOLICS AND SLAVERY: 1789–1866 (Kenneth J. Zanco ed., 1994) (compiling various sources highlighting the views of American Catholics on slavery during the first half of the nineteenth century).

[44] *See* NEWELL G. BRINGHURST, SAINTS, SLAVES, AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM 41–44 (1981) (discussing Joseph Smith's Books of Moses and Abraham and stating that the Mormon church leader's writing justified viewing blacks in an inferior light).

[45] Newell G. Bringhurst, *The Mormons and Slavery—A Closer Look*, 50 PAC. HIST. REV. 329, 329 (1981).

When Abraham Lincoln was elected president in 1860, southern Protestant ministers called for their region to do what the southern Methodists, Baptists, and Presbyterians had earlier done in response to slavery's critics: secede.[46] "In the period of warfare [1861–1865] as in that of the secession crisis [1860–1861], clergymen were second to no other professional class in buttressing the struggle for southern independence," supporting the liberty of Southerners to preserve their way of life as well as their property interest in slaves.[47] In response to Lincoln's Emancipation Proclamation of 1863, ninety-six religious leaders from eleven denominations issued "An Address to Christians Throughout the World" condemning the "ruthless persecution" of the slaveholder and Lincoln's "malice" toward them, who were to bring salvation to their slaves through the Christianizing institution of slavery.[48]

Even after the Thirteenth Amendment, adopted in 1865, abolished slavery, some religious leaders continued to invoke biblical arguments for slavery,[49] but increasingly, southern religious leaders modernized Noah's Curse to address the post-slavery environment.[50] Thus, Reverend Benjamin Morgan Palmer, the leader of the new Southern Presbyterian Church, transformed Noah's Curse to support the liberty of religious southern whites to avoid close association with blacks.[51] Reverend Palmer spearheaded the backlash against "forced integration" in New Orleans and was the main proponent for the de jure segregation of the races in the city's public schools.[52] His argument for racial segregation also brought the story of Noah's Curse forward a few

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[46] *See* SMITH, *supra* note 21, at 171–88 (providing a detailed account of southern ministerial calls for secession because of the slavery issue); SNAY, *supra* note 25, at 49 (noting influential role played by southern clergymen during the secession crisis).

[47] SMITH, *supra* note 21, at 188; *see id.* at 188–207 (providing a detailed account of the support southern clergy gave to the Confederate cause).

[48] *See id.* at 197–98 (describing and quoting from the Address).

[49] *See id.* at 207–16 (detailing proslavery arguments that survived the Civil War).

[50] *See* HAYNES, *supra* note 25, at 12–13 (previewing later discussion regarding reliance on *Genesis* 9–11 as a source of prosegregation arguments).

[51] *See id.* at 125–27 (introducing idea that Palmer used Noah's Curse as a rationale for racial hierarchy in the post-slavery South).

[52] *See id.* at 127, 136 (noting Palmer's efforts to ensure segregation by establishing all-white parochial schools in response to admittance of black pupils to public schools).

chapters:[53] Ham's grandson was Nimrod, the ruler of Babel[54] and, according to Christian tradition, the architect of the Tower of Babel, a project of human arrogance.[55] To thwart Nimrod's project, the Lord instilled in the builders different languages, so that the men could no longer understand one another and then "scattered them abroad from thence upon the face of all the earth."[56] The lesson that Reverend Palmer and other southern ministers drew from this fiasco was that if arrogant descendants of Ham (i.e., Nimrod) sought to disrupt the divine plan for segregation of the races, the Lord would thwart those plans through divine dispersion that reaffirmed the original design.[57] Call this the "Nimrod's Hubris" argument for racial segregation.[58] Under this theory, it was a matter of *religious liberty* for devout southern whites (and many blacks) to remain separate from members of the other race, and so the Southern Presbyterians, Methodists, and Baptists religiously segregated their own congregations in the period after the Civil War.[59]

As with secession, formal segregation of the races within churches became the model for legal segregation of the races in southern states after 1877. A keystone for religious and legal apartheid was legal as well as religious bans against miscegenation (interracial marriage); such laws swept the country

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[53] *See id.* at 158–59 (discussing emergence of Nimrod in Palmer's rhetoric).

[54] *Genesis* 10:1–10.

[55] *Genesis* 11:1–6.

[56] *Genesis* 11:7–9.

[57] *See* HAYNES, *supra* note 25, at 137–38, 157–58 (quoting Palmer as stating, "the first pronounced insurrection against [God's] supremacy was the attempt by Nimrod to defeat this policy [of divine separation]").

[58] Another argument for racial segregation was that Eve was tempted to her (and Adam's) doom by a black man (in one version a black woman or woman-man). *See generally* Mason Stokes, *Someone's in the Garden with Eve: Race, Religion, and the American Fall*, 50 AM. Q. 718 (1998) (explaining theory that Africans were not only the cause of humankind's Fall, but were not even human).

[59] *See* R. BENTLEY ANDERSON, BLACK, WHITE, AND CATHOLIC: NEW ORLEANS INTERRACIALISM, 1947–1956, at 3 (2005) (noting segregation in Catholic parishes); PAUL HARVEY, REDEEMING THE SOUTH: RELIGIOUS CULTURES AND RACIAL IDENTITIES AMONG SOUTHERN BAPTISTS, 1865–1925, at 46 (1997) (describing segregation within Baptist churches); WOOD, *supra* note 25, at 315–18 (identifying segregation among Methodist congregations after the Civil War); *id.* at 329–32 (discussing segregation within Baptist churches).

after the Civil War.[60] Antimiscegenation was justified on religious grounds, even in courts of law.[61] "Mixing" of the races would invite interracial sexual congress,[62] which was a violation of God's Word expressed in Noah's Curse—a precept that religious southern segregationists found reaffirmed throughout the Old and New Testaments.[63] Perhaps the most-deployed biblical argument against interracial marriage was Isaac's Blessing to his son Jacob: "And Isaac called Jacob, and blessed him, and charged him, and said unto him, Thou shalt not take a wife of the daughters of Canaan," namely, women of African descent.[64]

Southern whites' strong aversion to miscegenation undergirded the systematic adoption of apartheid laws in the South after Reconstruction.[65] One of the pioneers of apartheid was Louisiana, which had been racially integrated in many arenas throughout the nineteenth century.[66] The militant segregationist theology of Reverend Palmer, pastor of the city's largest Protestant church, had an attentive audience in post-Reconstruction New Orleans.[67] Other Protestant churches followed Palmer's lead, as did Catholic Archbishops who segregated parish churches, parochial schools, and hospitals all over Louisiana.[68] It is against this backdrop of

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[60] *See* ROBERT J. SICKLES, RACE, MARRIAGE, AND THE LAW (1972) ("Only Maine among the states of the union was found by [Justice] Taney to have made no declaration of black inferiority [such as a miscegenation law] of any kind.").

[61] *See, e.g.*, Green v. State, 58 Ala. 190, 194 (1877) (upholding antimiscegenation law because "He [God] has made the two races distinct"); Scott v. State, 39 Ga. 321, 326 (1869) (rejecting the notion that the races are equal, for "[t]he God of nature made it otherwise, and no human law can produce it").

[62] *See* Hovenkamp, *supra* note 15, at 635 (quoting a Kentucky court saying that "[f]rom social amalgamation it is but a step to illicit intercourse").

[63] *See Acts* 17:26 (stating that each race's lot in life is according to God's plan, delivered from Paul to the Athenians); 2 *Corinthians* 6:17–18 ("Wherefore come out from among them, and be ye separate, saith the Lord, and touch not the unclean thing; and I will receive you."); *Deuteronomy* 7:3 ("Neither shalt thou make marriages with [women of African descent] . . . ."); *Ezra* 9:11–15 (relating Ezra's prayer about intermarriage); *Genesis* 27–28 (recounting Isaac's blessing to Jacob and Jacob's subsequent dream).

[64] *Genesis* 28:1.

[65] Hovenkamp, *supra* note 15, at 635 (noting common belief that any kind of social integration was bad because it would lead to miscegenation).

[66] *See, e.g.*, HAYNES, *supra* note 25, at 136 (noting that New Orleans schools were integrated for a period in the 1870s).

[67] *See id.* at 127 ("[F]rom 1856 until his death in 1902, Benjamin M. Palmer was New Orleans's pre-eminent clergyman.").

[68] ANDERSON, *supra* note 59, at 3–7.

religion-based precepts and actions, as well as the social mores intertwined with religion, that the Louisiana legislature enacted a statute in 1890 requiring separate railroad cars for the different races—this was the statute at issue in *Plessy v. Ferguson*, which was the occasion for the Supreme Court to insulate apartheid from judicial review for two generations.[69]

B. TOLERABLE RACIAL VARIATION: BLACKS' CIVIL RIGHTS UNDERSTOOD AS A CHALLENGE TO RELIGIOUS LIBERTY

Once southern segregation was entrenched, Noah's Curse and the other scriptural arguments lost much of their prominence, but their ideas were translated into the modernized discourse of science and sociology. For example, the biblical arguments against interracial sexuality gained support from science-based arguments that "colored" races were "inferior" and would yield a horrifying "mongrel race" if crossbreeding with whites were to occur.[70] Moderate apologists for segregation defended it along pragmatic lines: racist attitudes—to which religion had contributed—were so deeply entrenched in the minds of southern whites and many blacks that integration was not practically feasible.[71]

The science-based arguments for segregation took on a bad odor in the 1930s and 1940s, as scientists subjected them to withering critique.[72] Moreover, the science supporting apartheid suffered from guilt by association with the scientific racism of the hated Nazis.[73] Buoyed by modern science indicting racial prejudice, the civil rights movement challenged apartheid with increasing success after World War II, but that success inspired a comeback

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[69] 163 U.S. 537, 540, 552 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[70] *See, e.g.*, Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1217–19 (1966) (noting theory that a person of mixed blood is "inferior" in quality to one of racial purity had been discredited by studies).

[71] *See generally* PETER C. MURRAY, METHODISTS AND THE CRUCIBLE OF RACE, 1930–1975 (2004) (providing overview of practical difficulties resulting from attempts to desegregate and move toward racial equality).

[72] *See* VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 129–31 (2008) (discussing the rise of studies disputing eugenics and how such theories became associated with racism and Nazism).

[73] *Cf.* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 6–10 (2006) (discussing the significance of World War II as a war against racism).

for the religious liberty arguments in favor of apartheid and against racial mixing.[74] Racial equality thus directly threatened religion because churches themselves were largely segregated; only 0.1% of all black Protestants worshipped in integrated churches at the end of World War II.[75] Congregations and preachers within the United Methodist Church South, the Southern Presbyterian Church, and, most strongly, the Southern Baptist Convention righteously attacked the Supreme Court's decision in *Brown v. Board of Education*.[76]

An unusually detailed example was *The Christian Problem of Racial Segregation*, by Southern Baptist minister, the Reverend Humphrey Ezell.[77] The bulk of his book was a compendium of all the Old Testament passages supporting the segregation of the races[78] and barring interracial marriages,[79] as well as New Testament support, including the racially pure lineage of Christ[80] and warnings against racial mixing.[81] Science reinforced the lessons of Scripture, for, according to the reverend, scientists demonstrated that there were profound physical, mental, and

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[74] *See, e.g.*, MURRAY, *supra* note 71, at 79–80 (discussing the use of arguments that white congregations even worshipped differently and black churches were "emotional" to justify segregation in the Methodist Church in the years after *Brown*).

[75] FRANK S. LOESCHER, THE PROTESTANT CHURCH AND THE NEGRO: A PATTERN OF SEGREGATION 76–77 (1948); Robert M. Miller, *The Attitudes of American Protestantism Toward the Negro, 1919–1939*, 41 J. NEGRO HIST. 215, 215 (1956).

[76] 347 U.S. 483 (1954); *see also* WAYNE FLYNT, ALABAMA BAPTISTS: SOUTHERN BAPTISTS IN THE HEART OF DIXIE 455–58 (1998) (stating that Baptists reacted strongly against *Brown*, and that other denominations shared their views); MURRAY, *supra* note 71, at 75, 81–82 (discussing Southern Methodists' reaction to *Brown*); Andrew M. Manis, *"Dying from the Neck Up": Southern Baptist Resistance to the Civil Rights Movement*, BAPTIST HIST. & HERITAGE, Winter 1999, at 33, 34–35 (indicating that Baptists vigorously rejected the civil rights movement and the *Brown* decision).

[77] HUMPHREY K. EZELL, THE CHRISTIAN PROBLEM OF RACIAL SEGREGATION (1959).

[78] *E.g.*, *Genesis* 9:24–27 (describing the story of Noah's curse of his son Ham).

[79] *See, e.g.*, *Deuteronomy* 7:3 (instructing the Israelites not to marry members of other tribes); *Ezra* 9:1–3 (discussing the "abominations" of marrying members of other nations); *Genesis* 28:1 (describing Isaac's instruction to Jacob not to "take a wife of the daughters of Canaan," i.e., of African descent).

[80] *See Luke* 3:23–38 (describing earthly forefathers of Christ).

[81] EZELL, *supra* note 77, at 29–26; *see also, e.g.*, *Acts* 17:26 (stating God "hath made of one blood all nations . . . and hath determined . . . the bounds of their habitation"); 2 *Corinthians* 6:17–18 (describing God's commands to be separate and to touch nothing unclean).

emotional differences between the white and black races.[82] Reverend Ezell synthesized the Noah's Curse and Isaac's Blessing arguments with constitutional arguments for American apartheid.

First, he argued that it was not "discrimination" to separate the races because scriptural and scientific differences rendered racial mixing inappropriate.[83] It is only "discrimination" when similar things are treated differently.[84] Rather, throwing blacks and whites together in forced integration would be a denial of "equality," not its fulfillment.[85] Second, Reverend Ezell argued that racial integration and, inevitably, sexual mixing would generate social disorder and chaos and would be disastrous for the country.[86] Third, he argued segregation "is necessary to fulfill the principles of our basic government and laws," namely, the Declaration of Independence and the U.S. Constitution.[87] "In the enjoyment of all our liberties and blessings, we must observe the restrictions [apartheid] that will give to others their own liberties and blessings," he observed.[88] "The liberties, rights, and happiness of all of us can only be preserved if we practice the laws of segregation that protect the privileges and rights of all of us. Laws of segregation are necessary to maintain the constitutional rights of every American citizen."[89] Although this was not the only religion-based response to *Brown*, it did represent the views of most religious white Southerners and of many religious persons outside the South, including Mormons in the West.[90]

Because *Brown* did not cover private establishments, an even bigger practical challenge to religion-based segregation was the

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[82] *See* EZELL, *supra* note 77, at 23–25 (discussing alleged differences).

[83] *Id.* at 22–23.

[84] *See id.* at 23 ("[T]he inequalities of our people must be recognized.").

[85] *Id.* at 22–24.

[86] *Id.* at 24–31.

[87] *Id.* at 11.

[88] *Id.* at 12.

[89] *Id.*

[90] *See* BRINGHURST, *supra* note 44, at 151 (explaining that throughout the early twentieth century, the Church of Latter-day Saints reaffirmed its policy of excluding blacks from the priesthood); *Negro Cooperation Survey Conducted*, BAPTIST STANDARD, Nov. 6, 1968, at 21 (stating that only 11% of the Southern Baptist Convention congregations were willing to admit blacks in 1968).

proposed Civil Rights Act of 1964,[91] which aimed to apply the nondiscrimination principle to private restaurants, hotels, and workplaces. Southern opposition to the law was fierce, and much of it was religion-based invocation of a constitutional freedom not to associate with racial minorities.[92] West Virginia Senator Robert Byrd—a Southern Baptist—criticized the proposed legislation for imperiling the "liberties and freedoms" of many "honest, hard-working, religious citizens of this country."[93] He supported his own libertarian constitutional stance by invoking Noah's Curse, Isaac's Blessing, and the Levitical rules against interbreeding cattle and sowing with "mingled seed."[94] "God's statutes, therefore, recognize the natural order of the separateness of things," concluded Senator Byrd.[95] Senator Byrd was far from idiosyncratic in his liberty-based opposition to the 1964 Act; the House members opposed to the bill emphasized fifteen different liberties the new law would abridge for Southerners who were opposed to racial mixing for religious and other reasons.[96]

Notwithstanding ferocious religion-based opposition such as this, the 1964 bill was enacted, and that statute triggered a wave of legal clashes between civil rights for blacks and religious liberty of some religious whites. In the wake of the 1964 Act, and in response to federal judges freshly willing to read *Brown* to require racial integration in public schools, Baptist and other churches all over the South created new religious academies as refuges where white parents could send their children to segregated schools.[97] In

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[91] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in sections of 42 U.S.C.).

[92] The freedom-not-to-associate argument is mainly connected with secular critics of *Brown* and the 1964 Act. *See, e.g.*, Robert H. Bork, *Against the Bill*, CHI. TRIB., Mar. 1, 1964, § 1, at 1 (stating that adopting the Civil Rights Bill would "enforc[e] associations between private individuals which would . . . destroy personal freedom").

[93] 110 CONG. REC. 13,206 (1964).

[94] *Id.* at 13,206–07; *see also Leviticus* 19:19 ("Thou shalt not let thy cattle gender with a diverse kind: thou shalt not sow thy field with mingled seed . . . .").

[95] 110 CONG. REC. 13,207.

[96] *See* H.R. REP. NO. 88-914, at 64–65 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2433–34 (listing fifteen separate liberties and "civil rights" the bill would abridge).

[97] *See* U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 1 (1982) (describing 1967 report concluding *Brown* had led to establishment of private segregated schools in the South); DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 5–9 (1976) (providing overview of private schools that arose in the South following *Brown* and

1970, however, the Treasury Department decided that segregated academies were not entitled to federal income tax exemptions as "charitable" institutions.[98] Advocates for religious fundamentalists urged Congress to override the Department because removal of tax exemption threatened the liberty to run schools along the lines laid out in the Noah's Curse reading of the Bible.[99] Congress declined to override the agency and later expanded the rule to include segregated social clubs.[100]

The Treasury Department's policy posed a problem for many of the segregated academies, including the Goldsboro Christian Schools (GCS), a Baptist-affiliated academy established in 1963, just as Wayne County, North Carolina was implementing court-ordered school integration.[101] From its inception, the school forbade the admission of black students, maintaining that God "separated mankind into various nations and races," and that such separation "should be preserved in the fear of the Lord."[102] This dilemma was not limited to primary and secondary schools, however, as the most famous example of a segregated academy was Bob Jones University (BJU), a Baptist-affiliated university founded in 1927.[103] From its inception, the school excluded black students because of the Bible's rule against "intermingling" the

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subsequent decisions enforcing desegregation in the 1960s); Joseph Crespino, *Civil Rights and the Religious Right*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S, at 90, 95–97 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (discussing rise of segregation academies after *Brown*).

[98] *See* Rev. Rul. 71-447, 1971-2 C.B. 230 (providing tax exemptions only to schools with nondiscriminatory policies); Rev. Rul. 75-231, 1975-1 C.B. 158 (determining that the 1970 ruling applied to religious academies).

[99] *See, e.g.*, *Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the S. Comm. on Fin.*, 96th Cong. 18 (1979) (statement of Sen. Harry F. Bryd Jr., Chairman, Subcomm. on Taxation & Debt Mgmt. Generally) (discussing the threat to religious private schools posed by the IRS regulation regarding tax exemptions).

[100] *See* Act of Oct. 20, 1976, Pub. L. No. 94-568, 90 Stat. 2697 (providing that discriminatory social organizations can no longer enjoy tax exempt status).

[101] Complaint at 3–11, Goldsboro Christian Schs. v. United States, 461 U.S. 574 (1983) (No. 81-1); ROBERT R. MAYER ET AL., THE IMPACT OF SCHOOL DESEGREGATION IN A SOUTHERN CITY: A CASE STUDY IN THE ANALYSIS OF EDUCATIONAL POLICY 31 (1974) (explaining the Goldsboro City School Board's integration plan).

[102] *See* Complaint, *supra* note 101, at 9–10 (discussing the school's segregation policy).

[103] Bob Jones Univ. v. United States, 461 U.S. 574, 579 n.4.

races.[104] Litigating Treasury's denial of their tax-exempt status, BJU and GCS not only invoked religious liberty as a justification for antiblack discrimination, but also invoked the Free Exercise Clause as a constitutional protection.[105] Although the Reagan Administration supported the statutory arguments made by the segregated academies on appeal, it did not endorse their constitutional arguments.[106] Ultimately, the Supreme Court affirmed the Treasury Department's pre-Reagan policy in *Bob Jones University v. United States*.[107]

The Fair Housing Act of 1968 required landlords leasing more than three apartments to refrain from race discrimination,[108] a requirement that was contrary to the religious precepts of many religious white landlords, who considered leasing their premises to black tenants a violation of the scriptural case against racial mixing. Before the 1968 Act went into effect, the Supreme Court in *Jones v. Alfred H. Mayer Co.* interpreted the Civil Rights Act of 1866 to impose civil liability against any person who discriminated because of race in a leasing or other property transaction.[109] After this decision in 1968, it was a serious violation of federal law for property sellers, realtors, bankers, and the like to refuse to deal with or sell to blacks in property transactions. In *Runyon v. McCrary*, the Court ruled that private segregated academies were liable for damages and possibly injunctions if they refused to enter contracts with black families to enroll their children.[110]

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[104] *See* Plaintiff's Ex. No. 1, Is Segregation Scriptural?: Address Given over Radio Station WMUU, Bob Jones University, Apr. 17, 1960, at A98, A100, A111, *Bob Jones Univ.*, 461 U.S. 574 (No. 81-3) (claiming that BJU had planned to build a school like Bob Jones "for colored people" but ran into "agitation").

[105] *See Bob Jones Univ.*, 461 U.S. at 602–03 (outlining the petitioners' constitutional arguments).

[106] *See* Olatunde Johnson, *The Story of* Bob Jones University v. United States *(1983): Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 126, 144–48 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2010) (describing series of events surrounding the government's reversal of position on the IRS's ability to revoke BJU's tax exemption).

[107] *See Bob Jones Univ.*, 461 U.S. at 605 (affirming that discriminatory private schools do not qualify for tax-exempt status).

[108] 42 U.S.C. §§ 3603–3604 (2006).

[109] 392 U.S. 409, 413 (1968).

[110] 427 U.S. 160, 172–73 (1976).

C. BENIGN VARIATION: FUNDAMENTALIST CHURCHES ACQUIESCE IN CIVIL RIGHTS FOR BLACKS

The clashes between civil rights and religion described above tell only part of the story. Plenty of support exists in the Bible for recognition of universal civil rights.[111] "Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit . . . ."[112] The Christ who declared that the second greatest commandment was "You shall love your neighbor as yourself"[113] could not be a prophet of segregation, many fundamentalists concluded.[114] Moreover, increasing numbers of fundamentalist Bible scholars became openly skeptical of segregationist interpretations of Noah's Curse and the other passages: such interpretations relied on extra-biblical facts (e.g., that Ham and Canaan were the ancestors of Africans), wrenched isolated passages out of context, extravagantly overread them, and ignored biblical evidence pointing toward universal brotherhood.[115]

A more inclusive, "universal brotherhood" reading of Scripture became increasingly popular after World War II, when the civil rights movement's petition for America to renounce racist ideology was powerfully reinforced by our country's self-image as a model democracy.[116] Thus, in 1946 the Presbyterian Church in the United States of America adopted a resolution calling for a "non-segregated church in a non-segregated society."[117] In 1957, the

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[111] *See generally* RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT 1954–1965 (David W. Houck & David E. Dixon eds., 2006) (collecting many pro-equality sermons and religious tracts).

[112] *Matthew* 28:19 (New King James).

[113] *Matthew* 22:39 (New King James).

[114] *See, e.g.*, T.B. MASTON, THE BIBLE AND RACE 117 (1959) (acknowledging segregation as a temporary measure but stating God did not intend for one race to be subservient or treated as innately inferior, and to do so would hurt the Christian movement).

[115] *See id.* at 105–17 (presenting textual exegesis skeptical of Noah's Curse and Nimrod's Hubris arguments for slavery and segregation); EVERETT TILSON, SEGREGATION AND THE BIBLE 23–28 (1958) (discussing and refuting implicit assumptions underlying the biblical bases for segregation in the stories of Ham and Nimrod).

[116] *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 179–213 (1999) (discussing how the country's backlash against totalitarianism and the Nazi regime changed views on civil rights for minorities).

[117] Fred Heuser, *Stories from Our Past: Presbyterians and the Struggle for Civil Rights*, PERSPECTIVES, 3 (Jan. 2007), http://oga.pcusa.org/perspectives/jan07/stories.pdf.

Reverend Martin Luther King, Jr. and other black Baptist ministers founded the most significant grassroots civil rights organization, the Southern Christian Leadership Conference.[118] Dr. King worked closely with the National Council of Churches, an umbrella Protestant organization that strongly supported him.

Through papal pronouncements, the Roman Catholic Church denounced racism in the 1940s and 1950s. In 1958, Pope Pius XII admonished the faithful against "the excesses to which pride of race and racial hatred can lead. The Church has always been actively opposed to attempts at genocide and to practices arising from what is called 'the color bar.' "[119] In *Discrimination and the Christian Conscience*, the American Catholic Bishops decreed that racial segregation is inconsistent with "the Christian view of man's nature and rights."[120]

Even southern white Protestant churches relented. In 1939, the Northern and Southern Methodist Churches, which had split during the Civil War over the issue of slavery,[121] reunited;[122] for the 300,000 black Methodists, however, the Church created a separate Central Jurisdiction, so that the southern white Methodists would not have to mingle with the Methodists of color.[123] After 1945, voices for civil rights became more vocal within the Church.[124] Between 1952 and 1956, the General Conference of the Methodist Church proclaimed the belief that the

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[118] *See* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 88–125 (1986) (detailing the history of the SCLC). *See generally* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW (2004) (discussing the critical role of black churches in the struggle for civil rights).

[119] Pius XII, Allocution, *Le Congrès International*, to International Society for Blood Transfusion (Sept. 5, 1958), *discussed in* JOSEPH T. LEONARD, THEOLOGY AND RACE RELATIONS 258 (1963).

[120] Roman Catholic Bishops, USA, *Discrimination and the Christian Conscience* (1958), *discussed in* LEONARD, *supra* note 119, at 264.

[121] *See supra* note 40 and accompanying text.

[122] FREDERICK A. NORWOOD, THE STORY OF AMERICAN METHODISM: A HISTORY OF THE UNITED METHODISTS AND THEIR RELATIONS 409 (1974); W. Edward Orser, *Racial Attitudes in Wartime: The Protestant Churches During the Second World War*, 41 CHURCH HIST. 337, 340 (1972).

[123] *See* NORWOOD, *supra* note 122, at 407–09 (discussing how the creation of the segregated Central Jurisdiction was a compromise necessary to reunify the Methodist Church).

[124] Orser, *supra* note 122, at 337.

"Master permits no discrimination because of race, color, or national origin."[125] While these Church documents were rejected by many southern Methodist congregations and pastors,[126] they reflected the power of integration-friendly theology within the denomination.[127] The Presbyterians followed a similar path.[128]

And even the Southern Baptists began to endorse a more racially inclusive message. In the wake of *Brown*, the 1954 Southern Baptist Convention recognized a report of its Christian Life Commission which praised the ruling for being "in harmony with the constitutional guarantee of equal freedom to all citizens, and with the Christian principles of equal justice and love for all men."[129] Southern Baptist mission work, in high gear after World War II, persistently pressed a universalist and inclusive approach that valued Christians of all races and ethnicities.[130]

The LDS Church was similarly complex, its racist theology increasingly challenged by missionaries.[131] In 1963, the LDS Church formally endorsed "full civil equality for all of God's children."[132] The LDS First Presidency was more precise in 1969: "Negro[es]" should enjoy "full Constitutional privileges," but "matters of faith, conscience, and theology are not within the purview of the civil law."[133] Like southern churches, the Mormons

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[125] Andrew M. Manis, *"City Mothers": Dorothy Tilly, Georgia Methodist Women, and Black Civil Rights*, *in* POLITICS AND RELIGION IN THE WHITE SOUTH 125, 132 (Glenn Feldman ed., 2005).

[126] *See, e.g.*, *id.* at 133–34 (describing the "spirited defense" of segregation mounted by one pastor in response to the Methodist Church's support of *Brown*).

[127] *See id.* at 132 (describing young Methodists calling "on every level of the Methodist church . . . in support of the [Brown] decision").

[128] *See generally* JOEL L. ALVIS, JR., RELIGION AND RACE: SOUTHERN PRESBYTERIANS, 1946–1983 (1994) (discussing impact of the civil rights movement on the Presbyterian Church); David M. Reimers, *The Race Problem and Presbyterian Union*, 31 CHURCH HIST. 20 (1962) (describing resistance to unification of the Presbyterian Church over the issue of segregation).

[129] Manis, *supra* note 76, at 35.

[130] *See* ALAN SCOT WILLIS, ALL ACCORDING TO GOD'S PLAN: SOUTHERN BAPTIST MISSIONS AND RACE, 1945–1970, at 149–51 (2005) (describing Baptist mission as aimed at educating its own members as well as others about the importance of racial harmony and equality).

[131] *See* BRINGHURST, *supra* note 44, at 188–89 (noting the importance of Mormon missionaries' work in nonwhite regions which undermined the denial of priesthood for blacks).

[132] *Id.* at 231.

[133] *Id.* at 232.

favored racial equality in the abstract—except when it might infringe on the Church's freedom to discriminate against African-American worshippers based upon religious doctrine, or when it might encroach on the liberty of white Mormons not to associate with black Mormons as a matter of religious principle.[134]

The 1960s witnessed more religious "conversions": all of the major Protestant denominations substantially abandoned the racist renderings of the biblical stories about Noah, Ham, Canaan, Nimrod, Isaac, and Jacob.[135] Southern Episcopalians, Methodists, and Presbyterians tolerated or even endorsed the civil rights movement, and many supported the 1964 Act.[136] The Southern Baptists largely opposed the Act, but their stance softened after the political culture changed in the wake of the Voting Rights Act of 1965, which empowered millions of southern blacks to vote.[137] At the same time anti-civil rights politicians such as Strom Thurmond (S.C., 1957–2003) and Robert Byrd (W. Va., 1959–2010) abandoned segregationist policies, so did segregationist Baptist titans such as Reverends W.A. Criswell and Jerry Falwell.[138] In a revelation from the Lord, the First Presidency of the LDS announced in 1978 that the exclusion of blacks from Mormon priesthood was not consistent with God's Word and was immediately discontinued.[139] In 1995, the Southern Baptist

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[134] *See id.* at 232–33 (stating that "the Negro" should be a equal member of society and enjoy all constitutional privileges, but denying blacks the ability to enter the priesthood as a matter of religious freedom).

[135] Conservative Presbyterians, for example, abandoned the Noah's Curse argument but still opposed "race mixing," without biblical support. *See* Reimers, *supra* note 128, at 212 (noting the southern sentiment "that Christian love and helpfulness can be shown and be given while preserving racial integrity").

[136] *See* ALVIS, *supra* note 128, at 10, 111–13 (discussing how members of "mainline" churches participated in the civil rights movement, and the Presbyterians specifically, participated in the 1965 Selma March).

[137] *See* Manis, *supra* note 76, at 44 ("After the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, . . . [m]ost white Southerners, Baptists included, gradually but grudgingly came to accept it.").

[138] *See* W.A. Criswell, An Address to the First Baptist Church, Dallas, Texas: Church of the Open Door (June 9, 1968), *in* JAMES E. TOWNS, THE SOCIAL CONSCIENCE OF W.A. CRISWELL 162–71 (1977) (advocating a racially inclusive vision of Christianity); JERRY FALWELL, STRENGTH FOR THE JOURNEY: AN AUTOBIOGRAPHY 298 (1987) (describing Falwell's support for the integration of his Christian private schools in 1968–1969).

[139] *See* ARMAND L. MAUSS, ALL ABRAHAM'S CHILDREN: CHANGING MORMON CONCEPTIONS OF RACE AND LINEAGE 231–36 (2003) (discussing events leading up to 1978 policy change).

Convention acknowledged that racism is inconsistent with Christian teachings and apologized for its longtime support for slavery and apartheid.[140]

The constitutional issue of interracial marriage illustrates the transition. Among southern segregationists at this time, no issue stirred more violent emotions, and religion-based condemnation, than miscegenation. Thus, Virginia Circuit Court Judge Bazile in 1959 upheld the state's antimiscegenation law, based upon this observation:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that [H]e did not intend for the races to mix.[141]

Judge Bazile imposed a one-year jail sentence on the Lovings, which he suspended on condition that they not set foot in segregated Virginia for twenty-five years.[142] On appeal, after the enactment of national civil rights laws, the Virginia Supreme Court upheld the statute—but based only upon state court precedent and without uttering a word about its religion-based justification in the trial court; moreover, the court nullified the trial judge's requirement that the Lovings stay out of Virginia for twenty-five years.[143] After the 1966 elections, when Virginia (among other states) voted several southern segregationists out of

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[140] *See* ORAN P. SMITH, THE RISE OF BAPTIST REPUBLICANISM app. D, at 229 (1997) (mentioning that the SBC issued an apology for slavery and racism at its 150th Anniversary Convention).

[141] Loving v. Virginia, 388 U.S. 1, 3 (1967); *see also The Law: Anti-Miscegenation Statutes: Repugnant Indeed*, TIME, June 23, 1967, *available at* http://www.time.com/time/magazine/article/0,9171,839535,00.html (discussing *Loving*).

[142] *Loving*, 388 U.S. at 3.

[143] Loving v. Commonwealth, 147 S.E.2d 78, 82–83 (Va. 1966), *rev'd*, 388 U.S. 1 (1967) (declining to overturn precedent and instead deferring to the legislature to change the statute).

office,[144] the U.S. Supreme Court unanimously invalidated the antimiscegenation statute in *Loving v. Virginia*.[145]

Most religious white Southerners did not endorse the Court's decision in *Loving*. For example, even after Bob Jones University abandoned its blanket exclusion of black students, it continued to ban interracial dating and marriage. When BJU's case regarding its tax-exempt status reached the Supreme Court, numerous religious groups filed supportive amicus briefs. It is noteworthy that none of those amicus briefs endorsed the school's religious viewpoint, and most rejected it as a matter of their own faith.[146] The Baptists and Presbyterians described Bob Jones University's religious principles as "racist," even if sincere.[147] In March 2000, Bob Jones III announced that BJU would permit interracial dating.[148] Today, BJU's website apologizes for conforming to the "segregationist ethos of American culture" and for failing "to accurately represent the Lord and to fulfill the commandment to love others as ourselves."[149]

Even though Bob Jones University capitulated on its religious liberty claims, Christian-based racism (such as the Christian Identity Movement) remains a lively phenomenon in the United

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[144] *See, e.g.*, JULIAN E. ZELIZER, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948–2000, at 72–73 (2004) (discussing losses of conservatives such as Willis Robertson and Howard Smith to integrationists who had the support of the black vote, resulting in a "political earthquake").

[145] 388 U.S. at 2.

[146] *See* Brief for National Ass'n of Evangelicals as Amicus Curiae Supporting Petitioner at 2, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (No. 81-3) (noting most evangelicals would not support BJU's views on interracial dating and marriage, but instead supporting them due to the threat to religious freedom posed by the tax policy); Brief for Center for Law and Religious Freedom of the Christian Legal Society as Amicus Curiae Supporting Petitioner at 3 n.2, *Bob Jones Univ.*, 461 U.S. 574 (No. 81-3) (noting amicus does not support BJU's views, but "[t]he 'truth or falsity of the University's beliefs is not relevant here' ").

[147] Brief for the American Baptist Churches in the U.S.A. joined by the United Presbyterian Church in the U.S.A. as Amici Curiae Supporting Petitioner at 1, *Bob Jones Univ.*, 461 U.S. 574 (No. 81-3).

[148] *See* CAMILLE KAMINSKI LEWIS, ROMANCING THE DIFFERENCE: KENNETH BURKE, BOB JONES UNIVERSITY, AND THE RHETORIC OF RELIGIOUS FUNDAMENTALISM 89–90 (2007) (discussing the media frenzy prompting the policy change after George W. Bush's 2000 campaign stop at the school).

[149] *Statement about Race at BJU*, BOB JONES UNIV., http://www.bju.edu/welcome/who-we-are/race-statement.php (last visited Jan. 23, 2011).

States.[150] Many clashes between statutory or constitutional racial equality and the liberties of religious persons continue to occur in the United States. Because the Supreme Court has restricted the reach of the Free Exercise Clause, most of these new liberty–equality clashes are adjudicated under the Free Speech Clause of the First Amendment and the right of association the Supreme Court has read into the First Amendment.[151] Disturbingly, many of the racial equality–religious liberty clashes have involved cross burning, where the religious liberty of the racist is publicly displayed in ways that threaten citizens of color.[152] The Ku Klux Klan deploys cross burning to this day as a ceremony combining Christian prayer, militant singing (often "Onward Christian Soldiers"), and celebration of Bible-based white supremacy.[153] Although cross burning is associated with violence, the Supreme Court has often afforded it First Amendment protection.[154]

In sum, consider how southern religion evolved from the beginning of our nation to the present. Before 1865, southern Protestantism supported slavery and opposed its abolition on religious and cultural grounds. To southern white Protestants, the Emancipation Proclamation represented an abridgment of *cultural liberties* enjoyed by the faithful. Prior to World War II, southern Protestantism supported apartheid, and most Protestants opposed postwar racial integration, in large part because it would violate

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[150] *See generally* MICHAEL BARKUN, RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT (1994) (analyzing the growth, beliefs, and influence of the Christian Identity Movement in the United States).

[151] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 365–67 (2003) (finding acts of cross burning, which may be seen as racially inflammatory acts even if they are not specifically intended to intimidate, to be protected speech); Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54 (E.D. Mich. 1989) (finding First Amendment protection for some racially insensitive speech and noting "[i]t is an unfortunate fact of our constitutional system that the ideas of freedom and equality are often in conflict").

[152] *See, e.g.*, *Black*, 538 U.S. at 347–48 (construing constitutional validity of state statute banning cross burning with the intent to intimidate).

[153] *See id.* at 353–57 (describing the history of Ku Klux Klan, including the development of cross burning and religion-based ceremonies).

[154] *See, e.g.*, *id.* at 364 (striking down statute because it treats the act of burning a cross as prima facie evidence of racial amicus); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (striking down local cross-burning ordinance as viewpoint discrimination because it only applied to racially motivated fighting words); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (reversing conviction involving cross burning and striking down statute punishing "mere advocacy" of violence as opposed to unprotected incitement to imminent violence).

the *associational liberties* (the right not to associate) enjoyed by the faithful. After the civil rights movement, many religious Southerners and their institutions continued to oppose miscegenation on religious grounds and insisted that state antidiscrimination measures abridged the *expressive liberties* enjoyed by the faithful.

TABLE 1. SOUTHERN CHRISTIAN SUPPORT FOR RACE DISCRIMINATION

DENOMINATION	DOES THE BIBLE SUPPORT SLAVERY (1860)?	DOES THE BIBLE SUPPORT APARTHEID (1940)?	DOES THE BIBLE SUPPORT ANTI-MISCEGENATION LAWS (1960)?
Presbyterians	Yes	Yes, But Wavering	Unclear
Methodists	Yes	Yes, But Wavering	Unclear
Baptists	Yes	Yes	Yes
Episcopalians	Yes	Acquiescent	No
Mormons	Yes	Yes	Yes
Roman Catholics	Acquiescent	Acquiescent	No
Jews	No	No	No

II. RELIGIOUS LIBERTY AND EQUALITY FOR GAYS

For most of American history, there was no class of people who were "homosexual" or "gay," as these terms entered the English language only in the 1890s and twentieth century, respectively.[155] Once homosexuality became a coherent category, the law denied equal treatment wherever religious majorities believed as a matter of faith that sexual or gender variation was *malignant*. Christian theology posited that the *immoral conduct* of homosexuals generated a degraded *status* as a matter of Christian *belief*. Sodomy, the abominable crime against nature, was the metonym for homosexuality and the basis for Christian condemnation of homosexuals as outlaws. The latter half of the twentieth century, however, witnessed a concerted civil rights campaign for sexual equality within society, within legal circles, and within

[155] *See* JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 84 (1995) (describing the rise of the heterosexuality–homosexuality distinction, and positing that it is a post-1890 construction).

churches.[156] As Americans gradually came to accept the notion that sexual variation is *tolerable* and, ultimately, *benign*, the moral objections to racial integration and miscegenation abated, and American Christianity underwent its own conceptual revolution.

A. MALIGNANT SEXUAL VARIATION: RELIGION-BASED ARGUMENTS AGAINST SODOMY AND, LATER, FOR THE "APARTHEID OF THE CLOSET"

Virtually all of the American colonies and, after independence, almost all of the states made the "crime against nature," or "sodomy," a serious offense (a capital offense until the early nineteenth century, a felony after that).[157] Even more so than slavery, laws criminalizing sodomy were inspired by the Judeo-Christian tradition.[158] Ironically, however, the scriptural case against nonprocreative intercourse is drawn from much the same materials as the scriptural case for slavery.[159]

Sodomy, the crime against nature, secured its colloquial name from the Book of Genesis, which discusses the Sin of Sodom.[160] According to Genesis, the citizens of Sodom sexually assaulted an angel of God who was seeking hospitality within the city.[161] This reprehensible behavior brought the wrath of the Lord down upon the "cities of the plain" (Sodom and Gomorrah).[162] Except for Lot and his family, all the denizens of these sinful cities were

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[156] *See generally* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 (2008) (describing previous accounts of gay rights campaign); WILLIAM N. ESKRIDGE JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE (2006) (describing fight for changes in opinion regarding gay marriage).

[157] *See* JONATHAN NED KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY 37 (1983) (discussing these laws in the early American colonies).

[158] *See id.* at 37–39 (describing biblical basis for criminalizing sodomy in the American colonies).

[159] *See, e.g.*, PETER COLEMAN, CHRISTIAN ATTITUDES TO HOMOSEXUALITY 275–77 (1980) (surveying various doctrinal readings and concluding there are clear scriptural prohibitions against homosexual behavior); DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 29–41 (describing biblical references to and condemnation of homosexual practices).

[160] *See Genesis* 19:1–29 (describing the destruction of Sodom and Gomorrah).

[161] *Genesis* 19:4–11.

[162] *Genesis* 19:24–25.

obliterated with "brimstone and fire."[163] Early rabbinical and later Roman Catholic commentators read these passages as a cautionary tale about dangerous sexuality, especially predatory male sexuality and rape.[164]

In the American colonies, the primary textual basis for criminalizing sodomy was the "Levitical Mandate": "If a man also lie with mankind, as he lieth with a woman, both of them shall have committed an abomination; they shall surely be put to death."[165] The Levitical Mandate was the direct basis for colonial New England's laws criminalizing "man lying with man" and the primary basis for other colonial laws criminalizing the crimes "against nature."[166] Note that the Levitical Mandate applied only to men, and probably only to anal sex between men; the sodomy laws during the Colonial Era and the nineteenth century followed that understanding.[167] Although they could not commit "sodomy" (anal sex) with one another, women could commit the sin of bestiality by having intercourse with animals.[168] Both women and men committed an "abomination unto the LORD" if they dressed in the attire of the other sex.[169]

As with slavery, Christ said nothing about homosexual activities and preached an inclusive religion that embraced sexual nonconformists.[170] As with slavery, the Letters from St. Paul provide the most specific New Testament support for negative teachings about same-sex intimacy.[171] Thus, Paul admonished the congregation in Rome that the "dishonorable passions" of women

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[163] *Id.*

[164] *See* COLEMAN, *supra* note 159, at 29–35 (discussing previous interpretations of Sodom and Gomorrah).

[165] *Leviticus* 20:13; *see also Leviticus* 18:22 (stating that man lying with "mankind" is an "abomination").

[166] *See* KATZ, *supra* note 157, at 37–39 (collecting colonial laws and prosecutions enforcing the Levitical Mandate).

[167] ESKRIDGE, *supra* note 156, at 16–23; *see also* KATZ, *supra* note 157, at 37 (noting "unique" New Haven law banning male–female anal sex).

[168] *See Leviticus* 20:16 (commanding that a woman who lies with a beast shall be put to death).

[169] *Deuteronomy* 22:5.

[170] Indeed, Mary Magdalene kept company with Jesus's mother during His crucifixion and afterwards. *See, e.g.*, *Matthew* 27:56, 27:61, 28:1 (describing Mary Magdalene's presence at the crucifixion and visits to the tomb of Jesus with His mother).

[171] *See supra* notes 37–38 and accompanying text.

as well as men who "exchanged natural relations for unnatural" were displeasing to God[172] and would be visited with God's judgment on the bodies of such sinners.[173] Although "Paul's Admonition" never defines "unnatural relations," it is the most specific biblical evidence for modern antihomosexual discourse, especially anti-lesbian discourse.

But in biblical times, no class of persons called "homosexuals" existed.[174] Thus, when St. Paul wrote to the congregation at Corinth, he said this: "[N]either fornicators, nor idolaters, nor adulterers, nor *malakoi*, nor *arsenokoitai*, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God."[175] The Greek terms Paul used are literally read, "soft to the touch" (*malakoi*) and "male in a bed" (*arsenokoitai*). Precisely how these terms are translated is driven by social context. The King James Version, from the seventeenth century, translated these terms as "effeminate" and "abusers of themselves with mankind," respectively.[176] The Revised Standard Version, from the twentieth century, translated and combined these terms into "homosexuals," even though that term is both anachronistic and inaccurate, as it could include lesbians.[177] The evolving translation of First Corinthians reflects the evolution of sexual attitudes in American society and of Christianity itself.

However open-ended Paul's Admonition, the Levitical Mandate, and the Sin of Sodom were when originally written, these passages took on culturally specific meanings after the American Civil War. As subcultures of "fairies" (effeminate men) and "women-identified-women" (many of them lesbians) became prominent in American cities, Christian moralists went after them with a vengeance: "degenerates," "inverts," and "sex perverts" (terms of the era) were considered moral lepers, diseased human beings who

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[172] *Romans* 1:26 (RSV).

[173] *See Romans* 1:32 (noting God judges sinners who perform these acts as worthy of death).

[174] *See supra* note 155 and accompanying text.

[175] 1 *Corinthians* 6:9–10.

[176] 1 *Corinthians* 6:9.

[177] JOHN J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL 50 (4th ed. 1993).

needed to be segregated, lest they pollute children and society.[178] Because society kept a tight lid on sexual and gender minorities, these hysterical views did not occupy an important place in mainstream American religion. All the leading Christian denominations subscribed to biblical admonitions against the Sin of Sodom, but there was little religious discourse even as to precisely what the "Sin of Sodom" actually entailed. State legislatures, however, specified and expanded upon the traditional "crime against nature."[179] Between 1879 and 1921, most American states created new crimes involving oral sex upon a man, and a few states made oral sex upon a woman a crime as well, although it was not sodomy.[180] It does not appear that either the Roman Catholic Church or any of the Protestant denominations had anything to do with these expansions of the law, although their boosters were surely religious persons who considered the prohibited behaviors abominable.

Between 1921 and 1961, state and federal governments adopted hundreds of statutes imposing civil disabilities on "homosexuals and other sex perverts," to use the terminology of the era.[181] As with racial segregation, the country's major religions did nothing to ameliorate the antihomosexual terror, but unlike with race, it was not particularly inspired by religious fervor either.[182] Ironically, religion did not engage intensely with homosexuals until the 1960s and 1970s, when gay people became increasingly prominent in public culture and when legal reformers were contemplating sex crime reform that would decriminalize

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[178] *See* ESKRIDGE, *supra* note 156, at 26–31 (discussing the reactions of disgust of Christian moralists to the "new body politics").

[179] *See id.* at 49–53 (detailing the precise changes in American sodomy laws between 1881–1921).

[180] *Id.*

[181] *See id.* at 102–05 (discussing many civil disabilities imposed upon sexual and gender minorities). *See generally* Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920–1960*, 74 J. AM. HIST. 83 (1987) (describing various civil disabilities imposed by state statute).

[182] *See generally* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004) (relaying how homosexuals were considered as dangerous a threat to national security as Communists during the Cold War).

"homosexual activities."[183] After compromising on sodomy reform in order to retain criminal penalties against abortion in Illinois in 1961, the Roman Catholic Church in 1965 almost single-handedly blocked sodomy reform in New York based upon the Church's view that sodomy is a carnal sin.[184] The New York Archdiocese's opposition to sodomy was no doctrinal innovation, but what was novel was the Church's increasingly obsessive focus on "homosexual sodomy," to the exclusion of heterosexual sodomy and other sexual activities outside of marriage. In 1975, the Vatican reaffirmed the Church's traditional teachings that the only moral sexuality is that expressed within the framework of a God-sanctioned marriage.[185] But the Church's *Persona Humana* focused, for the first time in an official Vatican *pronunciato*, on scriptural condemnation of *homosexual* acts "as a serious depravity" and stated that homosexuals acts are "intrinsically disordered."[186]

Antihomosexual rhetoric and activism were even more pronounced among fundamentalist Protestant denominations in the 1960s and 1970s. For example, on the eve of the Stonewall riots,[187] *Christianity Today* announced:

> Romans 1:18–32 shows that homosexuality is contrary to nature, and that it is part of the degeneration of man that guarantees ultimate disaster in this life and in the life to come. . . . The Church had

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[183] *See* ESKRIDGE, *supra* note 156, at 111 (suggesting a receptive audience in the drafters of the Model Penal Code to repealing consensual sodomy laws).

[184] *See id.* at 145–47 (discussing Catholic resistance to the decriminalization of consensual sodomy).

[185] Congregation for the Doctrine of the Faith, *Persona Humana: Declaration on Certain Questions Concerning Sexual Ethics* ¶ VII (Dec. 29, 1975), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html [hereinafter *Persona Humana*].

[186] *Id.* ¶ VIII; *see also id.* ¶ IX (stating that masturbation constitutes a "grave moral disorder"); *cf. Romans* 1:24–27 (describing unnatural affections as the result of turning against God); 1 *Corinthians* 6:9 (noting that those who are "effeminate" and "abusers of themselves with mankind" shall not inherit God's kingdom); 1 *Timothy* 1:10 (providing that the law of God is made for all sinners, including those "that defile themselves with mankind" as well as "whoremongers" and "liars").

[187] *See* ESKRIDGE, *supra* note 156, at 166–67 (discussing events surrounding the Stonewall riots in New York in 1969).

> better make it plain that Christianity and homosexuality are incompatible even as it proclaims deliverance for the homosexual from his sinful habit through faith in Jesus Christ.[188]

During this period, fundamentalist Protestant churches focused their attention on the Sin of Sodom, which they associated with the newly emerging population of openly gay people.[189] At the same time the Southern Baptist Convention was shedding its official racist theology, it was adopting an increasingly homophobic one.[190] Like the Catholics, some fundamentalist Protestants were carrying their biblical vision into the political process. In 1969, Baptist Kansas became the first state in the union to repeal its consensual sodomy law but create a new crime limited to "homosexual sodomy."[191] Six other Baptist-dominated states took similar action between 1969 and 1990.[192] In other words, the Sin of Sodom was rendered legal for everyone except men and women engaged in "homosexual" relations. Baptists did not consider this "discrimination," because a lesbian having oral sex with a woman is engaged in "unnatural" relations condemned by *Romans* 1:26–27, while a man having oral sex with a woman (specifically his wife) was not thought to be covered by Paul's Admonition.[193]

The LDS also became intensely interested in the issue largely in reaction to the new visibility of gay people in their own

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[188] Editorial, *The Options of Modern Man*, 14 CHRISTIANITY TODAY 132, 134 (1969); *see also* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 44–51 (1997) (surveying the militant opposition of *Christianity Today* to tolerance for gay people from 1965–1980).

[189] *See* HERMAN, *supra* note 188, at 44–51 (discussing focus on sin of homosexuality during the 1960s and 1970s).

[190] *See* SMITH, *supra* note 140, at 215–31 (recognizing improved relations between the Southern Baptist Convention and the black National Baptist Convention around the same time as the SBC was beginning to pursue increasingly strident antihomosexual resolutions); *id.* at 185–90 (discussing Southern Baptists renouncing apartheid and inviting coalitions with blacks on issues like abortion).

[191] ESKRIDGE, *supra* note 156, at 165.

[192] Other Baptist states repealed criminal sanctions for heterosexual but not homosexual sodomy: Texas (1973), Arkansas (1977), Missouri (1977), Maryland (1980), Oklahoma (1986), and Tennessee (1987). *See id.* app. at 388–89, 394–97, 400–03 (charting state-by-state changes in consensual sodomy laws).

[193] *See id.* at 6–7, 204 (explaining the perceived moral distinction between same-sex acts and different-sex acts).

backyards.[194] Idaho repealed its consensual sodomy law as part of an overall sex crime reform statute in 1971.[195] When the *Advocate*, a national gay publication, trumpeted this move as a victory for gay rights, Mormon activists pressed the legislature to reverse itself.[196] In 1972, the legislature not only tossed out the laboriously developed reform code, but it reenacted the old criminal code, lest Idaho "be perceived as 'promoting' homosexuality."[197] Two other states with significant Mormon populations (Montana and Nevada) followed the Kansas model of repealing criminal bars for heterosexual but not homosexual sodomy in the 1970s.[198]

Just as Scripture had been invoked (and stretched) to support racial segregation and antimiscegenation laws, so it was invoked (and stretched) to support "homosexual" sodomy bars. But, as previously discussed, the Bible never uses the word "homosexual," and the Levitical and Pauline condemnations as well as the story of Sodom are most likely to be admonitions against sexual assault and promiscuity, and are not necessarily addressed to long-term committed relationships. The significance of these admonitions has been grossly overstated. There are dozens of Levitical purity rules, and many more of them speak to association with menstruating women than to men lying with men.[199] The fundamentalist who insists upon following each and every biblical command literally is warned that he needs to refrain from interbreeding cattle, mixing seeds, and wearing that wool-linen blended outfit, for all of these are forbidden by *Leviticus* 19:19.[200] For religions that call themselves "Christian," it was amazing to see so much attention to a matter that Christ Himself ignored, in

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[194] *See id.* at 182–84 (detailing the account of Idaho's sodomy reform, then its LDS-inspired revocation).

[195] *Id.*

[196] *Id.*

[197] *Id.* at 183.

[198] *See id.* app. at 396, 398 (charting state-by-state changes in consensual sodomy laws).

[199] *See, e.g.*, *Leviticus* 15:19–31 (listing purity rules for men and women after engaging in sexual intercourse).

[200] *See Leviticus* 19:19 ("Thou shalt not let thy cattle gender with a diverse kind; thou shalt not sow thy field with mingled seed; neither shall a garment mingled of linen and woollen come upon thee.").

contrast to adultery, specifically condemned by Christ[201] but neglected by righteous Christians during this period.[202]

Fundamentalists' focus on issues of homosexuality came during the same period when they were giving up their Bible-based opposition to "forced integration" of the races.[203] Indeed, this represented a "great transformation" in American fundamentalism. Not only did fundamentalist theology realign itself (abandoning racist principles and emphasizing instead antihomosexual principles), but so did the sociology of fundamentalism; the apartheid-era antimony among white and black Protestants and the older antimony between Protestants and Catholics eased considerably, and one feature of the rapprochement was their shared opposition to the "homosexual agenda."[204] For example, in 1981, a coalition of white and black Baptists teamed up with the Roman Catholic Church to persuade the House of Representatives to veto the District of Columbia's rape-reform law because it also deregulated consensual sodomy.[205]

B. TOLERABLE SEXUAL VARIATION: GAYS' CIVIL RIGHTS UNDERSTOOD AS A CHALLENGE TO THE FREEDOM OF RELIGIOUS PERSONS AND INSTITUTIONS NOT TO ASSOCIATE

In 1981, the Christian Right saw opposition to sodomy reform as an effort to preserve traditional family values in American culture.[206] They were even more strongly opposed to municipal and state laws barring sexual orientation discrimination in the

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[201] *See Matthew* 19:9 ("Whosoever shall put away his wife, except for fornication, and shall marry another, committeth adultery; and who so marrieth her which is put away doth commit adultery.").

[202] The Christian Right was avid for President Reagan, who apparently violated *Matthew* 19:9 twofold when he married his second wife Nancy, who was also once-divorced. *See, e.g.*, ESKRIDGE, *supra* note 156, at 212 (listing Christian groups that contributed to Reagan's presidential election in 1980).

[203] *Compare supra* Part I.C, *with supra* Part II.A.

[204] *See* ESKRIDGE, *supra* note 156, at 197 (asserting that religious leaders eased animosities both between Catholics and Protestants and between black and white Protestants by coming together to pursue common projects).

[205] *See id.* at 213–18 (discussing the religious coalition that lobbied the House of Representatives to use its veto power pursuant to the District's home rule statute).

[206] *See, e.g., id.* at 209–11 (discussing efforts by fundamentalists to prevent sodomy reform in Florida).

workplace, in public accommodations, and in housing and education—not just because such laws would "promote homosexuality," but also because they were threats to the liberties of religious parents, landlords, and employers.[207] Like segregationists who invoked religion as a basis for a constitutional "right not to associate" with black people,[208] so homophobes invoked religion as a basis for a constitutional "right not to associate" with gay people.[209]

In January 1977, the Board of County Commissioners of Dade County, Florida adopted a law barring sexual orientation discrimination in the workplace.[210] Orange juice celebrity and devout Baptist, Anita Bryant opposed the ordinance because it not only violated God's biblical commandments, but also "infring[ed] upon [her] rights and discriminate[ed] against [her] as a citizen and a mother to teach [her] children and set examples . . . of God's moral code as stated in the Holy Scriptures."[211] Her campaign to "Save Our Children" sought to revoke the law through a popular referendum.[212] Bryant attracted the support of Southern Baptist pastors, the Catholic Archbishop of Miami, and Orthodox rabbis.[213] Save Our Children combined the wild argument that "recruitment" of children is absolutely necessary for the survival and growth of homosexuality,[214] with explicit invocations of biblical admonitions against homosexuality as in their press release, "Why Certain Sexual Deviations Are Punishable by Death."[215]

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[207] *See infra* note 239 and accompanying text.

[208] *See supra* notes 92–94 and accompanying text.

[209] *See infra* note 260 and accompanying text.

[210] *See* JAMES T. SEARS, REBELS, RUBYFRUIT, AND RHINESTONES: QUEERING SPACE IN THE STONEWALL SOUTH 232–36 (2001) (describing events surrounding the meeting at which the ordinance passed).

[211] ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 16–26 (1977).

[212] *See id.* at 125 (discussing the outcome of the referendum).

[213] *See id.* at 22–25.

[214] Joe Baker, *Anita . . . With the Smiling Cheek*, ADVOCATE, Apr. 20, 1977, at 6; *see also* DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 303–04 (1999) (quoting a Save Our Children advertisement that stated "homosexuals" are out to seduce your children, and the law ought not convey "legitimacy" upon the "sexually perverted").

[215] *See* SEARS, *supra* note 210, at 239 & n.63 (discussing movement and press release).

Pitting religious family liberty against gay equality was a popular strategy: the Dade County ordinance went down by a 2–1 margin,[216] and other antidiscrimination laws met similar fates in dozens of subsequent antigay initiative campaigns.[217] The Save Our Children model for antigay politics combined (1) appeals to Scripture and religious authority demonizing homosexuality as an "abomination" in the eyes of God, with (2) baseless stereotypes about homosexual men as predatory, sex-crazed, diseased, and hedonistic, and (3) concerns that "special rights" for these immoral, selfish, and predatory people would invade constitutional rights and liberties of God-fearing people and their vulnerable children.[218] The new antihomosexual politics of disgust and contagion epitomized by Save Our Children came upon America just as the older anti-integration politics of disgust and mongrelization was winding down.

The Southern Baptist Convention has made homosexuals the new scapegoats of their theology (replacing mixed-race couples). For Southern Baptists tolerance of homosexuality represented *both* the promotion of an unhealthy and Godless "lifestyle" *and* specific harm to God-fearing Americans. The Baptist-inspired Moral Majority characterized AIDS as God's judgment on homosexuals.[219] In 1986, the President of the Southern Baptist Convention announced that God Himself created AIDS to show His displeasure with homosexuality.[220] In 1988, the Southern Baptist Convention overwhelmingly adopted a resolution

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[216] William N. Eskridge Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1017 (2005).

[217] *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 253, 257–60 (1997) (reporting the astounding success of antigay referenda from 1974–1994); Donald P. Haider-Markel et al., *Lose, Win, or Draw: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307–08 (2007) (noting that 71% of ballot initiatives resulted in losses for supporters of gay rights from 1972–2005).

[218] *See* Eskridge, *supra* note 216, at 1016–17 (describing nature of Save Our Children's campaign and beliefs about homosexuals).

[219] Ronald Godwin, *AIDS: A Moral and Political Time Bomb*, MORAL MAJORITY REP., July 1983, at 2 ("*In short, what gays do to each other makes them sick and, more and more frequently, dead!*"); *see also* Paul Cameron, *Homosexuality: A Deathstyle, Not a Lifestyle*, MORAL MAJORITY REP., Sept. 1983, at 7 ("In fact, gays are highly mobile infectious disease factories.").

[220] *See* SMITH, *supra* note 140, at 218 (noting speech given by Dr. Charles Stanley, President of the SBC).

condemning homosexuality as "depraved" and an "abomination in the eyes of God."[221] Since 1988, the Southern Baptist Convention has adopted no fewer than ten resolutions supporting discrimination against gay people in employment, marriage, and education, and opposing hate crimes legislation.[222] (Although the LDS Church is also regarded as strongly antigay, that denomination's official position has been more tolerant.[223])

The Southern Baptists' stridently antihomosexual theology was not the only religion-based response to the new visibility of gay people. Just as American religion had splintered in response to the civil rights movement, so it splintered in response to the gay rights movement.[224] This not only revealed the diversity and normalcy of homosexuality, but also situated gay lives within the Judeo-Christian tradition. Religious gay people pushed back against antihomosexual readings of the Bible. Thus, the Sin of Sodom, gay-friendly critics argued, was not "homosexuality," a term that would have been meaningless in that era, but rather, sexual assault as well as inhospitality.[225] Likewise, Paul could not have been condemning "homosexuals" when he denounced *malakoi* and *arsenokoitai* in First Corinthians and, indirectly, in Romans.[226] Instead, Paul's condemnation was more targeted—against male prostitutes or promiscuous men and women—a reading that makes sense of the terms Paul used, but leaves open

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[221] *Id.* at 221. In 1992, the SBC changed its bylaws to mandate the expulsion of any church that "acts to affirm, approve or endorse homosexual behavior." *Id.* at 225–26.

[222] *See Past SBC Resolutions*, S. BAPTIST CONVENTION, http://www.sbc.net/resolutions/AMResSearchAction.asp?SearchBy=Keyword&DisplayRows=10&frmData=homosexuality&Search=Search (last visited Jan. 23, 2011) (displaying past resolutions under the search term "homosexuality").

[223] *See Homosexuality*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://lds.org/study/topics/homosexuality?lang=eng (last visited Jan. 23, 2011) (expressing compassion for gay people and encouraging them to follow the law of chastity covering all church members).

[224] *See supra* notes 121–40 and accompanying text.

[225] *See* MCNEILL, *supra* note 177, at 42–46 (discussing possible meanings of the Hebrew word "yādhà"); JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 91–96 (1980) (arguing against sexual interpretations of the Hebrew term for "knew" in Genesis). Both texts follow the detailed analysis offered in 1955 by Derrick Bailey. BAILEY, *supra* note 159, at 9–11.

[226] *See* MCNEIL, *supra* note 177, at 50–56 (discussing variation in translations resulting from the imprecise meaning of the Greek terms).

the possibility that committed, monogamous lesbian and gay relationships are acceptable.[227] In light of Christ's teaching that sin-saturated human beings have no moral authority to judge the sexual sins of others, pro-gay interpretations of Scripture have maintained that the Church ought not support state sodomy laws or state discriminations against gay people. Between 1969 and 1986, many faiths and religious Americans backed away from hard-line views that "homosexual sodomy" should be criminalized and that "homosexuals" should be objects of pervasive discrimination. At the same time, these faiths wanted to preserve their own liberty to discriminate against sexual minorities.

1. The Roman Catholic Church. The Vatican's 1975 Declaration *Persona Humana* announced that "homosexual acts" are "disordered," but also acknowledged the modern distinction between sexual orientation and sexual acts.[228] The next year, the National Conference of Catholic Bishops responded with a more gay-tolerant document, "To Live in Christ Jesus," which said this: "Homosexuals, like everyone else, should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice. They should have an active role in the Christian community."[229] Different dioceses adopted slightly different readings of these documents. For example, the Church in the state of Washington interpreted the pronouncements to support the conclusion that "*prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual orientation or activity*."[230]

In contrast, the Boston, Massachusetts Diocese invoked Catholic doctrine to oppose antidiscrimination legislation under continuous legislative deliberation from 1973 to 1989. The main argument advanced by the bishops was that "experience has

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[227] *See id.* at 56 (noting how neither term referred to homosexuals necessarily but rather, "debauched" individuals).

[228] *Persona Humana*, *supra* note 185, ¶ VIII.

[229] National Conference of Catholic Bishops, *To Live in Christ Jesus* (Nov. 11, 1976), *reprinted in* HOMOSEXUALITY AND THE MAGISTERIUM: DOCUMENTS FROM THE VATICAN AND U.S. BISHOPS 1975–1985, at 9 (John Gallagher ed., 1986).

[230] Washington State Catholic Conference, *The Prejudice Against Homosexuals and the Ministry of the Church*, *reprinted in* HOMOSEXUALITY AND THE MAGISTERIUM, *supra* note 229, at 46, 50.

shown that the passage of legislation of this type will be seen by many as a step toward legal approval of the homosexual lifestyle."[231] The bishops made the Scripture-based no promo homo arguments as well as liberty-based arguments.[232] Because the Church's "hiring practice is obliged to reflect her stance on the morality of sexual activity," the antidiscrimination law might be construed to deny the Church "hiring discretion whenever legitimate questions arise about the appearance, lifestyle and activity of certain homosexual employees."[233] For sixteen years, supporters of the bill had to persuade skeptical legislators that gay people are good workers and pose no threat to the normal operation of workplaces and other institutions in the state.[234] The Massachusetts Gay Civil Rights Act was finally adopted in 1989,[235] by which time the Church's opposition had dimmed, in part because of broad exemptions from the antidiscrimination rule for religious institutions.[236]

Explicitly reaffirming antihomosexual readings of the Bible, the Vatican's 1986 "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons" concluded that the Church should oppose civil law reform when "the view that homosexual activity is equivalent to, or as acceptable as, the sexual expression of conjugal love has a direct impact on society's understanding of the nature and rights of the family and puts

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[231] Daniel Cronin, Timothy J. Harrington, Bernard F. Law, Joseph F. Maguire, *Statement of Massachusetts Catholic Bishops* (May 31, 1984), *reprinted in* HOMOSEXUALITY AND THE MAGISTERIUM, *supra* note 229, at 97, 98 [hereinafter *Massachusetts Bishops*]; Peter M. Cicchino et al., Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 594 (1991) (quoting a religion-based opponent of the bill speaking in 1988).

[232] *See* Cicchino et al., *supra* note 231, at 594 (discussing Catholic bishops' concern that passage of the antidiscrimination law would affect the Church's freedom to make hiring decisions based on its beliefs about the morality of homosexual activity).

[233] *Massachusetts Bishops*, *supra* note 231, at 98; *see also* Cicchino et al., *supra* note 231, at 573–74 (quoting other arguments from religion-based opponents of the bill).

[234] *See, e.g.*, Cicchino et al., *supra* note 231, at 574–80 (discussing fears that gay people were child molesters, leading to concerns about them serving as foster parents and in other state-approved roles).

[235] *Id.* at 549.

[236] Act of Nov. 15, 1989, ch. 516 §§ 1, 14, 1989 Mass. Acts 796, 796, 801–02; *see also* Cicchino et al., *supra* note 231, at 573–99 (describing the struggle to persuade skeptical legislators).

them in jeopardy."[237] Notwithstanding the Vatican's tough mandate, most Catholic lay people were opposed to criminalizing consensual sodomy, and the American Catholic Church remained neutral when the Supreme Court adjudicated the constitutionality of consensual sodomy laws in *Bowers v. Hardwick*.[238]

2. Mainstream Protestantism. By 1986, most mainstream Protestant denominations were on record that the Bible does not support criminal sanctions against consensual homosexual behaviors and that gay people ought not be objects of social or legal discrimination.[239] The National Council of the Churches of Christ resolved in 1975 that "every person is entitled to equal treatment under the law" and added "affectional or sexual preference" to the list of criteria that ought not be the basis for denying legal rights.[240] Similar positions were taken by the Unitarian Universalist Association (1970), the Presbyterian Church (U.S.A.) (1970), the Philadelphia Yearly Meeting of Friends (1973), the Episcopal Church (1976), the United Methodist

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[237] Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, *in* THE VATICAN AND HOMOSEXUALITY: REACTIONS TO THE "LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS" 1, 5 (Jeannine Gramick & Pat Furey eds., 1988) [hereinafter *Letter on the Pastoral Care of Homosexual Persons*].

[238] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). Although the Catholic League filed an amicus curiae brief in favor of upholding the sodomy statute, the Catholic Church itself remained neutral. Brief for the Catholic League for Religious and Civil Rights as Amicus Curiae Supporting Petitioner, *Bowers*, 478 U.S. 186 (No. 85-140). This neutrality is in strong contrast to constitutional abortion cases, where the Church maintained an active amicus practice. *E.g.*, Brief for the United States Catholic Conference as Amicus Curiae, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).

[239] The discussion in this and the next three paragraphs is based upon various resolutions and statements quoted and excerpted in an amicus curiae brief filed in *Bowers*. *See* Brief for the Presbyterian Church (U.S.A.) et al. as Amici Curiae Supporting Respondents at 14–16, *Bowers*, 478 U.S. 186 (No. 85-140) (arguing that contemporary consensus in society requires that consensual sodomy be decriminalized); *see also id.* apps. A & B at *1a–14a (collecting statements from various denominations); HOMOSEXUALITY AND ETHICS app. at 235–42 (Edward Batchelor, Jr. ed., 1980) (collecting various religious documents on homosexuality in the 1970s).

[240] *See* Brief for the Presbyterian Church (U.S.A.) et al., *supra* note 239, app. at 12–13 (quoting the National Council of the Churches of Christ's position of sexual preference as a basis for discrimination).

Church (1976), the American Lutheran Church (1977), the United Church of Christ (1977), and the Disciples of Christ (1977).[241]

The Lutheran Church proposed a notion of *tolerable* but not benign sexual variation.[242] On the one hand, the Church can endorse neither "their call for legalizing homosexual marriage" nor "their conviction that homosexual behavior is simply another form of acceptable expression of natural erotic or libidinous drives," but it did "*endorse their position that their sexual orientation in and of itself should not be a cause for denying them their civil liberties.*"[243] Other mainstream Protestant denominations followed the same tolerant but not embracing approach. Thus, the United Methodist Church's *Book of Discipline* "does not condone the practice of homosexuality and consider [sic] the practice incompatible with Christian teaching," but at the same time "implore[s] families and churches not to reject or condemn lesbian and gay members."[244] Since 1984, the *Book of Discipline* has forbidden "self-avowed practicing homosexuals" from being ordained or appointed to serve in any capacity in the Church.[245]

In 1978, the Presbyterian Church issued a comprehensive statement on "The Church and Homosexuality" which reaffirmed earlier support for repeal of consensual sodomy laws and for enactment of measures protecting gay people against violence and discrimination.[246] The document also reexamined Scripture, concluding that the Sin of Sodom was rape, that one of the hundreds of Levitical purity rules was a bar against anal sex between men, and that St. Paul's condemnations refer to dissolute

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[241] *See id.* at app. 1–13 (describing various denominational statements); HOMOSEXUALITY AND ETHICS, *supra* note 239, app. at 235–43 (quoting from similar resolutions).

[242] *See* Brief for the Presbyterian Church (U.S.A.) et al., *supra* note 239, app. at 7–9 (expressing concern that humans are hurting because of their involvement in homosexual behavior but recognizing homosexuals need "*for justice in the arena of civil affairs*").

[243] *Id.*

[244] UNITED METHODIST CHURCH, BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 161(G) (2004).

[245] *Id.* ¶ 304(3). My research associate, Jayme Herschkopf, examined each edition of the Book of Discipline since 1976 and found this language's first appearance in 1984.

[246] THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AM., THE CHURCH AND HOMOSEXUALITY 43–45, 62 (1978), *available at* http://oga.pcusa.org/publications/church-and-homosexuality.pdf (reaffirming the gay rights resolutions adopted by the General Assembly in 1970).

behaviors rather than to any and all homosexual relations.[247] Notwithstanding this potentially pro-gay point of view, the statement left open the question of whether the Church should ordain openly gay people as ministers, elders, or deacons.[248]

3. Judaism. In 1977, the General Assembly of the Union of American Hebrew Congregations (UAHC), now known as the Union for Reform Judaism (URJ) representing the views of Reform Jewish congregations, adopted a resolution that "homosexual persons are entitled to equal protection under the law," that "discrimination against homosexuals" is wrong, and that "private sexual acts between consenting adults are not the proper province of government."[249] This broad civil rights stance probably reflected the views of many Conservative and some Orthodox Jewish congregations as well, in part because they have been alert to the evils of state persecution of despised minorities. As discussed below, more variety existed among different Jewish sects as to the moral acceptability of homosexual relations.

The UAHC went well beyond the Presbyterians, Methodists, and Catholics in welcoming openly gay persons as full and equal members of Reformed Jewish congregations.[250] Orthodox Jews, in contrast, have viewed homosexuality as a sin, but few Orthodox Jews favored state punitive action against gay people.[251] In the middle are the Conservative Jews, who rejected state discrimination against gay people but remained divided as to the morality of homosexual relations in the 1980s.[252]

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[247] *See id.* at 16–17, 19, 20–24 (analyzing scripture concerning homosexuality).

[248] *See id.* at 47–56 (representing the divisions of opinion within the task force and within the Church).

[249] UNION OF AM. HEBREW CONGREGATIONS, GENERAL ASSEMBLY STATEMENT ON HOMOSEXUALITY (1977), *reprinted in* HOMOSEXUALITY AND ETHICS, *supra* note 239, app. at 242.

[250] *See* UNION OF AM. HEBREW CONGREGATIONS, 60TH GENERAL ASSEMBLY RESOLUTION ON GAY AND LESBIAN JEWS (1989), *available at* http://urj.org//about/union/governance/reso//?syspage=article&item_id=2065 (advocating for the support of gay and lesbian Jews).

[251] *See generally* CHAIM RAPOPORT, JUDAISM AND HOMOSEXUALITY: AN AUTHENTIC ORTHODOX VIEW (2004) (describing homosexual activity as clearly proscribed by Jewish law and discussing views of Orthodox Judaism toward homosexuality).

[252] *See Homosexuality and Conservative Judaism*, WIKIPEDIA (Sept. 19, 2010, 6:25 PM), http://en.wikipedia.org/wiki/Homosexuality_and_Conservative_Judaism.

As even this brief survey suggests, there was considerable debate within American religion about the civil rights of gay people in the 1970s and 1980s. An important legal event brought much of the debate into sharper constitutional focus. Colorado's governor in 1990 issued an executive order barring sexual orientation discrimination in state workplaces;[253] Denver, Aspen, and Boulder had adopted ordinances banning such discrimination in private as well as public (municipal) workplaces.[254] In response, some religious fundamentalists formed a coalition to override these gay equality measures.[255] Their instrument was Amendment 2, a voter initiative to change the Colorado Constitution to deny gay people any official protection against discrimination.[256] The arguments made by proponents of Amendment 2 were very similar to those raised by supporters of the Dade County initiative.[257] According to the Amendment 2 ballot materials promulgated to voters by the supporters of the initiative, the homosexual "lifestyle is sex-addicted and tragic"; "homosexuals" are consumed by venereal disease and "live shorter lives"; and "homosexuals" are predatory, seeking to invade decent people's houses and schools, take away their jobs, and recruit their children.[258] Like Anita Bryant in the Dade County initiative, the supporters of Amendment 2 appropriated the rhetoric of rights to argue that equality for gay people meant the loss of liberties for God-fearing families.[259] Specifically, the Amendment 2 ballot materials warned that antidiscrimination laws protecting sexual

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[253] Monte E. Kuligowski, Comment, Romer v. Evans*: Judicial Judgment or Emotive Utterance?*, 12 ST. JOHN'S J. LEGAL COMMENT. 323, 325 (1996).

[254] *Id.* at 325 & n.12; *see also* Romer v. Evans, 517 U.S. 620, 623–24 (1996) (discussing ordinances enacted in Aspen, Boulder, and Denver).

[255] *See* Kuligowski, *supra* note 253, at 325–26 (discussing organization of grassroots movement to counter gay-rights initiatives).

[256] *See Romer*, 517 U.S. at 624 (mandating that the state and its agencies "shall [not] enact, adopt or enforce any statute . . . whereby homosexual . . . orientation, conduct, practices, or relationships shall constitute . . . the basis of . . . any minority status, quota preferences, protected status or claim of discrimination").

[257] *See supra* notes 211–18 and accompanying text.

[258] *See* WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW app. 3 at 1524–31 (2d ed. 2004) (collecting Amendment 2 ballot materials); Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 191–99 (1997) (same).

[259] *See* BRYANT, *supra* note 211, at 16–18 (describing Bryant's biblical and liberty-based opposition to the ordinance).

minorities would subject children to the loss of their sexual freedom, deny parents their freedom to control the upbringing of their children, force homosexual roommates onto unconsenting college students, deny religious denominations their freedom to worship according to their understandings of Scripture, and force Christian landlords to accept promiscuous "homosexuals" as tenants.[260]

After Colorado voters ratified Amendment 2, gay rights advocates challenged it as a violation of the Equal Protection Clause.[261] On appeal to the Supreme Court, an amicus brief from the Christian Legal Society defended Amendment 2 as needed to protect religious liberties in the face of antidiscrimination laws.[262] Joined by half a dozen prominent fundamentalist committees, the CLS brief argued that protection of religious liberty is an interest justifying Amendment 2, that antidiscrimination laws infringe on religious people's liberty not to associate with homosexuals, and that religious exemptions in such laws are ineffectual and impose an unacceptable burden on religion.[263] Although the Supreme Court in *Romer v. Evans* did not cite the ballot materials and barely mentioned the religious liberty argument, the Court concluded that Amendment 2 was so broadly written that it lacked a connection to any state policy except "animus" against gay people, which was impermissible.[264]

Not coincidentally, the Court's ruling was broadly consistent with the views of organized religion. In *Romer*, the Quakers, Presbyterians, Episcopalians, Unitarians, Conservative as well as Reformed Jews, and other religious groups filed amicus briefs supporting sexual orientation nondiscrimination and condemning Amendment 2 as intolerant.[265] In light of their traditional views,

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[260] *See supra* note 258 and accompanying text.

[261] *Romer*, 517 U.S. at 635.

[262] Brief for Christian Legal Society et al., *supra* note 12, at 26.

[263] *Id.*

[264] 517 U.S. at 632.

[265] *See* Brief of James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) as Amicus Curiae Supporting Respondents at 2, *Romer*, 517 U.S. 620 (No. 93-1039) (noting the Church has opposed discrimination against homosexuals since 1977 and discriminatory laws must be "vigorously opposed"); Brief of the American Friends Service Committee et al. as Amici Curiae Supporting Respondents at 1, *Romer*, 517 U.S. 620 (No. 94-1039) (arguing Amendment 2 violates the neutrality requirement in the

it is significant that the Mormons, the Baptists, and Catholics did *not* file briefs supporting one side or the other.

Indeed, reflecting a strong turn in public opinion toward toleration for gay people, the American Catholic Church was subtly readjusting its doctrinal stance toward homosexuality. According to the Vatican, men and women with homosexual tendencies "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."[266] After fighting the antidiscrimination law in Massachusetts through the 1980s, Catholic dioceses acquiesced in similar laws adopted by Catholic Connecticut in 1991 and Catholic Rhode Island in 1995. Archbishop John Francis Whealon of Hartford, Connecticut said this in 1991: "The Church clearly teaches that homosexual men and women should not suffer prejudice on the basis of their sexual orientation. Such discrimination is contrary to the Gospel of Jesus Christ and is always morally wrong."[267] Many Connecticut legislators took the Archbishop's statement as tacit approval of the antidiscrimination measure (adorned with religious liberty-protective exemptions).[268] The Roman Catholic shift in emphasis—not necessarily a shift in precise doctrine—was representative of organized religion in America, as public opinion shifted strongly toward toleration of gay Americans and same-sex couples.

C. TOWARD BENIGN SEXUAL VARIATION: RELIGIONS ARE ACQUIESCING IN CIVIL RIGHTS FOR GAYS

After *Romer*, the shift of religious discourse toward acceptance of gay people has continued at different paces for different

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religion clauses because it "encourages private discrimination in support of a particular religious belief to the detriment of contrary religious beliefs").

[266] CATECHISM OF THE CATHOLIC CHURCH, No. 2358, at 566 (1994); *see also* Letter on the Pastoral Care of Homosexual Persons, *supra* note 237, at 5–6 (urging respect for the "intrinsic dignity" of all people, including homosexuals).

[267] John F. Whealon, *The Church and the Homosexual Person*, CATH. TRANSCRIPT, Apr. 5, 1991, at 5.

[268] 1991 Conn. Gen. Assemb. H. Proceedings, at 2775–76 (Apr. 11, 1991) (statement of Rep. Wollenberg), *available at* http://search.cga.state.ct.us (enter "1991HTR00411-ROO-TRN.HTM" in the "Name" search criteria and select all databases; then follow the hyperlink).

denominations.[269] Another milestone was the Supreme Court's 2003 decision in *Lawrence v. Texas*,[270] striking down Texas's Homosexual Conduct Law with support from American religion. An amicus brief supporting the constitutional challenge was joined by six denominations and twenty-three gay-affirming groups within other denominations.[271] The religion amicus in *Lawrence* identified the Lutherans, Presbyterians, National Federation of Roman Catholic Priests' Councils, Disciples of Christ, Reformed Protestants, and Methodists as denominations that considered homosexual sodomy a sin but also believed that criminalizing such conduct is un-Christian.[272] The amicus brief identified five groups—United Church of Christ, the Unitarians, Reformed Jews, Quakers, Alliance of Baptists—that did not consider all homosexual sodomy to be sinful within the Judeo-Christian tradition.[273] Neither the Roman Catholic Church, the LDS nor the Southern Baptist Convention participated in *Lawrence*. One of the denominations joining the pro-gay amicus, however, was the Alliance for Baptists, 120 congregations that had separated from the Southern Baptist Convention in 1987, partly "in response to the biblical mandate for justice, the call to witness . . . the civil rights and equality of opportunity for persons of same-sex orientation, and to oppose the humiliation and violence done to them."[274]

Indeed, there is now debate about the stridently antihomosexual stance within the Southern Baptist Convention. In July 2009, Marv Knox, the editor of the *Baptist Standard*, asked his faith community to consider "how we [ought to] respond

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[269] *See infra* TABLE 2.

[270] 539 U.S. 558 (2003).

[271] Brief of the Alliance of Baptists et al. as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102) [hereinafter Religion amicus].

[272] *See id.* at 4–8 (giving a detailed examination of these denominations' stances toward criminalizing homosexual conduct).

[273] *See id.* at 9–11 (examining these denominations' views on the consistency of homosexuality with religion).

[274] ALLIANCE OF BAPTISTS, A CLEAR VOICE: REPORT OF THE TASK FORCE ON HUMAN SEXUALITY 5 (2001).

redemptively to homosexual Church members."[275] Expelling gay people from the Church is not "redemptive, because it singles out one behavior for condemnation while turning a blind eye to the broad range of sins," such as adultery.[276] Thus, "[m]ean ministers and deacons" have done greater damage to the "Kingdom of Christ than Baptist gays and lesbians."[277] A few dozen bloggers engaged with Knox, with most agreeing with his pro-tolerance stance.[278] Some bloggers wondered how the Baptist tradition of scriptural inerrancy could obsess so much about lesbian and gay Christians, about whom Jesus Christ said nothing negative, while ignoring the large number of divorced Christians who had remarried, contrary to *Matthew* 19:9.[279] Also, some bloggers recalled the days when Baptist churches preached that racial segregation was required by the Bible.[280] Are Baptists certain that today's antigay readings of the Bible are more reliable than racist readings a generation ago? Marv Knox admitted that he was not certain his reading of the Bible (to condemn homosexual acts) is the only one.[281] In early 2010, the Royal Lane Baptist Church in Dallas openly embraced its lesbian and gay members, possibly triggering another confrontation between the Convention and gay-tolerant congregations.[282] The SBC will probably follow the Roman Catholic Church and the LDS in moving toward a more gay-

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[275] Marv Knox, Editorial, *It's Time to Talk About Homosexuality*, BAPTIST STANDARD (July 11, 2009), http://www.baptiststandard.com/index.php?option=com_content&task=view&id=9802&Itemid=9 [hereinafter *It's Time to Talk*].

[276] *Id.*

[277] *Id.*

[278] *See, e.g.*, Achilles, Comment to *It's Time to Talk*, *supra* note 275 (July 13, 2009) (supporting "content and tone" of the editorial).

[279] *See* GUOJIAN53, Comment to *Its Time to Talk*, *supra* note 275 (July 13, 16, 2009) (discussing "chronic sin," especially if one divorces and remarries); Gene in NC, Comment to *It's Time to Talk*, *supra* note 275 (July 21, 2009) (discussing divorce, homosexuality, and links to lack of role models); Mark Texas, Comment to *It's Time to Talk*, *supra* note 275 (July 21, 2009) (discussing changing doctrine of the Church).

[280] *See* Mark Texas, Comment to *It's Time to Talk*, *supra* note 275 (July 21, 2009) (noting Baptist opposition to civil rights movement).

[281] *See* Maw, Comment to *It's Time to Talk*, *supra* note 275 (July 20, 2009) (noting "I may be wrong" in reading Scripture and certainly would be wrong to "crush the spirit" of a Christian gay person).

[282] Ken Camp, *Dallas Church Publicly Acknowledges Welcoming Stance Toward Gays*, BAPTIST STANDARD (Mar. 9, 2010), http://www.baptiststandard.com/index.php?option=com_content&task=view&id=10830&Itemid=53.

tolerant theology in the next generation—just as the SBC and the LDS ultimately did on the issue of race.[283]

Within various denominations that are more gay-accepting than the Southern Baptist Convention, one contentious issue has been the ordination or recognition of openly gay ministers, priests, or rabbis; but this is also changing. Reformed Jews, Unitarians, and the United Church of Christ have been ordaining openly gay rabbis and ministers since the 1970s or early 1980s.[284] The Episcopal Church has ordained openly gay and lesbian priests since 1989, and in 1994 it officially opened up the priesthood to gay people.[285] In 2003, the Church promoted an openly gay man, Paul Robinson, to be a Bishop in the Church and in 2009 opened up all Church positions to gay people.[286] These moves impelled many parishioners and several congregations to leave the Church.[287] The Presbyterian Church (U.S.A.) and the United Methodist Church have maintained official stances against openly lesbian and gay clergy, but there is significant support within each denomination to open up congregational and ministerial positions on a nondiscriminatory basis.[288]

The most contentious issue has been recognition of lesbian and gay marriages. The Roman Catholic Church considers different-sex, procreative marriage to be the centerpiece of Christian doctrine relating to sexuality, gender, and the family, and for this reason in 2003, the Vatican's Congregation for the Doctrine of the

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[283] *See Same-Gender Attraction*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://www.lds.org/same-gender-attraction (last visited Jan. 23, 2011) (disapproving same-sex relationships but expressing compassion for gay people).

[284] *See, e.g., Stances of Faiths on LGBT Issues: United Church of Christ*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/5055.htm (last visited Jan. 23, 2011) (surveying the history of the United Church of Christ, including openly gay ministers as early as 1972).

[285] *Stances of Faith on LGBT Issues: Episcopal Church*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/4990.htm (last visited Jan. 23, 2011).

[286] *Id.*

[287] *See id.* (discussing controversy that developed within the Church as a result of these actions).

[288] *See generally* THE LOYAL OPPOSITION: STRUGGLING WITH THE CHURCH ON HOMOSEXUALITY (Tex Sample & Amy E. Delong eds., 2000) (discussing changes on Methodist view of homosexuality); John P. Burgess, *Framing the Homosexuality Debate Theologically: Lessons from the Presbyterian Church (U.S.A.)*, 41 REV. RELIGIOUS RES. 262 (1999) (discussing similar issues within the Presbyterian Church).

Faith issued *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*.[289] Admonishing Catholics to oppose state recognition of same-sex "marriages," the statement also expressed skepticism about other forms of legal recognition: "Those who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that the approval or legalization of evil is something far different from the toleration of evil."[290] The Mormons and the Southern Baptists have also strongly opposed gay marriage.[291] For all three denominations, the gay marriage issue has become the new Maginot Line for homosexuality, essentially superseding consensual sodomy laws and laws denying gay people civil rights. Notably, this helps explain why these denominations did not participate in *Lawrence* and *Romer*.

In contrast, gay marriages are recognized by the United Assembly of Hebrew Congregations (the Reformed Jews), the Unitarian Universalist Church, the United Church of Christ, the Society of Friends (the Quakers), and most recently, in 2009, the Episcopal Church.[292] The Presbyterian General Assembly in 2004–2005 endorsed the idea that the state should recognize lesbian and gay relationships as civil unions, but not as

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[289] Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (2003), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

[290] *Id.* at Sec. II, ¶ 5.

[291] *See infra* TABLE 2.

[292] *See Homosexuality*, UNION FOR REFORM JUDAISM, http://urj.org/ask/questions/homosexuality/ (last visited Jan. 23, 2011) (allowing rabbis to officiate at same-sex ceremonies); *The* Unitarian Universalist Association *and Homosexuality*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/hom_uua.htm (last visited Jan. 23, 2011) (discussing acceptance of same-sex marriage); *Stances of Faiths on LGBT Issues: United Church of Christ*, *supra* note 284 (endorsing same-sex marriages); *Stances of Faiths on LGBT Issues: Religious Society of Friends (Quakers)*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/5027.htm (last visited Jan. 23, 2011) (noting an increasing number of Quaker communities "take the marriages and unions of LGBT couples under their care"); *Stances of Faiths on LGBT Issues: Episcopal Church*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/4990.htm (last visited Jan. 23, 2011) (voting to allow bishops to perform same-sex marriages in 2009).

marriages.[293] Likewise, the Churchwide Assembly of the Evangelical Lutheran Church of America voted in 2009 to find ways to "allow congregations that choose to do so to recognize, support and hold publicly accountable, lifelong, monogamous, same-gender relationships."[294] Other denominations have engaged in intense discussions about same-sex marriages and unions but have not changed their doctrine on this matter.[295]

TABLE 2. RELIGIOUS SUPPORT FOR SEXUAL ORIENTATION DISCRIMINATIONS

DENOMINATION	DOES THE BIBLE SUPPORT CRIMINALIZING HOMOSEXUAL SODOMY (1986)?	DOES THE BIBLE SUPPORT STATE ANTIGAY DISCRIMINATION (1996)?	DOES THE BIBLE SUPPORT EXCLUDING LESBIAN AND GAY COUPLES FROM CIVIL MARRIAGE (2010)?
Roman Catholics	Unclear	No	Yes!
Southern Baptists	Yes	Yes!!!	YES!!!
Mormons	Probably Yes	Probably Yes	Yes!
Methodists	No	No	Yes (but wavering)
Presbyterians	No	No	Yes (but support civil unions)
Lutherans	No	No	Unclear
Episcopalians	No	No	No
Reformed Jews	No	No	No

As TABLE 2 indicates, the tension between equal rights for gay people and liberty for religious people has been obliterated for a good many denominations and reduced for others. Indeed, the evolution continues. At the institutional level, the main clash between gay equality and religious liberty is going to come when the state insists that religious groups receiving state subsidies adhere to nondiscrimination rules—such as the conflict between

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[293] *See Stances of Faiths on LGBT Issues: Presbyterian Church (U.S.A.)*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/5021.htm (last visited Jan. 23, 2011) (forbidding Presbyterian clergy from performing same-sex marriages).

[294] *Stances of Faith on LGBT Issues: Evangelical Lutheran Church in America*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/4993.htm (last visited Jan. 23, 2011).

[295] *See Stances of Faiths on LGBT Issues: United Methodist Church*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/religion/5060.htm (last visited Jan. 23, 2011) (Sept. 19, 2010) (noting doctrine against same-sex marriage was challenged but upheld).

CLS and the Hastings College of Law.[296] These clashes are mainly occurring only in states such as California that are moving toward a policy of benign sexual variation that parallels the benign racial variation policy the country as a whole accepts. One of the ways that a state expresses public policy and civic identity is by disassociation; as more states move toward a policy of full equality for LGBT citizens, these public subsidy cases will pop up in more jurisdictions. Many of the new wave of equality–liberty clashes, however, will involve religious *individuals*, rather than religious *organizations* or *associations*. The doctor who does not want to assist lesbian reproduction, the "homo-anxious" photographer, the Bible-reading employee protesters, the Leviticus-spouting employee, and the Romans-spouting student are going to be the plaintiffs in many, perhaps most, of the actual equality–liberty cases.

III. SOCIETY, RELIGION, AND LAW AS MUTUALLY CONSTITUTIVE: SOME LESSONS FOR GAY EQUALITY–RELIGIOUS LIBERTY CLASHES

Recall the exchanges between the Justices and the lawyers in *Christian Legal Society* in 2010. The history and the sociology of American religion can contribute to a deeper understanding of legal analogies relevant to that case. As Hastings's attorney Gregory Garre suggested, there are strong parallels between American religion's former embrace of racist doctrines and its more recent embrace of homophobic doctrines.[297] Not only are racist and homophobic religious doctrine structurally similar in the way they approach Scripture,[298] but in both instances denigration of minorities was an article of religious faith.

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[296] *See* Boy Scouts of Am. v. Wyman, 335 F.3d 80, 99 (2d Cir. 2003) (upholding Connecticut's policy of not providing state resources to the Scouts because of their open discrimination against gay people).

[297] *See* Transcript of Oral Argument, *supra* note 4, at 46–47 (analogizing Bob Jones's interracial dating beliefs to CLS's beliefs about homosexuals).

[298] In each case, isolated passages have been wrenched out of historical context to demonize minorities. Both racist and homophobic readings of the Bible start with Genesis (the Sin of Sodom and Noah's Curse), claim authoritative guidance in rules laid down in Leviticus, and clinch their cases with St. Paul's admonitions. Ahistorical readings of these passages are then generalized into broad moral directives that eclipsed the inclusiveness of Christ's teachings.

Moreover, racist religion and homophobic faith demonized minorities according to the script visualized in FIGURE 3 at the beginning of this Article: their degraded *status*, immoral *conduct*, and anti-Christian *message* were deeply interconnected. Thus, racist religion depended upon the mythic rape of Noah by Ham, conduct that justified God's condemnation of the descendants of Canaan to a degraded status, namely, slavery and apartheid. In the same way, homophobic faith today depends on the mythic biblical condemnation of "homosexual" conduct that justifies a degraded or second-class status for gay people. Accordingly, when CLS excludes "unrepentant homosexuals," it is discriminating based upon *conduct* and *message*, as Mike McConnell said at oral argument in *Christian Legal Society v. Hastings*,[299] but it is *also* discriminating based upon *status*, the point made by Greg Garre in the same oral argument.[300] And that close link among conduct, message, and status also fit the religious liberty arguments made by Bob Jones in the 1980s: interracial sexual *conduct* sends a *message* that is inconsistent with the Bible and justifies a degraded *status* that needs to be excluded from a Christian university. In both *Bob Jones* and *Christian Legal Society*, religion constructed the minority so that his *status* as an inferior or as a demon grew out of his sinful lusts and other *conduct*, which bespoke a Godless *message* of hedonism and dissolution. Race, like sexual orientation, was both a status and an inferred conduct; the status and conduct carried messages that polluted the religious community if they were not excluded. Status, conduct, and message have been the holy trinity of religion-based discrimination and subordination of both citizens of color and homosexual citizens.

It is notable that the American religions that were the strongest supporters of abolition and desegregation were also the first to support equal rights for gay people: Quakers, Reformed Jews, and Unitarians. The religions that were the staunchest supporters of slavery and apartheid have also been the staunchest opponents of gay rights: Southern Baptists and Mormons. Mainstream

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[299] *See* Transcript of Oral Argument, *supra* note 4, at 18–19 (noting CLS can discriminate based on belief and conduct but not status).

[300] *See id.* at 35 (asserting that if "race" is a status, so is sexual orientation).

southern Protestant denominations such as the Episcopalians, Presbyterians, Methodists, and Lutherans had poor records on slavery and apartheid but abandoned their racist heritage in the mid-twentieth century; likewise, they are in the process of abandoning homophobic doctrines in the early twenty-first century. The big contrast is the Roman Catholic Church, which acquiesced in slavery and apartheid without supporting these institutions doctrinally, while its theologians have developed detailed antihomosexual doctrines.

The *meta-point* of the descriptive analysis is that *religion, society, and the state are mutually constitutive*—each influences the others, and none evolves without reference to the others. When the Supreme Court sanctioned apartheid in 1896,[301] it did so against a background of American religion that either endorsed or acquiesced in apartheid as God's "Plan" for America. Conversely, when one variable changes, it has an effect on the others, such that it is hard to tell which way the causal arrow runs. Thus, when *Brown v. Board of Education*[302] initiated a sea change in American public law, southern religions were also shifting away from support for apartheid, as was public opinion. Likewise, by the time the Supreme Court decided *Romer* and *Lawrence*, American public opinion had shifted toward greater tolerance for gay people, as had the official doctrinal stances of most American religions. Neither set of shifts was in complete lockstep, but they did show striking synchronicity. The remainder of this Part offers reflections about how religion, sexual minorities, and the judiciary ought to cope with the implications of this analysis.

A. RELIGION

Religious doctrine on matters relating to race and sexuality has been relentlessly dynamic: the Word of God has changed constantly. Religious leaders and thinkers have a natural tendency to emphasize the continuity between foundational text drafted in the past and proscriptions followed in the present—but

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[301] Plessy v. Ferguson, 163 U.S. 537, 552 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[302] 347 U.S. 483 (1954).

there is no way to pretend that doctrine is the same today as it was fifty years ago. Even the Southern Baptists and the Latter-day Saints, two relatively doctrinaire religions, have confessed that their recent dogma supporting racial segregation was wrong.[303] If they were wrong on God's "Directives" toward slavery, apartheid, and miscegenation, should those religions be so certain they have discerned God's "Directive" correctly concerning gay people? Do *Leviticus* 13:20 and *Romans* 1:26–28 provide such clear evidence that God condemns homosexuality such that condemnation ought to be central to religious faith? Does a Bible chock full of polygamy,[304] intimate same-sex relationships,[305] and nervousness about sexual intercourse of any kind[306] really say anything definitive about state regulation of sexuality and civil marriage? Many Catholics, Protestants, and Jews who are scripturally devout say that God is okay with gay marriage.[307]

Because the Bible is a treasure trove of quotable but vague admonitions, the prejudiced reader can find support for many biases and stereotypes. Social science research teaches us that moral judgments are often driven by people's disgust at sexual and other activities that strike them as dirty, animalistic, or emotionally out of control.[308] Hysterical prejudice against African-

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[303] *See supra* notes 139–40.

[304] *See, e.g.*, *Exodus* 21:10 (acknowledging potential of taking another wife); 2 *Samuel* 5:13 (describing King David taking on more wives); 1 *Kings* 11:13 (mentioning how Solomon had 700 wives).

[305] *See, e.g.*, 1 *Samuel* 18:1–4, 2 *Samuel* 1:26 (describing the love between David and Jonathan); *Ruth* 1:14–17 (telling of the closeness between Ruth and Naomi). John the Baptist, Jesus Christ, and Paul never married a woman.

[306] *See, e.g.*, 1 *Corinthians* 7:8–9 (stating Paul's admonition that avoiding sexual entanglement is best, but counseling marriage if one cannot resist one's passions).

[307] *See, e.g.*, WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT app. at 193–208 (1996) (collecting letters and statements from devout Jews, Catholics, and Protestants to this effect).

[308] *See* WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 98–101 (1997) (analyzing the psychological and sociological implications of anal penetration); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 817 (2001) (noting how moral judgments are caused by quick moral intuitions); Paul Rozin et al., *Disgust*, *in* HANDBOOK OF EMOTIONS 637, 642 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000) ("Anything that reminds us we are animals elicits disgust." (citation omitted)); *see also* ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES 219, 363 (1996) (discussing "hysterical characters," their prejudices, and their depiction of other groups as highly sexual and animalistic).

Americans and gay people have motivated extravagant readings of the Bible to support scandalously bad policies, from slavery to marriage bans, that have harmed America as well as these minorities. In short, religion in American history has often translated—and in effect "laundered"—social prejudice into respectable discourse. On the other hand, religion is more than an institutionalized funnel for hysterical and obsessive prejudices. At its best, religion can be (and is often) critical and redemptive, bringing human neighbors together under the broad tent of the Almighty. The abolitionist movement and the civil rights movement enjoyed religious support, and many of the leaders were ministers or religious thinkers.[309] The gay rights movement has enjoyed the warm support of many denominations, including most of the ones examined in TABLE 2. It requires little stretch of the Judeo-Christian tradition to support lesbian and gay relationships, especially those where committed partners are creating a loving and supportive household for children they are raising. Religion can lower the stakes of identity politics in this country and ease our transition from a hysterical antihomosexual state of terror to one that is gay-friendly and accepting.

B. GAY RIGHTS

Just as religious fundamentalism needs to be more attentive to gay people, so gay rights ought to attend to organized religion, which has been an important barometer for society's acceptance of gay rights. So long as mainstream religions uniformly condemned homosexual relations as sinful and pernicious, sodomy reform was virtually impossible in the United States. Once most denominations had backed away from insisting that homosexual sodomy ought to be a crime, as evidenced by their official pronouncements and amicus briefs, it was easy for the *Lawrence* Court to strike them down. The pragmatic importance of religion to gay rights means that national recognition of gay marriage is

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[309] *See* JIM WALLIS, THE GREAT AWAKENING: REVIVING FAITH & POLITICS IN A POST-RELIGIOUS RIGHT AMERICA 2 (2008) (discussing religious movements in U.S. history and calling "the black church's leadership of the civil rights movement" a " 'great awakening' of faith that changed politics").

premature, because most religions still deeply oppose that innovation.[310] Hence, *Perry v. Schwarzenegger*,[311] the federal challenge to California's Proposition 8, would almost certainly fail at the U.S. Supreme Court level, if the litigation gets that far, and this is one reason to be reluctant about seeking premature Supreme Court recognition of marriage equality.

The foregoing history also supports Dean Martha Minow's suggestion that the gay-friendly state go out of its way to accommodate religion, so long as religion is willing to meet the state halfway.[312] Dean Minow's best example involves San Francisco's broad antidiscrimination ordinance requiring employers to treat same-sex domestic partners the same as spouses for health and other insurance purposes.[313] As applied to Roman Catholic employers, such a policy presented a sharp gay equality–religious liberty clash, but Mayor Willie Brown negotiated a settlement with the Archdiocese that allowed Catholic-sponsored employers to ask unmarried employees to designate a household member, with whom they wanted to share their health benefits.[314] Although this resolution was a compromise of pure equality, it was a useful example of what I call "equality practice," where equal treatment minus an accommodation is acceptable where deep and sincere religious principles are in play.[315]

C. JUDICIAL DOCTRINE

In *Christian Legal Society*, the religious group ought to receive no legal pass from obeying antidiscrimination rules because it

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[310] *See supra* TABLE 2.

[311] 591 F.3d 1147 (9th Cir. 2010).

[312] *See* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 829 (2007) (arguing that negotiation strategies could be used to resolve these types of conflicts).

[313] *Id.*

[314] *Id.* at 829–30.

[315] *See* WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS, at xiii (2002) ("Equality for [homosexuals] is a liberal right for which there is no sufficient justification for state denial—but it is not a right that ought to be delivered immediately, if it would unsettle the community."). *But see* Robin Fretwell Wilson, The Calculus of Accommodation (Dec. 4, 2009) (unpublished manuscript) (on file with author) (arguing for statutory accommodations for religious institutions and persons).

claims to discriminate based only on conduct and message, for its exclusion of "unrepentant homosexuals" operates as both a status-based and a conduct-based discrimination, indistinguishable from the discrimination in *Bob Jones*. On the other hand, the mutually constitutive nature of society, religion, and law creates complications for the race analogy in one critical respect. Today, society, religion, and law are united in support of the proposition that racial variation is benign and ought not be the basis for exclusion from public programs and private workplaces and accommodations. Currently, at the national level, no such consensus exists regarding homosexuality. Most of American society, most religious denominations, and constitutional law have accepted the notion that there is a great deal of *tolerable* sexual variation (including homosexuality), but there is no consensus around the more ambitious norm that homosexuality is a *benign* variation.[316]

Whatever the cogency of Noah's Curse or Paul's Admonition might be for race and sexuality issues as an academic matter, those passages have had a deep, primordial significance for millions of Americans. As the Supreme Court has learned from its experience with *Brown* and *Roe* and the backlashes each decision generated, strongly clashing primordial sentiments are dangerous to our democracy. Judges are incompetent to resolve these issues where the nation is closely but intensely divided, but they can and ought to lower the stakes of such primordial politics.[317] This means that judges should not prematurely constitutionalize fundamental issues where the nation is not settled; however, judges can sometimes ameliorate local conflicts that have escalated. A reading of some of the earlier precedents involving clashes between religious liberty and gay equality suggests three strategies for judges to follow in lowering the stakes in *Christian*

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[316] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (concluding that the state interest in combating homophobia was not serious enough to justify restrictions on the Boy Scouts's expressive association rights).

[317] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1283 (2005) (suggesting judges can lower the stakes in these clashes by assuming that neutral rules are enforced, denying groups state assistance in trying to exclude or denounce other groups, and clearing away obsolete laws).

Legal Society and other recent gay equality–religious liberty clashes.

1. Do Not Rush to Constitutionalize. For issues involving primordial identity politics where the country is intensely but rather evenly divided, neither the Court nor the political process should try to settle the matter one way or the other, either invalidating or firmly entrenching old rules. *Christian Legal Society* is precisely the sort of constitutional case where the Court should *not* lay down a broad constitutional rule. CLS claimed that it enjoyed a broad right to expressive association and that remedying discrimination based on sexual orientation is not a sufficiently important state interest to justify denying CLS public space.[318] Justice Ginsburg's opinion for the Court declined to address these still-combustible issues and, instead, started with the parties' agreement that Hastings had created a limited public forum and focused its analysis entirely on whether the law school's "all-comers" policy was viewpoint-neutral and reasonable.[319]

Another useful illustration of the "passive virtues" approach in action is *Parker v. Hurley*.[320] The state education department required primary schools to develop programs introducing pupils to family relationships, including lesbian and gay families.[321] Parents sued the local school board when it did not allow them to "opt out" of such instruction.[322] Judge Wolf doubted that federal constitutional precedents imposed this duty on the school system and dismissed the constitutional claims;[323] he also dismissed the state statutory claims without prejudice so the parents could refile in state court.[324]

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[318] Brief for Petitioner, *supra* note 17, at 26–36.

[319] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 (2010) (refusing to focus on protecting sexual minorities and instead following the parties' stipulation to focus on the law school's requirement that all subsidized student groups accept "all comers"); *see also id.* at 2985–86 (refusing to rule on CLS's expressive association claims and focusing only on the reasonableness of the law school's regulation of its limited public forum). *But see id.* at 2995–98 (Stevens, J., concurring) (addressing the constitutionality of the sexual orientation nondiscrimination policy as applied to CLS).

[320] 474 F. Supp. 2d 261 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008).

[321] *Id.* at 263.

[322] *Id.* at 266–67.

[323] *Id.* at 267–68.

[324] *Id.* at 278–79.

2. Interpret Antidiscrimination Rules to Accommodate Core Religious Institutions. Also fitting within a passive virtues approach are the old principles that judges should prefer a statutory resolution to a constitutional one and should interpret statutes to avoid serious constitutional difficulties.[325] Thus, judges have read a "ministerial exception" into civil rights statutes, which ameliorates a primordial equality–religion clash.[326] A corollary to the "ministerial exemption" would be a canon cautioning that civil rights laws should be construed to allow some leeway when normative organizations or relationships are in play. Thus, if *Parker v. Hurley* were refiled in the state courts, judges should be friendly to the parents' reading of the statute allowing them to opt out of instruction that "primarily involves human sexual education or human sexuality issues."[327] Following Dean Minow, a judge should consider a preliminary ruling that the statute is applicable, but leave it to the parents and the school to work out the details of exactly how the opt-out should operate in practice.

An exemplary decision along these lines is Judge Julia Cooper Mack's opinion for the court in *Gay Rights Coalition v. Georgetown University*.[328] The D.C. Human Rights Act barred colleges and universities from discriminating in their services and programs because of sexual orientation.[329] As a Roman Catholic institution, Georgetown declined to recognize gay and lesbian student groups.[330] Avoiding a needless clash with the Free Exercise Clause, Judge Mack ruled that the statute did not require Georgetown to *recognize* the gay and lesbian student groups.[331] Following the statute's strong support for equal treatment of gay people, however, Judge Mack reasoned that the law did require Georgetown to provide services and facilities to such groups on an

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[325] *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932) (asserting that it is a "cardinal principle" that the court first attempt to construe a statute so that a constitutional issue may be avoided).

[326] *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63 (D.C. Cir. 1996) (discussing the ministerial exception).

[327] *Parker*, 474 F. Supp. 2d at 263 (quoting MASS. GEN. LAWS, ch. 71, § 32A (2007)).

[328] 536 A.2d 1 (D.C. 1987) (en banc).

[329] D.C. CODE § 1-2520 (1981).

[330] *Gay Rights Coal.*, 536 A.2d at 4.

[331] *Id.* at 5 & n.2.

equal basis with other student groups.[332] While *Boy Scouts of America v. Dale* would require a different constitutional analysis today, judges should consider the cogency of Judge Mack's vision. She vigorously enforced the antidiscrimination norm of the statute, but interpreted the law to accommodate genuine religious principle. In my view, Judge Mack's resolution was Solomonic in the best sense, because it nudged the university and students to work out an accord that enriched both the school and its gay population.[333] Echoing Judge Mack's accommodationist attitude, Justice Ginsburg's opinion in *Christian Legal Society* importantly emphasized that the reasonableness of Hastings's nondiscrimination policy was confirmed by the existence of several channels for CLS to express its views within the law school.[334]

3. Favor Narrow, As-Applied Constitutional Rulings over Broad Facial Invalidations. If federal judges must reach the constitutional issue, they should not try to resolve issues at which society is not at rest. Judges have displayed this kind of judicial caution in the "Day of Silence" cases, where students critical of "homosexuality" pushed back against school policies condemning antigay hatred and violence.[335] In the Seventh Circuit case, the federal district judge had denied a motion for a preliminary injunction to prevent the school from censoring student expression pushing back against the school's gay-friendly Day of Silence.[336] Judge Richard Posner's opinion reversed the lower court, barring the school from prohibiting students to wear "Be Happy, Not Gay" T-shirts; this expression by traditionalist students was not reasonably considered threatening to gay or gay-friendly students.[337] In the Ninth Circuit case, Judge Stephen Reinhardt reached a different conclusion, in part because the Day of Silence

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[332] *Id.*

[333] I was the Georgetown University Law Center's first openly gay tenured faculty. After Congress exempted religious institutions from D.C.'s Human Rights Act in 1990, Georgetown honorably stuck to its agreement with the students.

[334] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2976 (2010) (noting CLS still had access to school facility for meeting and advertising).

[335] Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 670 (7th Cir. 2008).

[336] *Id.* at 669.

[337] *See id.* at 676 (stating the T-shirts posed no risk of provoking violence against homosexuals, and granting a preliminary injunction limited to the T-shirts).

had been adopted in the wake of serious incidents of antigay violence and because the trial judge found that the school's censorship of a T-shirt reading "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:17' " was a reasonable response to concerns for the safety and security of gay students in the public school system.[338] Based on *Harper*, censorship of a "Homosexuals Are an Abomination" T-shirt may be defensible because *Leviticus* 20:13 demands death to men "lying" with other men and thus encourages antigay violence.[339]

The best constitutional rule for *Christian Legal Society* would be similarly narrow, as the Court recognized. The point of law in Justice Ginsburg's opinion for the Court was that a public college or graduate school can create a purposive limited public forum where participation is conditioned upon compliance with clearly defined and viewpoint-neutral antidiscrimination rules.[340] If colleges manipulate public forums as a pretext to discriminate against religious groups like CLS, this rule provides a remedy, as Justice Ginsburg also recognized.[341] In contrast, Justice Alito's dissenting opinion was much too provocative, seeking to settle too much in a case where the nation remains deeply divided.[342]

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[338] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1174 n.10, 1184, 1191 (9th Cir. 2006), *vacated* 549 U.S. 1262 (2007) (noting history of disruption at school supported reasonableness of the ban).

[339] *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601–02, 608 (9th Cir. 2004) (allowing the company to censor an employee's display of *Leviticus* 20:13 in reaction to its gay-friendly signs).

[340] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984–86 (2010) (describing the states' right to restrict access to the forum as long as the restrictions are reasonable and viewpoint neutral).

[341] *See id.* at 2995 (remanding to the Ninth Circuit for consideration of CLS's claim that the all-comers policy was a pretext for discrimination against religious groups); *id.* at 2998–3000 (Kennedy, J., concurring) (noting how it is possible to show discriminatory intent in the school's enforcement of the policy).

[342] *See id.* at 3000–20 (Alito, J., dissenting) (arguing that in denying public funds, Hastings violated CLS's First Amendment rights).