EMORY | LAW

Emory Law Journal

Volume 63 | Issue 4

2014

# By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage

Andrew C. Stevens

# BY THE POWER VESTED IN ME? LICENSING RELIGIOUS OFFICIALS TO SOLEMNIZE MARRIAGE IN THE AGE OF SAME-SEX MARRIAGE


## ABSTRACT

*State recognition of same-sex marriage has presented significant new challenges to the law of religious freedom under the First Amendment. For example, all states license religious officials to solemnize civil marriage, a ceremony required for a valid marriage in all states. Could a state that has recognized same-sex marriage require its licensed religious officials to administer their licenses in such a way as not to discriminate against same-sex couples? Or would such a law violate the free exercise rights of that licensed religious official? Or, conversely, is the very practice of state licensing of religious officials to solemnize and enact civil marriage an impermissible establishment of religion in violation of the Establishment Clause?*

*This Comment argues that (1) the Free Exercise Clause, as currently interpreted, does not protect licensed religious officials from a law forbidding them to discriminate against same-sex couples and (2) the typical marriage solemnization ceremony by a licensed religious official violates the Establishment Clause.*

*This Comment also presents several solutions to remedy these paradoxical outcomes under the law. First, as to the Free Exercise Clause issue, this Comment proposes both statutory and judicial remedies that would exempt licensed religious officials from laws that prohibit discrimination in exercising marriage solemnization licenses. Second, as to the Establishment Clause issue, this Comment proposes narrow time, place, and manner restrictions on religious weddings and consecrations of civil marriages that would remedy the Establishment Clause violation without requiring states to strip religious officials of their licenses to solemnize civil marriage.*

INTRODUCTION ..... 981
I. LICENSING RELIGIOUS OFFICIALS TO SOLEMNIZE CIVIL MARRIAGE .. 986
*A. State Regulation of Marriage* ..... 986
*B. History of Religious Solemnization of Civil Marriage* ..... 987
II. CLERGY FREE EXERCISE AND THE FIRST AMENDMENT ..... 988
*A. State Recognition of Same-Sex Marriage* ..... 988
*B. No Free Exercise Exemption for Licensed Religious Officials* ... 990
III. AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION ..... 997
*A. The Establishment Clause: A Brief Survey* ..... 997
*B. A Licensed Religious Official Is Not a State Actor* ..... 1000
*C. An Impermissible Delegation of Governmental Authority* ..... 1003
*D. The Historical Practice Inquiry* ..... 1006
IV. TOWARD THE PROTECTION OF A ROBUST RELIGIOUS LIBERTY ..... 1009
*A. The Free Exercise Problem* ..... 1009
*1. Statutory Remedies* ..... 1009
*2. Judicial Remedies* ..... 1010
*a. An Expanded Ministerial Exception* ..... 1010
*b. The Expressive Association Doctrine* ..... 1013
*B. "Unfusing" the Establishment Problem* ..... 1014
CONCLUSION ..... 1019

## INTRODUCTION

State recognition of same-sex marriage has presented significant new challenges to the law of religious freedom under the First Amendment to the U.S. Constitution. For example, all states employ sophisticated and nuanced marriage licensing regimes that license religious officials to solemnize civil marriages, a ceremonial act required for a valid marriage in all states.[1] A growing number of states have recognized same-sex marriage while protecting their LGBT citizens from discrimination on the basis of sexual orientation.[2] But, in those latter states, some religious communities and officials refuse to marry same-sex couples.[3] Many same-sex couples regard this refusal as discrimination.[4]

Could a state require its licensed religious officials to administer their marriage licenses in accordance with the state's nondiscrimination laws, and remove their licenses to marry anyone if they refuse? Would such a requirement violate the First Amendment free exercise rights of the religious official or of the official's religious group? Such a law could force decisions by religious officials similar to those of Catholic churches in Illinois, Massachusetts, and Washington, D.C., which terminated their adoption services once those jurisdictions passed laws forcing the Church to consider same-sex couples as potential adoptive parents.[5]

Alternatively, could a state go further and simply forbid religious officials to perform marriages altogether as a mandate of the First Amendment Establishment Clause? The Establishment Clause forbids certain delegations of government authority to religious officials as a violation of the principle of separation of church and state.[6] Yet state regimes that license religious officials to enact civil marriage appear to do just that: delegate government authority to religious officials.

---

[1] *See infra* notes 13–16.

[2] *See infra* notes 26–27.

[3] *See, e.g.*, Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, VATICAN.VA (June 3, 2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

[4] *See, e.g.*, Steve Siebold, *Legalize Gay Marriage—Discrimination Is Not Christ-Like Behavior*, HUFFPOST GAY VOICES (May 31, 2012, 4:19 PM), http://www.huffingtonpost.com/steve-siebold/legalize-gay-marriage_b_1560370.html ("The opposition to gay marriage is all about control and power . . . .").

[5] *See* Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES, Dec. 28, 2011, http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html.

[6] *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982).

Has a state created an impermissible establishment of religion when it licenses religious officials to solemnize civil marriages—an unconstitutional condition now finally exposed by the conflicts over same-sex marriage? If so, all state-given licenses would therefore need to be stripped from men and women of the cloth. Is this the beginning of another brave new world—the disestablishment of marriage?

This Comment's answer is no. Instead, this Comment first argues that while the Free Exercise Clause, as currently interpreted, does not entitle a religious official to discriminate against same-sex couples in the administration of his or her license according to his or her conscience, other legal remedies, based on statutes and judicial exemptions, can offer that protection. Second, this Comment argues that the typical solemnization ceremony by a religious official does violate the Establishment Clause, but remedying this violation does not require the removal of all solemnization licenses from religious officials. Instead, the implementation of narrow time, place, and manner restrictions that distinctly separate the civil and spiritual components of a religious wedding ceremony is all that is required. In coming to these conclusions, this Comment thus recognizes and navigates the peculiar tension presented between the two Religion Clauses of the First Amendment.[7] On the one hand, the Free Exercise Clause urges the protection of religious officials in the exercise of their licenses. On the other hand, the Establishment Clause urges that those licenses be taken away.

In preserving the status quo of state licensing of religious officials to solemnize civil marriage, this Comment does not adopt a strict separation of church and state approach. A strict separationist approach in marriage argues that no religious officials should be licensed to marry couples whatsoever, leaving legal participation and authority over marriage exclusively in the hands of the state.[8] Churches would be free to have their own ceremonies, governed according to their faiths, but their ceremonies would carry no legal relevance.[9] Strict separationists argue that this is either (1) constitutionally required by the

---

[7] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004) ("These two Clauses . . . are frequently in tension.").

[8] *See, e.g.*, Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 206 (Douglas Laycock et al. eds., 2008).

[9] This system would resemble that of Germany. In Germany, civil marriage may only be enacted by a civil registrar, and separate religious ceremonies have "no legal effect under German law." *See* AFTER SECULAR LAW 316 (Winnifred Fallers Sullivan et al. eds., 2011) (internal quotation mark omitted).

Establishment Clause or (2) the simplest and most effective solution to our current debates over marriage.[10]

Responding to the first argument, this Comment demonstrates that the Establishment Clause does not require the adoption of a strict separationist approach. Instead, this Comment shows that while the typical religious wedding ceremony does violate the Establishment Clause, narrow time, place, and manner restrictions on such ceremonies are all that is required to remedy the violation. These narrow restrictions would require two separate ceremonies at two different times and places, so as to distinctly separate the civil and religious aspects of marriage.

More significantly, however, as to the second argument, a strict separationist approach does not adequately appreciate the interests of religious individuals and communities in having civil marriages solemnized by officials of their faith. Not only do many religious adherents believe that marriage encompasses both spiritual and civil responsibilities, but the solemnization of a religious couple's wedding by an official of their faith has deep spiritual significance for the individuals being wed, the officiate, and the larger religious community. Thus, the wedding solemnization by a religious official represents both of these commitments and beliefs, spiritual and civic. To adopt a strict separationist approach is to do harm to this understanding of marriage for all three of these religious actors. Indeed, it is to harm the very exercise of their religion.

For example, for the religious individuals being married, the opportunity to have their marriage solemnized by an official of their faith is not merely a matter of convenience; it is a spiritual recognition of the multifaceted and powerful commitments that come with their marital vows. For the religious official who marries them, it is not merely a matter of pride or power; it is the opportunity to make sacred even the civil responsibilities of marriage for his congregants and to impress upon them the weight of the institution. Likewise, for the larger religious community, it is not merely a matter of tradition; it is the commitment to an understanding of marriage and citizenship that helps to define and hold together that very community. A state should thus not trammel these interests, these acts of faith, absent a clear constitutional mandate, and no such mandate exists.

---

[10] *See, e.g.*, Laycock, *supra* note 8, at 206.

This discussion of what marriage means to a particular religious community implicates a larger issue, one also tremendously relevant to this Comment (particularly in Part III concerning the Establishment Clause inquiry). That larger issue concerns the nature, or ontology, of marriage. Marriage is not merely a contractual agreement, created and ended by the state; for many it is also a sacred institution—a divine covenant or sacrament. Indeed, for many, the spiritual responsibilities and commitments of marriage subsume their temporal counterparts. The work of Joel Nichols and others bears witness to the importance of this spiritual aspect of marriage alongside its secular and temporal aspect.[11] It therefore cannot be said that marriage is one or the other, temporal or spiritual, contract or covenant; it is by its nature an amalgamation of the two. This means that it cannot be decided once and for all whose understanding of marriage will govern. And as stated above, this Comment demonstrates that both understandings of marriage can coexist under the First Amendment without resorting to strict separation.

To arrive at these conclusions, this Comment will proceed as follows: Part I begins by surveying the landscape of states' current regulation of marriage and their regimes licensing religious officials to solemnize civil marriage. Part I also explores the historical role in marriage of religious officials on behalf of the state. This historical survey is crucial to the Establishment Clause inquiry, which often entails an analysis of whether a certain practice has been such a longstanding cultural or historical practice so as to become part of a larger civic custom of society.[12]

Part II starts by summarizing the developments in state recognition of same-sex marriage and of antidiscrimination statutes based on sexual orientation, as well as state statutes designed to protect the free exercise rights of religious officials in solemnizing marriages. These statutory frameworks provide the basis for the Free Exercise and Establishment Clause tensions described above. Part II then explores whether licensed religious officials could seek an exemption through the First Amendment Free Exercise Clause from a state law prohibiting discrimination on the basis of sexual orientation in the exercise of marriage solemnization licenses. This Comment argues that, as

---

[11] *See* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 5 (Joel A. Nichols ed., 2012); *see also* Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 180–96 (2009) (discussing the religious nature of marriage and the multifaceted nature of religious activity).

[12] *See* discussion *infra* Part III.D.

currently interpreted, the Free Exercise Clause provides no such protection. Such a law would likely be found to be a neutral law of general applicability, thus allowing no free exercise exemption to its requirements.

Part III explores whether state statutory provisions licensing religious officials to solemnize civil marriages are an impermissible establishment of religion in violation of the First Amendment Establishment Clause. As will be shown, the Establishment Clause prohibits certain delegations of government authority to religious officials.[13] Specifically, it prohibits a fusion of religious and governmental functions.[14] Though the state licensing statutes do not establish a religion, this Comment argues that the ubiquitous conflation of governmental and religious functions by a religious official at a typical wedding ceremony *does* violate the Establishment Clause's prohibitions on impermissible delegations of governmental authority.

Part IV examines the possible solutions to the First Amendment Free Exercise and Establishment Clause problems presented in this Comment. Because the Free Exercise Clause does not protect a religious official's right to discriminate against same-sex couples in the administration of his or her license, objecting religious officials must therefore rely on statutory or judicial exemptions from any laws prohibiting such discrimination, either at the state or federal level. Moreover, while some state religious freedom statutes provide piecemeal protection, this Comment argues that the best and most efficient source of statutory protection for abstaining religious officials should come from a federal statute. Such federal legislation should include protections for the conscience of licensed religious officials and from civil, criminal, and tax liability for their refusal to solemnize same-sex marriages. However, in the absence of statutory exemptions, this Comment argues that religious officials and communities should be able to avail themselves of judicially crafted exemptions in the form of the ministerial exception most recently articulated in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[15] and the expressive association doctrine in *Boy Scouts of America. v. Dale*.[16] Ultimately, these more corporate free exercise and associational rights provide licensed religious officials with the freedom to exercise their solemnization licenses according to their individual faiths.

---

13 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).
14 *See id* at 126.
15 132 S. Ct. 694, 714–15 (2012).
16 530 U.S. 640, 648 (2000).

Next, to remedy the establishment problem from Part III, Part IV proposes narrow time, place, and manner restrictions on the solemnization of marriages by licensed religious officials. These restrictions will focus on dividing more clearly the separate governmental and religious functions of marriage. By requiring two separate ceremonies, in two separate places, at two distinct times, and prohibiting spiritual language in the civil ceremony, these regulations will ensure that there is no longer a fusion of governmental and religious functions in the solemnization of marriages by licensed religious officials. This regime also accurately represents the dual nature of marriage, as both a civil and spiritual institution. Part IV ends by addressing the potential legal challenges to these regulations based upon the ironic burdens such regulations place on free exercise rights and their possible excessive government entanglement with religion.

Finally, the Conclusion of this Comment explores the implications of its findings for legislatures, the law, and objecting religious communities. As the Conclusion will make clear, the First Amendment Religion Clauses make competing claims on the religious official licensed to solemnize civil marriage; though the Free Exercise Clause, as currently interpreted, does not provide religious officials with the protection to solemnize only those marriages that their faiths allow, other statutory and First Amendment exemptions do. At the same time, narrow time, place, and manner regulations are required to remedy the Establishment Clause violation caused by religious officials solemnizing civil marriage in such a way that creates a fusion of governmental and religious functions.

## I. LICENSING RELIGIOUS OFFICIALS TO SOLEMNIZE CIVIL MARRIAGE

### *A. State Regulation of Marriage*

Marriage is regulated principally by state, not federal, law. This provides for remarkable diversity in laws regulating the requirements of a valid marriage and who may legally solemnize a civil marriage.[17] However, every state extends a license, an authorization by law, to solemnize a wedding to only a specifically defined group of people.[18] In several states, solemnizing a wedding without statutory authorization is a violation of the law and is subject

[17] For a comprehensive survey of state statutes authorizing individuals to officiate weddings, see Robert E. Rains, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, but Who Am I to Do So?*, 64 U. MIAMI L. REV. 809, 842–77 (2010).

[18] *See id.*

to a penalty.[19] Moreover, in almost every state, a solemnization ceremony is necessary for a valid marriage.[20] Typically, states authorize religious officials and governmental officials, such as justices of the peace, to officiate marriage ceremonies.[21] As mentioned above, these state licensing regimes form the basis for the Free Exercise and Establishment Clause issues discussed below.

### *B. History of Religious Solemnization of Civil Marriage*

The role religious officials play in solemnizing civil marriage has been in place in America since its colonial beginnings.[22] As early as 1694, religious officials were allowed to solemnize civil marriages alongside local magistrates.[23] In Anglican colonies, the law expressly declared the children of marriages performed by religious officials outside the established church to be illegitimate.[24] Thus, while initially a feature of state religious establishments,[25] since the American Revolution, states have allowed religious officials of all denominations to participate in the solemnization of civil marriage, including Catholics and Jews who have been denied other rights.[26]

Religious solemnization of civil marriage continued uninterrupted after the disestablishment of religion by the states, and the practice was not raised in the debates surrounding the adoption of the individual state constitutions or the federal First Amendment Religion Clauses.[27] Nor did the issue arise in debates over the meaning of the Establishment Clause in state or federal

---

[19] *See, e.g.*, CONN. GEN. STAT. § 46b-22 (2013) ("All marriages attempted to be celebrated by [persons not found in the statute] are void."); IOWA CODE § 595.11 (2014) (imposing a $50 penalty on marriages solemnized by individuals not authorized to do so in the statute).

[20] *See* Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 747, 753 (2011) ("Except for the handful of jurisdictions that recognize common law marriages, all states require those seeking marriage to perform some type of procedure that is relatively uniform but often oddly burdensome." (footnote omitted)); *see also, e.g.*, N.C. GEN. STAT. § 51-1 (2013) (requiring solemnization in the presence of a minister or magistrate); OKLA. STAT. tit. 43, § 7 (2011) ("All marriages must be contracted by a formal ceremony performed or solemnized . . . .").

[21] *See* Rains, *supra* note 17, at 842–77.

[22] MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 76 (1985).

[23] *Id.*

[24] Michael W. McConnell, *Establishment at the Founding*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 45, 53 (T. Jeremy Gunn & John Witte, Jr. eds., 2012).

[25] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438–39 nn.157–58 (discussing the licensing of dissenting faiths in colonies with Anglican establishments).

[26] *See* GROSSBERG, *supra* note 22, at 76.

[27] *See id.*; *infra* note 29.

constitutions.[28] The early Republic did see notable public controversies over the propriety of official proclamations establishing specific days for fasting, prayer, and thanksgiving, and whether or not the mail should run on Sundays.[29] Likewise, religious teachers and exercises in state public schools, in addition to state funding of religious private schools, raised similar objections.[30] By 1833, every state in the Union had eliminated taxes tolled to support its clergy,[31] and later nineteenth-century cases challenged the scope of government support for religious social services.[32] But in the midst of all this controversy over the meaning and application of the disestablishment of religion, religious solemnization of civil marriage remained unchallenged.[33]

The absence of any controversy over this issue in the past could mean that no public official thought of this role of the religious official as problematic under the Establishment Clause. Or this issue could have never crossed the minds of the Founders and the first generation thereafter. Whatever the reason, this history will prove important when the Establishment Clause question is taken up in Part III.

## II. CLERGY FREE EXERCISE AND THE FIRST AMENDMENT

### *A. State Recognition of Same-Sex Marriage*

At the time of publication, either through statute, judicial decision, or ballot initiative, seventeen states and the District of Columbia have recognized the rights of same-sex couples to marry.[34] Corresponding with this recognition, many states (most of which have not recognized same-sex marriage) have amended their state civil rights acts to protect their citizens against

---

[28] *See* GROSSBERG, *supra* note 22, at 76; *infra* note 29.

[29] *See* Daniel L. Dreisbach, *Defining and Testing the Prohibition on Religious Establishments in the Early Republic*, *in* NO ESTABLISHMENT OF RELIGION, *supra* note 24, at 252, 261–66.

[30] *See* Steven K. Green, *The "Second Disestablishment": The Evolution of Nineteenth-Century Understandings of Separation of Church and State*, *in* NO ESTABLISHMENT OF RELIGION, *supra* note 24, at 280, 294–99.

[31] *See* Thomas C. Berg, *Disestablishment from Blaine to* Everson*: Federalism, School Wars, and the Emerging Modern State*, *in* NO ESTABLISHMENT OF RELIGION, *supra* note 24, at 307, 311.

[32] *See id.* at 315–32.

[33] *See supra* notes 27–32.

[34] FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last updated Dec. 20, 2013); *see, e.g.*, VT. STAT. ANN. tit. 15, § 8 (2009) (recognizing same-sex marriage through statute); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (adopting same-sex marriage via judicial decision).

discrimination in employment and in public accommodations on the basis of sexual orientation.[35]

Recognizing the tension between a citizen's right to be free from discrimination and the authority of religious officials to solemnize civil marriage, most states that have recognized same-sex marriage have enacted legislative protections for religious officials who would refuse to marry a same-sex couple.[36] Depending on the state, these statutes include a combination of the following protections: no religious official shall be compelled to solemnize any marriage against his or her conscience; a refusal will not affect a church's property tax exempt status; and no refusal will create any civil liability on the part of the religious official or the corporate body.[37] Two states that have recognized same-sex marriage, Iowa and Massachusetts, however, do not have these statutory exemptions.[38] Could one of these states—or future states that adopt comparable regimes—require its religious officials not to discriminate against same-sex couples in the administration of their licenses to solemnize civil marriage?

The rest of Part II will confront the situation in which a state that recognizes same-sex marriage has passed legislation requiring all those given the legal authority to solemnize civil marriage to solemnize the marriages of all couples who seek their services, straight or gay, who otherwise are eligible to marry. Failure to administer the license in this way, the legislation says, will result in a forfeiture of the license so extended. In other words, religious officials may no longer discriminate against same-sex couples in their solemnization of civil marriage. Perhaps unexpectedly, such legislation would not violate the First Amendment free exercise rights of the religious official who would choose not to solemnize same-sex marriages due to his or her faith.

---

[35] *See* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1190 nn.66–67 (2012) (surveying the twenty-one states' and the District of Columbia's sexual orientation antidiscrimination laws).

[36] *See* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 283–84 nn.44–48 (2010) (summarizing state laws protecting the conscience of religious officials in light of same-sex marriage); *see also* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1509–11 (2012).

[37] *See, e.g.*, N.Y. DOM. REL. LAW § 11, 1-a (McKinney Supp. 2014); *see also* CAL. FAM. CODE § 400(a) (West Supp. 2014).

[38] *See, e.g.*, MASS. GEN. LAWS ch. 207, § 38 (2012); *see also* IOWA CODE § 595.10 (2014).

### *B. No Free Exercise Exemption for Licensed Religious Officials*

Current free exercise laws are controlled by the 1990 Supreme Court case *Employment Division v. Smith*.[39] In that case, the Court held that neutral laws of general applicability are constitutionally permissible under the First Amendment Free Exercise Clause even if they burden a private party's religion.[40] Thus, if a law that required all individuals licensed to solemnize civil marriage to do so in a nondiscriminatory manner were found to be a neutral law of general applicability, then a licensed religious official would have no free exercise exemption.[41] Conversely, if the law were found to be not neutral or not generally applicable, it would be subject to strict scrutiny and required to be narrowly tailored to serve a compelling governmental interest.[42]

Courts, however, have had difficulty articulating precisely what makes a law neutral and of general applicability.[43] For example, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court found that though a statute prohibiting animal sacrifice on its face appeared neutral, it was used to single out only certain forms of religious animal sacrifice when applied.[44] The Court thus struck the ordinance down as unconstitutional.[45] In contrast, in *Locke v. Davey*, the Court determined that the State of Washington's statutory prohibition of the use of state scholarship funding for students seeking a theology degree was not unconstitutional.[46] Though Justice Scalia (the author of the *Smith* opinion) dissented, arguing that this statute was unconstitutional since it facially discriminated against religion,[47] the majority reasoned that the burden placed on religion was "far milder" than that in *Lukumi* because it imposed neither a civil nor criminal sanction on the practice of religion.[48] As a result of these inconsistent rulings by the Supreme Court, lower courts have had difficulty applying the *Smith* standard.[49] Nevertheless, a statute prohibiting discrimination against same-sex couples by those licensed to solemnize

---

39 494 U.S. 872 (1990).

40 *See id.* at 879.

41 *See id.*

42 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

43 *See* Erin N. East, Comment, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 EMORY L.J. 259, 280–83 (2009) (discussing the problems faced by courts in applying the *Smith* standard).

44 *See Lukumi*, 508 U.S. at 538–39.

45 *See id.* at 524.

46 *See* 540 U.S. 712, 715 (2004).

47 *See id.* at 726 (Scalia & Thomas, JJ., dissenting).

48 *See id.* at 720 (majority opinion).

49 *See* East, *supra* note 43, at 282–83.

marriages makes no facial reference to religion and, so long as it applies to all actors covered, appears to be a neutral law of general applicability.

There is a question, however, as to whether the religious neutrality of a law is determined only by its final words or also by the intent of the legislature or the actions of governmental officials in implementing the law. The Supreme Court has not addressed this issue, but in *Stormans, Inc. v. Selecky*, a federal district court enjoined the State of Washington's "duty to fill" statute on behalf of pharmacists who raised religious objections to filling prescriptions for contraceptives.[50] The court enjoined the statute based on evidence that "strongly suggest[ed] that the overriding objective of the subject regulations was . . . to eliminate moral and religious objections from the business of dispensing medication."[51] Thus, the statute, despite its neutral wording, was not a neutral law of general applicability and was subject to strict scrutiny, which it did not pass.[52]

The Ninth Circuit Court of Appeals reversed the district court's decision, however, ruling that it was improper to look to the statute's legislative history and intent to establish whether the law was neutral and of general applicability.[53] Additionally, to the extent that the Washington State Board of Pharmacy's motivation for adopting the rule could have been discerned, the Ninth Circuit wrote, "it indicates that the Board's concern was to promote the public welfare, not to burden religious belief."[54] Under a rule as such, almost any carefully crafted and facially neutral legislation would pass muster under the *Smith* test and be found neutral and of general applicability. This is especially true if the authors of the legislation utter nothing as evidence to the contrary.

This no-intent approach is similar to the one the Supreme Court endorsed in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*.[55] In *Martinez*, a religious student group on a public California law school campus challenged a policy requiring official student groups to comply with the school's nondiscrimination policy.[56] Specifically, all recognized student groups on campus were required to accept

---

50 *See* 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007), *vacated*, 586 F.3d. 1109 (9th Cir. 2009).
51 *Id.* at 1259.
52 *Id.* at 1259–60, 1263.
53 *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1133–34 (9th Cir. 2009).
54 *Id.* at 1134.
55 130 S. Ct. 2971 (2010).
56 *See id.* at 2974.

all comers—that is, not to discriminate on the basis of, among other things, religion and sexual orientation.[57] The Christian Legal Society was denied official student group status because its by-laws required the exclusion of students who did not sign and comply with a statement of faith that contained prohibitions on "unrepentant homosexual conduct."[58] In denying the Christian Legal Society's claim that the law school had violated its First Amendment right to free exercise, the Court did not look beyond the face of the statute in question in deciding its constitutionality.[59]

In dissent, Justice Alito argued that use of the nondiscrimination policy was intended to burden religious organizations like the Christian Legal Society.[60] The law school, Alito wrote, "currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society."[61]

It should be noted, however, that the Supreme Court has previously inquired into the intent of a statute when addressing First Amendment case law. For example, in *McCreary County v. ACLU of Kentucky*, a Kentucky courtroom expanded its original Ten Commandments display to include other nonreligious items throughout the course of its Establishment Clause litigation.[62] In striking down the display, the Court gave great weight to what it discerned to be intent to disguise its original Establishment Clause violation.[63]

The Court also looked to the intent of Congress in passing the Religious Lands Use and Institutionalized Persons Act in order to uphold the act from an Establishment Clause challenge.[64] Even more explicitly, in *Board of Education v. Mergens*, the Court considered the phrase "noncurriculum related" in the Equal Access Act of 1984 in light of its "broad legislative purpose" to "address perceived widespread discrimination against religious speech in public schools."[65]

Despite these precedents, the law remains uncertain regarding whether an intent-based inquiry could be used to strike down a law requiring religious

---

57 *Id.*
58 *Id.* (internal quotation marks omitted).
59 *See id.* at 3001 (Alito, J., dissenting).
60 *See id.* at 3000.
61 *Id.*
62 *See* 545 U.S. 844, 850 (2005).
63 *See id.* at 863–66.
64 *See* Cutter v. Wilkinson, 544 U.S. 709, 714–17 (2005).
65 496 U.S. 226, 238–39 (1990) (internal quotation mark omitted).

officials to not discriminate on the basis of sexual orientation in solemnizing civil marriages. *Martinez* was the most recent of these cases to be decided and is very similar in nature to the hypothetical at issue here. Moreover, the intent of a statute barring discrimination on the basis of sexual orientation is likely to be found to be just that: the protection of same-sex couples from discrimination.

The *Smith* test therefore provides little protection for religious objectors disobeying antidiscrimination laws designed to protect same-sex couples.[66] For example, in *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, a lesbian woman seeking intrauterine insemination to become pregnant filed suit under California's Unruh Civil Rights Act against two doctors who refused to administer the treatment to her on the basis of their religious objection to her sexual orientation.[67] The California Supreme Court held that the Unruh Civil Rights Act, which protects same-sex couples from discrimination, was a neutral law of general applicability.[68] Thus, the doctors could not violate this statute by claiming a First Amendment free exercise exemption.[69] If this case is any indication, any inquiry into the intent of a law prohibiting discrimination against same-sex couples in the solemnization of civil marriage is unlikely to change the analysis of these laws as neutral and of general applicability.

However, should a court find that the law is not neutral or of general applicability, a litigant must then demonstrate that the law cannot survive strict scrutiny—that the law serves no compelling governmental interest or that it is not narrowly tailored.[70] The law could also be subject to strict scrutiny if it were enacted in a state that had its own state version of the federal Religious Freedom Restoration Act[71] or a state constitutional provision that provides greater protection for religious liberty than the federal Free Exercise Clause.[72] Nevertheless, a state's interest in protecting its citizens from discrimination is a

---

66 *See* East, *supra* note 43, at 286–87.

67 *See* 189 P.3d 959, 964 (Cal. 2008).

68 *Id.* at 966; *accord* Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 68, 309 P.3d 53 (holding that the New Mexico Human Rights Act, which prohibits discrimination against customers on the basis of sexual orientation, is a neutral law of general applicability).

69 *See N. Coast Women's Care*, 189 P.3d at 966–67.

70 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

71 *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010); Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013).

72 *See, e.g.*, W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2012) (analyzing the states that retain a strict scrutiny requirement post-*Smith*).

compelling governmental interest.[73] Therefore, the argument would come to rest on whether the law is narrowly tailored. The question then becomes whether it is necessary to curtail the conscience rights of a small group of religious individuals when there are many other licensed individuals, religious and nonreligious, who would be willing to solemnize the marriages of same-sex couples.

On this point, several commentators argue that to protect same-sex couples while simultaneously accommodating religious objectors, the law should evaluate the burdens imposed by such an objection.[74] If the burden imposed upon a same-sex couple by a religious objector is too great, they argue, then the same-sex couple's need would trump the religious official's objection, thus stripping him of his protection.[75] This would likely occur in circumstances where there is only one church within a large geographic area with no justice of the peace to substitute. While these instances might be rare, they are more likely to occur in less populous areas or, ironically, in communities with smaller gay or lesbian populations.[76] In more populous areas, where gay and lesbian couples could likely readily find able and willing substitute officiates, an analysis of the relative burdens would therefore likely protect the religious objector.[77]

Additionally, in *Church of the Lukumi Babalu Aye*, the Supreme Court struck down an ordinance forbidding certain religious animal sacrifices in part because the ordinances "proscribe[d] more religious conduct than [was] necessary to achieve their stated ends."[78] Thus, because same-sex couples could always avail themselves of the self-help measure of seeking a nonobjecting licensed official to solemnize their marriages,[79] a marriage

---

[73] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . .").

[74] *See, e.g.*, Laycock, *supra* note 8, at 198; *see also* ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 150 (2010).

[75] *See* Laycock, *supra* note 8, at 197–98.

[76] *See* Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 8, at 77, 97–100. This analysis assumes (problematically) that the burden imposed on a morally objecting religious official is not different *in kind* from the burden imposed on same-sex couples.

[77] *Cf.* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330–33 (2007) (discussing the "proportionality" element of the narrow tailoring prong of strict scrutiny).

[78] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

[79] *Cf.* Ashcroft v. ACLU, 542 U.S. 656, 667 (2004) (finding the Child Online Protection Act to not be the least restrictive means and thus unconstitutional because of the existence of private filtering software); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 807 (2000) (striking down a similar law for similar reasons); Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional*

antidiscrimination law would likewise proscribe more religious conduct than necessary to achieve its ends.[80] For these reasons, should the law be found to be nonneutral or nongenerally applicable, it would likely not survive strict scrutiny.

Nevertheless, a law requiring all individuals to administer their marriage licenses in a nondiscriminatory fashion would most likely be found neutral and of general applicability. Therefore, a state, consistent with the Free Exercise Clause as currently interpreted, could require its licensed religious officials to administer their licenses in a nondiscriminatory fashion to other-sex and same-sex parties.

This point is not without controversy. Many authors dismiss such a claim outright.[81] Distinguished law and religion scholars Ira Lupu and Robert Tuttle also argue that this conclusion is incorrect.[82] While they acknowledge that a government could, by "impos[ing] a condition on its grant of the authority to solemnize marriages," create such a law "in a constitutionally defensible way,"[83] Lupu and Tuttle go on to say that "[t]he idea that clergy are agents of the state, authorized to solemnize civil marriage, and therefore subject to considerable state control, is deeply inconsistent with a core aspect of religious liberty."[84] Specifically, Lupu and Tuttle argue that cases such as *McDaniel v. Paty*,[85] *Locke v. Davey*, and *Hosanna-Tabor*[86] stand for the proposition that "full religious liberty cannot co-exist with state control over the clergy."[87]

---

*Jurisprudence*, 87 MINN. L. REV. 743, 762 (2003) (discussing the impact of the availability of private self-help measures on whether laws are narrowly tailored).

80 The goal of such a statute could not be to end all forms of private discrimination against same-sex couples. *See infra* note 123 (discussing the state action doctrine). Thus, because a licensed religious official is not a state actor (see Part III), the religious official's conduct would either fall outside the scope of the statute's stated ends entirely or, at minimum, be proscribed more than necessary due to available self-help measures, as discussed above. *Cf.* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2423 (1996) ("If the law doesn't actually advance the interest, then not having the law at all would be a less restrictive but equally effective alternative.").

81 *See, e.g.*, Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J. C.R. & C.L. 123, 152 (2012) ("A state cannot, consistent with the First Amendment, require . . . priests to solemnize . . . marriages at odds with their own traditions."); Bold, Jr., *supra* note 11, at 199; *cf.* Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 977 (2007) (discussing the potential issues surrounding the licensing of religious officials to solemnize civil marriage).

82 *See* Lupu & Tuttle, *supra* note 36, at 283.

83 *Id.* at 282.

84 *Id.* at 284.

85 *See infra* Part III.

86 *See infra* Part IV.

87 Lupu & Tuttle, *supra* note 36, at 284.

Moreover, they argue, "the First Amendment diffuses and separates powers, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent."[88] "State interference with these forms of selectivity," they conclude, "cannot possibly be consistent with the free exercise of religion."[89]

Lupu and Tuttle may ultimately be correct. But their analysis neglects the reality of *Smith*. As demonstrated above, the Free Exercise Clause, as interpreted in *Smith*, allows a state to burden the religious liberty of its citizens with neutral laws of general applicability.[90] Lupu and Tuttle appear instead to be arguing for an exception to *Smith* based on more corporate free exercise and associational rights, found outside the Free Exercise Clause.[91] These larger, corporate free exercise rights will thus play a crucial role in the solution section of this Comment and are addressed in Part IV.

Because a law requiring all individuals to administer their licenses to marry in a nondiscriminatory fashion would likely be found to be neutral and of general applicability, the Free Exercise Clause provides no exemption for religious objectors to the law. As a result, protections for religious objectors must come from outside the First Amendment Free Exercise Clause. These protections include not only state and federal statutory exemptions, but judicially crafted exemptions, such as the ministerial exception[92] and the expressive association doctrine.[93] These protections are explored in Part IV of this Comment.[94]

But perhaps the more complex and troublesome First Amendment issue relating to licensing religious officials is whether these regimes have created an impermissible establishment of religion. How can we abide religious officials being able to withhold legal rights from other citizens? Is this not the law operating according to a certain faith? To answer these questions, this Comment addresses in Part III this Establishment Clause question before

---

88 *Id.* at 285 (citing Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998)).

89 *Id.*

90 *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

91 The authors point to another means of protecting the free exercise rights of licensed religious officials, namely the expressive association doctrine, which is discussed in Part IV. *See* Lupu & Tuttle, *supra* note 36, at 285–86.

92 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 714–15 (2012).

93 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

94 The issue of whether a targeted statutory exemption for religion constitutes an establishment of religion will also be addressed in Part IV.

turning to solutions to both the Free Exercise and Establishment Clause issues in Part IV.

## III. AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION

As intimated above, there appears to be a First Amendment Establishment Clause problem in allowing marital status and attendant rights to be meted out by religious officials according to their personal religious beliefs. Why are religious officials able to wield this civil power and withhold it from some citizens according to their private faiths? Before diving into whether this practice violates the Establishment Clause, it will be useful to begin with a brief survey of what the Establishment Clause prohibits and how its interpretation has changed over time. After this brief survey, Part III addresses two theories of how the practice of licensing religious officials to solemnize civil marriage may be considered an establishment of religion—one based on the state action doctrine and another on an impermissible delegation of governmental authority. Part III concludes with a discussion of perhaps the strongest argument *against* religious solemnization of civil marriage as an establishment of religion—that of the historical practice exemption to a violation of the Establishment Clause.

### *A. The Establishment Clause: A Brief Survey*

Throughout its history of interpreting the Establishment Clause, the Supreme Court has developed several unique and contrasting approaches.[95] First, there is the "separationist" approach. This approach emphasizes the need to protect government and religious affairs from unduly influencing or relying on one another for support, adherence, or financial stability.[96] First appearing in the 1947 decision, *Everson v. Board of Education*,[97] which incorporated the Establishment Clause into the Fourteenth Amendment Due Process Clause,[98] this separationist line of cases has been used most ardently in cases forbidding the use of religious officials, ceremonies, and symbols in public schools,[99] and those preventing taxpayer support of religious organizations.[100]

---

[95] *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 173 (3d ed. 2011).

[96] *See id.* at 174.

[97] 330 U.S. 1 (1947).

[98] *See* WITTE & NICHOLS, *supra* note 95, at 175.

[99] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

[100] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970).

In contrast, an "accommodationist" approach emerged before *Everson* in a 1952 case upholding the constitutionality of time-release programs for religious students of public schools to attend religious services.[101] "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion," Justice Douglas wrote.[102] Accommodation logic thus argues for equal treatment of religion as opposed to complete ostracism from government affairs.[103] Most prominently until the 1970s, this accommodationist line of cases allowed for numerous avenues of government support for private religious schools.[104]

However, beginning in the 1960s, the Supreme Court sought to find a new middle-ground analysis in the form of a "neutrality" approach to the Establishment Clause.[105] A three-prong test thus emerged in 1971 in the case of *Lemon v. Kurtzman* to strike down a state policy of reimbursing religious schools for some of the costs of teaching required secular courses.[106] For a challenged law to be constitutional under this new *Lemon* test, the law must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not "foster an excessive . . . entanglement" between church and state.[107] Yet the *Lemon* test remains inconsistently applied, if at all.[108]

In the wake of this inconsistency, numerous other approaches to the Establishment Clause have emerged. Tests such as "endorsement," "coercion," "equal treatment," or "strict neutrality" have each been favored by a particular Justice or Court at one time or another.[109] Similarly, the Court has at times used a wild card "history" or "tradition" approach to Establishment Clause cases.[110] This wild card historical test, as mentioned above, is evaluated below in section D.

Clearly, these Establishment Clause cases are often in tension with one another. And though the Establishment Clause prohibits such practices as

---

101 *See* Zorach v. Clauson, 343 U.S. 306, 315 (1952).
102 *Id.* at 314.
103 *See* WITTE & NICHOLS, *supra* note 95, at 177.
104 *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766–67 (1976).
105 *See* WITTE & NICHOLS, *supra* note 95, at 177.
106 *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).
107 *Id.* at 612–13 (internal quotation mark omitted).
108 *See* WITTE & NICHOLS, *supra* note 95, at 180.
109 *See id.* at 180–86.
110 *See id.* at 185–86.

mandatory morning Bible readings in public school,[111] prayers offered at middle school graduations[112] or at football games,[113] public displays of religious symbols in county courthouses,[114] and education policies that overwhelmingly benefit private religious schools,[115] it is not immediately clear how the Establishment Clause ought to apply to the religious official licensed to solemnize civil marriage.

For example, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Supreme Court held that the Establishment Clause did not forbid a legislature from allowing religious groups the right to only hire members of their own faith, for religious or secular jobs.[116] In *Hosanna-Tabor v. EEOC*, the Court upheld the right of a religious education licensee to engage in religious discrimination.[117] Thus, when a religious organization is operating within its own affairs, it can sometimes discriminate on at least religious grounds. However, as cases like *Hosanna-Tabor* and *Martinez* make clear, what looks like discrimination on religious grounds to a religious organization may look like disability or sexual orientation discrimination to others.[118]

In contrast to cases featuring religious groups operating within their own affairs, religious groups are not permitted to discriminate on religious grounds when they are operating with state funding or performing governmental functions.[119] Thus, faith-based initiatives that receive government money may not discriminate on religious grounds against recipients of that money.[120] Likewise, a state may not delegate its governmental functions to be carried out by a religious organization.[121] For example, in *Larkin v. Grendel's Den*, the Supreme Court struck down as unconstitutional a state law that allowed

---

111 *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

112 *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).

113 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).

114 *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881 (2005); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989).

115 *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

116 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987).

117 *See infra* Part IV.

118 *See supra* notes 55, 92.

119 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982); Bradfield v. Roberts, 175 U.S. 291, 298–99 (1899).

120 *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 798 (2000) (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)) (inquiring as to whether a program "defines its recipients by reference to religion").

121 *See Larkin*, 459 U.S. at 127.

churches to veto applications for liquor licenses.[122] Other laws concerning the inspection of food and the police protection of private universities have also been struck down under this rule.[123]

Deciding whether the practice of religious officials solemnizing civil marriage is an impermissible establishment of religion thus requires one to answer questions concerning the extent to which a licensed religious official is a private or state actor, and whether states have improperly delegated their governmental functions to private religious officials. These questions are addressed in the sections below.

Section B argues that because licensed religious officials are not state actors, they do not violate the Establishment Clause when they discriminate in the solemnization of civil marriages on the basis of religion. Section B also argues that the extension of a license to solemnize civil marriage by the state does not constitute such a substantial benefit to religious officials so as to justify the prohibition of religious discrimination in its administration. However, section C argues that states *have violated* the Establishment Clause by impermissibly delegating their governmental functions to private religious officials so as to create an impermissible "fusion" of governmental and religious functions. Section D then argues that this Establishment Clause violation is unlikely to fall within the historical or cultural practice exemption to the Establishment Clause introduced above.

### *B. A Licensed Religious Official Is Not a State Actor*

A licensed religious official would be bound by the Constitution and the Establishment Clause only if that official were also a state actor.[124] Although the state action doctrine is at times unclear and incoherent,[125] the religious

---

122 *See id.*

123 *See* Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 432 (2d Cir. 2002) (striking down a portion of New York's kosher fraud laws); State v. Pendleton, 451 S.E.2d 274, 278 (N.C. 1994) (finding that "the State of North Carolina delegated its police power to [a private religious institution]" in violation of the Establishment Clause).

124 *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("Since the decision of this Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (citation omitted)).

125 *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1985).

official licensed to solemnize civil marriage is certainly not a state actor.[126] As *Moose Lodge No. 107 v. Irvis* makes clear, the mere licensure of an individual or an organization does not make that private individual or organization a state actor.[127] Thus, it is no violation of the Establishment Clause for such a licensed religious official to discriminate in the administration of his or her license according to the dictates of his or her faith.

This stands in some tension with cases that inquire into the existence of religious discrimination practiced by faith-based nonprofits that receive government funding or other benefits,[128] and also with cases that examine whether a private actor performs a function that is "traditionally the exclusive prerogative of the State."[129] Nevertheless, these tensions can be reconciled.

To begin, as discussed above, marriage is not an exclusive prerogative of the state.[130] Because marriage is not the exclusive prerogative of the state, the licensed religious official is not converted into a state actor.

Yet an argument could be made that because religious officials who solemnize civil marriage receive customary payments from the couples that receive their services, these payments are a form of government funding, and therefore religious officials should not be permitted to discriminate on religious grounds in the exercise of their governmentally funded activity. Such customary payments to the religious officiate, however, are virtually identical to the system of private vouchers redeemed at religious schools upheld in *Zelman v. Simmons-Harris*.[131] In *Zelman*, a group of Ohio taxpayers brought an Establishment Clause challenge against an Ohio program of tuition assistance that led to 96% of those receiving the assistance enrolling in religious schools.[132] Despite this statistic, the Supreme Court upheld the program, finding that it was a neutral program of "true private choice."[133] The

---

126 *See* Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 8, at 1, 20.

127 *See* 407 U.S. 163, 176–77 (1972) (holding that a private club did not become a state actor as a result of its license to serve alcohol).

128 *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 757–58 (1976); Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson, 403 U.S. 672, 683 (1971).

129 *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (italics removed) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)) (internal quotation marks omitted) (citing Blum v. Yaretsky, 457 U.S. 991, 1011 (1982)).

130 *See* Bold, *supra* note 11, at 185.

131 *See* 536 U.S. 639, 662–63 (2002).

132 *Id.* at 658.

133 *Id.* at 662.

Court thus affirmed a line of cases that found such neutral programs of private choice immune from an Establishment Clause challenge.[134]

Virtually the same system is at play here, where the licensed religious official is compensated for his or her services as wedding officiate. Because such state licensing statutes are neutral with regard to religion,[135] any payments to a solemnizing religious officiate is the result of true private choice. Consequently, such customary payments to the licensed religious official do not constitute government funding, nor do they change the Establishment Clause analysis.

Furthermore, religious discrimination by a religious entity only becomes problematic when a certain threshold benefit is extended. The licensing of religious officials to solemnize civil marriage does not cross this benefit threshold. This can be seen best by juxtaposing various decisions forbidding or allowing religious discrimination by religious entities depending on the individual context. For instance, government aid to religious social services or schools clearly triggers an inquiry into the existence of religious discrimination on the part of the religious recipient.[136] Likewise, a religious group seeking recognition and access to school resources on a public law-school campus was not permitted to discriminate on religious grounds.[137] Yet, as noted above in *Presiding Bishop v. Amos*[138] and *Hosanna-Tabor*,[139] schools and churches have been permitted to engage in religious discrimination despite the benefits of incorporation and teaching licenses extended by the state.[140]

Thus, the benefit of a license to solemnize civil marriage does not cross this "benefit threshold" because such a license is more akin to the legal ability to incorporate or teach than it is to the benefit of government tax dollars or private university resources. For example, the legal recognition given to a religiously solemnized marriage ceremony is like the legal recognition given to the preexisting constitutional rights of religious entities to organize,

---

134 *Id.* at 662–63.

135 *See supra* Part I.

136 *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 797–98 (2000) (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)) (inquiring as to whether a program "defines its recipients by reference to religion").

137 *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2994–95 (2010).

138 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).

139 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706–09 (2012).

140 *See, e.g.*, DURHAM & SMITH, *supra* note 72, § 4:1 (detailing the need for religious organizations to incorporate).

incorporate, and educate their children.[141] The issue is not whether religious groups have a constitutional right to give legal effect to their marriage ceremonies, but that the legal recognition of those ceremonies does not further augment the abilities of those communities to have private wedding ceremonies, which they are already capable of doing under the First Amendment.[142] Government aid or school resources, in contrast, enable religious organizations to operate in ways that they otherwise would not be able. Furthermore, unlike government aid, which raises the possibility of coerced support of religious practices,[143] a religious official licensed to solemnize civil marriage coerces no one in solemnizing the marriages of only those couples that choose that official. Therefore, because the religious official and community gain no benefit other than mere legal recognition, a license to solemnize civil marriage does not constitute such a substantial benefit so as to warrant a prohibition on its religiously discriminatory application.

### *C. An Impermissible Delegation of Governmental Authority*

Even if a licensed religious official is not a state actor, or a license does not constitute such a substantial benefit so as to justify a prohibition on religious discrimination, another wholly distinct Establishment Clause issue may be asserted against the licensed religious official; this theory may be called the "Impermissible Delegation Doctrine." Specifically, as mentioned above, the Establishment Clause has been read to forbid certain delegations of civil authority and discretion to religious institutions.[144]

For example, in *Larkin v. Grendel's Den*, a Massachusetts law allowing churches to veto applications for a liquor license within five hundred feet of church property was found to be an impermissible establishment of religion.[145]

---

[141] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (recognizing the rights of parents to send their children to religious private schools).

[142] *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. 694, 707 (2012) (recognizing the limits of government interference with internal church doctrine and practices).

[143] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . .").

[144] *See* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, Stevens & O'Connor, JJ., concurring) ("We have believed that . . . a government cannot endure when there is fusion between religion and the political regime."); *see also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 709–10 (1994) (striking down a school district created along religious lines); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982); Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 432 (2d Cir. 2002) (striking down a portion of New York's kosher fraud laws); State v. Pendleton, 451 S.E.2d 274, 278 (N.C. 1994); State *ex rel.* Heitkamp v. Family Life Servs., Inc., 2000 ND 166, ¶ 36, 616 N.W.2d 826, 839.

[145] *See Larkin*, 459 U.S. at 127.

In striking down the law, the Supreme Court found that the law "enmeshe[d] churches in the exercise of substantial governmental powers contrary to . . . the Establishment Clause."[146] Additionally, the Court was concerned that the statute could provide "a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[147] Moreover, "the core rationale underlying the Establishment Clause," the Court wrote, "is preventing 'a fusion of governmental and religious functions.'"[148] According to the Court, the Framers thus did not intend a "government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[149]

Is the authority to marry similar to the authority to veto applications for a liquor license? Arguably, the burdens imposed by a denial of marital status, with its denial of marital benefits and stigma of discrimination, is more of a burden than the business lost from a denied liquor license. But perhaps these cases are distinguishable: churches in *Larkin* held absolute veto power;[150] in contrast, objecting religious officials are the exception to the rule—they hold no veto power. Also, *Larkin* entailed the delegation of pure governmental power[151]: the discretion to make zoning decisions. Marriage, on the other hand, is not a pure and unequivocal government power. Is this distinction enough to avoid the dictum in *Larkin*?

As noted above, other cases have used this "fusion" rationale to strike down laws concerning the regulation of fraudulent Kosher food,[152] the creation of a school district along religious lines,[153] a court order allowing a corporation and its ministerial association to select a new board of directors,[154] and a religious university's use of state police power.[155] Perhaps most notably, however, this prohibition on fusions of governmental and religious functions

146 *Id.* at 126.
147 *Id.* at 125–26.
148 *Id.* at 126–27 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).
149 *Id.* at 127.
150 *Id.* (stating that the law at issue gave the church "unilateral and absolute power").
151 *Id.* at 122 ("This is a power ordinarily vested in agencies of government.").
152 *See* Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 432 (2d Cir. 2002).
153 *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696–97 (1994).
154 *See* State *ex rel.* Heitkamp v. Family Life Servs., Inc., 2000 ND 166, 616 N.W.2d 826.
155 *See* State v. Pendleton, 451 S.E.2d 274 (N.C. 1994).

was used in *Lee v. Weisman* to help strike down a public school's practice of offering nonsectarian prayers at graduation ceremonies.[156]

*Larkin* and its progeny thus invite an examination of when and where a "fusion of governmental and religious functions" occurs. To be sure, marriage entails both governmental and religious functions. For example, on the one hand, the Massachusetts and Iowa Supreme Courts describe their decisions recognizing same-sex marriage as relating only to "civil marriage"—marriage created and maintained by the state.[157] On the other hand, those faiths apt to object to solemnizing same-sex marriages believe marriage is a covenant before God and man, or a sacrament symbolizing God's relationship with man.[158]

Are these two functions "fused" when a religious official solemnizes the marriage of two individuals in his or her congregation? Arguably yes—that is, if the religious official purports to be enacting civil and religious authority with the same breath at the pronouncement of marriage. This seems to be what religious officials in fact do when they proclaim, at the culmination of their religious ceremony, "By the power vested in me by the state of *X*, I now pronounce you husband and wife." And what is a fusion of governmental and religious functions if not a single proclamation by one individual that accomplishes both civil and spiritual marriage?

As this analysis makes clear, even though marriage is not an unequivocal sole governmental power, like the authority to make zoning decisions, what authority the state does have over marriage is fused with the authority of a religious community in the same ceremony. This fusion thus violates the Establishment Clause of the First Amendment.

This, however, does not end the establishment inquiry. As mentioned previously, in a long line of establishment cases, the Supreme Court has held that certain longstanding and culturally significant religious displays in public do not violate the Establishment Clause. In the next section, however, this

---

156 *See* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, Stevens & O'Connor, JJ., concurring) ("We have believed that . . . a government cannot endure when there is fusion between religion and the political regime.").

157 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) ("We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage."); *see also* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (stating that "*civil* marriage will now take on a new meaning").

158 *See, e.g.*, John Witte, Jr. & Joel A. Nichols, *More Than a Mere Contract: Marriage as a Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595, 606–11 (2008).

Comment argues that this historical practice exception cannot be relied on to pardon this otherwise impermissible fusion of governmental and religious functions.

### *D. The Historical Practice Inquiry*

The Supreme Court has held that certain cultural and historical practices of state and federal government entities that appear to contain religious elements do not violate the Establishment Clause.[159] For example, in *Lynch v. Donnelly*, the Supreme Court upheld a Rhode Island government display of a manger scene while observing that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life."[160] The Court found that the manger scene took on a secular civic purpose having become a part of the fabric of society.[161] Similarly, in upholding a state practice of funding a chaplain to open its legislative sessions in prayer, the Court wrote, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[162] Moreover, in upholding a public display of the Decalogue, the Court wrote that the Decalogue had become part of "America's heritage."[163] These precedents therefore provide a possible Establishment Clause escape route for the otherwise impermissible fusion of governmental and religious functions discussed above.

Unfortunately, the Supreme Court in this area has charted a jagged and uncertain course in deciding what government displays of religion are permissible.[164] Contributing to this uncertainty is the fact-intensive and context-specific nature of the inquiry.[165] That being said, several rules of thumb can be gleaned from Court precedent to help determine whether the solemnization of marriages by religious officials is an establishment of religion.[166]

---

159 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

160 *Id.* at 674.

161 *See id.* at 680–86.

162 Marsh v. Chambers, 463 U.S. 783, 792 (1983).

163 *See* Van Orden v. Perry, 545 U.S. 677, 689 (2005) (plurality opinion).

164 *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989) (holding that a similar manger scene was a violation of the Establishment Clause).

165 *See id.* at 621 n.70.

166 These four rules of thumb are borrowed from WITTE & NICHOLS, *supra* note 95, at 234–36.

First, older displays and practices are more likely to be permissible displays of religion than newer displays and practices.[167] This principle when applied to the solemnization of marriages by religious officials seems to overwhelmingly weigh against a finding of an establishment of religion. As discussed in Part I, religious officials have been solemnizing marriages since the colonial period. The first colony began licensing clergy to solemnize weddings in 1694.[168] Moreover, the ubiquitous role of religious officials in marriage ceremonies today seems to fit perfectly within the scope of those practices that have become part of the civic fabric of society.[169]

But perhaps this timeframe that encompasses the colonial period proves too much. Norms, societal attitudes, and the law itself have changed drastically in recent times on the subject of marriage.[170] How then can what was commonplace in colonial times continue to justify the status quo concerning marriage today? Nevertheless, the longstanding historical practice of religious solemnization of civil marriage may be the strongest argument against a finding of an establishment of religion.

Second, the characterization of the establishment symbol or practice in question is crucial.[171] This inquiry clearly weighs in favor of a finding of establishment. The question here is how one characterizes the traditional wedding ceremony solemnized by a religious official. Given the presence of the religious official, the (typical) church venue, the recitation of prayers, and the exchanging of vows, there seems no other conclusion than that it is a religious ceremony. A court could strain, if it wished, to find elements that favor the secular character of a typical wedding ceremony, but that would likely prove unconvincing since the ceremony's secular nature is certainly matched by its spiritual nature.

---

[167] *See id.* at 235 ("Older religious displays and practices were at issue in *McGowan*, *Marsh*, *Lynch*, *Van Orden*, *Pleasant Grove*, and *Buono*, and the government won each time. Newer displays were at issue in *Stone*, *Allegheny*, and *McCreary*, and the government lost each time.").

[168] *See* GROSSBERG, *supra* note 22, at 76.

[169] *See supra* notes 137–39 and accompanying text.

[170] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (finding that a Virginia ban on interracial marriages violated the Fourteenth Amendment); *cf.* Lawrence v. Texas, 539 U.S. 558, 563 (2003) (finding that a Texas criminal statute prohibiting "deviate sexual intercourse with another individual of the same sex" violated the Fourteenth Amendment).

[171] *See* WITTE & NICHOLS, *supra* note 95, at 235 ("*Stone* and *McCreary* characterized the Decalogue as a religious symbol and struck it down; *Van Orden* and *Pleasant Grove* characterized it as an historical marker and let it stand.").

Third, government displays of religion that take place on private property fare better than displays of religion on government property.[172] Because a wedding ceremony typically takes place on private property, one might think that the third factor weighs against a finding of establishment. Here, paradoxically, the fact that this government delegation of authority takes place overwhelmingly within the walls of churches would favor a finding of establishment. The reason for the reversal is evident when considering the nature of the symbol or practice in relation to its proper location: religious symbols most naturally belong on private property, whereas government authority most naturally should be exercised from within government agencies.

Finally, the fourth factor is "whether the religious symbol or practice is offset by secular symbols or practices."[173] Here, there do not appear to be many secular symbols or practices to offset the religious nature of the ceremony. The fourth factor therefore likely weighs in favor of a finding of an establishment of religion or is a neutral factor at best.

Altogether, the uncertainty of this line of cases[174] and these four rules of thumb make clear that the "government display of religion" line of cases provides no safe haven for the practice of religious solemnization of civil marriage. The longstanding historical and cultural nature of the religious official's role in marriage ceremonies makes for a compelling argument that it should not now be found to be an establishment of religion. Yet there is also the definite possibility a court could understand the radical new changes in marriage laws and norms to require a new understanding of the traditional role of religion in marriage.

Thus, despite the possibility of a historical exception, governmental and religious functions are indeed fused, in violation of the Establishment Clause, at the solemnization of a civil marriage by a licensed religious official. This therefore constitutes an impermissible delegation of government authority to religion.

This, however, does not mean that the nuptial world as we know it is ending; as Part IV demonstrates, narrow time, place, and manner regulations

---

[172] *See id.* at 236 ("Government-sponsored displays on private property, as in *Lynch*, get more deference than private displays on government property, as in *Stone* and *Allegheny*.").

[173] *Id.*

[174] *See id.* at 237 ("Even a sympathetic reader of the Court's modern establishment law is tempted to apply to it the definition that Oliver Wendell Holmes Jr. once applied to the common law: 'chaos with an index.'").

are all that are required to cure this impermissible establishment of religion. These measures will not require religious officials to be stripped of their licenses nor require officials to abandon their historical role in the solemnization of civil marriages. In turning to solutions to these constitutional problems, however, Part IV begins by first setting forth solutions to the free exercise problem discussed previously. Part IV then details the time, place, and manner regulations needed to remedy the Establishment Clause violation just described.

## IV. TOWARD THE PROTECTION OF A ROBUST RELIGIOUS LIBERTY

### *A. The Free Exercise Problem*

As discussed in Part II, a state may, consistent with the Free Exercise Clause, require its religious officials licensed to solemnize civil marriage to administer their licenses in a way that violates the dictates of their faiths.[175] Though this may be yet another unintended consequence of *Smith*, barring its death, any protection for religious officials must come from within its framework. These protections can therefore take two forms. First, Congress or the states can pass statutory exemptions explicitly protecting religious officials' right to refuse to marry same-sex couples. Second, should Congress or state legislatures fail to pass statutory protections, religious communities will be able to avail themselves of judicially crafted remedies.

#### *1. Statutory Remedies*

The most apt remedy to this problem is the one already enacted in almost every state that has recognized same-sex marriage: a state statutory exemption protecting the right of religious officials to refuse to solemnize marriages against their conscience. But such legislative exemptions are not without controversy and are often subject to heated debate.[176] As noted above, these exemptions are conspicuously absent in a few states.[177] Moreover, if a state were to pass marriage solemnization antidiscrimination laws, it may not be inclined to pass such statutory protections. And while most states have already passed such conscience-protection statutes, the variances in coverage could

---

175 *See supra* Part II.

176 *See* Frank Gulino, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty*, N.Y. ST. B.J., Jan. 2012, at 38 (outlining the compromise and debate over New York's conscience exemption to its same-sex marriage laws).

177 *See, e.g.*, MASS. GEN. LAWS ch. 207, § 38 (2012); *see also* IOWA CODE § 595.10 (2014).

potentially lead to divergent interpretations by state courts.[178] Therefore, the most expedient and comprehensive remedy available for religious communities is a federal conscience exemption.[179]

Federal legislation aimed at protecting the right of religious officials to refuse to marry same-sex couples should therefore include the following: (1) a conscience clause protecting a religious official's refusal according to his faith to solemnize same-sex marriages, (2) a clause disallowing any civil or criminal liability for such a refusal, and (3) a clause protecting the tax-exempt status of these refusing religious communities. These exemptions would prove comprehensive in protecting religious officials and their communities of faith.

Additionally, these statutory exemptions raise no Establishment Clause concerns. In a long line of cases, most recently again affirmed in *Cutter v. Wilkinson*, the Supreme Court has recognized that targeted exemptions for the free exercise of religious adherents do not fall within the prohibition of the Establishment Clause.[180] These protections would therefore be immune from an assault on their constitutionality.

### *2. Judicial Remedies*

If Congress or state legislatures are unable or unwilling to pass statutory conscience protections for religious officials, religious litigants will be able to avail themselves of two judicially crafted exemptions, one of which comes from outside the Free Exercise Clause. The first is the expanded ministerial exception as laid down in *Hosanna-Tabor*.[181] The second is the expressive association doctrine recognized in *Boy Scouts of America v. Dale.*[182]

#### *a. An Expanded Ministerial Exception*

The ministerial exception had long been recognized by U.S. courts of appeals as an exception for religious institutions' employment relationships with their ministers[183] before being adopted by the Supreme Court in *Hosanna-*

---

178 *See* Wilson, *supra* note 36, at 1509–11 (comparing statutory exemptions for clergy in several states).

179 Whether such a federal conscience exemption would violate the Tenth Amendment's federalism protections is beyond the scope of this Comment.

180 *See* Cutter v. Wilkinson, 544 U.S. 709, 724 (2005).

181 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

182 530 U.S. 640, 644 (2000).

183 *See Hosanna-Tabor*, 132 S. Ct. at 705 & n.2.

*Tabor*.[184] In *Hosanna-Tabor*, the Court held that the ministerial exception applied to a church that had fired one of its "called teachers" when that teacher had filed a claim under the ADA against the church.[185] Thus, what would have otherwise been retaliation was protected conduct under the ministerial exception.[186]

Interestingly, the Court did not contest the fact that the ADA's prohibition on retaliation was a neutral law of general applicability.[187] Yet the Court distinguished *Smith* from this case by pointing out that *Smith* involved regulation of "only outward physical acts" of the religious.[188] "The present case, in contrast," the Court wrote, "concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit."[189]

The *Hosanna-Tabor* decision is paradoxically both frighteningly open-ended and narrow. The holding by its very words is limited to the decision by a church to fire a minister who had brought an employment discrimination suit against the church.[190] But the Court in the next sentence states that it "express[es] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[191]

Therefore, it appears as though the ministerial exception could be broadened to cover a religious official who objected to a law that would require the official to violate his or her conscience in solemnizing a same-sex marriage. To do so, the ministerial exception would first have to be broadened to cover not just the ability of a church to control who its ministers are. But certainly, whose marriages a minister solemnizes, with the spiritual authority and duty that a minister carries, is "an internal church decision that affects the faith and mission of the church itself."[192] And if "[t]he church must be free to

184 *See id.* at 706.
185 *Id.* at 706–07.
186 *Id.* at 706–09.
187 *Id.* at 707.
188 *Id.*
189 *Id.* (citation omitted).
190 *Id.* at 710.
191 *Id.*
192 *Id.* at 707.

choose those who will guide it on its way,"[193] then the church should also be free to choose upon whose marriages it will extend its spiritual blessing. Thus, there is some chance that the ministerial exception could be expanded to cover decisions by churches concerning whose marriages a minister may, as the church's representative and faith leader, solemnize or bless.

This expansion of the ministerial exception would not be unprecedented. The Court itself in the *Hosanna-Tabor* decision, before adopting the ministerial exception, detailed prior precedents relating to government interference with internal church decisions to support the ministerial exception's grounding within the First Amendment.[194] The Court cited *Watson v. Jones*,[195] in which the Court "declined to question" the determination of the General Assembly of the Presbyterian Church that the antislavery faction of one of its churches controlled the property of that church's location.[196] The Court in that case wrote that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[197]

Cited next is *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, in which the Court held that a New York law that required the Russian Orthodox Church in New York to recognize a decision of its North American governing body violated the Free Exercise Clause.[198] In the third and final case cited, the Court held that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."[199] "When ecclesiastical tribunals decide such disputes," the *Hosanna-Tabor* Court observed, "'the Constitution requires that civil courts accept their decisions as binding upon them.'"[200]

These cases provide a larger context for the ministerial exception and demonstrate that the Court recognizes that the Free Exercise Clause protects

---

193 *Id.* at 710.
194 *Id.* at 704–05.
195 80 U.S. (13 Wall.) 679 (1871).
196 *See Hosanna-Tabor*, 132 S. Ct. at 704.
197 *See Watson*, 80 U.S. (13 Wall.) at 727.
198 *See* 344 U.S. 94, 120–21 (1952).
199 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976).
200 *See Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Serbian E. Orthodox Diocese*, 426 U.S. at 725).

the ability of religious institutions to make their own decisions regarding internal issues of faith.

Therefore, because the decision by a religious community to solemnize a marriage is an intimate, internal issue of faith and theology, the ministerial exception should be broadened to protect licensed religious officials and their communities. Marriage is a profoundly spiritual institution for many religious communities and their adherents. It is not entered into lightly; and for some, it is not exited easily either. If a faith is afforded the right to determine its questions of leadership and theology, it should also be afforded the right to withhold its sacrament or covenant of marriage from those whom it believes to be theologically unfit for the union. To cast the same in terms more natural to the ministerial exception, a religious community should not only be able to control who its ministers are, but to whom those ministers administer the privileges of their faith as well.

*b. The Expressive Association Doctrine*

In *Boy Scouts of America v. Dale*, the Supreme Court held that the First Amendment prevented the Boy Scouts from being forced to admit a gay scout leader into its leadership, as would be required under antidiscrimination laws.[201] The Boy Scouts, the Court held, were protected by a right of expressive association under the First Amendment.[202] A church or faith community should also be able to avail itself of this argument. Clearly, being forced to solemnize or celebrate a marriage contrary to the tenets of a religious official's faith would burden the expression of that religious official's faith as well as the faith of that official's larger religious community (since the religious official, as noted above, is a representative and leader of that community). Lupu and Tuttle put it this way: "[A] proposition crucial to religious liberty is that religions, to maintain their integrity, must and do discriminate."[203] As a result, the argument would run, religious communities should be able to protect the integrity and public expression of their faiths by availing themselves of the same expressive association protection extended in *Dale*.

---

201 530 U.S. 640, 656 (2000).
202 *Id.*
203 Lupu & Tuttle, *supra* note 35, at 285.

But at issue in *Dale* was a private, voluntary association, merely incorporated by the state as a nonprofit.[204] These religious officials, on the other hand, are recipients of state power—the license to marry. Does this put religious officials outside the protection of the expressive association doctrine?

As noted in Part III, courts have held that faith-based organizations that receive money from the federal government cannot administer their funds in such a way as to discriminate on religious grounds or unduly proselytize.[205] Likewise, commercial entities are likely not protected by a similar associational freedom.[206] But an objecting religious official, but for the extended license, would simply be a private entity; he or she receives no government money and does not operate as a commercial enterprise. Moreover, the larger religious community, in contrast to the singular licensed religious official as an individual, is virtually identical to the Boy Scouts in *Dale*: a private, voluntary association incorporated as a nonprofit.[207] Thus, the religious community as a whole may be best able to assert the expressive association doctrine to protect itself and its individual licensed religious officials.

Regardless, because a law requiring religious officials to solemnize marriages contrary to their faith would burden the expressive faith of (1) the religious official and (2) the larger religious community of which that official is a representative, courts should also extend the expressive association doctrine to protect religious officials and communities from any such laws.

### *B. "Unfusing" the Establishment Problem*

As demonstrated in Part III, when a religious official enacts both civil and spiritual marriage in a single solemnization ceremony, he or she fuses governmental and religious functions.[208] This fusion thus constitutes an impermissible establishment of religion. As discussed earlier, this is one reason why some call for the strict separation of church and state in marriage.

---

[204] *Dale*, 530 U.S. at 649.

[205] *See supra* Part III; *see also* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1605 ("Religious organizations . . . . may be pressured to become wholly secular in order to receive aid on a level playing field.").

[206] *See* Lupu & Tuttle, *supra* note 36, at 285 n.60 (citing a Minnesota case that did not grant a for-profit Christian health club the right to discriminate on the basis of religion).

[207] *See Dale*, 530 U.S. at 644.

[208] *See supra* Part III.

But what if these two functions could be teased out—that is, unfused? Consider first whether *the statute* that licenses religious officials to marry individuals fuses governmental and religious functions by its very nature. The statute does not forbid a religious official to marry a couple in a purely religious or spiritual sense. Nor does it forbid that religious official from marrying a couple in only the legal or civic sense. Could a religious official then not "marry" a couple twice? These separate ceremonies or solemnizations would thus represent the separate functions of government and religion, unfused, with respect to marriage. This separation would in effect unfuse the impermissible delegation as forbidden in *Larkin*.

A statute licensing religious officials to solemnize civil marriage is therefore akin to statutes that require the state certification of teachers to teach in religious schools. Certifying teachers to teach in religious schools does not *ipso facto* establish a religion.[209] Moreover, the Supreme Court in *McDaniel v. Paty* held that a Tennessee statute that disqualified ministers from holding elected office was an unconstitutional violation of the minister's free exercise rights.[210] The Court's brief analysis is worth quoting in full:

> Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties."[211]

In effect, in *McDaniel* the Court recognized that ministers can wear two hats at the same time—those of both a citizen and a minister.

A statute licensing a religious official may thus be naturally read to allow for a religious official to marry a couple both spiritually and legally, wearing

---

209 *See, e.g.*, Fellowship Baptist Church v. Benton, 815 F.2d 485, 500 (8th Cir. 1987) (upholding a teacher certification requirement as applicable to religious schools); *see also* Sheridan Road Baptist Church v. Dep't of Educ., 396 N.W.2d 373 (Mich. 1986); State *ex rel.* Douglas v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981).

210 *See* 435 U.S. 618, 626 (1978).

211 *Id.* (citations omitted).

the proverbial two hats yet again. Thus, the establishment problem created by states licensing religious officials to solemnize civil marriage is created not by the statute itself, but at the point of solemnization—that is, in the ceremony itself.

Thus, what is needed is not strict separation but a clearer division in the solemnization ceremony between a religious official acting in his or her spiritual capacity and in his or her publicly licensed capacity. To accomplish this, Congress or state legislatures should enact narrow time, place, and manner regulations aimed at ensuring this clear division. These time, place, and manner regulations should require that two separate ceremonies be held for all marriages solemnized by a licensed religious official. A religious official could first marry a couple spiritually,[212] and then in a second civil ceremony, held in a different location, marry the couple civilly. These regulations should also prohibit language invoking state authority in the spiritual ceremony and invocations of spiritual authority in the civil ceremony; for example, a religious official should no longer purport to marry a couple spiritually by the power vested in him or her by the state.

These regulations would not be unique in the world. In fact, these regulations would be similar to what France and England require of their marriage ceremonies. For example, France requires a ceremony celebrated by a civil authority; a religious ceremony may or may not be held afterwards.[213] Likewise, in England, there are restrictions on where weddings can take place and, in a ceremony, on what words may be used.[214]

Enacting regulations such as these would thus accomplish the necessary unfusing of governmental and religious functions to avoid an Establishment Clause violation. The religious official acts first only in his spiritual and private capacity. In this first ceremony, the religious official has carried out his or her spiritual function. Only once this spiritual power is fully exercised and finished altogether may the religious official then carry out his or her governmental function of solemnizing the couple's civil marriage as required by law. There is a clear divide between the two functions, and no words are

---

212 *See* Deuteronomy 5:7 (King James) ("Thou shalt have none other gods before me.").

213 *See* CODE CIVIL [C. CIV.] art. 165 (Fr.).

214 *See* Marriage Act, 1949, 12 & 13 Geo. 6, c. 76, § 44 (detailing the language to be used in the solemnization ceremony); Marriage Act, 1994, c. 34, § 1 (amending Marriage Act 1949 to allow for the approval of local premises for marriage solemnization).

spoken by the licensed religious official to compromise that divide. The Establishment Clause is thus satisfied.

Aside from potential political resistance, these regulations would likely face two main legal challenges, both of which are ultimately unavailing. First, it could be argued that these regulations unduly burden a religious community's free speech rights or (ironically) its free exercise rights. Second, it could be argued that these regulations foster an "excessive entanglement" between government and religion.

As to the first argument, the Supreme Court has held that valid time, place, and manner restrictions that may burden an individual's First Amendment rights are not unconstitutional.[215] As long as these restrictions were passed in such a way as to apply generally and nondiscriminatorily (similar to *Smith*'s neutral and of general applicability rule), then they are likely to be valid time, place, and manner restrictions.[216]

Moreover, even if these procedural safeguards were not found to be valid time, place, and manner regulations on public conduct, they would likely survive strict scrutiny. Under a strict scrutiny analysis, there is a threshold question of whether there is even a significant enough burden on free exercise to justify a cause of action.[217] Under these restrictions, the burdens of having two separate ceremonies, in two separate locations, while only avoiding improper invocations of authority, are likely *de minimis*.[218]

As to the second argument, these provisions do not lead to an impermissible "excessive entanglement" of government and religion. Recall that this excessive entanglement test comes from the third prong of the three-prong test articulated first in *Lemon v. Kurtzman*.[219] Specifically, the test requires that state policies do not foster "excessive entanglement between government and religion."[220]

---

215 *See* Poulos v. New Hampshire, 345 U.S. 395, 402 (1953) (upholding the "uniform, nondiscriminatory, and consistent administration of . . . licenses for public meetings"); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("[A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets . . . .").

216 *See Cantwell*, 310 U.S. at 304.

217 *See* Locke v. Davey, 540 U.S. 712, 718–19, 725 (2004) (finding the exclusion of theology majors from state scholarship funding as only a "relatively minor burden").

218 *See id.* at 725.

219 403 U.S. 602, 612–13 (1971).

220 *Id.* at 609 (internal quotation marks omitted).

To begin, it is unclear how the excessive entanglement test would be applied to these time, place, and manner regulations. *Lemon* and its progeny originally were focused on state funding of religious education.[221] Moreover, *Lemon*'s separatist logic has been walked back considerably following the Equal Treatment line of cases culminating in the Court's upholding of a state-funded voucher program in which 96.6% of the voucher funding went to religious schools.[222] The *Lemon* test has, however, been applied to cases outside the school funding context and primarily in the religious symbols context.[223]

Yet the time, place, and manner regulations proposed in this Comment fall into neither category. There is no government funding at stake, and no symbolic featuring of religion in the public square. In fact, these regulations do the very opposite; they are designed to cure the true excessive entanglement of church and state—that is, their functional fusion in the wedding ceremony solemnized by a licensed religious official.[224]

If an excessive entanglement claim were to be made, it would likely be made in connection with enforcing these regulations. But the enforcement of these regulations need not be any different than the enforcement of any other time, place, and manner restrictions that a religious institution is subject to. That a church is subject to building and fire codes does not create excessive entanglement.[225] Thus, the enforcement of these provisions, unlike what some may fear, would not require the state to be best man at every wedding. Likewise, they would not result in excessive entanglement between church and state.

---

[221] *See id.* at 606; *see also* Agostini v. Felton, 521 U.S. 203, 222 (1997); Sloan v. Lemon, 413 U.S. 825, 832 (1973); Aguilar v. Felton, 473 U.S. 402 (1985); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973).

[222] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002); WITTE & NICHOLS, *supra* note 95, at 214–18.

[223] *See, e.g.*, Van Orden v. Perry, 351 F.3d 173, 177 (5th Cir. 2003) (stating that the *Lemon* test "remains a required starting point in deciding contentions that state displays of symbols . . . are contrary to the First Amendment"), *aff'd*, 545 U.S. 677, 689 (2005).

[224] *See supra* Part III.

[225] *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 696–97 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command." (citations omitted)).

## CONCLUSION

As noted in the Introduction and embodied in the discussion of these two competing problems, the First Amendment Religion Clauses "often exert conflicting pressures."[226] Here, the First Amendment simultaneously urges the protection of religious officials and their communities in the exercise of their licenses (through the Free Exercise Clause) while at the same time counseling either that those same licenses be taken away or exercised in a particularly acceptable manner (through the Establishment Clause). Yet this Comment has demonstrated that it is possible to arrive in the safe "corridor between the Religion Clauses"[227] for this issue of religious officials licensed to solemnize civil marriage.

As to the first issue of religious officials seeking the protection of the Free Exercise Clause, this Comment has demonstrated, paradoxically, that for licensed religious officials, the Free Exercise Clause does not provide an exemption to a law prohibiting discrimination on the basis of sexual orientation in the administration of marriage solemnization licenses. Any such antidiscrimination law would likely be found to be neutral and of general applicability. As a result, any protection from these laws for licensed religious officials must come from statutory or judicial exemptions. First and foremost, a federal conscience exemption for religious officials who refuse to solemnize same-sex marriages would be the most effective and efficient solution. But in the absence of such a statutory exemption, licensed religious officials and their larger faith communities should be able to claim the protections of an expanded ministerial exception and the expressive association doctrine.

As to the establishment issue created by states licensing religious officials to solemnize civil marriages, this Comment has demonstrated that while these statutes do not establish a religion, there is an impermissible fusion of governmental and religious functions at the point of solemnization—that is, in the ceremony itself. This fusion of governmental and religious functions is also unlikely to be protected by the longstanding historical and cultural practice exception. Remedying this establishment problem, however, does not require a strict separationist approach. Indeed, stripping religious officials of their licenses to solemnize civil marriages would be to discount the faith of (1) the religious individuals to be wed, (2) the religious officials themselves, and (3) the larger religious communities of which these two groups are a part. Thus,

---

[226] Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).
[227] *Id.* at 720.

this Comment has proposed narrow time, place, and manner regulations intended to unfuse the governmental and religious functions at civil wedding ceremonies solemnized by religious officials. These regulations require two separate ceremonies, at two different times and places, while prohibiting language that confuses the authorities invoked in either ceremony. Furthermore, it has been demonstrated that these regulations would also survive constitutional challenge.

If this Comment's thesis were adopted, much work would need to be done. As to the free exercise issue, states need to preempt any nondiscrimination laws by passing specific statutory exemptions protecting religious officials. However, if a state does not pass statutory exemptions, courts should expand the ministerial exception and the expressive association doctrine to protect licensed religious officials.

As to the Establishment Clause issue, however, every state could face an imminent action against the fusion of governmental and religious functions at the typical marriage ceremony solemnized by a licensed religious official. Thus, there is the possibility of an impending political maelstrom, encompassing litigants, states, and religious communities. As a result of a lawsuit, these communities would be thrust into a conversation about the modern meaning of the Establishment Clause and its interpretation in *Larkin* and its progeny. In the end, the narrow time, place, and manner restrictions this Comment proposes would provide the most simple and narrow means by which to remedy the establishment violation. Thus, religious communities should be receptive of these measures to avoid the alternative strict separation solution.

In setting forth these arguments, this Comment has sought to uphold both of the necessary bastions of religious liberty enshrined in the First Amendment. On the one hand, this Comment has advocated for the protection of the religious liberty of religious officials to solemnize only those marriages allowed by their faith. On the other hand, this Comment has argued for the protection of religious liberty that the Establishment Clause affords to all individuals—that no faith should be entitled to an establishment of religion.

ANDREW C. STEVENS*

* Articles Editor, *Emory Law Journal*; Robert W. Woodruff Scholar; J.D. Candidate, Emory University School of Law (2014). First and foremost, I must thank my advisor, professor, and mentor, Professor John Witte, Jr. This Comment would not have been possible without your encouragement, insight, and work in the

field of religious liberty. I would also like to thank Kristi North, Gautam Reddy, Gary Guadagnolo, and the staff of the *Emory Law Journal*. I am also indebted to Will Bradbury and Joel Langdon for their excellent assistance in preparing this work for publication. Lastly, this article is dedicated to my wife, Courtney; our marriage is what made this Comment about marriage worth writing.