CAN ACADEMIC FREEDOM IN FAITH-BASED COLLEGES AND UNIVERSITIES SURVIVE DURING THE ERA OF *OBERGEFELL*?

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INTRODUCTION

On August 15, 1990, Saint Pope John Paul II promulgated *Ex Corde Ecclesiae* ("*Ex Corde*"),[1] literally, "From the Heart of the Church," an apostolic constitution about Roman Catholic colleges and universities. By definition, apostolic constitutions address important matters concerning the universal Church.[2] *Ex Corde* created a tempest in a teapot for academicians by requiring Roman Catholics who serve on faculties in theology, religious studies, and/or related departments in Catholic institutions of higher education to obtain a Mandatum, or mandate, from their local bishops, essentially a license certifying the faithfulness of their teaching and writing in terms of how they present the magisterial position of the Church.[3]

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1. *See Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities* (1990) [hereinafter Ex Corde Ecclesiae], http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/Documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html (last visited Nov. 27, 2015).

2. *Apostolic Constitution*, THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 76 (Richard P. McBrien ed., 1995).

3. *See* David L. Gregory & Charles J. Russo, *The Third National Conference of the Association of the Religiously Affiliated Law Schools: Proposals to Counter Continuing Resistance to the Implementation of Ex Corde Ecclesiae,* 74 ST. JOHN'S L. REV. 629, 632 n.13 (2000); *see also* James D. Gordon III & W. Cole Durham, Jr., *Toward Diverse Diversity: The Legal Legitimacy of Ex Corde Ecclesiae,* 25 J.C. & U.L. 697, 709 (1999).

The strident opposition of Roman Catholic theologians and others[4] who feared that *Ex Corde* would have limited their rights to academic freedom, coupled with mostly half-hearted enforcement efforts by local bishops, essentially rendered *Ex Corde* a dead letter in the United States.[5] In reality, though, *Ex Corde* enhances academic freedom in its goal of pursuit of the truth.[6] Still, the perceived threat *Ex Corde* posed to academic freedom did not amount to much. Twenty-five years after the promulgation of *Ex Corde*, a genuinely lethal threat to academic—as well as religious[7]—freedom to

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4. *See, e.g.*, Charlotte Hays, *Catholic Educator: Ex Corde "Troublesome,"* THE CARDINAL NEWMAN SOC'Y (May 30, 2012, 10:21 AM), http://www.cardinalnewmansociety.org/CatholicEducation Daily/DetailsPage/tabid/102/ArticleID/793/catholic-educator-ex-corde-ecclesia-troublesome.aspx (quoting an emeritus faculty member who taught English at Assumption College in Massachusetts).

5. *See* Charles J. Russo & David L. Gregory, *Ex Corde Ecclesiae and American Catholic Higher Education: The Calm Before the Storm or Dead in the Water?*, 19 J. PERS. EVAL. EDUC. 147, 148 (2007). *But see* Kimberly Scharfenberger, *Holy Angel University in Philippines Sets Example on Mandatum, Catholic Identity*, THE CARDINAL NEWMAN SOC'Y (Sept. 9, 2015, 4:59 PM), http://www.cardinalnewman society.org/CatholicEducationDaily/%20DetailsPage/tabid/102/ArticleID/%204362/Holy-Angel-University-in-Philippines-Sets-Example-on-Mandatum-Catholic-Identity.aspx; Kathryn Zagrobelny, *Walsh President: Ex Corde Inspired University to 'Grow, Develop, and Fulfill Our Mission,'* THE CARDINAL NEWMAN SOC'Y (Nov. 20, 2014, 2:52 PM), http://www.cardinalnewmansociety.org/CatholicEducation Daily/DetailsPage/tabid/102/ArticleID/3725/Walsh-President-Ex-corde-Inspired-University to%e2%80% 98Grow-Develop-and-Fulfill-Our-Mission%e2%80%99.aspx.

6. At Part 1, para. 12, Ex Corde reads:

> 12. Every Catholic University, as a university, is an academic community which, in a rigorous and critical fashion, assists in the protection and advancement of human dignity and of a cultural heritage through research, teaching and various services offered to the local, national and international communities. It possesses that institutional autonomy necessary to perform its functions effectively and guarantees its members academic freedom, so long as the rights of the individual person and of the community are preserved within the confines of the truth and the common good.

See Ex Corde Ecclesiae, supra note 1, pt. 1, ¶ 12 (emphasis in original) (citations omitted). The National Conference of [American] Catholic Bishops reiterated the essence of *Ex Corde* in Article 2, §§ 1 and 2 of *Ex Corde Ecclesiae*:

> 2. Academic freedom is an essential component of a Catholic university. The university should take steps to ensure that all professors are accorded "a lawful freedom of inquiry and of thought, and of freedom to express their minds humbly and courageously about those matters in which they enjoy competence." In particular, "[t]hose who are engaged in the sacred disciplines enjoy a lawful freedom of inquiry and of prudently expressing their opinions on matters in which they have expertise, while observing the submission [*obsequio*] due to the magisterium of the Church."
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> 3. With due regard for the common good and the need to safeguard and promote the integrity and unity of the faith, the diocesan bishop has the duty to recognize and promote the rightful academic freedom of professors in Catholic universities in their search for truth.

See The Application of Ex Corde Ecclesiae for the United States, U.S. CONF. OF CATH. BISHOPS, http://origin.usccb.org/about/doctrine/publications/ex-corde-ecclesiae.cfm (last visited Nov. 28, 2015) (essentially regulations implementing the document) (alteration in original) (citations omitted).

7. During his comments during his visit to the White House, Pope Francis reminded his audience that "the right to religious liberty . . . remains [one of] America's most precious possessions. And as my brothers in the United States have reminded us, all of us to be diligent precisely as good citizens to preserve

theologians and more broadly to all in higher education, especially those employed in faith-based institutions, as well as all believers, looms large on the academic horizon. The Supreme Court's exercise of raw judicial over-reaching in *Obergefell v. Hodges* ("*Obergefell*"),[8] raises doubts about whether the academic freedom rights of faculty members and their religiously affiliated colleges and universities can survive governmental interference if they remain true to their beliefs in viewing marriage as a permanent relationship between one man and one woman.[9]

In *Obergefell*, a five-to-four judgment authored by Justice Anthony Kennedy,[10] the Supreme Court discovered a heretofore unknown right to substantive due process in the Fourteenth Amendment,[11] thereby imposing same-sex unions throughout the United States. The Court reached this outcome absent evidence that imposing same-sex unions was supported by the history or language of the Fourteenth Amendment coupled with the fact that the Justices ignored the democratic process. In fact, a bare majority of Justices imposed its will on the Nation by ignoring the will of voters in thirty-two of the thirty-five states[12] who, when afforded the chance to reframe marriage, chose to retain its definition as being between one man and one woman.

Described as a "judicial Putsch"[13] in Justice Scalia's acerbic dissent, *Obergefell* was decided on the thin reed of dignity for gays and lesbians that Justice Kennedy divined in the Fourteenth Amendment pursuant to the long discredited *Lochner* doctrine.[14] Under *Lochner*, the Supreme Court invalidated

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and defend that freedom from everything that would threaten or compromise it." *Remarks by Pope Francis and President Barack Obama at an Arrival Ceremony for the Pope,* FED. NEWS SERV. TRANSCRIPTS, Sept. 23, 2015, 2015 WLNR 28271391 (alteration in original).

8. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

9. For an analysis of *Obergefell* published just three days after it was handed down, see Scott Jaschik, *Will Supreme Court Decision on Same-Sex Marriage Challenge or Change Christian Colleges?*, INSIDE HIGHER ED (June 29, 2015, 3:00 AM), https://www.insidehighered.com/news/2015/06/29/will-supreme-court-decision-same-sex-marriage-challenge-or-change-christian-colleges. For other early views on *Obergefell*, see *SCOTUSblog Coverage*, Obergefell v. Hodges, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/obergefell-v-hodges (last visited Nov. 30, 2015).

10. *See Obergefell*, 135 S. Ct. at 2591.

11. In his criticism of the majority opinion's "discover[y]," Justice Scalia wrote:

> They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment."

Id. at 2629–30 (Scalia, J., dissenting).

12. *Id.* at 2638 (Thomas, J., dissenting).

13. *Id.* at 2629 (Scalia, J., dissenting).

14. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating a law designed to regulate the number of hours that bakers could work in a day or week as an unnecessary interference with the liberty to enter

almost two hundred laws as violating individual liberty before reversing its course of "converting personal preferences into constitutional mandates."[15]

Of course, there is no question, gay and lesbian couples should be able to continue to exercise their rights to live freely whether "to cohabitate and raise their children in peace[,]"[16] visit one another in hospitals, inherit property, or engage in a myriad of other activities available to Americans. Even so, the implementation of *Obergefell* presents grave concern over its potential impact on individual faculty members and their faith-based institutions if they disagree with the Court's diktat by continuing to teach religious truths grounded in the Biblical belief in marriage as being between one man and one woman.[17] Aware of this concern, Justice Alito cautioned that *Obergefell* "will be used to vilify Americans who are unwilling to assent to the new orthodoxy[,] . . . by those who are determined to stamp out every vestige of dissent."[18]

The outcome in *Obergefell* has progressives[19] and their allies in Congress anxious to extend their vision of a radically transformed United States, brooking no compromise, granting no quarter to those who believe in marriage as a union between one man and one woman—a position that was all but universally accepted barely a generation ago. Progressives are thus seeking to confer protected status on same-sex unions—ignoring the long cherished right to freedom of religion and accompanying protections—such as the academic

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into contracts protected by the Fourteenth Amendment). For representative, if slightly dated, commentary on this case, see David E. Bernstein, Lochner v. New York: *A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1525–26 (2005); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 917 (1987); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 100 (1991).

15. *See Obergefell*, 135 S. Ct. at 2618.

16. *Id.* at 2635.

17. *See Genesis* 2:24 (The New American Bible) ("That is why a man leaves his father and his mother and clings to his wife; and the two of them become one body.").

18. *See Obergefell,* 135 S. Ct. at 2642 (Alito, J., dissenting). Reflective of the universal nature of the Roman Catholic Church, the Archbishop of Sydney, Australia, echoed Alito's words in his Acton Lecture on Religion and Freedom. Setting his speech in the near future, the Cardinal feared:

> By 2025 public speeches and debates on same-sex 'marriage' and like issues are rare as few organisations [sic] and venues are willing to risk the vilification that follows upon hosting them. The idea that marriage is a natural institution that precedes states and religions, that it is founded on sexual complementarity and oriented to family formation, is now regarded as unspeakable in the public square—though from time to time the usual suspects still raise it in their 'extreme right-wing' think-tanks, newspaper columns or pulpits.

Archbishop Anthony Fisher, *Should Bakers Be Required to Bake Gay Wedding Cakes? The State of Our Democracy and of Religious Liberty in Contemporary Australia*, ARCHDIOCESE OF SYDNEY (Oct. 14, 2015), http://sydneycatholic.org/people/archbishop/addresses/2015/20151014_215.shtml.

19. Critics of Christianity are often those "on the political left, . . . [who] have taken to calling themselves and their causes 'progressive'" rather than liberal. Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders The "Progressive" Peril*, 105 MICH. L. REV. 1233, 1245 n.50 (2007) (alteration in original). These critics stand purportedly liberal open-mindedness on its ear by rejecting out-of-hand ideas inconsistent with their own.

freedom to disagree enshrined in the First Amendment.[20] Conversely, in a looming battle of dueling legislative proposals before Congress, defenders of religious liberty who view marriage as being between one man and one woman are striving to preserve and protect the free exercise rights of people of faith[21] while affording those who accept same-sex relationships the ability to live as they wish.

Against this background, the first section of the remainder of this article opens by briefly examining three cases presaging *Obergefell* as a prelude to a short review of the Court's judgment. The second section of the paper is divided into three related sections. This part of the article opens with a short review of the nature of academic freedom before identifying the nature of the threats it faces in faith-based institutions if they continue to hold to their belief in marriage as being between one man and one woman. The final part of the article addresses ways to protect the academic freedom rights of believers to engage in scholarship, teach, and speak as they wish, free from outside interference "by those who are determined to stamp out every vestige of dissent"[22] with regard to same-sex unions.

Consistent with the proposed First Amendment Defense Act,[23] the second part of the article advocates that faith-based colleges and universities—paying particular attention to those of the Roman Catholic tradition[24] and their employees—should retain their religious identities.[25] This section also defends the academic freedom rights of faculty members to teach and publish,

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20. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I, § 1.

21. See *infra* notes 153–63 and accompanying text for a discussion of these proposed laws.

22. *See Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

23. See *infra* notes 153–63 and accompanying text for a discussion of this proposed law.

24. While this article focuses on Roman Catholic institutions, its concerns apply equally to other faith-based colleges and universities, in light of Peter Vierick's often cited dictum that "anti-Catholicism is the anti-Semitism of the intellectual." His actual words were that "Catholic-baiting is the anti-Semitism of the liberals." PETER VIERECK, SHAME AND GLORY OF THE INTELLECTUALS 45 (Beacon Press 1953). Misquotes of Viereck notwithstanding, the spirit of his words remains true. *See also* Mark S. Massa, *The Last Acceptable Prejudice?*, AMERICA, Mar. 25, 2000; Mike Dorning, *Religion, Gays, Politics Turn Parade into Battle*, CHI. TRIB., Mar. 15, 1993, at 1, 1993 WLNR 4062014 (reporting that members of the gay group ACT-UP chained themselves to pews in St. Patrick's Cathedral while shouting down Cardinal O'Connor before others "spat out" and desecrated the Eucharist by stepping on the consecrated hosts). *See, e.g.*, Bruce Weber, *Tangle of Issues in St. Patrick's Brouhaha*, N.Y. TIMES, Mar. 6, 1992, at B3, 1992 WLNR 3351573; Sam Roberts, *One More Time, with Turmoil; True to Tradition, St. Patrick's Marchers Face Controversy*, N.Y. TIMES, Mar. 17, 1993, at B1, 1993 WLNR 3367862. An updated version of Viereck's musing would clearly include other Christian Churches.

25. Maintaining their religious identities is an ongoing concern for leaders in Roman Catholic colleges and universities. *See* Libby A. Nelson, *Catholic Colleges Consider Role of Trustees*, INSIDE HIGHER ED (Jan. 30, 2012, 3:00 AM), http://www.insidehighered.com/news/2012/01/30/catholic-colleges-consider-role-trustees (reporting on the January 29, 2012, comments of Rev. Joseph P. McFadden, Bishop of Harrisburg [PA], chair of the U.S. Conference of Catholic Bishops' Committee on Catholic Education: "It's time for the laity [as members of boards of trustees] to step up to ensure that the Catholic faith continues into the third millennium.") (alteration in original).

as well as worship, freely without having to live under a cloud of fear over the potential loss of governmental benefits because they disagree with *Obergefell* by remaining true to their long held sincere religious beliefs. The article rounds out with a brief conclusion.

Initially, it is important to reiterate the author's belief that individuals who are gay and lesbian should remain free "to cohabitate and raise their children in peace[,]"[26] while being left to live as they wish without restrictions in their daily lives. At the same time, people of faith in the academy, and elsewhere, should have the same freedom to live in ways consonant with their sincerely held religious faiths. As such, this article hopes to add to the dialogue—advocating for a middle ground wherein people of good will on both sides of the divide over the definition of marriage can respectfully disagree on whether same-sex unions should receive governmental imprimaturs or benefits, while, at the same time, safeguarding the rights of each other.

I. *OBERGEFELL V. HODGES*

Of course, *Obergefell* did not arise in a vacuum. Aware of this, it is helpful to begin by providing thumbnail sketches of three cases advancing the rights of gay and lesbians because they set the stage for Justice Kennedy's re-writing of American jurisprudence on marriage. This section then briefly reviews the Supreme Court's opinions in *Obergefell*[27] because a goal of this paper is to use the essence of their views as a departure point in examining the impact of *Obergefell* on the academic rights of faculty members and their faith-based institutions.

II. PRE-HISTORY

A. *Lawrence v. Texas*[28]

Justice Kennedy's majority opinion in a five-to-four judgment invalidated a statute from Texas making it a crime for two persons of the same sex to engage in specified intimate sexual conduct as unconstitutional when applied

26. *See Obergefell*, 135 S. Ct. at 2635.

27. For a full review of the Court's opinion and a discussions touching on some of the issues identified herein, see Charles J. Russo, *Religious Freedom in Faith Based Educational Institutions in the Wake of* Obergefell v. Hodges: *Believers Beware*, 2016 B.Y.U. EDUC. & L.J. 263 (2016).

28. Lawrence v. Texas, 539 U.S. 558 (2003). For representative commentaries, see Victor Romero, *An "Other" Christian Perspective on* Lawrence v. Texas, 45 J. CATH. LEGAL STUD. 115 (2006); Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 411 (2004).

to adult males who participated in consensual acts of sodomy in the privacy of their homes.[29]

B. *United States v. Windsor*[30]

In a five-to-four order by Justice Kennedy, the Supreme Court invalidated Defense of Marriage Acts ("DOMA") as an unconstitutional deprivation of the right to liberty of the person protected by the Fifth Amendment by defining marriage as a union of one man and one woman as husband and wife.[31]

C. *Hollingsworth v. Perry*[32]

Chief Justice Roberts wrote the Supreme Court's opinion in yet another five-to-four order invalidating California's Proposition 8, a voter-enacted ballot initiative amending the state Constitution by defining marriage as being between a man and a woman, maintaining that the plaintiffs lacked standing when state officials responsible for doing so chose not to act.[33]

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29. *Lawrence,* 539 U.S. at 558, 561 (overturning Bowers v. Hardwick, 478 U.S. 186 (1988) wherein Justice Kennedy's majority opinion had previously upheld the constitutionality of a law from Georgia criminalizing intimate acts between consenting same-sex adults).

30. United States v. Windsor, 133 S. Ct. 2675 (2013).

31. *Id.* at 2675, 2681, 2696. For representative commentaries on this case, see, e.g., Catherine J. Archibald, *Is Full Marriage Equality for Same-Sex Couples Next? The Immediate and Future Impact of The Supreme Court's Decision in* United States v. Windsor, 48 VAL. U. L. REV. 695 (2014); Richard S. Myers, *The Implications of Justice Kennedy's Opinion in* United States v. Windsor, 6 ELON L. REV. 323 (2014).

32. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

33. *See id.* at 2658, 2668, *remanded to* 725 F.3d 1140 (9th Cir. 2013) (dismissing for lack of jurisdiction). For representative commentaries on this case, see Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After* Hollingsworth v. Perry, 71 WASH. & LEE L. REV. 229, 231 (2014); Matthew A. Melone & George A. Nation III, "*Standing" on Formality:* Hollingsworth v. Perry *and the Efficacy of Direct Democracy In The United States*, 29 BYU J. PUB. L. 25, 26–27 (2014). It is interesting to compare the silence when the United States refused to defend DOMA and California chose not to try to save Proposition 8, because they disagreed with the underlying laws, with the resulting furor after the County Clerk in Rowan County, Kentucky, Kim Davis, refused to grant marriage licenses to same-sex couples due to her religious beliefs. Davis' case went to the Supreme Court which rejected her appeal for being found in contempt of court. Davis v. Miller, 2015 WL 5097125 at *1 (2015). For news stories, see James Higdon & Sandhya Somashekhar, *Ky. Clerk, Back on Job, Doesn't Block Licenses*, WASH. POST, Sept. 15, 2015, at A02, 2015 WLNR 27363176; Michael Muskal, *Still Wedded to Beliefs, Ky. Clerk Freed from Jail Judge Satisfied Her Deputies Are Issuing Licenses to Gays, Tells Her Not to Interfere*, CHI. TRIB., Sept 9, 2015, at 14, 2015 WLNR 26695320; James Higdon, Sarah Larimer & Sandhya Somashekhar, *Ky. Clerk Defies Court Order on Marriage Licenses*, WASH. POST, Sept. 2, 2015, at A01, 2015 WLNR 25985754.

III. *OBERGEFELL V. HODGES*

A. *Facts/Judicial History*

Obergefell began when fourteen same-sex couples and two men whose same-sex partners were deceased successfully filed suit in Michigan,[34] Kentucky,[35] Ohio,[36] and Tennessee.[37] The plaintiffs sought to obtain marriage licenses or have their partnerships recognized. In a consolidated appeal of all four cases, the Sixth Circuit reversed in favor of the States, holding that officials did not have constitutional duties to grant licenses to same-sex couples who wished to marry or to recognize such arrangements entered into in other jurisdictions.[38] The Supreme Court, in turn, agreed to hear an appeal[39] and reversed in favor of the plaintiffs.[40]

B. *Majority Opinion*

As author of the Supreme Court's five-to-four majority opinion, Justice Kennedy identified the two questions at issue as:

> The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.[41]

Absent precedent supporting his analysis, Justice Kennedy repudiated centuries of American, and world, law, history, and religious teachings in divining that "[i]t cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners."[42]

Justice Kennedy divided his response to the first question into four sections, each of which is briefly noted. He started by declaring that "[a] first premise of the Court's relevant precedents is that the right to personal choice

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34. *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014).

35. *See* Bourke v. Beshear, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014).

36. *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 972–73 (S.D. Ohio 2013); Henry v. Himes, 14 F. Supp. 3d 1036, 1041, 1061–62 (S.D. Ohio 2014).

37. *See* Tanco v. Haslam, 7 F. Supp. 3d 759, 762–63 (M.D. Tenn. 2014).

38. *See* DeBoer v. Snyder, 772 F.3d 388, 421, 428 (6th Cir. 2014) (Daughtrey, J., dissenting), *rev'd*, 135 S. Ct. 2584 (2015).

39. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2608–09 (2015).

40. *Id.* at 2591–93, 2608 (Justice Kennedy delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan joined).

41. *Id.* at 2593.

42. *Id.* at 2598.

regarding marriage is inherent in the concept of individual autonomy."[43] Second, Kennedy decided that the right "to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[44] In an unintended irony, he wrote that "[a] third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[45] The reality is that despite paying lip service to the needs of children, Kennedy focused his opinion exclusively on the desires of same-sex couples.

"Fourth and finally, [Kennedy wrote] this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[46] Here he failed to rebut the dissenters who reasoned that that the Court acted too hastily, shortchanging the democratic process by imposing same-sex unions as the law of the land.[47] Moreover, Kennedy was unable to allay the concerns of believers, addressing their rights to advocate and teach their positions by failing to demonstrate respect for people of faith or to offer concrete protections to safeguard their constitutional right to freedom of religion.[48] Kennedy's weak attempt to assuage believers fell flat in light of his condescending comment that those who disagree with the Court lack "a better informed understanding of how constitutional imperatives define a liberty . . . ."[49]

Justice Kennedy briefly responded to the second issue, namely "whether the Constitution requires States to recognize same-sex marriages validly performed out of State."[50] He summarily ruled that if same-sex couples can exercise their right to enter marriages in their home states, there is no lawful basis on which officials in other jurisdictions can refuse to recognize such unions.

Reflecting on *Obergefell* and its impact on First Amendment rights to the free exercise of religion, and, more specifically, on the academic freedom of

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43. *Id.* at 2599.
44. *Id.*
45. *Id.* at 2600.
46. *Id.* at 2601 (alteration in original).
47. *Id.* at 2607.
48. Kennedy wrote:

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id.

49. *Id.* at 2602.
50. *Id.* at 2607.

individual faculty members and their faith-based colleges and universities, a key question comes to mind: insofar as this was the fourth, and final case with a five-to-four judgment signaling a clear divide on the Supreme Court about issues involving gay lifestyles, it is a mystery why the majority rushed headlong into a dramatic re-shaping of marriage—and likely American society, not to mention religious freedom—without having first tried to establish a consensus to defend the rights of both sides of the equation on this important issue.

C. *Dissents*

1. *Chief Justice Roberts*

Chief Justice Roberts began his dissent[51] by noting the obvious, namely "[t]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."[52] Next, he expressed his concern that the Court's imposition of same-sex unions would impact religious freedom. In fact, Roberts later highlighted how the Solicitor General "acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage."[53] The Chief Justice added that "people of faith can take no comfort in the treatment they receive from the majority today."[54] Roberts ended by suggesting that those who were happy with the outcome in *Obergefell* can celebrate the Court's holding but not the Constitution because its judgment had nothing to do with the Constitution.[55]

2. *Justice Scalia*

Justice Scalia began his brief, but strident, dissent[56] by expressing his greater concern over how a bare majority of nine unelected judges could impose their will over the American people than the way marriage is defined. As noted, Scalia chided the majority for having "discovered in the Fourteenth

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51. *Id.* at 2611 (Roberts, C.J., dissenting) (Chief Justice Roberts' dissent was joined by Justices Scalia and Thomas).

52. *Id.*

53. *Id.* at 2626.

54. *Id.*

55. *Id.* It is curious that Chief Justice Roberts adopted a position of interpreting the Constitution narrowly in light of his opinion in the Court's six-to-three judgment in King v. Burwell, 135 S. Ct. 2480 (2015), a day earlier, affirming that the Affordable Health Care Act ("ACA") authorized tax credits for health insurance purchased from federally-established exchanges. Roberts read the ACA, more commonly known as Obamacare, expansively in rejecting a challenge to the health care exchanges imposed by the federal government based on what he described as legislative intent absent express language authorizing their creation. *Id.*

56. *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting) (Justice Scalia's dissent was joined by Justice Thomas).

Amendment a 'fundamental right'"[57] that somehow remained hidden from the Founders and many of the Court's most illustrious jurists[58]—echoing his fears from an earlier case that "[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."[59]

3. *Justice Thomas*

Justice Thomas' dissent[60] reasoned that regardless of how liberty is defined, the petitioners did not lose their Fourteenth Amendment rights in this regard because they were neither restrained nor imprisoned for having entered into same-sex relationships. Rather, he observed how the petitioners were free "to cohabitate and raise their children in peace[,]"[61] free to live as they wished without restrictions on their daily lives. Thomas feared that the Court undermined the political process by failing to respect the well-working democracy process under which voters in thirty-two of the thirty-five states who were afforded the opportunity to reframe marriage chose to continue defining it as being between one man and one woman.[62]

Turning to religious liberty, Justice Thomas worried how *Obergefell* would engender conflict between the government and religious institutions as well as people of faith.[63] Thomas was concerned by the majority's failure to consider that such conflict would, and is already, occurring insofar as "individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."[64]

4. *Justice Alito*

Justice Alito began his dissent[65] by criticizing the majority for overstepping its role because the Constitution's silence rendered marriage a matter for the States. He also rebutted Kennedy's Liberty Clause stance, retorting that five unelected Justices misused their authority to impose their will on the American people. Alito joined the chorus of the other dissenters in

57. *Id.* at 2629.

58. *Id.* at 2629–30.

59. *See* Board of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 686–90, 711 (1996) (Scalia, J., dissenting) (affirming that the First Amendment protects independent contractors from dismissal or prevention of the automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech).

60. *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting) (Justice Scalia joined Justice Thomas' dissent).

61. *Id*. at 2635.

62. *Id.* at 2638.

63. *Id.* at 2638–39.

64. *Id.* at 2638.

65. *Id.* at 2640 (Alito, J., dissenting) (Justices Scalia and Thomas joined Justice Alito's dissent).

expressing his fear that *Obergefell* "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[66] Alito added that the majority's attempt to allay the concerns of believers notwithstanding, he was deeply concerned that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[67]

IV. THREATS TO ACADEMIC FREEDOM: A BRIEF OVERVIEW OF AMERICAN ACADEMIC FREEDOM

As an initial matter, before discussing threats to academic freedom and responses to *Obergefell*, this second part of the article begins by briefly reviewing its nature and source. It almost goes without saying that any examination of academic freedom in American higher education[68] must begin with the bedrock document in this area.[69]

The *Statement of Principles on Academic Freedom and Tenure* ("*Statement*") promulgated by the American Association of University Professors ("AAUP") in 1940, traces its origins to an organizational meeting giving birth to the original proclamation of its *1915 Declaration of Principles*.[70] Declaring that "[t]he common good depends upon the free search for truth and its free exposition,"[71] the *Statement* examines academic freedom in the context of research and service along with the place of tenure.

In its most relevant provision on academic freedom, the *Statement* stipulates:

> 1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties;
> 2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. *Limitations*

66. *Id.* at 2642.

67. *Id.* at 2642–43.

68. See RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955), for a seminal study of this issue.

69. See Ralph Sharp, *Academic Freedom*, in ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION 6 (Charles J. Russo ed., 2010), for an overview of American academic freedom. *See* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 605 (4th ed. vol. 1 2006), for a more detailed review.

70. *See 1940 Statement of Principles on Academic Freedom and Tenure*, AAUP, at 13, http://www.aaup.org/file/1940%20Statement.pdf.

71. *Id.* at 14.

3. *of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment*.[72]
4. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[73]

Academic freedom is not explicitly identified in the First Amendment. Yet, academic freedom relies on the First Amendment because it is designed to liberate faculty members to pursue the truth[74] in their writing and teaching as forms of free speech and expression[75] within the boundaries of their disciplines, free from outside interference.[76] Justice Frankfurter's concurrence in *Sweazy v. New Hampshire,* highlighted the essence of academic freedom:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[77]

Writing for the Supreme Court's majority in *Keyishian v. Board of Regents*,

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72. A 1970 comment in the *Statement* adds: "Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 'Statement,' and we do not now endorse such a departure." *Id.* (emphasis added).

73. *Id*. (internal citations omitted).

74. Justice Oliver Wendell Holmes penned an apt description of truth: "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (affirming convictions for conspiring to violate the 1917 Espionage Act).

75. See GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012), for an examination of wider attacks on freedom of speech, religious and other forms.

76. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 252–53 (1989), for a commentary on point.

77. *See* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (internal citations omitted) (ruling that placing the plaintiff in contempt for refusing to answer questions about the content of his lectures and knowledge of a political party was an invasion of his liberties in the areas of academic freedom and political expression).

Justice Brennan observed that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[78]

Efforts to limit the academic freedom rights of faculty members and their faith-based colleges and universities, or any institutions of higher learning, because they disagree with *Obergefell* or the politically correct orthodoxies of the day would indeed cast a pall of orthodoxy on the academy. Limits of this kind would cause inestimable damage to both the "marketplace of ideas"[79] as protected by academic freedom, and religious freedom more broadly.

As suggested by a 1970 comment in the *Statement*,[80] the academic freedom of individual faculty members in faith-based institutions[81] may differ significantly from their peers in public colleges and universities. The primary difference is that the rights of faculty members in religious institutions are defined by the terms of their employment contracts while those in public colleges and universities are typically rooted in constitutional protections.[82] Accordingly, as discussed below,[83] because religious institutions have greater latitude with regard to what faculty members can teach and write, they should be able to impose stricter controls over their activities to ensure doctrinal orthodoxy.[84] Even so, because *Ex Corde* enhances academic freedom by its

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78. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (invalidating statutes and regulations making membership in specified organizations prima facie evidence of disqualification for employment in public colleges and universities).

79. Cited in more than seventy of its cases, perhaps the Court's most apropos use of the term is in Keyishian v. Board of Regents. *Id.* ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (internal citations omitted).

80. *See* Hofstadter & Metzger, *supra* note 68.

81. See Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 228 (2001/2002), for a review of this question.

82. See, e.g., Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. L. REP. 1 (2002), for discussions of whether academic freedom is an individual or institutional right; Terrence Leas & Charles J. Russo, Waters v. Churchill: *Autonomy for the Academy or Freedom for the Individual?*, 94 EDUC. L. REP. 1099 (1994). See, e.g., Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009), for a review of the former. See, e.g., Matthew W. Finkin, On 'Institutional' Academic Freedom, 61 TEX. L. REV. 817 (1983), for a discussion of the latter.

83. *See infra* note 86 and accompanying text.

84. Such a situation arose when Charles E. Curran, a priest and tenured faculty member in the Department of Theology at the Catholic University of America, was dismissed over his public dissent from Church teachings. For a discussion of this case, *see* Charles J. Russo, *Academic Freedom and Theology at the Catholic University of America: An Oxymoron?*, 55 EDUC. L. REP. 1, 1 (1989) (having initially questioned the wisdom of judicial deference to university officials, the author now agrees with the outcome

commitment to the truth, faculty members in Catholic colleges and universities may have greater protection than their colleagues in other faith-based institutions.[85] Although some of the emerging fears due to *Obergefell*, such as the potential loss of accreditation, are arguably greater for faith-based institutions than individual faculty members, these threats could also have a chilling effect on how academicians fulfill their duties.

V. THREATS TO ACADEMIC FREEDOM

One need only look at a recent incident from the nominally Roman Catholic institution, Marquette University in Milwaukee, Wisconsin, operated in the Jesuit tradition, to observe how the toxic combination campus imposed restrictions on speech and academic freedom could be coupled with the sorts of limits that may be applied to faith-based institutions facing the threat of the loss of tax exempt status or accreditation for refusing to embrace same-sex unions regardless of their deeply held religious teachings. While readily conceding that this controversy pre-dates *Obergefell*, it highlights the protected status of issues associated with same-sex unions, even if institutions are religiously affiliated, exempt from scrutiny normally afforded controversial topics under the auspices of academic freedom.

A "nationally acclaimed"[86] faculty member in the Department of Political Science, John McAdams, who was long critical of university officials for failing to preserve the institution's Jesuit tradition, was banned from campus[87] for posting a criticism on his blog[88] in response to a graduate teaching assistant "who labeled a student's views on traditional marriage as 'homophobic.'"[89] McAdams, an associate professor also commented on the blog that "like the

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of the case). See Equal Emp. Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996), for a similar dispute reaching a like outcome. See Charles J. Russo & David L. Gregory, *Some Reflections on the Catholic University's Tenure Prerogatives*, 43 LOY. L. REV. 181, 181 n.1 (1997), for a discussion of this case.

85. *See* Russo & Gregory, *supra* note 5, at 148, 151.

86. M.D. Kittle, *Professor to Face His Peers Soon in Marquette University Academic Freedom Fight*, WIS. REP., Sept. 8, 2015, 2015 WLNR 26611852.

87. *See* Mark Belling, *From Great to Politically Correct, MU Shows True Colors*, THE FREEMAN, Dec. 24, 2014, 2014 WLNR 36455742.

88. McAdams wrote that "a tactic typical among liberals now. Opinions with which they disagree are not merely wrong and are not to be argued against on their merits, but are deemed 'offensive' and need to be shut up." *See* Jonathan Rosenblum, *Campus Thought Control*, THE JERUSALEM POST, July 10, 2015, at 35, 2015 WLNR 22401409.

89. *See* Kimberly Scharfenberger, *Marquette's Treatment of Banned Professor Shows 'Hypocrisy of Academic Freedom*, CATH. EDUC. DAILY (Feb. 27, 2015, 9:19 AM), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4017/Marquette%E2%80%99s-Treatment-of-Banned-Professor-Shows-%E2%80%98Hypocrisy-of-Academic-Freedom%E2%80%99.aspx.

rest of academia, Marquette is less and less a real university. And, when gay marriage cannot be discussed, certainly not a Catholic university."[90]

Ironically, at the same Marquette University, "[moral theology professor] Daniel Maguire, who publicly opposed Church teaching on life issues taught at the university for many years without any consequence."[91] McAdams faces the revocation of tenure and termination of his employment even as this controversy garners national[92] and international attention.[93]

In a later development of this controversy, Professor McAdams, in a letter to the University President,[94] refused the latter's unilateral demand for his resignation. Moreover, a university committee "recommended McAdams be suspended without pay through the Fall 2016 semester."[95] Not surprisingly, Professor McAdams filed a lawsuit seeking to retain his position.[96]

The behavior of officials at Marquette[97] stands in stark contrast to the actions of leaders at Fuller Theological Seminary in Pasadena, California.[98] Officials at Fuller denied tenure to a faculty member who taught classes on the New Testament because his position on marriage was inconsistent with that of Jesus and he urged Christian Churches to accepted same-sex unions.[99]

It appears that the faculty member from Fuller will not pursue legal remedies. Even if the former faculty member were to file suit, the likely absence of substantive due process right protections in his contract, coupled with the ministerial exception[100] contained in Title VII, and which the Supreme Court unanimously upheld in *Hosanna-Tabor Evangelical Lutheran Church*

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90. *See Campus Inquisition*, NEW CRITERION, Apr. 1, 2015, at 1, 2015 WLNR 11027084.

91. *See* Scharfenberger, *supra* note 89 (alteration in original).

92. *See Marquette Dispute Escalates*, NAT'L CATH. REP., Jan. 2, 2015, at 3, 2015 WLNR 2050879 (reporting that McAdams "will take legal measures if necessary to overturn Marquette University's decision to ban him from campus after he criticized a teaching assistant in a blog post for not allowing philosophy students in her class to discuss the ethics of gay marriage.").

93. *See* Rosenblum, *supra* note 88.

94. *See Letter to President Lovell*, MARQ. U. DEP'T OF POL. SCI. http://www.will-law.org/wp-content/uploads/2016/04/2016-04-04-Signed-Letter-to-Lovell.pdf (last visited Apr. 14, 2016).

95. *See* Austin Ruse, *Marquette Professor Won't Apologize, and Won't Go Quietly*, BREITBART NEWS (Apr. 5, 2016), http://www.breitbart.com/big-government/2016/04/05/marquette-prof-says-university-president-repeatedly-lied; *see also* M.D. Kittle, *McAdams: Here's What Marquette President Can Do With His Reinstatement Demands*, WISC. REP., Apr. 5, 2016, 2016 WLNR 10270407.

96. M.D. Kittle, *As Classes Begin at Marquette University, McAdams' Liberty Lawsuit Plods Along*, WISC. REP., Sept. 2, 2016, 2016 WLNR 26738534 (reporting that the litigation has reached the discovery stage).

97. For similar responses, see Justin Petrisek, *Theologians at USF [University of San Francisco], Santa Clara Undermine Church Teaching*, CATH. EDUC. DAILY (Oct. 7. 2015, 9:00 AM), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4407/Theologians-at-USF-Santa-Clara-Undermine-Church-Teaching.aspx (reporting that faculty members at other Jesuit institutions fail to comport themselves in manners consistent with Church teachings).

98. *See* FULLER THEOLOGICAL SEMINARY, http://fuller.edu (last visited Oct. 27, 2015).

99. *See* Robert A.J. Gagnon, *Fuller Seminary Takes A Stand*, FIRST THINGS (Sept. 11, 2015), http://www.firstthings.com/web-exclusives/2015/09/fuller-seminary-takes-a-stand.

100. *See infra* note 126, at 441–42 and accompanying text.

and School v. Equal Employment Opportunities Commission ("*Hosanna-Tabor*"),[101] should render a challenge futile.[102]

Based on the preceding, three post-*Obergefell* threats to faith-based institutions should raise grave concerns for faculty members and their institutions remaining faithful to Church teachings rooted in the Biblical belief that marriage is between one man and one woman. The first issue came to the fore during the oral arguments in *Obergefell*. Justice Alito asked Solicitor General Verrilli, "in the *Bob Jones*[103] case, a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?"[104]

The Solicitor General responded: "You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue."[105] Even if one concedes that the state tax status of faith-based institutions is not yet at issue, it seems likely that such challenges will not be long in coming.

A related second concern deals with a different form of financial assistance. A matter of potentially great significance for many faculty members is whether the federal government will seek to deny financial assistance for research grants for them and graduate students. Further, students at faith-based colleges and universities who believe in marriage as a union between one man and one woman may have to fear the loss of Pell grants and guaranteed student loans[106] for tuition, a matter impacting both them and their institutions.

Unfortunately, the third threat has already impacted at least one faith-based institution of higher education, Gordon College in Massachusetts, when

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101. *See* Hosanna-Tabor Lutheran Church & Sch. v. Equal Emp. Opp. Comm'n, 132 S. Ct. 694 (2012).

102. See *supra* note 83, for an article reviewing judicial deference to leaders in Roman Catholic institutions.

103. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (revoking the university's tax-exempt status under the Internal Revenue Code, pursuant to which individuals who donated money were entitled to tax deductions on their federal income taxes, because its officials engaged in discriminatory admissions practices with regard to race by refusing to admit African-Americans and forbidding inter-racial dating, based on the institution's religious doctrine). *See* Charles O. Galvin and Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353, 1354 (1983) (for representative commentary). *See also* William A. Drennan, Bob Jones University v. United States: *For Whom Will the Bell Toll?,* 29 ST. LOUIS U. L.J. 561, 562 (1985).

104. *See* Transcript of Oral Argument at *38, Obergefell v. Hodges, 2015 WL 1929996 (2015) (No. 14-556). This same language is cited in the proposed Federal First Amendment Defense Act, H.R. 2802, 114th Cong. § 2(3) (2015), "Nevertheless, in 2015, when asked whether a religious school could lose its tax-exempt status for opposing same-sex marriage, the Solicitor General of the United States represented to the United States Supreme Court that "it's certainly going to be an issue." For a more thorough discussion of this proposed law, *see infra* notes 153–63 and accompanying text.

105. *See Obergefell*, 2015 WL 1929996, at *38.

106. *See, e.g.*, *Alternative to Student Loans, But No Replacement*, MT. VERNON REG. NEWS, July 31, 2015, 2015 WLNR 22765224.

it was threatened with the denial of accreditation for refusing to accept same-sex unions and the gay lifestyle as the norm despite their beliefs in Biblical norms. While Gordon College[107] presently seems to have avoided such a fate,[108] similar threats are likely to emerge.[109] Aware of these potential challenges to academic freedom, let alone institutional survival, administrators and faculty leaders must take pro-active steps to defend their rights from specious attacks of discrimination for holding true to their faiths.

VI. REPELLING THREATS TO ACADEMIC FREEDOM

As threats to academic freedom mount—even if self-inflicted, as at Marquette University[110]—institutional leaders have two related options, one internal and the other external, to protect themselves and their institutions.

A. *Statutory Protections*

In order to help insure compliance with institutional religious aims, including the protection of academic freedom, educational leaders in Roman

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107. *See, e.g.*, *id*. (discussing the impact of alternatives on schools such as Gordon College, a Christian school in Massachusetts that was at risk of losing its accreditation because the college opposes "homosexual practices."); Paul Leighton, *Gordon Accreditation Still in 'Good Standing' after Evaluation*, SALEM NEWS, May 5, 2015, 2015 WLNR 13076885; *Legal Threats on Religious Schools*, DESERET NEWS, Nov. 7, 2014, 2014 WLNR 31272948.

108. Interestingly, a Catholic institution in Massachusetts, Emmanuel College cancelled its athletic schedule with Gordon because its president was one of fourteen signatories of a letter to President Obama requesting a religious exemption from his Executive Order forbidding discrimination based on sexual orientation. Kimberly Scharfenberger, *Christian College Stands for Religious Freedom, Catholic College Retaliates by Cancelling Sports Matches*, CATH. EDUC. DAILY (Mar. 11, 2015), http://cardinalnew mansociety.org/CatholicEducationDaily/DetailsPage/tabid/102?ArticleID/4063/Christian-College-Stands-for-Religious-Freedom-Catholic-College-Retaliates-by-Cancelling-Sports-Matches.aspx.

109. *See* Mark A. Kellner, *Are Religiously Affiliated Law Schools under Fire?*, DESERET NEWS, Feb. 15, 2015, 2015 WLNR 3196818 (in discussing faith-based schools, but identifying on Liberty University's Law School in Lynchburg, Virginia, partially addressed the status of TW, reporting that the "Nova Scotia Supreme Court declare[d] the province's barristers' society could not refuse to license graduates of Trinity Western's law school because it didn't like the school's covenant."). A like situation in British Columbia, Canada, serves as an object lesson for faith-based institutions in the United States despite the differences in the legal systems of both countries. The controversy involved the law school at fifty-two year-old Christian Trinity Western ("TW") University, in Langley, British Columbia, https://www.twu.ca/, which was denied accreditation due to its teachings on gay lifestyles and same-sex unions. *See also Law Society Council Upholds Trinity Western Accreditation*, LEGAL MONITOR WORLDWIDE, Jan. 27, 2015, 2015 WLNR 4346048 (reporting that law graduates of TW could practice in New Brunswick). *But see* Mark Jaskela, *TWU Ruling Shows Intolerance; Fear, Prejudice and Slippery Ethics Behind Banning Christian Law School*, VANCOUVER SUN, Dec. 19, 2014, 2014 WLNR 35965146 (reporting that British Columbia revoked TW's accreditation).

110. *See* Kimberly Scharfenberger, *Negative Reactions to Catholic Values at Marquette No Surprise Says Former Prof*, CATH. EDUC. DAILY (Feb. 2, 2015), http://www.cardinalnewmansociety.org/Catholic EducationDaily/DetailsPage/tabid/102/ArticleID/3941/Negative-Reactions-to-Catholic-Values-at-Marquette-No-Surprise-Says-Former-Prof.aspx (A retired faculty member at Marquette expressed no surprise at negative attitudes toward Catholic teachings).

Catholic colleges and universities should protect themselves internally by hiring for mission[111] under Title VII by seeking to employ individuals whose lifestyle choices are consonant with their teachings. More specifically, if faculty hiring committees and leaders select individuals who are likely to remain true to Church teachings, particularly for the purposes of this article, with regard to the belief in marriage as a union between one woman and one man, then this may help to underscore their reliance on the three primary statutory protections available under Title VII.[112]

First, Title VII affords religious institutions the right to adopt policies instituting hiring preferences to those who are faithful to their beliefs.[113] According to this part of Title VII, "religion, sex, or national origin is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the operations of that particular business or enterprise."[114] Even so, courts continue to reach mixed results in the application of this provision.[115] Yet, Catholic colleges and universities have hired individuals who are gay, even extending health and other benefits,[116] resulting in disputes over providing coverage for abortion[117] to their partners. However, it is another matter

111. For a commentary on point, see Charles J. Russo, *Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow Their Beliefs in Hiring*, 45 U. TOLEDO L. REV. 457 (2014); *see also* Robert J. Araujo, *Ex Corde Ecclesiae and Mission-Centered Hiring In Roman Catholic Colleges and Universities: To Boldly Go Where We Have Gone Before*, 25 J.C. & U.L. 835 (1999).

112. *See* 42 U.S.C.A. § 2000e(b) (2012) *et seq.* The threshold exemption under Title VII stipulates its application to institutions with fifteen or more employees.

113. *See, e.g.*, Maguire v. Marq. Univ., 814 F.2d 1213, 1218 (7th Cir. 1987) (affirming that an applicant for a job teaching moral theology failed to present a prima face case of religious discrimination under Title VII in light of her pro-abortion views).

114. *See* 42 U.S.C.A. § 2000e–2 (e)(1) (2012).

115. *See* Boyd v. Harding Acad. of Memphis, 88 F.3d 410, 414–15 (6th Cir. 1996) (upheld the dismissal of a suit filed by a former preschool teacher who claimed that she was fired due to her pregnancy where she was unable to prove that officials violated Title VII by applying a policy against premarital sex in a discriminatory manner). *But see* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 656 (6th Cir. 2000) (reversing a grant of summary judgment in favor of a diocese, remanding for further consideration where it was unclear whether the teacher's contract was not renewed solely due to her having given birth six months after she was married).

116. *See, e.g.*, *Archbishop Lucas Disappointed by Creighton's Decision to Offer Same-Sex Benefits,* CATH. EDUC. DAILY (Oct. 28, 2014), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/3643/Archbishop-Lucas-Disappointed-by-Creighton%E2%80%99s Decision-to-Offer-Same-Sex-Benefits.aspx.

117. *See, e.g.*, *Unholy Coercion: California Officials Seek to Force Churches to Bankroll Abortion*, WASH. TIMES, Oct. 24, 2014, 2014 WLNR 29675345; '*Coercive and Discriminatory'*, AMERICA, Oct. 27, 2014, 2014 WLNR 30240178 (noting that the law targeted Loyola Marymount and Santa Clara University because they had dropped such coverage); Justin Petrisek, *Loyola Marymount U. Complies with California Abortion Mandate*, CATH. EDUC. DAILY (Sept. 30, 2014), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/3567/Loyola-Marymount-U-Complies-with-California-Abortion-Mandate.aspx (officials at Loyola initially complied with the law but later filed a complaint that apparently has yet to be resolved); Howard Friedman, *Churches File Complaint with HHS Over California Abortion Coverage Requirement*, RELIGION CLAUSE, Oct. 13, 2014, 2014 WLNR 28515532. *See also* Luke Ranker, *Planned Parenthood Protests University of Scranton Abortion Policy*, THE TIMES-TRIB. (Mar. 10, 2013), http://thetimes-tribune.com/news/planned-parenthood-protests-university-of-scranton-abortion-

altogether to recognize same-sex relationships as marriages such as occurred at Fordham University,[118] where the only reaction of campus officials[119] when the Chair of the Theology Department entered such a partnership was to wish the couple "a rich life filled with many blessings."[120]

As evidence of nascent resistance to *Obergefell*, on the same day it was handed down, the 181 member Council of Christian Colleges and Universities, of which 121 institutions are in the United States, issued a statement declaring that "[i]t stands to reason, then, that the tax-exempt status and religious hiring rights of religious institutions will be protected when they advance the religious mission of a college or university."[121] Unfortunately, an earlier letter to President Obama,[122] seeking exemptions for faith-based employers from his Executive Order barring federal contractors from what it describes as "discrimination" based on sexual orientation and gender identity,[123] went unheeded. This suggests that any accommodations to protect the deeply held religious beliefs and academic freedom of faculty members employed in faith-based institutions are presently unlikely to come easily, if at all, under the present administration.

Second, the closely related ministerial exception applies to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution,

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policy-1.1845838#comment-1898827700 (reporting on the resulting controversy at the Jesuit-run university when officials ended coverage for abortion, noting that all of "about a dozen" protesters gathered).

118. *See* Justin Petrisek, *Theology Chairman's Same-Sex Wedding Begins 'Flood' of Challenges to Catholic Identity*, CATH. EDUC. DAILY (July 7, 2015), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4277/Theology-Chairman%E2%80%99s-Same-Sex-Wedding-Begins-%E2%80%98Flood%E2%80%99-of-Challenges-to-Catholic-Identity.aspx (reporting on the Episcopalian marriage of the chair of the Jesuit-run Fordham a day after *Obergefell*, warning that it will lead to challenges to Catholic identity in Catholic institutions).

119. Subsequently, a faculty member in Fordham's law school published an article calling on states to discontinue their moralistic recognition of religious marriages. *See* Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668314; *see also* Kimberly Scharfenberger, *Fordham Law Professor Urges End to 'Religious, Gendered' Marriage*, CATH. EDUC. DAILY (Oct. 9, 2015), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4412/Fordham-Law-Professor-Urges-End-to-%E2%80%98Religious-Gendered%E2%80%99-Marriage.aspx (it remains to be seen whether Fordham officials will comment on this article).

120. *See Go Beyond a Foot-Stomping 'No'.*, NAT'L CATH. REP., July 7, 2015, 2015 WLNR 22287638.

121. *See CCCU Statement on the* Obergefell v. Hodges *Decision's Impact on Religious Institutions*, COUNCIL FOR CHRISTIAN C. & U. (June 26, 2015), https://www.cccu.org/news/articles/2015/StatementonObergefellvHodges.

122. *See* Kirsten Powers, *Letter Sent to President Obama Requests That Hiring Rules Recognize Faith*, USA TODAY (July 9, 2014), http://www.usatoday.com/story/opinion/2014/07/08/kirsten-powers-religious-exemption-myths-hobby-lobby-column/12385801.

123. *See* Executive Order—Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014), https://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen.

or society of its activities."[124] Initially referred to as the *McClure*[125] exception from the case in which it was enunciated, this measure places the burden of proof of the necessity of BFOQs on employers even if individuals are not ordained clerics. In order to apply the BFOQ exception, leaders in religious institutions must prove that the teaching or other activities of staff members are so integrally related to furthering their spiritual and pastoral missions that their duties may be treated as ministerial.[126]

Assuming that the Supreme Court would respect its own precedent, a doubtful proposition in light of the attitudes of the activists who foisted *Obergefell* on the Nation, institution leaders may be able to rely on two cases which support religious freedom. First, as highlighted, the Court unanimously upheld the ministerial exception in *Hosanna-Tabor*,[127] albeit under the Americans with Disabilities Act,[128] rather than Title VII. In an opinion by Chief Justice Roberts, the Court agreed that Church officials rather that the Federal Equal Employment Opportunities Commission, had the right to decide who qualified as a minister, thereby protecting their ability to preserve institutional integrity.[129]

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124. *See* 42 U.S.C.A. § 2000e–1 (2012).

125. *See* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) (affirming that Title VII precluded judicial intervention in a dispute over gender-based discrimination between a "church and its minister" where a female officer completed professional training).

126. *See, e.g.*, Pime v. Loyola Univ. of Chi., 585 F. Supp. 435, 443 (N.D. Ill. 1984) (holding that it was not an unlawful employment practice for officials at a Jesuit university to hire and employ members of their own religious community rather than a non-Catholic applicant for designated positions teaching philosophy where being Catholic was a BFOQ reasonably necessary to further operational goals). *But see* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992) (rejecting a school's claim of a BFOQ defense where it was unclear whether a librarian was dismissed due to her out-of-wedlock pregnancy or gender discrimination).

127. *See* Hosanna-Tabor Lutheran Church & Sch. v. Equal Emp. Opp. Comm'n, 132 S. Ct. 694 (2012)*; see also* Charles J. Russo & Paul E McGreal, *Religious Freedom in American Catholic Higher Education*, 39 RELIGION & EDUC. 116 (2012).

128. *See* 42 U.S.C. § 12101 (2012) *et seq*.

129. *See Hosanna-Tabor*, 132 U.S. at 710 ("The church must be free to choose those who will guide it on its way.").

Post *Hosanna-Tabor* litigation has largely,[130] but not always,[131] extended the applicability of this exception in K-12 schools. While not suggesting that all employees in faith-based institutions be classified, or could qualify, as ministers—a dubious proposition at best—some creative hiring and faculty professional development, coupled with reinvigorating the need for the Mandatum in *Ex Corde* may offer a measure of protection.

Another case offering potential support for faith-based institutions is *Agency for International Development v. Alliance for Open Society International* ("*Alliance*").[132] In *Alliance*, the Supreme Court enunciated the unconstitutional conditions doctrine. Under this doctrine, the legality of a condition for receiving a subsidy, or more appropriately for religious educational institutions, tax exemptions for themselves and tax deductions for donors, depends on whether the condition(s) define or reach outside of programs. In other words, the "government may impose conditions that define the program, but may not impose conditions that reach outside the program."[133] Given the apparently irreconcilable difference between *Alliance*'s limits on imposition of governmental conditions on the receipt of aid and *Bob Jones*'[134] denial of tax-exempt status under the Federal Tax Code[135] to a university

130. On the same day as *Hosanna-Tabor*, the Court rejected two other cases involving the ministerial exception. *See* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 1088 (2012) (where a Director of the Department of Religious Formation unsuccessfully sued her Roman Catholic Diocese for gender and age discrimination after being dismissed); *Id.* (where a Director of Religious Education ("DRE"), who also taught mathematics, sued her Roman Catholic diocese after having alleged violations of the state statutes for retaliatory dismissal over charges unrelated to her duties as a DRE)*; see also* Henry v. Red Hill Evangelical Lutheran Church of Tustin, 134 Cal. Rptr. 3d 15 (Cal. Ct. App. 2011) (upholding the dismissal of a teacher who was living with her boyfriend and raising their child without being married because she was a "spiritual leader" for the purposes of the ministerial exception); *see also* Herzog v. Saint Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012) (rejecting the age, sex, and marital status claims of a teacher in a Lutheran school who was dismissed due to budgetary constraints in light of her status as "called," just like the plaintiff in *Hosanna-Tabor*).

131. *See* Hamilton v. Southland Christian Sch., 680 F.3d 1316 (11th Cir. 2012) (reversing and remanding in favor of a teacher for further consideration of whether she was dismissed for being pregnant out of wedlock or for engaging in premarital sexual relations where school officials failed to raise the affirmative defense of the ministerial exception under *Hosanna-Tabor*).

132. *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013).

133. *See* William E. Thro, *The Limits of* Christian Legal Society, 2014 CARDOZO L. REV. 124, 125 (2014); *see also* William E. Thro, *Undermining* Christian Legal Society v. Martinez, 295 EDUC. L. REP. 867 (2013).

134. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

135. "[I]n July 1970, the IRS concluded that it could 'no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination.'" *Id.* at 578 (second alteration adopted) (quoting IRS News Release July 7, 1984, reprinted in App in No. 81-3, p. A235). A year later, "in Revenue Ruling 71–447, 1971–2 Cum. Bull. 230:

> Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept [of 'charity']. . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."

engaged in discriminatory practices,[136] more guidance may be needed via federal statutory intervention.

Returning to Title VII, the final exemption applies to institutions "in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university, or other educational institution . . . directed toward the propagation of a particular religion."[137] Insofar as this exemption permits employers in religious institutions to establish hiring preferences for members of their faiths consistent with the AAUP's *Statement*,[138] it could impact their rights to academic freedom. For example, the Eleventh Circuit permitted officials at a Baptist university to limit a faculty member's teaching assignments to undergraduate classes and prevent him from teaching in its divinity school due to religious differences he had with his dean.[139] The court added that even though the university was no longer under the direct control of a religious governing body, it was entitled to the exemption because it was still substantially supported by the same church.[140]

To date, it is unfortunate that officials in some Roman Catholic institutions have not taken more proactive stands in safeguarding their religious missions, actions thereby impacting campus climates and matters impacting academic freedom. Such a scenario is evidenced in the first of two controversies emanating from Loyola Marymount University in Los Angeles, a nominally Roman Catholic institution in the Jesuit tradition. A July 2014 faculty survey found that less than one-third of Loyola Marymount's faculty members were Roman Catholic,[141] a clear violation of *Ex Corde*.[142] Survey results further

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Id. at 579 (second alteration adopted).

136. *But see* Bob Jones University *Drops Interracial Dating Ban: Fundamentalist School Finds Itself Thrust into Republican Presidential Debate*, CHRISTIANITY TODAY (March 1, 2000), http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html.

137. *See* 42 U.S.C.A. § 2000–(e)(2)(e) (2012).

138. *See* AAUP, *supra* note 70.

139. *See* Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997); *see also* Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618 (6th Cir. 2000) (granting the college's motion for summary judgment, thereby permitting the dismissal of an employee who was ordained by a church with a large gay congregation).

140. *See Killinger*, 113 F.3d at 200.

141. *See* Kimberly Scharfenberger, *Catholic Professors Claim Hostile Environment at Loyola Marymount Univ.*, CATH. EDUC. DAILY (June 17, 2015), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4252/Catholic-Professors-Claim-Hostile-Environment-at-Loyola-Marymount-Univ.aspx.

142. Pursuant to Article 4, § 4, of *Ex Corde*:

> § 4. Those university teachers and administrators who belong to other Churches, ecclesial communities, or religions, as well as those who profess no religious belief, and also all students, are to recognize and respect the distinctive Catholic identity of the University. In order not to endanger the Catholic identity of the University or Institute of Higher Studies, the number of non-Catholic teachers should not be allowed to constitute a majority within the Institution, which is and must remain Catholic.

revealed that Catholics on the "faculty are under significant duress as a result."[143]

Acting with egregious disregard for Church teaching, even though a faculty member at Loyola Marymount pointed it out, officials appointed an individual to head its presidential search committee despite the fact he chaired the board of an organization that donated more than $500,000 to Planned Parenthood, a pro-abortion organization.[144] Loyola University did subsequently hire a Roman Catholic as its new President.[145]

Organizational leaders should concomitantly demonstrate their adherence to the tenets of their faith in other actions as a means of demonstrating their commitment to academic freedom by creating a Catholic ethos. As an initial matter, officials could require newly hired members of theology/religious studies departments to seek a Mandatum under *Ex Corde*. Moreover, leaders should enhance the religious identities and missions of their institutions by requiring newly-hired theologians to comply with a 1989 mandate of the Vatican Congregation for the Doctrine of the Faith by complying with Canon 833[146] in professing the Oath of Fidelity.[147] At present, officials at only 17 out of almost 200 Catholic colleges and universities in the United States require theologians to profess the Oath of Fidelity.[148]

B. *Emerging Statutory Issues*

As reviewed briefly earlier, dueling legislative proposals with radically divergent perspectives on marriage and the future of religious freedom are making their way through the post-*Obergefell* Congress. Because the way in which this legislative battle plays out will have a significant impact on the

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See Ex Corde Ecclesiae, supra note 1, pt. II, art. 4, § 4.

143. *See* Scharfenberger, *supra* note 141.

144. *See* Kimberly Scharfenberger, *Head of Univ.'s Presidential Search Committee Chaired Org. That Gave Thousands to Planned Parenthood*, CATH. EDUC. DAILY (Nov. 19, 2014), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/3718/Head-of-Univ-s-Presidential-Search-Committee-Chaired-Org-That-Gave-Thousands-to-Planned-Parenthood.aspx; *see also* Ian Lovett, *Abortion Vote Exposes Rift at a Catholic University*, N.Y. TIMES (Oct. 6, 2013), http://www.nytimes.com/2013/10/07/us/abortion-vote-exposes-rift-at-catholic-university.html?_r=0.

145. *See* Michael Busse, *Will the Return of a Catholic to LMU's Top Position Steer the University in a Different Direction?*, THE L.A. LOYOLAN (Apr. 8, 2015), http://www.laloyolan.com/news/will-the-return-of-a-catholic-to-lmu-s-top/article_5e886d2c-d479-5bfe-bbfa-874de856b7e8.html.

146. According to Canon 833.7, the profession is required by "teachers in any universities whatsoever who teach disciplines pertaining to faith or morals, when they begin their function . . . ." Code of Canon Law, *Title V. The Profession of Faith (Can. 833),* LIBRERIA EDITRICE VATICANA, http://www.vatican.va/archive/ENG1104/__P2R.HTM (last visited Nov. 30, 2015).

147. *See* Justin Petrisek, *Why Do Colleges Require the Oath of Fidelity?*, CATH. EDUC. DAILY (Sept. 22, 2015), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4384/Why-Do-Colleges-Require-the-Oath-of-Fidelity.aspx.

148. *Id.*

academic freedom rights of individual faculty members and their institutions, the contents of these proposed laws are worth reviewing.

The inaptly named Equality Act[149] is co-sponsored by members of the Democrat caucus in the House of Representatives.[150] Although unlikely to become law in the near future due to Republican control of both chambers of Congress,[151] this statute is disconcerting to say the least.[152] If the proposal were enacted, it would negatively impact faith-based colleges and universities, as well as the ability of theologians and other academicians to rely on their cherished right to academic freedom in their scholarship and teaching. In part, this law would award protected status for "sexual orientation" and "gender identity," while denying exemptions for faith-based organizations defining marriage as being between one man and one woman. As a sign of how radical it is, this proposal would also forbid faith-based institutions from using the Religious Freedom Restoration Act ("RFRA")[153] as a defense for acting on their beliefs such as viewing a marriage as being between one man and one woman.[154]

Almost a month earlier, on the same day, Republican leaders in the Senate and House of Representatives introduced the First Amendment Defense Act ("FADA").[155] FADA aims to safeguard religious liberty while seeking to ward off progressive intolerance against faith-based institutions and individuals who believe in marriage as being between one man and one woman.[156]

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149. This bill seems to be a successor to the Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 5(A) (2013), intended to outlaw discrimination due to sexual orientation. *See* Charles J. Russo, *Religious Freedom in the United States: When You Come to a Fork in the Road, Take It*, 38 U. DAYTON L. REV. 363 (2013) at notes 223–226 and accompanying text.

150. This act was introduced in the House as H.R. 3185, and Senate as S. 1858 on July 23, 2015.

151. *See* Jennifer E. Manning, *Membership of the 114th Congress: A Profile*, CONG. RES. SERV. (Oct. 31, 2105), http://fas.org/sgp/crs/misc/R43869.pdf (reporting that "[a]s of October 31, 2015, in the House of Representatives, there [were] 247 Republicans (including 1 Delegate), 193 Democrats (including 4 Delegates and the Resident Commissioner of Puerto Rico), and no vacancies. The Senate has 54 Republicans, 44 Democrats, and 2 Independents, who both caucus with the Democrats.").

152. In an earlier fight over religious freedom, a pro-abortion group unsuccessfully challenged the tax status of the Roman Catholic Church. *See* Abortion Rights Mobilization v. United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), 495 U.S. 918 (1990) (affirming that a pro-abortion group lacked standing to challenge the tax-exempt status of the Roman Catholic Church based on its pro-life teachings.).

153. *See* 42 U.S.C.A. § 2000bb (2012). *But see* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the RFRA as it applied to States). For representative commentaries on this case, *see* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); *see also* Douglas Laycock, *Conceptual Gulfs In* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998).

154. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2638 (2015).

155. On June 17, 2015, H. R. 2802 was introduced in the first session of the House in the 114th Congress while Sec. 1. S. 1598, which was identical, was introduced in Senate.

156. Protection of the Free Exercise of Religious Beliefs and Moral Convictions:

> In General. Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or

FADA would offer broad-based protection to believers as a compromise between those whose views on marriage, and ultimately religious freedom, differ dramatically.[157] While neither questioning nor attacking *Obergefell*, FADA would prohibit the federal government from discriminating against people of faith who view marriage as a relationship between one man and one woman, language apparently reflecting Justice Kennedy's unsuccessful attempt to allay the concerns of believers about the future of religious freedom.[158]

In light of strong support from President Obama[159] and Democrats,[160] as well as activist groups,[161] FADA faces an uphill battle as the Equality Act. Even so, all those interested in preserving religious, and academic, freedom in faith-based colleges and universities should work toward the enactment of FADA and similar state laws.

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should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

See First Amendment Defense Act § 3(a) (2015).

157. *See id.* A discriminatory action is any action taken by the Federal Government to:

> [A]lter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a); disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person; withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person; withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or otherwise discriminate against such person.

First Amendment Defense Act § 3(b)(1)–(5) (2015).

158. *See Obergefell,* 135 S. Ct. at 2602.

159. *See, e.g.*, Felicia Sonmez, *Barack Obama: 'The First Gay President'? Newsweek Bestows Provocative Title on Barack Obama after He Shows Support for Same-Sex Marriage*, WASH. POST, May 15, 2012, 2012 WLNR 23620204; *see also President Obama Becomes the First American Leader to Support Same-Sex Marriage*, MONTREAL GAZETTE, May 10, 2012, 2012 WLNR 9800950.

160. *See, e.g.*, Alex Roarty, *Democrats to Officially Back Gay Marriage*, NAT'L J. ONLINE, June 30, 2012, 2012 WLNR 16364137. *Democrats Back Gay Marriage*, COMMERCIAL APPEAL, Aug. 10, 2012, 2012 WLNR 19252814.

161. As could have been expected, the American Civil Liberties Union announced that it would not defend individuals with claims involving same-sex unions under the Religious Freedom Restoration Act. *See* Jim Galloway, *Political Insider Blog: ACLU Disavows Support for Federal 'Religious Liberty' Law*, ATLANTA J. CONST., June 29, 2015, 2015 WLNR 19261505.

Along with FADA and the Federal RFRA,[162] state religious freedom statutes,[163] combined with gubernatorial Executive Orders,[164] may offer measures of protection to faith-based institutions and their employees in their collective profession of their belief in marriage as a union between one man and woman. Working in tandem, the Federal and state RFRAs[165] can help to protect faculty members and their faith-based colleges and universities by prohibiting governmental intervention from placing substantial burdens on their rights to the free exercise of religion absent compelling state interests achievable by the least restrictive means possible.

CONCLUSION

Leaders and faculty members in Roman Catholic, and all religiously affiliated colleges and universities, may soon find themselves at the proverbial fork in the road when asked to respond to *Obergefell*.[166] On the one hand, these educators will have the option of affirming their religious faiths and institutional missions by staying true to their beliefs in marriage as a permanent relationship between one man and one woman. Those who remain faithful may subject themselves to draconian penalties such as the loss of their tax-exempt status or accreditation that the state qua mammon[167] may impose on

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162. *See* 42 U.S.C.A. § 2000bb (2012).

163. As of March, 2015, at least twenty states enacted religious freedom laws. Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. TIMES (Mar.31,2015), http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0; *see* Fredrick Mark Gedicks, *Public, Private, Religious Freedom Restoration Acts in the U.S. States*, *Quaderni Costituzionali, No. 3* (Bologna: Il Mulino, 2015 Forthcoming) (cited with the permission of the author), SOCIAL SCI. RES. NETWORK (Sept. 8, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733 (for a brief commentary on state RFRAs with a focus on Indiana's statute).

164. *See, e.g.*, Emily Lane, *Louisiana's Religious Freedom Bill Effectively Defeated in Committee*, THE TIMES-PICAYUNE (May 28, 2015), http://www.nola.com/politics/index.ssf/2015/05/louisianas_religious_freedom_b.html (also reporting that Governor Bobby Jindal signed an Executive Order into effect on May 19, 2015, to prevent the government from taking such actions as revoking licenses and tax benefits based on the beliefs of individuals or institutions that marriage is between one man and one woman.); *see also* Exec. Order No. BJ 15-8 (May 19, 2015), http://www.doa.la.gov/osr/other/bj15-8.htm.

165. *See* Terry Eastland, *The Kim Davis Matter*, WEEKLY STANDARD (Sept. 21, 2015), http://www.weeklystandard.com/article/kim-davis-matter/1028511 (for a news commentary suggesting that state RFRAs can be used to protect religious freedom).

166. *See Statement Calling for Constitutional Resistance to* Obergefell v. Hodges, AM. PRINCIPAL PROJECT (Oct. 8, 2015), https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF (a powerful statement warning of grave consequences if *Obergefell* is treated as controlling precedent); *see* Michael Brown, *Legal Scholars Rise Up Against the Supreme Court's Judicial Despotism*, TOWNHALL COLUMNISTS (Oct. 12, 2015), http://townhall.com/columnists/michaelbrown/2015/10/12/legal-scholars-rise-up-against-the-supreme-courts-judicial-despotism-n2064245 (for a laudatory commentary on the statement).

167. Mommon, more accurately ma'maon, literally "that in which one places his trust in" in Aramaic, at Luke16.9, Carroll Stuhlmueller, *The Gospel According to Luke*, in THE JEROME BIBLICAL COMMENTARY 149 (Raymond E. Brown, Joseph A. Fitzmyer & Roland E. Murphy eds.1968), was also personified as

people of faith[168] if political leaders and jurists fail to recognize that "[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution."[169] Alternatively, Judas-like, some educators may betray their beliefs by paying obeisance to the imposition of *Obergefell*, repudiating their religious identities in attempting to preserve institutions destined to operate as shells of their former selves. Those who turn from their religious faiths may ultimately answer to God as described in Revelation: "So, because you are lukewarm, neither hot nor cold, I will spit you out of my mouth."[170]

Faced with governmental interference in a post-*Obergefell* world, leaders and faculty members in Roman Catholic, as well as other faith-based, colleges and universities should stay the course. Educators should thus resist the siren call of trying to preserve federal financial benefits in response to governmental pressure to comply as they work to preserve their rights to academic and religious freedom by staying true to their faiths, values, and institutional missions. Time will tell whether leaders and faculty members in Roman Catholic, and other faith-based, colleges and universities remained faithful to Christian teachings on marriage or fell prey to "the dictatorship of relativism" of which Pope Benedict XVI eloquently warned.[171]

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opposition to God at Mark 6.24, John L. McKenzie, *The Gospel According to Matthew*, in THE JEROME BIBLICAL COMMENTARY 74 (Raymond E. Brown, Joseph A. Fitzmyer & Roland E. Murphy eds. 1968).

168. One can only hope and pray that the words of the late Cardinal George of Chicago never come to pass in the United States: "Observing the growing anti-Christian legislation, Francis Cardinal George ominously stated in 2011, 'I expect to die in my bed, my successor will die in prison, and his successor will die a martyr.'" *See* Michael P. Orsi, *Tracking Worldwide Christian Persecution*, WASH. TIMES, Apr. 17, 2014, 2014 WLNR 10319649.

169. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (citing U.S. CONST. amend. I).

170. *See Revelation* 3:16 (The New American Bible).

171. *See* Adelle M. Banks, *Evangelicals Hear their Moral Language*, SUN HERALD, Apr. 4, 2005, 2005 WLNR 22885649 (reporting that "[t]he day before Roman Catholic Cardinal Joseph Ratzinger became Pope Benedict XVI, he declared in a public Mass that a 'dictatorship of relativism' threatens the absolute truth claims of the church.").