

# Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System

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## TABLE OF CONTENTS

INTRODUCTION ..... 506

I. THE USE OF RIGHTS RHETORIC IN THE CHRISTIAN LEGAL SOCIETY’S LITIGATION STRATEGY ..... 509

II. RIGHTS CLASH AND THE ZERO-SUM GAME ..... 512

    A. THE ZERO-SUM GAME: HIGH STAKES DISPUTES ..... 513

    B. CHOOSING A WINNER ..... 514

        1. Gay Rights Trump Religious Rights ..... 514

        2. Religious Rights Trump Gay Rights ..... 516

III. IMPLICATIONS: THE (IN)ABILITY OF THE LEGAL SYSTEM TO RESOLVE THE CLS RIGHTS CLASH IN A PRINCIPLED WAY ..... 517

    A. THE COURTS: UNPREDICTABLE UMPIRES OR REDEEMABLE REFEREES? ..... 518

    B. THE LEGISLATURES: “ENLIGHTENED STATESMEN”? ..... 520

    C. EXTRA-INSTITUTIONAL APPROACHES ..... 522

        1. Private Dispute Resolution: Room for Compromise or Compromised Results? ..... 522

        2. Ballot Initiatives: Trust the Result to the Will of the People? ..... 524

IV. A DIFFERENT PERSPECTIVE: CASE STUDIES IN POLITICAL–JUDICIAL DIALOGUE ..... 525

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A. CANADA . . . . .	526
B. VERMONT . . . . .	529
CONCLUSION . . . . .	532

## INTRODUCTION

That some religious beliefs clash with the gay rights movement is undeniable.<sup>1</sup> In August 2005, leaders in Christianity, Judaism, and Islam gathered in Jerusalem to protest the WorldPride festival, an event organized by gay leaders to promote tolerance and diversity.<sup>2</sup> As *The New York Times* noted, “[i]nterfaith agreement is unusual in Israel”; it was the protest of a gay rights festival in which these leaders found common ground.<sup>3</sup> And in 2000, when the first WorldPride festival took place in Rome, Pope John Paul II publicly conveyed his distaste for the event.<sup>4</sup>

Closer to home, the clash between religion and the advancement of the gay rights movement is also present and has taken the form of litigation.<sup>5</sup> This Note will use as an example the litigation efforts of the Christian Legal Society (CLS), which, among other endeavors, maintains student chapters at universities throughout the country.<sup>6</sup> In particular, this Note will explore CLS’s lawsuits seeking exemptions from public universities’ nondiscrimination policies.<sup>7</sup> The litigation arises from the fact that CLS chapters prohibit any student who engages in homosexual conduct or believes that homosexual conduct is not

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1. See Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations That Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 718–19 (2009) (describing recent examples of religious organizations adopting or enforcing anti-gay policies); Laurie Goodstein & Greg Myre, *Clerics Fighting a Gay Festival for Jerusalem*, N.Y. TIMES, Mar. 31, 2005, at A1; Jane Lampman, *Gay Marriage Looms as “Battle of Our Times,”* CHRISTIAN SCI. MONITOR, June 1, 2006, at 13, available at <http://www.csmonitor.com/2006/0601/p13s01-lign.html>; see also George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 640 (1999) (stating that “America’s largest religious denominations all condemn homosexuality”); Douglas Laycock, Yale Kamisar Collegiate Professor of Law, *A Conscripted Prophet’s Guesses About the Future of Religious Liberty in America*, Address at the University of Michigan (Oct. 25, 2007) (“There is no very good reason for there to be conflict between religious liberty and gay rights, but there is.”).

This is not to say that all religious groups maintain an anti-gay mentality. See, e.g., Michael Luo & Christina Capocchi, *Lutheran Group Lifts Limits on Gay Clergy*, N.Y. TIMES, Aug. 22, 2009, at A9 (“[L]eaders of the country’s largest Lutheran denomination voted Friday[, August 21, 2009,] to allow gay men and lesbians in committed relationships to serve as members of the clergy.”).

2. Goodstein & Myre, *supra* note 1.

3. *Id.* It should be noted, however, that not all Christian, Jewish, and Muslim leaders protested the festival; in fact, some were disappointed in the protesting clergy’s response to the event. *Id.*

4. *Id.* (“Pope John Paul II appeared on a balcony over St. Peter’s Square and delivered a message expressing his ‘bitterness’ that the gay festival had gone forward, calling it an ‘offense to the Christian values of a city that is so dear to the hearts of Catholics across the world.’”).

5. See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (mem.).

6. CLS Law Student Ministries, <http://www.clsnet.org/law-students/cls-law-student-ministries> (last visited Aug. 20, 2009).

7. Specifically, this Note will look at CLS’s litigation with Arizona State University, The Ohio State University, Southern Illinois University, and University of California, Hastings College of the Law.

sinful from being an officer or voting member.<sup>8</sup> As a result of this policy, CLS chapters have come into conflict with school administrations that forbid their student groups from discriminating on the basis of sexual orientation and which argue that CLS violates those nondiscrimination policies.<sup>9</sup> For example, because CLS's chapter at the University of California, Hastings College of the Law refused to "open its membership to all students irrespective of their religious beliefs or sexual orientation," it was "the only unregistered group at the College."<sup>10</sup> The school froze money it had set aside for the group and prohibited CLS from accessing the university's means of communication with the student body.<sup>11</sup>

If its membership selection process violates universities' nondiscrimination policies, CLS argues, it has a constitutional right to an exemption from such policies to the extent that they require nondiscrimination based on sexual orientation.<sup>12</sup> CLS does not challenge the application of university policies to its membership criteria insofar as the policies prohibit discrimination based on age, ethnicity, gender, disability, color, national origin, race, or veteran status.<sup>13</sup> Of the four cases this Note considers, two of them—the suits against Arizona State University<sup>14</sup> and The Ohio State University<sup>15</sup>—settled before a court decision was rendered. CLS litigated a third case in the Seventh Circuit, successfully

8. See Brief and Required Short Appendix of Plaintiff-Appellant, Christian Legal Society Chapter at 5–6, *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853 (7th Cir. 2006) (No. 05-3239), 2005 WL 3738595 [hereinafter CLS Brief, *Walker*]; Verified Complaint for Declaratory and Injunctive Relief at 6, *Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow*, No. 04-2572 (D. Ariz. Nov. 17, 2004) [hereinafter ASU Chapter Complaint]; Verified Complaint for Declaratory and Injunctive Relief at 5–6, 8, *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law*, No. C 04-04484 JSW (N.D. Cal. Oct. 22, 2004) [hereinafter Hastings Chapter Complaint]; Verified Complaint for Declaratory and Injunctive Relief at 5, *Christian Legal Soc'y Chapter of Ohio State Univ. v. Holbrook*, No. 04-197 (S.D. Ohio Mar. 12, 2004) [hereinafter OSU Chapter Complaint].

9. See ASU Chapter Complaint, *supra* note 8, at 9–12; OSU Chapter Complaint, *supra* note 8, at 8–11.

10. Hastings Chapter Complaint, *supra* note 8, at 9.

11. *Id.*

12. CLS Brief, *Walker*, *supra* note 8, at 42; ASU Chapter Complaint, *supra* note 8, at 11–12; OSU Chapter Complaint, *supra* note 8, at 12, 14; Letter from Steven H. Aden, Chief Litig. Counsel, Ctr. for Law and Religious Freedom, to Judy Chapman, Dir., Office of Student Servs., Hastings Coll. of the Law, Univ. of Cal. (Sept. 23, 2004) (on file with author).

13. ASU Chapter Complaint, *supra* note 8, at 12; OSU Chapter Complaint, *supra* note 8, at 8, 12.

14. *Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV 04-2572-PHX-NVW, 2006 U.S. Dist. LEXIS 25579, at \*14–18 (D. Ariz. Apr. 28, 2006); see also Reply Brief of Plaintiff-Appellant, Christian Legal Society Chapter at 9–10, *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853 (7th Cir. 2006) (No. 05-3239) [hereinafter CLS Reply Brief, *Walker*] (discussing details of ASU settlement); Hastings Chapter Complaint, *supra* note 8, at 8 (same). The terms of the settlement allowed CLS to limit membership to those who agreed not to have any extra-marital sex. See *Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV 04-2572-PHX-NVW, 2006 U.S. Dist. LEXIS 25579, at \*14–18 (D. Ariz. Apr. 28, 2006). This agreement encompasses all homosexual activity in Arizona, where "[m]arriage between persons of the same sex is void and prohibited." ARIZ. REV. STAT. ANN. § 25-101(C) (2007).

15. See Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 895 n.18 (2009) (mentioning CLS's settlement with OSU).

obtaining a preliminary injunction against Southern Illinois University School of Law (SIU Law).<sup>16</sup> The parties subsequently settled, with SIU Law acquiescing to CLS's membership and officer requirements.<sup>17</sup> The United States Supreme Court recently granted certiorari in the fourth case, in which CLS sued Hastings College of the Law and was unsuccessful in the Ninth Circuit.<sup>18</sup>

This Note will argue that the litigation strategy CLS adopted in these cases creates a problem that uniquely challenges the United States legal system's ability to arrive at a principled result. Part I demonstrates how CLS has adopted the rights rhetoric commonly expected from the gay rights movement in its litigation strategy. Part II argues that by adopting this rhetoric, CLS creates a clash between its religious rights and the homosexual students' rights—a rights clash that inevitably leads to a zero-sum game. Part III critiques legal institutions' ability to resolve this particular rights clash given the zero-sum game, drawing in part on Critical Legal Studies (Crit)<sup>19</sup> arguments about the indeterminacy of rights rhetoric. It also assesses the usefulness of citizen-driven, extra-institutional approaches to the problem, concluding that they too are flawed.

Years before her Supreme Court appointment, Justice Sonia Sotomayor reflected on the uncertainty that often inheres in legal questions, as this Note argues it does in religion–homosexuality rights clashes:

The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. *But what is 'correct' is often difficult to discern when the law is attempting to balance competing interests and principles . . .*<sup>20</sup>

Sotomayor went on to observe that the public reaction to this uncertainty can be frustration and that, “[u]nfortunately, lawyers themselves sometimes feed that cynicism by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases.”<sup>21</sup>

The goal of this Note is not simply to “join[] a chorus of critics of the

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16. Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) (holding that CLS demonstrated a likelihood of success on the merits).

17. Press Release, Alliance Def. Fund, S. Ill. Univ. Settles Lawsuit with Christian Legal Soc’y, Will Recognize Chapter (May 22, 2007), *available at* <http://www.alliancedefensefund.org/news/story.aspx?cid=4126>.

18. Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane, 319 F. App’x 645 (9th Cir. 2009) (mem.), *aff’g* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006), *cert. granted sub nom.* Christian Legal Soc’y Chapter v. Martinez, 78 U.S.L.W. 3011 (U.S. Dec. 7, 2009) (No. 08-1371).

19. To avoid confusion with the Christian Legal Society, which this Note will refer to as “CLS,” this Note only will refer to Critical Legal Studies as “Crit.”

20. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 35 (1996) (emphasis added).

21. *Id.* at 36.

system,” but to “educat[e lawyers and the public] . . . about . . . the reasons for the law’s uncertainty; the values and limitations of the adversary system; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals.”<sup>22</sup> Thus, this Note concludes that it is important for rights clashes to be resolved institutionally, but it argues for a change in our perspective on how those institutions can properly handle rights clashes. Instead of expecting an ideal solution to a rights clash in each act of a legal institution—such as a judicial decision or a legislative enactment—we should view each act as an imperfect moment in a political–judicial dialogue winding its way toward a principled resolution. Part IV evaluates this perspective by examining two case studies of institutional dialogue as it has played out in attempts to resolve the religion–homosexuality rights clash. Part IV concludes that although this perspective does not address all of the complications that rights clashes introduce, it does help temper expectations of what can be achieved from our current legal system while still maintaining hope for a proper result in the long term.

#### I. THE USE OF RIGHTS RHETORIC IN THE CHRISTIAN LEGAL SOCIETY’S LITIGATION STRATEGY

The aspect of the Christian Legal Society’s litigation strategy on which this Note will focus is its adoption of rights rhetoric. Rights arguments involve universalizing the interests of an identity group by “restat[ing] the interests of the group as characteristics of all people,” thereby “allow[ing] the group to make its claims as claims of reason rather than of mere preference.”<sup>23</sup> Invoking rights thus gives an argument a sense of a determined outcome.<sup>24</sup> Rights arguments seem binding and dispositive in American legal disputes because arguments that “appeal to shared and uncontested understandings of the Constitution” and that are framed in “the language of a common tradition” are most effective in constitutional cases.<sup>25</sup> In other words, Americans are receptive to the language of rights. Rights rhetoric has been used so much in American legal disputes that a framework has developed: the existence of an identity group, a right to do “identity-defining things,” and a right to be free from discrimination based on those actions.<sup>26</sup>

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22. *Id.* at 50.

23. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 188 (Wendy Brown & Janet Halley eds., 2002). Kennedy gives the following example: “A gay person’s interest in the legalization of homosexual intercourse [might be] restated as the right to sexual autonomy . . .” *Id.*

24. *Id.* at 195 (“The appeal to a rule cast in the form of a right, or to a value understood to be represented by a right, may produce the experience of closure . . .”).

25. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1356–57 (2006).

26. See Kennedy, *supra* note 23, at 188.

CLS's litigation strategy adopts this rhetoric of rights along with the related arguments based in identity and discrimination. In its briefs, CLS characterizes the lawsuits as "*civil rights* case[s] brought by a student religious group against state university officials . . . ."<sup>27</sup> At the crux of CLS's strategy of rights infringement is its self-characterization as an identity group. In its demand letter to The Ohio State University (OSU), CLS asserted that it would have to compromise its identity to comply with the university's nondiscrimination policy and argued that it has a constitutional right to "define [its] identity through [its] membership and officer qualifications."<sup>28</sup> CLS also argued, in its litigation with both OSU and Southern Illinois University School of Law, that the belief that homosexuality is a sin is so integral to CLS's identity that the ability to exclude active homosexuals and those who believe homosexuality is not a sin is key to its very existence: "If it is to comply with [a university's] non-discrimination policy, the chapter must quite literally cease to exist. . . . [I]t must become a different organization, with the original organization truly passing out of existence."<sup>29</sup> As an identity group, CLS argues, it is being discriminated against by the universities.<sup>30</sup>

Of course, rights rhetoric commonly has formed the basis of the litigation strategy of the gay rights movement,<sup>31</sup> CLS's indirect adversary in this litigation. Indeed, in their briefs defending the application of the universities' nondiscrimination policies to CLS, groups such as Hastings Outlaw and the American Civil Liberties Union invoke similar discrimination and identity rhetoric.<sup>32</sup> As a

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27. CLS Brief, *Walker*, *supra* note 8, at 3 (emphasis added); see Brief of Appellant at 3, *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane*, 319 F. App'x 645 (9th Cir. 2009) (mem.) (No. 06-15956), *aff'g* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006), *cert. granted sub nom.* *Christian Legal Soc'y Chapter v. Martinez*, 78 U.S.L.W. 3011 (U.S. Dec. 7, 2009) (No. 08-1371), 2006 WL 3420535 [hereinafter CLS Brief, *Kane*].

28. Letter from Timothy J. Tracey, Litig. Counsel, Ctr. for Law and Religious Freedom, to Kimberly C. Shumate, Assoc. Legal Counsel, Ohio State Univ. (Nov. 24, 2003) [hereinafter Tracey Demand Letter] (on file with author).

29. CLS Brief, *Walker*, *supra* note 8, at 20–21; see Tracey Demand Letter, *supra* note 28.

30. See, e.g., CLS Brief, *Kane*, *supra* note 27, at 14–15 (comparing Hastings College of the Law's treatment of other student groups to its treatment of the CLS chapter at Hastings).

31. See Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 101 (2002) (arguing that "identity-based strategies became uniquely necessary [for the gay rights movement] in the wake of *Bowers v. Hardwick*"); Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 310 (2008) (noting that, since early in its history, "[t]he gay rights movement has framed its agenda in terms of rights discourse"); see also PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 1–9 (2000) (discussing use of the term "rights" in courtroom battles for gay rights).

32. See, e.g., Brief of Appellee Hastings Outlaw at 9–15, *Kane*, 319 F. App'x 645 (No. 06-15956) (describing research about discrimination against students based on actual or perceived homosexuality and noting universities' "compelling interest" in protecting "students from the effects of invidious discrimination on the basis of sexual orientation and religion"); Brief of *Amici Curiae* American Civil Liberties Union et al. at 6–18, 20, 26, *Kane*, 319 F. App'x 645 (No. 06-15956) (arguing that the university has a compelling interest in eradicating discrimination based on religious identity and sexual orientation, and therefore it has an "interest in enforcing its nondiscrimination policy" against all



result, the language of rights is on both sides of this litigation. In fact, CLS explicitly analogizes its own arguments to its adversary's reliance on rights rhetoric, stating: "Treating a religious organization[']s acts of self-definition as discrimination ironically results in the university itself discriminating against religious groups" and "does not enhance, but instead diminishes, religious diversity at [the university]."<sup>33</sup>

The fact that CLS has adopted the rhetoric of civil rights movements in its briefs and demand letters is not surprising. As described above, rights rhetoric makes for a compelling litigation strategy.<sup>34</sup> Because both sides of a lawsuit are subject to this same constraint on effective strategy,<sup>35</sup> their rhetoric often converges:

As movement and counter-movement struggle to persuade (or recruit) uncommitted members of the public, each movement is forced to take account of the other's arguments, and in time may even begin to incorporate aspects of the other's arguments into its own claims—a dynamic that can transpire unconsciously or with the quite conscious purpose of strengthening arguments under conditions of adversarial engagement.<sup>36</sup>

In fact, CLS is not the only religious litigant to adopt rights rhetoric in its briefs opposing a gay rights issue. A recent example is the plaintiffs in *Parker v. Hurley*.<sup>37</sup> In *Parker*, the plaintiffs' children read books in their kindergarten and second-grade classes that positively represented gay couples.<sup>38</sup> Because this message conflicted with the plaintiffs' religious beliefs, the plaintiffs challenged the schools' practice of presenting these books without giving parents an opportunity to "opt out" their children.<sup>39</sup> In their Petition for Certiorari to the United States Supreme Court, the plaintiffs wrote: "[T]he reality is that, at least

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student groups, including CLS, in order to "prevent discrimination" and "ensure that all people have an opportunity for inclusion"); Brief of *Amici Curiae* American Civil Liberties Union, and American Civil Liberties Union of Illinois at 18–23, *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853 (7th Cir. 2006) (No. 05-3239), 2005 WL 3738598.

33. Tracey Demand Letter, *supra* note 28.

34. See *supra* notes 23–26 and accompanying text.

35. Siegel, *supra* note 25, at 1364; cf. Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649 (2007) (discussing the adoption of woman-protective arguments, rhetoric traditionally used by the pro-choice movement, by pro-life advocates).

36. Siegel, *supra* note 25, at 1330–31; see also Kennedy, *supra* note 23, at 198 ("The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's right and the other from the defendant's."); Rutledge, *supra* note 31, at 310 ("[I]n the last two decades the Christian Right has shifted strategy to meet the 'rights discourse' of the gay rights movement head on. . . . [R]eligious conservatives have found that the discourse is an accurate vocabulary for the 'battle of our time.' . . . They have begun to latch onto this conflict, rights against rights." (footnote omitted)).

37. 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (mem.).

38. *Id.* at 90.

39. *Id.* at 90, 93.

in Lexington, Massachusetts, the petitioners [plaintiffs] represent a *tiny minority* comprised of people who harbor deep and abiding religious beliefs . . . . The whole purpose of *civil rights* litigation is to protect minorities from the government overreaching the defendants exhibited.”<sup>40</sup>

As Professor Martha Minow has noted, “‘Civil rights’ include rights that are potentially at odds with one another [and t]he term [civil rights] refers to not only the hard-won bans against racial subordination and gender-based and sexual orientation-based discrimination; it also safeguards the free exercise of religion.”<sup>41</sup> Thus, that CLS adopted this rights rhetoric is not surprising. The bigger question is what effect a rights clash has on the outcome of the resulting legal battle.

## II. RIGHTS CLASH AND THE ZERO-SUM GAME

Scholars have discussed for years the religion–homosexuality rights clash in the context of religious groups seeking exemptions from nondiscrimination laws insofar as they protect gay rights.<sup>42</sup> Professor Minow has described the state of the scholarly debate:

Even those who disagree about the answer can agree upon the question: how can a pluralistic society commit to both equality and tolerance of religious differences? Do we best serve those commitments by ensuring extension and application of civil rights laws throughout the society, or by ensuring regard and protection for the diverse practices and beliefs of religious communities?<sup>43</sup>

Perhaps not surprisingly, scholars disagree on the proper outcome to this problem. Section II.A discusses the concept of the “zero-sum game”—the notion that when one side wins the other side loses<sup>44</sup>—as applied to the religion–homosexuality rights clash. Section II.B demonstrates that reasonable people can and do disagree about the proper resolution of that zero-sum game: legal scholars seem to agree that both sides raise valid claims of rights, but they diverge when answering the question of which side’s rights should be given priority.

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40. Petition for Writ of Certiorari at 9, *Parker v. Hurley*, 129 S. Ct. 56 (2008) (mem.), *denying cert. to* 514 F.3d 87 (1st Cir. 2008) (emphasis added) (footnote omitted).

41. Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781, 786 (2007).

42. See, e.g., Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 63–64 (2006); Howarth, *supra* note 15, at 915, 932; Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 131–38 (2006); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3–9, 44 (2000); Rutledge, *supra* note 31, at 297–300, 305–09 (discussing the religion–homosexuality rights clash in the context of the Catholic Charities of Boston, which stopped providing adoption services when it was denied an exemption from Massachusetts’s antidiscrimination laws that would have permitted it to refuse to place children with gay couples).

43. Minow, *supra* note 41, at 783.

44. Feldblum, *supra* note 42, at 87.



## A. THE ZERO-SUM GAME: HIGH STAKES DISPUTES

One can appreciate the irreconcilability of the two parties' arguments in the CLS case by putting oneself alternately in the shoes of gay students and the shoes of students in the CLS chapters. Political theorist Amy Gutmann has described the competing interests in this type of scenario:

Prejudicially blocked entries into voluntary associations may . . . be considered unjust. Yet the freedom to form an exclusive group and the freedom to join one are both valued freedoms. Whichever way a democracy resolves this conflict between the freedom to join and the freedom to exclude, the freedom of some people to express their identities as they see fit will be limited by the freedom of others.<sup>45</sup>

The inevitable win-loss that Gutmann describes can be understood as a zero-sum game. Professor Chai R. Feldblum has argued that because of the foundation of the religion-homosexuality clash on moral valuations, the two sides are locked in a zero-sum game, meaning that "a gain for one side necessarily entails a corresponding loss for the other side."<sup>46</sup> In other words, the beliefs of the two sides are at such odds that their interests in the outcome are irreconcilable. The practical effect, as Professor Minow puts it, is that "[a]ccommodating religious groups requires that government actors say 'no' to civil rights advocates and to individuals who otherwise would receive civil rights protections. . . . Yet failing to accommodate religious groups carries its own risks."<sup>47</sup>

Although a zero-sum rights clash between identity groups need not rest on inimical moral beliefs,<sup>48</sup> the "head-on" nature of *this* clash (religion and homosexuality)<sup>49</sup> stems from the moral nature of their disagreements: For those, such as CLS, whose religious convictions lead them to believe that homosexuality and bisexuality are immoral, any governmental protection of gay individuals is

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45. AMY GUTMANN, *IDENTITY IN DEMOCRACY* 32 (2003).

46. Feldblum, *supra* note 42, at 87.

47. Minow, *supra* note 41, at 822–23; *see also* McConnell, *supra* note 42, at 43–44. Former Judge Michael McConnell observed that the disputes between religion and sexual orientation

feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality. For the most part, our current debates are mutually intolerant: one side seeks to use the force of law to maintain the traditional moral stance against homosexual conduct, while the other wishes to use law to change social attitudes and bring about full social acceptance of homosexuality.

McConnell, *supra* note 42, at 43–44.

48. *See* Mark Leibovich, *Rights vs. Rights: An Improbable Collision Course*, N.Y. TIMES, Jan. 13, 2008, § 4 (Week in Review), at 1 (discussing the clash between the women's rights and civil rights movements for political gains throughout American history and the potential for this clash to be a "zero-sum game").

49. Minow, *supra* note 41, at 791.

a “loss.”<sup>50</sup> The opposite is true for those who believe that homosexuality and bisexuality are morally unproblematic; for them, the failure of government to ensure the equality of people of all sexual orientations through laws is a “loss.”<sup>51</sup> Thus, given any governmental action or inaction, only one side feels it has “won.” This Note will demonstrate that this rights clash, because of its premise on a divisive moral question, is particularly problematic to resolve.

#### B. CHOOSING A WINNER

When stakes are this high,<sup>52</sup> there is significant disagreement regarding the proper outcome. The question comes down to whether gay rights should receive blanket protection of nondiscrimination policies or whether religion should be singled out and granted exemptions—the two extremes of the zero-sum game. Thus, many scholars have asked, “Is religion special?”<sup>53</sup> In other words, given this clash of rights, is there something about religion that would suggest it should be favored over gay rights? Or is the opposite true, that in fact there is something special about equal rights for gay citizens that should allow those rights to trump religious freedom? This section will describe the arguments on both sides of this debate. It should be noted at the outset that few of the scholars discussed in this section believe that one hundred percent of cases should come out on the same side; several suggest there should be some level of case-by-case determination that permits the opposing side’s rights to be accommodated in limited circumstances.<sup>54</sup> That caveat aside, these scholars disagree about which side should be accommodated *most* of the time.

#### 1. Gay Rights Trump Religious Rights

One response is that religion should not receive special treatment; rather, gay rights, like other civil rights, outweigh religious objections. The arguments here are both normative and precedential. The normative argument contends that nondiscrimination against gays is the proper result. Professor Feldblum conducted her own weighing of the interests at stake in the zero-sum game and determined that, on balance, the right to be free from discrimination based on sexual orientation generally must trump religious rights.<sup>55</sup> Feldblum argues that a “baseline of nondiscrimination” is necessary to “[e]nsur[e] that LGBT people can live honestly and safely in all aspects of their social lives” and “that

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50. Feldblum, *supra* note 42, at 87.

51. *Id.*

52. See GUTMANN, *supra* note 45, at 173 (“When conscience contests democratic laws, one imperfect ethics confronts the other . . . [T]he stakes are so high on both sides: respect for the rule of law on the one hand, upon which democratic justice depends, and respect for individual conscience on the other, upon which democratic justice also depends.”).

53. *Id.* at 151–91; Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 572–74.

54. See, e.g., Feldblum, *supra* note 42, at 120–22; McConnell, *supra* note 42, at 3, 38–42.

55. Feldblum, *supra* note 42, at 119 (“[I]n making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people.”).

members of the public who have a morally neutral characteristic are able to live without fear or vulnerability of discrimination based on that characteristic.”<sup>56</sup>

Beyond this normative argument,<sup>57</sup> another contention on this side of the debate is that the government should not treat gay rights differently from civil rights based on race. Civil rights based on race generally prevail over religious rights, while the relationship between religious rights and rights based on sexual orientation (and gender) is less settled.<sup>58</sup> Writing on religious groups’ requests for exemptions generally, Professor Kathleen Sullivan has argued that the First Amendment’s Establishment Clause and Free Exercise Clause do not require exemptions from civil rights laws:

The Religion Clauses enable government to pursue and endorse a culture of liberal democracy that will predictably clash over many issues with religious subcultures. The public classroom, for example, may inculcate commitments to gender equality that are incompatible with notions of the natural subordination of women to men drawn by some from the Bible. Protection for religious subcultures lies in exit rights, vigorously protected under the Free Exercise Clause: the solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school.<sup>59</sup>

A parallel argument is that the law already has recognized that civil rights trump religious rights when it comes to racial discrimination and that this recognition should extend to gay rights.<sup>60</sup> *Bob Jones University v. United States*<sup>61</sup> is an example of how the courts protect civil rights based on race from religious exemptions to nondiscrimination laws.<sup>62</sup> In 1970, the Internal Revenue Service (IRS) began refusing tax-exempt status to private schools that had racially discriminatory policies.<sup>63</sup> Bob Jones University fell victim to the IRS’s decision because of the school’s policy, motivated by fundamentalist Christian principles, of prohibiting interracial dating and marriage.<sup>64</sup> Its policy was to expel any student who engaged in interracial dating, supported interracial dating, or was affiliated with a group that supported interracial marriage.<sup>65</sup> The university argued, among other points, that the IRS could not refuse tax-exempt status based on the university’s prohibition against interracial dating because the

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56. *Id.* at 119, 120.

57. Feldblum recognizes that her premise that being gay is “morally neutral” is not yet universally accepted. *See supra* note 50 and accompanying text.

58. Minow, *supra* note 41, at 782 (“The pattern of inconsistent treatment of race, gender, and sexual orientation reveals the different trajectories of social movements mobilized around each category . . .”); *see id.* at 792–814.

59. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 213–14 (1992).

60. *See* Feldblum, *supra* note 42, at 120.

61. 461 U.S. 574 (1983).

62. *See* Feldblum, *supra* note 42, at 120 & n.159; Minow, *supra* note 41, at 794–801.

63. *Bob Jones Univ.*, 461 U.S. at 578.

64. *Id.* at 580–82.

65. *Id.* at 580–81.

school policy was grounded in “sincerely held religious beliefs.”<sup>66</sup> The United States Supreme Court, in an opinion by Justice Burger, rejected this argument, holding that the Religion Clauses did not prohibit the IRS from refusing tax-exempt status to Bob Jones University based on its racially discriminatory policy.<sup>67</sup> Professor Feldblum sums up the argument: “Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect LGBT people.”<sup>68</sup>

## 2. Religious Rights Trump Gay Rights

Other scholars argue that the weighing of the interests comes out on the other side: given the existence of a rights clash, gay rights should not trump religious freedom. Stating that Feldblum’s normative argument “loses sight . . . of comparable intangible burdens felt by conservative Christians,” Professor Andrew Koppelman has concluded that “[a] more precise account of the balance suggests that religious objectors should usually be accommodated.”<sup>69</sup> Koppelman proposed that Feldblum’s argument that it is necessary to resolve rights clashes in favor of gay rights to ensure LGBT people can “live lives of honesty” and avoid vulnerability<sup>70</sup> is just as true for religious believers—that they too should be protected for these reasons.<sup>71</sup>

Scholars like Koppelman argue that, in the United States, there is good reason to favor religion and grant it exemptions from laws of general applicability. In one article, Koppelman answers the question his title poses, *Is It Fair to Give Religion Special Treatment?*, in the affirmative, arguing that if the law must pick sides, religion is a fair and proper side to choose because it is a “distinctive human good”:

As soon as one sets aside crude utilitarianism and begins to decide which human concerns ought to receive special weight and dignity in political decision making, some amount of discretion is unavoidable. All we can do is enumerate ultimate goods, such as religion, and honor them as best we can. But we can only accommodate them one at a time. Because religion is a distinctive human good, accommodation of religion as such is not unfair.<sup>72</sup>

On the doctrinal front, former Judge Michael McConnell has approached this issue by contending that giving religion special constitutional treatment is in

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66. *Id.* at 602.

67. *Id.* at 577, 604–05.

68. Feldblum, *supra* note 42, at 120. *See generally* Mirkay, *supra* note 1 (arguing that discrimination violates religious organizations’ charitable purpose).

69. Koppelman, *supra* note 42, at 126.

70. *See supra* note 56 and accompanying text.

71. Koppelman, *supra* note 42, at 135.

72. Koppelman, *supra* note 53, at 574.

keeping with the goals of the First Amendment.<sup>73</sup> He argues that the Religion Clauses are intended to minimize government's disturbance of private observance of religion.<sup>74</sup> Exemptions from generally applicable laws based on religious objection are acceptable special treatment of religion because they help to advance this constitutional goal: "[R]eligion receives special consideration, not so that it can be privileged, but rather, that it may be left alone."<sup>75</sup> For example, the broad exemption from employment nondiscrimination laws for places of religious worship in choosing their leaders (like rabbis and priests) "is a fundamental aspect of the separation between church and state."<sup>76</sup>

Related to this position is a response to the argument<sup>77</sup> that *Bob Jones* should extend to discrimination on the basis of sexual orientation. Professor Douglas W. Kmiec has noted that the IRS has "cautioned against finding *Bob Jones* like violations of public policy premised on other individual rights."<sup>78</sup> Specifically discussing same-sex marriage, Kmiec's argument focuses on the *Bob Jones* Court's test: tax exempt status could be refused only if "there is *no doubt* that the organization's activities violate fundamental public policy."<sup>79</sup> Professor Kmiec argues that both the "no doubt" standard and the requirement of a violation of a "fundamental public policy" prevent the *Bob Jones* Court's reasoning from extending to same-sex marriage.<sup>80</sup> Although the Court found that Bob Jones University's racial discrimination ran counter to "a common law public policy against racial discrimination in education," Professor Kmiec argues that "[t]here is no comparable common law base supporting same-sex marriage."<sup>81</sup>

### III. IMPLICATIONS: THE (IN)ABILITY OF THE LEGAL SYSTEM TO RESOLVE THE CLS RIGHTS CLASH IN A PRINCIPLED WAY

As described in Part I, rights rhetoric is especially persuasive due to the American perception of rights as guaranteed and determinate.<sup>82</sup> As a result, rights-based arguments are attractive to parties to disputes. But Part II demonstrated that when rights clash—that is, when *both* sides of a dispute adopt rights rhetoric—reasonable people may disagree over how that clash should be resolved. Does that mean that when both parties to a dispute invoke rights language, the outcome becomes *indeterminate*?

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73. See McConnell, *supra* note 42, at 3, 11–12.

74. See *id.* at 11.

75. *Id.* at 12.

76. *Id.* at 20.

77. See *supra* note 68 and accompanying text.

78. Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103, 109 (Douglas Laycock et al. eds., 2008).

79. *Id.* at 110 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

80. *Id.*

81. *Id.*

82. See *supra* notes 23–26 and accompanying text.

Section III.A will explore the courts' ability to resolve the CLS disputes in a principled way. To structure that discussion, the section describes the argument, advanced by Critical Legal Studies scholars (Crits) twenty-five years ago<sup>83</sup> and now generally accepted among legal scholars,<sup>84</sup> that rights rhetoric leads to indeterminacy in the courts.<sup>85</sup> The section will then explore the implications of the Crit indeterminacy theory for courts faced with the religion-homosexuality rights clash. Section III.B will evaluate arguments for relying on the legislatures to resolve disputes like CLS's. Finally, section III.C will examine the advantages and overwhelming pitfalls of extra-institutional, citizen-driven approaches as alternative means of resolving rights clashes. This Part will conclude that these legal institutions and extra-institutional resolutions all face grave setbacks when used to resolve rights clashes like the one posed in the CLS litigation.

#### A. THE COURTS: UNPREDICTABLE UMPIRES OR REDEEMABLE REFEREES?

As was illustrated in Part II of this Note, legal scholars disagree on the appropriate outcome of the religion-homosexuality rights clash. What does that mean for the ability of courts to make the determination in a principled way in cases like the CLS litigation, where these rights are pitted against each other? This section will evaluate arguments that the rights clashes created in litigation strategies like the CLS cases make the outcome of the litigation uniquely indeterminate.

Critical Legal Studies scholars have argued that, in fact, rights rhetoric leads to indeterminacy in the courts. Disputing the common belief that rights arguments are binding and determinate of outcome,<sup>86</sup> Crits argue that rights arguments are as likely to create indeterminacy as are policy arguments.<sup>87</sup> By "indeterminacy" these scholars mean lacking a single, objective, predictable answer to a legal problem.<sup>88</sup> In other words, rights arguments, like policy and

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83. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371, 1373 (1984).

84. See MARK TUSHNET, *LEGAL SCHOLARSHIP AND EDUCATION*, at xiii (2008). This is not to suggest that scholars agree on the implications of the Crits' rights rhetoric arguments for legal institutions. See, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xxii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY: KEY WRITINGS*] ("Crits of color[, a movement that responded to Critical Legal Studies,] agreed to varying degrees with some dimensions of the [Critical Legal Studies] critique—for instance, that rights discourse was indeterminate. Yet we sharply differed with critics over the normative implications of this observation."). This Note also does not argue that all facets of the Crit argument are now generally accepted—it makes no claim as to any of the Crits' arguments beyond that about the indeterminacy of rights rhetoric.

85. See TUSHNET, *supra* note 84, at xiii.

86. See *supra* notes 23–26 and accompanying text.

87. See Kennedy, *supra* note 23, at 195.

88. See *id.* ("Although rights arguments have meaning and effect in legal discourse, it is clear that they are open to the same analysis of open texture or indeterminacy as legal argument in general. . . . [C]ritique flattened the distinction between rights argument and policy argument in general."); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524 (1991) [hereinafter Tushnet, *Political History*] ("[T]he indeterminacy argument held that within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances."); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341 (1997).



normative arguments, are susceptible to strategy and value judgments.<sup>89</sup>

Indeterminacy is especially salient when there is a rights clash (that is, both sides of a dispute argue for recognition of their respective rights) because it inevitably leads to balancing of the conflicting interests.<sup>90</sup> And once a court begins balancing competing claims of rights, Crits argue, “it is implausible that it is the rights themselves, rather than the ‘subjective’ or ‘political’ commitments of the judges, that are deciding the outcome.”<sup>91</sup>

The implication of this theory for the CLS litigation is that the religion–homosexuality rights clash it presents cannot be resolved in courts in a principled, unbiased way. This proposition has some support from empirical evidence and non-Crit scholars. A 2003 study that analyzed federal courts of appeals judges’ decision making found that ideology, although not the only factor that influenced the decisions, “played a significant role for most judges.”<sup>92</sup> Professor Koppelman has recognized recently that “the contestable nature of the value judgments that are involved [in the decision whether to give religion special treatment] suggest[s] that courts should not have the last word on these matters.”<sup>93</sup> Perhaps the most pertinent support for the relevance of the Crits’ argument to the CLS cases is that two circuits currently are split on the CLS problem: CLS won a preliminary injunction against Southern Illinois University in the Seventh Circuit<sup>94</sup> but was denied an injunction against University of California, Hastings College of the Law in the Ninth Circuit.<sup>95</sup>

Without responding directly to the problem of indeterminacy, some scholars have proposed that, in fact, the courts are a reasonable place for rights rhetoric.<sup>96</sup> The benefits that inure, these scholars argue, are so valuable as to outweigh the problem of indeterminacy.<sup>97</sup> In particular, they suggest that the

89. See Kennedy, *supra* note 23, at 197, 209; Tushnet, *Political History*, *supra* note 88, at 1524 (“[T]here is no interesting difference between legal discourse and ordinary moral and political discourse.”).

90. See Kennedy, *supra* note 23, at 197 (“[A]dvocates . . . end up with balancing tests that render rights argument[s] indistinguishable from the open-ended policy discourse it was supposed to let us avoid.”).

91. *Id.* at 198; see also Tushnet, *supra* note 83, at 1373.

92. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1508 (2003); see *id.* at 1514.

93. Koppelman, *supra* note 53, at 602–03.

94. *Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006).

95. *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane*, 319 F. App’x 645 (9th Cir. 2009) (mem.), *aff’g* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006), *cert. granted sub nom.* *Christian Legal Soc’y Chapter v. Martinez*, 78 U.S.L.W. 3011 (U.S. Dec. 7, 2009) (No. 08-1371).

96. See Mark Tushnet, *Survey Article: Critical Legal Theory (Without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 109 (2005) (“[T]he minority critique of the critique of rights . . . in its strongest versions [argued] that the critique of rights failed to appreciate the way in which the language of rights—if not ‘rights’ themselves—worked in the political struggles of racial minorities in the United States.”).

97. See CRITICAL RACE THEORY: KEY WRITINGS, *supra* note 84, at xxiii (“To the emerging race [C]rits, rights discourse held a social and transformative value in the context of racial subordination that

expression of rights rhetoric is a critical part of the political advancement of minorities because rights are “affirmations of human values.”<sup>98</sup>

The problem with these benefits of adjudicating *rights*, however, is that they do not eliminate the problem of indeterminacy when adjudicating *rights clashes*. Professor Elizabeth Schneider, though arguing that rights rhetoric is a critical part of political discourse, recognizes that “there is always a risk that a political struggle will be so fixed on rights discourse or winning rights in courts that it will not move beyond rights and will freeze political debate and growth. Rights discourse can be an alienated and artificial language that constricts political debate.”<sup>99</sup> To the extent that we value courts’ ability to resolve rights clashes in a principled and predictable way—a desire that is uniquely felt when the two parties going head-to-head are *both* minority groups—the question remains whether there is a better option for resolving these disputes.

#### B. THE LEGISLATURES: “ENLIGHTENED STATESMEN”?<sup>100</sup>

Some scholars contend that legislatures are the better branch in which to resolve problems like the religion–homosexuality rights clash.<sup>101</sup> These scholars generally argue for weaker or lesser judicial review as a means of achieving greater power for legislative decision making. Mark Tushnet, for example, has said that “conscientious” public officials<sup>102</sup> outside the courts reasonably could do the job of interpreting the Constitution—at least for certain questions, including “the vindication of the Declaration’s principles: the principle that all people were created equal, the principle that all had inalienable rights.”<sup>103</sup> As Professor Jeremy Waldron has argued, judicial review “does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake

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transcended the narrower question of whether reliance on rights could alone bring about any determinative results.”).

98. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 610 (1986); see also CRITICAL RACE THEORY: KEY WRITINGS, *supra* note 84, at xxiii–xxiv (“[T]he very notion of a subordinate people exercising rights was an important dimension . . . , significant not simply because of the occasional legal victories that were garnered, but because of the transformative dimension of African-Americans re-imagining themselves as full, rights-bearing citizens within the American political imagination.”).

Professor Schneider states that this advancement can be attained at both the individual and group levels: “[T]he assertion or ‘experience’ of rights can express political vision, affirm a group’s humanity, contribute to an individual’s development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages.” Schneider, *supra*, at 590.

99. Schneider, *supra* note 98, at 611 (footnote omitted).

100. THE FEDERALIST NO. 10, at 50 (James Madison) (Ian Shapiro ed., 2009).

101. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14, 52, 73 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1346 (2006).

102. TUSHNET, *supra* note 101, at 54.

103. *Id.* at 11.

when citizens disagree about rights.”<sup>104</sup> Professor Waldron contends that rather than strong “rights-based judicial review,” the preferable way to resolve rights disagreements should

respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise. *Ordinary legislative procedures can do this . . .* and an additional layer of final review by courts adds little to the process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights.<sup>105</sup>

Central to this argument is the notion that “politics is the arena of compromise,” a characteristic that would theoretically solve the problem of having to pick a winner in the zero-sum game.<sup>106</sup> Tushnet explains: “As legislators develop statutes, even civil rights statutes, they necessarily listen to their opponents and often develop compromises accommodating some of their opponents’ concerns—accommodations that courts would be hard-pressed to create.”<sup>107</sup>

The problem that remains is that, as Professor Feldblum has noted, the zero-sum game is *inevitable* where the government is involved,<sup>108</sup> and legislatures may be too easily swayed by majority opinion to reach a principled solution to a rights clash. Any legislative action or inaction with regard to this issue takes a position on the moral question.<sup>109</sup> Therefore, changing political views on the subject would lead to the greatest indeterminacy of all because legislatures are (perhaps by definition) “often contingent—shifting with political winds.”<sup>110</sup> Even to the extent that legislatures are consistent, they may not be best suited to resolving rights clashes. The Founders, of course, were particularly concerned by the strength of representative legislatures and their potential for tyrannical majorities,<sup>111</sup> as well as the potential for “legislative failures [to reflect] the will of the majority.”<sup>112</sup> As a practical and relevant example, Professor Koppelman has suggested that there may be widespread subordination of religious rights in legislative actions.<sup>113</sup> Thus, there is reason to doubt whether legislatures alone can resolve rights clashes in a principled way.

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104. Waldron, *supra* note 101, at 1353.

105. *Id.* at 1406 (emphasis added).

106. TUSHNET, *supra* note 101, at 169.

107. *Id.*

108. *See supra* note 46 and accompanying text.

109. *See* Feldblum, *supra* note 42, at 88.

110. Corey A. Johanningmeier, Note, *Law & Politics: The Case Against Judicial Review of Direct Democracy*, 82 IND. L.J. 1125, 1138 (2007).

111. THE FEDERALIST NO. 51, at 265–66 (James Madison) (Ian Shapiro ed., 2009).

112. Johanningmeier, *supra* note 110, at 1138.

113. *See* Koppelman, *supra* note 53, at 602–03.

## C. EXTRA-INSTITUTIONAL APPROACHES

This section evaluates citizen-driven approaches to resolving the religion—homosexuality rights clash. In particular, it discusses (1) methods of private dispute resolution, including settlements, and (2) ballot initiatives. It concludes that, like legal institutions, these approaches have critical drawbacks when used to resolve rights clashes and, thus, are not adequate substitutes for institutional solutions.

## 1. Private Dispute Resolution: Room for Compromise or Compromised Results?

Recognizing some of the problems of judicial and legislative resolutions of rights clashes, some scholars have suggested that the best way to avoid the zero-sum game is to resolve disputes privately. This section will argue that private negotiations and settlements may, theoretically, avoid the zero-sum game. However, it also will suggest that this solution is not a cure-all because it leaves systemic problems with legal institutions in place.

Michael McConnell has suggested that the best way to resolve rights clashes—and avoid a zero-sum game—is for the government to step away and allow the parties to handle their disputes privately:

Under this approach, the state should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality, and should refrain from using its power to favor, promote, or advance one position over the other. . . . Thus, the government would not punish sexual acts by consenting gay individuals, nor would it use sexual orientation as a basis for classification or discrimination, without powerful reasons, not grounded in moral objections, for taking such action. On the other hand, the government would not attempt to project this posture of moral neutrality onto the private sphere, *but would allow private forces in the culture to determine the ultimate social response.*<sup>114</sup>

In other words, the challenges experienced by courts and legislatures facing rights clashes can be resolved by removing such issues from their jurisdiction. Martha Minow similarly has argued that because litigation may not be the ideal context for the “normative growth” that can come from verbalizing rights, a more satisfactory option may be for parties to negotiate a mutually acceptable solution.<sup>115</sup> Professor Minow recognizes that “[t]he experience of litigation may be too brutal and polarizing to serve the purpose of encouraging particular parties to join together in exploring normative commitments through interpretation.”<sup>116</sup> She suggests that through “settlement, mediation, or planning long before litigation,” the parties may be more able to encourage normative growth

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114. McConnell, *supra* note 42, at 44 (emphasis added).

115. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1907 (1987).

116. *Id.*

and come to an understanding of their competing interests “away from the centers of official power while still gaining from their shadows.”<sup>117</sup>

In theory, these solutions would allow the parties to avoid the kind of polarizing result they might receive in court or from legislation, which cannot take all future concrete circumstances into account. Thus, parties like CLS and their parent universities could avoid the zero-sum game’s trademark win-lose conclusion through negotiation. Prime examples of how settlement can avoid the zero-sum game are CLS’s settlements with Arizona State University<sup>118</sup> and The Ohio State University.<sup>119</sup> In those cases, unlike in its litigation with University of California’s Hastings College of the Law,<sup>120</sup> CLS was able to reach a compromise with the parent schools absent court decisions.

Although it may be true that settlements and other means of private dispute resolution will often avoid the zero-sum game for a given dispute, they are not a perfect solution to the *institutional* problem raised by rights clashes in litigation. Settlements are inextricably linked to litigation because threats of litigation must be sincere in order to motivate settlement negotiations;<sup>121</sup> thus, there is a potential that any given rights clash will go to court. But because settlements do not make law binding on courts or parties other than those parties privy to them,<sup>122</sup> they do not help advance principled results in legal institutions for future litigation (or for legislative decision making). Unlike legislation and court decisions, which are public and so can build off of each other<sup>123</sup> and which in fact often *must* build off of each other, settlements are not as effective in promoting progress in constitutional understanding—as evidenced by the coexistence of a circuit split with two settled cases in the CLS litigation.<sup>124</sup> “Certain implicit presuppositions of our constitutional order authorize and constrain dispute; these enabling and constraining understandings in turn produce conflict that destabilizes the constitutional order in ways that strengthen it. In this way, constitutional culture invites and channels conflict over the Constitution’s meaning that forges potent new constitutional understandings.”<sup>125</sup> However, rights clashes do not serve this purpose if they are settled privately.

A related problem with negotiation as a proposed solution was raised in the discussion of legislatures in section III.B, but it bears repeating: even when the

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117. *Id.*

118. See CLS Reply Brief, *Walker*, *supra* note 14, at 9–10 (discussing the ASU settlement).

119. See Howarth, *supra* note 15, at 895 n.18 (referring to the OSU settlement).

120. Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane, 319 F. App’x 645 (9th Cir. 2009) (mem.), *aff’g* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006), *cert. granted sub nom.* Christian Legal Soc’y Chapter v. Martinez, 78 U.S.L.W. 3011 (U.S. Dec. 7, 2009) (No. 08-1371).

121. See 15A AM. JUR. 2D *Compromise and Settlement* § 26 (2009).

122. See *id.* §§ 9, 32, 37 (explaining that settlements are contracts); 17A AM. JUR. 2D *Contracts* § 412 (2009) (stating that contracts generally are binding only on the parties to them).

123. See Koppelman, *supra* note 53, at 603.

124. See *supra* notes 94–95 and accompanying text.

125. Siegel, *supra* note 25, at 1351.

government does not “get involved,” it is taking a side.<sup>126</sup> In other words, refusing to take a side *is taking a side* when it comes to governmental action.<sup>127</sup> This Note has just argued that the problem with private solutions of rights clashes is that they do not help government institutions progress toward an accepted resolution. McConnell took as a given in his argument for private resolutions that the government will not take a position; however, inaction simply creates a default position. Professor Feldblum responded directly to McConnell’s argument<sup>128</sup> that the government should not play a role in resolving rights clashes but rather allow people and groups to reconcile privately:

[W]hat McConnell fails to appreciate in his analysis is the zero-sum nature of the game. That is, he fails to recognize that the government is necessarily taking a stance on the moral question every time it fails to affirmatively ensure that gay people can live openly, safely, and honestly in society.<sup>129</sup>

## 2. Ballot Initiatives: Trust the Result to the Will of the People?

In those states where ballot initiatives are an option, citizens can propose statutory provisions and constitutional amendments.<sup>130</sup> If those citizens successfully satisfy the requisite procedures, the proposals are subject to a popular vote—not to legislative enactment.<sup>131</sup> In the past twenty years, voters have been asked to consider—and have both approved and defeated—many anti-gay initiatives.<sup>132</sup> In the November 2008 elections, for example, voters in Arizona, California, and Florida approved ballot initiatives amending their respective state constitutions to prohibit gay marriage, and voters in Arkansas approved a ballot initiative banning gay couples from adopting children.<sup>133</sup>

Although ballot initiatives have their advantages,<sup>134</sup> their drawbacks are particularly problematic for resolving rights clashes. Perhaps of most concern, ballot initiatives lack the greatest advantage of private dispute resolution: compromise.<sup>135</sup> The “deliberative process” on which the American representative system was built is absent from ballot initiatives.<sup>136</sup> Although the proposal of a ballot initiative may give rise to public debate, that debate does not lead to

126. See *supra* note 109 and accompanying text.

127. See Feldblum, *supra* note 42, at 88.

128. See *supra* note 114 and accompanying text.

129. See Feldblum, *supra* note 42, at 88.

130. Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1308 (2009).

131. *Id.* at 1308–09.

132. See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151, 161 tbl.1 (2009).

133. Local Ballot Measures, CNN.COM, Jan. 12, 2009, <http://www.cnn.com/ELECTION/2008/results/ballot.measures/>.

134. Skiba-Crafts, *supra* note 130, at 1309–10.

135. See Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1739 (1998).

136. See *id.* at 1739–40.



a retroactive modification of the proposed amendment; legislative debate, on the other hand, is used to mold enactments.<sup>137</sup>

And even as they depart in this respect from the legislative process, which does offer some level of compromise, ballot initiatives share a flaw with representative lawmaking: tyranny of the majority.<sup>138</sup> When both parties in rights clashes claim to be minority groups, this drawback causes one to wonder if there is a better solution.

#### IV. A DIFFERENT PERSPECTIVE: CASE STUDIES IN POLITICAL–JUDICIAL DIALOGUE

Part III argued that legislatures and courts each have unique challenges when faced with rights clashes but that a resolution from these institutions is preferable to extra-institutional (that is, citizen-driven) approaches. This Part argues that the flawed nature of each case and each piece of legislation that attempts to resolve this rights clash necessitates a new perspective on what one can expect from any given case or legislative enactment. It proposes that one can view each flawed case and piece of legislation as a part of an ongoing *political–judicial dialogue* that is working toward a principled and acceptable resolution. Dialogue theory “describ[es] the nature of interactions between courts and non-judicial actors in the area of constitutional decision-making.”<sup>139</sup> Through such interaction the law of the jurisdiction evolves to take into account the rights of religious groups as well as homosexual citizens.

Institutional dialogue might be the best means by which Americans can expect a proper resolution to rights clashes for several reasons. It allows for compromise, the benefit of private dispute resolution. Yet it avoids the problem of private resolution, which is that the results rely on legal institutions without resolving their challenges. That problem is eliminated because political–judicial dialogue is rooted in legal institutions; it checks and balances their individual weaknesses.

However, institutional dialogue is not necessarily an ideal solution. By definition, it only leads to a conclusion over time; thus, any individual decision of a court or legislature will be an imperfect stepping stone to a compromise. Even if these “imperfect” cases and legislative enactments lead to what observers of and participants in the American legal system consider a principled resolution down the road, they affect individuals in their wake. Additionally, whether a resulting compromise is the “ideal” solution to a rights clash cannot be readily determined, especially when both sides of the clash continue to debate the result.<sup>140</sup>

This Part aims to illustrate how one can view such a dialogue as an institu-

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137. Skiba-Crafts, *supra* note 130, at 1310.

138. *Id.* at 1311.

139. Christine Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective*, 21 TEMP. INT’L & COMP. L.J. 1, 1 (2007).

140. *See infra* notes 188–89 and accompanying text.

tional resolution to rights clashes. It will examine two recent cases of dialogue in a specific religion–homosexuality rights clash: the debate over legalization of same-sex marriage in Canada and in Vermont. Although this scenario departs from the CLS–university litigation that has formed the basis of this Note thus far, it concerns the same rights clash because the debates over same-sex marriage often are framed as a clash between religious and gay rights.<sup>141</sup> The salience of this rights clash in the same-sex marriage debate is demonstrated by the existence of<sup>142</sup> and desire for<sup>143</sup> religious exemptions from marriage laws. This Part will describe how zero-sum games framed the dialogues in Vermont and Canada, how the courts and legislatures interacted over a period of years to reach a solution, and how they still may be engaging in those dialogues.

#### A. CANADA

The Canadian debate over the legalization of same-sex marriage culminated in 2005 with a federal law that recognizes the right of gay couples to marry while emphasizing “the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.”<sup>144</sup> But the path to this legislation, which is described in this section, began years before 2005. During those years, Canadian legislatures and courts both made critical decisions and responded to each other’s moves.

At the foundation of this years-long debate is the same variety of rights clash

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141. See Kmiec, *supra* note 78, at 104; Laura Reidel, *Religious Opposition to Same-Sex Marriage in Canada: Limits to Multiculturalism*, 10 HUM. RTS. REV. 261, 261–62 (2008), available at <http://www.springerlink.com/content/u55335237m072816/fulltext.pdf>; Ben Schuman, Note, *Gods and Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2108–24 (2008).

In fact, a focus on this specific manifestation of the religion–homosexuality rights clash may not be a significant departure at all. As section III.B will describe, the Christian Legal Society submitted an amicus brief opposing same-sex marriage and civil unions in a seminal Vermont case using language similar to the rights rhetoric it employed in its litigation against the universities. See Brief Amici Curiae on Behalf of Christian Legal Society et al. at 11, *Baker v. State*, 744 A.2d 864 (1999) (No. 98-32); see also Rutledge, *supra* note 31, at 311 (“[T]he Christian Legal Society has made legal opposition to gay marriage a central focus of [its] strategy.”).

142. See, e.g., An Act To Protect Religious Freedom and Recognize Equality in Civil Marriage, S. 115, 2009–2010 Leg. (Vt. 2009) (enacted) (amending VT. STAT. ANN. tit. 9, § 4502 to read, in part, “[A] religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage.”).

143. See Robin Wilson, *Protection for All in Same-Sex Marriage*, L.A. TIMES, May 3, 2009, at A39; Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Robin Fretwell Wilson, Professor of Law, Washington & Lee Univ. Sch. of Law, & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch. to Hon. Christopher G. Donovan, Speaker of the House, Conn. House of Representatives (Apr. 20, 2009) (on file with author) (expressing religious liberty concerns with a Connecticut bill to grant same-sex couples the right to marry that did not have “religious-conscience protections” and urging the General Assembly to “craft[] an appropriate religious accommodation provision”).

144. Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

that this Note observed in the CLS litigation with universities. Religious groups vocally opposed the legalization of same-sex marriage,<sup>145</sup> sometimes framing their resistance in rights rhetoric. The Canadian Islamic Congress (CIC), for example, spoke out against the federal bill proposing to legalize same-sex marriage (which was eventually enacted), fearing that it “violate[d] Canadians’ religious rights by interfering in matters of faith.”<sup>146</sup> The CIC specifically pointed to the concern that religious groups would be prosecuted for refusing to provide same-sex couples with venues for their weddings.<sup>147</sup> In addition, Christian groups intervened to appeal a Quebec case that had legalized same-sex marriage, seeking to overturn the lower court’s holding.<sup>148</sup>

A suitable place to begin examining the Canadian dialogue is the case of *M. v. H.*<sup>149</sup> In this seminal decision, the Supreme Court of Canada held that by excluding members of same-sex relationships from spousal support obligations, Ontario’s Family Law Act violated the prohibition against discrimination on the basis of sexual orientation in the Canadian Charter of Rights and Freedoms.<sup>150</sup> The Supreme Court further held that the exclusion of members of same-sex couples from the protection of the law demeaned those individuals’ dignity.<sup>151</sup> As a result, the Supreme Court invalidated that section of the Family Law Act that limited spousal support rights to heterosexual relationships.<sup>152</sup>

*M. v. H.* triggered responses and conversations in legislatures at varying levels of Canadian government. One commentator describes the legislative reaction:

[T]he ruling [in *M. v. H.*] rapidly led to a process of legislative revision at both the federal and provincial levels. In the three years following *M. v. H.*, all Canadian jurisdictions enacted legislation that extended social policy benefits to same-sex couples, though there were varying degrees of defiance and controversy in different provinces regarding how far these amendments should go in order to respect equality.<sup>153</sup>

Additionally, the year after *M. v. H.*, Canada’s Parliament passed the Moderniza-

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145. See Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, 20 *BYU J. PUB. L.* 195, 216 (2006); Reidel, *supra* note 141, at 276 (“[A]mong those who opposed the legalization of same-sex marriage in Canada, most claimed to speak for a particular religious or cultural constituency.”).

146. Press Release, Canadian Islamic Congress, Islamic Congress Urges Government to Dump Same-Sex Marriage Bill: MPs Spending Too Much Political Capital on the Issue (Feb. 7, 2005), available at [http://www.canadianislamiccongress.com/mc/media\\_communique.php?id=582](http://www.canadianislamiccongress.com/mc/media_communique.php?id=582).

147. *See id.*

148. Cece Cox, *To Have and To Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 *LAW & SEXUALITY* 1, 20 (2005).

149. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

150. *Id.* at 5–7.

151. *Id.* at 7.

152. *Id.* at 10; *see also* Bateup, *supra* note 139, at 47 (characterizing the *M. v. H.* ruling as “an unambiguous declaration . . . that same-sex couples must be treated equally”).

153. Bateup, *supra* note 139, at 47–48 (footnotes omitted).

tion of Benefits and Obligations Act, which gave all of the “benefits and obligations” of common law partnership to same-sex couples without changing the definition of “spouse.”<sup>154</sup>

Several years after *M. v. H.*, the Courts of Appeal in both Ontario and British Columbia held that same-sex couples were entitled to marry.<sup>155</sup> Interestingly, in *EGALE Canada Inc. v. Canada (Attorney General)*, the British Columbia court held that its opinion would not take effect for over a year—until July 2004—in order to give the federal and provincial legislatures the opportunity to amend the laws to reflect the court’s decision.<sup>156</sup> However, that attempt at dialogue with the legislatures did not last long; it was soon replaced by a sort of dialogue among the courts: The Ontario decision, *Halpern*, was issued about a month after *EGALE Canada* and decreed that same-sex couples’ right to marry became effective immediately.<sup>157</sup> That holding led the British Columbia court to revisit *EGALE Canada*, and, two months after its initial decision, that court made its holding effective immediately, as well.<sup>158</sup>

The Canadian federal government decided not to appeal either *Halpern* or *EGALE Canada*<sup>159</sup> but rather to draft legislation that would recognize their holdings<sup>160</sup>—a prime example of political–judicial dialogue. In addition, the Canadian Parliament requested an advisory opinion from the Supreme Court of Canada regarding the constitutionality of this legislation.<sup>161</sup> In *Reference re Same-Sex Marriage*, the Supreme Court held, among other things, that the legalization of same-sex marriage was permissible and that under the Canadian Charter of Rights and Freedoms, religious groups would be protected from performing marriages that violated their religious beliefs.<sup>162</sup> Thereafter, Parliament enacted the law.<sup>163</sup>

As this timeline demonstrates, the path toward Canada’s federal Civil Marriage Act involved a back-and-forth between legislatures and courts at both the federal and provincial levels. In order to evaluate the usefulness of this Canadian case study as a model for resolving rights clashes in the United States, it is important to recognize the relevant structural and cultural differences between the two countries. Culturally, several scholars have argued that the religious

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154. Modernization of Benefits and Obligations Act, 2000 S.C., ch.12 (Can.).

155. See *EGALE Can. Inc. v. Canada (Attorney Gen.)*, [2003] 13 B.C.L.R. (4th) 1, paras. 158–59 (Can.); *Halpern v. Canada (Attorney Gen.)*, [2003] 225 D.L.R. (4th) 529, paras. 125, 142 (Ont. Ct. App.).

156. *EGALE Can.*, 13 B.C.L.R. (4th) at para. 161.

157. *Halpern*, 225 D.L.R. (4th) at para. 156.

158. *EGALE Can. Inc. v. Canada (Attorney Gen.)*, [2003] 15 B.C.L.R. (4th) 226, para. 8 (Can.).

159. See Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT’L J. CONST. L. 712, 715 (2006).

160. See *id.* at 716.

161. See *id.*

162. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, paras. 5–6 (Can.); see Hogg, *supra* note 159, at 717–18, 720.

163. See Hogg, *supra* note 159, at 720–21.

right carries less weight in Canadian politics than it does in the United States.<sup>164</sup> This difference may diminish the importance of the rights clash to the Canadian dialogue. Structurally, there are two aspects of Canada's legal system that might encourage inter-branch dialogue, neither of which exists in the United States. First, as evidenced by *Reference re Same-Sex Marriage*, the Supreme Court of Canada may give advisory opinions on the constitutionality of drafted legislation. In the United States, by contrast, the Constitution prohibits such opinions, limiting courts' jurisdiction to "cases" and "controversies."<sup>165</sup> This difference is not too damaging to the potential for successful American dialogue, however, because the advisory opinion regarding the Civil Marriage Act was only one aspect of the Canadian political-judicial dialogue. Second, Section 33 of the Canadian Charter permits legislatures to override judicial decisions holding that certain legislation violates rights granted in the Charter.<sup>166</sup> As one author put it, the Section 33 override is, theoretically, "the ultimate form of dialogue between courts and legislatures."<sup>167</sup> This difference, however, may not be especially telling either: Canadian legislatures use their override ability rarely, and it has never been used by the Parliament.<sup>168</sup>

Thus, given the present structure of the legal system in the United States, the relevance of the Canadian dialogue has limitations. Although religious opposition to same-sex marriage certainly played a role in Canada, its effect may have been limited. Additionally, the structure of the relationship between Canadian legislatures and courts may mean a dialogue in that country would take a different form than it would in the United States.<sup>169</sup> However, as the next section will illustrate, a dialogue regarding this same rights clash has taken place in the United States, as well.

#### B. VERMONT

Like Canada, the United States has a *nationwide* political-judicial dialogue regarding same-sex marriage. State lawmakers respond to litigation in other states' courts, creating inter-state dialogues between the political and judicial realms.<sup>170</sup> There are also intra-state dialogues between the political and judicial realms; this section will demonstrate such an intra-state dialogue in Vermont.

Vermont, like Canada, has adopted a same-sex marriage law that explicitly recognizes the rights of religious groups. On April 7, 2009, the Vermont legis-

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164. See, e.g., Bala, *supra* note 145, at 226; Cox, *supra* note 148, at 10.

165. See U.S. CONST. art. III, § 2, cl. 1; *Muskrat v. United States*, 219 U.S. 346, 361–63 (1911).

166. Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 543 (2005).

167. *Id.*

168. *Id.*

169. Bateup, *supra* note 139, at 1 ("Dialogue theory has been most popular in Canada, due to the unique institutional mechanisms adopted in that country to promote an interactive relationship between courts and legislatures.").

170. See Keck, *supra* note 132, at 156–61.

lature overrode Governor Jim Douglas's veto to enact that legislation.<sup>171</sup> The law amended the existing definition of marriage so that it is no longer limited to "one man and one woman," but rather is available to any "two people."<sup>172</sup> The bill, as enacted, also has an explicit exemption for religious groups that do not wish to provide amenities for same-sex marriages:

[A] religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage.<sup>173</sup>

The debate that led to this enactment, like the debate in Canada, at times created a religion–homosexuality rights clash. Of particular relevance to this Note, CLS wrote an amicus brief in a seminal Vermont case, *Baker v. State*.<sup>174</sup> In *Baker*, same-sex couples requested a declaratory judgment that they were entitled to marry under the Vermont constitution.<sup>175</sup> When the plaintiffs appealed the case to the Supreme Court of Vermont, CLS and twenty other religious groups submitted an amicus brief opposing the appellants.<sup>176</sup> Just as CLS used rights rhetoric in its briefs opposing universities, its amicus brief in *Baker* employed the language of rights to oppose same-sex marriage in Vermont. For example, the brief noted, "The right of religious exclusivity claimed by a religious organization may seem intolerant to some who do not share the same religious convictions. Such a right, however, is indispensable to the preservation of religious autonomy and self-definition."<sup>177</sup>

The outcome in *Baker* set up a political–judicial dialogue. The Supreme Court of Vermont held that same-sex couples had the right under the Vermont constitution "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."<sup>178</sup> However, the court did not determine how that constitutional right should be recognized, leaving it up to the Vermont legislature to determine whether to grant same-sex couples an "alternative legal status to marriage," such as domestic partnerships, or the right to marriage

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171. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1.

172. See An Act To Protect Religious Freedom and Recognize Equality in Civil Marriage, S. 115, 2009–2010 Leg. (Vt. 2009) (enacted) (amending VT. STAT. ANN. tit. 15, § 8, effective Sept. 1, 2009).

173. See *id.* (amending VT. STAT. ANN. tit. 9, § 4502).

174. 744 A.2d 864 (Vt. 1999).

175. *Id.* at 867–68.

176. Brief Amici Curiae on Behalf of Christian Legal Society et al., at 11, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-32).

177. *Id.*

178. *Baker*, 744 A.2d at 886.



itself.<sup>179</sup> Vermont's legislature responded to this holding the following year by enacting "civil union" legislation, under which same-sex couples could receive all of the "rights and obligations of married persons under state law" without the label "marriage."<sup>180</sup>

At that point, the dialogue continued in the form of electoral setbacks as well as electoral gains.<sup>181</sup> Professor Thomas M. Keck has stated that many Vermont legislators "paid for [their response to *Baker*] at the polls"<sup>182</sup> and that "the fall 2000 statewide elections were 'conducted in significant part as a referendum on civil unions.'"<sup>183</sup> Specifically, sixteen incumbents who had backed the bill were unseated from the Vermont General Assembly, and the Vermont House of Representatives went from majority Democrat (the party associated with supporters of civil unions) to majority Republican.<sup>184</sup> However, as Professor Keck notes, these setbacks were accompanied by an indication of support: the Vermont Senate did not experience a political overthrow, and the governor and lieutenant governor—both Democrats and both supporters of the civil union bill—were re-elected.<sup>185</sup>

On February 6, 2009, the Vermont House of Representatives introduced a bill that would allow same-sex couples to marry.<sup>186</sup> Governor Jim Douglas vetoed the bill, but on April 7, 2009, the legislature overrode his veto.<sup>187</sup>

Thus, the path to the marriage law resembled Canada's experience insofar as it was characterized by an exchange between the judiciary and legislature. The result in both locations was a bill legalizing same-sex marriage and explicitly recognizing religious groups' right to refuse to participate in at least some aspects of same-sex marriages.

Whether these dialogues have achieved an *ideal* resolution of the religion–homosexuality rights clash, however, is unclear. The debates continue, with some arguing that the religious exemptions are insufficient. For example, the Vermont exemptions are limited to religious *groups*; a concern about the rights of individual religious objectors remains.<sup>188</sup> Additionally, the recognition of

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179. *Id.* ("We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions.").

180. Bala, *supra* note 145, at 223–24.

181. Keck, *supra* note 132, at 161–62.

182. *Id.* at 161.

183. *Id.* at 162 (quoting WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 81 (2002)).

184. *Id.*

185. *Id.*

186. Louis Porter, *Vt. House To Introduce Same-Sex Marriage Bill*, RUTLAND HERALD, Feb. 6, 2009, at A1.

187. Goodnough, *supra* note 171.

188. *See, e.g.,* Kmiec, *supra* note 78, at 104 ("Were federal protection or substantive due process to be construed to require states to license same-sex marriage, those who have profound moral or religious objection to the social affirmation of homosexual conduct would be argued to be the outliers of civil society, and for that reason, to be ineligible for a tax exemption or other public benefit."); Wilson, *supra*

religious organizations' right to abstain from presiding over same-sex marriages in the Canadian Civil Marriage Law is not an additional protection; rather, it is merely a specific application of existing religious rights under the Canadian Charter.<sup>189</sup> Despite the fact that the dialogues may be ongoing, they have already been successful in providing the compromise of private dispute resolution while advancing—rather than ignoring—legislatures' and courts' resolutions to the religion–homosexuality rights clash.

### CONCLUSION

The Christian Legal Society is engaged in a legal war that has battles all across the country—from Ohio and Illinois to Arizona and California. A quick read of the briefs reveals there is no love lost between the litigants in these disputes. A closer read demonstrates something potentially more problematic: a rights clash. CLS's litigation strategy mimics that of its indirect opponent in this litigation, the gay rights movement. The result is a rights-against-rights collision, and when the dust settles, only one side will feel it has won the zero-sum game. Can the legal system solve this problem in a principled way?

Law students are inculcated with the understanding that each American legal institution has benefits and drawbacks—hence our system of checks and balances. However, this Note has argued that rights clashes create a unique problem that neither the courts nor legislatures alone can handle in a principled way. The Note has evaluated the arguments for resolving rights clashes primarily in the judiciary and those for resolving rights clashes primarily in legislatures. It has concluded that although there are normative and strategic arguments for each of these solutions, they both have drawbacks that speak distinctively to the problem of a rights clash.

Yet it is important for the solution to come from the legal system rather than from private resolutions such as settlements or ballot initiatives. Although private resolution more readily permits compromises, which may avoid the zero-sum game often posed by rights clashes, it relies on the legal system without fixing it. Ballot initiatives do not even share the benefit of compromise and have the added setback of threatening tyranny of the majority. Additionally, governmental inaction results in a default government position, thereby perpetuating the lack of a principled result and a clear winner and loser of the zero-sum game, as opposed to a compromise.

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note 143 (“As important as [Vermont’s] exemptions for organizations are, states still weighing same-sex marriage should do better. Wedding advisers, photographers, bakers, caterers and others who prefer to step aside from same-sex ceremonies for religious reasons also need explicit protection.”).

189. See Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT’L J.L. POL’Y & FAM. 249, 256–57 (2006) (noting that, in response to a certified question from the federal government, the Supreme Court of Canada “held that the section 2(a) guarantee of religious freedom [in the Canadian Charter of Rights and Freedoms] was broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages[] contrary to their religious beliefs”).

The best manner to reach a solution—as is the case for most hard questions—is probably a shade of gray: the courts and legislatures must simultaneously tackle this problem and push each other toward an acceptable solution. As the cases of same-sex marriage legislation in Canada and Vermont demonstrate, such political–judicial dialogue may lead the government to compromise—the benefit of private dispute resolution—while still taking a purposeful position that balances the rights of religious groups and gay citizens.

Whether there will be a winner or a loser of the zero-sum game created by CLS’s litigation strategy, or whether the government can resolve the rights clash in a compromise, remains to be seen. But it is clear from the litigation materials that the stakes are high.