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Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?

Lucien J. Dhooge

PUBLIC ACCOMMODATION STATUTES AND SEXUAL ORIENTATION: SHOULD THERE BE A RELIGIOUS EXEMPTION FOR SECULAR BUSINESSES?

LUCIEN J. DHOOGE*

> *[T]he First Amendment is not a libertarian manifesto entitling businesses to operate without any restrictions on their conduct in the marketplace.*[1]
>
> *This isn't 1964 anymore. . . . We've moved beyond that. If you open up your doors to the general public, you can't pick and choose who you are going to deal with.*[2]

ABSTRACT

This Article examines the issue of whether there should be a religious exemption for secular businesses from public accommodation statutes that protect prospective patrons from discrimination on the basis of sexual orientation. The Article examines this issue in the context of protecting free exercise of religion versus offering services to all members of the public equally and without distinction. The Article concludes that the perceived threat to religious liberty posed by such statutes is exaggerated, that the consequences of granting exemptions would be harmful, and that state-sanctioned discrimination is contrary to the fundamental principles of justice and equality underlying the U.S. legal system.

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* Sue and John Staton Professor of Law, Scheller College of Business, Georgia Institute of Technology.

1. Answer Brief of Appellee-Respondent Vanessa Willock at 39, Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33687).

2. Adam Nagourney, *Arizona Bill Stirred Alarm in the G.O.P.*, N.Y. TIMES, Feb. 28, 2014, at A11 (quoting former Oklahoma Governor Frank Keating).

INTRODUCTION

The past year has been characterized by enormous strides toward full equality for the LGBT community. The U.S. Supreme Court's opinion in *United States v. Windsor* has been followed by an uninterrupted string of victories on the issue of marriage equality in federal district courts and state courts.[3] The most recent successes in the U.S. Court of Appeals for the Tenth Circuit mark the first time that a federal circuit court of appeals has upheld the right of same-sex couples to marry.[4] A growing number of states, thirty-one in all, prohibit

3. 133 S. Ct. 2675, 2694–96 (2013) (holding that Section 3 of the Defense of Marriage Act denying federal recognition of same-sex marriages was a violation of the Fifth Amendment's Due Process Clause); *see also* Emily Bazelon, *Who Needs the Supreme Court?,* SLATE (May 20, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/with_pennsylvania_gay_marriage_gets_its-8th_straight_win_who_needs_the.html, *archived at* http://perma.cc/LP9S-BLMP (documenting the unbroken line of judicial opinions striking down bans on same-sex marriage and the speed at which marriage equality is occurring post-*Windsor*); *Out for Freedom*, AM. CIVIL LIBERTIES UNION (2014), http://www.aclu.org/out-freedom, *archived at* http://perma.cc/75QE-SBDY (noting that six states legalized same-sex marriage after the U.S. Supreme Court's decision in *Windsor* and that forty-four percent of the U.S. population lives in states where same-sex marriage is legal). There were fifty-five marriage equality lawsuits pending in federal court, twenty-nine marriage equality lawsuits pending in state court, and at least one lawsuit pending in every state that did not permit same-sex couples to marry at the time of the publication of this Article. *See Pending Marriage Equality Cases*, LAMBDA LEGAL (last updated Nov. 3, 2014), http://www.lambdalegal.org/pending-marriage-equality-cases, *archived at* http://www.perma.cc/MQ8Y-R7NG.

4. *See* Bishop v. Smith, 760 F.3d 1070, 1079-82 (10th Cir. 2014) (holding that Oklahoma's prohibition upon same-sex marriage violated the Due Process and Equal Protection

discrimination in private or public employment or both on the basis of sexual orientation with a smaller number of states extending protection on the basis of gender identity.[5] A further blow for equality was struck in July 2014 with the issuance of a long-awaited executive order protecting federal government employees from discrimination on the basis of gender identity and prohibiting federal contractors from engaging in employment discrimination against members of the LGBT community.[6] These developments come on the heels of public opinion polls evidencing shifting attitudes toward homosexuality and greater social acceptance of the LGBT community.[7]

Clauses of the U.S. Constitution); *see also* Kitchen v. Herbert, 755 F.3d 1193, 1229-30 (10th Cir. 2014) (holding that Utah's prohibition upon same-sex marriage violated the Due Process and Equal Protection Clauses of the U.S. Constitution). The Tenth Circuit's opinions were followed shortly thereafter by an opinion of the Fourth Circuit Court of Appeals reaching the same conclusion. *See* Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (holding that Virginia's prohibition upon same-sex marriage violated the Due Process and Equal Protection Clauses of the U.S. Constitution). *But see* Deboer v. Snyder, 772 F.3d 388, 399-419 (6th Cir. 2014), *cert. granted*, 2015 U.S. LEXIS 624 (U.S. Jan. 16, 2015) (holding that same-sex couples do not have a fundamental constitutional right to marry and states are free to deny recognition to same-sex marriages performed in other states).

5. LAMBDA LEGAL, *In Your State* (2014), http://www.lambdalegal.org/states-regions, *archived at* http://perma.cc/W6XM-S2CF.

6. Exec. Order No. 13,672, 79 Fed. Reg. 42971 §§ 1–2 (July 21, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf, *archived at* http://perma.cc/XN89-MZS9; *see also* Press Release, The White House, Taking Action to Support LGBT Workplace Equality is Good for Business (July 21, 2014), (on file with author) (contending that employers recognize that workplace equality is in their best interest and that equality is supported by U.S. public opinion, state and local governments, and some faith communities).

7. *See, e.g.*, William Harms, *Americans Move Dramatically Toward Acceptance of Homosexuality, Survey Finds*, UCHICAGO NEWS (Sept. 28, 2011), http://news.uchicago.edu/article/2011/09/28/americans-move-dramatically-toward-acceptance-of homosexuality-survey-finds, *archived at* http://perma.cc/7D5Z-NZ38 (summarizing the results of a survey conducted by NORC which concluded that "Americans overwhelmingly support basic civil liberties and freedom of expression for gays and lesbians"); Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx, *archived at* http://perma.cc/B2Z9-7YZ8 (summarizing a Gallup Poll in which 59% of the survey pool found gay and lesbian relations morally acceptable); Warren Richey, *Polls Finds Broad, Rapid Shift Among Americans Toward Gay Marriage*, CHRISTIAN SCI. MONITOR, Mar. 27, 2014, *available at* http://www.csmonitor.com/USA/Politics/2014/0327/poll-finds-broad-rapid-shift-among-Americans-toward-gay-marriage, *archived at* http://perma.cc/CMJ8-G9NJ (summarizing the results of a Greenberg Quinlan Rosner Research poll); Carrie Wofford, *Why Equality Is Winning,* U.S. NEWS & WORLD REP., Mar. 26, 2014, *available at* http://www.usnews.com/opinion/blogs/carrie-wofford/2014/03/26/how-did-public-opinion-on-gay-marriage-shift-so-quickly, *archived at* http://perma.cc/HNE4-835M (concluding that "gay rights are suddenly ascendant" and attributing their rapid rise to efforts to encourage members of the LGBT community to self-identify in the 1970s and characterize same-sex marriage as encouraging, loving, and committed relationships).

The ascendancy of gay rights has been accompanied by a rise in assertions of religious freedom.[8] Efforts to protect free exercise and restore religious freedom have primarily taken the form of state legislative initiatives. One such example was Arizona Senate Bill 1062, which was vetoed by Governor Jan Brewer in February 2014.[9] The bill prohibited state action substantially burdening the exercise of religion by any individual, business association, trust, foundation, church or religious organization in the absence of a compelling governmental interest advanced by the least restrictive means.[10] This restriction upon state action applied to facially neutral laws, laws of general applicability and in judicial and administrative proceedings regardless of whether the government was a party.[11] Protected persons could not be compelled to act or prohibited from acting if such act or refusal was "substantially motivated by a religious belief, whether or not the exercise [was] compulsory or central to a larger system of religious belief."[12] The bill was condemned by a variety of national and state political officials and members of the business community as permitting a wide range of denials of service under the guise of religion, allowing use of religion as "a fig leaf for prejudice" and potentially resulting in unintended consequences with negative financial impacts upon the state.[13] However, one such consequence

8. *See, e.g.*, Adam Serwer, *Religious Freedom Used to Chip Away at LGBT Rights*, MSNBC (Feb. 19, 2014), http://www.msnbc.com/msnbc/religious-freedom-chip-away-gay-rights, *archived at* http://perma.cc/LR64-4ANR (describing gay rights from the viewpoint of social conservatives as an issue of religious freedom); Amy Stone, *The New Religious Freedom Argument: Gay Marriage in the 2012 Election*, POL. RES. ASSOCIATES. (Oct. 30, 2012), http://www.politicalresearch.org/2012/10/30/the-new-religious-freedom-argument-gay-marriage-in-the-2012-election, *archived at* http://perma.cc/GFW8-GN8Y (describing same-sex marriage as "the weapon that will be and is being used to marginalize and repress Christianity and the church" and utilization of religious freedom arguments as a means by which to appeal to evangelical Christians, libertarians, and moderates). *But see* Cathy Lynn Grossman, *Survey: Americans Turn Sharply Favorable on Gay Issues*, WASH. POST, Feb. 26, 2014, *available at* http://www.washingtonpost.com/national/religion/survey-americans-turn-sharply-favorable-on-gay-issues/2014/02/26, *archived at* http://perma.cc/S2K-AKKP (citing a survey conducted by the Public Religion Research Institute which found that nearly one in four people who left their childhood religion were motivated to do so by their former churches' negative teachings or treatment of the LGBT community as an important factor).

9. *See* Fernanda Santos, *Arizona Vetoes Right to Refuse Service to Gays*, N.Y. TIMES, Feb. 27, 2014, at A1.

10. S.B. 1062, 51st Leg., 2d Reg. Sess. §§ 1(5), 2(B), 2(C) (1–2) (Ariz. 2014).

11. *Id.* § 2(A-B), (D).

12. *Id.* § 1(2).

13. *See, e.g.*, Santos, *supra* note 9 (describing opposition by former presidential candidate Mitt Romney, U.S. Senator John McCain, and Florida Governor Rick Scott and possible relocation of the 2015 Super Bowl from Phoenix); Laurie Roberts, *Governor Brewer: Save Us from Crazy*, ARIZ. REPUBLIC (Feb. 21, 2014), http://www.azcentral.com/story/laurie-roberts/2014/02/24/gov-brewer-save-us-from-crazy/5710245, *archived at* http://perma.cc/X8VH-2VXK (minimizing the threat to religious freedom and asking Governor

clearly intended by the bill was to grant business owners the right to refuse service to the LGBT community based upon religiously motivated beliefs.[14]

The controversy did not end with Governor Brewer's veto. Supporters of the failed Arizona bill expressed disappointment and cited perceived growing threats and hostility to religious liberty.[15] These perceived threats were evident in legislation introduced in numerous statehouses purporting to shield the free exercise of religion in the context of public accommodations.[16] The introduction of such measures represented a revival of state legislative efforts which had

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Brewer to "calm the hysteria . . . save us from another round of crazy. . . . [and] [v]eto this vile bill"); Fernanda Santos, *Governor of Arizona is Pressed to Veto Bill*, N.Y. TIMES, Feb. 25, 2014, at A12 (describing opposition by U.S. Senators John McCain and Jeffrey Flake, Mayor Scott Smith of Mesa, Arizona, the Greater Phoenix Economic Council, Apple, Inc. and American Airlines).

14. *See, e.g.*, Juliet Eilperin, *After Veto in Arizona, Conservatives Vow to Fight for Religious Liberties*, WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/politics/after-veto-in-arizona-conservatives-vow-to-fight-for-religious-liberties/2014/02/27/4e0f877a-9fcb-11e3-b8d8-94557ff66b28_story.html, *archived at* http://perma.cc/KAG7-P39V (quoting Peter Sprigg, a senior fellow for policy studies at the Family Research Council, as stating "[t]here is a sense of alarm within the pro-family movement and among conservative Christians that there [are] growing threats to religious liberty, and many of those threats do relate to the agenda of the sexual revolutionaries").

15. *See, e.g.*, *id.* (in which a commentator expressed concern about "a public that is hostile to the very idea of religious liberty"); Bob Christie, *Religious Freedom Bill Riles Gay Rights Supporters*, ASSOCIATED PRESS, Feb. 21, 2014, http://bigstory.ap.org/article/gay-rights-groups-oppose-religious-protection-bill, *archived at* http://perma.cc/9X7Z-UKLG (in which Josh Kredit, legal counsel for the Center for Arizona Policy, stated that there is "a growing hostility toward religion").

16. *See, e.g.*, S.B. 377, 152d Leg., Reg. Sess. § 2(a) (Ga. 2014) (prohibiting state entities from substantially burdening the free exercise rights of any individual, business association or trust in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden results from a rule of general applicability); H.B. 426, 62d Leg., 2d Reg. Sess. § 1 (Idaho 2014) (prohibiting state occupational licensing boards and governmental subdivisions from denying, revoking or suspending a person's occupational or professional license, certificate or registration on the basis of business-related decisions in accordance with sincerely held religious beliefs or the exercise of religion relating to employment, client selection, and financial affairs); H.B. 2453, 100th Leg., Reg. Sess. § 1(a) (Kan. 2014) (exempting all individuals and business associations from providing services, accommodations, advantages, facilities, goods, or privileges related to the celebration of any civil union, domestic partnership or marriage not recognized by the state if so doing would violate sincerely held religious beliefs); S.B. 128, 89th Leg., Reg. Sess. §§ 2, 3(3) (S.D. 2014) (prohibiting any person or entity from initiating litigation against a business for refusing to serve an individual or couple on the basis of sexual orientation, levying punitive damages in an amount no less than $2000 against any person filing such litigation and barring enforcement of any federal recognition of sexual orientation as a protected class); S.B. 2566, 108th Leg., Reg. Sess. §§ 1(a)(3), 1(b)(1)(A) (Tenn. 2014) (exempting all individuals, business associations and trusts from providing services, accommodations, advantages, facilities, goods, or privileges related to the celebration of any civil union, domestic partnership or marriage not recognized by the state if so doing would violate sincerely held religious beliefs).

been relatively moribund since the late 1990s.[17] Although most of these recent efforts failed, they were successful in Mississippi,[18] which joined sixteen other states with express legislative provisions purporting to protect the free exercise of religion.[19]

These efforts will undoubtedly be revived in upcoming legislative sessions in many parts of the country. They will also increasingly focus on judicial challenges to federal and state legislation that are perceived to be hostile to religious freedom. Judicial challenges will undoubtedly focus on the U.S. Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*, in which the Court held that privately owned for-profit business associations possessed religious rights.[20] The Court's utilization of the compelling governmental interest and least-restrictive-means standards sets a high bar for other perceived governmental interferences with religious practices.[21] Of specific interest in the area of public accommodations is the Court's refusal to grant individuals and business associations the right to engage in racial discrimination in the name of free exercise.[22] While commendable, such a limitation was entirely predictable and leaves the door ajar for other forms of discrimination such as discrimination based on gender and actual or perceived sexual orientation. The full implications of *Hobby Lobby* remain to be determined, but it can be predicted with a high degree of confidence that the opinion will

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17. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475 (2010) (noting that ten states adopted religious freedom restoration acts between 1998 and 2000 but only three had done so in the following ten years).

18. *See* MISS. CODE ANN. § 11-61-5(b)(i)-(ii) (West 2014) (prohibiting the state from substantially burdening the free exercise rights of any person in the absence of a compelling governmental interest advanced by the least restrictive means); *see also* ASSOCIATED PRESS, *Mississippi: Bill to Shield Religious Practices Passes*, N.Y. TIMES, Apr. 1, 2014, at A15, *available at* http://nytimes.com/2014/04/02/US/mississippi-bill-to-shield-religious-practices-passes.html?_r=1, *archived at* http://perma.cc/VAG3-LT36.

19. *See* Ariz. Rev. Stat. Ann. § 41-1493 to -1493.02 (2014) (adopted 1999); CONN. GEN. STAT. ANN. § 52-571b(a)–(f) (West 2014) (adopted 1993); FLA. STAT. ANN. §§ 761.01–.05 (West 2014) (adopted 1998); IDAHO CODE ANN. §§ 73-401 to -404 (West 2014) (adopted 2000); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2014) (adopted 1998); KAN. STAT. ANN. §§ 60-5301 to -5307 (West 2014) (adopted 2013); KY. REV. STAT. ANN. § 446.350 (West 2014) (adopted 2013); MO. ANN. STAT. § 1.302.1 (West 2014) (adopted 2004); N.M. STAT. ANN. § 28-22-2 to 28-22-5 (West 2014) (adopted 2000); OKLA. STAT. ANN. tit. 51, § 251-258 (West 2014) (adopted 2000); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West 2014) (adopted 2002); R.I. GEN. LAWS ANN. § 42-80.1-1 to -4 (West 2014) (adopted 1998); S.C. CODE ANN. § 1-32-10 to -60 (2014) (adopted 1999); TENN. CODE ANN. § 4-1-407 (West 2014) (adopted 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001-.012 (West 2014) (adopted 1999); VA. CODE ANN. § 57-2.02(A)-(F) (West 2014) (adopted 2007).

20. No. 13-354, 2014 U.S. LEXIS 4505, at *39–*40, *44–*50 (U.S. June 30, 2014); *see also* KAN. STAT. ANN. § 60-5302(f) (West 2014); S.C. CODE ANN. § 1-32-20(3) (2014) (providing that privately-owned for-profit business associations possess religious rights).

21. *Hobby Lobby Stores,* 2014 U.S. LEXIS 4505, at *77.

22. *Id.* at *87.

serve as the basis for challenges to federal and state laws for the foreseeable future.

One of the sources of perceived threats to religious freedom is public accommodation statutes. This was the specific circumstance in two well-publicized cases involving religious objections to providing goods and services to same-sex couples celebrating marriages or civil unions.[23] Twenty-one states and the District of Columbia prohibit businesses deemed to be public accommodations from refusing to serve prospective patrons on the basis of sexual orientation.[24] These statutes also prohibit a wide range of associated behaviors, such as aiding and abetting discrimination, refusing accommodation to those who associate with members of the LGBT community and posting notices of the right to refuse service.[25]

This Article examines the issue of whether there should be a religious exemption for secular businesses from public accommodation statutes that prohibit discrimination on the basis of sexual orientation.[26] The Article first briefly reviews the history of the free exercise of religion and public accommodation statutes. The Article then compares and contrasts public accommodation statutes extending

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23. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 62–68 (N.M. 2013) (holding that the refusal of a wedding photography business to photograph a same-sex commitment ceremony violated the New Mexico Human Rights Act); *see also* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 1–2 (Colo. Civil Rights Comm'n May 30, 2014) (final agency order) (upholding an administrative law judge's determination that the refusal by a bakery to prepare a wedding cake for a same-sex couple violated Colorado's public accommodation statute).

24. *See* CAL. CIV. CODE §§ 51–51.2, 51.5 (West 2014) (adopted 2005); COLO. REV. STAT. ANN. § 24-34-601 (West 2014) (adopted 2008); CONN. GEN. STAT. ANN. §§ 46a–81d, 46a-81p (West 2014) (adopted 1991); DEL. CODE ANN. tit. 6, §§ 4501–4504 (West 2014) (adopted 2009); D.C. CODE §§ 2-1401.02 to .03, 2-1402.01, 2-1402.31 (2014) (adopted 1977); HAW. REV. STAT. §§ 489-2 to -5 (West 2014) (adopted 2006); 775 ILL. COMP. STAT. ANN. 5/5-101 to 103, 5/8A-104 (West 2014) (adopted 2006); IOWA CODE ANN. § 216.7 (West 2014) (adopted 2007); ME. REV. STAT. ANN. tit. 5, §§ 4591–4592 (2014) (adopted 2005); MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West 2014) (adopted 1989); MINN. STAT. ANN. §§ 363A.02–.03, 363A.11, 363A.24 (West 2014) (adopted 1993); NEV. REV. STAT. ANN. §§ 233.010, 651.050–.070 (West 2014) (adopted 2009); N.H. REV. STAT. ANN. §§ 354-A:16–17 (West 2014) (adopted 1998); N.J. STAT. ANN. §§ 10:5-4 to -5 (West 2014) (adopted 1992); N.M. STAT. ANN. §§ 28-1-2, 28-1-7, 28-1-9 (West 2014) (adopted 2004); N.Y. EXEC. LAW §§ 290–92, 296 (McKinney 2014) (adopted 2002); OR. REV. STAT. ANN. §§ 659A.003, 659A.005–.006, 659A.406–09, 659A.885 (West 2014) (adopted 2005); R.I. GEN. LAWS ANN. §§ 11-24-2 to -2.1 (West 2014) (adopted 1995); VT. STAT. ANN. tit. 9, § 4502 (West 2014) (adopted 1991); WASH. REV. CODE ANN. §§ 49.60.030, 49.60.215 (West 2014) (adopted 2006); WIS. STAT. ANN. §§ 106.52 (West 2014) (adopted 2009); Fairness for All Marylanders Act of 2014, 2014 Md. Laws ch. 474 (to be codified at MD. CODE ANN., STATE GOV'T §§ 20-101, 20-301 to -304 (2014)) (adopted 2014).

25. *See infra* notes 98–100 and accompanying text.

26. By "secular businesses," the author is referring to those which are not religious or otherwise connected with a church or other place of worship. *See* WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 577 (2d ed. 2002).

protection to prospective patrons on the basis of sexual orientation. The Article examines the possible consequences associated with granting religious exemptions based upon actual or perceived sexual orientation. The Article concludes that the perceived threat to religious liberty is exaggerated, the consequences of granting exemptions would be harmful, and that state-sanctioned discrimination is contrary to the fundamental principles of justice and equality underlying the U.S. legal system.

I. A BRIEF HISTORY OF FREE EXERCISE JURISPRUDENCE

The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[27] Since its inception, free exercise jurisprudence has focused on differentiating between legitimate government regulation of religious conduct as opposed to impermissible control of beliefs and the circumstances, if any, under which individuals may claim exemptions from government laws that impact religious practices.[28] Although the federal government occasionally granted exemptions to specific programs, these exemptions were largely statutory, based upon principles of conscience rather than exclusively religious objections, and were limited to a narrow set of activities.[29] Early U.S. Supreme Court jurisprudence refused to grant religious exemptions to government laws on the basis of the Free Exercise Clause.[30] The few exemptions upheld by the Court prior to the 1960s were based on other grounds such as free speech or due process.[31] The conclusion to be drawn from these opinions was that

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27. U.S. CONST. amend. I.

28. *See* Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 192 (2009) (discussing the regulation of religiously motivated conduct in early U.S. Supreme Court jurisprudence); *see also* Erin N. East, Comment, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 EMORY L.J. 259, 276–77 (2009) (discussing the history of free exercise jurisprudence in the U.S. Supreme Court).

29. The primary examples in this regard are the exemptions from military service provided to conscientious objectors pursuant to the Draft Acts of 1864 and 1917 and the 1940 Selective Service Act. *See* KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 49 (2006) (stating that "excusing people from military service remains the quintessential exemption, against which we can compare many other conflicts of legal duty and religious conscience"); *see also* East, *supra* note 28, at 276–77 (discussing the statutory nature of conscience-based exemptions from government programs in the nineteenth and twentieth centuries).

30. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) (upholding laws prohibiting polygamy and stating that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

31. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34, 642 (1943) (holding that the children of Jehovah's Witnesses could not be compelled to recite the

the Free Exercise Clause was not an effective means by which to secure exemptions from secular statutes of general application.[32]

The existing case law proved inadequate in addressing clashes between religious duties and secular legal obligations.[33] The Court's apparent reluctance to utilize the Free Exercise Clause as a basis for addressing these conflicts also changed in the intervening two decades. This new approach was annunciated in 1963 in *Sherbert v. Verner* in which the Court held that the religious practices of a member of the Seventh-Day Adventist Church who lost her job due to her refusal to work on Saturdays and was consequently denied unemployment compensation were unconstitutionally burdened.[34]

The Court upheld its previous determination that religiously motivated acts, as contrasted with beliefs, were "not totally free from legislative restrictions."[35] However, the Court also noted that the conduct deemed subject to permissible regulation in past cases "invariably posed some substantial threat to public safety, peace or order."[36] Such instances, implicating "[o]nly the gravest abuses [and] endangering paramount interests," permitted limitations on the basis

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pledge of allegiance in public schools on the basis of the compelled speech doctrine); Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940) (overturning the conviction of several Jehovah's Witnesses for violating a Connecticut statute prohibiting solicitation without a state license on the basis that its application to religious activities deprived the defendants of liberty without due process of law); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (invalidating an Oregon law requiring children to attend public schools as opposed to private, parochial and religious schools on the basis of due process).

32. *See, e.g.*, East, *supra* note 28, at 277 (describing early U.S. Supreme Court jurisprudence as "suggest[ing] that the Free Exercise Clause did not contemplate exemptions from government laws or policies"); Claire McCusker, Comment, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 393 (2007) ("During this period, it appeared clear that religious practices must give way to generally applicable secular statutes."); Yordy, *supra* note 28, at 192 ("From the beginning, free exercise of religion was not an unlimited license to behave in any way one saw fit.").

33. *See, e.g.*, Yordy, *supra* note 28, at 192–93 (criticizing U.S. Supreme Court jurisprudence regarding free exercise claims prior to the 1960s on the basis that it failed to give guidance as to permissible amounts of regulation, did not provide a clear standard by which to determine the constitutionality of such regulation and decided claims on a case-by-case basis which "was neither a model of judicial efficiency nor helpful to decision makers").

34. 374 U.S. 398, 404 (1963).

35. *Id.* at 403 (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)). The Court also affirmed its previous determination that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs . . ." and that the "[g]overnment may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . ." *Id.* at 402 (citing Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); *Cantwell*, 310 U.S. at 303 (emphasis omitted)).

36. *Id.* at 403 (citing Cleveland v. United States, 329 U.S. 14, 18 (1946) (polygamy and bigamy); Prince v. Massachusetts, 321 U.S. 158, 171 (1944) (child labor); Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905) (mandatory smallpox vaccination program); Reynolds v. United States, 98 U.S. 145, 166 (1878) (polygamy)).

of their compelling nature.[37] The asserted state interests in this case, specifically, the possibility of the filing of fraudulent claims by persons feigning religious objections to Saturday work and their effect upon the state unemployment fund and employers, did not rise to the level of compelling state interests.[38]

Furthermore, even assuming the filing of spurious claims and consequent harm to the unemployment fund and employers, the State failed to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[39] It was irrelevant to the Court that the determination of ineligibility imposed an indirect burden on religious practices rather than a direct burden such as may be associated with criminal sanctions.[40] Rather, the denial of eligibility forced Sherbert to "choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work . . . ."[41] The affirmation of these standards by the Court nine years later in *Wisconsin v. Yoder* seemingly cemented into law the government's substantial burden of demonstrating that regulation of religiously motivated actions could only be sustained if they were narrowly circumscribed to satisfy a compelling state interest.[42] This apparent clarity proved to be short-lived.[43]

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37. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

38. *Id.* at 407.

39. *Sherbert*, 374 U.S. at 407.

40. *Id.* at 404. In concluding that the absence of direct restraints or punishments did not immunize legislation from burdening free exercise, the Court analogized to speech and assembly cases in which it concluded that "indirect discouragements undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *Id.* at 404 n.5 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

41. *Id.* at 404. In dissent, Justice Harlan described the Court's conclusion as "disturbing both in its rejection of existing precedent and in its implications for the future." *Id.* at 418 (Harlan, J., dissenting). Justice Harlan contended that the Court's conclusion overruled existing precedent sustaining the application of Sunday closing laws to businesses operated by Orthodox Jews. *Id.* at 421 (citing Braunfeld v. Brown, 366 U.S. 599, 605–07 (1961)). Justice Harlan also concluded that the Court's holding granted special treatment to those refusing Saturday work on religious grounds while denying assistance to others whose identical behavior was not religiously motivated. *Sherbert*, 374 U.S. at 421–22.

42. 406 U.S. 205, 214 (1972) (overturning a state compulsory education statute as applied to Amish children). The Court defined the compelling government interest test as requiring a searching examination of the interests the government sought to promote and impediments to these objectives that would result from recognition of an exemption for fundamental claims of religious freedom. *Id.* at 235. Applying this standard, the Court found the state's purported interests in preparing students for participation in the political system and protecting them from ignorance and exploitation by prospective employers were not compelling with respect to Amish children. *Id.* at 222, 234. The Court reached this conclusion despite the state government's unquestioned authority over education and the facial neutrality of the compulsory attendance statute. *Id.* at 220.

43. *But see* Yordy, *supra* note 28, at 194 (contending that the standards established

The Court changed the standard for resolving conflicts between secular statutes and religiously motivated conduct twenty-seven years after *Sherbert* in *Employment Division, Department of Human Resources of Oregon v. Smith*.[44] The Court was confronted with a conflict between Oregon's narcotics laws prohibiting the knowing or intentional possession of controlled substances without a prescription from a medical practitioner and free exercise claims of the right to use peyote for sacramental purposes.[45] In upholding the denial of unemployment benefits, the Court refused to excuse individuals from compliance with "a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[46] The Free Exercise Clause was not violated as the prohibition upon a specific religious practice was "merely the incidental effect of a generally applicable and otherwise valid provision."[47] To hold otherwise would "permit every citizen to become a law unto himself."[48] The creation of "a private right to ignore generally applicable laws" would not only invite anarchy but would also contradict "constitutional tradition and common sense."[49] The government's ability to execute public policy, including enforcement of prohibitions upon conduct perceived to be harmful to society, could not depend on its effect on the spiritual development of religious objectors.[50]

Furthermore, laws implementing such public policy would most likely be unable to survive undiluted application of the compelling interest test.[51] The sheer diversity of religious beliefs and practices in the United States deprived the Court of "the luxury of deeming presumptively invalid, as applied to the religious objector, every

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by *Sherbert* and *Yoder* were never clear due to the Court's failure to define the terms "compelling state interest" and "burden on religion").

44. 494 U.S. 872 (1990).

45. *Id.* at 874. Oregon law classified peyote as a Schedule I controlled substance the unauthorized possession of which was a felony. *See* OR. REV. STAT. ANN. § 475.992(4)(a) (West 1987); Or. Admin. R. 855-080-0021(3) (1988). Alfred Smith and Galen Black were fired from their jobs at a private drug rehabilitation organization because of their use of peyote at a ceremony of the Native American Church to which they belonged. *Smith*, 494 U.S. at 874. The Oregon Employment Division deemed them ineligible for unemployment benefits as it determined that they had been discharged for job-related misconduct. *Id.* Smith and Black contended that this denial was in contravention of their free exercise rights to consume peyote for sacramental purposes. *Id.*

46. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

47. *Id.* at 878.

48. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

49. *Smith*, 494 U.S. at 885–86.

50. *Id.* at 885 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

51. *Id.* at 888.

regulation of conduct that does not protect an interest of the highest order."[52] Granting free exercise considerations primacy would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[53] The Court listed several different types of laws for which exemptions would have to be created should it apply the compelling interest test to all actions believed to be religiously commanded.[54] The Court subsequently reaffirmed *Smith's* conclusion that the government needs to satisfy the compelling interest test only when reviewing laws targeting specific religious practices rather than those deemed of general applicability.[55]

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52. *Id.* (emphasis omitted).

53. *Id.* However, the Court also noted that when the government creates individualized exemptions for secular purposes, it may not refuse to extend those exemptions to cases of "'religious hardship' without compelling reason." *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)). Some commentators have contended that this language may create an additional test independent of the neutrality and general applicability requirements. *See, e.g.*, Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 636 (2003). *But see* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 861 (2001) (stating that the extension of secular exemptions to cases of religious hardship is not a separate requirement but rather "is best understood as nothing more than a subset of the general applicability requirement"); Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1062 (2000) ("[C]ourts conflate the 'generally applicable' inquiry with the 'individualized exemptions' analysis, reasoning that where a law contains a system of individualized exemptions it cannot be generally applicable.").

54. *Smith*, 494 U.S. at 888–89. These laws included compulsory military service, the payment of taxes, health and safety regulations, compulsory vaccination requirements, drug laws, traffic laws, certain types of social welfare legislation, child labor laws, prohibitions upon animal cruelty, environmental protection laws, and laws prohibiting racial discrimination. *Id. But see id.* at 902 (O'Connor, J., concurring) (rejecting the majority's "parade of horribles" as a basis for abandoning the compelling interest test and its capable application by courts in striking "sensible balances between religious liberty and competing state interests"). Justice O'Connor noted that neutral laws of general applicability were equally capable of interfering with religious practices as laws expressly targeting religion. *Id.* at 901. Nevertheless, the governmental interest in regulating peyote use was compelling, and accommodation of contrary religious beliefs would unduly interfere with this interest. *Id.* at 907 (Blackmun, J., dissenting). The dissent contended that Oregon's interests were abstract, the supposed harm from granting an exemption was speculative, and the majority sacrificed individual interests in favor of the "rarified values" associated with fundamental concerns of government. *Id.* at 910–11 (Blackmun, J., dissenting) (quoting Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330–31 (1969)).

55. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–39 (1993) (holding that application of ordinances prohibiting animal cruelty to ritual animal sacrifice was intended to single out the practices of a discreet religious group for condemnation, was not compelled by the government's interests in protecting public health and preventing cruelty to animals and could have been more narrowly tailored to address specific issues concerning disposal of organic waste). In so concluding, the Court reiterated its holding in *Smith* that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531. The Court dismissed the need to

The Court's opinion in *Smith* was subject to criticism within the academic community.[56] There was also a reaction in the U.S. Congress. After unsuccessful efforts in 1991 and 1992, Congress succeeded in passing the Religious Freedom Restoration Act in 1993.[57] Signed by President Clinton on November 16, 1993, the purpose of the Act was "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ."[58] In so doing, the Act provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . in furtherance of a compelling governmental interest; and . . . [if the law] is the least restrictive means of furthering that compelling governmental interest."[59] The Act's passage provoked considerable debate about its constitutionality.[60] The U.S. Supreme Court settled this issue with respect to state and local law in 1997 in *City of Boerne v. Flores* in which it held that the Act violated Congress's power pursuant to the Fourteenth Amendment by expanding the coverage of the First Amendment in contravention of the states' authority to regulate the welfare of its citizens.[61] The

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"define with precision the standard used to evaluate whether a prohibition is of general application" as the ordinances at issue fell far below acceptable constitutional standards. *Id.* at 543.

56. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 3–4 (1990) (contending that *Smith* was inconsistent with the intent of the framers of the Constitution and existing precedent and expressing concern that it would not be effective in preventing religious persecution); Lund, *supra* note 17, at 471 (criticizing the conclusion in *Smith* that "[t]o the extent secular law clashes with religious obligation, religious obligation generally loses"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990) (arguing that the inclusion of religious liberty in the Bill of Rights provided it with special protection from government interference); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 134 (1993) (contending that *Smith* would subject the practices of minority religions to the whims of the majority). *But see* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 568–77 (1999) (rebutting claims that the outcome in *Smith* gutted otherwise vibrant free exercise principles).

57. 42 U.S.C. § 2000bb-2000bb-4 (2012).

58. *Id.* § 2000bb-1(b)(1).

59. *Id.* § 2000bb-1(a)-(b)(1)-(2).

60. *See* Yordy, *supra* note 28, at 198–99 (summarizing the arguments relating to the constitutionality of the Religious Freedom Restoration Act as it applied to federal and state law).

61. 521 U.S. 507, 532–36 (1997) (challenging the denial of a building permit to enlarge a Catholic church pursuant to a historical preservation ordinance). The opinion in *Flores* was silent on the issue of the constitutionality of the Religious Freedom Restoration Act as applied to federal statutes. This issue was ultimately resolved by the Court in 2006. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (upholding the granting of a preliminary injunction preventing application of the Controlled Substances Act to a religious sect that consumed sacramental tea containing the hallucinogen dimethyltryptamine listed as a controlled substance pursuant to federal law).

response of some states to *Flores* was the adoption of their own versions of religious freedom restoration acts.[62]

II. PUBLIC ACCOMMODATION STATUTES AND SEXUAL ORIENTATION

A. A Brief History of Public Accommodation Statutes

The history of public accommodation statutes may be traced to the post–Civil War era. The first national effort was the Civil Rights Act of 1875 which prohibited discrimination on the basis of race in access to lodging, public conveyances, and places of amusement.[63] This early effort is notable for its focus on race and narrow definition of public accommodations.[64] This effort proved short-lived however, having been invalidated by the U.S. Supreme Court in 1883.[65] As a result, responsibility for prohibiting discrimination in access to public

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62. *See supra* notes 18–19 and accompanying text. The U.S. Congress responded to *Flores* by adopting the Religious Land Use and Institutionalized Persons Act. *See* 42 U.S.C. § 2000cc-2000cc-5 (2012). Signed by President Clinton in 2000, RLUIPA prohibits land use regulations that impose substantial burdens upon the free exercise rights of persons unless the government can demonstrate that the burdens further a compelling state interest and are the least restrictive means of furthering such interest. *Id.* § 2000cc(a)(1). The same standard is applicable to substantial burdens placed upon the free exercise rights of incarcerated persons. *Id.* § 2000cc-1(a). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). This definition is mirrored in several state religious freedom restoration acts. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1493(2) (2014); FLA. STAT.ANN. § 761.02(3) (West 2014); IDAHO CODE ANN. § 73-401(2) (West 2014); 775 ILL. COMP. STAT. ANN. 35/1-5 (West 2014); MO. ANN. STAT. § 1.302.2 (West 2014) (defining "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief"); *see also* N.M. STAT. ANN. § 28-22-2(A) (West 2014) (defining the "exercise of religion" as "an act or a refusal to act that is substantially motivated by religious belief"). *But see* KAN. STAT. ANN. § 60-5302(c) (West 2014); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (West 2014) (requiring any act or refusal to act to be substantially motivated by a sincerely held religious tenet or belief). The religious freedom restoration acts in Mississippi, Oklahoma, Pennsylvania, South Carolina, Tennessee and Virginia do not contain explicit definitions of the term "exercise of religion."

63. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

64. *Id.* (prohibiting race discrimination with respect to "accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement"); *see also* James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech,* 64 VAND. L. REV. 961, 965–66 (2011) (discussing the limited reach of the Civil Rights Act of 1875).

65. *Civil Rights Cases*, 109 U.S. at 24–26. The Court held that the protections afforded by the Fourteenth Amendment to the U.S. Constitution were only applicable to "state action" rather than private discriminatory acts. *Id.* at 11. The Thirteenth Amendment could not serve as a basis for the Act as it prohibited slavery, and its reach did not include "ordinary civil injur[ies]" one might suffer as a result of an act of discrimination. *Id.* at 24.

accommodations fell to the states by default until the adoption of the Civil Rights Act of 1964.[66]

The states' record on protecting access to public accommodations in the eighty-one years between the decision in *The Civil Rights Cases* and the Civil Rights Act of 1964 was fragmented and deficient. Massachusetts was the only state to adopt a public accommodation statute prohibiting race discrimination prior to the Civil Rights Act of 1875.[67] Other states adopted similar legislation after *The Civil Rights Cases,* but enactment of such laws was largely a matter of geography with some states in the northern and western United States outlawing discrimination while Southern states codified segregation.[68] Progress was excruciatingly slow. By the mid-twentieth century, only eighteen states had adopted legislation prohibiting racial discrimination in public accommodations.[69] These statutes were generally restricted to discrimination on the basis of race or color in a narrowly defined group of accommodations.[70]

The U.S. Government re-entered the area with the adoption of Title II of the Civil Rights Act of 1964.[71] Although a historic milestone, the Act is somewhat timid by modern standards in its adherence to the narrow nineteenth century iteration of public accommodation law.[72] Prohibited discrimination was restricted solely to race, color, religion, and national origin.[73] Covered accommodations were limited

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66. *See* Gottry, *supra* note 64, at 965; *see also* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating a Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J. L. & GENDER 781, 786–87 (2013).

67. *See* Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts ch. 277, § 1, *reprinted in* MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS 156 (1961) (prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting").

68. Eleven northern and western states, led by New York and Kansas, adopted statutes outlawing racial discrimination in public accommodations between 1883 and 1885. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–39 (1978). By contrast, Tennessee was the only state in the former Confederacy to adopt a similar law prior to the mid-twentieth century. *Id.* at 239.

69. *Id.* at 239–40. In fact, by 1950, the number of states with statutes authorizing segregation in public accommodations exceeded the number of states with laws prohibiting such discrimination. *Id.* at 240.

70. *Id.* at 240; *see also* Muehlmeyer, *supra* note 66, at 788 (noting that early public accommodation laws prohibited discrimination on the basis of race and color in "a short list of places . . . . [such as] 'inns, taverns, hotels, public conveyances, restaurants, theaters, and barber shops'" (quoting Lerman, *supra* note 68, at 240)); Gottry, *supra* note 64, at 966 (noting that the Massachusetts public accommodations statute only prohibited discrimination in places providing "essential goods and services").

71. 42 U.S.C. § 2000a (2012).

72. *See* Muehlmeyer, *supra* note 66, at 789 (criticizing Title II for its close adherence to the "Nineteenth Century Interpretation" of public accommodations).

73. 42 U.S.C. § 2000a(a) (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations

to four discreet categories.[74] Additionally, the operations of establishments affecting commerce in a manner sufficient to trigger the Act's protections were circumscribed.[75] These requirements potentially excluded certain types of establishments that held themselves out to the public but were more "intimate and personal" in the services that they provided.[76]

In contrast to the long history of the federal and state governments and the U.S. Supreme Court with respect to race discrimination in public accommodations, there is much less judicial experience with sexual orientation. The U.S. Supreme Court has only decided two cases addressing public accommodation statutes and sexual orientation in the thirty-seven years since the District of Columbia became the first jurisdiction in the United States prohibiting discrimination on this basis.[77] In *Hurley v. Irish-American Gay, Lesbian, and Bisexual*

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of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

74. *Id.* § 2000a(b). This portion of the Civil Rights Act defined public accommodations as:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment and . . . which holds itself out as serving patrons of such covered establishment.

Id. § 2000a(b)(1)-(4).

75. *Id.* § 2000a(c). For example, a food service establishment was within the scope of the Act only if it served or offered to serve "interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce." *Id.* § 2000a(c)(2). A place offering exhibitions and entertainment was covered only if it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." *Id.* § 2000a(c)(3). "Commerce" was defined as "travel, trade, traffic, commerce, transportation, or communication among the . . . states," the states and the District of Columbia or among the states, the District of Columbia and a foreign country, territory or possession. *Id.* § 2000a(c)(4).

76. *Id.* § 2000a(b). For example, establishments providing lodging to transient guests with five or fewer rooms for hire and in which the proprietor occupied as his residence were excluded from coverage. *Id.* § 2000a(b)(1); *see also* Muehlmeyer, *supra* note 66, at 789–90 (characterizing this exception as "reflecting a policy that the nature of some establishments—like bed and breakfasts—are more 'intimate and personal' and should therefore fall outside the scope of the statute in order to respect the privacy of home-like establishments").

77. *See* D.C. CODE § 2-1402.31(a)(1) (2014). For a history of sexual orientation as a protected class under state and local public accommodation laws, see Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789 (2012).

Group of Boston, the Court held that the application of Massachusetts's statute prohibiting discrimination on the basis of sexual orientation to the annual St. Patrick's Day-Evacuation Parade compelled speech by the parade's sponsors in contravention of the First Amendment.[78] Five years later, in *Boy Scouts of America v. Dale,* the Court reached a similar conclusion with respect to associational rights in the context of the application of New Jersey's statute to membership in the Boy Scouts.[79] The results in *Hurley* and *Dale* have been described as standing for the proposition that an organization "may not be forced to communicate a particular message [through the application of public accommodation statutes], even when the organization does not exist principally for the purpose of communicating its views on the topic."[80] However, the Court has yet to consider whether the application of a public accommodation statute prohibiting discrimination on the basis of sexual orientation conflicts with the Free Exercise Clause of the First Amendment.

State legislative efforts to expand protections afforded by public accommodation statutes have increased significantly in more recent times. Current statutes have greatly expanded the number of covered business activities beyond nineteenth century definitions.[81] The number of protected classes has also grown beyond race.[82] This expanded

78. 515 U.S. 557, 573 (1995). The Court found the parade to be an expressive activity worthy of First Amendment protection. *Id.* at 567. The lower courts' order declaring the parade to be a public accommodation and thereby permitting the Irish-American Gay, Lesbian and Bisexual Group of Boston to participate compelled the parade organizers to affirm beliefs with which they disagreed and make statements they would rather avoid in violation of the compelled speech doctrine. *Id.* at 573. For discussion of the compelled speech doctrine, see Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 608–12 (2014).

79. 530 U.S. 640, 644 (2000). The Court held that application of New Jersey's public accommodation law to compel admission to membership in a private organization such as the Boy Scouts would "interfere with [its] choice not to propound a point of view contrary to its beliefs," specifically that homosexual conduct was inconsistent with its values and rules. *Id.* at 654.

80. Gottry, *supra* note 64, at 976.

81. *See, e.g.*, CAL. CIV. CODE § 51.5(a) (West 2014) (stating that "[n]o business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person . . . on account of any characteristic listed" in the statute, any perception regarding such characteristic or because the person is associated with a person possessing or believed to possess such characteristic); DEL. CODE ANN. tit. 6, § 4502(14) (West 2014) (defining a "place of public accommodation" as "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public"); *see also* Gottry, *supra* note 64, at 967 ("Current state public accommodation laws have cast off their historical roots and embrace a wide range of business activity.").

82. *See, e.g.*, CAL. CIV. CODE § 51(b) (West 2014) (prohibiting discrimination based upon "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation"); 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2014) (prohibiting discrimination based upon "race, color, religion, sex,

class includes sexual orientation in twenty-one states and the District of Columbia.[83] The next section of this Article compares and contrasts the public accommodation statutes that include sexual orientation within their protections.

B. A Comparative Analysis of State Public Accommodation Statutes and Sexual Orientation

State statutes prohibiting discrimination on the basis of sexual orientation are not uniform. Nevertheless, the stated legislative purposes of these statutes are similar. Five of these statutes may be described as proscriptive through specific reference to the elimination of discrimination as their primary purpose.[84] These statutes differ in their general description of the prohibition upon discrimination, but these differences are more stylistic than substantive.[85] Four of these statutes, plus an additional thirteen statutes, are affirmative in nature by granting to protected classes free, full and equal access to public accommodations.[86] These statutes differ in their description of this access, but once again, such differences are

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national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service"); WASH. REV. CODE ANN. §§ 49.60.030(1) (West 2014) (prohibiting discrimination based upon "race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability"); s*ee also* Gottry, *supra* note 64, at 967–68 (discussing the expansion of protected classes under current state public accommodation statutes).

83. *See supra* note 24 and accompanying text.

84. *See* DEL. CODE ANN. tit. 6, § 4501 (West 2014); D.C. CODE § 2-1401.01 (2014); HAW. REV. STAT. § 489-3 (West 2014); MD. CODE ANN., STATE GOV'T § 20-304 (West 2014); N.Y. EXEC. LAW § 290(3) (McKinney 2014).

85. *See* DEL. CODE ANN. tit. 6, § 4501 (West 2014) (prevention of discrimination); D.C. CODE § 2-1401.01 (2014) ("secur[ing] an end . . . to discrimination for any reason other than that of individual merit"); HAW. REV. STAT. § 489-3 (West 2014) (prohibiting "[u]nfair discriminatory practices" with respect public accommodations); MD. CODE ANN., STATE GOV'T § 20-304 (West 2014) (prohibiting the refusal, withholding from or denial "to any person any of the accommodations, advantages, facilities, or privileges of the place of public accommodation"); N.Y. EXEC. LAW § 290(3) (McKinney 2014) (prevention of discrimination).

86. *See* CAL. CIV. CODE §5(b) (West 2014); COLO. REV. STAT. ANN. § 24-34-601(2) (West 2014); CONN. GEN. STAT. ANN. § 46a-81d(a) (West 2014); DEL. CODE ANN. tit. 6, § 4503 (West 2014); D.C. CODE § 2-1402.01 (2014); HAW. REV. STAT. § 489-3 (West 2014); 775 ILL. COMP. STAT. ANN. 5/1-102(A), 5/5-102(A) (West 2014); IOWA CODE ANN. § 216.7 (West 2014); ME. REV. STAT. ANN. tit. 5, § 4591 (West 2014); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2014); MINN. STAT. ANN. §§ 363A.02(1)(a), 363A.11(1)(a) (West 2014); NEV. REV. STAT. ANN. §§ 233.010(2), 651.070 (West 2014); N.H. REV. STAT. ANN. § 354-A:16 (West 2014); N.J. STAT. ANN. § 10:5-4 (West 2014); N.Y. EXEC. LAW § 291(2) (McKinney 2014); OR. REV. STAT. ANN. § 659A.403(1) (2014); WASH. REV. CODE ANN. § 49.60.030(1)(b)(West 2014); WIS. STAT. ANN. § 106.52(3) (West 2014).

most likely stylistic rather than substantive.[87] Fifteen of these statutes expressly or implicitly describe full and equal access to public accommodations as a fundamental civil right.[88] However, only six of these statutes contain explicit legislative findings within their provisions as to the necessity of guaranteeing equal access to public accommodations and the pernicious impact of discrimination.[89]

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87. *See* CAL. CIV. CODE §51(b) (West 2014) ("All persons within the jurisdiction of this state are free and equal . . . ."); COLO. REV. STAT. ANN. § 24-34-601(2) (West 2014) ("full and equal enjoyment"); CONN. GEN. STAT. ANN. § 46a-81d(a) (West 2014) ("full and equal accommodations"); DEL. CODE ANN. tit. 6, § 4503 (West 2014) ("full and equal accommodations"); D.C. CODE § 2-1402.01 (2014) (granting individuals "an equal opportunity to participate fully in . . . economic, cultural and intellectual life . . . and to have an equal opportunity to participate in all aspects of life . . . ."); HAW. REV. STAT. § 489-3 (West 2014) ("full and equal enjoyment"); 775 ILL. COMP. STAT. ANN. 5/1-102(A), 5/5-102(A) (West 2014) (granting individuals "freedom from discrimination" and "full and equal enjoyment" of public accommodations); ME. REV. STAT. ANN. tit. 5, §§ 4591, 4592(1) (2014) ("equal access" and "full and equal enjoyment"); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2014) ("full and equal accommodations"); MINN. STAT. ANN. §§ 363A.02(1)(a), 363A.11(1)(a) (West 2014) (securing for persons "freedom from discrimination" and "full and equal enjoyment of public accommodations"); NEV. REV. STAT. ANN. §§ 233.010(2), 651.070 (West 2014)(granting persons "full and equal enjoyment" of public accommodations "without discrimination"); N.H. REV. STAT. ANN. § 354-A:16 (2014) (granting individuals "equal access" to public accommodations "without discrimination"); N.J. STAT. ANN. § 10:5-4 (West 2014) (stating that persons may "obtain" public accommodations "without discrimination"); N.Y. EXEC. LAW § 291(2) (McKinney 2014) (granting individuals "[e]quality of opportunity" with respect to public accommodations "without discrimination"); OR. REV. STAT. ANN. § 659A.403(1) (West 2014) (granting persons "full and equal accommodations . . . without . . . discrimination"); WASH. REV. CODE ANN. § 49.60.030(1)(b) (West 2014) ("full enjoyment").

88. *See* CAL. CIV. CODE § 51(a) (West 2014) (by title of the statute as the "Unruh Civil Rights Act"); CONN. GEN. STAT. ANN. § 46a-81d(a) (West 2014) (by inclusion of the law in the human rights chapter of the state's statutes); D.C. CODE § 2-1401.01 (2014) (by title of the legislation as the "Human Rights Law"); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2014); IOWA CODE ANN. § 216.7 (West 2014) (by inclusion of the law in the social justice and human rights subtitles of the state's statutes); ME. REV. STAT. ANN. tit. 5, § 4591 (2014); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2014); MINN. STAT. ANN. § 363A.02(2) (West 2014); NEV. REV. STAT. ANN. § 233.010 (West 2014) (by inclusion of the law in the chapter relating to the Nevada Equal Rights Commission); N.H. REV. STAT. ANN. § 354-A:16 (2014); N.J. STAT. ANN. § 10:5-3 (West 2014) (by inclusion of the law in the civil rights title of the state's statutes); N.M. STAT. ANN. § 28-1-2 (West 2014) (by title of the statute as the "Human Rights Act"); N.Y. EXEC. LAW § 290(1) (by title of the statute as the "Human Rights Law"); OR. REV. STAT. ANN. § 659A.006(2) (West 2014); WASH. REV. CODE ANN. § 49.60.030(1) (West 2014). Other states include public accommodation provisions within statutory sections relating to government, commerce, or criminal offenses. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601 (West 2014) (included in the title relating to the Colorado Department of Regulatory Agencies); DEL. CODE ANN. tit. 6, §§ 4501–4504 (West 2014) (included in the title relating to commerce and trade); HAW. REV. STAT. §§ 489-2 to -5 (West 2014) (included in the title relating to trade regulation and practice); R.I. GEN. LAWS §§ ANN. 11-24-2 to -2.1 (West 2014) (included in the title relating to criminal offenses); VT. STAT. ANN tit. 9, § 4502 (West 2014) (included in the title relating to commerce and trade); WIS. STAT. ANN. § 106.52 (West 2014) (included in the title relating to industrial regulation).

89. *See* MINN. STAT. ANN. § 363A.02(1)(b) (West 2014) ("Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy."); NEV. REV. STAT. ANN. § 233.010(2) (West 2014) (declaring that

There is less uniformity among the statutes upon consideration of their substantive provisions. The first notable difference occurs in the definition of public accommodations. Although the California statute does not use the term "public accommodations," it is clearly applicable to a very broad range of for-profit and non-profit organizations that promote the business or economic interests of their members.[90] The remaining statutes contain specific definitions of "public accommodations." However, these definitions are different and may classified in two categories. Ten states define "public accommodations" very broadly to include any establishment offering goods or services to the public.[91] The remaining statutes have lengthy but very general

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equal access is necessary to "protect the welfare, prosperity, health and peace of all [state residents]"); N.J. STAT. ANN. § 10:5-3 (West 2014) (stating that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State" and equal access is required in order to ensure "economic prosperity and general welfare" and prevent personal hardships, economic loss, physical and emotional stress, uncertainties and personal and professional disruptions associated with unlawful discrimination); N.Y. EXEC. LAW § 290(3) (McKinney 2014) (stating that discrimination "not only threatens the rights and proper privileges of . . . inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants"); OR. REV. STAT. ANN. §§ 659A.003, 659A.006 (West 2014) (stating that equal access is required in order to "ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination" and that such discrimination "not only threatens the rights and privileges of . . . inhabitants but menaces the institutions and foundation of a free democratic state"); WASH. REV. CODE ANN. § 49.60.010 (West 2014) (finding that "discrimination threatens not only the rights and proper privileges of [the state's] inhabitants but menaces the institutions and foundation of a free democratic state").

90. *See* CAL. CIV. CODE § 51.59(a) (West 2014) ("No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person . . . on account of any characteristic listed [herein]."). According to the California Supreme Court, the term "business establishments" must be interpreted "in the broadest sense reasonably possible." Curran v. Mt. Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 236 (Cal. 1998) (citation omitted). The term has been applied to for-profit commercial enterprises and non-profit organizations with an underlying business or economic purpose. *See, e.g.*, Stevens v. Optimum Health Inst., 810 F. Supp. 2d 1074, 1088–89 (S.D. Cal. 2011) (religious organization); O'Connor v. Village Green Owners Ass'n, 662 P.2d 427, 431 (Cal. 1983) (condominium association); Rotary Club of Duarte v. Bd. of Dir., 224 Cal. Rptr. 213, 221–26 (Cal. Ct. App. 1986) (nonprofit civic association). *But see Curran*, 952 P.2d at 236 (holding that charitable organizations whose activities are not related to business or economic purposes are not business establishments within the meaning of the public accommodation statute). Additionally, the Disabled Persons Act utilizes the term "public accommodation" with an accompanying list of locations. *See* CAL. CIV. CODE § 54.1(a)(1) (West 2014). California courts have concluded that the term "public accommodation" in this statute is closely related to the term "business establishment" and that the two terms should be analyzed together. *See* Californians for Disability Rights v. Mervyn's, L.L.C., 81 Cal. Rptr. 3d 144, 154 (Cal. Ct. App. 2008).

91. *See* CONN. GEN. STAT. ANN. § 46a-63(1) (West 2014) ("any establishment which caters or offers its services or facilities or goods to the general public"); DEL. CODE ANN. tit. 6, § 4502(14) (West 2014) ("any establishment which caters to or offers goods or

lists of establishments considered to be "public accommodations."[92]

services or facilities to, or solicits patronage from, the general public"); D.C. CODE § 2-1401.02(24) (2014) (all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, retail establishments offering goods, services and recreation to the public, and transportation facilities); 775 ILL. COMP. STAT. ANN. 5/5-101(A)(1)-(13) (West 2014) (all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, retail establishments offering goods, services and recreation to the public, transportation facilities, and non-sectarian educational institutions at any level); IOWA CODE ANN. § 216.2(13)(a) (West 2014) ("each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility" and all such places, establishments, or facilities that offer services, facilities, or goods gratuitously if they receive governmental support or a subsidy); MINN. STAT. ANN. § 363A.03(34) (West 2014) ("a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind . . . whose goods, services, facilities, privileges, advantages or accommodation are extended, offered, sold, or otherwise made available to the public"); N.M. STAT. ANN. § 28-1-2(H) (West 2014) ("any establishment that provides or offers its services, facilities, accommodations or goods to the public"); OR. REV. STAT. ANN. § 659A.400(1) (West 2014) ("Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements . . . or otherwise."); VT. STAT. ANN tit. 9, § 4501(1) (West 2014) ("any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public"); WIS. STAT. ANN. § 106.52(1)(e)(1) (West 2014) ("any place where accommodations, amusement, goods, or services are available either free or for a consideration").

92. *See* COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014) ("any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public" followed by a list of thirty-eight specific types of establishments); HAW. REV. STAT. § 489-2(1)-(12) (West 2014) ("a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public as customers, clients, or visitors" followed by a list of twelve specific types of establishments); ME. REV. STAT. ANN. tit. 5, § 4553(8)(A)-(N) (2014) ("a facility, operated by a public or private entity, whose operations fall within at least one of the following [fourteen] categories"); MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2014) ("any place . . . which is open to and accepts or solicits the patronage of the general public" followed by a list of ten specific types of establishments); NEV. REV. STAT. ANN. § 651.050(3)(a)-(o) (West 2014) (an "establishment or place to which the public is invited or which is intended for public use" followed by a list of fourteen specific types of establishments); N.H. REV. STAT. ANN. § 354-A:2(XIV) (2014) (an "establishment which caters or offers its services or facilities or goods to the general public" with twenty specific examples of such establishments); N.J. STAT. ANN. § 10:5-5(l) (West 2014) (all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, producers, manufacturers, wholesalers, distributors and retailers offering goods, services and recreation to the public, transportation facilities, and educational institutions at any level followed by a list of twenty-nine specific types of establishments); N.Y. EXEC. LAW § 292 (McKinney 2014) (all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, wholesalers and retailers offering goods, services and recreation to the public, and transportation facilities followed by a list of fifty-one types of establishments but specifically excluding public educational institutions); R.I. GEN. LAWS ANN. § 11-24-3(1-9) (West 2014) (listing forty-seven separate locations as "[p]laces of public accommodation"); WASH. REV. CODE ANN. § 49.60.040(2) (West 2014) ("any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities" followed by a list of twenty-three types of locations).

Although diverse in their specific listings, the definitions in these statutes primarily focus on lodging of transient guests, establishments serving food and beverages, places of exhibition, amusement and recreation, retail establishments offering goods, services and recreation to the public, and transportation facilities.[93]

By contrast, the sections of these statutes identifying protected classes are relatively uniform. All of these statutes, with the possible exception of Minnesota, include heterosexuality, homosexuality and bisexuality within the term "sexual orientation."[94] These statutes, with the possible exceptions of Delaware and Vermont, also extend the definition to include perceived orientation of persons by others.[95]

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93. Maryland's statute encapsulates these general areas of coverage through its application to lodging of transient guests, facilities principally engaged in the sale of food or alcoholic beverages, all places of exhibition or entertainment and retail establishments offering goods, services, entertainment, recreation or transportation to the public without further detailed lists of facilities or businesses. *See* MD. CODE ANN., STATE GOV'T § 20-301 (West 2014); *see also* N.H. REV. STAT. ANN. § 354-A:2(XIV) (2014); R.I. GEN. LAWS ANN. § 11-24-3(1)-(9) (West 2014).

94. *See* CAL. GOV'T CODE §12,926(s) (West 2014); COLO. REV. STAT. ANN. § 24-34-301(7) (West 2014); CONN. GEN. STAT. ANN. § 46a-81a (West 2014); DEL. CODE ANN. tit. 6, § 4502(16) (West 2014); D.C. CODE § 2-1401.02(28) (2014); HAW. REV. STAT. § 489-2(12) (2014); 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2014); IOWA CODE ANN. § 216.2(14) (West 2014); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2014); MD. CODE ANN., STATE GOV'T § 20-101(f) (West 2014); MASS. GEN. LAWS ANN. ch. 151, § 3(6) (West 2014); NEV. REV. STAT. ANN. §651.050(4) (West 2014); N.H. REV. STAT. ANN. § 21:49 (2014) ; N.J. STAT. ANN. § 10:5-5(hh)-(kk) (West 2014); N.M. STAT. ANN. § 28-1-2(P) (West 2014); N.Y. EXEC. LAW § 292(27) (McKinney 2014); OR. REV. STAT. ANN. § 174.100 (West 2014); R.I. GEN. LAWS ANN. § 11-24-2.1(h) (West 2014); VT. STAT. ANN tit. 1, § 143 (West 2014); WASH. REV. CODE ANN. § 49.60.040(26) (West 2014); WIS. STAT. ANN. § 111.32(13m) (West 2014). The New York statute includes asexuality within the definition of "sexual orientation." *See* N.Y. EXEC. LAW § 292(27) (McKinney 2014). The Minnesota statute does not use the terms "heterosexuality," "homosexuality" or "bisexuality" but rather defines "sexual orientation" as:

> having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.

MINN. STAT. ANN. § 363A.03(44) (West 2014). This definition presumably includes heterosexuality despite the absence of a specific reference.

95. *See* CAL. CIV. CODE § 51.5(a) (West 2014) (perceived orientation); COLO. REV. STAT. ANN. § 24-34-301(7) (West 2014) (perceived orientation); CONN. GEN. STAT. ANN. § 46a-81a (West 2014) (identification with a specific sexual orientation); D.C. CODE § 2-1402.31(a) (2014) (included within the prohibitions section rather than the definitional section); HAW. REV. STAT. § 489-2(12) (West 2014) (identification with a specific sexual orientation); 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2014) (perceived orientation); IOWA CODE ANN. § 216.2(14) (West 2014) (perceived orientation); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2014) (perceived orientation); MD. CODE ANN., STATE GOV'T § 20-101(f) (West 2014) (identification with one or more sexual orientations); MASS. GEN. LAWS ANN. ch. 151B, § 3(6) (West 2014) (identification with a specific sexual orientation); MINN. STAT. ANN. § 363A.03(44) (West 2014) (perceived orientation); NEV. REV. STAT. ANN. § 651.050(4) (West 2014) (perceived orientation); N.H. REV. STAT. ANN. § 21:49 (2014) (perceived orientation); N.J. STAT. ANN. § 10:5-5(hh) (West 2014) (perceived, presumed or identified orientation); N.M. STAT. ANN. § 28-1-2(P) (West 2014) (perceived orientation); N.Y. EXEC. LAW § 292(27)

However, only eighteen of these statutes expressly include gender identity or expression.[96] The definitions of gender identity and expression vary slightly among those statutes extending protection to this group.[97]

(McKinney 2014) (perceived orientation); OR. REV. STAT. ANN. § 174.100(6) (West 2014) (perceived orientation); R.I. GEN. LAWS ANN. § 11-24-2.1(h) (West 2014) (perceived orientation); WASH. REV. CODE ANN. § 49.60.040(26) (West 2014) (perceived orientation); WIS. STAT. ANN. § 111.32(13m) (West 2014) (identification with a specific sexual orientation). The Delaware statute makes no reference to perceived or identified sexual orientation but does state that it "shall be liberally construed to the end that the rights herein provided for all people, without regard to . . . sexual orientation . . . may be effectively safeguarded." DEL. CODE ANN. tit. 6, § 4501 (West 2014). It may be concluded from this language that discrimination on the basis of perceived or identified sexual orientation would be prohibited. Vermont's statute does not distinguish between actual and perceived orientation. *See* VT. STAT. ANN tit. 1, § 143 (West 2014). The questionnaire utilized by the Civil Rights Unit of the Vermont Attorney General's Office allows for aggrieved persons to file a complaint with respect to perceived orientation, but the Vermont Human Rights Commission does not make this distinction in the complaint form utilized in employment discrimination cases. *See Anti-Discrimination Law in Vermont*, GAY & LESBIAN ADVOCATES & DEFENDERS (2014), http://www.glad.org/rights/vermont/c/anti-discrimination-law-in-vermont, *archived at* http://perma.cc/V5L6-RE72.

96. *See* CAL. CIV. CODE §51.5(a) (West 2014) (actual or perceived gender identity and expression); COLO. REV. STAT. § 2-4-401(13.5) (West 2014) (gender identity); CONN. GEN. STAT. §§ 46a-64a (West 2014) (gender identity); DEL. CODE ANN. tit. 6, § 4503 (gender identity); D.C. CODE § 2-1402.31(a) (2014) (actual or perceived gender identity or expression); HAW. REV. STAT. § 489-3 (West 2014) (gender identity or expression); 775 ILL. COMP. STAT. ANN. 5/5-102(A) (West 2014) (actual or perceived gender-related identity); IOWA CODE ANN. § 216.7(1)(a) (West 2014) (gender identity); MD. CODE ANN., STATE GOV'T § 20-101(f) (gender identity); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2014) (actual or perceived gender identity or expression); MINN. STAT. ANN. § 363A.11(1)(a) (West 2014) (actual or perceived gender identity); NEV. REV. STAT. ANN. § 651.070 (West 2014) (gender identity or expression); N.J. STAT. ANN. § 10:5-4 (West 2014) (actual or perceived gender identity and expression); N.M. STAT. ANN. § 28-1-7 (West 2014) (gender identity); OR. REV. STAT. ANN. § 659A.403 (West 2014) (actual or perceived gender identity); R.I. GEN. LAWS ANN. §§ 11-24-2, 2.3 (West 2014) (actual or perceived gender identity or expression); VT. STAT. ANN tit. 9, § 4502(a) (West 2014) (gender identity); WASH. REV. CODE ANN. § 49.60.215(1) (West 2014) (actual or perceived gender identity and expression).

97. *See* CAL. CIV. CODE § 51(e)(5) (West 2014) ("a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth"); CONN. GEN. STAT. ANN. § 46a-51(21) (West 2014) ("gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth" as long as such identity or expression is "sincerely held, part of a person's core identity" as demonstrated by evidence such as "consistent and uniform assertion[s]" and not for an "improper purpose"); DEL. CODE ANN. tit. 6, § 4502(10) (West 2014) ("gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth" as long as such identity is "sincerely held as part of a person's core identity" as demonstrated by evidence such as "consistent and uniform assertion[s]" and not for an "improper purpose"); D.C. CODE § 2-1401.02(12A) (2014) ("gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth"); HAW. REV. STAT. § 489-2 (West 2014) ("actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression regardless of whether [they are] . . . different from that traditionally associated with the person's sex at birth"); 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2014) (an identity "not traditionally associated with

The majority of the statutes also prohibit acts related to unlawful discrimination. Thirteen statutes prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of persons will be refused or denied or that persons are unwelcome, objectionable, or undesirable due to their sexual orientation or gender identity.[98] Thirteen statutes prohibit

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the person's designated sex at birth"); IOWA CODE ANN. § 216.2(10) (West 2014) (the "identity of a person, regardless of the person's assigned sex at birth"); 94-348 ME. HUM. RIGHTS COMM'N REG. CH. 3, § 3.02(C)(2)-(3) (2014) (defining "gender identity" as an "individual's gender-related identity, whether or not that identity is different from that traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous" and defining "gender expression" as "the manner which [one's] gender identity is expressed, including, . . . through dress, appearance, manner, speech, or lifestyle"); MD. CODE ANN., STATE GOV'T § 20-101(e)(1)-(2) (West 2014) ("identity, appearance, expression, or behavior . . . regardless of the person's assigned sex at birth, which may be demonstrated by . . . consistent and uniform assertion of the person's gender identity . . . or . . . any other evidence that the gender identity is sincerely held as part of the person's core identity"); MINN. STAT. ANN. § 363A.03(44) (West 2014) (including actual or perceived "self-image or identity not traditionally associated with one's biological maleness or femaleness" within the definition of the term "sexual orientation"); NEV. REV. STAT. ANN. § 651.050(2) (West 2014) ("a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth"); N.J. STAT. ANN. § 10:5-5(rr) (West 2014) ("having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth"); N.M. STAT. ANN. § 28-1-2(Q) (West 2014) ("a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth"); OR. REV. STAT. ANN. § 174.100(6) (West 2014) ("gender identity, appearance, expression or behavior [regardless of whether it] differs from that traditionally associated with the individual's sex at birth"); R.I. GEN. LAWS ANN. § 11-24-2.1(I) (West 2014) ("actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression [regardless of] whether [they are] . . . different from that traditionally associated with the person's sex at birth"); VT. STAT. ANN tit. 1, § 144 (West 2014) ("an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth"); WASH. REV. CODE ANN. § 49.60.040(26) (West 2014) ("gender identity, self-image, appearance, behavior, or expression, whether or not . . . [they are] different from that traditionally associated with the sex assigned to that person at birth"). The Colorado statute utilizes "transgender" rather than "gender identity" but does not define the term. *See* COLO. REV. STAT. ANN. § 24-34-301(7) (West 2014).

98. *See* COLO. REV. STAT. ANN. § 24-34-601(2) (West 2014) ("any written, electronic, or printed communication, notice, or advertisement"); DEL. CODE ANN. tit. 6, § 4504(b) (West 2014) ("any written, typewritten, mimeographed, printed or radio communications"); D.C. CODE § 2-1402.31(a)(2) (2014) ("a statement, advertisement, or sign"); 775 ILL. COMP. STAT. ANN. 5/5-102(B) (West 2014) ("any written communication, except a private communication sent in response to a specific inquiry"); IOWA CODE ANN. § 216.7(1)(b) (2014) (applying to all publicity including advertising); ME. REV. STAT. ANN. tit. 5, § 4592(2) (2014) ("any notice or advertisement"); MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2014) ("any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign"); N.H. REV. STAT. ANN. § 354-A:17 (2014) ("any written or printed communication, notice or advertisement"); N.Y. EXEC. LAW § 296(2)(a) (McKinney 2014) ("any written or printed communication, notice or advertisement"); OR. REV. STAT. ANN. § 659A.409 (West 2014) ("any communication, notice, advertisement or sign of any kind"); R.I. GEN. LAWS ANN.

aiding, abetting, inducing or indirectly assisting in unlawful discriminatory acts.[99] California and Minnesota also prohibit discrimination against third persons on the basis of their association with others having or perceived to have a specific sexual orientation, gender identity or expression.[100]

Several of these statutes exclude specific accommodations, activities or organizations from their coverage.[101] The most significant

§ 11-24-2 (West 2014) ("any written, printed or painted communication, notice, or advertisement"); WIS. STAT. ANN. § 106.52(3)(a)(3) (West 2014) ("any written communication").

99. *See* CAL. CIV. CODE §52(a) (West 2014) (aiding and inciting discriminatory practices); COLO. REV. STAT. ANN. § 24-34-601(2) (West 2014) (indirect participation in unlawful discriminatory practices); DEL. CODE ANN. tit. 6, § 4504(a), (c) (West 2014) (indirect participation in unlawful discriminatory practices or assisting, inducing, inciting or coercing another person to engage in such practices); D.C. CODE §§ 2-1402.31(a)(1), 2-1402.61(a), 2-1402.62 (2014) (indirect participation in unlawful discriminatory practices, denying equal access to public accommodations through coercion, threats, or retaliation, and aiding and abetting unlawful discriminatory practices); HAW. REV. STAT. § 489-5(a)(2) (West 2014) (conspiracies "to aid, abet, incite, or coerce a person to engage in a discriminatory practice"); ME. REV. STAT. ANN. tit. 5, §§ 4553(10)(D), 4592(1) (2014) (aiding, abetting, inciting, compelling or coercing unlawful discriminatory practices and indirect participation in such practices); MD. CODE ANN., STATE GOV'T § 20-801(1) (West 2014) (aiding, abetting, inciting, compelling or coercing another person to engage in unlawful discriminatory practices); MASS. GEN. LAWS Ann. ch. 272, §§ 92A, 98 (West 2014) (indirect participation in unlawful discriminatory practices and aiding or inciting such practices); N.H. REV. STAT. ANN. §§ 354-A:2(XV)(d), 354-A:17 (West 2014) (aiding, abetting, inciting, compelling or coercing another person to engage in unlawful discriminatory practices and indirect participation in such practices); N.M. STAT. ANN. §§ 28-1-7(F), 28-1-7(I) (West 2014) (indirect participation in unlawful discriminatory practices, aiding, abetting, inciting, compelling or coercing such practices or willfully obstructing or preventing a person from complying with the public accommodation statute); N.Y. EXEC. LAW § 296(2)(a) (McKinney 2014) (indirect participation in unlawful discriminatory practices); OR. REV. STAT. ANN. § 659A.406 (West 2014) (aiding or abetting unlawful discriminatory practices); R.I. GEN. LAWS ANN. § 11-24-2 (West 2014) (indirect participation in unlawful discriminatory practices); WASH. REV. CODE ANN. §§ 49.60.215(1), 220 (West 2014) (indirect participation in unlawful discriminatory practices and aiding, abetting, encouraging or inciting such practices).

100. *See* CAL. CIV. CODE § 51.5(a) (West 2014); MINN. STAT. ANN. § 363A.15(2) (West 2014).

101. These exclusions are in addition to conditions or limitations with respect to access to public accommodations that are equally applicable to all persons regardless of their status or otherwise conform to usual and regular business practices. *See, e.g.*, CAL. CIV. CODE § 51(c) (West 2014) (exclusion for non-discriminatory requirements and standards applicable to all persons); COLO. REV. STAT. ANN. § 24-34-601(3) (West 2014) (allowing for distinctions based upon gender "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such places of public accommodation"); CONN. GEN. STAT. ANN. § 46a-81d(a) (West 2014) (exclusion for "conditions and limitations established by law and applicable alike to all persons"); DEL. CODE ANN. tit. 6, § 4504(a) (West 2014) (allowing for distinctions based upon gender identity or expression in "areas of facilities where disrobing is likely"); 775 ILL. COMP. STAT. ANN. 5/5-102.1(a) (West 2014) (exclusion for health care professionals and private service providers if such denial of accommodation is based upon a non-discriminatory reason equally applicable to all persons regardless of status); MD. CODE ANN., STATE GOV'T § 20-302 (West 2014) (exclusion for non-discriminatory conformance to "the usual

exclusion for purposes of this Article relates to religious organizations, facilities, and activities. Religion-based exclusions vary considerably among the states. For example, Connecticut, Maine and New Jersey limit their exclusions to specific areas of law that do not include public accommodations such as education, employment and housing.[102] The legality of any exclusion granted for religious purposes in California is to be determined by application of the standards set forth in *Employment Division v. Smith*.[103] By contrast, several states exempt religious organizations from their public accommodation statutes although the specific requirements to obtain an exclusion are different.[104] For example, Colorado's statute specifically excludes churches,

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and regular requirements, standards, and regulations of the establishment" that are equally applicable to all persons); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2014) (exclusion for non-discriminatory "conditions and limitations established by law and applicable to all persons"); N.J. STAT. ANN. § 10:5-4 (West 2014) (exclusion for non-discriminatory "conditions and limitations applicable alike to all persons"); R.I. GEN. LAWS ANN. § 11-24-1 (West 2014) (conditioning equal access to public accommodations upon "conditions and limitations established by law and applicable alike to all persons"); WASH. REV. CODE ANN. § 49.60.215 (West 2014) (providing exclusion for non-discriminatory "conditions and limitations established by law and applicable to all persons").

102. *See* CONN. GEN. STAT. ANN. §§ 46a-81p, 81aa (West 2014) (exempting religious corporations, entities, associations, educational institutions or societies with respect to employment distinctions based upon sexual orientation and gender identity relating to the carrying out of its activities or with respect to "matters of discipline, faith, internal organization or ecclesiastical rule, custom or law"); ME. REV. STAT. ANN. tit. 5, § 4553(10)(G)(1)-(3) (2014) (permitting religious corporations, associations, and organizations that do not receive public funds to make distinctions based upon sexual orientation with respect to employment, housing, and educational opportunity); N.J. STAT. ANN. § 10:5-5(l) (West 2014) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution").

103. *See* N. Coast Women's Care Med. Grp. v. San Diego Cnty. Superior Court, 189 P.3d 959, 966, 968 (Cal. 2008) (concluding that the Unruh Civil Rights Act was "a valid and neutral law of general applicability," that "[t]he Act further[ed] California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and that there [were] no less restrictive means for the state to achieve that goal" (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)).

104. *See, e.g.*, D.C. CODE § 2-1401.03(b) (2014) (allowing a religious organization to limit admission and "give[] preference[s] to persons of the same religion as is calculated by the organization to promote the religious . . . principles for which it is established or maintained"); IOWA CODE ANN. § 216.7(2)(a) (West 2014) (exempting a "bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose"); MD. CODE ANN., FAM. LAW § 2-202(3)(c) (West 2014) (allowing a "religious organization, association or society, or any nonprofit institution or organization operated, supervised, or controlled by a religious organization, association, or society" to limit admission or give preferences to individuals of the same religion or domination); MINN. STAT. ANN. § 363A.26(1-2) (West 2014) (allowing religious associations, corporations, and societies that are not organized for private profit and affiliated nonprofit institutions organized for educational purposes to limit admission and give preference to persons of the same religion or denomination and, "in matters relating to sexual orientation, tak[e] any action with respect to education, employment, housing and real property, or use of facilities" as long as such activities were not secular in nature and were related to the religious or educational purposes of the organization); N.H. REV. STAT. ANN. § 3540A:18

synagogues, mosques and other places principally used for religious purposes.[105] Illinois's statute exempts "the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals" in any place of public accommodation.[106] The majority of jurisdictions that have recognized same sex marriage rights legislatively have included an exemption for religious organizations, although these exemptions vary in language and coverage.[107]

(West 2014) (permitting "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization" to limit admission in order to "promote the religious principles for which it is established or maintained"); N.M. STAT. ANN. § 28-1-9(B) (West 2014) (permitting a "religious or denominational institution" to limit admission or give preferences to persons of the same religion and select buyers "as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established . . . unless membership . . . is restricted on account of race, color, national origin or ancestry"); N.Y. EXEC. LAW § 296(11) (McKinney 2014) (permitting a "religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization" to give preferences to persons of the same religion and take "such action as is calculated by such organization to promote the religious principles for which it is established or maintained"); OR. REV. STAT. ANN. § 659A.006(3) (West 2014) (allowing "a bona fide church or other religious institution" to restrict the use of facilities based upon "a bona fide religious belief about sexual orientation as long as . . . use of the facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution").

105. *See* COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014).

106. 775 ILL. COMP. STAT. ANN. 5/5-102.1(b) (West 2014).

107. *See* CONN. GEN. STAT. ANN. §§ 46b-22b, 35a (West 2014) (exempting churches and church-controlled organizations from participation in ceremonies solemnizing marriages in violation of their religious beliefs); D.C. CODE § 46-406(e)(1)-(2) (2014) (exempting religious societies and affiliated nonprofit organizations from being required to provide goods, services, accommodations and facilities relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); HAW. REV. STAT. § 572-12.2(a)-(b) (West 2014) (exempting religious organizations and affiliated nonprofit associations from being required to provide goods, services, and facilities relating to the solemnization or celebration of marriages that are in violation of their beliefs or faith and immunizing such refusals from serving as a basis for civil liability); 750 ILL. COMP. STAT. ANN. 5/209(a-10) (West 2014) (exempting organizations whose principal purpose is "the study, practice, or advancement of religion" from being "required to provide religious facilities" (but not businesses, health care and educational facilities or social service agencies) for the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); ME. REV. STAT. ANN. tit. 19-A, § 655(3) (2014) (exempting churches, religious denominations, and religious organizations from being required to host any marriage in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); MD. CODE ANN., FAM. LAW § 2-202(3)(a)-(b) (West 2014) (exempting religious organizations, associations and societies and affiliated nonprofit institutions from being required to provide goods, services, accommodations, facilities, and advantages relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); MINN. STAT. ANN. §§ 363A.26(3), 517.09(3)(a) (West 2014) (exempting religious associations, corporations, and societies from being required to provide goods, services,

III. PUBLIC ACCOMMODATION STATUTES AND SEXUAL ORIENTATION: SHOULD THERE BE A RELIGIOUS EXEMPTION FOR SECULAR BUSINESSES?

A. Religious Liberty and Public Accommodations: Two Preliminary Assumptions

1. The Presence of a Credible Threat to Religious Freedom

Any argument advocating the need for a religious exemption to public accommodation statutes based upon objections to sexual orientation is based upon two assumptions. The first assumption is that there is a credible threat to religious liberty in the absence of such an exemption. Proponents of exemptions contend that the expansion of protected classes and places in public accommodation statutes "have created an environment of potentially widespread First Amendment violations."[108] This expansion has far exceeded the narrow historical purpose of public accommodation law as expressed in its common law origins, specifically, guaranteeing access to "quasi-public" services

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accommodations, and facilities relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability to the extent that any refusal does not constitute a secular business activity); N.H. REV. STAT. ANN. §457:37(III) (2014) (exempting religious organizations, associations and societies and affiliated nonprofit institutions from being required to provide goods, services, accommodations, facilities, advantages or privileges relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); N.Y. DOM. REL. LAW § 10-B(1-2) (McKinney 2014) (exempting religious corporations from public accommodation laws with respect to the solemnization and celebration of marriages on the basis that their activities are private and immunizing refusals to provide accommodations, advantages, facilities or privileges from serving as a basis for civil liability); R.I. GEN. LAWS ANN. § 15-3-6.1(c)(1-2) (West 2014) (exempting religious organizations, associations and societies, and affiliated nonprofit institutions fraternal benefit and service organizations from being required to provide goods, services, accommodations, facilities, advantages and privileges relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability); VT. STAT. ANN. tit. 9, § 4502(k)(I) (West 2014) (allowing religious organizations, associations and societies to selectively provide services, accommodations and goods related to "the solemnization of a marriage or celebration of a marriage"); WASH. REV. CODE ANN. § 26.04.010(5)-(6), (7)(b) (West 2014) (exempting any entity "whose principal purpose is the study, practice, or advancement of religion" from being required to provide accommodations relating to the solemnization or celebration of a marriage and immunizing such entity from civil claims or causes of action based upon any refusal to provide accommodation); *see also* H.B. 438, 430th Gen. Assemb. § 3(a)-(b) (Md. 2012) (exempting religious organizations, associations and societies and affiliated nonprofit institutions from being required to provide goods, services, accommodations, facilities and advantages relating to the solemnization or celebration of marriages that are in violation of their beliefs and immunizing such refusals from serving as a basis for civil liability).

108. Susan Nabet, Note, *For Sale: The Threat of State Public Accommodation Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1515 (2012).

such as inns, restaurants, and common carriers.[109] As a result, modern public accommodation laws present a real and immediate threat to religious liberty through actual or threatened litigation. Litigation, threatened or otherwise, and the time and costs associated therewith will allegedly force religious individuals and institutions to compromise their principles with respect to sexual orientation.[110] From this point of view, the achievement of greater societal acceptance of the LGBT community as evidenced by the inclusion of sexual orientation as a protected class in an increasing number of public accommodation statutes will have the effect of placing religious practices and speech in the "societal closet."[111]

These dire predictions overstate the threat to religious liberty. The conclusion that the exercise of religion in the United States is frequently and substantially suppressed or heavily burdened is unsupported.[112] Conflicts, to the extent they exist, are generally fact-specific rather than broad-based attacks upon free exercise.[113] The existence of such conflicts in the realm of public accommodations may be further minimized by the willingness of market participants, no matter how devout in the practice of their faiths, to overlook personal prejudices in their quest to maximize profits.[114] This willingness is further supported by evidence that firms employing discriminatory practices rather than focusing purely on economic reasons in the operation of their businesses will fare worse in the long term.[115] Those businesses choosing to turn their backs on diversity in the twenty-first century marketplace risk profit, reputation and, possibly, their

109. *Id.* at 1516.

110. *See* Roger Severino, *Or For Poorer?: How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 979 (2007).

111. J. Brady Brammer, Comment, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. REV. 995, 1004 (2006).

112. *See* Lupu, *supra* note 56, at 566. Although it is beyond the scope of this Article, state religious freedom restoration acts granting broad-based exemptions have proven to be an ineffective means by which to protect religious liberty. *See* Lund, *supra* note 17, at 468, 479–80 (contending that such acts "simply have not translated into a dependable source of protection for religious liberty at the state level" and that there is "reason to doubt that state RFRAs provide meaningful protection for religious observance" given the almost complete absence of litigated claims).

113. *See* Lupu, *supra* note 56, at 566.

114. *See* Chapman, *supra* note 77, at 1820–21 ("[M]arket participants that are focused on the bottom line . . . may overlook their personal prejudices against employees, business owners, and consumers if they can assist in maximizing profits."); *see also* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 134 (2006) ("Antigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so.").

115. *See* Chapman, *supra* note 77, at 1821; *see also* KAUSHIK BASU, BEYOND THE INVISIBLE HAND: GROUNDWORK FOR A NEW ECONOMICS 78 (2011).

very existence.[116] Such firms thus may choose not to avail themselves of protections purportedly afforded by religious exemptions to the extent discriminatory practices are inconsistent with the bottom line.[117] Furthermore, although they differ in wording, public accommodation statutes extending protection to the LGBT community were drafted by legislators acutely aware of potential conflicts and thus contain significant exemptions for religious organizations, facilities and activities.[118] The absence of widespread threats and restraints upon free exercise and these exemptions have led some commentators to conclude that the true reason for seeking further exemptions is an objection to the increased secularization of society rather than the protection of religious liberty.[119]

2. The Free Exercise of Religion and Public Accommodations

A second assumption relates to the definition of free exercise in the context of business activities in general and public accommodations in particular. In *Employment Division v. Smith*, the Court defined the "exercise of religion" as involving "not only belief and profession but [also] the performance of (or abstention from) physical acts."[120] This definition was qualified by reference to unquestionably religious acts such as attendance at worship services, the sacramental use of bread and wine, proselytizing, and abstention from certain foods and modes of transportation.[121]

The breadth of activities constituting free exercise was widened by the Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.* In finding a free exercise right for secular for-profit corporations, the Court

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116. *See* Chapman, *supra* note 77, at 1820–21.

117. *See id.* at 1822.

118. *See supra* notes 102–07 and accompanying text; *see also* McCusker, *supra* note 32, at 396 (contending that "secular laws of general applicability," such as public accommodation statutes, and religious practices will infrequently conflict because such laws "were constructed with those religions as part of their lawmakers' worldviews, whether as their own religions or as religions shared by those around them").

119. *See, e.g.*, Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153, 157 (2000) (contending that religious freedom restoration acts were not enacted "to solve any actual, recognized problem of discrimination or burden on religious conduct. . . . [but were adopted] to institute a global protection of religiously motivated conduct whenever it conflicts with government regulation."); McCusker, *supra* note 32, at 398 ("[T]raditionally religious individuals are more likely to find their religious practices in conflict with facially neutral laws than they would have a century ago when traditional religious moral notions were more widespread.").

120. 494 U.S. 872, 877 (1990).

121. *Id. See also id.* at 893 (O'Connor, J., concurring) (defining the exercise of religion as including "'[t]he practice and performance of rites and ceremonies, worship . . . the right or permission to celebrate the observances (of a religion)' and religious observances such as acts of public and private worship, preaching, and prophesying" (quoting, in part, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 401–02 (James A.H. Murray ed. 1897))).

restated its definition in *Smith*.[122] However, the Court omitted *Smith's* qualifying language tying free exercise to unquestionably religious acts. Instead, the Court concluded that the exercise of religion involved "'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"[123] This language removed any necessary connection between the act or abstention and their association with religious observances set forth in *Smith*. As a result, any act or abstention regardless of its connection to specific rituals or observances could constitute free exercise as long as it was "engaged in for religious reasons."[124] Any doubt as to this expansion was eliminated by the Court's subsequent conclusion that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the] definition [of exercise of religion]."[125]

Such a broad definition may play havoc with unimpaired access to public accommodations free from discrimination. Statutes that mandate access to public accommodations clearly compel business practices or limit the ability of businesses to select which members of the public to serve. Such statutes are subject to judicial challenge to the extent that such compulsion or limitations are perceived to run afoul of the religious beliefs of the business's owners. For example, may an inn offering lodging to the general public refuse to provide a room to a same-sex couple whom the owner or manager perceives to be homosexuals? May a "family friendly" establishment, such as a restaurant or an amusement park, deny service or admission to the same couple? May a contractor refuse to build a house intended to be used by the couple as a residence? May a taxi cab driver refuse to transport a person he perceives to be a homosexual to a gay bar? The possibilities with respect to sexual orientation are limitless given the broad definition of public accommodations.[126]

This equation of business practices with the exercise of religion is in error. The commercial nature of business operations should distance the religious beliefs of the business's owners from any accommodation required to be given by the law.[127] This conclusion in the context of

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122. Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *44–*45 (U.S. June 30, 2014).

123. *Id.* at *44 (quoting *Smith*, 494 U.S. at 877).

124. *Id.* (quoting *Smith*, 494 U.S. at 877); *see also supra* note 62 and accompanying text (discussing the disconnection of the definition of "religious exercise" in the Religious Land Use and Institutionalized Persons Act from compulsion or centrality to a system of religious belief and the breadth of its definition in state religious freedom restoration acts).

125. *Hobby Lobby Stores, Inc.*, 2014 U.S. LEXIS 4505, at *44–*45.

126. *See supra* notes 90–93 and accompanying text.

127. *See* Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 733 (2001) (contending that religious freedom cases arising in a commercial

public accommodation statutes recognizes that such laws apply to business operations which in and of themselves are not exercises of religion.[128] In so doing, public accommodation statutes cannot reasonably be attacked as targeting religious-based activities.[129]

This conclusion recognizes a fundamental difference between religious and secular organizations. As correctly noted by Justice Ginsburg in her dissent in *Hobby Lobby*, secular for-profit corporations do not "exist to foster the interests of persons subscribing to the same religious faith" nor do they "exist to serve a community of believers."[130] To conclude otherwise creates a "new up-is-down world" in which those opposed to equal accommodation are practicing their faith when engaged in even the most routine commercial transactions. Such practices are not only harmful to those negatively impacted by their application but also trivialize professions and acts of faith engaged in for truly spiritual purposes by equating such acts with those engaged in solely out of bigotry and transparently discriminatory motives.

The equation of commercial practices with free exercise also invites sham claims seeking exemptions from public accommodation statutes on questionable religious grounds.[131] Any would-be discriminator could avoid compliance by re-characterizing their otherwise routine commercial operations as religious expression. Courts confronted with such claims would be hard-pressed to deny such claims given the prohibition upon judicial inquiry into the sincerity of religious beliefs.[132] Sincere or otherwise, such religious beliefs could

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context should be treated differently "on the theory that the commercial nature of the enterprise somehow distances the person's religious convictions from the ultimate activity being regulated. . . . [and] [q]ualitatively, that result seems right").

128. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 68 (N.M. 2013) (holding that the public accommodations provision of the New Mexico Human Rights Act applied to business operations, and in particular, decisions not to offer services to protected classes of persons which in and of themselves were not expressive).

129. *See* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 11 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision granting Complainants' Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment) (holding that the refusal to sell a wedding cake to a same-sex couple violated the Colorado public accommodation statute which was neutral, of general applicability and focused on preventing discrimination in the marketplace rather than aimed at restricting religious practices).

130. *Hobby Lobby Stores, Inc.*, 2014 U.S. LEXIS 4505, at *123, *126 (Ginsburg, J., dissenting).

131. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 41–43 (1994) ("The threat of cumulative exemptions comes not only from other sincere religious objectors, but from other persons who could feign the same objection to get the benefits of exemption.").

132. *See, e.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l

become a means by which to avoid compliance with the law. The ensuing results would most likely be subjective, unfair and non-uniform across jurisdictions.

It has been contended that the scope of the sham claims problem is exaggerated.[133] Such claims would be discouraged through a combination of "common sense costs," lack of seriousness of purpose, the risk of ill will directed at those asserting such claims, and the absence of material advantages associated with the receipt of an exemption.[134] These "informal constraints" would serve to "discourage all but the most foolhardy from even broaching the subject."[135] Perhaps this is so. Nevertheless, subjecting compliance with public accommodation statutes to the perceived ability of businesses and individuals to exercise self-control is not an enforcement strategy that inspires confidence. Even those concluding that the problem may be overstated have noted that the possibility of sham claims cannot be "completely prevented . . . [or] entirely discounted."[136] Such claims are for the courts to determine, but their ability to do so is circumscribed by restrictions upon inquiries into the sincerity and validity of religious beliefs.[137]

In any event, public accommodation statutes are potentially regulating conduct based upon religious beliefs rather than the beliefs themselves. The distinction is real and substantial. All individuals and businesses have an unlimited right to believe that which they choose free from government interference and intervention.[138] On the other hand, conduct, whether religiously motivated or otherwise, is subject to regulation for public safety and welfare reasons.[139] This

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Presbyterian Church, 393 U.S. 440, 450 (1969). *But see supra* note 61 and accompanying text (discussing the requirement of sincerely held religious tenets or beliefs in the Kansas and Texas Religious Freedom Restoration Acts).

133. *See, e.g.*, Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 132 (2006).

134. *Id.* at 132–33.

135. *Id.* at 133.

136. *Id.*; *see also supra* note 62 and accompanying text (discussing the broad definitions of "religious exercise" contained in the Religious Land Use and Institutionalized Persons Act and state religious freedom restoration acts).

137. *See Smith*, 394 U.S. at 887.

138. *Id.* at 877.

139. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). The Court stated:

> In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good

includes statutes enacted not to interfere with religious belief but rather to ensure non-discriminatory access to public accommodations.[140] Furthermore, those instances where courts have declined to permit government regulation of religiously based conduct have been limited to circumstances where the conduct is not prohibited by law,[141] inconsistent with rights asserted by others[142] or imposes more than an incidental burden upon a commercial activity.[143] Public accommodation statutes fit comfortably within these circumstances as outlawing discrimination, recognizing the right of members of protected classes to be free from discrimination in the marketplace and touching upon conduct in a manner incidental to the government's legitimate regulation of commercial activity.[144]

B. Religious Exemptions to Public Accommodation Statutes: An Inadvisable Compromise

1. Introduction

Assuming the existence of a credible threat to religious rights posed by public accommodation statutes and that commercial activities of businesses involve the exercise of such rights, there is a temptation to expand existing exemptions relating to religious organizations to include secular for-profit businesses.[145] There are several asserted

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> order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id.

140. *See* Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 602 (2010) (concluding that public accommodation laws "were not enacted with the intent to violate the religious views of certain individuals; instead they were put in place to provide protection and a legal remedy for people who face discrimination in the absence of such legal protections").

141. *See, e.g.*, *Smith*, 494 U.S. at 876. (concluding that religious based conduct may be free from government regulation when "the conduct at issue . . . was not prohibited by law").

142. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 604 (1961) (concluding that conduct that brings persons "into collision with rights asserted by any other individual. . . . most frequently require[s] intervention of the State to determine where the rights of one end and those of another begin. . . ." (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943))).

143. *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

144. *See* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 10 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision granting Complainants' Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment).

145. For a discussion of exemptions to public accommodation statutes for religious organizations, *see supra* notes 102–06 and accompanying text. For a discussion of exemptions

bases for such an expansion. For example, it may be contended that there can be no distinction between free exercise rights of religious organizations and similar rights asserted by businesses. Utilizing this approach, considerable doubt may be cast upon governmental interests underlying exemptions for a specific religious practice that does not extend to others engaged in the same practice.[146] The U.S. Supreme Court's opinion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* lends support to this approach to the extent that the Court overturned the government's ban upon the religious use of *hoasca* based upon its long-standing exception to the use of another hallucinogen, specifically, peyote, by the Native American Church.[147] Both substances had "high potential for abuse," "no currently accepted medical use," and presented safety concerns for users.[148] However, the granting and maintenance of an exception for the use of peyote for more than thirty years made it impossible for the Court to refuse to grant a similar exception for *hoasca* use by members of O Centro Espirita Beneficente Uniao do Vegetal.[149] This approach has been further bolstered by the Court's holding in *Hobby Lobby* granting for-profit corporations an exemption to a portion of the Affordable Care Act's contraceptive mandate closely resembling that which the Act previously granted to religious organizations.[150]

Other commentators have adopted a justification for the expansion of religious exemptions based upon exemptions granted to secular interests.[151] There are significant differences between the suggested approaches. Some commentators have contended that exemptions from generally applicable laws for secular interests justifies the application of strict scrutiny to governmental refusals to grant similar exemptions for religious practices.[152] Other commentators have

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to public accommodation statutes in the context of same-sex marriage, *see supra* note 107 and accompanying text.

146. *See* Brownstein, *supra* note 133, at 115 (contending that in free exercise cases, courts should look to other religious exemptions granted by the government, compare the practices and, if they raise similar concerns and the government exempts one practice from the law but not the other, "conclud[e] that the [government's asserted] interest lacks substance"); *see also* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 92–93 (2007) (discussing *Smith* and suggesting that Oregon acted unconstitutionally by banning the use of peyote in all circumstances while exempting Christian churches from the prohibition of the sale of alcohol in dry counties).

147. 546 U.S. 418, 433, 439 (2006).

148. *Id.* at 432.

149. *Id.* at 433–37.

150. *See* Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *43–*45 (U.S. June 30, 2014) (granting free exercise rights to closely held secular businesses regardless of corporate form and their central profit-making objective).

151. *See* Kaplan, *supra* note 53, at 1047 n.9.

152. *See* Duncan, *supra* note 53, at 850–51. This approach is based upon the result in *Employment Division v. Smith* in which the Court concluded that the presence of exemptions for secular interests without corresponding religious exemptions rendered subject

advocated for a "rough equality for religious groups in a secular world."[153] This "rough equality" may take many different forms. In its minimalist form, equality may simply prohibit laws that deliberately target religion.[154] Other commentators have argued that every secular exemption should be accompanied by a religious exemption.[155] A compromise view would require a secular exemption as a prerequisite for a religious exemption and would then determine whether the secular exemption endangered underlying legislative purposes to a lesser or greater degree than a religious exemption.[156] Regardless of their differences, all of these approaches conclude that exemptions for secular interests are relevant as they provide "objective information" courts may consider in striking the balance between religion and public policy that is inherent in every free exercise case.[157]

2. The Unworkability of Religious Exemptions

The case for religious exemptions should be rejected regardless of the basis upon which it is advanced. An initial problem lies with the granting of the exemptions themselves. Once granted, religious exemptions will take on lives of their own and quite likely will become permanent. It is unlikely that courts will invalidate a legislatively granted exemption. It is even more unlikely that legislatures would revoke a religious exemption once created. The circumstances under which governments may revoke a previously granted religious exemption remain largely undecided by the courts and unaddressed

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laws no longer neutral or of general applicability, thus requiring rigorous review. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

153. Lund, *supra* note 53, at 637. The need for equality is based upon difficulties that religious groups may encounter in securing exemptions during the legislative process; *see* Laycock, *supra* note 56, at 57. *But see* Lund, *supra* note 53, at 638 ("Religious groups are further helped by the very nature of the legislative process, which is conducive to the creation of secular exceptions. . . . [as] [t]he nature of legislation often turns on compromise; legislators make exceptions for groups in order to win over opposition.").

154. *See, e.g.*, Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71 n.3, 72 (2001) (contending that the Free Exercise Clause "protects only against statutes that target religious practice"); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 599 (1998) (contending that the Free Exercise Clause only prohibits "religious gerrymanders, laws which, upon close inspection, are designed intentionally to disadvantage religion").

155. *See, e.g.*, Laycock, *supra* note 56, at 49–50 (referring to reciprocity in granting exemptions as "most-favored nation status" for religious interests). *But see* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999) (criticizing reciprocity for secular and religious exceptions as unworkable, as "virtually all laws, including those widely seen as aiming at quite serious harms, contain many secular exceptions").

156. *See, e.g.*, Lund, *supra* note 53, at 640; Volokh, *supra* note 155, at 1542; Kaplan, *supra* note 53, at 1078–79; Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 767–70 (1999).

157. *See* Brownstein, *supra* note 133, at 127.

in the academic literature.[158] The scant judicial record aside, the "core problem" is the distinct possibility that the government can never eliminate or shrink previously granted exemptions.[159] Any such effort would not be neutral as its objective would be to increase burdens upon those individuals and businesses who previously enjoyed the benefit of the exemption.[160] Any revocation effort also would not be generally applicable as it would be directed specifically at religious beneficiaries.[161] The presence of secondary secular objectives underlying a revocation would be irrelevant due to the absence of neutrality and general applicability.[162]

There are only two possibilities for any given religious exemption if it cannot be revoked. One possibility is that the exemption remains unaltered and becomes a static part of free exercise law. As a result, ill-conceived exemptions with potentially deleterious consequences may become a permanent part of the legal landscape. However, this possibility is unlikely as this is generally not how the legal system operates. The U.S. legal system, especially in the field of constitutional law, focuses on interpretation and challenging boundaries. It is far more likely that a religious exemption will be tested, interpreted and expanded beyond those circumstances serving as its original justification. These possibilities should give courts and legislatures pause before creating exemptions to public accommodation statutes.[163]

158. *See, e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 632 (7th Cir. 2007) (upholding an amendment to the Illinois Religious Freedom Restoration Act allowing for the relocation of cemeteries in order to permit expansion and modernization of O'Hare International Airport); Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So.2d 48, 56–57 (Fla. Dist. Ct. App. 2006) (upholding an amendment of the Florida Religious Freedom Restoration Act to require full face photographs for purposes of driver's licenses and identification cards); *see also* Lund, *supra* note 17, at 494 (describing revocation of religious exceptions as "a remarkably undertheorized question in the law-and-religion field[,] [as] Free Exercise . . . scholarship focuses on the circumstances in which exemptions can be given. [But] [i]t tends not to focus on the circumstances in which exemptions can be taken back.").

159. Lund, *supra* note 17, at 494.

160. *Id.* at 495.

161. *Id.*

162. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (concluding that "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs").

163. *See* Lund, *supra* note 17, at 495 ("Once legislatures become aware that they cannot revoke religious exemptions, they will hesitate to ever give them."). *But see* Chapman, *supra* note 77, at 1804 (proposing a religious exemption for sexual orientation which would "allow [for] incremental narrowing of the exemption as time goes on and public or legal opinion shifts"). Chapman's proposal is flawed in several respects. The proposal fails to take heed of the free exercise principles of neutrality and general applicability to which any subsequent narrowing would be subjected. Clearly, any narrowing would be directed at those individuals or organizations engaging in discrimination on the basis of religious beliefs and thus would lack the necessary neutrality. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990). It would also violate the general applicability

The creation of religious exemptions also raises the issue of vital services. There is a distinct possibility that the LGBT community may be denied access to vital services if all religious objectors were provided with the option to deny goods and services based upon actual or perceived sexual orientation.[164] There is no guarantee that any statutorily based exemption will contain language preventing providers of such goods and services from denying access on the basis of sexual orientation. There is also no guarantee that legislatures will adequately craft an exemption for such providers.

A general definition of vital goods and services may be achievable.[165] However, there would be controversy and likely omissions in identifying providers of vital services beyond vague platitudes about public safety. For example, emergency room professionals and technicians are undoubtedly vital to the preservation of health and life.[166] Does this mean, however, that all emergency room personnel must render aid despite religious objections to homosexuality? Does such an exemption apply to other important health care issues such as the decision to become a parent and access to routine medical care? The answer to this question is clear in California but not in other states that prohibit discrimination on the basis of sexual orientation.[167] There are open questions as to the identity of other providers of emergency services and whether such entities should be included in any

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requirement as any narrowing would be directed only at the discriminatory practices purportedly motivated by religious beliefs. *Id.*; *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 524 (noting that the Florida legislature's decision to statutorily disallow animal sacrifice as part of the Santeria religion was impermissible because "their official actions violated the Nation's essential commitment to religious freedom"). The proposal also does not contain a mechanism by which legislatures may narrow previously granted exemptions and fails to address what would undoubtingly be individual and institutional reluctance to take action perceived to be at the expense of religion and favoring a historically unpopular group as the LGBT community. Additionally, the proposal does not account for the tendency of statutory exceptions to evolve and expand over time through subsequent legislative action and judicial decisions. Finally, the proposal impermissibly triggers narrowing of religious exemptions based upon shifts in public opinion presumably regarding sexual orientation. Even assuming a shift sufficient to support the narrowing of an existing exemption, the free exercise of religion is not subject to restraint based upon the whims of public opinion or the perceived acceptability of the beliefs and practices associated therewith.

164. *See, e.g.*, Muehlmeyer, *supra* note 66, at 809 (noting that "the typical LGBT experience with discrimination . . . occur[s] . . . in transactions that involve cultural values and close personal interaction").

165. *See* Chapman, *supra* note 77, at 1815 (proposing an exception to religious exemptions on the basis of "the health, life, or material pecuniary interest of an individual").

166. *Id.* at 1804.

167. *See* N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 968 (Cal. 2008) ("The [Unruh Civil Rights] Act further[ed] California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation . . . .").

exemption.[168] The feasibility of a "vital services" exemption is further undermined by the wide variety of services defined by state law as "vital."[169]

Enforcement of such an exemption presents many problems. For example, how are determinations of "vital services" to be made by legislators with any degree of specificity and confidence that their intent will be faithfully executed by decision-makers who are directly impacted and upon whom the burden of compliance falls? Compliance is perhaps best assured through "the threat of administrative action or litigation."[170] It is unlikely that such threats would be incorporated into any statutory scheme given the sensitivity of topics touching upon religious practices, and any penalties included in such a scheme are likely to be mild. Furthermore, a provider of goods and services outside the scope of a "vital services" designation ironically may be permitted to discriminate despite the fact that the individual seeking access supports such provider through his or her tax dollars. That such a determination may be made upon perceived sexual orientation is all the more distressing.

An exemption for hardship is equally inadvisable. This proposed exemption provides that a business would be permitted to refuse service on the basis of sexual orientation unless it was the only one capable of providing the good or service in question and the burden upon the potential customer would be heavy.[171] A provider would be

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168. *See* Chapman, *supra* note 77, at 1815 (proposing the designation of motel accommodations, rescue teams, tow companies and gasoline stations in remote areas as "vital services").

169. *See, e.g.*, 1987 Cal. Stat. ch. 1240(a) (declaring emergency medical services to be vital); 2008 Cal. Stat. ch. 393 § 1(b) (declaring services associated with health care, education, job training, and public safety to be vital); 720 ILL. COMP. STAT. ANN. 5/17-55 (West 2014) (defining "vital services" to include "services provided by medical personnel or institutions, fire departments, emergency services agencies, national defense contractors, armed forces or militia personnel, private and public utility companies, or law enforcement agencies"); NEV. REV. STAT. ANN. § 416.010(2) (West 2014) (defining vital services as those "necessary for the peace, health, safety and welfare of the people of this state"); N.J. STAT. ANN. § 2C:33-11.1(6) (West 2014) (declaring access to "heat, electricity [and] water" to be vital services); N.J. STAT. ANN. § 30:5B-22.1(d) (West 2014) (declaring services provided by "quality family child care providers" to be vital); 1994 N.Y. Laws ch. 546 § 1 ("declar[ing] that check cashers provide important and vital services to New York citizens"); N.Y. EXEC. LAW §§ 22–23 (McKinney 2014) (providing for state and local government disaster preparedness with respect to the restoration of "vital services"); R.I. GEN. LAWS ANN. § 19-14.4-2(b) (West 2014) ("declar[ing] that check cashing businesses provide important and vital services to Rhode Island citizens"); 1981 Wash. Sess. Laws 1374 (declaring services associated with "public safety, public health, and fire protection" to be "vital").

170. *See* Chapman, *supra* note 77, at 1815.

171. *See, e.g.*, Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 208 (2010) (proposing a hardship exception in the context of same-sex marriage); Douglas Laycock, *Afterword* to SAME-SEX

denied the benefit of this exemption if the potential customer could satisfy both prongs. There are several difficulties with this exemption as proposed. First, the exemption improperly places the burden of proof on potential customers who have been denied goods or service. But any exemption from public accommodation statutes should be an exception and not a rule. The burden of proof of entitlement to any exemption should fall on the potential beneficiary and not the current victim.

Additionally, the first prong of the exemption requires constant determinations regarding the identity of alternate providers of goods and services in the market in question.[172] This need for constant monitoring places substantial burdens on businesses seeking to utilize the exemption and requires them to determine whether goods and services offered by other providers are adequate substitutes.[173] The measurement of hardship to individuals denied goods or services is also problematic. Possible factors include increases in cost to potential customers, their financial ability to bear such costs and the geographic availability of substitute services.[174] These factors would need to be accounted for in any statutory exemption. A legislative balance satisfactory to all parties and that is readily adaptable to the myriad of circumstances in which it would arise is improbable.[175] Reliance upon courts to make such determinations suffers from these same problems as well as injects additional costs and uncertainty associated with litigation.[176]

Another possible exemption that should be discouraged is for small businesses.[177] Advocates equate the numerous small business exemptions contained within a wide range of federal statutes with a potential exemption from public accommodation laws.[178] However,

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MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 200 (Douglas Laycock et al. eds., 2008) (proposing a hardship exception in the context of same-sex marriage).

172. *See* Chapman, *supra* note 77, at 1814 (noting that a hardship exception would "require that each type of business be catalogued so as to keep abreast of its competitors and new additions or losses to the market").

173. *Id.* ("This [hardship exception] puts a great burden on the business to remain cognizant of every new move, as well as to rely on its own judgment about whether a service or business is substantially similar enough to be considered a substitute.").

174. *Id.* at 1808.

175. *Id.* at 1815 ("Also, from a fairness perspective, it does not make sense to punish one owner because he or she happens to have the only business of its type in town."). Chapman also concludes that "[o]n a political level . . . it is very unlikely that such an exception would pass as it is essentially placing the gay individual's right to public accommodation higher than the proprietor's religious-liberty right." *Id.* at 1814–15.

176. *Id.* at 1814.

177. *See, e.g.*, Berg, *supra* note 171, at 227 ("Small businesses that provide personal services tend to be direct embodiments of the owner's identity."); Chapman, *supra* note 77, at 1807–10.

178. *See, e.g.*, 42 U.S.C. § 2000e(b) (2012) (exempting enterprises with fourteen or fewer employees from compliance with the Civil Rights Act of 1964); *Id.* § 12111(5)(A)

this equation fails on several grounds. The underlying motivation for statutory exemptions from the Civil Rights Act and the Americans with Disabilities Act were financial, specifically, the desire not to burden small businesses with compliance costs.[179] Cost is not the primary motivating factor with respect to exempting small businesses from public accommodation statutes with respect to sexual orientation. The primary motivating factor instead is to validate discrimination against a specific group of individuals either possessing or believed to possess a particular characteristic to which the small business owner objects. These differences in motivation render equation of these exemptions suspect.

It also bears to note that definitions of what constitutes a "small business" differ. The Civil Rights Act and the Americans with Disabilities Act define small businesses based upon the number of employees.[180] However, the U.S. Supreme Court in *Hobby Lobby* extended free exercise rights to the corporate plaintiffs not based upon the number of employees but rather upon their status as close corporations.[181] The clear implication from this decision is that ownership structure rather than size is an important factor for corporate exercises of religious rights. As noted in Justice Ginsburg's dissent, these so-called "small businesses" may in fact be quite large with sizable revenue and numbers of employees.[182] Such businesses are a far cry from truly small "mom and pop" establishments. The harm that a religious exemption for such businesses may cause to individual potential customers and the cause of equal access to public accommodations would be magnified.

Furthermore, as noted by Justice Ginsburg, the logic of the majority opinion in *Hobby Lobby* extends free exercise rights to "corporations of any size, public or private."[183] Such an extension is necessarily fatal to a small business exemption as it applies to all corporations regardless of size. The holding in *Hobby Lobby* also disproves the "attenuation argument" in support of a small business exemption.[184] This argument contends that the larger a business becomes, the less justification exists for personal identification of the owner's religious

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(exempting enterprises with fourteen or fewer employees from compliance with the Americans with Disabilities Act).

179. *See* Chapman, *supra* note 77, at 1808.

180. *Id.* at 1807.

181. *See* Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *58, *61 (U.S. June 30, 2014).

182. *Id.* at *128–*29 n.19 (Ginsburg, J., dissenting) (citing Mars, Inc. ($33 billion in revenues and 72,000 employees) and Cargill, Inc. ($136 billion in revenues and 140,000 employees) as two examples of family-owned or closely held businesses potentially within the scope of the majority's opinion).

183. *Id.* at *128.

184. *See* Chapman, *supra* note 77, at 1810.

beliefs with the business's operations.[185] As a result, claims that the owner's religious rights have been infringed become less credible, and the business should not be permitted to discriminate.[186] The holding in *Hobby Lobby* extending free exercise rights to all corporations regardless of revenues, number of employees or market impact undercuts the argument that justification for discrimination terminates because the relationship between the owner's religious principles and the operation of the business become attenuated as a result of growth.

Finally, it is naïve to assume that the bigger the business, the less likely it is to assert religious rights should an exemption be granted. The majority's assurance in *Hobby Lobby* that it is "unlikely" that large publicly traded companies will avail themselves of their free exercise rights is pure speculation.[187] It is also cold comfort for potential victims of discrimination other than racial minorities who the Court identified as the sole group not subject to discrimination on religious grounds.[188] This is particularly the case with respect to the LGBT community which has been a historical target for discrimination.[189] It is also inconsistent with the profit model to conclude that a majority of businesses would elect to forego growth in order to preserve their exemption.[190] Instead, such businesses could elect to grow beyond any designated limitation and assert that the free exercise right found in *Hobby Lobby* knows no boundaries relative to size or ownership structure.[191]

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185. *See, e.g.*, *id.* ("Once an entity reaches a critical mass, the justification for an owner's feeling that his or her religious freedoms have been infringed upon through a personal identification with his or her business, or through in-person interactions with same-sex individuals, becomes less credible."); Laycock, *supra* note 171, at 199 ("Large businesses take up more market share, and an owner's claim of personal responsibility for everything that happens in his business grows more attenuated as the business expands, so a sensible legislative provision would be to put a limit on the size of [the] businesses eligible to claim an exemption.").

186. *See* Chapman, *supra* note 77, at 1810. Chapman contends that growth creates a "tipping point," after which time:

> [T]he owner should no longer be entitled to an exemption that would allow him or her substantially to affect commerce while discriminating on the basis of sexual orientation, because often growth will mean [that] the relationship between the owner's role in the business and the justification for the exemption will be too attenuated.

Id.

187. *Hobby Lobby Stores, Inc.*, 2014 U.S. LEXIS 4505, at *58.

188. *Id.* at *87.

189. *See, e.g.*, Chapman, *supra* note 77, at 1785–86, 1789–90.

190. *See id.* at 1810 ("Owners who feel that their rights would be infringed no matter what their entity's size can make a choice to forego growth and ensure the business stays under a certain size.").

191. Chapman concedes that the number of businesses that would forego growth in order to preserve a religious exemption "may be fewer than expected." *Id.* at 1810 n.131. It is likely that this number would be none at all in the wake of the majority's reasoning in *Hobby Lobby*.

Yet another variety of proposed exemption concerns same-sex marriage. Although beyond the scope of this Article, same-sex marriage considerations must be addressed to the extent they relate to possible exemptions from public accommodation statutes. A same-sex marriage exemption may take many different forms. For example, the exemption could relate to goods, services and facilities relating to the solemnization or celebration of marriages that violate the religious beliefs of individuals and businesses. This exemption would most likely resemble those granted to religious organizations by states which have endorsed same-sex marriage through legislation.[192] However, claims for religious exemptions by secular for-profit businesses have been rejected by courts and administrative agencies to date.[193]

Other proposals for a religious exemption in the same-sex marriage context are much broader. For example, the Becket Fund for Religious Liberty advocates exempting religious objectors from "facilitating" same-sex marriage.[194] Religious objectors could refuse to hire persons in same-sex marriages, extend benefits to same-sex spouses, make their property or services available for same-sex marriage ceremonies and provide housing to same-sex couples.[195] The Becket Fund urges courts and legislatures to adopt these exemptions in a "robust" manner.[196]

A religious exemption immunizing refusals to facilitate same-sex marriage is far too vague and capable of abuse to be a serious basis for legislation.[197] Any action that makes same-sex marriage easier could be considered facilitation beyond simply providing a venue, invitations, flowers, and a cake.[198] Business decisions affecting the availability of housing, employment, and job benefits to same-sex

192. *See supra* note 107 and accompanying text.

193. *See, e.g.*, Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 58–68 (N.M. 2013) (holding that a for-profit business's refusal to photograph a same-sex commitment ceremony violated the New Mexico Human Rights Act and enforcement of the Act did not violate the photographer's free exercise rights); Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 1–2 (Colo. Civ. Rts. Comm'n May 30, 2014) (upholding a determination by the Office of Administrative Courts that a bakery's refusal to sell a wedding cake to a same-sex couple violated the Colorado public accommodation statute and enforcement of the statute did not violate the owner's free exercise rights).

194. BECKET FUND FOR RELIGIOUS LIBERTY, SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (Jan. 2009), *available at* http://becketfund.org/wp-content/uploads/2011/04/same-sex-marriage-and-state-anti-discrimination-laws-with-appendices.pdf, *archived at* http://perma.cc/4UF7-VBW7.

195. *Id.*

196. *Id.* at 7.

197. *See* Michael Kent Curtis, Essay, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 194 (2012).

198. *See* WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS, *supra* note 26, at 228 (defining "facilitate" as "to make easy or easier").

couples could facilitate or deter them from marriage.[199] Should religious objections to same-sex marriage permit a landlord to refuse to rent an apartment to a same-sex couple? Should such objections allow an employer to threaten an employee with termination should he or she have a same-sex partner let alone marry them? The answer to these questions must be "yes" utilizing the Becket Fund's facilitation standard. Living arrangements and financial stability are after all important considerations for any couple contemplating marriage. Any action that makes these considerations easier for a same-sex couple thus facilitates a subsequent marriage.

A facilitation exemption is also very broad and could serve as a defense to other types of discrimination. It is unlikely that any such exemption would be limited to married same-sex couples. Assuming the basis for the exemption is objection to homosexuality rather than the institution of marriage, then the exemption should logically extend to unmarried members of the LGBT community.[200] If the purpose for the exemption is to recognize and protect sincere religious beliefs, then why should an exemption from antidiscrimination laws, including public accommodation statutes, be limited to homosexuals? If this is the true purpose, then an exemption should permit different treatment of any group, individual or conduct upon which there is a religious viewpoint.[201] This may include unmarried heterosexual couples who cohabitate, members of particular ethnic groups, adherents to other faiths, atheists, and women.[202] Such results appear

199. *See* Curtis, *supra* note 197, at 194.

200. *Id.* at 183, 194.

201. *Id.* at 194.

202. One might imagine a circumstance in which a secular for-profit business refuses to serve persons who have certain physical traits or clothing which leads the business's owner to perceive such persons as associated with a particular religion, ethnicity or country of origin to which owner has a faith-based objection. For example, a Christian or Jewish business owner could refuse service to a customer whose traits or clothing cause them to perceive that the individual is from a country that is hostile to Israel. A religious exemption would permit business owners to discriminate against persons of other faiths or no faith whatsoever. For example, the same business owner would be permitted to refuse service to a woman wearing a hijab based upon his perception that she is a Muslim or an individual wearing a T-shirt or button doubting the existence of a supreme being. Women could be subjected to many different forms of religion-based discrimination. Examples include a business that fires an unmarried woman who becomes pregnant, a woman who lives with a sexual partner outside of marriage, a woman who seeks employment or travels without the express permission or company of her husband or a male relative, and any woman who fails to conform to a business owner's perception of proper gender roles. The examples are virtually limitless given the myriad of religious beliefs and practices in the United States. No matter however as a sincere religious viewpoint regarding any person or circumstance would be all that is needed to trigger the exemption. Of course, many of these practices would be prohibited by federal law. *See, e.g.*, 42 U.S.C. §§ 2000a(a), 2000e-2(a)(1) (2012). However, an issue remains as to whether the Court's sole reference to race discrimination in *Hobby Lobby* may be interpreted as permitting religious beliefs

to be permissible from the Court's decision in *Hobby Lobby* which only prohibited race discrimination on religious grounds.[203]

The scope of any religious exemption ultimately may prove irrelevant. If an exemption protects sincerely held religious beliefs, then it becomes a potential excuse for widespread discrimination that serves to weaken public accommodation and antidiscrimination laws that protect not only the LGBT community but other historically oppressed groups.[204] If the scope is limited to the LGBT community, then it is clear that the underlying purpose is not the protection of religious belief but rather anti-gay animus.[205] Proponents of religious exemptions cannot have it both ways. Either exemptions are intended to apply to all religious beliefs, thereby permitting discrimination under any circumstance in which such beliefs are offended, or they are limited to homosexuality, thereby expressing an underlying purpose opposed to gay equality and liberty rather than for the purpose of securing religious freedom.

Assuming that the scope of any religious exemption is limited, moral condemnation is an insufficient basis upon which to deprive the LGBT community of its rights.[206] Religious exemptions in this context re-inject the irrelevant "morality determination" into decision-making in a manner antithetical to public accommodation statutes.[207] Public accommodation statutes by their nature are free from moral judgments. All persons are permitted to access and enjoy public accommodations regardless of their physical characteristics or beliefs. In permitting such access and enjoyment, these statutes separate the issue

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to serve as a basis for other types of discrimination. Courts and legislatures may very well be confronted with such claims in future cases. Such a result is an invitation to deeper sectarian conflicts and societal rifts and further judicial intervention into religious practices. *See* Roberts, *supra* note 13 (providing other examples of potential discrimination and concluding that religious exemptions give "individual and businesses the right to discriminate in the name of the Lord. Or Allah. Or Buddha or Ba'al or whatever supreme being they may worship").

203. *See* Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *87 (U.S. June 30, 2014) (stating that the Court's opinion did not provide a "shield" for racial discrimination on the basis of religion as "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

204. *See* Curtis, *supra* note 197, at 195–96.

205. *See id.* at 195.

206. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (concluding that "'if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest'" (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); *see also* Abodeely, *supra* note 140, at 601 ("[M]oral disapproval of a certain group is no excuse to deprive the group's members of their rights.").

207. Lin, *supra* note 127, at 721.

of discrimination from moral or social acceptance.[208] Citizens may not agree with one another's beliefs and practices, but most can agree that targeting individuals for different treatment in the context of public accommodations is indefensible.[209] Simply put, permitting non-discriminatory access to public accommodations is not the equivalent of moral or social acceptance. Permitting religious carve-outs injects individuals, businesses and governments into a polarizing and unnecessary debate by equating equal treatment with moral acceptance,[210] a debate that appears increasingly lost for those opposed to societal acceptance of homosexuality and the LGBT community.[211] Such equation undermines not only public accommodation statutes but other antidiscrimination laws which have enhanced equality and practical liberty.[212]

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208. *See id.* at 748 (discussing the role of anti-discrimination statutes on eliminating the morality debate).

209. *See* Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination? Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After* Tanner v. OHSU, 3 J. SMALL & EMERGING BUS. L. 269, 280–81 (1999) (comparing public attitudes about employment discrimination and social acceptance of the LGBT community).

210. *See* Lin, *supra* note 127, at 748; *see also* Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 NEB. L. REV. 723, 735–36 (1993) (contending that the gay rights movement gained greater societal acceptance by abandoning the morality debate in favor of equality and "victimage rhetoric"). *But see* Abodeely, *supra* note 140, at 601 (discussing the view of Christian advocacy groups that "any legislation benefitting LGBT people as a class stands in direct conflict with others' right to freely exercise their religion" and that "[s]ince these groups' interpretation of religious text informs them that homosexuality is immoral, they believe that, based on their religious beliefs, they should be able to refuse service, medical treatment, employment, and other accommodations to LGBT people"); Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 399 (1994) (questioning whether discrimination on the basis of sexual orientation should not be analogized to race discrimination as homosexuality is "morally controversial" and wrong); Rev. Austin Miles, *Hated for All the Right Reasons*, CHRISTIAN COALITION OF AMER. (Apr. 28, 2014), http://www.cc.org/blog/hated_all_right_reasons, *archived at* http://perma.cc/NA3M-J4PY (contending that the "homosexual lobby" has attacked and threatened "anyone they observe whose living standards put a spotlight on their own sins," that such critics are "evil for the sake of evil," and are "the last chance of the enemy to corrupt as many as he can for himself to take them with him to the pits of hell"); Kevin Theriot, *The Homosexual Agenda Marches Steadily Forward*, ALLIANCE DEFENSE FUND (Jan. 8, 2011), http://blog.speakupmovement.org/church/religious-freedom/the-homosexual-agenda-marches-steadily-forward/, *archived at* http://perma.cc/7K6E-GR7L (claiming that "a legal right to engage in homosexual behavior comes at the cost of religious freedom," that homosexuality has a "grave moral impact" on marriage, families and Christians' understanding as being the "bride of Christ" and that government leaders are imposing sexual immorality upon the country and "will lose the political will or power to merrily continue on this road to debauchery" only with intervention by the "Church of America").

211. *See supra* note 7 and accompanying text.

212. Curtis, *supra* note 197, at 180; *see also* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 667 (1999) (contending that "there is a presumption against differential treatment, and "[e]xemptions for religiously motivated conduct are, thus, presumptively questionable").

3. Exemptions and the Creation of a Two-Tier Society

A rollback of equality and liberty at this late date heralds a return to a two-tier society and places the government's imprimatur on discriminatory practices. Broad-based religious exemptions may be thought of as across-the-board simultaneous amendments of every statute in a state code that imposes some obligation to which an individual or association has a religious objection.[213] The state may have a compelling interest with respect to some of these statutes, and others may be the least restrictive alternative by which to achieve these interests. The state may nevertheless be required to defend each and every statute. The result in some cases may be to provide religious objectors "with a tool to bypass the effects of neutral, generally applicable laws on the basis of religious reasons that are unavailable to objectors with nonreligious reasons."[214] Exemptions granted under such circumstances "would not be available to those who object to homosexuality on nonreligious grounds."[215]

As a result, religious objectors would occupy a privileged position with respect to every state and local law or policy.[216] This preferential position in the marketplace impermissibly fails to "leave space for other[s] . . . who believe something different."[217] In the eloquent words of Justice Bosson in *Elane Photography,* this space is "part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people."[218] In Justice Bosson's words, this compromise "illuminates this country, setting it apart from the discord that afflicts much of the rest of the world."[219] Religious exemptions undermine this compromise, the respect that citizens owe one another whether or not they share the same beliefs, and invites discord and conflict.

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213. *See* Lund, *supra* note 17, at 493 (characterizing state religious freedom restoration acts as "simply amending every statute in a state's code simultaneously, specifying in each case that religious believers are exempt from the statute in question when it burdens their religious exercise without the necessary justification").

214. Lin, *supra* note 127, at 750; *see also* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 358 (1989).

215. Lin, *supra* note 127, at 750.

216. *See* Dolan, *supra* note 119, at 196 (criticizing the Illinois Religious Freedom Restoration Act as a violation of the Establishment Clause of the First Amendment to the U.S. Constitution and an unlawful preference under the Illinois Constitution).

217. Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring); *see also* Brownstein, *supra* note 133, at 63 ("All else being equal, individuals who hold religious beliefs . . . should not receive preferential treatment. We should all be equal under the law.").

218. *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring).

219. *Id.*

Exemptions also may grant secular advantages to religious objectors. The beneficiaries of exemptions could "escape burdens or receive benefits that have significant secular value."[220] In the case of public accommodation statutes, religious objectors may avoid providing goods and services to the LGBT community on faith-based grounds, something unavailable to nonreligious individuals who nevertheless object to homosexuality. Any cost savings associated with discriminatory practices are a benefit of having secular values.[221] Exemptions also may provide advantages to religious individuals and businesses in the marketplace of ideas.[222] Freedom from regulation may empower these individuals and businesses, facilitate communication of their message, and reduce their operational costs.[223] This provides an advantage over nonreligious individuals and businesses subject to regulation and operating without the benefit of an exemption.[224] This privileging may "distort the marketplace of ideas in favor of religious messages."[225]

Religious exemptions have the potential to cause harm to the LGBT community, a community that has been subjected to a historic pattern of widespread, pervasive and purposeful discrimination and unequal treatment at the federal and state levels.[226]

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220. Brownstein, *supra* note 133, at 71.

221. *See id.* (discussing how religious exemptions allow certain groups to "avoid an expense all other employers must bear").

222. *Id.* at 64.

223. *Id.*

224. *Id.; see also* Ellis West, *The Case Against A Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB POL'Y 591, 601 (1990) ("[E]xemptions to certain persons because of their religion . . . may give those religions . . . an unfair advantage over other religions, secular ideologies, churches, nonprofit organizations, or businesses with which they compete for members and money.").

225. Brownstein, *supra* note 133, at 64–65.

226. At the federal level, the LGBT community is protected by the Equal Protection Clause of the Fourteenth Amendment. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996). However, sexual orientation is excluded as a protected class by numerous federal antidiscrimination statutes. *See* 15 U.S.C. § 1691 (2014) (Equal Credit Opportunity Act); 42 U.S.C. §§ 2000a, 2000e-2(a) (2014) (enumerating protected classes under the Civil Rights Act of 1964); 42 U.S.C. §§ 3601, 3604 (2014) (Fair Housing Act); 42 U.S.C. § 12102 (2014) (defining protected individuals pursuant to the Americans with Disabilities Act). There is no federal prohibition upon discrimination in public accommodations on the basis of sexual orientation. At the state level, despite several recent and significant victories, same-sex relationships were not recognized in any form in twenty-eight states at the time of the preparation of this Article. *See In Your State—Marriage and Relationships*, LAMBDA LEGAL, http://www.lambdalegal.org/states-regions, *archived at* http://perma.cc/3JXK-DNWF (last visited Jan. 28, 2015) (click "marriage and relationships"; then click on each state for more information). Additionally, nineteen states did not extend private or public employment protection to the LGBT community at the time of the preparation of this Article. *See In Your State—Workplac*e, LAMBDA LEGAL, http://www.lambdalegal.org/states-regions, *archived at* http://perma.cc/3JXK-DNWF (last visited Jan. 28, 2015). There are no prohibitions upon discrimination in public accommodations on the basis of sexual orientation at the state level other than the previously discussed statutes. *See*

Antidiscrimination laws express government values of justice and equality, ensure that goods and services are freely available to all market participants, and protect individuals from humiliation and dignitary harm.[227] This dignitary harm is not restricted to impacted individuals. Discrimination also harms society by depriving it of "the benefits of wide participation in political, economic, and cultural life."[228] As noted by the U.S. Supreme Court in *Romer,* absent robust legal protections, discrete groups could be excluded from an "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[229] Creating a public accommodations carve-out for religious objectors on the basis of homosexuality thus will not only cause the LGBT community dignitary harm but will seriously hinder its ability to overcome "deep-rooted prejudice against [its] integration into society."[230] That this integration free from discrimination is in the best interests of members of the community and society at large cannot be seriously questioned.

Even assuming the absence of a societal interest in eliminating discrimination against the LGBT community, religious exemptions are difficult to justify if they cause "significant harm to specific individuals or the members of a discrete class."[231] Religious exemptions subordinate, and perhaps sacrifice, important interests of individuals and groups who do not adhere to the tenets of a particular faith so that others may freely practice their faith without interference.[232] These individuals and groups may be denied protections and benefits provided by general rules of law, on the sole basis of a purported conflict with the religious beliefs and practices of others.[233] Affected individuals and groups are forced to bear the entire cost of any exemption, while others to whom there is no religious objection enjoy the full benefits and protections of the law.[234] Religious beliefs and

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supra notes 24, 84–107 and accompanying text. Discrimination on the basis of sexual orientation also was not prohibited by the common law which adopted the view that businesses had "an absolute right to choose their customers and to exclude anyone from their businesses for any reason unless limited by a civil rights statute [or other law such as those applicable to innkeepers and common carriers]." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996).

227. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 64 (N.M. 2013); s*ee also* Daniel v. Paul, 395 U.S. 298, 307–08 (1969) (describing the purpose of Title II of the Civil Rights Act of 1964, in part, as "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public").

228. Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

229. 517 U.S. at 631.

230. Griego v. Oliver, 316 P.3d 865, 882 (N.M. 2013) (determining that same-sex couples had a fundamental right to marry under New Mexico law).

231. Brownstein, *supra* note 133, at 128.

232. *Id.*

233. *Id.*

234. *Id.*

practices are "unreasonably privileged" when they cause harm to and impose unequal burdens upon individuals and groups.[235]

Individuals and groups should not have to suffer such harm and bear such costs in the context of access to public accommodations. Individuals have a right to be free from discriminatory practices when they participate in the marketplace.[236] In addition, the public has an interest in ensuring that individuals are not excluded from access to the marketplace "solely on the basis of group membership or immutable individual characteristics."[237] This right and interest recognize that an individual choosing to go into business must surrender some freedom of action as his or her capacity to injure others increases as a result of entry into the marketplace.[238] This balance between individual rights, the public interest and the marketplace is not an outlier but rather is "in accord with current settled values."[239]

Discrimination interferes with this balance by depriving individuals of the opportunity to contract and acquire property on an equal basis.[240] A refusal to do business with another based upon his or her sexual orientation, no matter how religiously inspired, is an affront to individual rights and the public interest.[241] Although initially stated in the context of race discrimination in public accommodations, the same principle holds true with respect to sexual orientation, specifically, that equality under the law requires that "a dollar in the hands of [a member of the LGBT community] will purchase the same thing as a dollar in the hands of [a member of the heterosexual community]."[242]

4. The Alleged Corrective Role of the Marketplace

A religious exemption from public accommodation statutes as they relate to sexual orientation may be defended by application of

235. *Id.* at 66; s*ee also* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622 (2000) (contending that courts are less deferential to religious beliefs and practices when they "perceive third parties to be at risk of harm").

236. *See* Singer, *supra* note 226, at 1448.

237. *Id.*

238. *See* LESLIE A. CAROTHERS, THE PUBLIC ACCOMMODATIONS LAW OF 1964: ARGUMENTS, ISSUES AND ATTITUDES IN A LEGAL DEBATE 11 (1968) (stating that businesses are legitimately subject to regulation as they operate in the public realm and that "when a man chooses to go into business . . . he loses part of his freedom of action because his capacity to injure others has increased").

239. Singer, *supra* note 226, at 1448.

240. *Id.* at 1451.

241. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 86 (N.M. 2013) (Bosson, J., concurring) (concluding that the "refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple, the right granted them . . . to engage in the commercial marketplace free from discrimination").

242. Jones v. Mayer Co., 392 U.S. 409, 443 (1968).

market principles. Such a defense is based upon two distinct principles.[243] First, there is no need for regulation as the exclusion of customers is inconsistent with making money and maximizing profits.[244] Businesses will be forced to act reasonably due to market pressures and profit motives. Discrimination is also harmful to the community by making the particular state or location "a less attractive place for commercial enterprises to do business."[245] Discrimination against members of the LGBT community is particularly harmful and thus unlikely given its enormous buying power.[246]

The second principle is that public accommodation statutes increase the cost of doing business without a countervailing benefit.[247] This principle posits that public accommodation statutes invite baseless litigation.[248] After all, businesses will only exclude customers with good reason as to do otherwise would be inconsistent with making money and maintenance of a positive reputation in the community.[249] Thus, it is assumed that any decision to deny access to a potential customer must have been for good cause. Public accommodation statutes invite review of all decisions to exclude individuals or deny service.[250] Business owners should be free from such scrutiny as profit motives will ensure that they act in a reasonable manner.[251] From this perspective, public accommodation statutes accomplish nothing other than to "line the pockets of attorneys and subject businesses

243. *See* Singer, *supra* note 226, at 1447 (elaborating upon the corrective role of the marketplace in public accommodation discrimination and the source of the two principles discussed in the text).

244. *Id.; see also* Chapman, *supra* note 77, at 1820–21 (concluding that the market may reduce discrimination as "participants that are focused on the bottom line . . . may overlook their personal prejudices against employees, business owners, and consumers if they can assist in maximizing profits" and "firms that discriminate against employees or consumers based on race, religion, and sexual orientation . . . instead of characteristics that have to with job performance, ability to pay, or any other rational economic reason, will fare worse than other firms"); Muehlmeyer, *supra* note 66, at 809–11 ("One might argue that free markets already provide enough incentive against discrimination because establishments that discriminate against their customers lose business" and "market incentives already ameliorate the problem because few people would turn down making a quick buck selling some groceries to a gay person . . . . [as] few people would even know or care about the sexual orientation of their customers.").

245. Brief for New Mexico Small Businesses in Support as Amici Curiae Supporting Appellee Vanessa Willock at 15, Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33687).

246. *See* Press Release, Witeck Commc'ns, America's LGBT 2013 Buying Power Estimated at $830 Billion (Nov. 18, 2013) (on file with author). Witeck defines "buying power" as "the total after-tax income available to an individual to spend on personal consumption, personal interest payments or savings." *Id.* at 2.

247. Singer, *supra* note 226, at 1447.

248. *Id.*

249. *See id.*

250. *Id.*

251. *Id.*

to needless litigation to prove that they acted reasonably."[252] Such businesses will bear additional costs associated with settling claims, meritless or otherwise, when litigation expenses exceed settlement costs.[253]

This confidence in the market is misplaced. Competitive pressures and profit motives will not necessarily ensure equal and nondiscriminatory access to public accommodations.[254] Biases against the LGBT community may prevail as the community is relatively small and is still the subject matter of widespread prejudice in many parts of the country. The creation of a religious exemption merely provides potential discriminators with a cover for their biases. The market-based argument also ignores the fact that many for-profit corporations engage in actions that are inconsistent with profit maximization based upon the religious beliefs of management. Businesses that forego sales by refusing to open on Sundays, such as Hobby Lobby and Chick-fil-A, are just one example of actions inconsistent with profit maximization.[255] This very possibility was acknowledged in *Hobby Lobby* in which the Court held that "[w]hile it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[256]

The argument that the adoption of public accommodation statutes increases the cost of doing business by inviting frivolous litigation is also suspect. Public accommodation statutes may generate lawsuits against businesses perceived to have improperly refused access or service to a prospective customer. However, such claims would most likely be filed in the absence of such statutes as it is a generally accepted principle that businesses should not unreasonably refuse

252. *Id.*

253. Singer, *supra* note 226, at 1447.

254. *See id.* at 1448.

255. Estimates of lost sales due to Sunday closing are difficult to ascertain as Hobby Lobby and Chick-fil-A are privately held businesses. It has been estimated that the Sunday closing policy costs Hobby Lobby $100 million annually in lost sales. *See* Mary Vinnedge, *From the Corner Office: David Green of Hobby Lobby,* SUCCESS (Sept. 1, 2010), http://www.success.com/article/from-the-corner-office-david-green-of-hobby-lobby, *archived at* http://perma.cc/AD9Z-TN2R; Manny Lopez, *Marketplace: Hobby Lobby*, UT-SANDIEGO (Nov. 27, 2011), http://www.utsandiego.com/news/2011/Nov/27/marketplace-hobby-lobby, *archived at* http://perma.cc/WF48-KSTB. Chick-fil-A is estimated to forego $47.5 million in annual revenue and $190 million in net worth as a result of its Sunday closure policy. Tiffany Hsu, *Chick-fil-A Money Machine: Cathay Brothers Are Billionaires*, L.A. TIMES (July 31, 2012), http://articles.latimes.com/2012/jul/31/business/la-fi-mo-chickfila-cathay-billionaire-20120731, *archived at* http://perma.cc/UHQ9-AXLF.

256. Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *46 (U.S. June 30, 2014).

access or service.[257] There is no reason to believe that a rule allowing discrimination, under the guise of religion, against people possessing or perceived to possess a specific characteristic, would not be challenged as unreasonable, inconsistent with generally accepted principles of public access and equality, unfairly targeting an unpopular minority group, and capable of manipulation by some discriminators.[258] Litigation is a risk of doing business regardless of the state of the law. The broader question is whether the marketplace can and should be trusted to respect and entrusted with enforcement of such fundamental principles as equality and non-discrimination without government guidance and oversight.

An additional basis for not relying exclusively upon the marketplace to resolve the problem of sexual orientation discrimination in public accommodations is that such discrimination occurs more frequently in transactions involving cultural values and personal interaction than in so-called "quick buck transactions."[259] Public accommodations in the "cultural space" include healthcare, marital services, civic and community associations, health clubs, and educational facilities.[260] Cultural acceptance is perceived to be conferred by accommodating members of the LGBT community with respect to these services.[261] There is thus a greater likelihood of values conflicts and consequent resistance to accommodation under such circumstances.[262]

Resolution to such conflicts should not be relegated to the marketplace. If anything, such conflicts call for more robust public accommodation protections. One suggestion in this regard is to adopt a modern approach by expanding the definition of public accommodations beyond simple "quick buck" transactions.[263] A more modern

257. *See* Singer, *supra* note 226, at 1448.

258. *See id.*

259. *See* Muehlmeyer, *supra* note 66, at 809–11 (defining "quick buck transactions" as simple and routine consumer transactions that involve limited personal interaction, occur in a short period of time and do not implicate cultural values).

260. *See* N. Coast Women's Care Med. Grp. v. Sup. Ct., 189 P.3d 959 (Cal. 2008) (access to health care services); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212 (Cal. 2005) (family membership benefits); Monson v. Rochester Athletic Club, 759 N.W.2d 60 (Minn.App. 2009) (family membership benefits); Potter v. LaSalle Court Sports & Health Club, 384 N.W.2d 873 (Minn. 1986) (discrimination directed at gay member of health club); Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (photography services); *see also* Muehlmeyer, *supra* note 66, at 809–10; Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1626–27 (2001) (discussing public accommodations that fall within the "cultural space").

261. *See* Muehlmeyer, *supra* note 66, at 810.

262. *See id.*

263. *Id. But see* Laycock, *supra* note 171, at 198 (stating that conflicts between religious values, sexual orientation and public accommodations could be mitigated by merchants announcing their refusal to serve same-sex couples on their websites or signs posted outside of their premises). This proposal has been praised as putting the public

approach would expand public accommodations beyond the traditional understanding of inns, restaurants, and public carriers.[264] Such an expansion recognizes that individuals and businesses are expected to adhere to reasonable regulations and societal expectations when they elect to enter the commercial world.[265] This includes matters concerning religious values. The U.S. Supreme Court has recognized as much in holding that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[266] Such individuals relinquish autonomy on the issue of the identity of the individuals they serve.[267] Some state legislatures have recognized the need for an expanded definition of public accommodations and have acted accordingly.[268]

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on notice and holding those who have discriminatory views accountable. *See* Chapman, *supra* note 77, at 1815. However, the proposal ignores the fact that postings of the right to refuse service are prohibited in thirteen of the states that include sexual orientation in their public accommodation statutes. *See supra* note 98 and accompanying text. Additional obstacles include the unlikelihood that state legislatures would burden religious objectors through a posting requirement, the possibility of damage to the gay rights movement as a result of public displays of disapproval, and the proposal's failure to address dignitary harms to the LGBT community incurred as a result of knowing in advance that its members will be denied goods or services. *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 171, at 123, 153–56. A final practical difficulty is the wording of any notice or posting. *See* Curtis, *supra* note 197, at 198.

264. *See supra* notes 81, 90–91 and accompanying text.

265. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 284 (Douglas, J., concurring) (stating that "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain"); *see also* Brief of for ACLU Found. et al. as Amici Curiae Supporting Appellee-Respondent, at 10, Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33687) ("Once a business chooses to commodify words or expression into a service offered to the general public, it cannot use the First Amendment to hide from public accommodation laws that apply to the commercial marketplace."); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 (2006) ("Once individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules."); David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, COLUM. J. GENDER & L. 326, 363 (2012) (contending that public accommodation statutes do not force individuals to serve those persons to which they have moral objections but rather require such service when individuals voluntarily elect to engage in activities with a commercial purpose).

266. United States v. Lee, 455 U.S. 252, 261 (1982); *see also* Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *149–*50 (U.S. June 30, 2014) (Ginsburg, J., dissenting) (contending that the Court's holding in *Lee* extends beyond the taxes at issue in that case to other commercial activities).

267. *See* Bell v. Maryland, 378 U.S. 226, 314–15 (1964) (Goldberg, J., concurring) (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

268. *See supra* notes 90–91 and accompanying text.

However, there remains a lack of uniformity in definitions which should be addressed through expansion of accommodations to include those operating in what are perceived to be "cultural spaces."[269]

5. Justice and Equality Considerations

There have been many arguments advanced in favor of religious exemptions to laws in general and public accommodation statutes in particular. These arguments consist of two related strands. An initial contention is that religion occupies a privileged position in the United States.[270] As a result, the free exercise must be given broad latitude even if this latitude injures others or impedes the exercise of their rights.[271] The second contention is that governmentally imposed requirements or restrictions impermissibly burden free exercise.[272] This is particularly the case when such requirements or restrictions purportedly force individuals to undertake actions inconsistent with religious mandates, which are by their very nature absolute and incapable of being compromised.[273] Such is the case with respect to state laws protecting the LGBT community from discrimination and granting marriage rights regardless of religious objections to homosexuality.[274]

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269. *See supra* notes 90–93 and accompanying text.

270. *See, e.g.*, Brownstein, *supra* note 133, at 89–96 (stating that "[a]ll religious obligations implicate freedom of conscience" and that religion serves four important social purposes, specifically, providing "a source of values structurally divorced from government," fostering spiritual growth "isolated from material concerns . . . . and individual's routine emphasis on material self-interest," providing lives of participants with a "communal dimension" and preserving continuity of beliefs and practices through tradition); Durham, *supra* note 212, at 668 ("[R]eligious obligations are prior to other obligations of civil society.").

271. *See, e.g.*, Brownstein, *supra* note 133, at 80 ("Religion is privileged in the sense that protecting its exercise justifies sacrificing the interests of others.").

272. *See id.* ("Avoiding the privileging of religion (by prohibiting the harm causing conduct or requiring the payment of damages) effectively prevents the religious individual from exercising his faith."); *see also* Durham, *supra* note 212, at 669 ("[E]xemptions from ordinary civil legislation do not constitute privileging of religion; they constitute respect for and protection of the fundamental promise society makes to induce religious communities to join the social compact in the first place."); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 231–33 (1993) (claiming that only laws addressing "the gravest abuses," "paramount interests" of the "highest order," or "essential to national survival or to express constitutional norms" should survive judicial scrutiny in the event of a conflict with religious liberty).

273. *See, e.g.*, Brownstein, *supra* note 133, at 134 ("When free exercise rights are at issue . . . constitutional compromises seem less likely or even possible . . . . [as] religious mandates are absolute. Nothing short of literal obedience is acceptable.").

274. *See* Rena M. Lindevaldsen, *The Fallacy of Neutrality from Beginning to End: The Battle Between Religious Liberties and Rights Based on Homosexual Conduct*, 4 LIBERTY U. L. REV. 425, 461 (2010) ("Once the nation realizes that there will be a winner and a loser, then the only question is whether religious liberties . . . should be suppressed to

It bears to note however, whether admitted or not, that religious freedom cases are determined by balancing competing interests in order to reach a just result.[275] There are no blanket exemptions for religious practices regardless of whether one concedes religion's privileged position in the United States.[276] Governmental requirements or restrictions burdening free exercise are constitutional as long as the governmental interest is compelling and the requirement or restriction is the least restrictive means.[277] It is an imperfect method by which to weigh individual and societal interests against one another, but it has proven durable and workable.[278]

In the public accommodation arena, the balance must be struck in favor of justice and equality. Discrimination in public accommodations on the basis of sexual orientation is contrary to "the cherished American ideals of justice and equality under the law."[279] In many regards, it is analogous to racial and gender discrimination. As in race and gender, sexual orientation is based upon unalterable biological and genetic factors.[280] In a manner similar to racial minorities and women, the LGBT community has endured a long history of persecution and discrimination. This persecution included criminality

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promote legal recognition of same-sex relationships. For the Christian, the answer must be 'no'."); *see also* Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1378–88 (2007) (arguing that there is a clash between religious liberty and extending rights to the LGBT community and that religious liberty should prevail).

275. *See* Durham, *supra* note 212, at 677.

276. *See id* at 676–77 (cautioning against excessive religious freedom claims because if such claims "sweep too broadly, it is virtually impossible to avoid situations where most reasonable people would agree that secular concerns trump arguably religious claims" and that there are "many situations where it is reasonable to expect religious groups to respect and be willing to accommodate the needs of surrounding society"). Professor Brownstein summarized the need for acceptance of some limitations upon free exercise as follows:

> Broadly defined rights cannot always receive rigorous protection because doing so would unreasonably interfere with the government's ability to further the public good. No democratic society will surrender its power to pursue interests that conflict with rights so completely and irrevocably. Insistence on a rigid commitment to rigorous review risks an obvious response: the scope of the right will be limited to only those situations in which it does not conflict with any interests the society values or cares about.

Brownstein, *supra* note 133, at 82.

277. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *77 (U.S. June 30, 2014); City of Boerne v. Flores, 521 U.S. 507 (1997).

278. *See* Durham, *supra* note 212, at 677 (accepting the balancing aspect of any case involving a perceived clash between free exercise rights and governmental interests but also noting that "the balancing occurs on scales that are at best metaphorical and that lack any metric for quantifying what is being measured on a common scale").

279. Abodeely, *supra* note 140, at 600.

280. *See* Curtis, *supra* note 197, at 184 (summarizing research concluding that the evidence of biological and genetic factors in determining sexual orientation is "suggestive" of such links).

of homosexual conduct and violence while discrimination has manifested itself in employment, housing, access to health care, family issues (such as marriage and adoption) and public accommodations.[281] This persecution and discrimination often had (and still does have) its roots in religious belief as did race and gender discrimination.[282] This pattern of mistreatment also resulted in many of the same harms suffered by victims of race and gender discrimination including economic harm and harm to the human spirit.[283]

Race, gender and sexual orientation should be treated identically in the context of discrimination.[284] If a specific religious exemption should not be granted on the basis of race or gender, it should not be granted on the basis of sexual orientation. In the area of public accommodations, discriminators on religious grounds or otherwise should not be permitted to deny goods and services to members of the LGBT community if they are prohibited from making such distinctions on the basis of race and gender.[285]

Public accommodation statutes serve three interests: the protection of human dignity by prohibiting the degradation associated with discrimination, guaranteeing access to public establishments by imposing upon them a duty not to discriminate with respect to identified protected classes, and defining citizenship "based on the idea

281. *Id.* at 185 (discussing the history of criminality and punishment for homosexual behavior, the prevalence of hate crimes motivated by sexual orientation in the United States and employment discrimination directed at members of the LGBT community).

282. *Id.* at 187–92 (describing the history of religious arguments in support of slavery, racial discrimination and segregation and in opposition to women's rights and concluding that "[p]ast advocates of racial and gender discrimination and subordination are entitled to the same presumption of sincerity as current opponents of gay equality. Many believed the religious argument against integration and interracial marriage, just as many people believe the religious arguments against gay equality and liberty").

283. *Id.* at 186.

284. *Id.* at 177.

285. Professor Curtis admits that the analogy between race, gender and sexual orientation is not perfect. For example, race and gender are readily identifiable physical characteristics whereas sexual orientation is not. As a result, unlike racial minorities and women, members of the LGBT community could avoid discrimination by remaining closeted. Professor Curtis contends however that members of the LGBT community lived (and often continue to live) with a different fear, specifically, the fear of discovery and resultant persecution and discrimination. This fear was unique to the LGBT community and resulted in hiding one's identity and self-silencing. According to Professor Curtis, the identification issue does not defeat the analogy. *Id.* at 186–87. An additional distinction between discrimination based on status (such as being a member of a racial minority) and discrimination based on conduct (as in the case of homosexuality) also does not defeat the analogy. Professor Curtis contends that race discrimination was not based exclusively on skin color but also had conduct-based aspects such as race mixing in segregated facilities and interracial sexual conduct. Consequently, race discrimination may be based as much on an objection to the conduct of racial intermingling as discrimination against the LGBT community on the basis of the sexual conduct of its members. Curtis, *supra* note 197, at 192–94.

that markets seek consumers and thereby bring individuals into central social dynamics that are a part of citizenship."[286] The government has a compelling interest in the advancement of these interests.[287] A religious exemption from public accommodation statutes on the basis of sexual orientation sends a message contrary to these interests.[288] These interests will only be advanced by "broad and uniform application" of public accommodation statutes to all commercial enterprises without exception or exemptions.[289]

Such a result does not denigrate religion but only recognizes that, in the public accommodation sphere, the government's interests outweigh those of secular for-profit enterprises seeking to discriminate against members of the LGBT community on the basis of religious belief. In this limited context, there is no persuasive justification for respecting religious convictions more than secular beliefs.[290] To inject religion into this sphere is to invite arbitrary, unpredictable, and discriminatory results.[291] Equal and non-discriminatory access to public accommodations is at least the equivalent of free exercise of religion, both are human rights to which all are entitled to partake and enjoy. Religion can undoubtedly be freely exercised without engaging in discriminatory practices in the commercial marketplace. If such is not the case, that is, if religious liberty cannot be fully exercised unless believers retain the right to discriminate in public accommodations as they see fit, then the calculus

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286. Muehlmeyer, *supra* note 66, at 785; s*ee also* Hunter, *supra* note 260, at 1634 (contending that citizenship "is not purely a creature of the state . . . . [i]mplicitly, the law has recognized that markets have a role in constituting citizenship. . . . [P]ublic accommodation laws constitute one example of that acknowledgement. Markets seek consumers and thereby bring previously excluded individuals into central social dynamics"); Lauren J. Rosenblum, *Equal Access of Free Speech: The Constitutionality of Public Accommodation Laws*, 72 N.Y.U. L. REV. 1243, 1243 (1997) (describing the underlying purpose of public accommodation statutes as "ensur[ing] that all members of society have equal access to goods and services").

287. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 626, 628 (1984) (stating that public accommodation laws reflect "the importance, both to the individual and to society, of removing barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups" and further noting that these interests are compelling).

288. As noted by Professor Curtis, "[t]he message sent by allowing religious exemptions is that discrimination is wrong and illegal except when it is right and legal." Curtis, *supra* note 197, at 202–03.

289. Brief for New Mexico Small Businesses as Amici Curiae Supporting Appellee Vanessa Willock, *supra* note 245, at 2.

290. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. CHI. L. REV. 1245, 1248 (1994); *see also* West, *supra* note 224, at 613–23 (contending that religious exemptions lack legal justification as there is nothing distinctive about religion that justifies granting its privileged status over other rights).

291. *See* West, *supra* note 224, at 604–08.

clearly favors non-discrimination over what purports to be free exercise. In such a zero-sum game, "religious liberty should not trump human rights."[292] If indeed there is such a conflict, "it is essential that we not privilege moral beliefs that are religiously based over other sincerely held, core moral beliefs."[293] This country's ongoing commitment to furthering the causes of fundamental fairness and equal protection under the law and forging a cohesive national identity from the many requires nothing less.

CONCLUSION

Clashes between the free exercise of religion and expanded protections for the LGBT community are likely to continue and perhaps intensify in the future. This is unsurprising given increasing acceptance of the LGBT community and growing support for its equal treatment under law, acceptance and support that has expanded rapidly in the eleven years since the U.S. Supreme Court's opinion in *Lawrence v. Texas*.[294] Undoubtedly sensing this rapidly changing tide, some opponents of further expansion of gay rights have reframed their opposition to avoid the perception of victimization of the LGBT community associated with advocating for restrictions upon the granting of further rights and consequent continuation of second-class status. Instead, this reframing focuses on the claim that the granting of rights to the LGBT community infringes upon religious liberty.[295]

The reframing of this opposition raises many difficult and controversial issues. At least one of these issues, specifically, whether for-profit businesses may exercise religion, was resolved by the decision in *Hobby Lobby*.[296] Other thorny issues remain for future resolution. These issues include what acts constitute the free exercise of religion by businesses and the reach of *Hobby Lobby* to other areas such as employment and to other historically disadvantaged classes.

In the area of public accommodations, any purported conflict between religious liberty asserted by secular for-profit businesses and access to goods and services must be resolved in favor of the government's compelling interest in guaranteeing full and non-discriminatory access for all persons. Such a result is likely to be

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292. Chapman, *supra* note 77, at 1792.

293. Feldblum, *supra* note 265, at 123.

294. 539 U.S. 558, 564, 574 (2003) (holding that homosexuals have a protected liberty interest to engage in private consensual sexual activity and that such conduct is protected by substantive due process under the Fourteenth Amendment to the U.S. Constitution); *see also supra* note 7 and accompanying text.

295. *See supra* note 8 and accompanying text.

296. *See* Burwell v. Hobby Lobby Stores, Inc., No. 13-354, 2014 U.S. LEXIS 4505, at *39–*51 (U.S. June 30, 2014).

controversial and continue the ongoing conflict between LGBT rights and the free exercise of religion. But public accommodation statutes cannot be expected to "eliminate disagreement or craft perfect solutions [but can only be expected to] set fair terms for the market."[297] An outcome that recognizes the rights of everyone to full and equal participation in the marketplace for goods and services free from the harmful effects of invidious discrimination based upon innate physical characteristics or public perceptions thereof is such a fair term.

297. Answer Brief of Appellee-Respondent, *supra* note 1, at 39.