RELIGIOUS FREEDOM AND LGBT RIGHTS: 
TRADING ZERO SUM APPROACHES
FOR CAREFUL DISTINCTIONS AND GENUINE PLURALISM

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TABLE OF CONTENTS

I. INTRODUCTION .............................................................................................................................................. 1

II. BACKGROUND .................................................................................................................................................. 8
  A. Religious Freedom in Recent History ........................................................................................................... 8
  B. An Effective LGBT Rights Agenda .................................................................................................................. 10

III. KEY CONSIDERATIONS ................................................................................................................................. 14
  A. Not All Discrimination Is Equal .................................................................................................................... 14
  B. The Consequences of Definitions ................................................................................................................. 15
  C. Discreteness, Immutability, and Protected Classes ...................................................................................... 18
  D. A Surprising Take-Away from Lawrence v. Texas ...................................................................................... 20
  E. Finding Better Analogies ................................................................................................................................. 22

IV. CONCLUSION .................................................................................................................................................... 26

I. INTRODUCTION

Sexuality is an integral dimension of human life, and although few people
dispute its profound significance, deep disagreements exist regarding its proper
context and limits, which are themselves rooted in contrasting, deeply-held
beliefs and first principles. On a matter so deeply embedded in the mystery
of human life, what role should government law and policy play? How can policy
decisions do justice to the diversity of views and identities surrounding human
sexuality? In part, the answer arises from government recognizing the limits of
its competence and jurisdiction in this area, but the answer also lies in rightly
deciding whether and how to adjudicate disputes when exercises of religious
freedom result in discrimination against persons who may identify as lesbian,
gay, bisexual, or transgender.
In the United States, the exercise of religious freedom without undue burden from the state is a civil right protected by the Constitution. Due Process and Equal Protection before the law are also civil rights. At the ground level, “[a] civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury.” From a broader perspective, a civil right is a right or privilege deemed by the polity (via the Constitution) as essentially beyond political deliberation and, therefore, not subject to majoritarian views and legislative action. Closely related to defining a civil right is achieving clarity on what constitutes a violation of a civil right:

Discrimination occurs when the civil rights of an individual are denied or interfered with because of [his or her] membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person’s race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation.

Once a dispute or question is successfully couched within the civil rights framework, the dynamics change and the stakes become much higher. This

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1. U.S. Const. amend. I.
4. See id.
5. Id.
6. The political and legal questions on whether to apply traditional marriage laws to same-sex unions are good examples. See Where State Laws Stand, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/where-state-laws-stand (last updated Nov. 7, 2014) (As of Nov. 7, 2014, eighteen states have laws, statutes, and/or constitutional amendments that prohibit recognizing same-sex unions as marriages). Beyond the practical, legal implications of the civil rights framework, the rhetoric used also serves as evidence of the
point alone should dispose citizens of a constitutional democracy to rely on this framework only in very limited circumstances. However, and somewhat understandably, the potency of having success within this framework introduces strong incentives to use it. Here, the issue at hand is the question of how to resolve disputes where two civil rights appear to be in conflict. It is imperative first to determine whether the opposing claims are predicated on genuine violations of either side’s civil rights. Once that determination is made, legitimate civil rights claims can be vindicated based on the facts and merits of the case under review.

This article focuses on the overlap and frequent conflict between religious free exercise and equal protection in cases involving persons who identify as lesbian, gay, bisexual, and/or transgender (LGBT). Before proceeding, one qualification must be made on the last term in this oft-quoted acronym—transgender. The “LGBT” acronym will be used throughout the article; however, it should be noted that transgender identity does not necessarily always fit within such acronym, nor will it always fit within the observation, scenario, and/or argument being made here. While sexual orientation and gender identity are related, these characteristics are quite different at the conceptual and practical levels. In terms of similarities, both sexual orientation and gender identity can obscure the significance of male-female difference required for human flourishing, and the fact that part of that difference is rooted in the reality of our bodies as distinctly male or female. But they do so in different ways. Also significant is that both sexual orientation and gender

heightened stakes of this framework—casting proponents of traditional marriage as bigoted toward lesbian and gay persons for holding that view is widespread. Maureen Dowd, *Why Is He Bi? (Sigh)*, N.Y. Times, June 26, 2011, at SR5, available at http://www.nytimes.com/2011/06/26/opinion/sunday/26dowd.html. Their opposition to changing the definition of marriage is often not construed as principled disagreement on a matter of public policy but rather as a matter of remaining obstinately opposed to the “civil rights issue of our time.” Id. To offer a slightly different sort of example, The Human Rights Campaign, one of the leading national LGBT equal rights organizations in the United States, sells t-shirts and other apparel on its website with the slogan, “Love Conquers Hate.” Human Rights Campaign, T-Shirt Catalog, HUMAN RIGHTS CAMPAIGN, http://shop.hrc.org/clothing/tees.html (last visited Nov. 11, 2014). The implication of this slogan is problematic. Is it true that every instance of opposition to the LGBT equal rights agenda is animated by hatred and that conquering that hatred is a key ingredient for the movement’s success? The civil rights framework can produce this kind of morally charged language because to be on the wrong side of a debate successfully couched in this framework is to be comprehensively wrong—as distinct from coming to a different political or legal conclusion based on principled disagreement.

7. LGBT individuals, advocates, and many in the mental health community reject making a normative distinction between male-female and same-sex sexual relations and the
identity, as typically understood, involve an element of human agency and behavior, which alone puts these characteristics on the same side of a bright dividing line opposite other traits like race, national origin, and sex. Nevertheless, this article references LGBT as a single category, even if it is not a fully coherent one, because of this shared denial of the import of sexual difference but also because a wide array of LGBT advocates do so; therefore, to enter into the dialogue, this a necessary linguistic point of departure.

Examples of the conflict between religious freedom and LGBT rights are numerous; however, the main focus of this article is the issue of private businesses that wish to refuse certain services to LGBT individuals based on religious convictions. Many of the principles highlighted certainly apply more broadly, yet a one-size-fits-all approach to the current friction between religious freedom and LGBT nondiscrimination claims is exceedingly problematic. This is due in large part to the diversity of cases spanning an assortment of institutions (e.g., businesses, non-profit social service organizations, professional and civic organizations, schools, marriage and family, and government entities) and a variety of actions (e.g., refusing goods or services, hiring or firing employees, appointing and setting criteria for

proposition that human flourishing is somehow linked in any meaningful way to bodily complementarity in the realm of human sexuality. Same-sex and opposite sex intimate relations are deemed qualitatively indistinguishable. E.g., AM. PSYCHOLOGICAL ASS’N, LESBIAN, GAY, BISEXUAL & TRANSGENDER CONCERNS: APPROPRIATE AFFIRMATIVE RESPONSES TO SEXUAL ORIENTATION DISTRESS AND CHANGE EFFORTS (2011) available at http://www.apa.org/about/policy/booklet.pdf (“[S]ame-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality regardless of sexual orientation identity.”). For transgender, and other variants of gender-nonconforming persons, the rejection of the significance of our bodies as female or male is unrelated to the way human persons join sexually but rather unfolds in a single person who views her gender as dissonant with her biological sex and may want to present herself accordingly in select social settings or exclusively. From this perspective, there is no qualitative distinction between the decision to embrace and live out a gender identity consistent with one’s biological sex and the decision to embrace and live out a gender identity other than one’s biological sex, even if that entails altering one’s physical body in profound ways. Id. (“APA recognizes the efficacy, benefit and necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments”).

leadership, establishing employee codes of conduct and other internal rules, setting adoption placement guidelines, and defining marriage and family). Here, both the nature of the institution engaged in alleged discrimination and the nature of the alleged discrimination deeply impact whether and how a given case may involve legal harm to the LGBT individual(s) involved. All of these examples are timely; questions surrounding private businesses refusing services to persons who identify as LGBT are especially pertinent in the current political and legal climate.

To be fair, it is easy to see why LGBT advocates “invoke the civil-rights movement of the 1950s and early 1960s, and not just because it’s a handy way to take the moral high ground. Doing so puts a large body of legal sanctions, an expansive bureaucratic power, and a well-established tradition of social censure behind the goals” of the LGBT rights movement. There are many indications that use of the civil rights framework to advance LGBT interests will persist and even increase. A key concern for religious liberty emerges in this context because nondiscrimination laws are intended to leave no room for

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9. See, e.g., Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971 (2010) (Schools and private organizations); see also, Jay Lindsey, Schools work to balance gay, religious rights, BOSTON.COM (Feb. 22, 2012), http://www.boston.com/news/education/k_12/articles/2012/02/22/schools_work_to_balance_gay_religious_rights/ (describing the consequences of U.S. Supreme Court ruling allowing schools to withdraw support from discriminatory groups or groups with discriminatory practices or policies).

10. For example, a CNN article released the day Arizona Governor Jan Brewer vetoed SB1062 claimed that the bill would change the definition of “person” by, among other things, including “business organization” in the definition, hence allowing businesses to make religious freedom claims. The bill was widely touted as “anti-gay” because of the way it was perceived to allow businesses to assert religious beliefs as the basis to deny services to LGBT customers. Catherine E. Shoichet & Halimah Abdullah, Arizona Gov. Jan Brewer vetoes controversial anti-gay bill, SB 1062 (Feb. 26, 2014, 11:13PM), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/; see also Letter from Douglas Laycock, Professor, Univ. of Va. Sch. of Law, et al., to Janice K. Brewer, Governor of Ariz. (Feb. 25, 2014) available at http://www.azpolicy.org/media-uploads/pdfs/Letter_to_Gov_Brewer_re_Arizona_RFRA.pdf (A letter written from eleven law professors to Governor Brewer encouraging her to take a more measured assessment of the bill’s content.).


12. For example, the Human Rights Campaign recently called on “the LGBT movement to throw its weight behind a fully comprehensive LGBT civil rights bill. A bill that, at long last, would bar discrimination on the basis of sexual orientation and gender identity in all core civil rights categories—including housing, public accommodations, credit, education and, if ENDA fails to pass, in employment.” Chad Griffin, Why HRC Supports a Comprehensive LGBT Civil Rights Bill, HRC BLOG (July 9, 2014), http://www.hrc.org/blog/entry/why-hrc-supports-a-comprehensive-lgbt-civil-rights-bill.
differences of opinion—uniformity is normative here. If the starting assumption regarding every act of discrimination involving an LGBT individual is that this act is no different than discriminating on the basis of race, then no other argument will be viable and, if true, should not be viable. Whether these arguments involve well-articulated commitments to religious free exercise, associational and institutional rights, or some combination thereof, they will fall on deaf ears. Thus, the first priority for furthering this discussion must be to carefully explore the legitimacy of applying the racial discrimination analogy to various aspects of the LGBT rights movement. Even a proper commitment to principled pluralism bows before the uniformly condemneratory response demanded by racial discrimination. As it turns out, we must find better analogies.

13. See, e.g., Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014) (amending Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 8, 1969) and Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965)), available at http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employment. This Executive Order did not include a religious organization exemption, as requested by many religious leaders. See Letter to the White House organized by the Institutional Religious Freedom Alliance (June 25, 2014), available at http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf. By contrast, the Senate’s Employment Nondiscrimination Act (ENDA) did include a fairly strong exemption for religious organizations, and it was passed only months before. In the wake of the Burwell v. Hobby Lobby decision, many LGBT advocates withdrew their support for ENDA, largely due to the exemption for religious organizations in the bill. See also Ed O’Keefe, Gay rights groups withdraw support of ENDA after Hobby Lobby decision, WASH. POST (July 8, 2014, 4:37PM), http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision. This increasing rigidity on part of LGBT advocates is only intelligible if the LGBT rights movement is viewed as in full (or at least substantial) continuity with the classical civil rights movement that materialized in the mid-20th century in response to pervasive racial discrimination. Nondiscrimination laws are not immune to constitutional challenges, but without exemptions and/or accommodations built into them, they are generally intended to do more than exact legal penalties on violators; they also have the effect of stigmatizing the prohibited discrimination. Discrimination is understandably viewed as more than a mere technical violation of positive law—it is also viewed as a moral failure. Debates over exemptions and accommodations to nondiscrimination laws are so heated because they are often perceived as granting permission to do a moral wrong.

This article asserts that the racial discrimination analogy is improper for some cases of LGBT discrimination. Racial discrimination can only be construed as an irrational rejection of persons based on a discrete and immutable attribute.\textsuperscript{15} Sexual orientation and gender identity, by contrast, are not discrete and immutable attributes and are often defined as having a behavioral element.\textsuperscript{16} There are cases in which so-called discrimination against LGBT individuals is an expression of an organization’s beliefs about human sexual behavior, sexual difference, and/or the nature of associated sexual relationships. Government should not attempt to serve as a sexual-values referee among individuals and organizations, mainly because it is not competent to decide between competing views on these matters. This is not to say that the presence of religious conviction that translates into a particular understanding of human sexuality is enough to protect an organization from legal liability in cases of LGBT discrimination. The act of the discrimination itself must also be directly and identifiably linked to the view the individual or organization seeks to convey. This direct, identifiable link is indispensable in distinguishing invidious discrimination from lawful discrimination in cases involving LGBT persons.

A few more caveats are necessary to properly qualify this article’s argument before going any further. First, as the principal question here navigates the friction between religious free exercise rights and equal protection rights, this article will focus on acts of opposition to LGBT lifestyles that are based on religious beliefs. This, of course, does not to imply that religiously grounded motives constitute the only premises for deeply held moral convictions. Second, as this article assumes the presence of religious belief, integral to the underlying argument will be the First Amendment and its elaboration in the Religious Freedom Restoration Act.\textsuperscript{17} Lastly, though important and worthy of reflection, questions on the morality of same-sex sexual behavior, the equality of same-sex unions \textit{vis-a-vis} male-female marriages, and the validity of transgender identity are not implicated in this argument, except in the sense that the argument assumes these are the types of

\textsuperscript{15} Adam J. MacLeod, \textit{What’s at Stake at the Bakery: How Property Rights Got Sexy}, THE PUBLIC DISCOURSE (Mar. 4, 2014), http://www.thepublicdiscourse.com/2014/03/12391/ (“Exclusion on the basis of race is always unreasonable . . . “). See Brief for Dr. Paul McHugh as Amicus Curiae Supporting Petitioner Hollingsworth, 133 S. Ct. 2652 (2013) (No. 12-144), and Respondent Bipartisan Legal Advocacy Group, 570 U.S. 12 (2013) (No. 12-307) at 2 (“In contrast with race and sex, which are well-defined and understood, and despite popular beliefs to the contrary, sexual orientation remains a contested and indeterminate classification.”).

\textsuperscript{16} See McHugh, supra note 15, at 9; AM. PSYCHOLOGICAL ASS’N, supra note 7.

\textsuperscript{17} 42 U.S.C. ch. 21b (1994).
matters on which the legal and regulatory regime in the U.S. should tolerate a plurality of views.

II. BACKGROUND

A. Religious Freedom in Recent History

Religious freedom in the U.S. is clearly established by the First Amendment of the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”\(^{18}\) However, interpretations of the “establishment” and “free exercise” clauses have long been contested in courts, legislatures, academia, and the popular imagination. Congress passed the Religious Freedom Restoration Act (RFRA)\(^ {19}\) in 1993 largely in response to the Supreme Court decision, Employment Division, Department of Human Resources of Oregon v. Smith, in 1990.\(^ {20}\) In that case, the Court stated:

We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself . . . [Supreme Court decisions since Reynolds v. United States (1879)] have consistently held that the right of free exercise does not relieve an individual of the obligation to comply 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).\(^ {21}\)

However, in RFRA, “Congress enacted legislatively what had, until Smith, been understood by many to be the applicable constitutional standard – a law could not be enforced so as to prohibit religious conduct unless justified by a compelling state interest that cannot be satisfied by more narrowly tailored means.”\(^ {22}\) It is important to note the strong language found in RFRA:

\(^{18}\) U.S. CONST. amend. I.
\(^{19}\) 42 U.S.C. ch. 21b.
\(^{21}\) Id. at 878-79 (1990) (citation omitted).
Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”

The strict scrutiny test, the most rigorous form of judicial review, was written into the statute to protect the exercise of religion free from government encroachment. It is a mistake to presume that a case involving a conflict between a religious free exercise claim and a claim related to a statutory or regulatory right or protection, even if an anti-discrimination law is implicated, should, by default, be resolved against the religious free exercise claim.

Critics widely viewed Smith as an upset to previously established precedent on religious freedom in “saying that the government may constitutionally regulate religiously motivated conduct subject to the same reasonableness standard applied to regulation of other conduct—so long as it does so through ‘neutral law[s] of general applicability.’” Though RFRA aimed to “restore” what many understood as the previous constitutional standard for safeguarding religious freedom, the Supreme Court held that the ruling had gone too far. Consequently, the Court limited the application of RFRA to the federal government, holding that Congress had exceeded its authority under section 5


24. For a recent case involving these factors with the added element of the religious free exercise claim being made by a business, see Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

25. Congress’s stated findings and purposes in RFRA indicate how widespread this interpretation of Smith was. See 42 U.S.C. § 2000bb. Congress found that, “in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . .” Id. at § 2000bb(a)(4). Congress also declared that one of its purposes for passing RFRA was, “to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .” Id. at § 2000bb(b)(1).

26. Foltin, supra note 22.


of the Equal Protection Clause of the Fourteenth Amendment by imposing the compelling interest test on action by the states.  

Numerous targeted and more narrowly tailored versions of RFRA have been attempted since; some successful, but most failing. 

The collapse of a consensus in support of a broad standard protecting religious free exercise between the pendency of RFRA and [the Religious Liberty Protection Act] was the first sign of a paradigm shift, in some quarters at least – as an increasing number of civil rights groups began to articulate the view that so broad a standard, while intended to safeguard the core constitutional principle of religious liberty, could undermine another fundamental constitutional concern, that of ensuring equal protection under the law. (emphasis added)

In the intervening years since the late 1990s, numerous states have instituted their own RFRA laws; however, views are mixed on whether these laws permit the use of RFRA as a defense against an alleged civil rights violation. Texas’s RFRA, for example, “bars the use of that law as a defense to civil rights claims, except with respect to the performance of certain duties of a religious organization.”

B. An Effective LGBT Rights Agenda

Against this backdrop, LGBT advocates began to advance their own agenda more actively. Subsequent progress for the LGBT rights movement,
even if only considering the last five years, has swept through American law and culture at an almost dizzying pace. What follows are just a few instances which demonstrate how these developments span many sectors of society — marriage and family, business practices, governance of student and civic associations, military personnel rules, and K-12 education:

1. June 28, 2010: the U.S. Supreme Court ruled that a chapter of Christian Legal Society could be denied official recognition and related privileges at a public university for requiring voting members and leaders to sign a statement of faith affirming proper sexual expression is exclusive to male-female marriage.

2. December 22, 2010: President Obama signed into law the “Don’t Ask Don’t Tell Repeal Act of 2010,” initiating the process to change Defense Department policy that previously forbid service members from openly acknowledging their same-sex attraction and/or relationships.

3. June 26, 2013: the U.S. Supreme Court overturned the provision in the federal government’s “Defense of Marriage Act” that defined marriage, for federal purposes, as the union of one man and one woman. Thirty-two states, a sizable minority, now apply state marriage laws to same-sex what it was in 1994, the year after RFRA became law. See Annual Reports, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/the-hrc-story/annual-reports (last visited Nov. 11, 2014).


unions, and federal judges have ruled that same-sex marriage bans in Texas, Virginia, Kentucky, Oklahoma, and Utah violate the U.S. Constitution. More recently, a federal judge in Cincinnati declared Ohio must recognize same-sex marriages legally performed in other states. Numerous courts in various states have since struck down same-sex marriage bans.

4. November 7, 2013: the U.S. Senate passed the Employment Nondiscrimination Act (ENDA) adding protections for persons who identify as LGBT from employment discrimination. Many states have enacted similar employment protections.

5. July 21, 2014: the Obama Administration issued an Executive Order prohibiting organizations that contract with the federal government from engaging in hiring discrimination and other forms of discrimination based upon sexual orientation and gender identity.

6. Administrative, judicial, and legislative actions in Massachusetts, Maine, Colorado, and California have greatly expanded recognition and privileges for students who identify as transgender.

43. Where State Laws Stand, supra note 6.
46. See S. 815, 113th Cong. § 4 (2013) (“[ENDA] [p]rohibits covered entities (employers, employment agencies, labor organizations, or joint labor-management committees) from engaging in employment discrimination on the basis of an individual’s actual or perceived sexual orientation or gender identity.”).
47. See Nondiscrimination Laws: State by State Information – Map, ACLU, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited April, 2014) (Twenty states have employment discrimination protection statutes related to sexual orientation and all but four of those states also include gender identity in their statutes).
49. See MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUC., GUIDANCE FOR MASS. PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT, available at http://www.doe.mass.edu/ssce/GenderIdentity.pdf (last visited March, 2014); MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2012) (“No person shall be excluded from or discriminated
7. State courts have ruled that businesses must provide services for gay and lesbian commitment ceremonies.  

8. Catholic adoption and foster care agencies have been given ultimatums in several locations compelling these agencies to begin considering gay and lesbian couples for child placements or cease operating in those jurisdictions. 

One could argue that such a rapid succession of political and legal developments could not occur in a constitutional democracy unless correlative developments were already taking place in society. A mutually reinforcing dynamic between politics, law, and culture appears to be operative here in this rapid transition from widespread resistance to widespread affirmation of LGBT identities and practices in American life. Those individuals and institutions unwilling to conform to these changing views - for many due to their personal or religious beliefs - are now facing ever-higher legal (and social) penalties for going against the grain.

Can broad social space be legally preserved for expressing dissent from the prevailing attitudes endorsing LBGT behaviors and/or relationships when rooted in deeply held religious views? As earlier stated, it first depends on whether certain distinctions can be credibly made. Essentially, states and the
federal government must pursue a dual path of ensuring uniformity regarding equal treatment of LGBT persons while permitting diversity regarding views on the behaviors and relationships associated with LGBT persons, even when those views, expressed by certain business practices, constrain consumer options for people who identify as LGBT.

III. KEY CONSIDERATIONS

A. Not All Discrimination Is Equal

If one considers denial of recognition, privileges, and/or services involving persons who identify as LGBT to be no different than denial based on race, national origin, or sex, regardless of the actor in question (individual, government, business, non-profit, etc.) and regardless of the context of the discrimination, then the answer is clear—no moral space and very limited legal space should be preserved for such manifest disapproval. The argument could go as follows: it is illegal to discriminate against African American people on account of their race; therefore, it is also wrong to discriminate against persons who identify as LGBT on account of one or more of those identities. Stemming from deeply held religious views or not, when individuals or institutions engage in discrimination of this kind, these entities are rightly penalized legally and socially in multiple ways.

However, some instances of discrimination involving persons who identify as LGBT are not invidious and do not violate constitutionally mandated due process or equal protection rights, because they are not directed at an individual person. Instead, these instances express certain views on human sexuality that take the shape of public or private acts that deny recognition, privileges, and/or services to persons in certain contexts when to do otherwise would be to endorse a view of human sexuality contrary to one’s own. The truth of human sexuality is not an issue on which government should take a position; thus, the mere presence of an LGBT individual in a case involving discrimination, even if involving disapproval for one or more manifestations of

52. See U.S. CONST. amend. V (“No person shall be held to answer . . . without due process of law.”). See also U.S. CONST. amend XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”).


an LGBT identity, is not dispositive in whether the discrimination is invidious and demands government intervention.

Both individuals and institutions should affirm and respect the inherent dignity and infinite value of all persons. This is a matter that the state and the polity over which it governs can have only one view—a plurality of viewpoints is unacceptable here. However, refusing to affirm sexual expressions and associated relational forms, or forms of gender identity that may reduce human maleness and femaleness to matters of individual autonomy, are not *prima facie* offenses against human dignity and may be rooted in genuine religious convictions.\(^{55}\) Defending the religious freedom of individuals and institutions that embrace “traditionalist” views on human sexuality demands shining a bright light on the distinction between discrimination based on discrete, immutable attributes (like race, sex, or national origin) and discrimination based on certain forms of sexual expression or closely related events or symbols, such as, same-sex commitment ceremonies, gay-pride parades and festivals, or same-sex couples counseling. If this distinction is not viable, then no properly ordered understanding of the scope of religious freedom would suffice to preserve space for disagreement in the context of LGBT expressions.

### B. The Consequences of Definitions

Understanding the scope of the definitions associated with sexual orientation and gender identity is vital for preserving religious freedom in this context. This article deals primarily with sexual orientation but also notes that integrated into transgender identity (including both gender identity and expression)\(^ {56}\) is a behavioral dimension that, as a result, introduces the possibility of moral evaluation into the identity itself, which must remain absent in race, national origin, or sex.

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55. *E.g.*, *Catechism of the Catholic Church*, U.S. CONFERENCE OF CATHOLIC BISHOPS, paras. 2357-2359, available at [http://usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/](http://usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/) (summarizing the Catholic Church’s teaching on homosexuality and articulating the distinction between associated homosexual acts, which are described as “intrinsically disordered,” and “respect, compassion, and sensitivity” and the avoidance of “[e]very sign of unjust discrimination” toward persons who “experience an exclusive or predominant sexual attraction toward persons of the same sex.”).

56. AM. PSYCHOLOGICAL ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION (2011), available at [http://www.apa.org/topics/lgbt/transgender.aspx](http://www.apa.org/topics/lgbt/transgender.aspx) (referring to “[g]ender identity [as] a person’s internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.”).
According to the American Psychological Association (APA), “Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes.”57 Sexual orientation also refers to a “person’s sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions.” (emphasis added)58 Although no scientific or popular consensus exists on defining sexual orientation, the APA definition includes each of the most frequently referenced dimensions of sexual orientation: “attraction, behavior, and identity.”59

The crux of the confusion on all sides regarding LGBT issues is found in the degree to which all three dimensions (attraction, behavior, and identity) are included in the definition of sexual orientation.60 If behavior is inherent in the definition of the very identity the law seeks to protect from discrimination, this presents a problem. As applied, it can be an indirect means, even if unintended, for government to take a decisive position on human sexuality as opposed to doing what government should do in the area of nondiscrimination laws – ensure individual persons are not maltreated due to membership in a protected group or class. This is not merely theoretical. In Windsor,61 the Second Circuit [reasoned] that a class is “sufficiently discrete to qualify for heightened scrutiny if it’s identifying ‘characteristic invites discrimination when it is manifest.’”62 Here the Second Circuit conflates, almost in passing, the

58. Id.
60. See USCCB Chairmen Respond to “Unprecedented and Extreme” Executive Order, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (July 21, 2014), http://www.usccb.org/news/2014/14-126.cfm (responding to Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014)). In the news release, the Catholic Bishops state, “[T]he Church strongly opposes both unjust discrimination against those who experience a homosexual inclination and sexual conduct outside of marriage, which is the union of one man and one woman. But the executive order, as it regards federal government contractors, ignores the inclination/conduct distinction in the undefined term ‘sexual orientation.’ As a result, even contractors that disregard sexual inclination in employment face the possibility of exclusion from federal contracting if their employment policies or practices reflect religious or moral objections to extramarital sexual conduct.” Id. This statement is a good example of disaggregating attraction, behavior, and identity in such a way that remains unintelligible to LGBT advocates, which is what makes genuine debate on these matters so challenging.
distinction between identity and the manifestation of that identity that requires an element of human choice and behavior.\textsuperscript{63}

Most people would probably define sexual orientation in terms of “attractions,” but, when considering how those “attractions” should be protected by law, many often add the element of “behavior.” It seems intuitive—why protect an identity based on attractions from discrimination while withholding parallel protection for that identity when “it is manifest” in behavior? An inclination (even if deeply felt) does not by itself justify the attendant behavior. One cannot simply assert that one’s experience of same-sex attraction is a sufficient basis to say that the law should protect that person from facing any opposition whatsoever in manifesting that attraction publicly, whether in obtaining goods or services, joining associations, or seeking various forms of public affirmation. To reiterate, when government includes the behavioral dimension of sexual orientation in its efforts to enforce nondiscrimination laws, it is misguided. This action places the government in the position of improperly constraining non-governmental entities that have an interest in taking a particular stand on certain sexual expressions. This compulsion is beyond the government’s jurisdiction and competence.

Religious freedom advocates should pay close attention to the definition of sexual orientation cited in nondiscrimination statutes\textsuperscript{64} and should stress the point that the behavioral dimension must be omitted. For example, it may be

\textsuperscript{63} Windsor, 699 F.3d at 184 (“It may be that [the number of persons who identify with a particular sexual orientation] exceeds the number of persons whose sexual orientation is \textit{outwardly} ‘obvious, immutable, or distinguishing,’ and who thereby predictably undergo discrimination. But that is surely also true of illegitimacy and national origin. Again, what matters here is whether the characteristic invites discrimination when it is manifest.”). While discrimination based upon national origin may in some cases “invite discrimination when it is manifest,” focusing on this commonality between national origin and sexual orientation obscures the divergent underlying nature of the classes themselves. The forms of discrimination against LGBT persons that this article seeks to protect are those that clearly implicate an organization’s deeply held religious understanding of the goods of human sexuality and a desire by that organization to promote practices and/or messages consistent with those goods. There is no analogue to this form of discrimination for a trait like national origin, which consists of an objective identity devoid of any behavioral dimension. If a discrimination claim were to allege maltreatment based upon a practice closely associated with a particular national origin, this claim might prevail, but it should be regarded as different than a discrimination claim based solely upon the mere fact of one’s national origin as long as it is determined that an objection to the practice itself was the basis of the discrimination.

\textsuperscript{64} See, e.g., N.M. Stat. Ann. § 28-1-2(P) (2007), which defines sexual orientation as “heterosexuality, homosexuality or bisexuality, whether actual or perceived.” Such a “definition” merely states the very categories that require definition.
very appropriate to protect a lesbian from adverse treatment in a public accommodation on the basis of her experience of same-sex attraction. However, she does not have the right to unmitigated access to every good, service, privilege, or recognition from an institution or association, when affording access to one or more of those things directly enlists that organization in a positive act that supports or affirms her intimate relationship with her partner(s) and/or same-sex relationships more broadly. When one looks at protected classes like race, sex, or national origin, for example, neither human agency nor behavior are inherent to them; therefore, even when sexual orientation is included with these other classes for nondiscrimination purposes, the parallels only go so far. Given the absence of a behavioral dimension in these other classes, if a jurisdiction is going to add sexual orientation to the list, it needs to recognize what a drastic departure from past precedent it would be to prohibit disapproval of behavior in the application of nondiscrimination laws.

C. Discreteness, Immutability, and Protected Classes

Religious freedom should be understood to protect individuals and institutions, including private businesses, from legal liability in cases of discrimination involving persons who identify as LGBT, regardless of whether sexual orientation or gender identity are included among a state’s protected classes for nondiscrimination purposes. But what about the merits of designating these classes as suspect or protected classes in the first place, as the ENDA bill recently passed by the Senate would effectively do, and as many state laws have already done?

There are serious problems with designating sexual orientation and gender identity as suspect classes (effected by the courts) or protected classes (effected by statute) for nondiscrimination purposes. Foremost among them, LGBT categories are malleable, subjective, and lack consensus of meaning. An Amicus Curiae brief filed in the Hollingsworth v. Perry and U.S. v. Windsor cases (hereinafter referred to as the McHugh Brief) argued two basic points: “sexual orientation is neither a ‘discrete’ nor ‘immutable’ characteristic in the

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65. See 42 U.S.C. § 2000a (providing the federal definition of “public accommodation”).
67. § 2000e-2(a)(1)-(2).
68. Id.
70. See Nondiscrimination Laws: State by State Information – Map, supra note 47.
legal sense of those terms,”71 and “failing to satisfy the standards of discreteness and immutability have been the principal grounds on which the Court has in the past denied the application of heightened scrutiny to other suggested classes of persons.”72

1. Discreteness. Discreteness requires a trait or group be clearly defined;73 yet the scientific literature in the McHugh Brief shows no scholarly agreement exists on the meaning of sexual orientation, and the various definitions offered result in substantially different groups of people in terms of size and composition.74 Examples given in the McHugh Brief where the Supreme Court has denied heightened scrutiny to groups because they lack “discreteness or insularity” include the elderly, poor, and mentally disabled.75 Furthermore, the McHugh Brief draws the conclusion that “[t]he Court’s reluctance to create new suspect classes is particularly appropriate here because sexual orientation is a less discrete characteristic than age or poverty, which the Court has already refused to accord suspect-class status.”76 To be clear, this article does not deny that many individuals experience same-sex attraction as a given attribute to which they are simply responding. But lack of a clear definition of sexual orientation as a concept (as discussed above), the fact that some persons may identify with more than one point on a sexual orientation spectrum over the course of their lives and the problem of whether the concept of sexual orientation demands integrating identity and behavior, together point to a degree of indeterminacy too great to define a protected class.

2. Immutability. The other key point highlighted by the McHugh Brief is the importance of immutability: “[t]he Court’s jurisprudence makes clear that immutability is a necessary condition for recognizing a new protected class.”77 Supreme Court precedent suggests “immutability denotes a characteristic ‘determined solely by the accident of birth’” and that “[s]exual orientation, unlike race or gender, is not determined solely or even primarily at birth—there is no convincing evidence that biology is decisive.”78 The McHugh Brief

72. Id. at 2.
73. Id. at 5.
74. Id. at 8.
75. Id. at 11.
76. Id. at 5.
77. Id. at 5-6.
78. Id. at 15.
79. Id.
includes thirteen pages of cited studies detailing the complex social factors that appear to contribute to sexual orientation and its fluidity in people’s lived experience.\textsuperscript{80}

Additionally, the McHugh Brief concludes by arguing that even if the Court relaxed the definition of immutability, altering it to mean “a trait that is firmly resistant to change,” there is still “significant evidence that sexual orientation is more plastic than commonly supposed.”\textsuperscript{81} If this less rigorous meaning of immutability were to be applied to permit sexual orientation as it is presently understood to meet this standard, sexual orientation still lacks sufficient discreteness to become a suspect class entitled to heightened scrutiny under the Equal Protection Clause. As the McHugh Brief persuasively shows, the highly subjective and diverse nature of sexual orientation only further supports permitting broad social and legal space for a variety of viewpoints on it.\textsuperscript{82} In practice, applying equal protection and nondiscrimination rules across the board to all discriminatory acts involving LGBT persons wrongly limits this space.

D. A Surprising Take-Away from Lawrence v. Texas

Government law and policy should not be used to express majoritarian views on human sexuality absent other factors that warrant legal or public policy attention.\textsuperscript{83} Although, as a moral matter, human sexuality should not be reduced to a matter of mere consent among competent adults, as a political and legal matter, the coercive arm of government should tread lightly in this realm. The U.S. Supreme Court has weighed in on this and related issues on multiple occasions.\textsuperscript{84} One case in particular is worth reviewing.

\begin{enumerate}
\item Id. at 15-28.
\item Id. at 20-21.
\item Id. at 13.
\item See, e.g., Bowers v. Hardwick, 478 U. S. 186 (1986), (holding that the Constitution does not protect the right of gay adults to engage in consensual sodomy in a private space.) Though not doing so formally, Lawrence v. Texas, 539 U. S. 558 (2003), effectively overruled Bowers. See also Romer v. Evans, 517 U.S. 620 (1996) (striking down
In *Lawrence v. Texas*, the Supreme Court found that a Texas law criminalizing sodomy between male partners violates a constitutionally protected realm of freedom that extends “beyond spatial bounds [to presume] an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” Justice Anthony Kennedy, author of the opinion, clarified the question before the justices by stating, “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” The *Casey* decision, Kennedy continues, reasoned that “[o]ur laws afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” Further citing *Casey* in the same passage, Kennedy writes, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

The Court made abundantly clear that neither state nor federal criminal law might be used to express majoritarian views on human sexuality and related sexual relationships and lifestyles (in this case focusing on same-sex sodomy). As a constitutional question, the *Lawrence* decision is highly problematic; yet, as a public policy discussion, the Court’s reasoning offers some worthy insights. The Court’s distinction between principles of good public policy and principles of constitutionally protected rights and liberty interests should not be passed over too quickly—there is a massive difference. The former involves principles to be asserted in political debate and decided by orderly democratic processes while the latter removes certain questions from those democratic processes altogether. The point here is that, as a matter of public policy, *Lawrence* offers some important principles to consider, even though the Court mistakenly ruled them to be matters of constitutional protections.


87. *Id.* at 571 (quoting *Planned Parenthood*, 505 U.S. at 850).


89. *Lawrence*, 539 U.S. at 574.
With that caveat, the precedent of this case still stands; therefore, the Court's other statements in Lawrence elicit a broader question—why should the majority be permitted to "use the power of the State" via public accommodation laws, nondiscrimination laws, or other applications of due process or equal protection principles, to enforce the moral view that same-sex sexual conduct must be accepted? The American polity has transitioned over the past five decades from supporting the use of public law and policy to discourage sexual expressions outside of male-female marriage on multiple fronts to now approving a wide diversity of adult sexual expressions beyond male-female marriage, to the point of enshrining this diversity in law.

The principle implied in Lawrence, with some very careful qualifications, ought to be endorsed. When the exercise of discrimination in question can be identifiably linked to an organization's views on human sexuality (not a rejection of individual persons as such), then the prospect exists that public law and policy should not intervene. To intervene would be for the government to "mandate [its] own moral code" at the expense of appropriately preserving liberty, especially religious liberty. To assert that the State of Texas cannot establish certain views on human sexuality "through operation of the criminal law" while simultaneously advocating that other areas of law ought to establish other views by compelling private organizations to make certain decisions (whether internal or external) that endorse those views is incoherent and injudicious.

E. Finding Better Analogies

Let us return now to the key issue—the racial equality analogy fails to apply in the LGBT rights context in at least some cases. Even if many, or even most, Americans strenuously object to the views of religious people who deem same-sex conduct morally off-limits, the central point repeatedly made here is the truth about human sexuality is beyond the jurisdiction of public law and policy unless within a specified context where a compelling government interest exists. There are numerous examples where government action is warranted, but the merits of each must be politically contended for as they are not matters that cross any constitutional boundary.

90. Id. at 571.
91. Id. (quoting Planned Parenthood, 505 U.S. at 850).
92. Id. at 571.
93. For example, the government has a compelling interest in: (1) prosecuting criminal sexual conduct involving children and/or elements of force, fraud, or coercion, see, e.g., In re Blodgett, 510 N.W.2d 910, 914 (Minn. 1994) ; (2) prohibiting prostitution and any
To be clear, there are scenarios where an organization’s exercise of discrimination cannot be identifiably linked to its professed views on human sexuality (or the import of male-female sexual difference). Take for example the case of *Glenn v. Brumby*, which involved Vandy Beth Glenn, an employee who worked for two years in the Georgia General Assembly’s Office of Legislative Counsel as an editor and proofreader of bill language. Once it was confirmed that Glenn intended to transition publicly from male to female (i.e., he identified as a transgender female), Glenn was fired. On December 6, 2011, the Eleventh Circuit Court of Appeals upheld a lower court ruling that the Georgia General Assembly violated the Constitution’s Equal Protection Clause in firing Glenn. Simply put, no directly identifiable link could be drawn between the act of removing an employee from performing the duties of a legislative counsel and expressing a particular view on gender identity. In this case, there is also the issue that, as a government entity, the discriminating party is prohibited from expressing religious views. There may be similar cases where a person is in some way impaired by gender transition and job performance suffers, but then the issue would be about performing actual duties as required by the position and not the gender identity or expression itself.

In another recent example, the New Mexico Supreme Court decided in *Elane Photography, L.L.C. v. Willock* that a photographer was in violation of a state human rights law designating sexual orientation as a protected class by refusing to photograph a lesbian commitment ceremony. Is the denial of photography services to a lesbian couple for their commitment ceremony different than firing a qualified attorney for identifying as transgender, or denying service to customers at a restaurant because they are black? Louise Melling of the American Civil Liberties Union (ACLU) asks these precise questions in her provocatively titled article, “Will We Sanction Discrimination?”

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variant that turns sex (and people) into commodities, see, e.g., State v. Hicks, 360 A.2d 150 (Del. Super. Ct. 1976) (In the absence of a fundamental right to prostitution, states need not show even a compelling interest to justify prohibiting prostitution); and (3) prohibiting certain forms of pornography, particularly featuring children, see, e.g., New York v. Ferber, 458 U.S. 747, 761 (1982). In these examples, the justification for government involvement is not that of taking a definitive position on human sexuality itself but a particular incident of human sexuality that merits legal and/or public policy attention.

95. *Id.* at 1314.
96. *Id.*
97. *Id.* at 1320.
99. *Id.* at 59-61.
Can ‘Heterosexuals Only’ Be Among the Signs of Today?” 100

To illustrate the “harm” being done to gay and lesbian couples by some businesses in the wedding industry that refuse them services, Melling deploys a classic civil rights argument: “[t]he court in Piggie Park 101 did not ask whether there was another restaurant nearby where African Americans could be served . . . [or] whether the customers could have been accommodated elsewhere” because the “the nation had come to understand the harm created by a ‘Whites Only’ sign in a restaurant window.” 102

If a restaurant today denied service to individuals believed to be LGBT on account of their sexual orientation or gender identity just as the Piggie Park franchise did to blacks years ago, 103 the discrimination would clearly be invidious. Serving meals to gay individuals or gay couples in no way endorses a particular view of human sexuality; thus, no legitimate link can be drawn between this denial of service and the restaurant’s deeply held religious views on human sexuality. By contrast, a photographer who refuses to cover a lesbian commitment ceremony may be legitimately attempting to express a view on the truth of human sexuality and its relationship to the institution of marriage from a deeply religious perspective. So, what would be a better analogy to get at the actual principles at stake?

Suppose the director and a volunteer of a crisis pregnancy center associated with a Catholic parish go into a photography studio (consisting of three employees) and request photography services in covering an approaching “Right to Life” march in the area. The center director will be delivering an address at the event and requests photos of the address as well. The director and volunteer explain to the photographer that the center intends to display the photos for both personal and promotional use. During the discussion, each plainly communicates that their work at the center and participation in this event are deep expressions of their Catholic faith. The photographer respectfully declines to cover this event, advising that she supports a woman’s right to have access to a safe and legal abortion, and that she could not in good conscience feature an event by way of her photography services that promotes views contrary to those convictions. Could this be construed as a civil rights violation? Do the crisis pregnancy center director and volunteer have the right

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100. Louise Melling, Will We Sanction Discrimination?: Can “Heterosexuals Only” Be Among the Signs of Today?, 60 UCLA L. REV. DISC 248 (2013).
101. Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 434, 437 (4th Cir. 1967) (en banc) aff’d on other grounds, 390 U.S. 400 (1968) (finding that individuals may not be denied services “on account of their race and color” from drive-in restaurants and diners, in accordance with the Civil Rights Act of 1964).
102. Melling, supra note 100, at 252.
to be protected from discrimination in a public accommodation on account of their religion?

The parallels between *Elane Photography*\(^{104}\) and this hypothetical scenario are quite strong. The pro-choice photographer is not obligated to cover this event, nor should this case be viewed as discrimination based on the religious identity of the individuals from the crisis pregnancy center. Rather, it is the event (and the views and conduct the pro-life rally supports) that the photographer ought to be free consider in discerning whether to take the job. A same-sex commitment ceremony involves the same issues. In New Mexico (as in many other states) both one’s religion and one’s sexual orientation are protected classes; therefore, discrimination on those bases is prohibited in public accommodations.\(^{105}\) In both of these scenarios, the request for a service to cover an event (lesbian commitment ceremony or pro-life rally) is an expression of the protected identity but *not a necessary* expression of that identity (i.e., one does not inexorably follow from the other). Therefore, if one is to take the position that the New Mexico Supreme Court ruled rightly in *Elane Photography*, one must also take the position that the pro-choice photographer must, by law, cover the pro-life rally. The more plausible and just position is that the freedom to decline participation in both cases is perfectly acceptable since the protected classes (Catholic identity and lesbian identity) are not the actual basis for the discrimination; rather, refusal to participate in the event and, by extension, what the event directly represents is the basis.

Finally, this analogy highlights that there is no limiting principle for nondiscrimination rules if private businesses or other organizations are prohibited by law from objecting to a certain behavior in the conduct of their actual affairs. In a highly pluralist society like ours, people need to be given broader space to express their views publicly, to develop organizations that reflect those views, and to associate with others who share those views—the virtue of living peaceably amidst genuine disagreement must be encouraged by our laws and our cultural ethos. However, this virtue presupposes actual space in which individuals and institutions may publicly and peaceably disagree. The potent but also blunt instrument of civil rights law is not always appropriate for addressing the nuanced questions surrounding many LGBT rights cases.

105. N.M. STAT. ANN. § 28-7-1(f) (2012).
IV. CONCLUSION

This article argues the racial discrimination analogy does not apply to some cases of LGBT discrimination, because racial discrimination is always an irrational rejection of persons based on a discrete and immutable attribute. Sexual orientation and gender identity are different, particularly in that these characteristics are typically understood as having a behavioral element, utterly absent in the trait of race. There are cases in which discrimination against LGBT individuals is an expression of an organization’s beliefs about human sexual behavior, sexual difference, and/or the nature of associated sexual relationships. Government should not attempt, and is not competent, to be an arbiter between individuals and private organizations holding competing views on these matters. This is not to say that the presence of religious conviction that translates into a particular understanding of human sexuality is enough to protect an organization from legal liability in cases of LGBT discrimination. The act of the discrimination itself must also be directly and identifiably linked to the view the individual or organization seeks to convey. As stated in the introduction, this direct, identifiable link is indispensable in distinguishing invidious from lawful discrimination in cases involving LGBT persons.

Even on religious grounds, neither private businesses (with limited exceptions) nor governments may treat similarly situated persons differently merely on the basis of race, sex, religion, age, disability, national origin, and in some instances, sexual orientation and gender identity. A refusal by private businesses to participate in same-sex commitment ceremonies or to otherwise provide services to LGBT persons that would enlist them in promoting a particular view of sexual behavior and sexual relationships to

106. See 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin”). But see, e.g., 42 U.S.C. § 2000e-1 (2012) (allowing an exemption from Title VII of the Civil Rights Act of 1964 under certain circumstances); 42 U.S.C. § 12111(5)(A) (2012) (providing an exemption under the Americans with Disabilities Act for employers with less than fifteen employees); 29 U.S.C. § 630(b) (2012) (providing a similar exemption under the Age Discrimination in Employment Act for employers with less than twenty employees). See also Non-Discrimination Laws: State by State Information - Map, supra note 47 (illustrating twenty-two states with employment discrimination protections related to sexual orientation and all but three of those states also include gender identity protection).

which they object on religious grounds, should not be considered discrimination based on sexual orientation, unless the state’s definition of sexual orientation legally includes a behavioral dimension. However, if behavior is included, government may be put in the position of endorsing a particular view of sexual behavior and relationships, which may seriously undermine religious freedom. It must be reiterated that the morality of same-sex sexual behavior, the equality of same-sex unions vis-a-vis male-female marriages, and the validity of identifying as transgender, are not actually at play here. The moral questions surrounding each of these issues are important but are not directly implicated in this argument. This article does not contend that same-sex sexual behavior is immoral, that same-sex unions and male-female marriages are unequal, or that identifying as transgender is an invalid option. Instead, this article argues that government should not compel private organizations, even when they enter the public domain, to take a particular position on these behavioral and lifestyle matters by constraining real organizational decisions, such as, refusing goods or services, hiring or firing employees, appointing and setting criteria for organizational leadership, establishing employee codes of conduct and other internal rules, setting adoption placement guidelines, and defining marriage and family, as long as one key condition is met. Those decisions must be directly and identifiably linked to the religiously-based views on human sexuality that the organization intends to convey.

Should religious freedom or equal protection rights prevail when they are in conflict? This article has demonstrated that determining the basis of the discrimination is central to answering this question in LGBT cases, not because religious freedom always trumps equal protection rights, but because many LGBT rights cases are not equal protection cases in the first place. When there is a clearly articulable link between an act of discrimination involving LGBT persons and the discriminating entity’s deeply held religious views on human sexuality, male-female difference, and/or marriage and family, a religious liberty defense should prevail. Such discrimination should be regarded as a legitimate exercise of a First Amendment right, particularly as elaborated by RFRA. Determining whether religious freedom or equal protection rights should prevail when in conflict may depend on whether the case falls within federal jurisdiction (so that RFRA is in effect) or, whether the deciding jurisdiction has adopted RFRA into its own statutory scheme.

If so, the reasoning may proceed as follows: (1) to compel a private organization to act in a way that expresses approval for particular forms of sexuality with which it disagrees on religious grounds is indeed a substantial burden on religious free exercise; (2) once an individual or organization establishes that a law imposes a substantial burden on religious free exercise,
federal RFRA, or similar state equivalents, obligate the government to prove that it has a compelling governmental interest in enforcing this law and that the law is the least restrictive means to achieve that interest.

Imposing certain views of human sexuality on private organizations simply cannot be construed as a compelling governmental interest. Moreover, according to Lawrence, it seems that imposing such constraints on liberty should not be a considered a governmental interest at all. The basis of the discrimination claim should insulate private organizations from some LGBT nondiscrimination claims. Even in jurisdictions where sexual orientation is a protected class, if sexual orientation is not the actual basis of the discrimination, no claim exists. A religious liberty defense would aid here in clarifying the manner in which the alleged refusal or denial was not directed at the LGBT person as such, but rather expressed opposition to a manifestation of human sexuality consistent with the organization’s religious convictions. In jurisdictions where RFRA or an equivalent applies, the religious freedom claim can be articulated more methodically and with greater likelihood of being given due regard.

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108. See generally Lawrence v. Texas, 539 U.S. 558, 578 (2003) (explaining that the government may not quell the rights of consenting adults to express their sexuality sans a legitimate state interest).

109. Id. at 578.