Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry

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Introduction

There is a growing body of legal literature discussing the extent to which state recognition of same-sex marriages will burden the religious liberty of individuals and faith-based institutions. Most scholars recognize that some conflicts will arise. There is far less accord on the magnitude of the problem and even less on the desirability of governmental responses to mitigate this concern.

Legal commentators have taken a range of positions in this debate. To some scholars opposed to same-sex marriage, the burdens on religious liberty resulting from state recognition of same-sex marriages are simply additional reasons why the legal recognition of such marriages should be forcefully opposed.1 Other scholars argue that accommodations for religious objectors to same-sex marriage are almost always unjustified and are outweighed by the costs such accommo-
tions would impose on same-sex marital couples.\(^2\) The non-academic rhetoric on this issue is often even more one-sided and extreme.\(^3\)

A different cohort of scholars, and I include myself in this group, have tried to argue for a middle-ground position, sometimes described as a live and let live approach to the problem.\(^4\) These writers


3. Political rhetoric on this issue often considers state recognition of same-sex marriages and religious liberty to be essentially a zero-sum game that will result in decisive victory or defeat for one side or the other. Opponents of same-sex marriage perceive the gay and lesbian community and straight supporters of same-sex marriage as irrevocably hostile to religion. Accordingly, they assume that no meaningful religious accommodations will be granted if same-sex marriages are recognized. See Chai R. Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 BROOK. L. REV. 61, 87 (2006) [hereinafter Feldblum, Gay Rights and Religion] (explaining how for those who view homosexual acts as sinful or harmful, or those who believe homosexual orientation is morally neutral, the debate about same-sex marriage creates a zero-sum game, where “a gain for one side necessarily entails a corresponding loss for the other”); Laura K. Klein, Rights Clash: How Conf{}licts Between Gay Rights and Religious Freedoms Challenge the Legal System, 98 GEO. L.J. 505, 513–15 (2010) (describing legal scholarship construing this conflict and others to be a zero-sum game); Lupu & Tuttle, supra note 2, at 278 (describing how opponents of same-sex marriage have argued that state recognition of same-sex marriage is “a zero-sum game” in which “[t]he gains for same-sex families would come at the expense of religious communities”).

Proponents of marriage equality, operating under a similar zero-sum perspective, often perceive concerns about religious liberty and demands for accommodation as nothing more than a political ploy to mobilize opposition to same-sex marriages. They doubt that any reasonable accommodations will placate opponents. Moreover, accommodations impose costs on others. Groups that refused any meaningful accommodation of the liberty and equality interests of the gay and lesbian community for so many years have no entitlement to special consideration once their power has been displaced. See, e.g., Douglas Laycock, Afterword, in Emerging Conf{}licts, supra note 2, at 189, 190 [hereinafter Laycock, Afterword] (noting that some gay rights activists construe the protection to be provided to religious liberty “down to the vanishing point”); Gilreath, supra note 2, at 214 (perceiving demands for religious accommodations from the perspective that “every hard-won escape from the caste [in which gays and lesbians have been placed] is propagated into an attack on the liberty of the people who created the caste system and put you in it.”).

4. Several authors adopt a middle-ground position and explicitly use some form of live and let live terminology to describe their stance. See, e.g., Laycock, Afterword, supra note 3, at 192; Robin Fretwell Wilson, Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, in Emerging Conf{}licts, supra note 2, at 81 [hereinafter Wilson, Matters
attempt to identify a working framework for providing accommodations to individuals and institutions that object to facilitating or recognizing same-sex marriages on religious grounds. Their goal is to take the legitimate needs and interests of both religious groups opposed to same-sex marriages and the gay and lesbian community into account in determining whether particular categories of accommodation should be adopted. I applaud this objective. But I have serious misgivings about much of the commentary written to further it.

This article suggests an alternative middle-ground position. In many ways, however, my contribution to this Symposium is more of a rhetorical essay than the kind of doctrinal analysis typically published in law reviews. In part, this is because there is a paucity of law and cases on this subject. Once the issue of coercing clergy to officiate over marriage ceremonies is taken off the table, as it should be, under the free exercise doctrine established in Employment Division v. Smith, religious accommodations are pretty much a matter of legislative discretion. Discussions about the need for, or the legitimacy of, such legislation are primarily political and normative. There is only limited opportunity for conventional doctrinal analysis.

5. The few cases and administrative actions that have been identified as illustrating the burdens on religious liberty resulting from a state recognizing same-sex marriages have been exhaustively addressed in the literature. See, e.g., Marc D. Stern, Same-Sex Marriage and the Churches, in EMERGING CONFLICTS, supra note 2, at 1; Berg, Common, supra note 4, at 209–12; Lupu & Tuttle, supra note 2. I refer readers to these articles for extensive, but not always consistent, commentary on these disputes. The discussion of the Ocean Grove Camp Meeting Association dispute, in particular, is thoroughly and thoughtfully explained in Lupu & Tuttle, supra note 2, at 279–82; see also Piero A. Tozzi, Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. CATH. LEGAL STUD. 269, 300 (2009) (noting the small number of cases that test religious liberty with regards to same-sex marriage).

6. Marc Stern, who maintains that state recognition of same-sex marriage will result in significant burdens on religious individuals and institutions in other respects, correctly summarizes the position of legal scholars when he writes that “[i]n no serious believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.” Stern, supra note 5, at 1. Because of popular misconceptions on this issue, however, Chip Lupu and Robert Tuttle do us all a valuable service by carefully and persuasively explaining why any state regulation requiring clergy to officiate over marriages prohibited by their faith would be struck down as unconstitutional. Lupu & Tuttle, supra note 2, at 282–86.

More importantly, my reason for adopting an essay format for this piece is that my dissatisfaction with existing middle-ground commentary not only relates to the substantive conclusions of other authors but also to the tone and tenor of their arguments. Most of the middle-ground commentary I have read has been written by scholars who strongly support religious liberty either as a constitutional mandate or as a basis for statutory accommodation. Their articles attempt to explain why religious accommodations in this context are necessary and deserve to be adopted.8

I assume that at least one important audience for these articles is readers who support states recognizing same-sex marriages. It seems obvious, at least to me, that writers need not work very hard to convince religious objectors to same-sex marriage that their interests in not facilitating or validating such marriages should be accommodated. At most, religious objectors to same-sex marriage may need to be convinced that the scope of accommodations they seek must be limited to some extent. But surely the audience that will be most skeptical of the need for, and legitimacy of, significant accommodations, will be those who will bear the cost of accommodations—same-sex couples and their families and supporters. This is the side of the same-sex marriage debate that has to be persuaded of the merits of religious accommodations.

In my judgment, most of the commentary supporting accommodations for religious objectors to same-sex marriage will be unconvincing and unpersuasive to that audience.

One of my goals in writing this essay is to attempt to present the middle-ground position more effectively. I think there are arguments supporting religious accommodations that are more persuasive to proponents of same-sex marriage than those that have been offered so far. At a minimum, commentators supporting accommodations have to demonstrate that they are willing to take the needs and interests of the gay and lesbian community into account as well as the religious liberty interests of faiths opposing same-sex marriages. I hope to do that in this essay. With respect, I do not believe the other commentary I have read persuasively accomplishes that objective.9

Of course, my essay will have little value if it substantially understates the need for, and the importance of, religious accommodations in an effort to make the availability of any accommodations more

8. See articles cited supra note 4.
palatable. Thus, my goal is to critically evaluate claims for religious accommodations in a way that fairly recognizes the interests of those seeking such accommodations and explains my support for a range of accommodations in a way that might be persuasive to those who will bear their cost.

I do not know whether it is possible to be entirely even-handed in discussing this issue, but I can say something about the perspective I bring to this enterprise. I am unequivocally committed to the moral necessity of states recognizing same-sex marriages, but I have also spent much of my professional life writing about, and advocating for, the rigorous protection of religious freedom. That foundation may not make my arguments persuasive to anyone. But it ought to be a credible place to begin the discussion of a middle ground in this often heated and hurtful debate.

I. The Normative Foundation for Accommodating Religious Objections to Same-Sex Marriages

A. Distinguishing Political Compromise from Normative Justifications

There is a political rationale for accepting some significant accommodation of religious objectors to same-sex marriages that has persuasive force—at least as an abstract argument. Proponents of same-sex marriage should recognize that religious liberty arguments are being employed as a reason for denying same-sex couples the right to marry. Clearly stated commitments to religious accommodations would preemptively neutralize these arguments.

A comparable political argument can be presented to opponents of same-sex marriage. While opponents of same-sex marriage have achieved victories in the legislature and at the ballot box in most states in recent years, future cultural demographics on this issue are far from favorable. Young people differ dramatically from their elders in their willingness to accept same-sex marriages.10 Concessions on same-

10. See Adam Nagourney, Same-Sex Marriage Holds Peril for GOP, N.Y. TIMES, Apr. 28, 2009, available at http://www.nytimes.com/2009/04/29/us/politics/29memo.html?_r=1&scp=10&sq=demographics%20of%20gay%20rights%20issues&st=cse (reporting polls showing that 57% of respondents under 40 supported same-sex marriage, compared to 31% of respondents over 40); David Masci, Public Opinion on Gay Marriage: Opponents Consistently Outnumber Supporters, PEW FORUM ON RELIGION & PUB. LIFE (July 9, 2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/Public-Opinion-on-Gay-Marriage-Opponents-Consistently-Outnumber-Supporters.aspx (finding opponents of same-sex marriage outnumber supporters by the widest margin among older people, with those over age 65
sex marriage rights in return for religious accommodations should be offered now. There will be far less incentive to consider such accommodations on the part of proponents of same-sex marriage when the political tide has turned.

While I understand and appreciate these political arguments, I believe their utility is limited. The political case for religious accommodations is grounded on power relationships. These arguments would be most persuasive in a jurisdiction with a roughly equal power relationship between the two sides of the same-sex marriage debate. In that circumstance, it might be advantageous to both sides to forge some kind of meaningful compromise. But these situations may be the exception rather than the rule. In most jurisdictions where opponents of same-sex marriage have been successful, there seems to be little support for softening the majority’s position in exchange for even broadly stated religious accommodations. Similarly, in the few jurisdictions where same-sex couples receive state recognition for their marriages, there is often no political imperative for accommodating religious groups whose long standing opposition to same-sex marriage has finally been overcome.11 Put simply, in jurisdictions where the power relationships between the two sides are decidedly unequal, there seems to be little evidence that the more powerful side is interested in a compromise.

Also, it is difficult to measure the political impact of granting religious accommodations—particularly with regard to ballot measures. It is hard to predict how and whether writing particular religious accommodations into legislation would significantly alter the popular vote when same-sex marriage issues are placed on the ballot. Indeed, the history of how accommodation issues have played out in same-sex marriage campaigns and debate has not been auspicious.

Opponents of same-sex marriage have argued with considerable effect during initiative campaigns that state recognition of such marriages will subject churches to legal sanction if clergy refuse to officiate over same-sex marriage ceremonies.12 Responses by constitutional opposing gay marriage by a margin of 64% to 24%, whereas only 45% of those under 30 are opposed to same-sex marriage).

11. See generally Laycock, Afterword, supra note 3, at 196 (noting that “[e]xisting gay-rights legislation often includes no religious exemption at all apart from background rights under state and federal constitutions . . . .”).

scholars and others—that such contentions lacked merit because the Constitution protects clergy and congregations from being coerced into performing ceremonies prohibited by their faith\(^{13}\)—were often ignored or cast aside. Certainly, they did not appear to sway the tenor of public debate.

Given this reality, it is hardly surprising that proponents of same-sex marriage and others have attempted to allay these concerns by accepting or promoting legislation explicitly prohibiting the coerced officiating of same-sex marriage ceremonies.\(^{14}\) Those accommodations, however, have often been cavalierly dismissed as meaningless and unnecessary by some legal scholars and political activists on the grounds that they are redundant to the protection provided to clergy

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\(^{13}\) During the campaign over Proposition 8, fifty-nine constitutional law professors from fourteen California law schools signed a statement affirming that the Constitution protects a religious organization’s decision about whether to solemnize or recognize particular marriages. See Michael Gardner, Law Professors Enter Prop. 8 Fray on Church’s Tax-Exempt Status, SAN DIEGO UNION-TRIBUNE, Oct. 30, 2008, http://legacy.signonsandiego.com/news/politics/20081030-9999-1n30exempt.html.

\(^{14}\) Conn. Gen. Stat. § 46b-22b (2010) (“No member of the clergy authorized to join persons in marriage pursuant to section 46b-22 shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the U.S. Constitution or section 3 of article first of the Constitution of the state.”); D.C. CODE § 46-406(c) (2010) (“No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage.”); VT. STAT. ANN. tit. 18, § 5144(b) (2010) (“[D]oes not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action.”); Me. REV. STAT. ANN. tit. 19-A, § 655 (2009) (repealed 2009) (“A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.”); Cal. S.B. 906, § 2(a), 2009–10 Reg. Sess. (Cal. 2010) (vetoed by governor after approval by legislature) (“A priest, minister, rabbi, or authorized person of any religious denomination . . . shall [not] be required to solemnize a marriage that is contrary to the tenets of his, her, or its faith. Any refusal to solemnize a marriage under this subdivision shall not affect the tax exempt status of any entity.”).
and houses of worship by the First Amendment.15 I do not dispute the conclusion that these accommodations are almost certainly unnecessary and redundant to constitutional doctrine in this area. But given the way that the coerced officiating issue has been misused in political campaigns, the rejection of this accommodation as largely meaningless feeds the perception that arguments about religious accommodation are nothing more than political gamesmanship. Proponents of same-sex marriage conclude that there is little point in responding positively to accommodation demands because any accommodation granted will be belittled and result in new demands for additional accommodations.16

In any case, whatever the ultimate value of political compromises may be, the focus of this essay is on normative concerns rather than political matters. As a political matter, religious accommodations are a cost that proponents of the right of same-sex couples to marry may have to incur in order to achieve their goals. As such, accommodations are grudgingly accepted only when it is necessary to do so. I argue that religious accommodations should be accepted, because they are justified under a vision of personal autonomy and integrity that deserves support from both religious groups and the gay and lesbian community. Indeed, until more progress is made on developing a shared commitment to respect for differences, the prospect of political compromise on this issue will be more of an aspiration than a realistic goal.

B. The Problem of Past, Present, and Future Burdens: The Rhetorical Threshold for Arguing in Favor of Religious Accommodations for Objectors to Same-Sex Marriage

There is a comparative justice asymmetry in any discussion of accommodating religious objectors to same-sex marriage that cannot be

15. Robin Wilson, The Flip Side of Same Sex Marriage, L.A. Times, May 3, 2009, http://articles.latimes.com/2009/may/03/opinion/oe-wilson3 (suggesting that New Hampshire’s same-sex marriage law provides “meaningless protections” to religious freedoms because protections offered fall under preexisting first amendment protections); see also Berg, Religious Liberty Letter, supra note 4, at 11 (belittling protection against “forced officiating” as unnecessary and “a distraction from real situations where religious conscience is at risk”).

16. I do not suggest that commentators supporting accommodations have to assign greater value to legislative prohibitions against coercive officiating than these provisions deserve. But they do have to discuss this issue in context if their arguments are to be credible.
avoided. For the most part, the burdens on religious liberty that may result from states recognizing same-sex marriage do not yet exist. At best they are prospective, at worst speculative. There is no uncertainty, however, about the invidious, oppressive treatment gays and

17. See supra note 4 and accompanying text.
18. See, e.g., Berg, Common, supra note 4, at 212 (conceding that “same-sex marriage may not have yet produced a measurable increase in conflicts” between gay rights and religious liberty and “that the total number of cases between religious objectors and same-sex couples [even outside of marriage] has not been huge”).
19. See, e.g., Wilson, Matters of Conscience, supra note 4, at 89 (explaining that “although a church’s or religious organization’s risk of losing its Sec. 501(c)(3) characterization may be remote, it cannot be ignored.”); Maggie Gallagher, Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty, WKLY. STANDARD, May 15, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwh.asp (suggesting that “[e]ven a slight risk of anything so damaging as the loss of tax-exempt status will persuade many such groups to at least mute their marriage theology.”).

Some predictions of the impact of same-sex marriage and gay rights legislation on religious liberty extend beyond what can be even reasonably described as speculative. There are some limited circumstances involving, for example, public employees and student speech in public schools where speech condemning same-sex marriage (as well as speech on an almost limitless list of other subjects) will receive less than rigorous protection. See, e.g., Stern, supra note 5, at 7–19 (describing some of these situations). However, there is no constitutional foundation for arguing that civil rights protection for gays and lesbians and same-sex couples will result in clergy or religious people being punished for expressing alleged “hate” speech in churches or the public square as some commentary suggests. See, e.g., Fredric J. Bold, Jr., Note, Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws, 158 U. PA. L. REV. 179, 199 (2009) (asserting the “prospect of ‘hate speech’ laws . . . prevent[ing] or at least chill[ing] an organization from expressing . . . theological arguments against same-sex marriage”).

It is particularly disingenuous to raise such concerns without describing the constitutional case law in this area that renders any such possibility so implausible. In Virginia v. Black, 538 U.S. 343 (2003), the U.S. Supreme Court had to struggle to uphold a law prohibiting cross burning, a notoriously racist symbol associated with brutal acts of violence. It only did so in the context of the law being limited to threats, an accepted category of unprotected speech, and because the law satisfied a narrow and convoluted exception to the holding of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)—a decision which effectively precludes the prohibition or prosecution of hate speech in most circumstances, even when the speech at issue would be otherwise unprotected. Indeed, a line of authority extending over decades demonstrates the protection that hate speech or religious speech critical of others receives under accepted first amendment doctrine. See, e.g., Snyder v. Phelps, 2011 WL 709517; Terminello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Conn., 310 U.S. 296 (1940); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). The fact that hate speech laws have been applied to religious commentary in other countries lacking a comparable constitutional commitment to freedom of speech has no bearing on U.S. law.

Still other comments speak for themselves as to their plausibility, see, e.g., Mary Ann Glendon, For Better or for Worse?, WALL ST. J., Feb. 25, 2004, at A14, arguing that “[g]ay-marriage proponents use the language of openness, tolerance, and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination the likes of which we have rarely seen before.”
lesbians have suffered in the not so recent past in our society. Nor is there any doubt about the unequal treatment and material disadvantages that same-sex couples experience today as a consequence of discriminatory state and federal legislation. Put frankly, the worst-case scenario for religious individuals and institutions that proponents of same-sex marriage can realistically imagine pales in significance to the burdens imposed on the gay and lesbian community historically and even today.

This does not mean that concerns about the impact of state recognition of same-sex marriage on the liberty of religious individuals and institutions are misplaced. Law changes to reflect changing social attitudes. The force of the liberty and equality arguments supporting state recognition of same-sex marriages is too powerful to be continually rejected. Eventually, additional states are going to recognize same-sex marriages. That recognition of same-sex marriages will have some significant impact on the religious liberty of some individuals and faith-based institutions. Claims for religious accommodation in the future will not lack substance.

Acknowledging the past and current burdens imposed on gays and lesbians does not undermine the case for religious accommodations. Unfairness and injustice in the past does not legitimize the burdening of important liberty values in the future. But new slates cannot be written until prior burdens and hardships are recognized. Discussions of religious accommodations have to be more cognizant of the


21. See Laycock, Afterword, supra note 3; Wilson, Matters of Conscience, supra note 4; Berg, Common, supra note 4; Berg, Religious Liberty Letter, supra note 4.
extent of discrimination that has been directed at those who are now being asked to accommodate the needs of others.

C. The Common Ground Underlying Religious Liberty and the Right of Gay and Lesbian Couples to Marry

A strong normative case can be made for accommodating religious objectors to same-sex marriage in some circumstances. There are also powerful arguments for denying the propriety of such accommodations, however. A persuasive discussion of the reasons for granting accommodations should acknowledge these arguments and demonstrate why they are mistaken or, alternatively, why they are outweighed by competing considerations.

In practice, however, there are serious barriers to this kind of a discussion. This is not an easy area of law to write about. The debate underlying religious accommodation questions, in relation to the conflict about same-sex marriage in our society, invokes intensely passionate emotions from the opposing sides.22 Even more problematically, some significant part of the emotional undercurrent of this controversy is grounded on suspicion and fear of the motives of the opposing sides.23 I take it as a given that persuasive argument requires identifying some mutually acceptable common ground between the participants in a discussion. In debates on same-sex marriage and accommodations for religious objectors to same-sex marriage, the common ground often seems hard to find and too small to stand on.

The situation may not be as dire as it sometimes appears to be, however.24 The common ground is far broader than is typically recognized by the competing sides in the same-sex marriage debate. Indeed, there are striking parallels between autonomy and equality

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22. Given my commitment to gay and lesbian rights and to religious liberty, this issue raises internal conflicts that I have had to struggle to resolve. Accordingly, the solution I propose has a personal ethical dimension to it as well as public policy basis. See infra notes 90–110 and accompanying text. I will not argue to gay and lesbian couples that they should bear the cost of religious accommodations in the name of religious liberty unless I can say that I am willing for my family to incur similar costs for the same reason.

23. See, e.g., Laycock, *Afterword*, supra note 3, at 191 (noting that in the same-sex marriage controversy “[e]ach side sees the other as a genuine threat to its values and to its own liberty”); Stern, *supra* note 5, at 28 (explaining that “[w]hen each side thinks that the effort is not about the resolution between a localized conflict but a skirmish in a take-no-prisoners war, it is hard to expect either side to allow the other any victories.”).

24. See Laycock, *Afterword*, supra note 3, at 189–92 (describing the anthology he helped to edit as “a depressing book” because the articles in it suggest how difficult it will be to marshal support for reasonable accommodations that balance the legitimate interests of gays and lesbians and religious objectors to same-sex marriage).
rights, which are grounded in sexual orientation and intimacy, and autonomy and equality rights, which are grounded in religious identity, belief, and practice. Put simply, both religious liberty and the right of same-sex couples to marry share a common constitutional and normative foundation: a commitment to personal autonomy, authenticity in conduct, and relational responsibilities.

Accepting religious accommodations, therefore, serves utilitarian as well as deontological values. Doing so is not only the right thing to do; it also reinforces that common foundation—our cultural and constitutional commitment to personal and associational autonomy. In that sense, accepting religious accommodations protects more than religious liberty. Demonstrating the universality of that foundation—even when it is against self-interest—strengthens the argument for recognizing the right of same-sex couples to marry. It reaffirms our collective understanding that one of the most effective ways to protect one’s own autonomy rights is to recognize the autonomy rights of others.

The common foundation underlying both religious liberty and the right to marry can be described and defended from a variety of perspectives. First, both rights reflect a commitment to personal autonomy, the right to live one’s life in a way that authentically expresses one’s identity. Religious liberty “is part of the basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition.” Other commentators have justified religious liberty using a similar analysis.

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25. See id. at 189 (explaining that “religious minorities and sexual minorities could easily be on the same side . . . [because] they make essentially parallel and mutually reinforcing claims against the larger society.”).

26. Alan Brownstein, Coexistent Rights: Same-Sex Marriage and Religious Liberty Coexistent Rights, Liberty, May/June 2009, at 9, available at http://www.libertymagazine.org/index.php?id=64. Professor Laycock expresses a similar argument when he writes that: “[c]laims to liberty by religious traditionalists would be more credible, and quite possibly more persuasive, if they did not devote so much of their energy to restricting the liberty of others.” Laycock, Afterword, supra note 3, at 194.


The right of same-sex couples to marry shares a similar foundation. As Justice Blackmun explained: “sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality.”29 The right to marry, in establishing access to a social institution in which responsible sexual intimacy may take place, reflects the importance of this relationship to individual autonomy and identity.30

For devoutly religious persons, religion is a core aspect of their identity.31 It is a fixed part of who they are. Religion “represent[s] the basic truths by which [devout] persons order their lives and their place in the world.”32 Similarly, sexual orientation may be a fixed part of a gay or lesbian person’s identity.33 Just as it is unrealistic, useless,
and oppressive to insist as a matter of social policy that gays and lesbians should just stop being gay, it is equally unacceptable to insist that devoutly religious persons should just stop obeying the dictates of their faith.34

Also, religion and sexual orientation both have a merged identity and conduct dimension to them. It makes no sense to tell devout Catholics, for example, that they are protected as to their identity but are prohibited from practicing Catholicism. It is similarly senseless to protect gays and lesbians from discrimination based on their sexual orientation while prohibiting their right to sexual intimacy and marriage.35 Neither gays and lesbians nor religious individuals can reasonably be asked to change who they are or to separate their conduct from their identity. Religion is no more an easily discarded lifestyle than is the expression of one’s orientation toward sexual intimacy and association.36

individual for whom religion is a core aspect of their identity. I am not sure what term to use to capture the same idea for sexual orientation.

34. Stephen Carter forcefully describes the attitude that religious beliefs can be easily tossed aside:

If you can’t take your exam because of a Holy Day, get a new Holy Day! If the government decides to destroy your sacred lands, just make some other lands sacred! If you must go to work on your Sabbath, it’s no big deal. It’s just a day off! Pick a different one! If you can’t have a blood transfusion because you think God forbids it, no problem! Get a new God!


Of course, people can lose their faith and change their religious beliefs. They can fall into or out of love and elect to marry or not to marry or to continue or end a marital relationship. When these decisions are internally driven they reflect the reality that human beings may change their identity in important respects over time. When those decisions are coerced by the state, however, they represent a fundamental intrusion into personal identity and an oppressive constraint on personal liberty.


35. As Chai Feldblum argues, “gay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. For years, gay people have been told by some entities that they should separate their status from their conduct.” Feldblum, Moral Conflict and Conflicting Liberties, supra note 2, at 142.

36. Professor Berg expresses a similar position with considerable force and eloquence. He writes:

[B]oth same-sex couples and religious objectors argue that certain conduct is fundamental to their identity, and that they should be able to engage in it free from unnecessary state interference or discouragement. For same-sex couples, the conduct in question is to join personal commitment and fidelity to sexual expression—a multi-faceted intimate relation—in a way consistent with one’s sexual orientation. For religious believers, the conduct is to live and act consistently with the demands made by the being that made us and holds the whole world together.
In addition, religious belief and practice and sexual orientation, intimacy, and marriage are intrinsically relational. In Judge John Noonan’s words: “[R]eligion is a relationship to God; God is not a category; and categorization misses the living communication between believer and God that is at the heart of the matter.” Religion is also relational in that it typically involves a group of individuals continually building a narrative—a “vision of itself, of what its members aspire to be both individually and communally”—that consists “of the intentions, commitments, beliefs, settings, images, and stories relating to the group.” The relational nature of intimacy and marriage needs no explanation or defense.

Moreover, both of these kinds of relationships are the source of duties and responsibilities. Also, they are both intended to express the seriousness of mutual commitments. Religious people want to have the liberty to fulfill the responsibilities that arise out of their relationship with G-d. Religious practice and assembly allows them to express their commitment to G-d and to co-religionists. Same-sex couples want to marry to express their commitment to the person with whom they want to share their lives and to fulfill the responsibilities that arise out of this relationship.

Even the arguments against protecting religious liberty and against recognizing the right of same-sex couples to marry have used the same slippery slope analogies to make their case. It is tiresome to
hear the regularly repeated litany that if states recognize same-sex marriages, they will also have to recognize polygamy. But it is worth remembering that this was the same argument used by the Supreme Court in 1878 in *Reynolds v. United States* to limit free exercise rights solely to religious beliefs and to leave religious conduct entirely unprotected. If religious conduct as well as belief was protected, the Court feared, then the polygamous Mormons challenging their convictions on constitutional grounds might have had an argument deserving serious constitutional consideration. The fear of having to recognize and protect polygamy has been the pit at the bottom of the slippery slope arguments that have been employed to deny the rights of both gays and lesbians and religious minorities.

I understand that some individuals on both sides of the same-sex marriage debate may have considerable difficulty accepting the argument that religious liberty and the right of same-sex couples to marry share a common normative foundation. The debate about same-sex marriage involves profound disagreements about what is good or moral. At the poles of the continuum, gay and lesbian relations are denounced as abominations and religious opposition to gay and lesbian rights is rejected as invidious bigotry. Closer to the center of the continuum, language becomes less pejorative, but the moral conflict between the two sides remains deep and divisive.

In such circumstances, the assertion that religious liberty and the right of same-sex couples to marry are grounded on similar justifications may seem untenable to some individuals. After all, a person on

43. See, e.g., Ben Schuman, *God and Gay: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 Geo. L.J. 2103, 2119–20 (2008) (quoting Santorum’s statement regarding Lawrence v. Texas, 539 U.S. 558 (2003), that, “If the Supreme Court says that you have the right to consensual sex within your home, than you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery.”); Stanley Kurtz, *Beyond Gay Marriage*, *Weekly Standard*, Aug. 4, 2003, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/002/938xpsxy.asp (predicting, “gay marriage is [likely] to take us down a slippery slope to legalized polygamy and ‘polyamory’ (group marriage)’); The Slippery Slope of Same-Sex “Marriage”, *Family Research Council* 1 (2004), http://downloads.frc.org/EF/EF04C51.pdf (expanding marriage beyond one man and one woman will lead to impossibility of excluding “virtually any relationship between two or more partners of either sex—even non-human ‘partners’”); O’Reilly Suggested that Without Prop 8, “A Man Can Have 27 Wives”; CA Supreme Court Disagrees, *Media Matters For Am.* (Nov. 19, 2008, 6:36 PM), http://mediamatters.org/research/200811190017 (host Bill O’Reilly stating that if states allow same-sex couples to marry they would be required under equal protection to allow polygamous marriages).


45. *Id.* at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).
either side of this contentious debate might argue: How can anyone sensibly assert that my right to engage in morally good behavior has no greater justification than someone else’s “right” to engage in morally reprehensible behavior? If religious opponents to same-sex marriage are bigots to the gay and lesbian community and gay and lesbian couples are abominations to traditional religious congregations, neither group can accept that both communities may be protected under similar rationales.

The argument for shared justifications, however, does not evaluate the moral rectitude of the competing positions about same-sex marriage. Its focus is on the autonomy, identity, and human needs of the people on both sides of this dispute. The question here is not whether costs or burdens are deserved under some moral framework. It is whether they exist and the extent to which they are recognized as substantial. Pursuant to this analysis, imprisoning a gay man for the act of sodomy is an enormous burden. The belief that sodomy is a moral wrong does not change the magnitude of that penalty. A state’s decision to deny a same-sex couple the right to marry results in a broad range of adverse financial and legal consequences.46 These financial and social burdens do not become less severe if one believes that they are justified on moral grounds. Similarly, terminating the employment of a religious individual who refuses to provide services at the wedding reception of a gay or lesbian couple is a serious burden. The characterization of the employee’s conduct as unacceptable discrimination does not change the cost to an individual of losing one’s job.47

46. There are numerous studies documenting the economic costs of denying same-sex couples the right to marry, see, e.g., The Economics of Equal Marriage, NAT’L ORG. FOR WOMEN (June 2009), http://www.now.org/issues/marriage/marriage_economics_fact_sheep.pdf; Michael D. Steinberger, Federal Estate Tax Disadvantages for Same-Sex Couples (2009), available at http://escholarship.org/uc/item/9nt0170b; Lisa Bennett & Gary J. Gates, The Cost of Marriage Inequality to Gay, Lesbian and Bisexual Seniors (2004), http://www.hrc.org/documents/cost_of_marriage.pdf. Of course, if a state provides for some kind of domestic partnership status for same-sex couples, that may mitigate the economic costs of denying the opportunity to marry with regard to state benefits, but it will be irrelevant to the denial of benefits at the federal level.

47. Professor Berg suggests that another way to approach the reality that both sides of the same-sex marriage debate see the opposing side as acting immorally is to urge both sides to recognize that despite these perceived moral failings, there is much that is virtuous in both traditional religion and committed same-sex relationships. Berg, Common, supra note 4, at 220–24. I agree, but I would cast the argument in traditional civil rights terms.

Several years ago, there was an angry exchange of letters in my local newspaper, The Davis Enterprise, on whether the community should continue to support the Boy Scouts in light of their discrimination against gay youth. In response to those letters I wrote an op-ed piece that evaluated the debate this way:
This distinction between the justification for protecting liberty and the moral evaluation of the way that liberty is exercised resonates with our conventional understanding of religious liberty and can be extended to apply to the right to marry as well. The essence of religious liberty, after all, is the right to be different, and to be wrong. Members of many faiths do not surrender their conviction that adherents of other faiths, or nonbelievers, are deeply and seriously in error in their beliefs and practices. Nor do they doubt that these errors will have serious consequences. To the believer, false faiths may lead their followers to eternal damnation, and lure innocent persons down the wrong road away from G-d.

[A] . . . writer protests that the critical letters [disapproving of the Scouts’ policy] seem to be ignoring all of the positive things that the Boy Scouts do—for the boys and young men who are Scouts and for the community as a whole. All the good things about Scouting seem to count for nothing to the critics. All they see is the discriminatory policy, but in reality Scouting is so much more than that. [T]his is an important and valid point. But can’t the writer see that the Boy Scouts’ policy about gays makes the very same mistake? To the Scouts, it doesn’t matter how brave, loyal, helpful, hard-working, reverent, honest or trustworthy a gay person is. It doesn’t matter if they are braver, more trustworthy, or more helpful than lots of other Scouts. All that the Scouts see is their sexual orientation. Nothing else matters.

One of the most demeaning things about discriminatory policies [prohibited by civil rights laws] is that they focus on one characteristic of a person—their race, religion, national ancestry or sexual orientation—and act as if that one attribute determines the value of the person. Scouting is a lot more than one discriminatory policy. And gay people are a lot more than their sexual orientation.

Alan Brownstein, Scouts Discrimination Policies are Hurtful, DAVIS ENTERPRISE, Sept. 24, 2000, at A12. Similarly, traditional religions are a lot more than one allegedly discriminatory belief might suggest. And gay and lesbian families are a lot more than their sexual orientation and conduct.

48. See Martha C. Nussbaum, Liberty of Conscience: In Defense of America’s Tradition of Religious Equality 19 (2008) (“One thing that the religion clauses do is to protect areas of liberty within which people can hold different beliefs and also exercise religious conduct.”).

49. See, e.g., David M. Smolin, Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives, 44 J. CATH. LEGAL STUD. 99, 108 (2005) (describing the inherent irrationality of atheism by explaining “rejecting God is like rejecting the air we breathe; atheism is as rational as fish deciding to ‘not believe’ in the water in which they swim.”).

50. See, e.g., Brownstein, Justifying Free Exercise Rights, supra note 32 at 524, (quoting Kelly Burke, No Sacred Cows in Dean’s Tirade, SYDNEY MORNING HERALD, Mar. 10, 2003, at A4 (reporting comments of Dean of Anglican Cathedral in Sydney Australia that “[D]ifferent religions cannot all be right. Some, or all of them, are wrong. And if wrong, [they] are the monstrous lies and deceits of Satan devised to destroy the life of the believers.”)); Bernard Lewis, I’m Right, You’re Wrong, Go To Hell, ATLANTIC MONTHLY (May 2003), http://www.theatlantic.com/magazine/archive/2003/05/quot-i-apos-m-right-you-apos-re-wrong-go-to-hell-quot/2723/ (“For some religions, just as ‘civilization’ means us, and the rest are
Religious individuals who support religious liberty for adherents of faiths they believe to be false do not do so because they believe that the faith communities receiving protection are moral or correct. The justification for protecting false faiths does not depend on the accuracy or value of what is believed. At its core, religious liberty recognizes the deeply felt need of individuals to determine religious truth for themselves and the right to live one’s life authentically in accordance with one’s religious identity.51

For similar reasons, religious individuals should be able to understand the need of same-sex couples to authentically express their identities and fulfill the responsibilities that arise out of the most barbarians, so ‘religion’ means ours, and the rest are infidels.”); see also Brownstein, Harmonizing, supra note 27, at 110–11, 156–57.

The issue is complicated, of course. There is no uniformity of religious attitude or perspective, and religious positions change over time. For example, Hans K"ung noted that:

The traditional Catholic position [regarding salvation] . . . is widely known: Extra Ecclesiam nulla salus—there is no salvation outside the Church . . . . “[O]utside the Catholic Church, no one, neither heathen nor Jew nor unbeliever nor schismatic, will have a share in eternal life, but will, rather, be subject to the everlasting fire . . . .”

Hans K"ung, A Christian Response, in Christianity and World Religions 19, 23 (Peter Heinegg trans., 1993 ed. 1986) (quoting Council of Florence: Denz, 714; DS 1351); The Roman Catholic Church has abandoned this teaching, but other faiths, including some sections of Greek Orthodox Catholicism and Protestantism, share similar beliefs. See Timothy Ware, The Orthodox Church 247 (1997 ed. 1963) (“[Greek Orthodoxy . . . teaches that outside the church there is no salvation.”); John H. Erickson, The Challenge of Our Past: Studies in Orthodox Canon Law and Church History 128 (1991) (“[O]utside the [Greek] Orthodox Church as we see it there is simply undifferentiated darkness in which the Pope is no different than a witchdoctor.”); The Catholicity of Protestantism 92 (R. Newton Flew & Rupert E. Davies eds., 1950) (noting that John Calvin’s idea that outside the church, “no salvation can be hoped for” . . . remains the Protestant conviction down to the present day) (quoting John Calvin, Institutes of the Christian Religion, bk. IV, ch. i, § iv).

Official doctrine and the beliefs of the laity may also be inconsistent. One recent survey reported that 52% of American Christians believe that adherents of at least one non-Christian faith can achieve eternal life while 29% of American Christians responded that they believe that theirs is the one true faith that can lead to eternal life. The percentage of those who believe that theirs is the only true faith is considerably higher for white evangelical Protestants (49%) and black Protestants (45%) than other groups, however. Christians vary in attitudes toward particular non-Christian faiths as well. Thus, 29% of all American Christians believe that Muslims cannot achieve eternal life, but 45% of white evangelical Protestants hold this belief. Many Americans Say Other Faiths Can Lead to Eternal Life, Pew Forum on Religion & Pub. Life (Dec. 18, 2008), http://pewforum.org/Many-Americans-Say-Other-Faiths-Can-Lead-to-Eternal-Life.aspx.

51. Michael McConnell explains that religious liberty in a pluralistic society must recognize that “the individual believer [is] the only legitimate judge of the dictates of conscience.” Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 173 (1992). Religious liberty “protect[s] the freedom to act in accordance with the dictates of religion, as the believer understands them.” Id. at 175.
meaningful relationship in their lives—even if the manifestations of intimacy and love involves conduct they consider sinful. Proponents of same-sex marriage, in turn, should be able to appreciate the importance to religious individuals of being free to authentically express their identity and fulfill the responsibilities that arise from a relationship that defines their existence—even if the manifestations of religious exercise involves conduct they consider immoral.52

The liberty and autonomy rights grounded on this mutual understanding have to operate as a two-way street. These rights cannot meaningfully be restricted solely to those who exercise their liberty and autonomy in approved ways. There is no gold standard that defines the scope of fundamental rights by only protecting what the majority deems to be the best religions or the best kinds of sexual intimacy or marriage. By creating a legal regime that protects individual and institutional autonomy rights, we mutually agree to limit the use of state authority to interfere with core autonomy interests. These limitations must apply with equal rigor when we are in the majority and can use state power to impose our beliefs on others, and when we are a minority and fear having the majority’s beliefs imposed on us. An honest commitment to these principles will support both religious liberty and the right of gays and lesbians to marry the person with whom they choose to share their lives.

II. The Problem of Identifying an Analytic Model for Evaluating Claims for Accommodation by Religious Objectors to Same-Sex Marriages

If my analysis is correct so far, both same-sex couples seeking to exercise the right to marry and religious groups rejecting that right on theological grounds are asserting liberty interests that deserve state recognition and respect. The problem middle-ground commentators confront is figuring out how we should go about reconciling these commonly grounded, but sometimes conflicting, autonomy rights.

52. See Berg, Common, supra note 4, at 207 (“Even though the two are pitted against each other in disputes, the strongest features of the case for same-sex civil marriage also make a strong case for significant religious-liberty protections for dissenters.”); see also Feldblum, Gay Rights and Religion, supra note 3, at 103 (recognizing the impact of anti-discrimination laws on religious identity by acknowledging “the logical intertwining that many people (including religious people) experience between their conduct and their beliefs such that compliance with a neutral civil rights law may burden their belief liberty.”).
A. Ad Hoc and Categorical Approaches for Religious Accommodation

Much of the literature on this issue so far involves relatively intuitive and ad hoc arguments about the propriety of granting religious exemptions and accommodations in particular circumstances.\(^53\) Many of these articles are thoughtfully done—although, as I will explain later, I do not always find the analysis of these writers to be persuasive. There is some commentary, however, that focuses on existing models of accommodation from which useful analogies to same-sex marriage issues might be drawn.\(^54\)

The advantage of looking at existing models of accommodation should be obvious. The United States has a long history of resolving conflicts between religious liberty and public policy requirements through carefully crafted exemptions and accommodations. It makes little sense to ignore what we have learned over time about these kinds of conflicts.

Moreover, and this is a point that needs to be emphasized, there is nothing about same-sex marriage that suggests it represents a unique, outlier problem because of its impact on religious liberty. Civil rights laws often have the potential to create problems for religious individuals and institutions. This is and has been true for laws prohibiting discrimination based on race, gender, and religion.\(^55\) Indeed, one of the reasons that calamitous claims about the impact of same-sex marriage on religious liberty seems so implausible is that they isolate laws affirming same-sex marriage and ignore their shared status with many other civil rights requirements.

Religious individuals and institutions may have legitimate concerns about the reach of civil rights laws in general and the impact such laws may have on religious liberty.\(^56\) There is no reason, however, to think that state recognition of same-sex marriages requires us to

\(^{53}\) See, e.g., Laycock, Afterword, supra note 3, at 195; Berg, Common, supra note 4, at 227–28; Lupu & Tuttle, supra note 2, at 289.

\(^{54}\) See infra notes 61–70 and accompanying text.

\(^{55}\) See, e.g., Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (reviewing the impact of Title VII prohibition on religious discrimination in hiring on religious institutions); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (evaluating government interest in eradicating racial discrimination in education as justification for burdening free exercise rights of private university); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (rejecting discrimination claim brought by female minister against church authorities).

develop an entirely new and distinct methodology for resolving the tension between religious objectors and general laws that challenge the dictates of a person’s faith. Indeed, the contention that religious objectors to same-sex marriage must receive special accommodations beyond those that would be provided to others in comparable circumstances raises questions about preferentialism and equity that need to be addressed and resolved.

1. Uniformity Among Faiths in the Granting of Discretionary Accommodations

One of the perplexing difficulties intrinsic to a regime of discretionary legislative accommodations is the problem of equal treatment among faiths. Not all faith communities and religious congregations oppose same-sex marriage. Moreover, religious objections to facilitating or validating same-sex marriages are not the only religious beliefs or practices that may be burdened by existing or future laws. Conflicts between religious autonomy and public policy are common in a diverse and complex society. Only some of those conflicts will be resolved through adequate accommodations of the needs of religious individuals and institutions. Thus, proponents of accommodation for religious objectors to same-sex marriage have to confront the issue of uniformity and equity. Why should these specific religious beliefs and conduct be accommodated when other religiously motivated conduct remains subject to legal burdens?

As a matter of constitutional mandate under the Establishment Clause, accommodations should not be granted to favored faiths and denied to others in comparable circumstances. Even if minimum constitutional requirements are satisfied, basic concerns of fairness


58. See Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (striking down creation of special school district to accommodate needs of small religious sect in part because of uncertainty that other faiths would receive similarly favorable treatment); Larson v. Valente, 456 U.S. 228, 254 (1982) (holding that Establishment Clause requires invalidation of Minnesota statutory accommodation relieving certain religious organizations from legal obligation to complete registration forms and file financial statements, while requiring other religious organizations to comply with registration and filing mandate); see also Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O’Connor, J., concurring) (arguing that statutory accommodation of employees seeking days off to observe the Sabbath violates Establishment Clause in part because “the statute singles out Sabbath observers for special and . . . absolute protection without affording similar accommodations to ethical and religious beliefs and practices of other private employees.”).
and equity suggest that religious accommodations should be provided on the basis of neutral, nonsectarian criteria that to the extent possible treats all faiths with equal respect.

These principles are far easier to state than they are to apply. In some cases, larger faiths may not need accommodations, because laws are drafted initially in a way that takes their beliefs into account.59 Given that reality, a greater number of accommodations for smaller faiths should not raise undue concerns about partiality or preferentialism.60 Moreover, religions vary dramatically in their practices and beliefs, so much so that there is often no common denominator that helps courts or legislatures determine if one faith is being favored over others with regard to the accommodations it receives.61 Religions are not similarly situated in their need for accommodations, and there is no generic baseline from which the accommodations different faiths receive can be easily measured and compared.62

There are some categorical baselines, however, that allow some possibility for comparative analysis. To take one example, Title VII imposes on employers a fairly lenient duty to accommodate the religious beliefs and practices of employees.63 Under this standard (which

59. EVANS, supra note 31, at 218 (“Many ordinary regulations already accommodate widely practiced religions; they are simply so much a part of our lives that we fail to see them. School closings for Christmas and Easter and Sunday office closings reflect the needs of the Christian majority. However, when Jews ask for excused absences from schools for the Jewish High Holidays, we notice the accommodation request.”). Obviously, employees who are Sunday Sabbath observers do not need to be accommodated when state Sunday closing laws preclude such conflicts between employee religious obligations and workplace responsibilities. Seventh-day Adventists and Jews who observe Saturday as the Sabbath require accommodations. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Braunfield v. Brown, 366 U.S. 599 (1961).

60. Conscientious objector provisions that relieve small pacifist sects of military obligations, for example, may be upheld without undue concern about political favoritism. See generally Gillette v. United States, 401 U.S. 437 (1971) (holding that the Military Selection Service Act providing that religious objectors to a particular war, as well as all wars, does not violate the Establishment Clause).

61. For example, the fact that one faith receives an accommodation for its members who observe Saturday as their Sabbath and work for government agencies requiring employees to work on weekends provides little assistance to a court asked to adjudicate the denial of an exemption from police officer grooming requirements sought by officers whose faiths prohibit them from shaving or wearing their hair short. The two religious practices, Sabbath observance and wearing beards and long hair, and the state’s interest in granting or denying the accommodation, have no relationship to each other.


63. See TWA v. Hardison, 432 U.S. 63, 84 (1977) (interpreting religious accommodation provision in Title VII to allow employer to deny requested accommodation whenever granting it would expose employer to more than a de minimus cost); see also EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. 2008); Weber v. Roadway Express, Inc., 199 F.3d 270, 273 (5th Cir. 2000).
has been adopted in many states as well),64 the denial of an employee’s request for a change in his work schedule in order to allow him to observe the Sabbath is frequently upheld on the grounds that granting the accommodation would impose too serious a burden on his employer or co-workers.65 With this lenient standard as the general background for religious accommodation in employment cases, what would be the justification for presumptively providing private and public employees who object to facilitating or validating same-sex marriages a distinctive accommodation relieving them of religiously objectionable work responsibilities?

As a political matter, the question may not be a difficult one to answer. Same-sex marriage is a politically salient issue today that is likely to be brought to the legislature’s attention. Alternatively, as noted earlier, one might argue that the provision of such accommodations would help persuade legislators and the electorate to support the recognition of same-sex marriages.66 As a normative matter, however, the argument that there is something about religious objections to same-sex marriage that warrants special consideration for accommodation remains to be made. The use of existing accommodation models helps to resolve this concern by basing religious accommodations for objectors to same-sex marriage on accommodations granted in roughly similar circumstances to individuals and communities adhering to different religious requirements.

2. Potential, but Problematic Models of Accommodation

If existing accommodation models may have some utility in working through this problem, as I believe they do, we still have to determine which model should be the basis of our analysis. Several alternative approaches have been suggested.

64. See, e.g., Cook v. Lindsay Olive Growers, 911 F.2d 233 (9th Cir. 1990) (holding that CAL. GOV. CODE § 12940 (Deering 2010), requiring employers to offer religious accommodations unless they present undue hardship, is satisfied when employer allows employee to transfer to lower position); EEOC v. UPS, 1994 U.S. Dist. LEXIS 3614, at *15 (N.D. Ill. March 24, 1994) (“The fact that Plaintiff might have had to wait one to six months before assuming a full-time insider position does not make [the proposed] ... accommodation unreasonable.”).


66. As previously noted, I believe it is hard to evaluate such arguments.
One model analogizes discrimination against same-sex couples to racial discrimination.67 Pursuant to this analysis, *Loving v. Virginia*68 is the paradigm case for arguing that legal restrictions on same-sex marriages are unconstitutional.69 In *Loving*, the U.S. Supreme Court struck down state anti-miscegenation laws on the grounds that they violated both the equal protection clause’s prohibition against racial discrimination and the substantive due process right to marry.70

*Bob Jones University v. United States*71 is the controlling precedent on whether religiously motivated racial discrimination should be accommodated on religious liberty grounds. In *Bob Jones*, a private, religious university denied admission to students in interracial marriages and threatened to expel any current students who married or dated someone of a different race. When the IRS revoked the university’s tax exempt status because of its racially discriminatory policies, the university challenged that decision in court on the grounds that the revocation violated the free exercise right of private religious schools to operate their programs according to their religious beliefs. In rejecting that argument, the Court held that the government’s interest in eradicating racial discrimination in education “substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”72

Some commentators applaud this analogy to racial discrimination.73 Others fear it.74 They all agree, however, that if this model is

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67. See, e.g., Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaign*, in EMERGING CONFLICTS, supra note 2, at 108 (discussing, but rejecting, the analogy between opposition to same-sex marriage and racial discrimination). The race discrimination model has been the focus of same-sex marriage commentary for many years. See, e.g., James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 111–16 (1993).


70. *Loving*, 388 U.S. at 11–12.


72. Id. at 604.

73. See, e.g., John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. Rev. 1119, 1164 (1999) (arguing that the “analogy [between same-sex marriage and interracial marriage] is powerful and persuasive”); Feldblum, *Gay Rights and Religion*, supra note 3, at 129 (arguing that in the commercial arena “[j]ust as we do not
adopted, only the most narrow and limited accommodations for religious objectors to same-sex marriages will be accepted, if any are accepted at all.

An alternative model focuses on the exemptions granted to health care providers who are conscientiously opposed to performing abortions, sterilizations, and other medical procedures prohibited by their faith. The adoption of this model would support a broad range of accommodations exempting religious objectors from many legal obligations to support or facilitate the marriage of a same-sex couple.

To narrow the scope of accommodations suggested by the health care conscience clause analogy—and avoid some of the serious costs some accommodations might impose on a same-sex married couple—commentators have proposed a limitation to this analysis: the religious objectors’ claim for an exemption from legal or employment obligations requiring them to facilitate or recognize same-sex marriages would be denied in certain circumstances. Specifically, a claim for religious accommodation would be rejected when granting it would cause same-sex couples to suffer significant material hardship—by denying them access to needed goods or services that they could not obtain from alternative providers.

I do not think either of these two models provides a persuasive foundation for thinking about religious objections to same-sex marriages. Racial discrimination provides an inappropriate analogy, because racism plays such a uniquely invidious role in U.S. history. This

tolerate private racial beliefs that adversely affect African-Americans . . . even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect [the ability of] LGBT people [to live in the world].”; Gilreath, supra note 2, at 209–10 (explaining that if the analogy between same-sex marriage and interracial marriage is accepted, as it should be, the idea of a county clerk refusing to issue a marriage license to a gay couple on religious grounds would be as unacceptable as “the idea of a county clerk being able to refuse a marriage license to a Black and white couple”).

74. See, e.g., Bold, supra note 19, at 201; Berg, Common, supra note 4, at 234–35. Douglas Kmiec expresses concern that under the reasoning of Bob Jones, an argument could be raised that churches and other religious organizations should lose their federal tax-exempt status for refusing to accept same-sex marriages. After considering the issue, he explains why the arguments for any such change in federal tax policy are unpersuasive. Kmiec, supra note 67, at 108–11.

75. See, e.g., Wilson, Matters of Conscience, supra note 4, at 77–102.

76. Id. at 101. Other commentators do not necessarily press the healthcare analogy in their work but support essentially the same framework. See, e.g., Berg, Common, supra note 4, at 208 (arguing that “[a]ccommodation[s] should be made . . . unless the religious objector’s refusal of services would cause a concrete hardship on the ability of the same-sex couple to marry”).
is our country’s original sin. The goal of purging racial discrimination from our polity and society has no equal and no counterpart.

I think the analogy to conscience clauses for health care providers who refuse to perform abortions is also inadequate. These clauses are limited in their scope to a set of specific health care decisions. They have little relevance to objections to ongoing relationships that may endure for decades. Nor do these accommodations protect religiously motivated discrimination directed at an individual’s or a couple’s status or identity. Accommodating discrimination against same-sex marital couples is simply more complex and far-reaching than conscientious objection to performing abortions.

The most obvious distinction between the conscience clauses provided to health care providers and the religious accommodations sought by objectors to same-sex marriage is that the latter accommodation extends far beyond the provision of a singular service. The religious objector demands the liberty to avoid any conduct that treats the same-sex couple as validly married. The breadth of this accommodation is extraordinary. Marital status entitles individuals to share property rights, participate in health care decisions, and assume parental responsibilities over children. As Lupu and Tuttle note, such an accommodation would “extend[ ] to all services sought by same-sex couples during the entire course of a relationship, from food and shelter to healthcare and legal representation.” To be even roughly comparable in scope, a conscience clause for health care providers relating to abortion would have to exempt religious individuals and

77. See Berg, Common, supra note 4, at 235 (arguing that “racial discrimination is unique: it is the only wrong over which we have fought a civil war . . .”).

78. Thus, for example, while restrictions on all other rights of inmates in prisons are reviewed under an extremely deferential standard of review, the temporary segregation by race of new prisoners in prison cells to avoid violence was subjected to strict scrutiny. Johnson v. California, 543 U.S. 499 (2005). Even in prisons, the goal of eliminating racial discrimination has the highest priority.

79. See Berg, Common, supra note 4, at 227 n.130 (describing provisions of model religious accommodation statute which he endorses).

80. Lupu & Tuttle, supra note 2, at 292. Lupu and Tuttle correctly conclude that the distinction between conduct facilitating the act of getting married and conduct that recognizes a marriage as valid

is of great conceptual significance. Solemnization and celebration of a wedding are one-time events in the life of a particular couple, and represent a religious organization’s highest level of engagement and imprimatur. By contrast, the availability of goods and services may represent significant material opportunities over a lengthy period of time for a same-sex couple, and, in at least some circumstances, represent considerably less significant symbols of approval from a religious organization.

Id. at 301.
institutions from any obligation to provide health care of any kind to any woman who had an abortion sometime during her life and any man who had cooperated with her decision to terminate her pregnancy.

I also do not believe that limiting accommodations to circumstances involving significant material hardship for same-sex marital couples solves the problem with this approach. Indeed, given the purported commitment to a “live-and-let-live approach,” the lack of normative symmetry here is troubling. First, religious accommodations are granted regardless of whether the religious objectors can avoid the burdens on their faith without suffering undue hardship. The same-sex couple’s protection against discrimination, by contrast, is restricted to only those circumstances in which they will suffer material hardship.

The assumption underlying this conclusion appears to be that the religious individual never has any alternatives other than losing his job or closing his business if he is not provided an accommodation excusing him from providing services that facilitate or recognize a same-sex marriage. Thus, the same-sex spouse who asks a department store employee for assistance in buying a suit for his wedding and the same-sex couple who orders a wedding cake from a small bakery will often have alternative choices available to them to obtain the goods and services they are seeking. Without an exemption from anti-discrimination laws, the employee and bakery owner have no alternatives—other than to break the law or violate the tenets of their faith.

But this assumption will be erroneous in many circumstances. The department store employee may be able to shift his position from

This does not mean that the accommodation of conduct that recognizes a marriage as valid is never justified. It does suggest that this distinction must be acknowledged, and that the expansion of costs that it engenders must be taken into account.

81. See supra note 4 and accompanying text.

82. Laycock, for example, seems to suggest that if accommodations to religious objectors in for-profit businesses are denied the alternatives are “requiring a merchant to perform services that violate his deeply held moral commitments,” or “exclude[ing] from a range of occupations and professions many believers who are unwilling to violate their faith commitments,” Laycock, Afterword, supra note 3, at 198, 201. Berg is even more explicit. He writes that if accommodations are not granted, the religious individual or institution, “must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money.” Berg, Common, supra note 4, at 229. In the section of her article dealing with religious objectors in business and the professions, Wilson discusses the varying burdens same-sex couples may confront if accommodations are granted but does not evaluate the alternatives available to the objector if an accommodation is denied. Wilson, Matters of Conscience, supra note 4, at 100–02.
men’s clothing to some other department at the store in which he works. That new position may be less desirable than his previous work responsibilities, but workplace accommodations often require some sacrifice from the religious employee.\footnote{Some accommodations require serious sacrifice. See, e.g., Drum v. Ware, 7 Fair Empl. Prac. Cas. (BNA) 269, 7 Empl. Prac. Dec. (CCH) P9244 (W.D.N.C. 1974) (upholding the opportunity to work on a part-time basis at another post office 150 miles away as a reasonable accommodation of a postal worker who refused to work on Saturdays for religious reasons). I do not suggest that such accommodations are always fair or adequate. The point is that there is a continuum of burdens that fall between termination and full accommodation. For examples of other burdensome accommodations see Reed v. UAW, 569 F.3d 576 (6th Cir. 2009) (holding union made reasonable accommodation by allowing union member who had religious objection to paying union dues to donate money to charity in lieu of paying union dues, despite required payments to charity being twenty-two percent more than union dues); Bruff v. N. Miss. Health Servs., 244 F.3d 495, 502 n.23 (5th Cir. 2001) (holding employer had provided reasonable accommodation by allowing employee to apply for alternative positions that would have required “significant reduction in salary” after employee objected on religious grounds to providing counseling to improve homosexual or extra-marital relationships); Miller v. Drennon, No. 3:89-14664, 1991 WL 325291 (D.S.C. June 15, 1991) (holding employer made reasonable accommodation to employee-paramedic who objected to sleeping in the same room as women by allowing employee to switch shifts, authorizing him to sleep in his ambulance; and by offering use of heated, pop-top camper).}

Certainly, the choice will not always be an exemption or termination. Similarly, the bakery owner may have to give up the opportunity to make and sell wedding cakes. That may result in economic loss, but it may not require the bakery to shut down its operations.

Of course, if an accommodation regime is attempting to be fair and equitable to both religious objectors and same-sex couples, it would not be acceptable to ignore the economic costs incurred by religious providers and employees while protecting same-sex couples from any economic burden resulting from discrimination. But many religious accommodations will impose serious costs on same-sex couples. The failure to adequately address those costs is a serious weakness of the commentary advocating religious accommodations except when they result in serious hardship.

There are two issues here. First, in current commentary, there is very little said about the cost of providing accommodations to religious institutions.\footnote{Berg, for example, argues that, “accommodation should extend to a broad range of religious organizations,” Berg, Common, supra note 4, at 227, and that these accommodations should not be limited to facilitating a marriage ceremony but would apply to any conduct that required the organization to treat a marriage as valid. Id. at 227, n.129. Nothing is said about the burden these accommodations would impose on same-sex couples.} As I will discuss later in this essay, I agree that many institutional accommodations should be granted. But shouldn’t the cost of these accommodations be recognized as part of the social
calculus under discussion—if for no other reason than as a sign of respect for the price that protecting religious liberty demands in these situations? For example, California today has a twelve percent unemployment rate. Permitting nonprofit religious organizations to discriminate against hiring gays and lesbians who are qualified to perform the jobs for which they have applied causes undeniable harm to rejected applicants. Allowing a religious institutional employer to deny health care benefits to the same-sex spouse of a gay or lesbian employee may result in substantial out of pocket expenses for the couple in obtaining private insurance or paying for uninsured medical treatments. By denying a same-sex couple access to subsidized married student housing, a religiously affiliated university may substantially increase the couple’s living costs. These religious liberty accommodations may be justified, but they are not free.

Second, some commentary seems to assume that all goods and services are fungible in quality and price. Thus, in discussing accommodations for commercial businesses, the burden on same-sex couples is only taken into consideration in two circumstances. A hardship would be substantial enough to negate a religious accommodation if the same-sex couple is completely denied access to the good or service at issue. Alternatively, an accommodation should not be granted if the couple would be subject to inordinate delay in obtaining the good or service because they would have to confront so many objectors until they were finally able to identify a willing provider.

86. See generally Levin v. Yeshiva Univ., 754 N.E.2d 1099 (N.Y. 2001). For example, the rental rate for on-campus family housing at UC Davis is $740 to $760 per month for a two-bedroom apartment. The average cost of an off-campus two bedroom apartment is around $1,200. Davis Apartment Vacancy Rate Increases Fourfold, UC DAVIS NEWS & INFO., (Dec. 16, 2009), http://www.news.ucdavis.edu/search/news_detail.lasso?id=9343.
87. See, e.g., Wilson, Matters of Conscience, supra note 4, at 94 (explaining that “legislative accommodations necessarily would come at the expense of same-sex couples in those unusual situations where no other providers are reasonably available and there is a real barrier to access,” but in most cases the only cost will be to “the dignitary interests of same-sex couples.”); Berg, Common, supra note 4, at 226 (arguing for strong religious accommodations that would be overridden “if the objector’s refusal to serve would effectively prevent the same-sex couple from receiving services and so impose a substantial hardship on their ability to marry.”).
88. It is not always clear exactly what constitutes the kind and magnitude of hardship that merits consideration in determining whether a religious accommodation is too costly to be accepted. Laycock explains that “the inconvenience of having to get the same service
This is simply too narrow a basis for discussing costs and burdens. Most jobs, for example, differ in terms of duties, salary, benefits, and work hours. Even primary care physicians have varying degrees of experience and expertise. Anyone who believes that all caterers are comparable in cost, menu, and quality has never arranged a wedding reception or bar mitzvah.

Consider the problem of religious accommodations for landlords who refuse to rent homes or apartments to same-sex couples. Pursuant to the above framework for evaluating hardship, the operative question would be whether allowing religious landlords to discriminate against same-sex couples would prevent the couple from finding housing in the community. If the answer to that question is “no,” as it probably would be in many urban areas, then the sole cost to the couple in being rejected as tenants of the apartment or house they sought to rent would be the dignitary harm of experiencing discriminatory treatment.

Happily as a law professor, I am able to own my own home and have not had to enter the rental market for quite some time. But I have not forgotten what renting an apartment involves from my experiences during less prosperous years, while looking for housing while on sabbatical, and talking to my adult children who are entering the rental market. Finding some place to rent is usually possible. Finding the kind of place you want, in the area you want to live, at an affordable price, is something else again. Being denied an apartment or house may mean that a same-sex couple has to rent a housing unit of lower quality or higher price, one that is further from work or in the wrong school district, one that is in a less safe neighborhood or will not allow them to keep their pets. All of these are very real costs, the kind of costs that cause many couples to look for weeks or more before finding the right place to rent. Any serious discussion of the equities of accommodating religion-based discrimination in housing should take those costs into account.

from another provider nearby,” does not justify interfering with the religious liberty of a commercial service provider. Laycock, Afterword, supra note 3, at 198. He is less explicit, however, in describing what constitutes an unacceptable burden on same-sex couples. Here, he identifies “choke points,” a “merchant’s refusal . . . [that] might actually delay or prevent” a couple’s access to goods and services, and situations where “the available choice of merchants might become so constrained that inconvenience would become a significant hardship.” Id. at 199–200. It appears that his focus is on denial of access or inordinate delay, rather than quality or price.
The weight assigned to the dignitary and emotional costs of discrimination varies in the literature.\textsuperscript{89} From an abstract legal perspective, it is worth remembering that these are constitutionally cognizable injuries. Being assigned to a separate-but-equal railroad car or drinking fountain on the basis of one’s race or other suspect characteristic (even by a private actor) is an injury in fact.\textsuperscript{90} The essence of equal protection doctrine and many civil rights laws is that it is fundamentally demeaning for individuals to have their value as a person, a tenant, an employee, or a customer determined by one attribute or characteristic.\textsuperscript{91}

As a practical matter, I think the injury caused by discrimination is harder to deal with than some commentary recognizes. I am tempted to suggest that anyone who describes the experience of being denied housing or service in a place of public accommodation on the basis of race, religion, or other personal characteristics as a "symbolic" injury\textsuperscript{92} has never had to endure such treatment. But that may not be the case. People have different feelings when they are exposed to this

\textsuperscript{89} Compare Feldblum, \textit{Gay Rights and Religion}, supra note 3, at 119 (describing being “denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian . . . [as] a deep, intense, and tangible hurt”), and Gilreath, \textit{supra} note 2, at 208–09 (arguing that discrimination does not simply cause individual gays and lesbians embarrassment and offense; it demonstrates and affirms their lack of equality and status), with Laycock, \textit{Afterword}, \textit{supra} note 3, at 198 (describing the impact of discriminatory conduct as similar to the “hurt feelings or personal offense” one experiences from insulting speech—which typically does not justify legal redress), and Berg, \textit{Common}, \textit{supra} note 4, at 229 (describing the “disturbance, hurt, and offense” of being subject to discriminatory treatment by commercial providers, standing alone, as being neither concrete, tangible nor sufficient an injury to justify denying accommodations to religious objectors).


\textsuperscript{91} See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (explaining that “[o]ne of the principle reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000); Gay Rights Coal. v. Georgetown Univ., 536 A.2d 1, 32 (D.C. 1987) (describing the justification for provision protecting gays and lesbians against discrimination in \textit{District of Columbia Human Rights Act} as the determination “that a person’s sexual orientation, like a person’s race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations”).

\textsuperscript{92} See Berg, \textit{Common}, \textit{supra} note 4, at 229 (describing protection against nonmaterial impact of discrimination as symbolic in nature).
kind of an affront. I think it is fair to say that for some reasonable number of people, this is no minor injury. The injury is also magnified if it occurs in the presence of one’s spouse or children. Again, I recognize that some of these costs will be unavoidable if accommodations are going to be granted. But these burdens should not be minimized.

The above analysis indicates that an accommodation regime that takes respective hardships into account is going to be more complicated than the existing commentary suggests. But even under a one-sided regime that granted accommodations except in cases of serious hardship to same-sex couples, this approach seems extraordinarily and unacceptably impractical. How does one measure and identify serious hardship? If economic cost is a relevant variable, do we also take the wealth or poverty of the injured couple into account? Nor will conditions be the same over time. Vacancy rates, for example, vary monthly, seasonally, and yearly. It is not just geography that determines the availability of market alternatives but time as well.

Moreover, this problem extends beyond rental housing. Suppose a same-sex couple seeks accommodation at a bed and breakfast establishment far from home during holiday season. May the proprietor deny them an available room because of their same-sex relationship? Would having to take rooms at a large hotel several miles away at almost twice the price constitute serious hardship? Because of the highly contextual nature of this limitation on accommodations, in many cases neither the religious objector nor the same-sex marital couple would receive adequate guidance as to the scope of their rights. Any model that requires an ad hoc hardship limitation on relig-

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93. Years ago, when the regulation of hate speech at public universities was being seriously discussed at law schools, I attended several programs in which this subject was addressed by faculty and students. I confess that I remember little of the substance of those meetings. What I do recollect, however, was the substantial difference in attitude of individuals who had been victimized by hate speech. To some people, hateful insults were easily ignored or at least tolerated as a nuisance. Other people found them to be far more hurtful and difficult to deal with or forget.

94. See Laycock, *Afterword*, supra note 3, at 200 (suggesting that accommodations for merchants might be less justified in the Bible Belt (where there will be fewer providers willing to serve same-sex clients) than in Greenwich Village (where presumably many more merchants would be willing to serve same-sex customers)).

95. My example presumes no prior reservation. Thus, it does not implicate the more serious burden of refusing to honor a reservation when the proprietor discovers that his guests are a same-sex couple. See, e.g., Laycock, *Afterword*, supra note 3, at 198; Feldblum, *Moral Conflict and Conflicting Liberties*, supra note 2, at 123–24. My example does presume a common vacation scenario where available accommodations are limited.
ious accommodations will be extremely difficult to administer fairly or efficiently.

I recognize some indeterminacy is inevitable under any system of accommodations and that any framework will be a work in progress that evolves and becomes more definite through experience and revisions over time. But an appropriate model of accommodation can narrow the scope of indeterminacy and provide the community with a strong intuitive sense of when accommodations or exceptions from accommodations should be recognized.

No matter what model of accommodation is adopted, one admonition cannot be avoided or ignored. If any analysis evaluating the costs of granting or failing to grant accommodations is going to be persuasive, it must demonstrate to both sides of the same-sex marriage debate that the costs and burdens they are being asked to bear are accurately described and acknowledged. Ignoring the costs resulting from the accommodation of religious organizations does not do that. Ignoring all of the material costs resulting from the accommodation of businesses other than the complete denial of access to goods and services does not do that. Emphasizing that without accommodations, some religious individuals may lose their job, be forced to leave their profession, or sell their business is clearly an important and valid point. But it must also be acknowledged that in some cases, the objector may be able to obey his religious obligations without incurring such serious burdens.

III. Equating Accommodations for Discrimination Against Same-Sex Couples with Accommodations for Religious Discrimination

There is a better model available than racial discrimination or conscience clauses for health care providers. The most persuasive and useful model to serve as a foundation for evaluating religious accommodation claims related to same-sex marriage is religion itself. That is, the starting place for determining whether an accommodation should be granted is to ask whether a comparable accommodation would be granted to an individual or institution seeking the right to discriminate on the basis of religion in providing services or benefits to others. In situations where conscience clauses are generally adopted to free a religious objector from any duty to perform, facilitate, or acknowledge the beliefs and practices of people of other faiths, there may be an initial presumption that a similar accommodation should be adopted with regard to same-sex marriages.
This analogy would not be conclusive. Religious discrimination may be a persuasive place to begin our inquiry, but it will not always provide an adequate answer to accommodation questions. There will still be places where distinctions need to be drawn. But I think that discrimination on the basis of religion comes closer than any other arguable model to helping identify and justify appropriate accommodations for religious objectors to same-sex marriage.

Several reasons support this analogy. To begin with, this model presents a normative framework that at least has the possibility of being acceptable to both sides of the same-sex marriage debate. In carefully working out accommodations for religion-based religious discrimination, we recognize that there is something of value on each side of the scale.\textsuperscript{96}

This model also communicates an important message to those who will bear the cost of accommodating religious objectors to same-sex marriage. Many religious individuals value religious liberty. They understand that permitting religious institutions to discriminate on the basis of religion both protects and burdens religious liberty. Using religious discrimination as the operative model for evaluating accommodations for religious objectors to same-sex marriage counters the contention that the scope of accommodations devalues the interests of gays and lesbians. Accommodating religious discrimination in appropriate circumstances may impose costs on religious individuals, but it does not devalue their rights or interests. It simply recognizes that in some situations their rights and interests may be outweighed.

The religious discrimination model also creates a practical symmetry. Religious individuals will stand in the same shoes as same-sex couples at least to some extent. The breadth of accommodations ac-

\textsuperscript{96} Justice Brennan’s concurring opinion in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 340 (1987), emphasizes the importance of these competing values. Brennan votes to uphold amendments to Title VII, which exempt nonprofit religious organizations from the statute’s prohibition against religious discrimination in hiring, but he is cognizant of the religious liberty costs and benefits of doing so. \textit{Id.} at 341–42. Thus, Brennan writes, “we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.” \textit{Id.} at 342–43. He also explains, however, that an exemption that puts a person “to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or . . . employment itself . . . [has] the potential for coercion . . . [which] is in serious tension with our commitment to individual freedom of conscience in matters of religious belief.” \textit{Id.} at 340–41. See Steven G. Gey, \textit{Why is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment}, 52 U. Pitt. L. Rev. 75, 92 (1990) (explaining that “the regulation being lifted to avoid burdening the free exercise of religion [in Amos] is a regulation protecting the free exercise of religion.”).
cepted under this model justifies discrimination against religious individuals and groups as well as same-sex couples.

This model also helps to justify the denial of accommodations in appropriate circumstances. As noted previously, many religious individuals forcefully reject the tenets of other faiths and the beliefs of those who deny the existence of G-d. Thus, when civil rights laws prohibit religious discrimination, they may be asking people of faith to facilitate beliefs and practices they consider sinful and immoral. The decision to sometimes deny accommodations to persons and institutions whose faith requires them to discriminate on the basis of religion recognizes this reality. These decisions also recognize, however, that the burden on religious liberty resulting from the denial of accommodations may be outweighed by the harm experienced by the victims of religious discrimination.

Our society has struggled with developing a careful balance of the competing interests at stake in developing exemptions from civil rights laws when religious liberty and equality interests fall on both sides of the scales. We have a track record on this issue. Moreover, we have collective intuitions grounded on experience that we can draw on in evaluating these issues. Given the common foundation underlying the liberty and equality interests of both same-sex couples and those seeking religious accommodations, we may look to that record, experience, and informed intuitions as a fitting framework for evaluating requests for accommodation by religious objectors who conscientiously oppose facilitating or recognizing same-sex marriage.

What would a system of accommodations look like under the model I have proposed? I can only offer some examples for the purposes of this article, but those examples should provide helpful illustrations of the approach I am endorsing. First, this model would protect non-profit religious institutions far more than it would protect commercial businesses.97 Title VII’s exemption of non-profit religious institutions denying benefits or services to same-sex couples might be less defensible if the organization is “generally open to all without regard to religion” but are more justified if the organization commonly practices religious exclusivity. Lupu & Tuttle, supra note 2, at 297. I am not convinced that this is an appropriate factor to consider. Generally speaking, I am wary of the idea that more exclusionary faiths are more deserving of accommodations than congregations and institutions that are more open to outsiders. Certainly, an accommodation policy that requires discrimination against people of other faiths as a pre-condition for accommodating objectors to same-sex marriage creates a somewhat perverse incentive. Moreover, the theological tenets of a particular religion may not preclude extending benefits to members of different faiths but would prohibit the provision of such benefits to same-sex couples.

97. Lupu and Tuttle suggest that accommodations for religious institutions denying benefits or services to same-sex couples might be less defensible if the organization is “generally open to all without regard to religion” but are more justified if the organization commonly practices religious exclusivity. Lupu & Tuttle, supra note 2, at 297. I am not convinced that this is an appropriate factor to consider. Generally speaking, I am wary of the idea that more exclusionary faiths are more deserving of accommodations than congregations and institutions that are more open to outsiders. Certainly, an accommodation policy that requires discrimination against people of other faiths as a pre-condition for accommodating objectors to same-sex marriage creates a somewhat perverse incentive. Moreover, the theological tenets of a particular religion may not preclude extending benefits to members of different faiths but would prohibit the provision of such benefits to same-sex couples.
organizations from the statute’s prohibition against religious discrimination in hiring would extend to the hiring of married gays and lesbians. If a married gay or lesbian is hired, the exemption might be reasonably applied to the provision of spousal benefits to the nonemployee spouse of the same-sex couple. These accommodations impose serious costs in increased medical insurance premiums and restricted job opportunities. We have determined, however, that the autonomy of religious institutions justifies the imposition of such costs on religious individuals and a similar analysis would apply for same-sex couples.

Accommodating discrimination in the provision of goods and services by religious institutions raises harder issues and cannot be resolved by a blanket rule. Religious schools, day care centers, and summer camps that are permitted to practice religious exclusivity in accepting children would be permitted to exclude the children of gay and lesbian families as well. In other circumstances, however, the autonomy of religious institutions would have to be subordinated to the needs of gay and lesbian families.

Religiously affiliated hospitals would be required to recognize the validity of a same-sex marriage and the rights conferred by that relationship and status. In part this reflects the reality of a scarcity of med-

In my judgment, the operative issue is whether a religious organization should be permitted to discriminate on the basis of religion. From that perspective, in most cases, the extent to which it actually does discriminate on the basis of religion would be largely irrelevant to the justification for accommodation in same-sex marriage cases.

99. Lupu and Tuttle take no position on this issue. I find it an easier issue than they do perhaps in part because I believe that the costs of such accommodations can and should be mitigated by government cost spreading. See infra notes 116–19, and accompanying text.
100. Some state anti-discrimination statutes explicitly permit religious schools to practice religious discrimination in admissions. See, e.g., MINN. STAT. § 363A.26 (2004) (noting that an “institution organized for educational purposes that is operated, supervised, or controlled by a [non-profit] religious association . . . corporation . . . or society” is not prohibited from “(1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation . . .”). Religious schools clearly believe that they have a similar right to deny admission to gay or lesbian students or children of gay or lesbian couples. See, e.g., Maura Dolan, School Can Expel Lesbian Students, Court Rules, L.A. TIMES, Jan. 28, 2009, http://articles.latimes.com/2009/jan/28/local/me-school28 (chronicling expulsion of two students from California Lutheran High School for being in lesbian relationship); Press Release, Archdiocese of Denver, Statement of the Archdiocese of Denver on Catholic School Admissions Policy (March 5, 2010), http://www.archden.org/repository//Documents/PressReleases/Education/StatementOnSchoolPolicy_SacredHeartJesusBoulder_3.5.10.pdf (“Parents living in open discord with Catholic teaching in areas of faith and morals unfortunately choose by their actions to disqualify their children from enrollment.”).
ical resources in many communities, the limitations on choice created by exigent medical circumstances, and the vulnerability and dependency of patients and their families to hospital policy. It is also based on our intuitive understanding of the propriety of religious discrimination in this context. I cannot imagine a religious hospital being allowed to deny the legal prerogatives due the spouse of a patient because the hospital objected to an interfaith marriage or the marriage of previously divorced individuals. It is also inconceivable to me that a religious hospital could deny the prerogatives of the parent of a child-patient because the marriage of the parent to the child's birth mother violated the religious tenets of the sponsoring faith.

Accordingly, religious hospitals would be required to acknowledge the rights due the same-sex spouse of a patient in their care and the parental rights of same-sex parents of a child receiving treatment. Spouses could not be denied either visiting opportunities or the power to participate in health care decisions that are based on marital relationships because of the hospital’s refusal to accept the validity of their marriage. Hospitals also could not treat a parent whose legal relationship to a child-patient was derived from his or her marriage to a same-sex spouse any differently than a parent in an opposite-sex marriage.

The question of whether a religious organization providing adoption services should be permitted to refuse to place children with same-sex couples has received particular attention because of the controversy surrounding the Catholic Charities adoption program in Massachusetts and other locations. Confronted with a government demand that it consider same-sex couples as adoptive parents, Catholic Charities has terminated its adoption services. Under the religious discrimination model, the analysis would begin by asking whether religiously affiliated adoption programs are permitted to refuse to


place children with a family of a different faith than the birth parents.\textsuperscript{103} To the extent that law and culture accept the decision of birth

\textsuperscript{103} An analysis of the role that religion plays in the adoption of children in the United States is obviously beyond the scope of this article. It should be noted, however, that many states have statutes that, to a limited degree, require or prefer religious matching of adoptive parents and children. Some of these states have statutory provisions which require that children be placed for adoption with persons of the same religious faith when practicable. See \textit{MD. CODE ANN., FAM. LAW} § 5-520 (West 2010) ("In placing a minor child for adoption or in giving the care, custody, or control of a minor child to any person, a licensee shall give preference to persons of the same religious belief as that of the child or the child’s parents unless the parents specifically indicate a different choice."); \textit{MO. REV. STAT.} § 211.221 (2004) (requiring adoption agencies to give preference to adoptive parents that are the same religion as the child’s parents when practicable); \textit{NEV. REV. STAT.} § 62E.130 (2009) ("In placing a child in the custody of a person or a public or private institution or agency, the juvenile court shall select, when practicable, a person or an institution or agency governed by persons of . . . [t]he same religious faith as that of the parents of the child."); \textit{OHIO REV. CODE ANN.} § 2151.32 (West 2010) ("In placing a child under any guardianship or custody other than that of its parent, the juvenile court shall, when practicable, select a person or an institution or agency governed by persons of like religious faith as that of the parents of such child, or in case of a difference in the religious faith of the parents, then of the religious faith of the child, or if the religious faith of the child is not ascertained, then of either of the parents."); \textit{OKLA. STAT. tit. 10A, § 1-4-705.A} (2010) (requiring that child be placed with persons or agency of same religious faith as parents “if possible”); \textit{20 PA. CONS. STAT. ANN. § 5113} (West 2005) ("A person of the same religious persuasion as the parents of the minor shall be preferred as guardian of his person."); \textit{S.C. CODE ANN.} § 63-15-20 (2009) ("In placing the child in the custody of an individual or a private agency or institution, the court shall, whenever practicable, select a person or an agency or institution governed by persons of the same religious faith as that of the parents of such child . . ."). Two states seek to preserve and protect the religious faith of children. \textit{NEB. REV. ST.} § 43-509 (2009) (requiring that religious faith of children be “preserved and protected”); \textit{N.Y. SOC. SERV. LAW} § 573 (McKinney 2008) (requiring that children be placed with adoptive or foster parents of same religious beliefs as child “where practicable”). New York also seeks to, "give effect to [the parent’s] religious wishes . . .” \textit{Id.} Four states use matching only when requested by the natural parents. \textit{DEL. CODE ANN. tit. 13, § 911} (requiring that, absent hardship in securing placement, adoption agencies place children with adoptive parents of whatever faith desired by the natural parent(s)); \textit{KY. REV. STAT. ANN.} § 199.471 (West 2009) (requiring that petitions for adoption shall not be denied on basis of religious, ethnic, racial, or inter-faith background of adoptive applicant, unless contrary to expressed wishes of biological parent(s)); \textit{ME. REV. STAT. tit. 22, § 4063} (2004) ("If the parents of a child in the custody of the department request in writing that the child be placed in a family of the same general religious faith, for foster care or adoption, the department shall do so whenever a suitable family of that faith can be found."); \textit{MINN. STAT.} § 259.29 (2007) ("If the birth child parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the birth parent or parents, the agency shall place the child in a family that meets the birth parent’s religious preference."). California permits adoption agencies to refuse to give children to a person of a different religious faith than the child or their parents. \textit{CAL. WELF. & INST. CODE} § 11264 (West 2010) ("[N]o institution shall be required to surrender a child to any person of religious faith different from that of the child or the parents of the child.").

For further information on the role that religion plays in adoption procedures see Laura J. Schwartz, \textit{Religious Matching for Adoption: Unraveling the Interest Behind the “Best Inter-
parents to limit the adoption possibilities available to their child based on the religious beliefs of the adopting family, and religiously exclusive adoption agencies are selected by birth parents with these restrictions in mind, permitting the agency to restrict adoptions to same-sex couples would be acceptable. At a minimum, it would be acceptable in an environment where there were a sufficient number of organizations involved in placing children for adoption so that religious restrictions would not present an unacceptable barrier to same-sex couples adopting children and would not impose unacceptable burdens on children waiting to be adopted.

Difficult questions also arise with regard to non-profit religious organizations that receive government support. Generally speaking, religious organizations receiving government grants or subsidies are prohibited from denying equal services to clients of other faiths or nonbelievers in government funded programs. Although I know of no case on point, I would presume that these requirements would preclude a publicly funded faith-based provider from refusing to provide services to a couple or family because of theological concerns about the validity of the couple’s marriage. Thus, the issue of government funding would be another basis for limiting accommodations related

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104. This analysis presumes that an adoption agency affiliated with a particular faith would be permitted to reserve its services for birth parents committed to the raising of their children in accordance with the tenets of that faith. An agency accepting children of birth parents of various faiths would be more limited presumably in its ability to impose religious restrictions on the adoption of all the children it attempted to place with new families.


106. Charitable choice legislation providing funding to religious organizations for the provision of social welfare services typically prohibit religious discrimination against the intended beneficiaries of the funded services. See, e.g., 42 U.S.C. § 604a(g) (2006) (stating that “a religious organization shall not discriminate against an individual in regard to rendering assistance funded under [this section] . . . on the basis of religion, a religious belief, or refusal to actively participate in a religious practice”); Children’s Health Act of 2000, 42 U.S.C. § 300x-65(f) (2006) (“A religious organization providing services through a grant, contract, or cooperative agreement under any substance abuse program . . . shall not discriminate . . . on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.”); see also Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding constitutionality of Ohio school voucher program, which required religious schools to accept students of all religions as a condition for eligibility of voucher funds).
Accommodations for commercial enterprises, however, are much more difficult to justify. One problem here is as true for religious discrimination as it is for discrimination against gay and lesbian couples. In many cases, the basis for discrimination may be masked in religious rhetoric, but, in fact, it is grounded in prejudice. In this sense, gays and lesbians are not Blacks; they are Jews (or Muslims). Under the model I propose, if a hotel could not refuse to rent its honeymoon suite to a Jewish or Muslim couple, the hotel would be prohibited from engaging in similar discrimination against same-sex couples.

Certainly, the broadest definition of accommodation for commercial enterprises is untenable. Such an accommodation would apply to any commercial provider who sincerely objects on religious grounds to providing any goods or services that facilitate or validate a same-sex marriage based on the objector’s personal determination as to if and when his conduct is so attenuated and remote from the same-sex couple’s marriage or marital status to relieve him of his religious obligations. The range of commercial interactions that would arguably fit under this rubric of accommodation is so broad that it would substantially undermine the utility of anti-discrimination statutes.

107. See, e.g., Stern, supra note 5, at 28 (noting that it is “hard to describe” some of the opposition to gay rights that allegedly stems from religious sources “as anything other than raw bigotry”).

108. An inquiry into sincerity of belief is the most constitutionally acceptable basis for determining whether a religious objector’s claims deserve respect, but it is fraught with difficulties in its application. See, e.g., United States v. Ballard, 322 U.S. 78 (1944); Patrick v. Le Fevre, 745 F.2d 153, 157 (2d Cir. 1984) (“Sincerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant’s most veiled motivations and vigilantly separate the issue of sincerity from the factfinder’s perception of the religious nature of the claimant’s beliefs.”); Int’l Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) (noting that “it is frequently difficult to separate [the legitimate inquiry into sincerity of a belief] from a forbidden one involving the verity of the underlying belief”).

109. See supra notes 73–74 and accompanying text (describing the potential breadth of accommodations protecting objectors from having to validate a same-sex marriage).

110. See, e.g., Wilson, Matters of Conscience, supra note 4, at 92–93 (suggesting that objector’s must have the liberty to determine whether their conduct is too attenuated to constitute a breach of their religious obligations). Lupu and Tuttle contend that if this subjective understanding of facilitation is adopted, an accommodation “could be claimed by anyone who believes that his or her conduct would facilitate a same-sex marriage . . . no matter how remote . . . [the conduct] is from any specific action, such as a wedding . . . ”). Lupu & Tuttle, supra note 2, at 292.
It is possible that some accommodations might be made available for sole proprietors or small businesses engaged in the provision of wedding services (e.g., photographers, wedding planners, and the like). The argument here is that granting such an accommodation would not seriously burden same-sex couples, since no couple wants to hire a photographer, for example, who rejects the legitimacy of their relationship. If we are talking about large hotels and catering facilities, however, a hotel should have no more right to refuse to host the reception for a same-sex wedding than it has a right to refuse to cater the reception for a bar mitzvah.

A similar analysis would probably apply for counselors and therapists. If the provider of therapeutic services holds religious convictions that would interfere with his or her provision of services to gay or lesbian clients, allowing the provider to refuse to provide services to individuals in a same-sex relationship would protect the provider’s clients’ autonomy and mental health as much as it would accommodate the provider’s religious beliefs. Indeed, this analysis might apply to other providers of health care services where the provider’s attitude, emotional support, and ability to respect the patient’s autonomy are crucial to his or her ability to properly address a patient’s medical problems. If the religious beliefs of health care providers complicate their ability to treat gay or lesbian patients, arranging alternative health care arrangements may serve the needs of provider and patient alike.

When we move beyond these core “for profit” services that facilitate a marriage ceremony or reception, which in many ways represent a “win-win” rather than a “zero-sum” situation, the cost to same-sex couples increases and the line drawing becomes much more indeterminate.111 For example, Thomas Berg describes the provisions of a

111. Berg debates Lupu and Tuttle on whether Title VII’s provision for religious accommodations provides an appropriate analogy for accommodating a business owner who refuses on religious grounds to provide goods and services to a same-sex married couple. Lupu and Tuttle contend that the analogy is inappropriate because of informational asymmetry. The employer is in a much better situation to evaluate the costs of accommodation and the alternatives available for mitigating the conflict than is true in the case of a same-sex couple denied goods or services. Lupu & Tuttle, supra note 2, at 289–90. Berg responds that to the extent that these informational asymmetries exist, they are more than offset by the greater burden the business owner will experience if an accommodation is denied compared to the cost the same-sex couple will incur if the accommodation is granted. Berg, Common, supra note 4, at 251–32.

These scholars raise important points. I would add two caveats to their arguments. I think the burden that Berg contends that business owners must bear may be overstated in some circumstances. See supra notes 76–78 and accompanying text. The informational asymmetry and costs incurred by same-sex couples that concern Lupu and Tuttle may be
model religious accommodation bill (which contains a “substantial hardship” exception) that would protect any “individual, sole proprietor, or small business” from being required . . . to provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage.”112 This language is ambiguous in several respects,113 and that ambiguity is magnified in an environment where people are suspicious of each other’s motive.

A central question for such legislation is the extent to which the provision applies to any commercial interactions that might be construed as assisting to “celebrate” or directly “perpetuating” the same-sex couple’s relationship for the entirety of their marital life or whether it would be largely limited to the provision of goods and services that directly facilitate a wedding ceremony and reception.114 The lifetime burden of being vulnerable to discrimination creates an aggregate burden that is greater than the sum of individual incidents.

Under the framework I propose, the operative question is whether we would protect the same class of proprietors from being required to assist in or promote the solemnization or celebration or any religious life cycle event. Let us take an example. Flowers are often purchased to celebrate life cycle events. Most of the florists I have done business with over the years have been small businesses. I admit on a personal level that the idea that local florists could refuse the patronage of my family because our celebrations reflect our Jewish beliefs and heritage is an unpalatable prospect. But I suggest that this is the proper analogy to think about in trying to balance the competing autonomy rights that are at issue in the same-sex marriage controversy.

The model statute Professor Berg describes also protects small businesses from being required “to provide benefits to any spouse of an employee.”115 To evaluate this provision, let’s consider another hypothetical. Joe operates a small business with three employees, all of
whom receive health benefits for their families. Sarah, one of Joe’s employees, has been working for Joe for five years. Sarah is a lesbian. She doesn’t know whether Joe is aware of her sexual orientation. It has never come up. Sarah falls in love with Jane, a single mom who is unemployed. The two women get married. Because of his religious beliefs, Joe refuses to provide health care benefits for Jane or the couple’s child.

There are two sets of questions here. One deals with uncertainty. Does the cost of purchasing private health insurance for Sarah’s spouse and the child for whom she now shares parental responsibility constitute substantial hardship? How difficult must it be to find comparable employment that provides health care benefits before the substantial hardship exception kicks in? Second, let us change the identity of the characters to implicate the religious discrimination model. Assume Sarah is Jewish and she marries John, a Christian. Joe, who is also Jewish, strongly objects to interfaith marriages on religious grounds. He refuses to provide health benefits to John. Once again we may ask whether we are willing to accommodate his refusal to do so in order to help us determine whether we should accommodate Joe’s refusal to provide health benefits to Sarah’s same-sex spouse, Jane.

Finally, the model religious accommodation bill Professor Berg describes protects individuals and small businesses from being required “to provide housing to any married couple.”116 Although it was not clear from earlier versions of the model bill, the most recent text provides that this accommodation is limited to landlords owning and operating one rental property of no more than five units.117 Although this provision, if adopted, may deny same-sex couples particularly desirable housing in certain communities,118 I think it would probably be acceptable under the religious discrimination analysis. The analysis is straightforward. If a landlord of less than six units would be permitted to refuse to rent housing to an interfaith couple on religious grounds, the landlord should be permitted to deny housing to a same-

116.  Id.

117. The model bill defines a small business in part as a legal entity “that offers housing for rent, that owns five or fewer units of housing.” Berg, Common, supra note 4, at 233 n.161 (citing model bill § (b)(3)(C)).

118. In the neighborhood in the Bronx where I grew up, there were thousands of apartments in large apartment buildings but a very modest number of duplexes. Needless to say, access to a duplex unit, which usually provided a small backyard where children could play on grass rather than concrete or asphalt, was particularly desirable.
sex couple as well. 119 Similarly, if a landlord is permitted to refuse to rent a housing unit to a Jewish family because he does not want to facilitate Jewish religious ceremonies that would regularly take place on his property and have a mezuzah on the doorframe of any rental unit, he should be permitted to reject same-sex couples as tenants as well. 120

With regard to employee accommodations, under Title VII, employers have a limited duty to accommodate the religious beliefs and practices of their employees. 121 Accordingly, an employee who objected to facilitating the marriage of a same-sex couple and sought to be relieved of job responsibilities that required him to do so would have the same right to request an accommodation as exists today for employees whose other religious beliefs and practices (such as the need to have Saturday or Sunday off to observe the Sabbath) are burdened by the requirements of their job. The standard used to review the denial of the requested accommodation would not differ from that which is conventionally applied in Title VII cases dealing with other employee religious practices and beliefs.

Obviously, the list of illustrations could go on. Further, as I indicated earlier, there will certainly be areas where distinctions should be drawn between religious discrimination and discrimination against same-sex marriages and marital couples.

I offer the suggestion of looking to the model of accommodations for religious discrimination as the beginning, not the end, of the discussion. In this heated and polarized area of law and life, however, having a place to begin the discussion is no small matter.

IV. Cost Spreading and Mitigating Burdens

An auxiliary issue that has received attention in the literature deals with operational concerns that accompany religious accommodations. One question involves the point at which same-sex couples must be notified that a particular provider intends to exercise the rights granted to him by statutory religious accommodations to refuse

119. Federal fair housing legislation provides an exemption from otherwise applicable anti-discrimination requirements in the sale or rental of housing for “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.” 42 U.S.C.A. § 3603(b)(2) (West 2010).
120. It is not clear that such discrimination would be permitted. See generally Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009).
121. See supra notes 57–59 and accompanying text.
to provide them the goods or services they are seeking. A related question asks whether such a provider should be required to inform same-sex couples of alternative sources of the goods or services—sources that do not object to serving same-sex couples as customers or clients.

These issues are of greater importance in some situations than others. If counseling services are at issue, for example, it is imperative that a gay or lesbian client receive notice of a therapist’s religious misgivings before they disclose very personal and sensitive information about themselves or develop the deep ties that often arise between therapist and patient. Similarly, in the context of medical services, Vikram Amar and I argued in a comment on the North Coast Women’s Care Medical Group, Inc. v. Superior Court case that:

:o]nce a patient bares body and soul to a medical practitioner with the trust and understanding that she will receive the care she is seeking, one might reasonably argue that it is too late for a physician to express reservations, religious or otherwise, about going forward with a treatment the patient has every reason to expect would be provided.123

Similarly, the proprietor of a bed and breakfast should be required to notify a same-sex family that he refuses to provide them a place to stay before they attempt to check-in to a room after traveling hundreds of miles to their holiday destination. On the other hand, as Douglas Laycock and others have noted, there are also problems with requiring professionals, commercial businesses, and non-profit organizations exercising their right to discriminate under accommodation statutes to publicly declare that they will not provide goods and services to same-sex marital couples.124 The cumulative expressive impact of such declarations may have far more serious consequences than the decisions of the providers themselves acting independently and outside of the public eye.

124. Laycock, Afterword, supra note 3, at 198–99 (noting fear that posting of notices by professionals and merchants declaring that they will not provide services to same-sex couples for religious reasons, “would reinforce resistance and embolden other merchants to post similar notices”); Lupu & Tuttle, supra note 2, at 290 (explaining that, “[i]n some areas at least, public pronouncements of exclusion might make such refusals even more common.”).
Whether religious objectors have a duty to give same-sex couples denied services a list of alternative providers\(^{125}\) has also provoked disagreement. There is little doubt that conveying this information would mitigate the burden imposed on the discriminated against couple. It is argued, however, that this obligation itself would violate the objector’s beliefs that he cannot facilitate or validate a same-sex couple’s marriage in any way.\(^{126}\)

An alternative approach to both of these problems is to recognize that the government has a dual role in religious accommodations cases. One governmental goal is to protect religious liberty. This objective is achieved by providing religious objectors an accommodation that exempts them from having to obey civil rights laws or other legal requirements that violate the tenets of their faith. The government’s other goal is to do what it can to further the purposes of the statute under which the religious objector has been granted an exemption. Here, that purpose is to relieve members of a protected class of the burden of private or public discrimination in the provision of goods and services.

The government can further both of these objectives by taking steps to spread the costs of the accommodation more broadly so that they do not fall quite so disproportionately on the members of the protected class.\(^{127}\) The justification for cost spreading in these circumstances is fairly straightforward. Religious liberty is a public, political good. Protecting religious liberty through religious accommodations serves the public interest as well as the needs of the particular beneficiaries of any specific exemption. Accordingly, it is fair to spread the cost of such accommodations among the public at large, rather than

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125. See Lupu & Tuttle, supra note 2, at 290 (arguing that instead of notifying prospective patrons that they will not provide goods or services to same-sex couples, “[a] more appropriate informational requirement would demand that, as a condition of the exemption, religious objectors provide customers with a list of ready and willing providers”).

126. Berg, Common, supra note 4, at 232; see generally Laycock, Afterword, supra note 3, at 195–96 (discussing religious traditions that impose moral culpability on a believer, “who cooperates with another’s wrongdoing, or even who fails to sufficiently resist [the other’s wrongdoing]”) (internal citation omitted).

127. Lupu and Tuttle suggest that one of the reasons accommodations for religious objectors in business should be denied is that the cost of such accommodations would fall heavily and disproportionately on “a discrete set of customers.” Lupu & Tuttle, supra note 2, at 290–91. They argue that in the employer-employee context and other circumstances in which religious accommodations are granted, “the costs of the burden can be broadly distributed.” Id. at 290. The point is well-taken, but I do not believe that the ability of government to spread the costs of accommodating religious objectors to same-sex marriage has been fully considered—particularly if we are willing to think outside the box on this issue.
standing by and allowing them to fall on the members of a relatively limited and discrete class.\textsuperscript{128}

I suggest that the government should spread the cost of religious accommodations by taking on the obligation of developing and distributing information regarding the availability of services to same-sex couples. If lists of providers who have no reservations about providing goods and services to same-sex couples are made available through the Internet or other means, at least some of the burden of religiously justified discrimination may be mitigated. Same-sex couples would be able to choose physicians, therapists, bakers, and florists with the assurance that they would receive respectful attention to their needs and that their patronage would be welcome. Moreover, a list of providers who are willing to offer goods and services to same-sex couples expresses a far less negative message than posted notices declaring a proprietor’s unwillingness to serve same-sex couples on religious grounds.

Government mitigation of the burdens of religious accommodation can be furthered through a variety of other cost-spreading mechanisms as well. The state could develop a health care insurance pool to provide medical insurance to the spouses of employees of religious organizations who would otherwise have been entitled to employment-based health insurance, but for the refusal of religious employers to include same-sex spouses in the health care benefits provided to employees. HMO’s and health care provider groups contracting with medical insurance companies might be required to include a sufficient number of health care professionals willing to provide treatment to the gay and lesbian community in their membership.\textsuperscript{129} The opportunities for mitigation are varied. What is necessary is the understanding by government and by those who support religious accommodations that government’s role does not end by the granting of exemptions—it extends to mitigating and spreading the costs of accommodations to the extent that it is reasonably possible to do so.


\textsuperscript{129} Such a requirement would alleviate the problem that same-sex couples would not be able to obtain medical services from preferred or in-network providers in their health insurance plans. This issue has arisen in litigation. \textit{See} First Amended Complaint for Damages and Petitions for Injunctive Relief at 12, N. Coast Women’s Care Med. Grp. v. Superior Court, 189 P.3d 959 (Cal. 2008) (No. GIC770165), 2001 WL 39919623, at para. 36 (alleging primary care medical group had exclusive arrangement with North Coast and that plaintiff had to seek reproductive therapy from “off plan” physician after North Coast refused to continue treating Plaintiff).