Religious Freedom, LGBT Rights, and the Prospects for Common Ground

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Bathrooms and Bakers

How Sharing the Public Square Is the Key to a Truce in the Culture Wars

Robin Fretwell Wilson

Too often, conflicts over LGBT rights and religious freedom follow a familiar pattern: partisans on both sides press uncompromising positions, knowing they leave no room for the other side. Sometimes, legislators – in cooperation with stakeholders or independently – fashion approaches that make room for all sides, as shown in the chapters by Senator J. Stuart Adams (Chapter 32) and Governor Michael Leavitt (Chapter 33). When they do not, however, laws written with different, older conflicts in mind govern conflicts *or* legislatures enact one-sided measures largely responsive only to one constituency – in both cases, a kind of "purity" model elevates one community's interests over others'. When legislators do not consciously make room for all, parties resort to litigation, which, by its nature, yields only one winner.

Americans overwhelmingly believe that LGBT people should not be treated differently just for being gay or trans. 71 percent favor protections for LGBT people "against discrimination in jobs, public accommodations, and housing."[1] Three in four say it should be illegal for an employer "to fire someone for being gay or lesbian."[2] Four of five believe it is already illegal to refuse to serve someone because of their sexual orientation or gender identity (together, SOGI).[3] A slim majority, 53 percent, oppose laws that require trans persons to use bathrooms corresponding to their sex at birth, while 39 percent favor them.[4]

But when asked whether bakers and other wedding vendors should be able to decline to assist weddings when guided by faith, Americans are split. As Douglas

[1] Robert P. Jones, Daniel Cox, Betsy Cooper & Rachel Lienesch, *Beyond Same-Sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from 2015 American Values Atlas*, PRRI (Feb. 18, 2016), https://perma.cc/S235-23PS.

[2] Emily Swanson, *Americans Think It Should Be Illegal to Fire Someone for Being Gay, Don't Realize It's Not Already*, Huffington Post (June 19, 2014), https://perma.cc/7SUB-BM2Q.

[3] *Id*.

[4] Daniel Cox & Robert P. Jones, *Majority of Americans Oppose Transgender Bathroom Restrictions*, PRRI (Mar. 10, 2017), https://perma.cc/A3QJ-5BML.

Laycock notes in Chapter 3, "48% support[] religious exemptions in the wedding cases and 49% oppose[] exemptions." Presumably Americans share the intuition expressed the day after *Obergefell v. Hodges*[5] by former Solicitor General Ted Olson, an instrumental figure in realizing marriage equality across the United States: "[B]eing asked to participate in a wedding, to perform a wedding, to sing in a wedding, to . . . be a wedding planner" is different than "walk[ing] into a bakery on the street and want[ing] to buy a pie or a doughnut . . . People have the right to refuse personal services with respect to things like that on a religious basis."[6]

This chapter shows that despite considerable support for LGBT rights *and* for protections for those who ask not to assist with marriages for faith-based reasons, a purity model reigns across most of the United States: access by LGBT persons to public places follows a red/blue fault line. Notably, twenty-two states and the District of Columbia protect LGBT persons from discrimination in employment, housing, or public accommodations through state laws; two of these protect against discrimination based only on sexual orientation.[7] These laws were passed before marriage equality came on the scene; until Utah enacted its protections as to housing and hiring, no Republican-led legislature had enacted a SOGI. None of the public accommodations laws leave room for wedding vendors like Masterpiece Cakeshop's owner Jack Phillips, whose case the US Supreme Court decided this term.[8] By contrast, twenty-nine states extend no protection in state law from discrimination in public accommodations to the LGBT community, muting the need for step-offs from performing religiously infused wedding services. These states are overwhelmingly Republican, with Republicans dominating both legislative chambers and, with rare exception, are led by Republican governors.[9] Significant numbers of residents in these states self-identify as religious.[10]

There are hopeful signs that sorely needed protections against discrimination in public accommodations can be extended to the full LGBT community. All across the nation, LGBT advocates and people of faith are sitting down to discuss more nuanced laws that protect both communities in the areas most core to them. Sometimes legislators participate in – and mediate – these conversations. In other cases, stakeholders are meeting on their own.

[5] 135 S. Ct. 2584 (2015).

[6] Jennifer Rubin, *Where Do We Go From Here on Gay Rights?*, Wash. Post (June 29, 2015), https://perma.cc/3NSP-NA6H.

[7] *See* Appendix, Chapter 35.

[8] Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n, No. 16-111, slip op. (U.S. June 4, 2018). For views on Phillips's case and the reasons he advances for being permitted to decline to make cakes for same-sex weddings, see McClain, Chapter 17; Melling, Chapter 19; Ryan Anderson, Chapter 27; McConnell, Chapter 28; and Pizer, Chapter 29.

[9] *See infra* Fig. 1; *State Partisan Composition*, Nat'l Conference of State Legis. (Jan. 30, 2018), https://perma.cc/8PX4-Z5SL. Nebraska's legislature is unicameral and nonpartisan; Nebraska has a Republican governor. Louisiana's Senate (25–14) and House (61–41) are majority-Republican; the governor is a Democrat.

[10] *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case W. Res. L. Rev. 1161, 1221 (2014).

But two hurdles to enacting legislation banning LGBT discrimination in public places loom large: bathrooms and bakers.

First deployed in 2008, the bathroom narrative is simple and strikingly effective: giving trans people equal access to facilities, opponents contend, threatens the safety of others.[11] This claim is not anchored in evidence about risks from trans people.[12] Still, as Section I shows, there has been no new statewide public accommodations law banning SOGI discrimination since the bathroom narrative took hold. This means the safety claim must be met head-on for new nondiscrimination laws to be tenable.

Importantly, federal regulators cannot push through the impasse blocking protections for LGBT persons – assuming the Trump Administration wanted to – because, as Jennifer C. Pizer notes in Chapter 29, Title II of the Civil Rights Act of 1964 does not bar discrimination on the basis of "sex." That bare fact precludes the extension to SOGI discrimination, as the Obama administration did in hiring, education, and other realms.[13]

Section II documents the growing importance of objections from a tiny handful of wedding vendors across the nation. Refusals by bakers, photographers, florists, and others to facilitating same-sex weddings for religious reasons have placed them at odds with, and in violation of, SOGI nondiscrimination laws written long before marriage equality became the law of the land. To date, no public accommodations law has allowed exceptions *once* a group has been defined as needing protection *and* a business has been defined as a "public accommodation." In other words, the business is all-in or all-out. This means that in places that ban SOGI discrimination, businesses that would gladly serve LGBT patrons for everything but religiously infused services like weddings, as Phillips and others say they would,[14] face legal sanction, protracted litigation, and even closure – just as if they had said "No Gays Allowed."[15]

Section III argues that the key to a truce in the culture war between faith and sexuality rests on rejecting a binary model that treats all services alike – all-in or all-out, no matter how religiously infused. As the lack of new state laws since 2008 illustrates, both sides still marshal enough influence to be in "blocking positions," freezing the status quo. Because SOGI laws have not historically made fine distinctions, the fight over new public accommodations laws has become an existential one for people of faith: oppose SOGIs in order to keep religious business owners afloat or

[11] *See infra* Section I.

[12] *See* Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 Lewis & Clark L. Rev. 1373 (2017).

[13] See Laycock, Chapter 3; Melling, Chapter 19; Hill, Chapter 26; Pizer, Chapter 29; and *Introduction* for descriptions and status of regulations and cases.

[14] See McClain, Chapter 17, and McConnell, Chapter 28, for accounts; *infra* Section II.

[15] *Tennessee Hardware Store Puts Up "No Gays Allowed" Sign*, USA Today (July 1, 2015), https://perma.cc/M23K-4D84.

risk closure.[16] LGBT people see the fight for new SOGI laws as existential, too: to avoid the humiliation and pain of being turned away.[17] This section sketches a new vision: regulate the business, not individual workers, so that every couple who walks in is served with dignity but no specific individual must perform any given service.

Section IV concludes that our familiar purity-model approaches do not adequately account for the interests of all in an evenhanded way. In three-fifths of America, LGBT people can be told "we don't serve people like you." In two-fifths, people of faith can be told "get over your faith or get out of business." Across all of America, the public square belongs only to one side.

Unless America finds news ways to share the public square, it will remain a checkerboard of injustice to someone. For a people that cares deeply about justice for all, that result is a shame, whether one lives in Alabama or New York.

I LGBT PEOPLE IN RED AMERICA

As noted, most people see denials of service based on characteristics irrelevant to the service as wrong – demeaning to the person refused, to the LGBT community, and to all of us. Yet, the United States is a checkerboard of public accommodation nondiscrimination laws, as Figure 30.1 shows.

Twenty-nine states provide no statewide protection to LGBT persons against being refused service in public spaces such as restaurants and hotels. Three states, Arkansas, Tennessee, and North Carolina, affirmatively bar the enactment of local nondiscrimination laws protecting LGBT people, measures being litigated or scheduled to sunset.[18] A minority, twenty-one states and the District of Columbia, protect members of the LGBT community from being denied service by public establishments – two on the basis of sexual orientation only.[19]

[16] *Preserve Freedom, Reject Coercion*, Colson Ctr. for Christian Worldview, https://perma.cc/HFP2-CP4L ("We therefore believe that proposed SOGI laws, including those narrowly crafted, threaten fundamental freedoms, and any ostensible protections for religious liberty appended to such laws are inherently inadequate and unstable.").

[17] For more on dignitary harms and law's expressive value, see NeJaime & Siegel, Chapter 6; Melling, Chapter 19; and Pizer, Chapter 29. For law's expressive effect, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2025–26 (1996) (noting a law's statement about a subject "may be designed to affect social norms and in that way ultimately to affect both judgments and behavior... [A]n appropriately framed law may influence social norms and push them in the right direction").

[18] *See* Ark. Act No. 137 (2015); Protect Fayetteville v. City of Fayetteville, 510 SW 3d 258 (Ark. 2017) (holding Fayetteville SOGI ordinance conflicted with state law); Tennessee Pub. Ch. 278 (2011); Howe v. Haslam, 2014 WL 5698877 (Tenn. Ct. App. 2014); 2016 N.C. Sess. Laws 3, *repealed by* 2017 N.C. H.B. 142 (preempting local laws until December 1, 2020).

[19] *See* Appendix, Chapter 35. New York interprets its Human Rights Laws to cover transgender people. 9 N.Y. Code of Rules and Regs. §466.13.

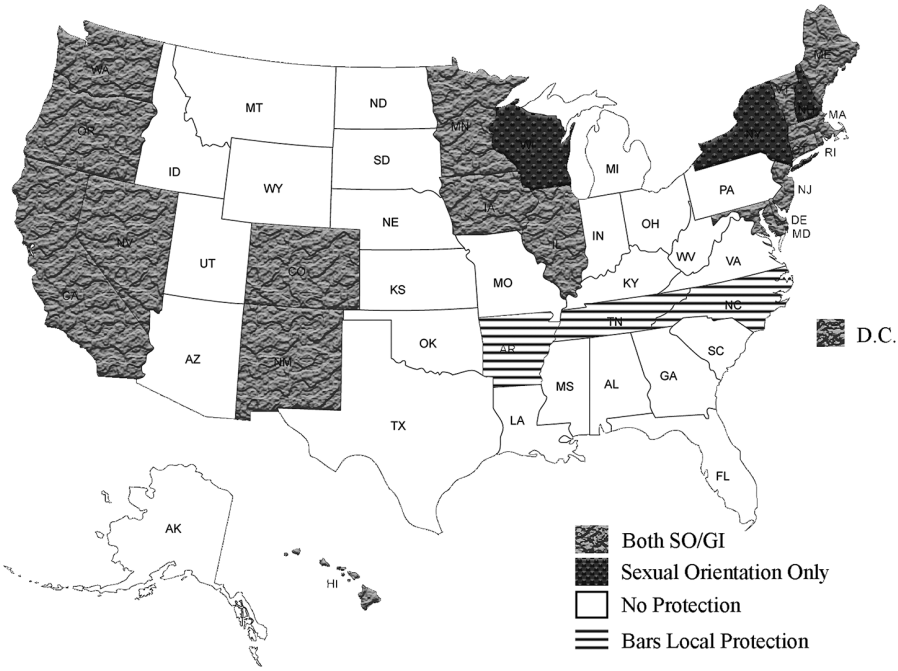

FIGURE 30.1 Public accommodations nondiscrimination laws (as of July 1, 2018)

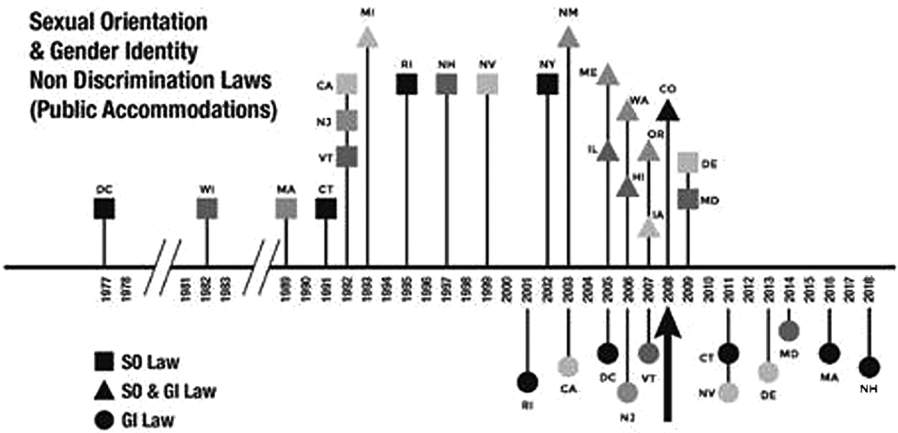

FIGURE 30.2 Timeline of nondiscrimination laws

As Figure 30.2 documents, although state SOGI laws date back to 1977, for the half-decade preceding and including 2008, states protected the full LGBT community in the nondiscrimination laws they enacted. That abruptly stopped in 2008.

After 2008, states have enacted LGBT protections in stages or added gender identity discrimination.[20] But the United States has seen no wholly new nondiscrimination law for all LGBT people in public accommodations since 2008, when the bathroom narrative emerged.

By recasting basic protections against SOGI discrimination as "allowing men to enter women's restrooms and locker rooms – defying common sense and common decency," opponents have stopped new laws, such as the Houston HERO Ordinance.[21] Opponents have also swept aside local ordinances protecting LGBT persons' full enjoyment of facilities. In North Carolina, for example, state legislators preempted Charlotte's SOGI, directing instead that all public accommodations require patrons to use the bathroom of their birth. The law provoked boycotts, travel bans, and numerous lawsuits before being mostly repealed.[22] Yet, despite the punishing backlash North Carolina experienced, the 2017 legislative year saw a raft of "bathroom-of-one's-birth laws" proposed across the country.[23] In 2018, campaigns for statewide office and initiatives to repeal local ordinances are being waged around bathroom access.[24]

Lawmakers who seek to enact protections for the full LGBT community in other realms, such as housing, must now contend with the "bathroom bill" label, too – even though sharing a bathroom with another member of the public is, patently, not an issue when renting an apartment for one's own use.[25] The move by regulators in Massachusetts, Iowa, and elsewhere to extend SOGI protections to houses of worship and other places previously considered off-limits only inflames matters further.[26] While those efforts have stalled or been disavowed,[27] careful line-drawing between the secular and sectarian can lower the stakes when writing nondiscrimination laws.[28]

[20] Maryland and Delaware enacted protections after 2008, while Connecticut, Massachusetts, and Nevada broadened pre-2008 bans on sexual orientation discrimination to include trans people. *See* Wilson, *Marriage of Necessity*, *supra* note 10, at 1383. New Hampshire recently joined those states by extending its ban to gender identity discrimination. *See* Appendix, Chapter 35.

[21] Houston, Tex., Ordinance 2014–530 (May 14, 2014).

[22] *See* Wilson, *Marriage of Necessity*, *supra* note 10.

[23] For citations and critique, see Melling, Chapter 19; Pizer, Chapter 29.

[24] *See, e.g.*, *Stop Wagner*, https://perma.cc/QRR2-CFHS; *Protect Our Privacy*, Alaska Family Council, https://perma.cc/GF7E-7NS9.

[25] *Sign the Petition: Stop Governor Wolf's Bathroom Bills*, PAFamily.org, https://perma.cc/A8K5-GC5E ("Some things just shouldn't be shared. Tell Gov. Wolf: No Bathroom Bill.").

[26] *Sexual Orientation and Gender Identity: A Public Accommodations Provider's Guide to Iowa Law*, Iowa Civ. Rts. Comm'n, https://perma.cc/5D5U-FTEA; *Gender Identity Guidance*, Mass. Comm'n Against Discrimination (Sept. 1, 2016) at 4–5, https://web.archive.org/web/20160915014340/http://www.mass.gov/mcad/docs/gender-identity-guidance.pdf.

[27] *See Gender Identity Guidance*, Mass. Comm'n Against Discrimination (revised Dec. 5, 2016), https://perma.cc/3NDP-ZHR8; Chris Johnson, *Anti-LGBT Group Withdraws Lawsuit Against Mass. Trans Law*, Wash. Blade (Dec. 12, 2016), https://perma.cc/N7L9-D2N4.

[28] *See* Adams, Chapter 32.

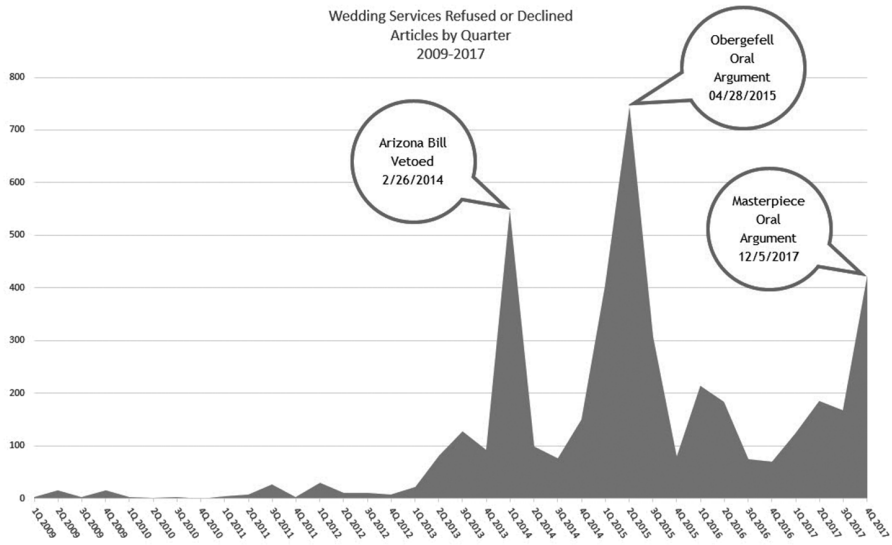

FIGURE 30.3 Reporting on wedding vendors declining to do service

On "bathroom" access, balancing two sets of interests is not hard: without fanfare and without trouble, Utah imposed a duty in its 2015 hiring and housing LGBT nondiscrimination law on all employers to accommodate trans workers' decisions to use the bathroom of their choice; employers retained discretion to adopt reasonable facility and grooming rules.[29] In the near- and mid-terms, however, the impulse to regulate *every* place people gather may defeat attempts to enact protections against discrimination in clearly warranted places: restaurants, bars, hotels, and other sectarian places.[30]

II RELIGIOUS WEDDING VENDORS IN BLUE AMERICA

Enacting new public accommodation laws faces a second, seemingly insurmountable hurdle: What to do about the baker, photographer, florist, or other wedding vendor conflicted over facilitating same-sex weddings? Here, the fires of resistance have been stoked by numerous stories of small wedding vendors who declined to facilitate same-sex marriages for religious reasons, as Figure 30.3 shows.[31]

[29] *Id.*

[30] *Accord* Melling, Chapter 19 ("Different questions arise where the issue concerns an exemption for an institution that primarily hires or serves only people of its own faith, or for an individual.").

[31] A search of LexisNexis's "News" database on March 2, 2018 for media accounts in U.S. jurisdictions yielded 4,443 discrete articles dating back to 2009. The specific search read "(gay or transgender or lgbt** or "sexual orientation") and wedding and (refus! or declin! w/5 serv!)." The oldest story described efforts to convince the Connecticut legislature to protect

Lawsuits followed these refusals, including two discussed at length in this volume, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *State v. Arlene's Flowers, Inc.*[32]

In the court of public opinion, small business owners conflicted over same-sex marriage have been treated like religious martyrs by some and pariahs by others.[33]

In courts of law, religious business owners have lost every case – until 2018.[34] In *Cathy's Creations*, for the first time, a state court held that the First Amendment right of a religious baker to be free from compelled speech outweighed the government's interest in preventing dignitary harm to a lesbian couple through its public accommodations law.[35] The Court candidly acknowledged:

> No matter how the court should rule, one side or the other may be visited with some degree of hurt, insult, and indignity. The court finds that any harm here is equal to either complainants or [Cathy's Creations' owner], one way or the other. If anything, the harm to [the owner] is the greater harm, because it carries significant economic consequences.

While the Supreme Court largely declined to address the free speech issues posed in *Masterpiece Cakeshop*, instead deciding the case based on antireligious sentiment that corrupted the adjudication, the outcomes under the literal terms of state nondiscrimination laws in Phillips's and *every other case* until *Cathy's Creations* were prefigured. All ran afoul of SOGI laws written years before marriage equality *without* this specific conflict in mind, as Figure 30.4 shows.

In *Masterpiece Cakeshop*, for instance, Phillips's refusal occurred in 2012, two years before same-sex marriages first became legal in Colorado in 2014.[36] Colorado's

wedding-service providers in its same-sex marriage law. Daniela Altimari, *Catholics Press Their Case*, Hartford Courant (Mar. 7, 2009), A1.

[32] Masterpiece Cakeshop, No. 16-111, slip op. State v. Arlene's Flowers, Inc., 389 P. 3d 543 (Wash. 2017) vacated and remanded, Order List, 585 U.S. __ (June 25, 2018), https://perma.cc/3X9Z-ADQQ. For other cases decided under laws predating marriage equality, see Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) *cert denied*, 134 S. Ct. 1787 (2014) (photographer); In the Matter of Klein, Case Nos. 44–14 & 45–14 (Or. Bureau of Labor & Industries 2015), https://perma.cc/QV27-Z5YB (religious bakers' denial of wedding cake for same-sex wedding); Complaint, Odgaard v. Iowa Civ. Rights Comm'n (Case No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013), https://perma.cc/WM6G-V6AW (Mennonite art gallery owners' refusal to rent venue for same-sex wedding ceremony).

[33] *Compare* Curtis M. Wong, *Sweet Cakes By Melissa Receives Donations After Judge Rules They Owe $135,000 To Lesbian Couple*, Huffington post (Feb. 2, 2016), https://perma.cc/ZG2D-NVEF, *with* Tom Coyne, *Memories Pizza Reopens After Gay Wedding Comments Flap*, Wash. Times (Apr. 9, 2015), https://perma.cc/UT9A-K3CW.

[34] Zack Ford, *12 Things Conservatives Have Predicted Would Happen Now That Marriage Equality Is Law*, ThinkProgress (June 29, 2015), https://perma.cc/L48R-L7WL.

[35] Dep't of Fair Emp't and Hous. v. Cathy's Creations, Inc., BCV-17–102855 (Cal. Super. Ct. of Kern) (Feb. 5, 2018) (finding no violation of state SOGI by religious baker refusing to bake custom wedding cake for lesbian couple, where couple was referred to a different baker who baked the cake).

[36] Masterpiece Cakeshop, 370 P.3d 272; *Same-Sex Marriage Officially Legal in Colorado*, KTTV News (Oct. 8, 2014), https://perma.cc/7TGC-H923.

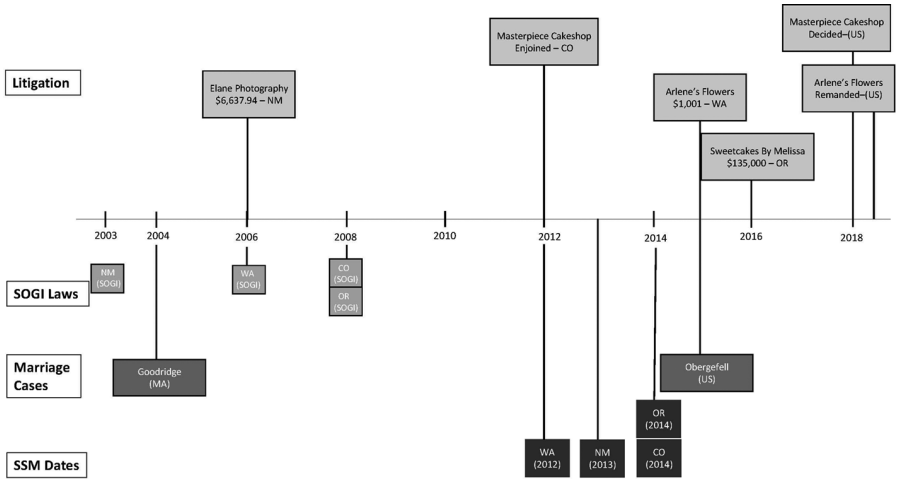

FIGURE 30.4 Enactment of SOGI laws in relation to same-sex marriage recognition

underlying law prohibiting discrimination in public accommodations was enacted in 2008, six years before marriage equality was recognized in Colorado and at a time when, as Figure 30.3 showed, the media paid little attention to same-sex wedding services, then largely a hypothetical possibility.[37] Obviously, when legislators cannot fully anticipate a need, as then, they cannot write specific rules to reconcile all the interests implicated; that is, they cannot tailor nondiscrimination laws written to address the central harm – persons being turned away from places like restaurants and hotels – while also avoiding the spillover to religiously infused services like weddings.

For many of these owners, their choice was "not about refusing service [to anyone] on the basis of sexual orientation or dislike for another person who is preciously created in God's image."[38] Betty Odgaard, owner of Görtz Haus Gallery,

[37] 2008 Colo. Sess. Laws 341 (May 29, 2008) (effective on passage). The earliest high-profile case pitting the rights of wedding vendors against the rights of same-sex couples also preceded marriage equality, Elane Photography, 309 P.3d 53 (N.M. 2013) *cert denied*, 134 S. Ct. 1787 (2014). There, a New Mexico wedding photographer declined to take pictures for a same-sex commitment ceremony in 2006. *Id.* The SOGI law under which the photography business was fined was enacted in 2004 – before any U.S. jurisdiction had conducted same-sex marriages and almost a decade before marriage equality became a reality in New Mexico, in 2013. N.M. STAT. § 28–1–7 (2004) (approved on March 10, 2004, effective July 1, 2014); Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (legalizing same-sex marriage); Goodridge v. Dep't of Public Health, 2004 WL 5064000 (May 17, 2004) (trial court order upon remand; first marriages on this date); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

[38] Barronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2015), https://perma.cc/4BG5-2WAA.

closed the gallery to all marriages rather than do same-sex marriages. The business later folded.[39] She felt conflicted about participating in the sanctification of same-sex marriages. "I would never discriminate in any area[,] that's not who I am. I just couldn't celebrate their wedding because of my faith."[40] Odgaard is not alone; marriage remains a religious occasion for half of all Americans, as Adams notes (Chapter 32).

So, too, with Barronelle Stutzman, who felt being asked to make flowers for her long-time client Rob Ingersoll and his husband Curt forced her to "choose between my affection for Rob and my commitment to Christ. As deeply fond as I am of Rob, my relationship with Jesus is everything to me. Without Christ, I can do nothing."[41] Stutzman's objection had less to do with Rob and Curt and more to do with Jesus. Odgaard's and Stutzman's marriage-focused objections may be parsed from objections to the couple themselves.[42]

Contrast wedding-focused objections to ones premised on homosexuality. Aaron Klein of Sweet Cakes by Melissa, which was ordered to pay $135,000 in fines and damages for refusing to bake a custom cake for a same-sex couple, quoted a Bible verse to one of the brides' mothers that labels same-sex relations "an abomination."[43] Unlike marriage-related objections, the basis for this objection *and* the protected ground, sexual orientation, are one and the same – they cannot be parsed: the objection is to serving the person at the counter precisely *because of* who they are.[44] Preexisting SOGIs make no distinction between refusals directed at a people and refusals tied to one's deeply held faith convictions about marriage.

Some, however, lump all these motivations together. True, "it was not the legality of marriage equality that was responsible for [businesses' repercussions]; it was laws

[39] The Odgaards sold the gallery building to a local church, saying, "If it can't be a gallery anymore, [a church] is the next best thing. We're pretty tickled." Kevin Hardy, *After Gay Marriage Controversy, Görtz Haus Now a Church*, Des Moines Reg. (Oct. 27, 2015), https://perma.cc/K3HT-VLFB.

[40] Curtis M. Wong, *Iowa's Görtz Haus Learns That Refusing to Host Gay Weddings Is Bad for Business*, Huffington post (Feb. 2, 2016), https://perma.cc/GN5G-KTH9.

[41] *Supra* note 38.

[42] Both businesses employ LGBT workers and otherwise serve LGBT people. *See* McClain, Chapter 17; Smith, Chapter 18; Appellant's Brief, Washington v. Arlene's Flowers, Inc., No. 91615–2 (Wash. 2015) at 9–10, 13 (noting Stutzman "has employed and served those who identify as gay, lesbian and bisexual, and their sexual orientation did not affect how she viewed them as employees, customers and friends"). *See also* Elane Photography, 309 P.3d 53 (N.M. 2013) *cert denied*, 134 S. Ct. 1787 (2014), Petition for a Writ of Certiorari, No 13–585 (2013), at 7, https://perma.cc/25YJ-6UHP ("[T]he Huguenins gladly serve gays and lesbians.").

[43] In the Matter of Klein, Case Nos. 44–14 & 45–14, 5–6 (Or. Bureau of Labor & Industries 2015), https://perma.cc/QV27-Z5YB (finding one bride's mother told the same-sex couple that the baker told her "her children were an abomination unto God").

[44] *See* Frank Bruni, *Bigotry, the Bible and the Lessons of Indiana*, N.Y. Times (Apr. 3, 2015), https://perma.cc/XJ25-8QSH (arguing people "should know better than to tell gay people that they're an offense. And that's precisely what the florists and bakers who want to turn them away are saying to them").

guaranteeing equal access to goods and services."[45] But these laws preceded marriage equality itself.

Treating refusals premised on marriage as if a business told a customer to "get the hell out of my shop" not only disserves persons of faith like Odgaard and Stutzman who are struggling to balance the demands of faith with the demands of the law – it disserves the LGBT community. That conflation *is* the roadblock to progress.

The key to progress for both sides is to meld their respective interests. Just as one baker forced out of business by laws that penalize adherence to widely held religious beliefs about marriage is one too many,[46] one LGBT person excluded for just being gay or trans should be one too many, as well.

As the next section illustrates, the false assumption that regulation of public accommodations has always followed a purity model, and therefore the public square has never been shared, is frustrating honest attempts at combining protections for sexual minorities with protections for people of faith.

III NONDISCRIMINATION LAWS AND THE PURITY MODEL MYTH

The key to a truce in the culture war between faith and sexuality rests on rejecting a binary model that treats all services by businesses on Main Street identically. As noted earlier, public accommodations laws today do not make fine distinctions *once* a class is defined as "protected" *and* a business on Main Street is regulated. But that all-in structure masks an important fact: our federal public accommodations laws and those of twenty-two states and DC reach a subset of all businesses open to the public or none at all.[47] In fact, outside the states that have SOGIs now, laws sweeping widely and laws sweeping narrowly are almost evenly split, as this section shows.

Whatever the sweep of public accommodations nondiscrimination laws, it is possible to keep religious wedding vendors in business while *not* turning gay couples away, just as it is possible to authorize businesses to share restrooms in a way that preserves the dignity and privacy of all patrons.

Lawmakers should not conflate duties placed on regulated businesses, however broadly defined, to serve all people with a duty on any *individual*, *even the owner*, to provide a religiously infused service. These are legally distinct. As Olson intimated shortly after *Obergefell*, they are morally distinct, too. The primary thrust of public accommodations laws is that no one who comes into a shop is told to get out, no one is sent down the street. That overarching goal can be accomplished by regulating the

[45] Ford, *supra* note 34. *See also* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417 (2012) (noting nondiscrimination laws spill over to contexts not imagined).

[46] *See* Ryan Anderson, Chapter 27.

[47] *See* Appendix, Chapter 35; Section III.A.2.

business, not every person in it. Pushing this distinction expressly into law would go a long way towards ensuring that sorely needed protections for the LGBT community do not come at the expense of shop owners' livelihoods.

A *Scope of Nondiscrimination Laws Reveal a Deeply Pluralistic America*

This subsection first diagrams the narrow scope of Title II and then places state laws on a continuum from targeted coverage to the broader, all-in coverage of some state laws.

1 Title II's Targeted Scope

Title II reaches a short list of places – inns and transient lodging, places that sell food for consumption on site, gas stations, entertainment venues, and establishments that contain these kinds of places for their patrons – and proscribes discrimination on a narrow set of bases: "race, color, religion, or national origin."[48] These places track the "common law notion that innkeepers and common carriers had an obligation to accept all 'travellers [sic].'"[49] "Private clubs or establishment[s]" fall outside Title II's coverage,[50] erecting a private/public distinction.[51] To trigger Title II, an establishment must affect commerce or be supported by state action.[52] This scope makes obvious a fact often overlooked: federal public accommodations law has never required all businesses to serve all comers.[53]

Contrast this narrow scope with the far more capacious scope of the Americans with Disabilities Act (ADA), which expressly encompasses retail establishments, all "service establishment[s]," "social service center establishments," including adoption agencies, and places of "public gathering."[54] While "religious organizations or

[48] 42 U.S.C. § 2000a (b) (2012).

[49] Phyllis Coleman, *eHarmony and Homosexuals: A Match Not Made in Heaven*, 30 QUINNIPIAC L. REV. 727, 741–42, n. 85–88 (2012).

[50] 42 U.S.C. § 2000a (e) (2012) (expressly exempting "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons" within Title II's scope).

[51] For importance of this boundary, see Krotoszynski, Chapter 7. The boundary between public and private has been probed in a dizzying array of circumstances. *See* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 115 n. 287 (2011) ("As a representative sample, country clubs, private membership organizations, mosques, health clubs and gyms, golf courses, local Franco-American fraternal clubs, and fishing and hunting clubs have had to litigate whether they were permitted to segregate based on sex under state anti-discrimination laws.").

[52] 42 U.S.C. § 2000a (2012).

[53] *See* NeJaime & Siegel, Chapter 6; McConnell, Chapter 28.

[54] Americans with Disabilities Act, 42 U.S.C. § 12181(7) (2012). Even cast broadly, ADA duties have been anchored to "physical place" so that an employer benefit plan fell outside its coverage. *See* Kolling v. Blue Cross & Blue Shield of Michigan, 318 F.3d 715 (6th Cir. 2003).

entities controlled by religious organizations" are expressly exempted,[55] it is difficult to imagine much that is not covered.

The narrowness of Title II's scope versus the ADA's is shown in cases interpreting Title II to exempt service establishments like hair salons. Take, for example, *Halton v. Great Clips, Inc.*[56] There, former employees and customers brought suit in federal court against a Great Clips franchise, alleging it refused to provide relaxers and "fades" – services predominantly sought by African Americans – while offering "permanents" to white customers. Plaintiffs charged violations of Title II and Ohio's public accommodations nondiscrimination law.

In granting summary judgment for the defendant business and owner on the Title II claim, the district court noted that, as a "threshold matter," Title II "clearly does not include retail stores and food markets because there has been little if any discrimination in the operation of these establishments."[57] For this proposition, it cited *Newman v. Piggie Park Enterprises*.

While courts "have found health spas, golf clubs, and beach clubs" to be covered by Title II as places of entertainment, the court would have been "hard-pressed to find that the hair services offered by [Great] Clips could be deemed 'entertainment.'"[58]

As a service establishment, Great Clips was simply not contemplated by Title II's definition. "[I]f Congress wanted to include … a service establishment, it could have amended Title II" to encompass such businesses.[59] Given the ADA's breadth and Title II's circumscribed scope, "inaction by Congress could not be mere oversight or an expectation that courts would broadly interpret the statute to include basically any type of establishment."[60] That Great Clips was located in a shopping plaza did not suffice to bring it within Title II. That "reading of the statute would bring every establishment in any mall or any shopping center within the statute's purview," a result Congress did not intend.[61]

Ironically, *Great Clips* relied upon *Newman v. Piggie Park Enterprises*, a case invoked across this volume. Pizer says of *Piggie Park* that "Americans have officially rejected racial segregation regardless of religious motivation;"[62] Louise Melling says restaurant franchise owners may "espouse the religious beliefs of his own choosing,"

[55] 42 U.S.C. § 12187 (2012).
[56] 94 F. Supp. 2d 856 (N.D. Ohio 2000).
[57] *Id.* at 862 (citing Newman v. Piggie Park Enterprises, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968)).
[58] 94 F. Supp. 2d at 862.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 863 (noting Title II would encompass businesses that have "a covered establishment" on premises, like a sit-down restaurant). Plaintiffs' claims went forward under Ohio law which regulates any "place for the sale of merchandise." 94 F. Supp. 2d at 870; Ohio Rev. Code § 4112.01(9).
[62] *See* Pizer, Chapter 29.

but do "not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[63] Linda McClain notes the Colorado court in *Masterpiece Cakeshop* cited *Piggie Park* for the same proposition,[64] as does the majority in *Masterpiece Cakeshop*.[65] But for all the emphasis placed on *Piggie Park*, the United States Court of Appeals for the Fourth Circuit observed:

> The sense of [Title II's] plan of coverage is apparent. Retail stores, food markets, and the like were excluded from the Act for the policy reason that there was little, if any, discrimination in the operation of them. Negroes have long been welcomed as customers in such stores.[66]

Congress never found a need for regulating retail establishments – or any businesses outside the narrow band covered by Title II. In other words, Congress never reached the butcher, the baker, or the candlestick maker.

2 The Variable Scope Under State Nondiscrimination Laws

State laws take a range of approaches, from the ADA's broad coverage to Title II's narrow one.[67] California's Unruh Civil Rights law typifies the former. It reaches "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[68] Other states hew closely to federal law in specifying enumerated *places*. Ohio is representative: it covers "any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public."[69]

[63] *See* Melling, Chapter 19 (quoting *Piggie Park*, 390 U.S. 400 at 945).

[64] *See* McClain, Chapter 17 (citing *Masterpiece Cakeshop*, 370 P.3d at 291 (quoting *Piggie Park*, 390 U.S. 400 at 945)).

[65] Masterpiece Cakeshop, No. 16-111, slip op. at 9.

[66] 372 F.2d at 476 (citing remarks of Senator Humphrey).

[67] *Compare* Coleman, *supra* note 49, at 741–42 ("Even though the federal statute continues to define public accommodations narrowly, state laws now typically include just about all businesses.").

[68] Cal. Civil Code §51.

[69] Ohio Rev. Code 4112.01(A)(9). In interpreting a similar list in a gambling probation statute, Ohio's Attorney General read "other place of public accommodation" to refer to places like those preceding it in the statute, like "hotel[s], restaurant[s], tavern[s], store[s], arena[s], hall[s]." Ohio Attorney General Op. 75–005 (Jan. 30, 1975), http://www.ohioattorneygeneral.gov/getattachment/1318d384-9d4d-40bf-bf82-a2ee85c6b37e/1975-005.aspx. Whether a particular place is "public" depends on its use. *Id.*

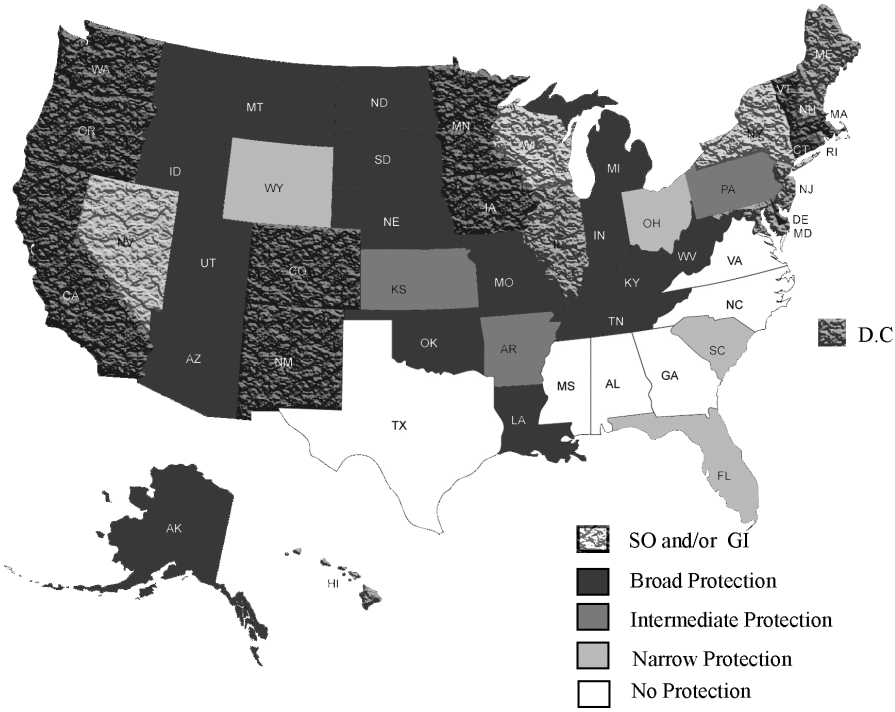

FIGURE 30.5 Breadth of nondiscrimination laws

Not all states cast the net as widely as possible, as Figure 30.5 shows. Indeed, America is a checkerboard on scope of nondiscrimination laws, just as it is with whether LGBT persons are protected from discrimination.[70]

Twenty-eight states follow the California all-in model, including some that have extended SOGI nondiscrimination protection to the LGBT community, such as Washington, and some that have not, such as Arizona.[71] Eight states hew to the

[70] Based on the text of scope provisions only, laws characterized here as broad cover all conceivable businesses. Laws with intermediate coverage anchorage coverage to a physical location and enumerated type of business but reach services, too. Narrow laws do not include a reference to services and hinge on enumerated places.

[71] *See* Appendix, Chapter 35, Col. 3 (listing Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia).

States often mirror federal law in not reaching private entities. *See, e.g.*, WIS. STAT. 106.52 (2015) ("'Public place of accommodation or amusement' does not include a place where a bona fide private, nonprofit organization or institution provides accommodations . . . to the following individuals only: a. Members of the organization or institution. b. Guests named by members . . . c. Guests named by the organization").

Even when a state's public accommodations law covers a longer list of businesses, scope questions arise. This is because "[h]istorically, public accommodations provided essential

federal government's specified-list of regulated places approach.[72] Six states, all in the Bible belt, have no public accommodations law protecting anyone from discrimination in public places.[73] Eight states and DC follow a middle course, focusing on places but explicitly including within the category of public accommodations businesses that provide "services."[74] Thus, state laws can be arrayed on a continuum between Title II's narrow and California's "all-in" approaches.

Despite the rhetoric that all businesses must serve all comers, that has not been the rule across America.[75] Query whether states that have not enacted SOGI nondiscrimination protections will be willing to include LGBT persons within the state's protections absent a new model for accommodating religious persons in such laws.

B *Regulating the Bakery, Not the Baker*

Underpinning the purity model is the notion that no departure can be tolerated from the way in which racial nondiscrimination has been addressed in this country. Enacted at a time of great racial division, the Civil Rights Act of 1964 (1964 Act) ameliorated many of the effects of discrimination based on race,[76] which has blighted our nation.

products or services but later cases include other, non-required businesses." Coleman, *supra* note 49. For instance, dating services have been found to be covered even when not statutorily enumerated. *See, e.g.*, Lahmann v. Grand Aerie of Fraternal Order of Eagles, 43 P.3d 1130, 1135–36 (Or. Ct. App. 2002).

[72] *See* Appendix, Chapter 35, Col. 3 (listing Florida, Nevada, New York, Rhode Island, Ohio, South Carolina, Wisconsin, and Wyoming).

[73] These states are Alabama, Georgia, Mississippi, North Carolina, Texas, and Virginia.

[74] *See* Appendix, Chapter 35, Col. 3 (listing Arkansas, District of Columbia, Illinois, Kansas, Maine, Maryland, New Hampshire, New Jersey, and Pennsylvania).

[75] Title II's narrow scope alleviates the pressure under a no-exceptions-once-regulated-approach because it reaches some but not all storefronts on Main Street. For example, small dental offices would not be regulated as public accommodations under federal law or the law of some states. *See* Robin Fretwell Wilson, *When Governments Insulate Dissenters From Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. Davis L. Rev. 703, 758–59 n.271 (2014). Thus, not all businesses a person might encounter walking down Main Street are regulated public accommodations, avoiding the question legally of whether professionals should be regulated exactly as businesses selling goods.

Because of scope limitations, some wedding vendors remain outside state SOGI laws. *See* Amy Lynn Photography Studio v. City of Madison, Case No. 17CV0555 at 3 (Wis. Cir. Ct. 2017), http://www.adfmedia.org/files/AmyLynnPhotographyJudgmentWisconsin.pdf (quoting Wis. Stat. § 106.52(1)(e)1 (2015))(finding no violation by Wisconsin photographer operating online business from her home because statute encompassed only businesses with a "physical storefront").

[76] Since the 1964 Act's passage, Americans have become increasingly intolerant of racial intolerance. Consider approval of marriages between "blacks and whites," where public support has leapt from about 10% in 1964 to 87% in 2013. *See* Frank Newport, *In U.S., 87% Approve of*

Change resulted in part because the 1964 Act permits no exceptions for smaller businesses.[77] As the president of the AFL-CIO said in testimony submitted to Congress:

> A Negro seeking service at a small lunch counter can be just as hungry as the one who stops at Howard Johnson's. The public accommodations bill is too important to be compromised by limiting either the size or type of establishment covered or the means of enforcing the right to equal service. We need a public accommodations bill with teeth in it.[78]

Congress did not regulate every "type of establishment," but it understood the "public-spirited proprietor will benefit from an enforceable public accommodations measure" applied uniformly to whatever establishments are covered; without blanket treatment for regulated businesses, the "public establishment [that] wants to do the right thing, but [is] concerned lest their competitors gain an advantage by continuing old discriminatory practices," may be disadvantaged in the marketplace and dissuaded from positive change.[79]

While the 1964 Act left aside small homeowners who rent rooms in their home, known as the Mrs. Murphy exception, the rationale for leaving them aside – "the right to privacy in one's residence" – "[had] no applicability to a small commercial hotel, a small restaurant, a bowling alley, or a barbershop."[80] Being turned away from a storefront on Main Street "carr[ied] different social meanings" than being refused by a private homeowner. "While a tired black family might bitterly resent [the homeowner's] decision, they would understand themselves as victims of her personal choice – and this is categorically different from the institutionalized humiliation imposed by a hotel clerk who rejects them.'"[81]

Congress expressly rejected a small lunch counter exception mirroring the small employer exception in Title VII of the 1964 Act.[82] An "explicit cutoff – in either dollar volume or number of employees – should [not] be written into this bill to

Black-White Marriage, vs. 4% in 1958, Gallup (July 25, 2013), http://www.gallup.com/poll/163697/approve-marriage-blackswhites.aspx.

77 Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y 1 (2014).

78 *Civil Rights – Public Accommodations: Hearings Before the S. Comm. on Commerce S. 1732, a Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce*, 88th Cong. 1259 (1963) (statement of Walter P. Reuther, President, International Union, United Automobile Workers).

79 *Id.*; *see also Civil Rights – Public Accommodations*, *supra* note 78, at 257. (Statement of Senator Javits) ("I do not believe Congress should itself discriminate against the larger businesses in favor of the smaller ones, in order to permit the latter the capability of racial discrimination.").

80 *Id.*, *supra* note 77, at 1260 (statement of Mr. Reuther). *See generally* Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. Rev. 951, 975 (2015) (noting that the Mrs. Murphy exceptions were premised on privacy, associational rights, civil rights, and political expediency, as well as "the difficulty and cost of enforcement and the collateral costs of federalizing interpersonal relationships").

81 Bruce Ackerman, We the People: The Civil Rights Revolution 142 (2014).

82 42 U.S.C. § 2000e(b) (2012) (exempting employers with fewer than 15 employees).

exempt outright smaller businesses."[83] Including such exemptions would "negate the moral and human base for this legislation."[84] And making some exceptions would undercut the assurance given that all Americans would be treated alike regardless of race.[85] Within a regulated category, such as hotels, "virtually universal coverage facilitated compliance by removing the fear that, if a public accommodation desegregated, its customers could flee to one that remained segregated."[86]

On the Senate floor, Vermont Senator Winston Prouty explained that "[t]he evil [Congress] seek[s] to remove is the degradation of a man in his use of the common privileges because his skin is not the proper color. The affront is to his dignity."[87] "Discrimination," the Senate report to the 1964 Act explained, "is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public."[88]

The 1964 Act sought to erase institutionalized humiliation, the primary evil of discrimination.[89] When a group can be freely denied access to businesses open to others, it signals to that group that it is inferior and not valued as members of the polity.[90]

The lesson of the 1964 Act is this: no one should be turned away from a business on Main Street open to everyone else. Treating customers with dignity requires that regulated businesses serve all customers. The stricture can be honored *without* running religious people out of the public square – by regulating the business, not individual workers, so that every couple who walks in is served with dignity but no specific individual must perform any given service.

New SOGI laws should make clear that, as to weddings, religious owners can fulfill duties imposed on their businesses without personally performing a given service. Larger business can hire a new employee to perform the service if existing employees, as a matter of faith, cannot. Small business owners of businesses where there is a high probability that the owner or a family member would be asked to do the service personally would retain the discretion to hire a new employee to assist the business to fulfill its new duty or to put in place arrangements with contractual partners to assist as needed.

[83] "[A] Negro should not be forced to decide whether the particular hotel or motel he is approaching is one large enough to treat him like any other fellow American. *"Civil Rights – Public Accommodations," supra* note 78 (Statement of Senator Javits).

[84] *Id.*

[85] *Id.*

[86] Landsberg, *supra* note 77, at 9–10 (quoting ACKERMAN, *supra* note 81, at 142).

[87] 110 CONG. REC. 8258 (1964).

[88] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291–92 (1964) (quoting S.Rep. No.872, 88th Cong., 2d Sess., 16).

[89] ACKERMAN, *supra* note 81.

[90] Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006); Nan. D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001) (describing the significance of citizenship).

For the smallest businesses, hiring new workers may be too costly, placing a premium on the need for legislators to leave the discretion afforded by contract law to subcontract with others to fulfill the obligation. If a business cannot afford to hire a new employee, a new duty on the business to serve all customers in all services can effectively force an owner to *personally* provide a particular service *unless* flexibility to cover the service through a subcontractor is baked in. Such a duty will, of course, apply whether a business is incorporated or conducted as a sole proprietorship.

The ability to use independent contractors to fulfill contracts for goods and routine services already exists in the background law of most states. The business remains on the hook contractually for the service, is liable for breach, and must ensure performance – just as businesses do when acting through employees.[91]

Now, if one sees SOGI laws as devices to run religious people out of the public square or to expunge certain views from society – a feature, not a bug[92] – this idea will be wholly unacceptable. But if the goal is to avoid the humiliation and dignitary losses LGBT persons experience all too frequently across the United States today,[93] then parsing between the business and owners accomplishes this.

IV CONCLUSION

Without a new model for sharing the public space, we risk perpetuating a culture war between faith and sexuality, a war no one can win.

No one should be turned away from a business open to all on Main Street. But neither should persons of faith effectively be barred from operating small businesses that focus on, or only sometimes cater to, weddings. To borrow a quip, bakeries cannot be choosers. But individual business owners should be allowed to decide how the cake is baked.

As Andrew Sullivan said once, neither side will "conquer intolerance with intolerance."[94] Finding flexible approaches that keep both parties in the public square is not only right and decent, it offers the best hope for "changing minds and hearts."

[91] Jared G. Kramer, *When Should Contracts Be Assignable? An Economic Analysis* 7 (Harvard Law Sch. John M. Olin Center for Law, Economics, & Business, Discussion Paper No. 484 (Aug. 2004) ("As a matter of contract default rules, contract rights can generally be assigned, and contract obligations can generally be delegated to others.").

[92] *Compare* Bruni, *supra* note 44 (quoting a prominent gay philanthropist as saying "church leaders must be made 'to take homosexuality off the sin list'").

[93] See NeJaime & Siegel, Chapter 6; Melling, Chapter 19; and Pizer, Chapter 29, for poignant accounts.

[94] Andrew Sullivan, *The Morning After In Arizona*, The Dish (Feb. 27, 2014), http://dish.andrewsullivan.com/2014/02/27/the-morning-after-in-arizona/.