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The Role of Religion in State Public Accommodations Laws

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THE ROLE OF RELIGION IN STATE PUBLIC ACCOMMODATIONS LAWS

ELIZABETH SEPPER*

ABSTRACT

In this Article, I provide a comprehensive account of the role of religion in public accommodations laws. I analyze public accommodations statutes across the fifty states, identify their boundaries, and categorize their religious exemptions. In so doing, I interrogate and debunk misconceptions widely held even by legal scholars that: the Civil Rights Act is a representative public accommodations law; antidiscrimination obligations of retail establishments and social service providers are unusual or new; exemptions for religious entities or small businesses are common; and public accommodations laws have as their central aim remedying market exclusion.

Part I sets out the basic framework of public accommodations law. For-profit businesses—the baker, doctor, and wedding venue of ongoing debates over same-sex marriage refusals—are the prototypical public accommodations. Non-profit religious organizations similarly assume nondiscrimination duties when they serve the public. In what has been a stable public-private divide, the state regulates commercial and quasi-commercial entities in the interest of equality, while granting private associations license to discriminate.

Part II demonstrates that public accommodations laws typically do not offer religious exemptions. When exemptions specific to religion exist, they tend to be limited to a narrow range of activities of religious non-profits and to co-religionist favoritism alone. This structure of limited or no religious exemptions remained intact through the decades, but cracks have recently appeared in the façade as states adopted religious exemptions related to sexual orientation (rarely) and marriage (commonly).

Part III examines the purposes of public accommodations laws. Whereas proponents of religious exemptions frequently argue that such laws target only pervasive exclusion from the market, the text of the statutes sets out individual and societal interests far broader than material goods and target segregation and subordination within the market as well as exclusion from it. As a matter

* Associate Professor, Washington University School of Law. Thank you to Chad Flanders, Sara Robertson, St. Louis University School of Law, Nelson Tebbe, and in particular Larry Sager.

of textual analysis alone then, courts faced with claims for exemption under state religious freedom restoration acts must weigh exemption against interests in full and equal enjoyment of public life.

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INTRODUCTION

Public accommodations and religious exemptions are very much of the moment. For-profit businesses refuse to take photos, bake cakes, or arrange flowers for same-sex couples out of religion-based objections to same-sex marriage or coupling.¹ Counselors and physicians have refused their services to gays and lesbians.² Non-profit religious organizations deny same-sex couple's requests to reserve wedding venues that they hold open to the public, rent in arms-length transactions, and do not supervise during the wedding ceremonies.³ Religiously affiliated adoption agencies withdraw from their state adoption contracts, rather than comply with sexual orientation antidiscrimination laws.⁴ Hospitals deny couples rights to hospital visitation and medical decision-making.⁵

In his Childress Lecture, Professor Lawrence Sager invites us to consider these conflicts between religious freedom and equality through the lens of structural injustice. As is typical of his scholarship, Sager brings a robust conception of equality into ongoing debates. In his view, modern

1. See Katie McDonough, *Yet Another Bakery Refuses to Make Cake for Gay Wedding*, SALON (May 15, 2013), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/?utm_source=feedly [<http://perma.cc/4MG7-C6CG>]; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: "That's Illegal."* ABC NEWS (Aug. 19, 2011), <http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333#.UZqtN7Wkrlw> [<http://perma.cc/JS36-6GPF>]; Rebecca Lindstrom, *Suwanee Business Refuses to Print Gay Wedding Invitation*, 11 ALIVE (Apr. 27, 2015), <http://www.11alive.com/story/news/local/suwanee/2015/04/24/suwanee-alphagraphics-franchise-gay-wedding/26318959/> [<http://perma.cc/JS36-6GPF>]; *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 94248 (Wash. Super. Feb. 18, 2015) (concluding that applying antidiscrimination law to florist refusing to serve same-sex wedding does not violate state or federal free exercise provisions).

2. *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty.* Superior Court, 189 P.3d 959, 963 (Cal. 2008) (involving physicians refusing to perform an intrauterine insemination for a lesbian); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868–69, 871 (11th Cir. 2011) (involving counseling student challenging expulsion from counseling program due to her religiously based refusal to counsel same-sex couples, contrary to professional standards requiring nonjudgmental, nondiscriminatory treatment of all patients).

3. See *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Div. on Civ. Rights Dec. 29, 2008).

4. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOS. GLOBE, Mar. 11, 2006, at A1 (reporting that bishops refused to comply with sexual orientation antidiscrimination law, though Catholic Charities has previously placed children with gays); Manya A. Brachear, *State Probes Religious Foster Care Agencies Over Discrimination*, CHI. TRIB. (Mar. 2, 2011), http://articles.chicagotribune.com/2011-03-02/news/ct-met-gay-foster-care-20110301_1_care-and-adoption-catholic-charities-parents [<http://perma.cc/DY46-RMRR>] (reporting that Lutheran Child and Family Services, Catholic Charities, and the Evangelical Child and Family Agency discriminated against same-sex couples in foster and adoption care).

5. Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, N.Y. TIMES (May 12, 2009), <http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/?r=0> [<http://perma.cc/8YDN-TFLQ>] (listing examples).

constitutionalism at bottom strives for the equal stature of all citizens. Its fundamental and deep aim is the eradication of patterns of diminished membership, which allot some people to lesser status than their fellow citizens based on their race, sex, religion, or sexual orientation. National progress toward these goals depends, not primarily on courts' interpretation of constitutional text, but on legislatures' passage of antidiscrimination laws ensuring full and equal access to all commercial enterprises. Sager issues a call for deeper consideration of state public accommodations laws as an essential tool in our society's efforts to dismantle "pervasive, enduring, and tentacular patterns of inequality" and to realize "the egalitarian commitments of our modern constitution."⁶ In this response, I take up his call.

As for-profit businesses and non-profit religious organizations claim rights to religious exemption, federal law has limited bearing. The federal Religious Freedom Restoration Act (RFRA) constrains only the federal government and does not affect the reach of state public accommodations laws.⁷ Moreover, the federal public accommodations law—Title II of the Civil Rights Act—applies to a narrow set of commercial entities and prohibits discrimination on the basis of "race, color, religion, or national origin" alone.⁸

State and local law therefore will be the battleground with one right pitted against another. On the one hand, twenty-one states currently have state Religious Freedom Restoration Acts, which generally prohibit state governments from imposing substantial burdens on free exercise unless such burdens are the least restrictive means to further a compelling governmental interest.⁹ In the 2015 legislative term, twelve additional states introduced but did not pass RFRAs.¹⁰ On the other hand, as we shall see, virtually all states have public accommodations antidiscrimination laws, which require places open to the public to grant customers full and equal treatment.¹¹ Twenty-two prohibit sexual orientation discrimination,¹² with more likely to do so in the foreseeable future. Hundreds of city and county ordinances extend local protection against discrimination linked to sexual orientation and/or gender

6. Lawrence Sager, Draft Keynote Address at the Saint Louis University Law Journal Childress Memorial Lecture 2015: Religious Freedom, Social Justice and Public Policy (Nov. 13, 2015) (unpublished manuscript) (on file with the *Saint Louis University Law Journal*).

7. *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

8. 42 U.S.C. § 2000a (2012).

9. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [http://perma.cc/9JTS-59Z2] (last visited Feb. 28, 2016).

10. *2015 State Religious Freedom Restoration Act Legislation*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> [http://perma.cc/2THH-EGLE] (last visited Feb. 28, 2016).

11. *See State Public Accommodation Laws*, *infra* note 19.

12. *Id.*

identity.¹³ While both state RFRAs and antidiscrimination requirements have a strong link to the constitutional text—the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, respectively—any tensions between them tend not to be resolved by the Constitution itself.¹⁴

Yet, ongoing scholarly and political debates over religious exemptions to nondiscrimination laws lack a comprehensive account of state public accommodations statutes. Because the legal scholarship previously suffered from a deficit of interest in public accommodations,¹⁵ the preeminent taxonomy of laws in this area, authored by Lisa Lerman and Annette Sanderson, dates from 1978.¹⁶ In the past three decades, however, states have modernized and amended their public accommodations statutes to add prohibited bases of discrimination. Some states only adopted their first nondiscrimination laws after 1978.¹⁷ Importantly, while Lerman and Sanderson systematically surveyed the applicability and enforcement of state public accommodations laws in 1978, they did not dwell on any religious exceptions to those laws.

In this Article, I provide a comprehensive account of the role of religion in public accommodations laws. I analyze public accommodations statutes across

13. See, e.g., ST. LOUIS, MO. CODE OF ORDINANCES § 3.44.080(C) (2015) (prohibiting discrimination on the basis of sexual orientation, gender identity, or expression in public accommodations).

14. Nonetheless, these conflicts generally are not governed by constitutional guarantees of religious freedom or equal protection. The Free Exercise Clause of the First Amendment does not require religious exemptions to neutral and generally applicable antidiscrimination laws. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Nor, as Sager says, does the Fourteenth Amendment dictate that non-governmental actors refrain from discrimination.

15. Some remarkable exceptions exist. See, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1448 (1996); David B. Cruz, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1178 (1994) (noting that “[f]ew courts or legal scholars have yet systematically considered whether or to what extent religious belief warrants constitutional exemption from laws that proscribe discrimination on the basis of sexual orientation”).

16. Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

17. For example, in 1978, thirty-nine states had public accommodations laws. Lerman & Sanderson, *supra* note 16, at 264. Today, forty-six states have such laws. *State Public Accommodation Laws*, *infra* note 19. Prohibitions on sex discrimination were adopted in the 1970s and ‘80s. Twenty-six states prohibited sex discrimination in 1978, compared to forty-six today. Lerman & Sanderson, *supra* note 16, at 264; *State Public Accommodation Laws*, *infra* note 19. Only nine states and D.C. prohibited marital status discrimination in 1978. Lerman & Sanderson, *supra* note 16, at 268. While D.C. and thirty-four cities and counties had ordinances against sexual orientation discrimination in 1978, no state had such protections. *Id.* at 269–70.

the fifty states, identify their boundaries, and categorize their religious exemptions. In so doing, I interrogate several of the themes of Sager's Childress Lecture and of the broader debate over religious exemptions to public accommodations laws. I debunk misconceptions widely held even by legal scholars that: the Civil Rights Act is a representative public accommodations law; antidiscrimination obligations of retail establishments and social service providers are unusual or new; exemptions for religious entities or small businesses are common; and public accommodations laws have as their central aim remedying market exclusion.

To conduct this review, I compiled public accommodations laws from the District of Columbia and the forty-six states with such laws. I then identified prohibited bases of discrimination, discriminatory practices, definitions of public accommodations, and exceptions thereto (whether secular or religious). Where the statutory language of a religious exemption was ambiguous, I also conducted a search for case law or administrative guidance in order to more accurately categorize it.

Part I sets out the basic framework of public accommodations law. It demonstrates that the application of public accommodations law to the baker, doctor, and wedding venue is unremarkable. For-profit businesses are the prototypical public accommodation. Non-profit religious organizations similarly assume nondiscrimination duties when they serve the public. In what has been a stable public-private divide, the state regulates commercial and quasi-commercial entities in the interest of equality, while giving private associations license to discriminate in the interest of their in-turning nature. Statutory law and constitutional doctrine has not drawn a distinction between religious and secular, but rather has relied on multi-factor analysis (including profit status, commercial nature, selectivity, exclusivity, and intimacy of an entity) to police the public-private line.

Part II categorizes religious exemptions within state public accommodations statutes. It advances our understanding of how the law has balanced equality and religious freedom in commerce in the past.¹⁸ Public accommodations laws typically do not offer religious exemptions. When exemptions exist, they tend to be limited to a narrow range of activities of religious non-profits and to co-religionist favoritism alone. This structure of limited or no religious exemptions remained intact through the decades, but cracks have recently appeared in the façade as states adopted religious exemptions related to sexual orientation (rarely) and marriage (commonly).

18. Such analysis is particularly important, because religious objections against public accommodations laws can be seen as a current manifestation of long-running resistance to antidiscrimination laws in commercial life. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1209 (2014).

Part III examines the purposes of public accommodations laws. Whereas proponents of religious exemptions frequently argue that such laws target only pervasive exclusion from the market, the texts of the statutes set out individual and societal interests far broader than material goods and target segregation and subordination within the market as well as exclusion from it. As a matter of textual analysis alone then, courts faced with claims for exemption under state RFRAs must weigh exemption against interests in full and equal enjoyment of public life.

I. SETTLED EXPECTATIONS OF PUBLIC ACCOMMODATIONS AND PRIVATE ASSOCIATIONS

Today, virtually all states and the District of Columbia prohibit discrimination by public accommodations.¹⁹ In these jurisdictions, public accommodations may not discriminate on the basis of race, color, national origin, religion, and sex (South Carolina differs in that it allows sex discrimination).²⁰ Eighteen jurisdictions also prohibit discrimination based on marital status,²¹ gender identity,²² and age.²³ Twenty-two forbid sexual

19. *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<http://perma.cc/CP7B-AXX9>] (last visited Feb. 28, 2016). The only exceptions are Alabama, Georgia, Mississippi, and Texas. *Id.* North Carolina adopted a public accommodations statute in 2016. N.C. GEN. STAT. § 143-422 (2016). In some of these states, cities have passed antidiscrimination ordinances that apply to businesses within their boundaries. *Id.*

20. S.C. CODE ANN. § 45-9-10(A) (1990) (prohibiting discrimination in “any place of public accommodation” based on “race, color, religion, or national origin”). North Carolina specifies “biological sex.” N.C. GEN. STAT. § 143-422.11 (2016).

21. *State Public Accommodation Laws*, *supra* note 19 (listing Alaska, California, Colorado, Connecticut, Delaware, Illinois, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Vermont, Virginia, and D.C.).

22. *Non-Discrimination Laws*, MAP: MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [<http://perma.cc/H755-GDYH>] (last visited Feb. 28, 2016) (listing California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and D.C.).

23. CONN. GEN. STAT. § 46a-64 (2012); DEL. CODE ANN. tit. 6, § 4504 (West 2013); 775 ILL. COMP. STAT. § 5/1-103 (2015); LA. REV. STAT. ANN. §§ 51:2232(5) & 51:2247 (2014); MD. CODE ANN. STATE GOV'T. § 20-304 (West 2014); MICH. COMP. LAWS § 37.2302 (1977); MONT. CODE ANN. § 49-2-304 (2015); N.H. REV. STAT. ANN. § 354-A:16 (1998); N.J. STAT. ANN. § 10:5-4 (West 2006); N.D. CENT. CODE § 14-02.4-14 (2005); OHIO REV. CODE ANN. § 4112.02(G) (West 2009); OKLA. STAT. tit. 25, § 1402 (2014); OR. REV. STAT. § 659A.403 (2015); 43 PA. CONS. STAT. § 953 (1991); R.I. GEN. LAWS § 11-24-2 (2001); TENN. CODE ANN. § 4-21-501 (West 2015); VA. CODE ANN. § 2.2-3900(B)(1) (2001); W. VA. CODE § 5-11-2 (2015); D.C. CODE § 2-1402(a) (2014).

orientation discrimination.²⁴ A handful adds prohibited bases, such as familial or military status.²⁵

A. *Defining Public Accommodations*

To which places do such laws apply? As a general principle, public accommodations laws apply by virtue of an entity's public-facing role—its entering commerce and opening to the world at large. As Lerman and Sanderson explained in 1978, “[p]ublic accommodations’ is a term of art which was developed by the drafters of discrimination laws to refer to places other than schools, work places, and homes.”²⁶ Thus, education, employment, and housing antidiscrimination statutes, which typically involve a different set of legal obligations and exemptions, are outside the scope of this Article.²⁷

Statutory definitions of a public accommodation reflect three basic models.²⁸ Under the first model, statutes provide an exclusive list of businesses subject to antidiscrimination obligations.²⁹ The federal antidiscrimination law, Title II of the Civil Rights Act, for example, guarantees “[e]qual access” to five categories of establishments: “lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of

24. *State Public Accommodation Laws*, *supra* note 19 (listing California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, Washington, and D.C.).

25. ALASKA STAT. § 18.80.200 (2015) (“changes in marital status, pregnancy, or parenthood . . .”); CAL. CIV. CODE § 51(b) (West 2016) (“medical condition” and “genetic information”); CONN. GEN. STAT. § 46a-64(a) (2007) (“lawful source of income”); FLA. STAT. § 760.08 (2015) (“familial status”); 775 ILL. COMP. STAT. § 1/102(A) (2015) (“order of protection status,” “military status,” “unfavorable discharge from military services”); N.J. STAT. ANN. § 10:5-4 (West 2006) (“affectational or sexual orientation” and “familial status”); N.D. CENT. CODE § 14-02.4-02(6) (2015) (“status with regard to marriage or public assistance”); MASS. GEN. LAWS ch. 272, § 92A (2016) (“class”); D.C. CODE § 2-1402.31(a) (2014) (“personal appearance,” “familial status, family responsibilities, genetic information,” “matriculation, political affiliation, source of income, or place of residence of business of any individual”).

26. Lerman & Sanderson, *supra* note 16, at 217.

27. A few caveats about the scope of this analysis. First, disability discrimination is outside its scope. Disability often appears in a separate provision, requires more specific measures from public accommodations, and comes with a different body of federal law. Second, like Lerman and Sanderson, I exclude schools from this discussion. Although eleven states explicitly include private schools (though sometimes not religious schools) within the definition of public accommodations, the legal framework varies widely from state to state. Even states whose public accommodations laws cover schools may have freestanding education antidiscrimination statutes. Third, I largely exclude housing for similar reasons.

28. The exception is Virginia's statute, which uses the term “places of public accommodations,” but provides no definition. VA. CODE ANN. § 2.2-3900(1) (2001).

29. They tend to provide that a “‘place of accommodation’ means” or “includes.”

exhibition or entertainment;” and establishments located within covered establishments and open to the public.³⁰

Neither the form nor the scope of the Civil Rights Act is common among state laws. Only Florida defines public accommodations so narrowly (despite having enacted its statute in the 1980s).³¹ Also of more recent vintage, South Carolina’s statute defines public accommodations to include transient lodgings, eating places, hospital/medical facilities with overnight accommodations, retail or wholesale establishments, places of entertainment, and establishments in covered establishments.³² But it requires that, in order to be subject to the nondiscrimination law, such places must be licensed or permitted—limiting the statute’s reach with regard to most stores, for example.³³ From there, coverage broadens. Maryland adds to Title II’s list any retail establishment that “offers goods, services, entertainment, recreation, or transportation,”³⁴ and New York specifies a lengthy list of covered entities.³⁵

A second model, by contrast, defines the term “public accommodations” generally. An illustrative law applies to “any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public.”³⁶ Nineteen states provide a general definition along these lines.³⁷ Two others—California and Wyoming—do not use the

30. 42 U.S.C. § 2000a(b). In upholding Title II, the Supreme Court said, “There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. . . . [T]he constitutionality of such state statutes stands unquestioned.” *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259–60 (1964).

31. FLA. STAT. § 760.02(11) (2015).

32. S.C. CODE ANN. § 45-9-10(B) (1990).

33. *Id.* Kentucky takes a somewhat similar approach with regard to sex discrimination. KY. REV. STAT. ANN. § 344.145 (West 1984) (prohibiting sex discrimination by any “restaurant, hotel, [or] motel” categorically and by “any facility supported directly or indirectly by government funds”).

34. MD. CODE ANN., STATE GOV’T, § 20–301(4) (West 2014).

35. N.Y. CIV. RIGHTS LAW § 40 (McKinney 1945) (stating “[a] place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include . . .”).

36. ARK. CODE ANN. § 16-123-102(7) (2015).

37. For statutes with general definitions like Arkansas’s, see CONN. GEN. STAT. § 46a-63(1) (2004); DEL. CODE ANN. tit. 6, § 4502(14) (West 2014); IDAHO CODE ANN. § 67-5902(9) (2005); INDIANA CODE § 22-9-1-3(m) (2015); KY. REV. STAT. ANN. § 344.130 (West 1984); LA. REV. STAT. ANN. § 51:2232(9) (2014); MICH. COMP. LAWS § 37.2301(a) (2016); MINN. STAT. § 363A.03(34) (2004); N.M. STAT. ANN. § 28-1-2(H) (2007); N.D. CENT. CODE § 14-02.4092(14) (2013); OKLA. STAT. tit. 25, § 1401(1) (2013); OR. REV. STAT. § 659A.400(1)(a) (2013); S.D. CODIFIED LAWS § 20-13-1(12) (1994); TENN. CODE ANN. § 4-21-102(15) (West 2015); VT. STAT. ANN. tit. 9, § 4501(1) (1991); W. VA. CODE § 5-11-3(j) (2015). For a slightly narrower

term “public accommodation,” but extend nondiscrimination requirements to “all business establishments of every kind whatsoever”³⁸ and “all places or agencies which are public in nature, or which invite the patronage of the public,”³⁹ respectively.

The third model bridges the exclusive list and the general definition models. For example, Illinois, New Jersey, and Rhode Island each offers a non-exclusive and lengthy list of covered places.⁴⁰ Some statutes instead provide an exclusive list of categories to which the law applies, but then include a catch-all provision, which defines a public accommodation as any

definition, see IOWA CODE § 216.2(13)(a) (2007) (“each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility.”); UTAH CODE ANN. § 13-7-2(1)(a) (West 2011) (“every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or charge.”). Utah’s antidiscrimination law, however, applies not only to public accommodations, but also to “business establishments” and “enterprises regulated by the state.” *Id.* § 13-7-3.

38. CAL. CIV. CODE § 51(b) (West 2012).

39. WYO. STAT. ANN. § 6-9-101(a) (1982).

40. Illinois’ statute reads:

“Place of public accommodation” includes, but is not limited to:

- (1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than 5 units for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (2) a restaurant, bar, or other establishment serving food or drink;
- (3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (4) an auditorium, convention center, lecture hall, or other place of public gathering;
- (5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (7) public conveyances on air, water, or land;
- (8) a terminal, depot, or other station used for specified public transportation;
- (9) a museum, library, gallery, or other place of public display or collection;
- (10) a park, zoo, amusement park, or other place of recreation;
- (11) a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education;
- (12) a senior citizen center, homeless shelter, food bank, non-sectarian adoption agency, or other social service center establishment; and
- (13) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

775 ILL. COMP. STAT. § 5/5-101(A) (2009); *see also* N.J. STAT. ANN. § 10:5-5(l) (West 2009); R.I. GEN. LAWS § 11-24-3 (2015).

establishment that invites in the public.⁴¹ Maine’s law is in this model, applying to places that “fall within” the categories of lodging, eating places, entertainment and public gathering venues, sales and rental establishments, personal services from lawyers to laundromats, healthcare facilities, transportation, cultural sites, recreational and athletic facilities, educational institutions, social services, and government buildings—and then “[a]ny establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.”⁴² Finally, thirteen statutes take a slightly different form, both defining “public accommodation” generally and setting forth an illustrative (but not comprehensive) list of businesses encompassed within that definition.⁴³

In sum, in most states, virtually every category of entity open to the public constitutes a public accommodation. Few exceptions apply. Unlike employment antidiscrimination statutes, public accommodations provisions do not exempt small businesses or organizations.⁴⁴ It is the relationship to one’s

41. ARIZ. REV. STAT. ANN. § 41-1441(2) (2007); N.H. REV. STAT. ANN. § 354-A:2(XIV) (2006); WIS. STAT. § 106.52 (2011); D.C. CODE § 2-1401.02(24) (2007).

42. ME. REV. STAT. tit. 5, § 4553(8) (1995).

43. Colorado’s statute, for example, states:

“place of public accommodation” means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.

COLO. REV. STAT. § 24-34-601(1) (2014); *see also* ALASKA STAT. § 18.80.300(16) (2007); FLA. STAT. § 760.08 (2015); HAW. REV. STAT. § 489-2 (2006); KAN. STAT. ANN. § 44-1002(h) (2012); MASS. GEN. LAWS ch. 272, § 92A (1998); MO. REV. STAT. § 213.010(15) (1998); MONT. CODE ANN. § 49-2-101(20)(a) (2011); NEB. REV. STAT. § 20-133 (1973); N.C. GEN. STAT. ANN. § 143-422.12 (2016) (employing definition contained in N.C. GEN. STAT. § 168A-3(8)); OHIO REV. CODE ANN. § 4112.01(A)(9) (West 2009); 43 PA. CONS. STAT. § 954(l) (1997); WASH. REV. CODE § 49.60.040(2) (2009).

44. The lack of such exemptions likely precludes this line of argument from proponents of business religious exemptions. *See* Brief of Douglas Laycock et al. as Amici Curiae Supporting Petitioners at 34, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556tsacLaycock.pdf> [<http://perma.cc/G83P-5L5C>] [hereinafter *Obergefell Brief of Laycock et al.*] (“If, for example, an anti-discrimination law exempts very small businesses—at least if that exemption reflects a purpose to respect their privacy or free them from the burden of regulation—then the Constitution requires exemptions for religious conscience, subject to the compelling interest test.”).

customers or members that matters, not the number of one's employees. Mirroring the exemption for owner-occupied residences frequently found in housing antidiscrimination laws, statutes in thirteen states exclude proprietor-occupied transient lodging with a few rooms for rent from the definition of public accommodations.⁴⁵ Several states permit the extension of special deals in the form of senior citizen discounts or ladies' nights.⁴⁶

More often, obligations of sex nondiscrimination are qualified by concerns with "privacy,"⁴⁷ related to modesty and athletics. A number of statutes explicitly authorize sex segregation in restrooms, locker rooms, changing areas,⁴⁸ and sleeping accommodations in dormitories, rooming houses.⁴⁹ In

45. ARK. CODE ANN. § 16-123-102(7)(A) (2015); OKLA. STAT. tit. 25, § 1401(2) (1968); 775 ILL. COMP. STAT. § 5/5-101(A)(1) (2010); MD. CODE ANN., STATE GOV'T § 20-303(a)(3) (West 2014); MO. REV. STAT. § 213.010(15)(a) (2015); NEB. REV. STAT. § 20-133(1) (1973); NEV. REV. STAT. § 651.050(3)(a) (2011); S.C. CODE ANN. § 45-9-10(B)(1) (1990); UTAH CODE ANN. § 13-7-2(1)(a) (West 2010); *see also* KY. REV. STAT. ANN. § 344.130(2) (West 2000) (excluding "a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence"); DEL. CODE ANN. tit. 6, § 4502(14) (West 2014) (excluding the application to "the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public"); FLA. STAT. § 760.02(11)(a) (2015) ("Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence."); ME. REV. STAT. tit. 5, § 4592(3) (2007) (exempting from requirement not to discriminate against a person "on the grounds that the person is accompanied by a child or children who will occupy the unit[,] . . . the owner of a lodging place: A. That serves breakfast; B. That contains no more than 5 rooms available to be let to lodgers; and C. In which the owner resides on the premises"). Arizona exempts all dwellings from the public accommodations definition, but housing nondiscrimination obligations then apply. ARIZ. REV. STAT. ANN. § 41-1441(2) (2007).

46. CONN. GEN. STAT. § 46a-65(b)(2)(B)(2) (2012) (senior citizen discounts); MONT. CODE ANN. § 49-2-304(3) (2015) (age-based discounts); NEV. REV. STAT. § 651.065(1) (2011) (allowing "differential pricing, discounted pricing or special offers based on sex to promote or market the place of public accommodation"); OR. REV. STAT. § 659A.403(2)(b) (2013) (senior citizen discounts). Oklahoma has idiosyncratic exemptions for barber shops, beauty shops, and "privately-owned resort or amusement establishments." OKLA. STAT. tit. 25, § 1401(2) (1968).

47. *See, e.g.*, MONT. CODE ANN. § 49-2-404 (2015) ("Separate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy."); HAW. REV. STAT. § 489-4 (1986) ("The provision of separate facilities or schedules for female and for male patrons, does not constitute a discriminatory practice when such separate facilities or schedules for female and for male patrons are bona fide requirements to protect personal rights of privacy.").

48. CONN. GEN. STAT. § 46a-64 (b)(1)(B) (2015); DEL. CODE ANN. tit. 6, § 4504(a) (West 2013); 775 ILL. COMP. STAT. § 5/5-103(B) (1988); IND. CODE § 22-9-1-3(q) (2015); KY. REV. STAT. ANN. § 344.145(2)(a) (West 1984); MD. CODE ANN., STATE GOV'T § 20-303 (West 2015); MINN. STAT. § 363A.24 (2015); MONT. CODE ANN. § 49-2-404 (2015); N.M. STAT. ANN. § 28-1-9(E) (2004); R.I. GEN. LAWS § 11-24-3.1 (2015); TENN. CODE ANN. § 4-21-503 (West 2015); WIS. STAT. § 106.52(3)(c) (2013).

certain states, health clubs⁵⁰ and athletic teams⁵¹ may limit their membership by sex. A few statutes envision restricting admission to one sex in a larger array of institutions.⁵² As a rule, however, the public-facing nature of an establishment determines its duties of nondiscrimination across all prohibited bases, whether race, religion, sex, or beyond.

B. The Private Club Exception and Quasi-Commercial Associations

As Sager observes, the most significant exception in public accommodations laws safeguards private clubs or places. Title II of the Civil Rights Act, for example, excises from its terms a “private club or other establishment not in fact open to the public”⁵³ Most state statutes provide that nondiscrimination obligations do not reach any private club or other

49. CONN. GEN. STAT. § 46a-64 (b)(1)(A) (2015); 775 ILL. COMP. STAT. § 5/5-103(C) (1980); KY. REV. STAT. ANN. § 344.145(2)(b) & (d) (West 1984); MASS. GEN. LAWS ch. 272, § 92A (1998); TENN. CODE ANN. § 4-21-503 (West 2015); WIS. STAT. § 106.52(3)(b) & (d) (2013).

50. ALASKA STAT. § 18.80.230(b) (2000); 775 ILL. COMP. STAT. § 5/5-103(B) (1980); MASS. GEN. LAWS ch. 272, § 92A (1998); TENN. CODE ANN. § 4-21-503 (West 2015); WIS. STAT. § 106.52(3)(e) (2013).

51. MINN. STAT. § 363A.24 (2015) (allowing “restricting membership on an athletic team or in a program or event to participants of one sex if the restriction is necessary to preserve the unique character of the team, program, or event and it would not substantially reduce comparable athletic opportunities for the other sex”); MICH. COMP. LAWS § 37.2302a(4) (2016) (“This section does not prohibit a private club from sponsoring or permitting sports schools or leagues for children less than 18 years of age that are limited by age or to members of 1 sex, if comparable and equally convenient access to the club’s facilities is made available to both sexes and if these activities are not used as a subterfuge to evade the purposes of this article.”).

52. COLO. REV. STAT. § 24-34-601(3) (2015) (“[I]t is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation.”); 775 ILL. COMP. STAT. § 5/5-103(B) (1980) (allowing administrative agency to “grant exemptions based on bona fide considerations of public policy” to facilities similar to health clubs and private restroom, locker, and bathing facilities); MASS. GEN. LAWS ch. 272, § 92A (1998) (exempting from sex antidiscrimination requirements “any corporation or entity authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational vocational, and character development of a single sex,” such as the Boy Scouts); N.J. STAT. ANN. § 10:5-12(f)(1) (West 2015) (exempting “any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex,” including among other things clinics and hospitals); TENN. CODE ANN. § 4-21-503 (West 2015) (“Nothing in this part shall prohibit segregation on the basis of sex of . . . other places of public accommodation the commission specifically exempts on the basis of bona fide considerations of public policy.”). With regard to sexual orientation, see MINN. STAT. § 363A.24 (2015) (exempting only from sexual orientation nondiscrimination protections “volunteers of a nonpublic service organization whose primary function is providing occasional services to minors,” such as the Boy Scouts).

53. 42 U.S.C. § 2000a(e) (2012).

establishment “which is in its nature distinctly private”⁵⁴ or which is “not in fact open to the public.”⁵⁵ Statutes in Alaska, California, and Virginia contain no explicit allowance for discrimination by private clubs,⁵⁶ but such clubs likely fall outside the statutes’ coverage by virtue of being closed to the public.

The private club exception extends to private associations, irrespective of whether they unite people in pursuit of religion, politics, recreation, or any other goals. Like secular private clubs, houses of worship, certain religious associations, and some activities of religious non-profits (such as providing certain religion-based services to co-religionists) may be excluded from the law’s reach due to their private nature. Private religious places and private secular places alike benefit from the exception.

Public accommodations statutes place organizations along a spectrum from public to distinctly private. At one end stand commercial entities—the inns, restaurants, bars, and also the retail stores, professional offices, and healthcare providers. They are open to the public and solicit their patronage for profit or revenue.⁵⁷ At the other end lie distinctly private places—private clubs with distinct memberships, closed to the public, secluded from public life, and dominated by non-commercial aspects. In between these two poles, quasi-commercial organizations combining commercial and private characteristics are also subject to antidiscrimination laws. Public accommodations laws routinely extend to membership organizations like the Rotary Club or Moose Lodge that we once would have thought to be private.⁵⁸

54. ARIZ. REV. STAT. ANN. § 41-1441(2) (2015); *see also* IOWA CODE § 216.2(13)(a) (2016); N.H. REV. STAT. ANN. § 354-A:2(XIV) (2007); MONT. CODE ANN. § 49-2-101(20)(b) (2015); N.J. STAT. ANN. § 10:5-5(1) (West 2015); N.M. STAT. ANN. § 28-1-2(H) (2007); N.Y. CIV. RIGHTS LAW § 40 (McKinney 2010); N.Y. EXEC. LAW § 292(9) (McKinney 2016); N.D. CENT. CODE § 14-02.4-02(14) (2013); WASH. REV. CODE § 49.60.040(2) (2015); D.C. CODE § 2-1401.02(24) (2010); 43 PA. CONS. STAT. § 954(1) (1997); R.I. GEN. LAWS § 11-24-3 (2015); S.D. CODIFIED LAWS § 20-13-1(12) (2016).

55. NEB. REV. STAT. § 20-138 (1973) (“a private club or other establishment not in fact open to the public”); *see also* ARK. CODE ANN. § 16-123-307(b) (2015); 775 ILL. COMP. STAT. § 5/5-103(A) (2016); MD. CODE ANN., STATE GOV’T § 20-303(a)(1) (West 2015); MICH. COMP. LAWS § 37.2303 (2015); MO. REV. STAT. § 213.065.1(3) (2015); NEV. REV. STAT. § 651.060 (2015); S.C. CODE ANN. § 45-9-20 (2015).

56. ALASKA STAT. § 18.80.300(16) (2015); CAL. CIV. CODE § 51 (West 2012); VA. CODE ANN. 2.2-3900(B)(1) (2001).

57. *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 116–17 (1953) (upholding D.C.’s application of public accommodations law to a restaurant because “[I]ike the regulation of wages and hours of work, the employment of minors, and the requirement that restaurants have flameproof draperies, these laws merely *regulate* a licensed business”) (emphasis added).

58. *See, e.g., Human Relations Comm’n v. Loyal Order of Moose Lodge No. 107*, 448 Pa. 451, 294 A.2d 594, *appeal dismissed*, 409 U.S. 1052 (1972), in which the United States Supreme Court left standing the decision of a state court that a fraternal membership organization was a public accommodation under the state law even though it had previously described it as “a private

What distinguishes a distinctly private club from a quasi-commercial one? Since the origins of the public accommodations laws, courts have identified markers of a private club. First, profit motive invariably identifies a place as a public accommodation. To qualify as private, an organization must be non-profit.⁵⁹ Second, private clubs must demonstrate selectivity in their membership.⁶⁰ The organization's size factors into this analysis. As one court explained, "Where there is a large membership or a policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective."⁶¹ For example, if all men who take a sailing class can join a yacht club, the club is not distinctly private, but rather open to half the public.⁶² Third, the club must be exclusive, working through, on behalf of, and oriented toward their members.⁶³ As distinguished from a public accommodation, a truly private club must: have machinery to carefully screen applicants for membership; limit the use of its facilities to members and bona fide guests; be controlled by the membership through meetings and elections; be operated on a non-profit basis solely for the benefit and pleasure of its members; and direct any publicity solely to its members.⁶⁴ An ostensibly private club thus may show itself to be public by, for example, engaging in commercial catering, providing facilities and lessons to nonmembers for a fee,

club in the ordinary meaning of that term." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972).

59. *See, e.g.*, *Daniel v. Paul*, 395 U.S. 298, 301–02 (1969) (concluding that recreation club "is not a private club. It is simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs."); *Daniel v. Am. Bd. of Emergency Med.*, 802 F. Supp. 912, 928 (1992) (noting distinction between for-profit and non-profit and operated solely for benefit and pleasure of members).

60. *Nesmith v. Young Men's Christian Ass'n of Raleigh*, 397 F.2d 96, 101–02 (4th Cir. 1968) (noting the Civil Rights Acts' "clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective'").

61. *Id.*

62. *See, e.g.*, *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1205 (N.Y. 1983) (holding that non-profit dedicated to boating was not "distinctly private" club because membership was extended to all males who passed basic piloting course and there was no plan or purpose of exclusivity other than sexual discrimination); *Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 214, 217–18 (Cal. 1985) (allowing girls to join a boys' club that was open to any boy for a nominal fee and operated a large recreational facility); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (noting that club was not exclusive because participation was "open to every white person within the geographic area, there being no selective element other than race").

63. Several legislatures reflected this concern in setting two minimum characteristics of private clubs: its members determine its policies and "its facilities or services are available only to its members and their bona fide guests." KY. REV. STAT. ANN. § 344.130 (West 2000); *see also* LA. REV. STAT. ANN. § 51:2232(9) (2014); OKLA. STAT. tit. 25, § 1401(1)(i) (1968); TENN. CODE ANN. § 4-21-102 (15) (West 2015).

64. *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).

and hosting events at which nonmembers network and gain valuable contacts.⁶⁵

Many statutes speak in the language of “bona fide” private clubs—demanding subjective good faith with objective analysis of the characteristics of the institution.⁶⁶ Laws bear hallmarks of legislators’ concerns that establishments would seek to game the private club exemption.⁶⁷ South Carolina, for example, stipulates that any institution, club, organization or place of accommodation that “offers memberships for less than thirty days is not private.”⁶⁸

Out of concern for the economic and political clout of some organizations that might otherwise qualify for exemption as “private,” several states impose additional limits. Kansas, for example, specifies that “a nonprofit recreational or social association or corporation” will come within the definition of a public accommodation if it “has 100 or more members and: (A) Provides regular meal service; and (B) receives payment for dues, fees, use of space, use of facility, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers.”⁶⁹ Likely for similar reasons, Michigan clarifies that sports, athletic, boating, yachting, golf, dining, and country clubs—which otherwise qualify as private—come within the scope of public accommodations law.⁷⁰ In several states, receipt of government funds or a state alcohol license suffices to make an accommodation public.⁷¹ That is, a place not otherwise defined as a

65. See, e.g., *Mill River Club, Inc. v. New York State Div. of Human Rights*, 873 N.Y.S.2d 167 (N.Y. App. Div. 2009).

66. IOWA CODE § 216.2 (13)(a) (2016); N.J. STAT. ANN. § 10:5-5(1) (West 2009); N.D. CENT. CODE § 14-02.4-02(14) (2013); N.M. STAT. ANN. § 28-1-2(H) (2007); S.D. CODIFIED LAWS § 20-13-1(12) (1994).

67. Lerman & Sanderson, *supra* note 16, at 223 (“Congress feared evasion of the Act via the private club exemption, and the federal courts have been intolerant of any such attempts at subterfuge.”).

68. S.C. CODE ANN. § 45-9-20 (1990).

69. KAN. STAT. ANN. §44-1002(i)(2) (2015); see also N.Y. EXEC. LAW § 292(9) (McKinney 2015) (identical factors); MONT. CODE ANN. § 49-2-101(20)(b) (2015) (identical factors); D.C. CODE § 2-1401.02(24) (2010) (identical factors but for numerosity requirement of less than 350 members); WIS. STAT. § 106.52(e)(2) (2013) (exempting “a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to” its members and named guests of members and the organization).

70. MICH. COMP. LAWS § 37.2301(a) (2016).

71. Five states apply nondiscrimination to “any place, store, or other establishment, either licensed or unlicensed, . . . that is supported directly or indirectly by government funds.” ARK. CODE ANN. § 16-123-102(7) (2015); IOWA CODE § 216.2(13)(a) (2016) (“any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy.”); KY. REV. STAT. ANN. § 344.130 (West 2000); LA. REV.

public accommodation might nonetheless become one through government action.

Even truly private clubs do not enjoy unfettered freedom to discriminate. When they turn toward the public or offer their goods and services to the customers of a public accommodation, they too may assume nondiscrimination duties.⁷² For example, a non-profit Jewish membership club might qualify as private for purposes of its membership and most of its activities. But if the club set up a lemonade stand in front of a grocery store, public accommodations law would apply.⁷³ Private residences also become public insofar as they are used to deliver services, goods, or facilities to the public; thus, those portions of a residence in which a home daycare is offered would constitute a public accommodation, whereas the private portions of the home would not.⁷⁴

As this analysis shows, various factors work in tandem and apply in a context-specific way. While the pursuit of profit invariably signals a public-facing nature, non-profit status does not suffice to render an organization distinctly private. A membership association may have certain noncommercial elements and yet be deemed open to the public.⁷⁵ Although disagreement may

STAT. ANN. § 51:2232(9) (2014); OKLA. STAT. tit. 25, § 1401(1) (1968); TENN. CODE ANN. § 4-21-102(15) (West 2015). Another two look to state funding more narrowly. DEL. CODE ANN. tit. 6, § 4502 (14) (West 2013) (“This definition includes state agencies, local government agencies, and state-funded agencies performing public functions.”); UTAH CODE ANN. § 13-7-2(1)(b) (West 2010) (“A place, establishment, or facility that caters or offers its services, facilities, or goods to the general public gratuitously shall be within the definition of this term if it receives any substantial governmental subsidy or support.”).

72. See, e.g., IOWA CODE § 216.2(13)(a) (2009) (“[W]hen such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.”); see also 775 ILL. COMP. STAT. § 5/5-103(A) (1980); MD. CODE ANN., STATE GOV’T § 20-303(a)(1) (West 2015); MICH. COMP. LAWS § 37.2303 (2016); MO. REV. STAT. § 213.065(3) (2015); NEB. REV. STAT. § 20-138 (1973); N.D. CENT. CODE § 14-02.4-02(14) (2013); S.D. CODIFIED LAWS § 20-13-1(12) (1994); WASH. REV. CODE § 49.60.040(2) (2015); W. VA. CODE § 5-11-19 (2015) (specifying that a private club may offer lodgings to its members or guests of members but may not discriminate with regard to ownership or operations of residential subdivisions or real estate sales). For licenses, see UTAH CODE ANN. § 13-7-1 (West 2010) (prohibiting discrimination in “enterprises regulated by the state”); § 13-7-2(3) (West 2010) (defining “[e]nterprises regulated by the state” as those subject to regulation under consumer credit, insurance, or public utilities codes or those that sell alcoholic beverages).

73. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1629 n.190 (2001) (discussing “the complications that can arise from the interpenetration of market and non-market functions within a single non-profit entity” and using California cases under state public accommodations law as an example).

74. See, e.g., ME. REV. STAT. tit. 5, § 4553(8) (1995) (differentiating between “the portion of the residence used exclusively as a residence” and those portions used “in the operation of the place of public accommodation” as well as entry ways and restrooms available to customers).

75. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 615, 626–27 (1984) (applying public accommodations laws to organization with commercial and non-commercial attributes); Warfield

arise at the margins between public and private, it has long been clear that characteristics of commercialism, profit, openness to the public, and lack of selectivity signal the public nature of an entity.

The Supreme Court's analysis of constitutional freedom of association tracks this statutory distinction between private club and public accommodation. For a century, the Supreme Court has endorsed the ability of states to prohibit discrimination by commercial entities.⁷⁶ In *Roberts v. U.S. Jaycees*, the Court further upheld the application of antidiscrimination law to the Jaycees, a quasi-commercial membership organization with both private and commercial characteristics.⁷⁷ In drawing the line between public and private, the Court contrasted intimate, private relationships—the home and the family—from these commercial relationships—exemplified by the “large business enterprise.”⁷⁸ Membership organizations, like the Jaycees, fall between these two poles, the Court recognized. But such “large and basically unselective groups”—the Court said, again echoing public accommodations law—do not qualify as intimate associations entitled to constitutional protection.⁷⁹ They lack the “attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship” that might show them to be like the family.⁸⁰ Nor, given the Jaycee's economic and commercial nature, did

v. Peninsula Golf & Country Club, 896 P.2d 776, 792–93 (Cal. 1995) (holding that a country club with highly selective membership criteria was a public accommodation because club facilities were provided to nonmembers for a daily fee); *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 524 N.E.2d 1364, 1367 (Mass. 1988) (holding that while the size, geographic limitations on membership, and lack of profit motive or public advertisement “tend to show that the Club is not open to . . . the general public, the determinative factor in this case, requiring the conclusion of publicness, is the total absence of genuine selectivity in membership”).

76. *See, e.g.*, *W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 363–64 (1907) (rejecting constitutional challenges to application of state public accommodations law of a place of entertainment held out to the public and “affected with a public interest” in “good order and fair dealing”); *Boy Scouts v. Dale*, 530 U.S. 640, 657 (2000) (contrasting “clearly commercial entities, such as restaurants, bars, and hotels” and “membership organizations such as the Boy Scouts” as regards the First Amendment rights of organizations); *see also* Bagenstos, *supra* note 18, at 1207–08 (explaining that businesses have long resisted public accommodations laws on the ground their choice of customers constitutes private activity safeguarded from state interference); James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142, 145–53 (2015) (discussing this history).

77. *Jaycees*, 468 U.S. at 625 (noting that the state law “has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct”).

78. *Id.* at 619–20.

79. *Id.* at 621.

80. *Id.* at 620.

its interest in expressive association prevail over aims of ensuring equality in public life.⁸¹

As Justice O'Connor explained in her concurrence, "[t]he Constitution does not guarantee a right to choose . . . those with whom one engages in simple commercial transactions, without restraint from the State."⁸² While "an association engaged exclusively in protected expression" enjoys wide-ranging First Amendment protections to select its membership and discriminate, a commercial association retains "only minimal constitutional protection" in this regard.⁸³ She said forthrightly: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."⁸⁴

Professor Sager seems to agree with the results of this analysis. In other work, he sets out a theory of "close associations," which he says largely tracks the intimate association of *Jaycees*.⁸⁵ Sager adopts Justice Brennan's view of intimacy as the "touchstone" of close association, such that "it is the private, in-turning nature of the group that signifies."⁸⁶ Such associations may involve a multitude of members, but are best understood, he says, as a series of dyadic relationships (for example, between a minister and a congregant).⁸⁷ He does not clarify, however, how a close association model would resolve the question of a nominally private club, where the entity has both public- and private-facing roles.⁸⁸

Sager's vision of egalitarian constitutionalism seems to require the commercial-noncommercial divide that underlies the Court's *Jaycees* decision. The theory of close association should expressly incorporate attributes of exclusivity, selectivity, purpose, and size to allocate constitutional protection from antidiscrimination law. In the absence of such considerations, "close association" would prove expansive and exempt entities that are not distinctly private but public-facing. Disfavored groups would likely come across such entities in the marketplace and face discrimination to the detriment of their equal membership in the community.

81. *Id.* at 623–29.

82. *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring).

83. *Id.* at 633–34 (O'Connor, J., concurring).

84. *Id.* at 636 (O'Connor, J., concurring).

85. Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 77, 98–99 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2015).

86. *Id.* at 98–99; *see also Jaycees*, 468 U.S. at 618–20.

87. Sager, *supra* note 85, at 86–87.

88. *Id.* at 87–88 (giving the example of the Thursday Club, which might lack characteristics of selectivity and exclusivity that the private club exception require).

What does the public accommodations framework mean for the various religious objectors—the bakery, the physician’s office, and the religious wedding venue? All of these businesses are prototypical public accommodations—holding themselves open to members of the public willing to pay for their services. Neither the statutory private club exception nor the constitutional right to intimate association removes their public status and licenses discrimination. By virtue of its profit motive alone, the bakery finds itself at the far end of the public-private spectrum. Having offered services to the public, the physician’s office similarly is captured within most statutory definitions of public accommodation.⁸⁹ The wedding venue operated by a religious organization has some characteristics of a private club (for example, its non-profit status), but is offered and held out to the public and has more commercial than associational attributes. For each of these entities, any markers of privacy or associational interest prove much less significant than those of the Jaycees organization, for example.

Despite claims to the contrary,⁹⁰ the application of antidiscrimination laws to these categories of commercial actors is not unprecedented, but well-established in social and legal understandings. For half a century, the constant answer to the question—may such entities discriminate against customers on invidious grounds?—has been a resounding “no.”

Such antidiscrimination obligations exist in tension with associational and religious freedoms, but they also promote those rights. Women and minorities have enjoyed full and equal treatment by organizations that previously would have refused to associate with them or which would have treated them as less than full and equal members. Religious minorities, in particular, have been the

89. Sometimes statutes explicitly list professional offices. *See, e.g.*, HAW. REV. STAT. § 489-2(10) (2006) (“A professional office of a health care provider . . . [defined to mean ‘healthcare facility, physician, dentist . . . chiropractor . . . optometrist . . . podiatrist . . . psychologist . . . occupational therapist . . . and physical therapist . . .’] or other similar service establishment”); *see also* 775 ILL. COMP. STAT. § 5/5-101(A)(6) (2007); ME. REV. STAT. tit. 5, § 4553(8)(F) (1995); NEV. REV. STAT. § 651.050(3)(g) (2011); N.H. REV. STAT. ANN. § 354-A:2(XIV) (2006); WASH. REV. CODE § 49.60.040(2) (2009).

90. Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1286 (2014) (saying that “constant practice may give rise to a *prescriptive* constitutional right,” but claiming that “established social practice . . . has never covered situations like *Elane Photography*, where the equities between the parties lie so much in favor of the firm”); *see also* Ryan T. Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, HERITAGE FOUNDATION, <http://www.heritage.org/research/reports/2015/11/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom> [<http://perma.cc/B8FS-S924>] (asserting, incorrectly, that the legal rule is that businesses, charities, civil organizations, and all adults may enter into or refuse to enter into contracts and that the government generally may not interfere in such decisions).

beneficiaries of longstanding statutory rights to freedom from discrimination. Indeed, the public accommodations case law features religious minorities prominently alongside racial minorities.⁹¹ In this way, the United States has had remarkable success in efforts to “encourage and respect religious diversity among ourselves as a free and equal people,” which Sager rightly celebrates.⁹² Antidiscrimination laws have formed, not a barrier to, but a foundation for religion and other important commitments to flourish in public, commercial life. As the next Part shows, religious exemptions have been rare and limited in public accommodations laws.

II. RELIGIOUS EXEMPTIONS FROM PUBLIC ACCOMMODATIONS LAWS

As Sager notes, public accommodations laws generally do not offer religious exemptions.⁹³ The public-facing nature of a business, not its claim to religiosity, tends to be determinative of its nondiscrimination obligations. Thus, religious non-profits in commerce—hospitals, insurance companies, and daycares—assume nondiscrimination obligations by virtue of being open to the public. For-profit businesses, irrespective of their owners’ religious beliefs, must serve all customers without discrimination based on any protected characteristic.

Several statutes, however, expressly mention religion. Sometimes, a religious exemption is parallel to a secular exemption. To the extent that the law allows some actors to discriminate in commercial enterprise, it treats secular and religious pursuits equally. Under Sager’s approach to religious accommodation, the symmetry of such exemptions is to be celebrated. Without prioritizing religious motivations, they recognize important commitments countervailing to antidiscrimination goals. At other times, statutes restrict exemption to religious reasons, a result Sager would deplore for relegating non-religious endeavors to second-class status. Such exemptions commonly permit only religious discrimination, according religious organizations a right to favor co-religionists.

This Part parses the various and limited religious exemptions to public accommodations laws. It demonstrates that the long-standing practice of no-or-limited religious exemptions is being destabilized as states grant unique exemptions to religious organizations with regard to LGBT- and marriage-related discrimination.

91. For a subset of cases involving discrimination against Jews, see *In re State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 872 (Minn. 1985); *Hornick v. Noyes*, 708 F.2d 321, 325 (7th Cir. 1983); *Lake Placid Club v. Abrams*, 160 N.E.2d 92, 92 (N.Y. 1959); *Anderson v. State*, 30 Ohio C.D. 510, 511 (Ohio Ct. App. 1918).

92. Sager, *supra* note 6.

93. See Sager, *supra* note 85, at 88.

A. *A Framework of Rare and Narrow Religious Exemptions*

Bracketing for a moment the changes wrought by marriage equality acts, this Section analyzes public accommodations laws as they stand generally. It shows that statutes tend to grant no special accommodation to religion. Notwithstanding any religious mission, an entity's commercial transactions bring it within the definition of a public accommodation. Like other private places, private religious organizations, such as churches or private non-profit membership organizations, may avail themselves the private club exception, but no other exemption applies.

Twenty-nine states provide no religious exemption from their public accommodations laws.⁹⁴ Four other states specify only narrow exemptions,⁹⁵ some of which enshrine constitutional limits. For example, Colorado excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes."⁹⁶ Illinois clarifies that, in public accommodations, the exercise of free speech or religion protected under the U.S. or Illinois constitutions shall not constitute a civil rights violation.⁹⁷

Several states grant certain religious organizations carve-outs equal to those provided to non-religious organizations. Thus, Kansas provides that "[p]ublic accommodations do not include a religious or non-profit fraternal or social association or corporation."⁹⁸ Similarly, in Missouri, the civil rights law does not apply to places "not in fact open to the public," such as private clubs and accommodations owned or operated by religious organizations.⁹⁹ Washington, D.C. specifies that religious or political organizations may limit membership or give preference to "persons of the same religion or political

94. Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Title II of the Civil Rights Act similarly countenances no religious exemption. 42 U.S.C. §2000a (1964); *see also* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 n.5 (1968) (describing a public accommodation's claim for religious exemption against compliance with Title II "patently frivolous").

95. COLO. REV. STAT. § 24-34-601(1) (2014) (churches); 775 ILL. COMP. STAT. § 5/5-102.1(b) (2010) (within constitutional limits); MICH. COMP. LAWS § 37.2301(a)(iv) (2000) (dining clubs); WASH. REV. CODE § 49.60.040(2) (2009) (cemeteries).

96. COLO. REV. STAT. § 24-34-601(1) (2014).

97. 775 ILL. COMP. STAT. § 5/5-102.1(b) (2010).

98. KAN. STAT. ANN. § 44-1002(h) (2012). Kansas only added the word "religious" in 1991 when it added "disability" and "familial" status to grounds of discrimination. 1991 Kan. Sess. Laws 147 (H.B. No. 2541) (1991). While Utah provides a much broader exemption limited to religion, it also specifies a "church" as one example of a "distinctly private" place. UTAH CODE ANN. § 13-7-2(c) (West 2010) ("Place of public accommodation" does not apply to any institution, *church*, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public.") (emphasis added).

99. MO. REV. STAT. § 213.065(3) (1998).

persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.”¹⁰⁰

Yet again, public accommodations law stands in contrast to other areas of antidiscrimination law. While housing and employment laws almost inevitably contain exemptions, public accommodations laws rarely do. Idaho’s antidiscrimination law is fairly typical. It allows for employment discrimination by a “religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its religious activities.”¹⁰¹ In real property transactions, it further permits religious educational institutions to give preference or limit admission to co-religionists and charitable or educational religious institutions to prefer co-religionists.¹⁰² But as to discrimination in public accommodations on the basis of race, color, religion, sex, or national origin, no mention of religion is made.¹⁰³

To the extent that some states provide exemptions specific to religious exercise, they most commonly excuse limited discrimination in favor of co-adherents. These exemptions sometimes apply to highly particularized circumstances—such as sectarian cemeteries,¹⁰⁴ nursing homes,¹⁰⁵ and dining clubs limited to co-religionists “for the purpose of furthering the teachings or principles of that religion.”¹⁰⁶ Less often, they permit discrimination in

100. D.C. CODE § 2-1401.03(b) (2005). D.C. does, however, add an additional exemption for “any religious organization, association, or society or non-profit organization” with regard to housing. *Id.* § 2-1401.03(d).

101. IDAHO CODE ANN. § 67-5910(1) (2005). For a statute that singles out sexual orientation but exempts in this way, see ME. REV. STAT. tit. 5, § 4553(10)(G) (2011) (exempting any “religious corporation, association or organization that does not receive public funds” from prohibitions on sexual orientation discrimination in employment, housing, and educational opportunity).

102. IDAHO CODE ANN. § 67-5910(6) (2005).

103. Idaho is idiosyncratic in that it exempts “[r]eligious organizations or entities controlled by religious organizations, including places of worship” from obligations not to discriminate on the basis of disability—a provision likely explained by the costs of compliance. *Id.* § 67-5910(5)(b). A similar provision exists at the federal level. Americans with Disabilities Act, 42 U.S.C. §§ 12182(a) & 12187 (1990) (exempting “religious organizations or entities controlled by religious organizations . . .”).

104. 43 PA. CONS. STAT. § 954(l) (1997) (explicitly including “nonsectarian cemeteries” within the definition of public accommodations); WASH. REV. CODE § 49.60.040(2) (2009) (exempting “columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution”).

105. CONN. GEN. STAT. § 46a-64(b)(4) (2015) (“[T]he prohibition of discrimination on the basis of creed shall not apply to the practice of granting preference in admission of residents into a nursing home . . . if (A) the nursing home is owned, operated by or affiliated with a religious organization, exempt from taxation for federal income tax purposes and (B) the class of persons granted preference in admission is consistent with the religious mission of the nursing home.”).

106. MICH. COMP. LAWS § 37.2301(a)(iv) (2000).

membership.¹⁰⁷ Minnesota and New Hampshire, for example, allow non-profit religious organizations to “limit[] admission to or giv[e] preference to persons of the same religion or denomination.”¹⁰⁸ New Mexico’s law states that religious institutions may give preference to co-adherents in renting and certain other limited real estate transactions “as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained.”¹⁰⁹

Prior to its marriage equality act, New York had a unique statutory scheme with an amalgam of these approaches to religious exemption. Two statutes, the Civil Rights Law and the Human Rights Law, prohibited discrimination in public accommodations. The former countenanced no religious exemption.¹¹⁰ The latter contained two exemptions. The first categorizes any corporation incorporated under the benevolent orders, education, or religious corporations law as “in its nature distinctly private.”¹¹¹ Because it bars the enforcement of the civil rights law symmetrically against both secular and religious organizations,¹¹² it is best understood as an exemption for places identified as private, rather than a religious exemption per se.¹¹³ The second exemption, by contrast, protects religiously motivated discrimination exclusively, authorizing “any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious

107. IOWA CODE § 216.7(2)(a) (2007) (exempting “[a]ny bona fide religious institution with respect to any qualifications the institution may impose based on religion . . . when such qualifications are related to a bona fide religious purpose”). Iowa’s exemption to public accommodations law only encompasses religious institutions, whereas the employment antidiscrimination law exempts “religious institution or its educational facility, association, corporation, or society.” *Id.* § 216.6(6)(d).

108. MINN. STAT. § 363A.26(1) (2013); N.H. REV. STAT. ANN. § 354-A:18 (1992).

109. N.M. STAT. ANN. § 28-1-9(B) (2004). Note, however, that a religion or denomination whose membership “is restricted on account of race, color, national origin or ancestry” may not prefer members of its own religion or denomination. *Id.*

110. *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 137 (N.Y. App. Div. 2006), *aff’d*, 859 N.E.2d 459, 466 (N.Y. 2006) (“[N]othing in Executive Law § 296(11) suggests that the Legislature may not, in another section of law, impose affirmative requirements upon religious-related employers. Executive Law § 296(11) merely excuses such employers from compliance with Executive Law § 296.”).

111. N.Y. EXEC. LAW § 292(9) (McKinney 2015).

112. *See, e.g., Gifford v. Guilderland Lodge*, 707 N.Y.S.2d 722, 722–23 (N.Y. App. Div. 2000) (applying the exemption to a non-religious membership organization formed under the benevolent orders law).

113. *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 7 (1985) (crediting city’s explanation that the exemption reflected the fact that “small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent” so as to need remedying to ensure inclusion of “women and minorities in the city’s business and professional world”) (internal quotations omitted).

organization” to discriminate in employment, sales and rental of housing, and membership in favor of “persons of the same religion or denomination.”¹¹⁴ Such organizations may also engage in what otherwise would be religious discrimination in “taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”¹¹⁵ While this language could become all-encompassing, in accordance with the requirement of liberal construction of antidiscrimination law, New York courts have understood the exemption to allow limited discrimination in favor of co-religionists.¹¹⁶

In several states, religious organizations may discriminate in their activities or the use of their facilities more broadly. For example, in Nebraska, if a religious organization owns or operates a public accommodation, it may give preference to its members in the use of the accommodation.¹¹⁷ In Kentucky, a religious organization can discriminate on the basis of religion in its activities and facilities if complying with the public accommodations law “would not be consistent with the religious tenets of the organization.”¹¹⁸ But an otherwise exempted religious organization may not discriminate on any basis—including religion—when it sponsors nonreligious activities that are offered to the public in the state.¹¹⁹

In the realm of state public accommodations laws, Utah stands out for its absolute exemption of religious organizations. Under its public accommodations (and employment and housing) antidiscrimination law, a religious organization has “the right to regulate the operation and procedures of its establishments” as it desires.¹²⁰ Any religious organization, but no other type of organization, may discriminate on the basis of race, color, sex, religion, ancestry, or national origin in activities that otherwise would be subject to public accommodations laws.

114. N.Y. EXEC. LAW § 296(11) (McKinney 2015).

115. *Id.* New Hampshire’s provision contains identical language with regard to the selection of members. N.H. REV. STAT. ANN. § 354-A:18 (1992).

116. *Priolo v. St. Mary’s Home for Working Girls, Inc.*, 597 N.Y.S.2d 890, 892 (N.Y. Sup. Ct. 1993) (“A catch-all phrase allowing ‘such action as is calculated . . . to promote’ cannot be used to broaden the specific exemption granted by EL § 296(11) to allow discrimination against another protected group.”); *Scheiber v. St. John’s Univ.*, 638 N.E.2d 977, 980 (N.Y. 1994) (noting that the “narrow exception for ‘preference [] in employment, housing, and admissions in order to promote the religious principles of such institutions’” does not permit a religious institution to “engage in wholesale discrimination”).

117. NEB. REV. STAT. § 20-137 (1973).

118. KY. REV. STAT. ANN. § 344.130(3) (West 2000).

119. *Id.*

120. UTAH CODE ANN. § 13-7-3 (West 1973).

B. *Sexual Orientation Exemptions as Cracks in the Façade*

As states extended prohibited bases under antidiscrimination law from race and national origin to sex and then to marital status and gender identity, the rule against religious exemptions remained relatively firm. Opening one's business to the public came with responsibilities of nondiscrimination. Religious organizations received at most a limited mandate to prefer co-religionists.

Five states, however, singled out LGBT discrimination for religious exemption.¹²¹ Several excuse a narrow range of entities or discriminatory actions. In Iowa, religious institutions may discriminate in their membership on the basis of sexual orientation and gender identity, just as they are entitled to do on the basis of religion.¹²² With a broader scope, New Mexico's exemption permits religious institutions or organizations to "impos[e] discriminatory employment or renting practices that are based upon sexual orientation or gender identity."¹²³ To the extent that public accommodations laws govern real estate rentals, these religious entities are exempt from LGBT antidiscrimination law. Nonetheless, the provision explicitly excludes from exemption all other for-profit or non-profit charitable activities undertaken by religious organizations.¹²⁴ As the Supreme Court of New Mexico observed, "[i]f a religious organization sold goods or services to the general public, [nothing in the law] would allow the organization to turn away same-sex couples while catering to opposite-couples."¹²⁵

As with private clubs, in drafting these exemptions, legislatures showed concern for the sincerity, non-profit status, and commercial role of the religious entity. Oregon's sexual orientation religious exemption, for example, extends only to "a bona fide church or other religious institution"—not religiously affiliated organizations, membership associations, or religious corporations more broadly.¹²⁶ Church-like institutions may discriminate in "housing or the use of facilities based on a bona fide religious belief about sexual orientation" only where "the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no

121. CONN. GEN. STAT. § 46a-81p (1991); IOWA CODE § 216.7(2)(a) (2009); MINN. STAT. § 363A.26(2) (2015); N.M. STAT. ANN. § 28-1-9(C) (2004); OR. REV. STAT. § 659A.006(3) (2015).

122. IOWA CODE § 216.7(2)(a) (2009) (exempting "[a]ny bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose").

123. N.M. STAT. ANN. § 28-1-9(C) (2004).

124. *Id.*

125. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 74 (N.M. 2013).

126. OR. REV. STAT. § 659A.006(3) (2015).

necessary relationship to the church or institution.”¹²⁷ Minnesota’s sexual orientation-related exemption has a wider scope, including non-profit religious associations, corporations, societies, or educational institutions.¹²⁸ Like Oregon’s statute, it excuses discrimination on the basis of sexual orientation in the use of facilities, but again circumscribes the exemption: “This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.”¹²⁹

The boundaries of such exemptions are often difficult to discern. If offering an accommodation to the public is considered a secular business or commercial activity, then the nondiscrimination duties would apply to, for example, the rental of facilities open on a non-exclusive basis to the public, while allowing the organization to rent facilities on an exclusive basis to its members. If a church ran a non-profit movie theater or a café—activities with secular counterparts and a strong commercial element, the exemptions would be unlikely to apply. On the other hand, a more permissive construction of some provisions is possible. In Minnesota, for example, a religious non-profit hospital might argue that healthcare constitutes its religious purpose, rather than a secular business activity unrelated to a religious purpose.¹³⁰

Connecticut seems to afford the greatest latitude to religiously motivated discrimination based on sexual orientation and gender identity or expression. Its antidiscrimination statute provides that a “religious corporation, entity, association, educational institution or society” may discriminate in employment, housing, education, and public accommodations “with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such” religious organization.¹³¹ The effect of this exemption on public accommodations laws is not self-evident. It could apply narrowly, allowing voluntary religious organizations to determine their membership, or broadly, permitting such organizations to enter commerce and deny services.

127. *Id.*

128. MINN. STAT. § 363A.26 (2015).

129. *Id.*

130. This interpretation would contradict the rationale according to which the government can generously fund religious hospitals without violating the Establishment Clause. It might also invite entanglement of the courts in religious doctrine as they consider “whether an activity is religious or secular.” *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

131. CONN. GEN. STAT. § 46a-81p (1991) (sexual orientation); *Id.* § 46a-81aa (gender identity or expression).

C. Marriage Exceptionalism and Religiously Motivated Discrimination

While LGBT-related exemptions in these five states departed from past practice, most states retained the status quo. No special exemption excused religiously motivated discrimination on the basis of sexual orientation.¹³² In public accommodations, bases of discrimination generally were treated equally, with the occasional exception of limited religious discrimination. As Sager argues, where the law applies, owners of public accommodations could not close their doors to members of the public because of their race, sex, marital status, or sexual orientation, whether their distaste was religiously motivated or not.¹³³ They could not make interracial or same-sex couples unwelcome or offer them treatment unequal to others.¹³⁴ This general rule, however, is under attack in the courts and perhaps especially vulnerable in the legislatures.

As legislatures moved to pass marriage equality acts, they often granted exemptions to religious organizations previously subject to public accommodations laws.¹³⁵ At the narrowest end, Maine and Illinois permit only church-like institutions to discriminate.¹³⁶ Maine lets such institutions refrain from “host[ing] any marriage,” while Illinois sanctions refusal to provide “religious facilities”—such as sanctuaries and parish halls—for solemnization or celebration of a marriage.¹³⁷ Depending on how these provisions are interpreted, they might simply reaffirm the private club exception in religious terms—conceding that religious places and services open to one’s membership need not be provided to others. At another step along the spectrum, Minnesota’s marriage act freed any religious organization to refuse goods or services related to the solemnization or celebration of a marriage, provided that

132. Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789–90 (2012) (“States that currently have such [sexual orientation antidiscrimination] statutes generally have minimal religious exemptions.”).

133. See Sager, *supra* note 6.

134. See generally James M. Oleske, *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 109 (2015).

135. *But see* DEL. CODE ANN. tit. 13, § 106(a) (West 1953) (exempting only solemnization).

136. ME. REV. STAT. tit. 19-A, § 655(3) (2011) (precluding the application of the law to require “any church, religious denomination or other religious institution to host any marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution”); 750 ILL. COMP. STAT. 5/209(a-10) (2016) (applying only to a “church, mosque, synagogue, temple, nondenominational ministry, interdenominational or ecumenical organization, mission organization, or other organization whose principal purpose is the study, practice, or advancement of religion . . .”).

137. ME. REV. STAT. tit. 19-A, § 655(3) (2011); 750 ILL. COMP. STAT. 5/209(a-10) (2016). The statute further clarifies that “[r]eligious facilities’ does not include facilities such as businesses, health care facilities, educational facilities, or social service agencies.” *Id.*

the organization's "secular business activities . . . the conduct of which is unrelated to the religious and educational purposes for which it is organized" may not engage in refusal.¹³⁸

The typical provision is more expansive. It authorizes religious entities to refuse to provide "services, accommodations, advantages, facilities, goods, or privileges" relating to the solemnization or celebration of a marriage—without caveat.¹³⁹ Several jurisdictions also permit religious organizations to decline to provide particular services "related to . . . the promotion of marriage"—such as "religious programs, counseling, courses, or retreats."¹⁴⁰

Four states went further, extending exemptions to the provision of social services. In Maryland, a religious entity may raise its religious beliefs against any "promotion of marriage through [its] social or religious programs or services."¹⁴¹ Connecticut and Minnesota ensure that the legalization of marriage for same-sex couples shall not "affect the manner in which a religious organization may provide adoption, foster care or social services."¹⁴² In all three states, however, if a religious social services provider receives government funds for its program, it may not discriminate.¹⁴³ Rhode Island proves the outlier. Even if they receive government funding, social or religious programs or services will not be required to provide public accommodations to an individual if they relate to the promotion of marriage in violation of the

138. MINN. STAT. § 517.09(3) (2013).

139. 2012 Md. Laws Ch. 2 (H.B. 438) Sec. 3(a)(1); N.Y. DOM. REL. LAW § 10-b (McKinney 2011); VT. STAT. ANN. tit. 9, § 4502(I) (2015); *see also* HAW. REV. STAT. § 572-12.2(a) (2015) (applying only to "goods, services or its facilities or grounds for the solemnization or celebration of a marriage"); MINN. STAT. § 363A.26(3) (2015) (listing "the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage"); R.I. GEN. LAWS § 15-3-6.1(c)(1) (2014) ("The solemnization of a marriage or the celebration of a marriage, and such solemnization or celebration is in violation of its religious beliefs and faith."); D.C. CODE § 46-406(e)(1) (2014) ("services, accommodations, facilities, or goods"); WASH. REV. CODE § 26.04.010(5) (2012) ("No religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage."); *Id.* § 26.04.020(6) ("No religiously affiliated educational institution shall be required to provide accommodations, facilities, advantages, privileges, service, or goods related to the solemnization or celebration of a marriage, including a use of any campus chapel or church.").

140. D.C. CODE § 46-406(e)(1) (2014); *see also* N.H. REV. STAT. ANN. § 457:37(III) (2010) ("religious counseling, programs, courses, retreats, or housing designated for married individuals").

141. 2012 Md. Laws Ch. 2 (H.B. 438) Sec. 3(a)(2).

142. CONN. GEN. STAT. § 46b-35b (2009); *see also* MINN. STAT. § 517.201(b) (2015).

143. 2012 Md. Laws Ch. 2 (H.B. 438) Sec. 3(a)(2) ("unless State or federal funds are received for that specific program or service"); CONN. GEN. STAT. § 46b-35b (2009) ("if such religious organization does not receive state or federal funds for that specific program or purpose"); MINN. STAT. § 517.201(b) (2015) ("if that association, corporation, society, or educational institution does not receive public funds for that specific program or purpose").

religious organization's beliefs.¹⁴⁴ These provisions have encouraged copycat religious exemptions in states that did not pass marriage equality acts and do not (yet) prohibit sexual orientation antidiscrimination by public accommodations.¹⁴⁵

As Sager would see it, these exemptions for religious actors introduce significant asymmetry into antidiscrimination law.¹⁴⁶ As he says of exemptions in another context, where a state provides a religion-specific exemption to a mandatory legal obligation, “[N]on-religious but passionate objectors to this favoring of religious objectors would have a strong claim to the effect that denying them an exemption but granting religious exemptions is itself a violation of religious freedom.”¹⁴⁷ One-sided exemptions raise the possibility of a conscience cascade to the detriment, in this context, of full and equal citizenship.

Nelson Tebbe has argued that marriage equality acts embedded structural injustice into public accommodations law¹⁴⁸—anathema to Professor Sager's constitutional vision. In most states, Tebbe says, these acts dealt “a significant setback to antidiscrimination law, not only for LGBT people, but potentially for others who wish to enter into unorthodox marriages.”¹⁴⁹ Prior to marriage equality, public accommodations laws in Hawaii, Illinois, Maryland, Vermont, and Washington contained no religious exemption at all.¹⁵⁰ Each state guaranteed full and equal treatment in secular and religious public accommodations irrespective of one's sexual orientation. And, in every state with public accommodations laws, religious objections to interfaith, interracial, and other religiously contested marriages had never before entitled religious organizations to exemption.

Placed in this context, marriage equality laws represent, not an unprecedented intrusion into commerce, but rather an unprecedented exemption of religious belief. Individuals once freed of discrimination in public accommodations now find themselves stripped of their rights.¹⁵¹ While

144. R.I. GEN. LAWS § 15-3-6.1(c)(2) (2014).

145. Each law allows a child-placing agency to refuse to provide adoption services that conflict with its beliefs and prohibits the state from taking any adverse action with regard to licensing, contracts, or grants based on that refusal. MICH. COMP. LAWS § 710.23g (2015); V.A. CODE ANN. § 63.2-1709.3(a) (2012); N.D. CENT. CODE § 50-12-07.1 (2013).

146. Sager, *supra* note 6.

147. *Id.*

148. Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 25 (2015) (discussing and critiquing such exemptions).

149. *Id.* at 48.

150. Oleske, *supra* note 134, at 109 n.44.

151. Rhode Island proves a slight exception to this story of retrenchment only because it treated civil unions as particularly offensive to religious belief a few years earlier. Like many other states, Rhode Island had no previous religious exemptions specific to sexual orientation (or religiously objectionable marriages). In recognizing civil unions, however, Rhode Island

same-sex marriage was their motivation, marriage-related exemptions tend to apply equally across bases of discrimination. A religious organization may discriminate against a couple, not only because of their sexual orientation, but also because of their race, sex (based on sex stereotyping about a dominant husband and submissive wife, for example), marital status (previously divorced person, for example), or religion.

Ultimately, while sexual orientation- and marriage equality-related religious exemptions chip away at what had been a settled rule, the framework principally holds firm. First and fundamentally, for-profit businesses retain all their nondiscrimination responsibilities. Wedding vendors—bakeries, florist shops, and photographers—and the professional offices—counselors and doctors—win no exemption. Second, no state exempts religious organizations wholesale. Generally, any license to discriminate is valid specifically as regards the wedding day. In a majority of jurisdictions that enacted marriage equality, religiously affiliated public accommodations—like wedding venues otherwise open to the public—may discriminate only with regard to the celebration or solemnization of the marriage.¹⁵² They otherwise remain bound to treat same-sex couples equally throughout the remainder of their married lives. In most states, an objecting religious social service provider, for example, finds no relief from duties to offer services on equal terms to gays and lesbians.

Admittedly, some went further. As Tebbe has argued, these religious exemptions in particular hold critical significance for the full and equal citizenship of gays and lesbians and other disfavored groups whose marriages may inspire religious ire.¹⁵³ Whether these cracks in the longstanding foundation of public accommodations law prove structural or superficial remains to be seen.

III. THE AIMS OF PUBLIC ACCOMMODATIONS LAWS

This Part demonstrates that public accommodations laws vindicate individual and societal interests in material, dignitary, and expressive terms. They target segregation and subordination as well as exclusion. Understanding

legislators chose to allow religious organizations, including hospitals, schools, and community centers, to refuse to “treat as valid any civil union.” R.I. GEN. LAWS § 15-3.1-5(a)(3) (2011). The marriage equality law thus offers greater protection to couples in marriages than in civil unions vis-à-vis religious organizations.

152. Tebbe, *supra* note 148, at 47 (“Any of these provisions would allow a religious organization, broadly defined, to refuse to allow same-sex couples to use its facilities for the celebration of their weddings . . . because all of them apply even to buildings and event spaces that operate as public accommodations.”).

153. *Id.* at 25.

these statutory aims proves fundamental to ongoing contestation over religious exemptions under state RFRA's.

While their language differs, statutes at root require full and equal treatment in the marketplace. Statutory language most commonly guarantees the “full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.”¹⁵⁴ It provides a right to participate, not merely in a “market niche” willing to serve one’s group, but in the market as a whole on full and equal terms with others.¹⁵⁵

Public accommodations statutes state purposes at three levels: the individual, the collective, and the democratic state.¹⁵⁶ At the first level, these laws seek to remedy harms to individuals. In terms of material equality, they foster access to the market. By requiring public-facing businesses to serve all without regard to race, sex, or other prohibited bases, they reduce search costs for goods and services previously only selectively available to disfavored groups. Public accommodations laws combine these material aims with dignitary and expressive goals.¹⁵⁷ They state as their purpose protecting the interest of individuals “in maintaining personal dignity, in realizing their full productive capacities, and in furthering their interests, rights and privileges as citizens.”¹⁵⁸ The New Jersey legislature, for example, found that:

because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning

154. NEV. REV. STAT. § 651.070 (2011); *see also* CONN. GEN. STAT. §§ 46a-64(a)(1)–(2), 46a-81d(a) (2007); FLA. STAT. § 760.08 (2015); HAW. REV. STAT. § 489-3 (2006); KAN. STAT. ANN. § 44-1002(i)(1) (2012); KAN. STAT. ANN. § 44-1001 (1991); MINN. STAT. § 363A.11 (2001); OHIO REV. CODE ANN. § 4112.02 (West 2013); OKLA. STAT. tit. 25, § 1402 (2011); OR. REV. STAT. § 659A.403 (2015); S.C. CODE ANN. § 45-9-10(A) (1990); UTAH CODE ANN. § 13-7-3 (West 1973); WASH. REV. CODE § 49.60.030(1) (2009); WYO. STAT. ANN. § 6-9-101(a) (1982).

155. Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 939 (2015).

156. VA. CODE ANN. § 2.2-3900(B)(1) (2001) (listing as purposes to “preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth”).

157. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627 (2015) (“Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.”).

158. 775 ILL. COMP. STAT. § 5/1-102(E) (2015).

difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.¹⁵⁹

In enacting public accommodations laws to cover sexual orientation antidiscrimination in particular, some states affirmatively invoked the importance of ensuring human dignity.¹⁶⁰

The purposes go beyond any specific individual to the benefit of society. Tennessee's law, for example, lists its purposes in individual terms—to “[s]afeguard all individuals within the state from discrimination,” “[p]rotect their interest in personal dignity and freedom from humiliation,” and “[f]urther the interest, rights, opportunities and privileges of individuals”—and societal terms—to “[s]ecure the state against domestic strife and unrest that would menace its democratic institutions,” and “[p]reserve the public safety, health and general welfare.”¹⁶¹ What might seem to be an individual interest becomes a public concern. The statutes recognize that eradicating discrimination aims to “make available to the state [the] full productive capacities [of all individuals], to secure the state against domestic strife and unrest, [and] to preserve the public safety, health, and general welfare.”¹⁶²

A number of statutes connect freedom from discrimination in public accommodations to citizenship. They describe discrimination as not only inflicting harm on individuals, but also “menac[ing] the institutions and foundations of a free democratic state.”¹⁶³ As such, as Nan Hunter argues, the denial of services constitutes not merely “an ordinary civil injury” but rather an expression of an ideology of the disfavored group’s inferiority to the detriment of the democratic statute.¹⁶⁴ Statutes accordingly speak of “civil rights”¹⁶⁵

159. N.J. STAT. ANN. § 10:5-3 (West 2006).

160. ME. REV. STAT. tit. 5 § 4552 (2005); OR. REV. STAT. § 659A.003 (2007).

161. TENN. CODE ANN. § 4-21-101 (West 1998).

162. Eradicating discrimination aims to “make available to the state the[] full productive capacities [of all individuals], to secure the state against domestic strife and unrest, [and] to preserve the public safety, health, and general welfare.” FLA. STAT. § 760.01(2) (2015). For similar language, see IDAHO CODE ANN. § 67-5901(2) (2005); UTAH CODE ANN. § 13-7-1 (West 2010); 43 PA. CONS. STAT. § 952(a) (2005).

163. KAN. STAT. ANN. § 44-1001 (1991); MINN. STAT. § 363A.02(1)(b) (1993); N.H. REV. STAT. ANN. § 354-A:1 (1998); N.J. STAT. ANN. § 10:5-3 (West 2006); OR. REV. STAT. § 659A.006(1) (2007); WASH. REV. CODE § 49.60.010 (2007); *see also* W. VA. CODE § 5-11-2 (2010) (describing discrimination as “contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society”).

164. Hunter, *supra* note 73, at 1620 (“There is a very particular and direct relationship between prohibitions on discrimination in public accommodations and the meaning of citizenship.”).

165. IND. CODE § 22-9-1-2(2)(a) (2015); KAN. STAT. ANN. § 44-1001 (1991); MINN. STAT. § 363A.02(2) (1993); OR. REV. STAT. § 659A.006(2) (2007).

frequently and “the basic human right to a life with dignity” occasionally.¹⁶⁶ They express values of constitutional equal protection¹⁶⁷ and reject the common law rule of strict construction in favor of liberal construction of statutory aims.¹⁶⁸

To further these purposes and achieve full and equal enjoyment of public life, public accommodations laws prohibit an array of discriminatory acts. Many, like Missouri’s, provide a laundry list of discriminatory acts:

It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in a place of public accommodation . . . or to segregate or discriminate against any such person in the use thereof [on a prohibited basis like race or sex].¹⁶⁹

Louisiana specifies that discrimination means “any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons.”¹⁷⁰

Twenty-one states expressly prohibit notice that one will discriminate.¹⁷¹ They bar signs to the effect that one will refuse accommodations, advantages,

166. ME. REV. STAT. tit. 5, § 4552 (2005); *see also* W. VA. CODE § 5-11-2 (2010) (“Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability.”).

167. Some statutes make this explicit. 775 ILL. COMP. STAT. § 5/1-102(F) (2015) (stating as a purpose of the antidiscrimination law “[t]o secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970”); N.H. REV. STAT. ANN. § 354-A:1 (1998) (listing as purpose “fulfillment of the provisions of the constitution of this state concerning civil rights”).

168. N.J. STAT. ANN. § 10:5-3 (West 2006) (“this act shall be liberally construed”); UTAH CODE ANN. § 13-7-1 (West 2010) (“This act shall be liberally construed with a view to promote the policy and purposes of the act and to promote justice.”); WIS. STAT. § 106.52(1)(e)(1) (2013) (“‘Public place of accommodation or amusement’ shall be interpreted broadly.”).

169. MO. REV. STAT. § 213.065 (1998). For similar language, see LA. STAT. ANN. § 51:2232(5) (2014); MD. CODE ANN., STATE GOV’T § 20-304 (West 2014); NEB. REV. STAT. § 20-134 (1974); N.M. STAT. ANN. § 28-1-7(F) (2004); VT. STAT. ANN. tit. 9, § 4502 (2015).

170. LA. STAT. ANN. § 51:2232(5) (2014).

171. N.H. REV. STAT. ANN. § 354-A:17 (1998). For similar language, see ALASKA STAT. § 18.80.230 (2000); COLO. REV. STAT. § 24-34-701 (2008); DEL. CODE ANN. tit. 6, § 4504(b) (West 2013); IDAHO CODE ANN. § 67-5909(5)(b) (2005); 775 ILL. COMP. STAT. § 5/5-102(B) (2007); IOWA CODE § 216.7(1)(b) (2007); KY. REV. STAT. ANN. § 344.140 (West 1992); ME. REV. STAT. tit. 5, § 4592(2) (2005); MASS. GEN. LAWS ch. 272, § 92A (1998); MICH. COMP. LAWS § 37.2302(b) (1977); MONT. CODE ANN. § 49-2-304(1)(b) (1993); N.J. STAT. ANN. § 10-5-12(f)(1) (West 2013); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1945); N.D. CENT. CODE § 14-02.4-16 (1995); 43 PA. CONS. STAT. § 955(i)(2) (2009); R.I. GEN. LAWS § 11-24-2 (2001); S.D. CODIFIED LAWS § 20-13-25 (1986); TENN. CODE ANN. § 4-21-502 (West 1978); W. VA. CODE §

facilities, or privileges on a prohibited basis or that the patronage or custom of any particular group is either unwelcome/objectionable or desired/solicited.¹⁷² Those statutes that are silent on notice also likely encompass such acts as infringing upon individuals' rights to full and equal enjoyment of public accommodations. Under such laws, a wedding vendor can no more advertise "we specialize in man-woman marriages" than it can proclaim "no same-sex marriages" in its storefront.¹⁷³

The laws target not only denial of services (a market access goal), but also acts that indirectly or directly cause persons of a particular race, color, national origin, religion, sex, or sexual orientation "to be treated as not welcome, accepted, desired, or solicited."¹⁷⁴ Allowing all groups into one's store but more closely surveilling people of a certain national origin, for example, is impermissible. Offering private meeting rooms only for men similarly amounts to discrimination. Reserving particular membership categories based on religion likewise infringes upon would-be customers' rights. Through public accommodations law, the liberty of business owners directly or indirectly to discriminate is curtailed in the interest of the full and equal participation in the marketplace of all people. While it remains true that public accommodations cannot exclude customers, the law also forbids direct or indirect infringement of customers' full and equal enjoyment of public accommodations.

The law thus anticipates and outlaws inclusion with subordination. It takes the perspective that discrimination can exist even where the disfavored group is included in the market. Indeed, disfavored groups frequently experience subordination, rather than complete exclusion. As Lerman and Sanderson observed in 1978, "complaints of insulting or discriminatory treatment intended to discourage certain customers are as common as complaints of outright refusals of entry."¹⁷⁵

As the statutes require, courts have formulated governmental interests as full and equal enjoyment of public accommodations, entailing achievement of material, dignitary, and expressive goals. In rejecting challenges to race antidiscrimination laws, the Supreme Court concluded that "[t]he Senate Commerce Committee made it quite clear that the fundamental object of Title

5-11-9(6)(B) (2010); WIS. STAT. § 106.52(3)(3)-(3m) (2011); D.C. CODE § 2-1402.31(a)(2) (2006).

172. *Id.*

173. *Anderson v. State*, 40 Ohio C.C. 510, 511 (Ohio Ct. App. 1918) (discussing goal of civil rights act "to prevent discrimination in public enjoyments and privileges, based on *favoritism* of race, color or other adventitious differences") (emphasis added); *see contra* *Trowbridge v. Katzen*, 203 N.Y.S.2d 736, 737-40 (N.Y. Sup. Ct. 1960), *modified*, 218 N.Y.S.2d 808 (N.Y. App. Div. 1961) (holding that the phrase "Serving Christian Clientele since 1911" in resort's advertising materials did not indicate that Jews were unwelcome or undesired).

174. *See, e.g.*, WASH. REV. CODE § 49.60.040 (1995).

175. Lerman & Sanderson, *supra* note 16, at 244.

It was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”¹⁷⁶ Congress targeted not only the quantitative effect—the frequency with which blacks were denied service—but also the qualitative effect—“the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging.”¹⁷⁷

In *Roberts v. U.S. Jaycees*, the Court again recognized compelling state interests in nondiscrimination in public accommodations.¹⁷⁸ Like violence, the Court said, “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.”¹⁷⁹ Like the statutory framework, the Court recognized distinct harms to both individuals and society. Discrimination in public accommodations, it said, “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”¹⁸⁰ The Court explicitly rejected the notion that access to goods and services in the market suffices, emphasizing the state interest in equal access is not restricted to “the provision of purely tangible goods and services.”¹⁸¹ For this reason, the *Jaycees* Court did not consider whether women might have other opportunities for networking and club membership elsewhere.¹⁸² It did not note that women equally might have formed other clubs, even though the case involved Minnesota affiliates that had granted women equal status contrary to the national Jaycee rules, suggesting the possibility of such alternatives.¹⁸³ Instead, the Court concluded that “assuring women equal access to such goods, privileges, and advantages” that the Jaycees’ offer outweighed the organization’s associational interests under the Constitution.¹⁸⁴

The Supreme Court public accommodations cases reflect the lived experiences of discrimination in a society where disfavored groups are included, but not fully accepted. In the clashes of the civil rights era, for example, blacks resisted their subordination and segregation, not only or always the barring of the market door. Consider the lunch counter sit-ins at Woolworth’s and other department stores. In the legal cases that resulted from

176. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

177. *Id.* at 253.

178. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

179. *Id.* at 628.

180. *Id.* at 625; *see also id.* at 626 (noting “the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women”).

181. *Id.* at 625.

182. *See, e.g., id.* at 609.

183. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 614 (1984).

184. *Id.* at 626.

sit-ins, the department stores frequently insisted that they had not discriminated because blacks were not excluded from the stores. They were willing to serve blacks in all of their many other departments, but not at the lunch counter.¹⁸⁵

Both exclusion and subordination were at work. Likewise, Bissinger's BBQ—which unsuccessfully asserted its religious liberty against the Civil Rights Act—did not refuse to provide food to black customers; its owner would serve them take-out, but did not want the races intermingling inside the restaurant.¹⁸⁶

Sex discrimination, of course, is the paradigm of inclusion with subordination. Indeed, even though we often treat it as an exclusion, *Jaycees* represents an instance of women's subordination in public life. The Jaycees included both men and women, but relegated women to lesser roles. Women could be members, but could not vote, hold office, or receive certain awards.¹⁸⁷ Their inclusion came subject to "archaic and overbroad assumptions about the relative needs and capacities of the sexes."¹⁸⁸

Thus far, the analysis in this Article has focused on the reach of public accommodations laws. What public accommodations laws cover, of course, is not conclusive of whether RFRA requires an exemption therefrom. Faced with allegations of violation of state public accommodations antidiscrimination law, public accommodations may seek a religious exemption under a state RFRA. What should a court make of such a claim? Assume that the entity comes under the protection of the state RFRA¹⁸⁹ and that, as RFRA requires, the antidiscrimination law substantially burdens its free exercise of religion.¹⁹⁰ The question then becomes: does the state have a compelling interest in applying the antidiscrimination law to religious objectors and could it equally further any such interest in a way less restrictive of religious exercise?

A more rigorous examination of public accommodations statutes matters both to the identification of the governmental interest at stake and to the least-

185. *Bell v. Maryland*, 378 U.S. 226, 271–76 (1964) (Douglas, J., concurring) (Appendix II to Opinion of Mr. Justice Douglas) (compiling sit-in cases in which drug store and retail managers testified that their establishments served blacks in all departments excepting lunch counters).

186. *Newman v. Piggie Park Enterprises*, 256 F. Supp. 941, 944–47 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).

187. *Jaycees*, 468 U.S. at 613.

188. *Id.* at 625.

189. *E.g.*, IND. CODE § 34-13-9-7(3) (2015) (allowing for-profit businesses to bring RFRA claims).

190. *See contra* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 742–45 (2014) (arguing that the attenuated nature of objecting wedding vendors' involvement and their lack of proximity and necessity to the alleged wrongful marriage render the burden of compliance insubstantial and their claims to exemption unjustified).

restrictive means analysis. If remedying market exclusion is the interest behind public accommodations law, it might be satisfied by a competitive market. For example, Richard Epstein, with whom many law and religion scholars now agree, contends that antidiscrimination laws are justified where a class is prevented from accessing the market due to pervasive discrimination.¹⁹¹ It follows that requiring all businesses to comply with antidiscrimination laws is no longer the least restrictive means to achieve the government's goals where a competitive market exists for comparable goods.¹⁹² In this view, alternate market providers—other florists, wedding venues, or photographers, for example—can meet the government's goal of ensuring a couple gains access to the market as a whole.¹⁹³ By contrast, if—as Sager argues in his lecture—public accommodations laws reflect a compelling constitutional interest in dismantling the “patterns of diminished membership in our national community within which some persons are systematically regarded and treated as less worthy by many other members of the community,”¹⁹⁴ it requires the general applicability of public accommodations laws to all public places.¹⁹⁵

To identify the interests served by antidiscrimination laws, a court will necessarily turn to the public accommodations statute itself. As this Part demonstrates, public accommodations laws vindicate individual and societal interests far broader than material goods, and target segregation and

191. Epstein, *supra* note 90, at 1282 (“Normatively, the correct rule is that freedom of association is a generalizable value that holds in all competitive markets; the effort to apply the antidiscrimination laws in that domain is a giant form of overreach, no matter whether the lines of difference are race, religion, or sexual orientation.”); *see also* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1480–83 (2015) (describing the arguments of law and religion scholars and advocates who now adopt Epstein's position).

192. Obergefell Brief of Laycock et al., *supra* note 44, at 5 (arguing that a “religious organization” should be exempted if “a same-sex couple seeking goods or services . . . can readily obtain comparable goods or services from other providers”); Letter from Robin Fretwell Wilson et al., to Paul A. Sarlo, N.J. Senate Judiciary Comm. Chairman (Dec. 4, 2009), <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/12/samesex-unions-and-religious-freedom-cont.html> [<http://perma.cc/28VH-VY98>] (proposing that public accommodations antidiscrimination laws should apply to small for-profit businesses where the customer is “unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship”); ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 28 (2010) (arguing that antidiscrimination laws should not apply to the market for fungible goods and services).

193. *E.g.*, Kristen Waggoner & Jonathan Scruggs, *Wash. Grandmother's Religious Freedom, Livelihood at Stake*, ALLIANCE DEFENDING FREEDOM (Dec. 18, 2014), <http://www.adfmedia.org/News/PRDetail/9465> [<http://perma.cc/T6FK-4WVZ>]; Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103, 141 (2015) (“There may be multiple adoption services, or multiple wedding photographers, ready to provide such service at little or no extra cost to the clients.”).

194. Sager, *supra* note 6.

195. *See generally* Sager, *supra* note 6.

subordination as well as exclusion. As a matter of textual analysis alone, a court necessarily must recognize a range of interests beyond market access. The least-restrictive means analysis will follow from the statutory text. Given an interest in full and equal enjoyment of public life, a court cannot easily conclude that the state has means to further this goal other than general applicability of nondiscrimination law. Access to some public places but not others does not further the broader aims of antidiscrimination law to address social stigma, construct equal citizenship, and create an inclusive society. Were religious exemptions tolerated, disfavored minorities would encounter refusing storefronts through pure accident—after all, they are public accommodations, open to the public. Such individuals would experience the burn of unequal treatment and stigma. They would be treated as unwelcome and unwanted in public life. From a societal perspective, groups might retreat into ethnic, racial, religious, and sexual enclaves.

CONCLUSION

For more than half a century, the public-private line policed by state public accommodations laws has held firm. Commercial actors—whether for-profit or non-profit, membership organizations or corporations, religiously or secularly motivated—were subject to its regulation. By contrast, private associations enjoyed the freedom to discriminate in forming the bonds of membership. Religiously motivated discrimination received little special treatment. The societal, constitutional, and statutory expectations were settled.

While public accommodations laws survived the frontal attacks on their existence during the civil rights era, religious exceptionalism may now undermine them. Beginning with sexual orientation exemptions in some states and extending more widely with same-sex marriage, legislators have authorized a range of religiously motivated discrimination unprecedented in public accommodations law. Cracks have emerged in what appeared to be a stable foundation. If commercial religious exemptions become the norm, Americans might see public accommodations as able to mount a religious defense against all antidiscrimination laws. To paraphrase Sager, victims of structural injustice defined by religion, race, gender, and sexual orientation might have to settle for diminished membership in lieu of full and equal participation in public life.