**NOTES**

**Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States**

**KELLY CATHERINE CHAPMAN***

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1784</td>
</tr>
<tr>
<td>I. PUBLIC ACCOMMODATIONS LAWS AND GAY RIGHTS</td>
<td>1787</td>
</tr>
<tr>
<td>A. STATE STATUTES AND SEXUAL-ORIENTATION DISCRIMINATION IN PUBLIC ACCOMMODATIONS CASE LAW</td>
<td>1789</td>
</tr>
<tr>
<td>B. SCHOLARS’ DIVERGENT VIEWS ON RELIGIOUS EXEMPTIONS TO GAY RIGHTS LAWS</td>
<td>1792</td>
</tr>
<tr>
<td>II. RELIGIOUS DATA SHOWS THE EXTENT TO WHICH HOLDOUT STATES ARE MORE RELIGIOUS THAN THOSE THAT CURRENTLY HAVE PUBLIC ACCOMMODATIONS GAY RIGHTS LAWS</td>
<td>1795</td>
</tr>
<tr>
<td>A. COMPARISON BETWEEN RELIGIOUSITY OF STATES WITH LAWS AGAINST SEXUAL-ORIENTATION DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND HOLDOUT STATES</td>
<td>1795</td>
</tr>
<tr>
<td>B. COMPARISON BETWEEN RELIGIOUS DENOMINATIONS OF POPULATION OF STATES WITH LAWS AGAINST SEXUAL-ORIENTATION DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND HOLDOUT STATES</td>
<td>1798</td>
</tr>
<tr>
<td>C. APPLICATION TO RELIGIOUS EXEMPTIONS</td>
<td>1801</td>
</tr>
<tr>
<td>III. A PROPOSED RELIGIOUS-EXEMPTION SCHEME THAT IS EASY TO NARROW OVER TIME</td>
<td>1803</td>
</tr>
<tr>
<td>A. WHOM TO EXEMPT?</td>
<td>1804</td>
</tr>
<tr>
<td>1. Type of Entity</td>
<td>1805</td>
</tr>
</tbody>
</table>

* Georgetown University Law Center, J.D. expected 2012; Randolph-Macon Woman’s College, B.A. 2007. © 2012, Kelly Catherine Chapman. This Note is dedicated to the memory of my father, Thomas C. Chapman. I would like to thank Professor Nan D. Hunter and Professor Richard Sander for their guidance and knowledge. All errors are my own.
a. Religious Entities ............................................. 1805

b. Private Organizations ........................................ 1806

2. Size of Entity .................................................... 1807

a. Justification for a Blanket Exemption. ..................... 1808

B. ENFORCEMENT .................................................... 1811

C. WHAT IF THE ONLY ENTITIES WHO CAN SERVE GAY PEOPLE ARE EXEMPT? ............................................. 1813

1. Hardship Exception ............................................. 1814

2. Putting Gay Individuals on Notice of Potential Discrimination .................................................... 1815

D. WHY STATE GAY-MARRIAGE BANS DO NOT PRECLUDE SUCH A STATUTE .................................................... 1816

E. CRITIQUES AND THE LIKELIHOOD OF PASSAGE .............. 1818

IV. THE MARKET MAY PROTECT GAY INDIVIDUALS MORE THAN EXPECTED .................................................... 1820

CONCLUSION .......................................................... 1823

APPENDIX ........................................................... 1824

I. TABLE 1: RELIGIOUS TRADITIONS’ VIEWS ON HOMOSEXUALITY .................................................... 1824

II. DATA, METHODOLOGY, AND RESULTS FOR FIGURES 1–2 (IMPORTANCE OF RELIGION IN EVERYDAY LIFE, FREQUENCY OF WORSHIP-SERVICE ATTENDANCE), FOOTNOTES 77–78 (EVANGELICAL PROTESTANT POPULATION DATA), AND DATA FOR TABLE 1 (RELIGIOUS TRADITIONS’ VIEWS ON HOMOSEXUALITY) .................................................... 1824

A. RESULTS FOR FIGURE 1 ........................................... 1825

B. RESULTS FOR FIGURE 2 ........................................... 1826

C. DATA AND METHODOLOGY FOR FOOTNOTES 77–78 .......... 1826

III. METHODOLOGY FOR FIGURE 3 (RELIGIOUS-AFFILIATION DATA) .................................................... 1826

INTRODUCTION

Todd Wathen and his partner of eight years immediately began planning a civil-union ceremony after learning that their love could soon be legally recog-
nized in their home state of Illinois. Wanting a “memorable place” to hold their ceremony, Wathen contacted two bed-and-breakfast inns in Illinois that advertised their ability to hold weddings and other related events. In response to Wathen’s inquiry, the first inn stated: “[a]t this point we will just be doing traditional weddings.” Later, the inn clarified that traditional weddings meant “weddings as opposed to civil unions.” The second inn’s co-owner responded that it too only “do[es] weddings,” then wrote to Wathen: “We will never host same-sex civil unions. We will never host same-sex weddings even if they become legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If that is discrimination, I guess we unfortunately discriminate.” The co-owner later sent Wathen unsolicited Bible passages “detailing how the Creator of the Universe looks at the gay lifestyle.” He told Wathen it was not too late to change his “behavior.”

As unfortunate as the communications were, Wathen and his partner’s story has a silver lining: Illinois law prohibits discrimination based on sexual orientation in places of public accommodation. This means that they can file, and have indeed filed, formal complaints against the inns through the Illinois Attorney General’s office and the state Department of Human Rights. In the majority of the states, however, gay individuals do not have such recourse: currently, only twenty-one states and the District of Columbia have such protections for sexual orientation. So, while the fight for gay marriage in California, Maine, and other similarly situated states wages on, and gay couples are currently able to marry in six other states and the District of Columbia,
more than half of the states—twenty-nine—still lack laws protecting gay individuals from even the most basic discrimination they may receive in public accommodations such as hotels, restaurants, and movie theaters.\(^{13}\)

This Note analyzes data to support the contention that the populations in the states that do not have public accommodations laws providing protection on the basis of sexual orientation (“holdout states”) are more religious—and greater numbers practice religions more strongly opposed to gay rights—than those that do have such laws.\(^{14}\) Although this distinction may be intuitive, such state religious data means that even the narrow, traditionally carved-out religious exemptions may not be broad enough in certain states to garner sufficient support for public accommodations protection (or, conversely, to deter sufficient opposition to the protection). Given the religious nature of the states that do not currently have such laws, conceding more expansive religious exemptions than are employed in less religious states would likely expedite the process—and may well be crucial to the ability of gay individuals to gain these protections in the foreseeable future.\(^{15}\)

Critics of broad religious exemptions believe that the exemptions undermine the purpose of the statutes themselves: when the purpose of a law is to protect against discrimination, why should some groups be given a free pass to do so?\(^{16}\) In order to assuage some of these fears, the exemption scheme itself should be constructed to allow maximum flexibility and ease in narrowing the exemption to allow for future progress in gay rights. Grafting together provisions from drafted or enacted federal legislation, this scheme would exempt entities that are below a certain size, but not larger entities that benefit more from and have a greater effect on commerce.

Part I of this Note provides a brief legal background to the conflict of gay rights and religion as it pertains to public accommodations laws in the United States and the scholarly debate surrounding it. Part II presents and analyzes religious data, comparing the religiousness of states that do and do not currently have laws protecting gay individuals from discrimination based on sexual


\[\text{13. See American Civil Liberties Union, supra note 10.}\]

\[\text{14. See infra Part II and Figure 1.}\]

\[\text{15. See, e.g., Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality And Religious Freedom, 5 Nw. J. L. & Soc. Pol'y 274, 275 (2010) (noting the conflict between religious concerns and state recognition of same-sex families); Danny Hakim, Exemptions Were Key to Vote on Gay Marriage, N.Y. Times (June 25, 2011), http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html (reporting that the passage of the New York State gay-marriage law occurred only after religious exemptions were negotiated into the bill).}\]

\[\text{16. See, e.g., Martha Minow, Should Religious Groups Be Exempt from Civil Rights Laws?, 48 B.C. L. Rev. 781, 822 (2007) (“Exemptions from civil rights laws vitiate or shrink those public policies.”); Minow notes that religious exemptions to antidiscrimination statutes have been applied inconsistently among race, gender, and sexual orientation, with sexual orientation receiving larger exemptions. Id. at 782.}\]
orientation. Part III details a proposed exemption scheme that is easy to narrow over time and addresses some concerns of critics of religious exemptions. Part IV explores the question of whether the marketplace protects gay individuals from discrimination more than many might believe.

I. PUBLIC ACCOMMODATIONS LAWS AND GAY RIGHTS

Under the Supreme Court’s current interpretation, the Constitution does not forbid discriminating against individuals based on their sexual orientation in public accommodations. Nor has Congress enacted a law forbidding such discrimination. The Supreme Court has held that gay individuals may be protected from unequal treatment under the Constitution’s Equal Protection Clause. However, the prevailing legal standard remains that statutes that differentiate between individuals based on sexual orientation (or that fail to protect individuals based on sexual orientation) are subject only to the bare-minimum “rational basis” standard. The Civil Rights Act of 1964 affords certain groups protection from discrimination in public accommodations—but not gay individuals. Members of the U.S. Congress have introduced legislation that would prohibit discrimination based on sexual orientation in public accommodations almost every year since 1974, but the bills have never passed. Though some states have stepped up to fill in this gap, as noted above, only twenty-one states and the District of Columbia currently provide such protection.

17. See Romer v. Evans, 517 U.S. 620, 635–36 (1996) (finding that Amendment 2 to the Colorado Constitution, which was enacted by referendum and prohibited legislation protective of gay individuals’ rights, was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause).
19. 42 U.S.C. § 2000a (1964); see also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (affirming Congress’ enactment of the Civil Rights Act of 1964 after a motel challenged the Act because it did not want to be forced to rent rooms to African-Americans as required by the Act’s public accommodations provision).
21. See, e.g., Housing Nondiscrimination Act of 2010, H.R. 4828, 111th Cong. (2010) (the most recent effort “[t]o amend the Fair Housing Act to prohibit housing discrimination on the basis of sexual orientation or gender identity, to amend the Civil Rights Act of 1964 to prohibit such discrimination in public accommodations and public facilities, and for other purposes”), available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4828.IH.
One important reason so many states have not passed statutes prohibiting discrimination in public accommodations based on sexual orientation may be the clash between an individual’s right to be free from discrimination and an individual’s right freely to exercise religion.\textsuperscript{22} This conflict has already been played out in some ways, as the Court has found that churches, church-affiliated organizations, and some private organizations can find exemption from antidiscrimination legislation through various clauses of the First Amendment.\textsuperscript{23}

One of the key clauses is the Free Exercise Clause, which reads, “Congress shall make no law . . . prohibiting the free exercise [of religion],”\textsuperscript{24} which the Supreme Court held applied to the states in 1940.\textsuperscript{25} Laws that burden religious belief without a compelling state interest can be struck down under the Free Exercise Clause.\textsuperscript{26} Recent jurisprudence outlined an applicable standard of scrutiny for Free Exercise claims that, if applied to state public accommodations statutes that prohibit sexual-orientation discrimination, would likely serve to hold the statutes constitutional.\textsuperscript{27} However, Congress so disagreed with this standard that it passed legislation designed to revert the standard to one of strict scrutiny,\textsuperscript{28} though the Court found this move beyond the scope of Congress’ authority.\textsuperscript{29} Moreover, when combined with other Constitutional claims—such as freedom of association and freedom of speech—the Court has utilized the higher standard of scrutiny, leaving open the possibility for some enterprises, like inherently expressive wedding-photography studios, to claim a higher

\textsuperscript{22} See, e.g., Marc L. Rubinstein, Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause, 46 HASTINGS L.J. 1585, 1592, 1605–09 (1995) (arguing and providing evidence “that religious forces are often the catalysts behind anti-gay-rights initiatives and that such forces are, at the very least, intimately intertwined with the organizations that are seeking to roll back gay rights victories”).

\textsuperscript{23} See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding a New Jersey public accommodations statute unconstitutional as applied to the Boy Scouts’ decision to remove a gay Boy Scout troop leader due to the organization’s freedom of association rights). The Court’s decision—that an exemption from a discrimination statute solely for religious organizations does not violate the Establishment Clause—also highlights the tensions inherent in a religious exemption. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding the religious exemption in Title VII of the Civil Rights Act, which exempts churches and religious organizations from antidiscrimination provisions).

\textsuperscript{24} U.S. CONST. amend. I.

\textsuperscript{25} Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

\textsuperscript{26} See, e.g., Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 141, 146 (1987) (applying strict scrutiny to find that a refusal to award unemployment benefits to a worker discharged for refusing to work on the Sabbath violated the Free Exercise Clause).

\textsuperscript{27} Emp’t Div. v. Smith, 494 U.S. 872, 878–79 (1990) (holding that when a law is both neutral and generally applicable, strict scrutiny analysis does not apply: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”); see also Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (confirming that neutral and generally applicable laws, though they may incidentally burden religious exercise, are not subject to compelling interest review).


\textsuperscript{29} City of Boerne, 521 U.S. at 536.
standard should be applied. The disagreement over the applicable standards highlights the lack of consensus regarding the proper standard of scrutiny for state laws burdening religious exercise. Thus, public accommodations statutes prohibiting all discrimination based on sexual orientation with no religious exemptions might fall into a gray zone: fining or otherwise punishing owners of public accommodations might burden free exercise of religion, at least as applied to entities with expressive or speech-related purposes.

A. STATE STATUTES AND SEXUAL-ORIENTATION DISCRIMINATION IN PUBLIC ACCOMMODATIONS CASE LAW

This conflict of rights in public accommodations statutes prohibiting discrimination based on sexual orientation first appeared in the 1970s in Washington, D.C., with twenty-one states also implementing statutes thereafter. States that currently have such statutes generally have minimal religious exemptions, most of which are consistent with those traditionally carved out through Su-

30. See Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971, 2985, 2988 (2010) (though it applied a lower level of scrutiny due to its limited public forum doctrine, the Court noted that “[i]n the context of public accommodations, we have subjected restrictions on . . . freedom [of association] to close scrutiny; such restrictions are permitted only if they serve ‘compelling state interests’ that are ‘unrelated to the suppression of ideas’—interests that cannot be advanced through . . . significantly less restrictive [means]’”); Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding New Jersey’s public accommodations law unconstitutional as applied to the Boy Scouts of America’s refusal to employ a gay assistant scoutmaster); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 578–80 (1995) (holding that a public accommodations statute, if applied to require parade organizers to allow a gay group to join, was unconstitutional because it violated the parade organizer’s rights to freedom of speech); Emp’t Div. v. Smith, 494 U.S. 872, 881–82 (1990) (noting that the standard had been different when a Free Exercise claim arose in conjunction with other First Amendment claims, such as freedom of speech, press, and expression).


32. See American Civil Liberties Union, supra note 10.

33. Of the twenty-two jurisdictions, only Delaware, Illinois, Iowa, Maine, and New Mexico include exemptions that are applicable to sexual orientation discrimination and extend beyond the traditional religious-based exemptions for public accommodations, but even these are minimal. See Delaware Equal Accommodations Law, Del. Code Ann. tit. 6, § 4502 (West 2011) (public accommodations definition does not apply 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”); 775 ILL. COMP. STAT. ANN. 5/5-101(A)(1) (West 2011) (public accommodations definition does not apply to “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”); IOWA CODE ANN. § 216.7 (West 2011) (prohibition on discrimination does not apply to the rental or leasing of accommodations of “less than six rooms within a single housing accommodation by the occupant or owner of such housing accommodation if the occupant or owner or members of that person’s family reside therein”); Maine Human Rights Act, Me. Rev. Stat. tit. 5, § 4592 (2011) (relevant statute provision does not apply to “the owner of a lodging place [i]that serves breakfast . . . contains no more than 5 rooms available to be let to lodgers; and [i]n which the owner resides on the premises.”); N.M. STAT. ANN. § 28-1-9(D) (West 2011) (relevant statutory provision does not “apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence”).
Premier Court jurisprudence. These include exemptions for actual places of religious worship, the organizations they operate, and certain private organizations. As gay-marriage laws gain traction, public accommodations statutes are uniquely positioned as a point of contention because marriage-related public accommodations contexts are those in which the conflict appears so commonly. Countless gray areas exist in which religious liberty and gay rights conflicts extend beyond churches, mosques, or synagogues, including: “[r]eligi-ously affiliated marriage-counseling services, day-care centers, retreat centers, summer family camps, or family community centers,” and businesses owned or operated by religious individuals.

Situations in which individuals and business entities find themselves navigating these gray areas have led to litigation across the country. Most often, though, cases involving public accommodations laws and discrimination based on sexual orientation occur in states that already have protections codified into law, as in other states no cause of action exists unless local ordinances or some other legal theory provide protection. Due to this dearth of state cases, two examples from states with laws prohibiting discrimination in public accommodation based on sexual orientation illustrate how some courts have approached the uniquely personal and difficult intersection of religion and gay rights.

In Elane Photography, a husband and wife who co-owned a commercial photography business in Albuquerque, New Mexico had to pay a $6,637.94

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34. See Dale, 530 U.S. at 654–56 (holding private organization was exempt from compliance with public accommodations law under the First Amendment because (1) it was an “expressive association,” (2) the ability of which to express its viewpoints privately and publicly would have been significantly affected by the inclusion of a certain individual).


36. See, e.g., Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685 (Human Rights Comm’n of N.M. Apr. 9, 2008); Bernstein v. Ocean Grove Camp Meeting Ass’n, No. PN34XB-03008 (N.J. Dep’t of Law & Pub. Safety, filed June 19, 2007); see also Hillig, supra note 1 (describing Wathen’s complaint).


award in legal fees and costs for refusing to photograph a same-sex civil ceremony.39 The photography company’s primary business was photographing weddings,40 but it had an unwritten policy that the company “would not photograph any image or event which was contrary to the religious beliefs of its co-owners.”41 After contacting the company to photograph her same-sex ceremony, Vanessa Willock learned that those religious beliefs included “only provid[ing] photographic services for traditional weddings between one woman and one man.”42 Willock filed suit based on New Mexico’s Human Rights Act, which prohibits discrimination based on sexual orientation in places of public accommodation.43 Though the photography company’s primary argument was that the photographer’s First Amendment rights to free exercise of religion and freedom of speech would be violated if he or she were forced to photograph a same-sex ceremony,44 the New Mexico Human Rights Commission held against the business.45 The New Mexico Human Rights Act did not provide a religious exemption for entities such as the two-person shop in Elane Photography; in the future, the owners would need to decide between their deeply held beliefs and their bread-and-butter business of photographing weddings. In such a small business, it is expected that owners may feel a personal connection to—and responsibility for—their work.

In North Coast Women’s Care, a small medical practice faced liability for refusing to perform intrauterine fertilization for a lesbian couple.46 After several failed attempts at self-fertilization,47 the couple went to North Coast, which confirmed it would perform the procedure.48 When the time came, however, the only doctor North Coast believed was licensed to perform the procedure refused to do so based on his religious beliefs.49 The couple ultimately needed a referral to a doctor outside of their insurance plan at a “substantially greater” cost than continuing at North Coast.50 The couple filed suit against the medical group under California’s Unruh Civil Rights Act’s public accommodations provision, which prohibits discrimination against individuals based on their sexual orienta-

39. Elane Photography, HRD No. 06-12-20-0685, at 2, 19.
40. Id. at 3.
41. Id. at 4.
42. Id. at 13.
43. Id. at 9–10.
44. Id. at 14, 16.
45. Id. at 17 (quoting Emp’t Div. v. Smith, 494 U.S. 872, 879 (1990) (finding that “the right [of] free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)”’)).
47. Id. at 963.
48. Id. at 963–64.
49. Id. at 964.
Like the proprietors in *Elane Photography*, North Coast also argued that state-mandated performance of intrauterine insemination would be contrary to the doctors’ First Amendment right to free exercise of religion. The California Supreme Court held against North Coast, finding no statutory religious exemption for such a situation. Again, the doctors at North Coast faced a difficult decision in which their deeply held religious beliefs might preclude them from earning their chosen livelihood. Other conflicts turn up in various other public accommodations contexts, always pitting the religious beliefs of one side against the right to be free of discrimination of the other.

**B. SCHOLARS’ DIVERGENT VIEWS ON RELIGIOUS EXEMPTIONS TO GAY RIGHTS LAWS**

As expected, scholars’ perspectives on the outcome of these cases and the general conflict fill a spectrum, with most scholars asserting what the balance between gay rights and religious liberty should be, and how best to achieve that balance. An obvious way to achieve such a balance between the conflicting rights is for statutes to include religious-based exemptions to laws protecting individuals from discrimination based on sexual orientation. However, opposition to these exemptions emerges from both sides. Some scholars believe that in the clash of rights, religious liberty should win over gay rights, with at least one going so far as to say the struggle between religious liberty and gay rights is a zero-sum game in which gay rights must lose.

Other scholars and advocates counter that religious liberty should not trump human rights, and that in a zero-sum game, the winner should be gay rights. Many scholars in this camp, however, do not oppose religious exemptions outright, but approve of them only in the most narrow of circumstances.

51. *N. Coast Women’s Care*, 189 P.3d at 964.
52. Id.
53. Id. at 965–69.
56. Rena M. Lindevaldsen, *The Fallacy of Neutrality from Beginning to End: The Battle Between Religious Liberties and Rights Based on Homosexual Conduct*, 4 Liberty U. L. Rev. 425, 461 (2010) (“Once the nation realizes that there will be a winner and a loser, then the only question is whether religious liberties and free speech rights should be suppressed to promote legal recognition of same-sex relationships. For the Christian, the answer must be ‘no.’”).
Professor Chai R. Feldblum espouses this view most succinctly:

If the “justifying principle” of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society from the antidiscrimination prohibition.57

Feldblum believes that “in dealing with this conflict . . . it is essential that we not privilege moral beliefs that are religiously based over other sincerely held core, moral beliefs.”58 Feldblum, however, still sees a place for exemption for a subset of entities, which “may include schools, day care centers, summer camps and tours,” that are “engaged in by belief communities . . . that are specifically designed to inculcate values in the next generation.”59

A balance could be struck between these two sides by arguing, as some scholars do, that gay rights laws must make sufficient room for religious freedom, some drawing on the First Amendment’s Free Exercise Clause as a reason to protect the right of individuals to practice their religion.60 Academia is filled with a spectrum of views on the debate61 and until one side abdicates or

58. Id. at 123.
59. Id. at 121. Additionally, Feldblum hesitantly proffers the idea of exemptions for leadership positions in religiously affiliated enterprises. See id. at 122.
60. See, e.g., Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Defendants-Intervenors-Appellants & in Support of Reversal at 3–19, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696) (arguing that same-sex-marriage laws should include “robust protections for religious liberty” otherwise church–state conflicts will ensue and religious conscience harmed); George W. Dent, Jr., Civil Rights for Whom? Gay Rights Versus Religious Freedom, 95 KY. L.J. 553, 555–58 (2007) (arguing that normative ideas such as equality will not resolve the conflict and that an analysis on the merits of the claims should result in gay individual’s freedom from being discriminated against limited by a deference to religious freedom); Andrew Koppelman, You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions, 72 BROOK. L. REV. 125, 135–38, 142–46 (2006) (arguing that religious exemptions are warranted because it would entail silencing an entire group and critics of such exemptions overlook the types of harms gay rights laws may cause to religious individuals).
the Supreme Court takes up any decisions, the conflict will remain unresolved. 

Rather than arguing the constitutional reasons for recognizing religious exemptions, this Note uses the current state of gay rights legislation and religious data to support, and indeed show the necessity of, religious exemptions for future progress in gay rights for public accommodations laws. The sheer number of gay individuals that live each day without protection in places of public accommodations supports moving as quickly as possible towards some level of protection, regardless of whether religious exemptions put in place along the way are constitutionally necessary. As mentioned above, only twenty-one states and the District of Columbia have laws that protect individuals against discrimination based on sexual orientation in places of public accommodation. 62 This means that, based on calculations using survey data, an estimated 50% of all

be defined by the boundaries of ‘self-realization,’ a concept and value constituted primarily of the First Amendment principles of identity, expression, and intimacy, the preservation of which would serve both those who seek protection under antidiscrimination laws, as well as those who seek exemption”); Jennifer Gerarda Brown, Peacemaking in the Culture War Between Gay Rights and Religious Liberty, 95 Iowa L. Rev. 747, 778–803 (2010) (arguing that in certain instances of conflict between gay rights and religious liberty, mediation, rather than litigation, may be the most helpful practice in recognizing the needs of both sides); Dent, supra note 60; Josiah N. Drew, Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace, 16 B. Y. U. J. Pub. L. 287, 312–14 (2002) (arguing that resolution of the conflict might best be found in analogizing sexual orientation to religion and applying the Constitution’s religion clauses to governmental action; in other words, the government can prohibit discrimination based on sexual orientation but it cannot favor homosexuality by coercing actors to embrace it); Maggie Gallagher, Why Accommodate? Reflections on the Gay Marriage Culture Wars, 5 Nw. J. L. & Soc. Pol’y 260, 260–62 (2010) (arguing that religious accommodations to gay rights laws should be given for reasons that are practical, civic, or based on moral sympathy and principle); Koppelman, supra note 60, at 127–131 (criticizing Chai R. Feldblum’s scholarship for placing the harm gay individuals face when discriminated against above the potential harm religious individuals would feel in being forced not to discriminate); Lindevaldsen, supra note 56, at 456–63 (arguing that religious liberty must be held above gay rights so far as to exclude them because even neutral laws implicitly support biblically prohibited conduct); Lupu & Tuttle, supra note 15, at 275 (noting the conflict between religious concerns and state recognition of same-sex families); Minow, supra note 16, at 785–86, 843–44 (noting that “exemptions are not required by the Constitution from neutral laws that do not target religious practice or belief,” but arguing for an option that takes religious beliefs into account when deciding whether an entity should be exempt from civil rights legislation to avoid backlash and out of respect for religious belief); Rubinstein, supra note 22, at 1615–18 (arguing that legislation prohibiting the enactment of protections for gay individuals violates the Establishment Clause); Eugene Volokh, Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites, 21 Cardozo L. Rev. 595, 597–600 (1999) (highlighting the more specific questions of the conflict than simply which side should prevail, and proposing the use of test suites to determine if the legal answers operate as intended). Some scholars, though not defining the conflict in explicitly religious terms, discuss the issue broadly. See, e.g., Holning Lau, Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law, 94 Cal. L. Rev. 1271, 1271–78 (2006) (advocating for the protection of gay individuals’ rights but arguing that a theory of ‘couples’ aggregate rights” is necessary for moral claims about gay individuals’ rights against sexual-orientation discrimination to be taken seriously); Wardle, supra note 55, at 1369, 1385–88 (arguing that same-sex marriage threatens “the institution of marriage, children, families and society” and therefore it should not be allowed). 62. See supra note 11 and accompanying text.
gay, lesbian, or bisexual adults and 52% of all same-sex couples in the United States live in states that do not forbid discrimination based on sexual orientation in places of public accommodation. Currently, if a lesbian couple wants to have a commitment ceremony or use intrauterine fertilization to have a child in Utah, their plans are dependent on the whim of the innkeeper or fertilization doctor—end of story.

II. Religious Data Shows the Extent to Which Holdout States Are More Religious Than Those That Currently Have Public Accommodations Gay Rights Laws

As a practical matter, not allowing for substantive religious exemptions in the states whose public accommodations laws do not currently protect gay individuals from discrimination may mean that such rights may never materialize—or at least not for many years to come. Religious reasons are the ones most often, and most fervently, advanced for why gay individuals should not be afforded rights. State religious data support the intuitive notion that states that do not currently have these laws have more religious populations and greater populations of members of religions that are hostile to gay rights. So, an all-or-nothing approach, though most faithful to the idea that gay rights are human rights, will not likely advance any of those rights for years to come in most states that do not currently have public accommodations antidiscrimination laws.

A. Comparison Between Religiosity of States with Laws Against Sexual-Orienta tion Discrimination in Public Accommodations and Holdout States

State religious data suggest that even narrow, traditionally carved-out religious exemptions may not be robust enough in certain states to garner sufficient support for public accommodations protection (or, conversely, to deter sufficient opposition to the protection). Though the states with less religious populations employ these narrow exemptions, broader religious exemptions will likely be needed in states that have more religious populations. Intuitively, states with more relatively religious populations are less likely to protect gay individuals’ rights—whether through popular vote, the courts, or legislation—and vice versa. Figures 1 and 2, which aggregate survey data regarding the importance of religion in everyday life and frequency of worship service attendance as a proxy for religiosity, drive this point home.

65. Notwithstanding local ordinances, which have cropped up in recent years. See infra notes 160–61.
Figure 1. Importance of Religion in Everyday Life

Figure 2. Frequency of Worship Attendance
Figure 1\textsuperscript{66} illustrates that, on average, 62% of the population in the states that do not include sexual orientation in their public accommodations statutes view religion as very important to everyday life. In comparison, only 48% of the population in states that do have such statutes view religion in the same way—a 14% difference. The survey responses were aggregated among the two groups. Using simple chi-square analysis of the survey responses, the difference between the two groups is statistically significant beyond the 0.01% level.\textsuperscript{67} On the other end, while only around 13% of the population of states that do not include sexual orientation in their public accommodations statutes view religion as not too important or not important at all, 21% of the population in states with such statutes felt the same way. The difference is nearly 10%, and the difference in the actual aggregated response data is also statistically significant beyond the 0.01% level using the chi-square analysis.\textsuperscript{68}

Figure 2\textsuperscript{69} tells a similar story. On average, about 44% of the population in states that do not include sexual orientation in their public accommodations statutes attend worship services at least once a week, which is nearly 12% greater than the average of just under 33% for states that do include sexual orientation in their public accommodations statutes. This difference in the respondents’ aggregated answers is statistically significant beyond the 0.01% level.\textsuperscript{70} Conversely, almost one-third of the population in states that do protect gay individuals from discrimination in public accommodations seldom or never attend worship services on average. In comparison, just under a quarter of the population in states that do not have such protection seldom or never attend worship services on average. On average, almost 70% of the population in states that include sexual orientation in their statutes do not attend church on a weekly basis. On the other hand, almost half of the population in states that do not include sexual orientation in their statutes weekly attend worship services; the difference between these two populations is also statistically significant
beyond the 0.01% level when responses were aggregated.71 Given the official positions that various religions take on same-sex relationships, many constituents in these states likely attend worship services that are unsupportive of, or even hostile to, equal treatment of gay individuals.72

B. COMPARISON BETWEEN RELIGIOUS DENOMINATIONS OF POPULATION OF STATES WITH LAWS AGAINST SEXUAL-ORIENTATION DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND HOLDOUT STATES

As noted above, some religious groups have differing attendance rates and official views on homosexuality; thus, states with high concentrations of certain religious denominations may be more likely to eschew protection of gay individuals in public accommodations. Though the intuitive notion is that religiousness generally correlates with a lack of support for gay rights, data suggest some religions are much less supportive than others.73 A critical indicator of a state’s aversion to gay rights legislation is its population of non-Catholic Christians, particularly Evangelical Christians. Surveys support the notion that these populations are some of the most hostile to gay rights.74 Though the differences in populations may not seem stark, they are often large enough to make a difference when voting statistics are taken into account.

Data from a 2007 study show that states that do not include sexual orientation in their public discrimination laws have an average Evangelical Protestant population of around 33%, which is nearly twice the average percentage of Evangelical Protestants in states that do protect gay individuals in public accommodations.75 A reported 64% of Evangelical Church members believe homosexuality should be discouraged by society—only the Church of Jesus Christ of Latter-Day Saints (the “Mormon Church”) (68%) and Jehovah’s Witnesses (76%) had a higher percentage of disapproving members.76 This means that states that do not include sexual orientation in their public discrimination laws have, on average, a larger proportion of their populations that more often believe that homosexuality should be discouraged than do other religions. This, of course, also means more voters exist who might strike down any proposed gay rights ballot initiatives or not elect politicians who support such initiatives.

71. The calculation used standard chi-square analysis. For full data and methodology, see Appendix.
72. See The Pew Forum on Religion & Pub. Life, Religious Groups’ Official Positions on Same-Sex Marriage, PewFORUM.ORG (July 27, 2010), http://pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx?. Of the major religious denominations Pew catalogued, eight out of sixteen held positions that were either unsupportive or hostile to same-sex relationships, while only three openly and affirmatively support same-sex relationships. Id.
74. Id.; see also infra Table 3.
76. Pew: Religious Beliefs and Practices, supra note 66, at 18. For a table comparing religious traditions’ members’ views, see infra Table 1.
legislation. Support for this notion may lie in the fact that 50% of Evangelical Christians believe that the government should do more to protect morality, a figure that only members of the Mormon Church surpass with 54%.77

Figure 3,78 above, utilizes data from a recent survey that may help identify differences in religious affiliation between states that do and do not include sexual orientation in their public accommodations statutes.79 The most striking difference lies in the average percent of the population of states that do not include sexual orientation in their public accommodations antidiscrimination laws that consider themselves non-Catholic Christians. On average in these twenty-nine states, non-Catholic Christians make up 63% of the population,

78. B A R R Y A. K O S M I N & A R I E L A K E Y S A R, A M E R I C A N R E L I G I O U S I D E N T I F I C A T I O N S U R V E Y: S U M M A R Y R E P O R T 18–22 (2009), available at http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf. In order to compare the religious compositions of the states that include sexual orientation in their public accommodations antidiscrimination laws with the states that do not, each state’s religious membership data was converted to a percentage based on the state’s population in 2000. Next, states were grouped according to whether the states included sexual orientation in their public accommodations antidiscrimination laws, and the averages were computed for each of the two groups.
79. Id. The authors combined all individual members of denominations that claim to be Christian, other than the Catholic Church, together but did not specifically state which denominations were included. For survey methodology, see infra Appendix.
nearly 20% higher than states that include sexual orientation in their public accommodations antidiscrimination laws.\(^{80}\)

Because all “other Christians” likely do not share proportionately the same beliefs about homosexuality as Evangelical Christians,\(^{81}\) the 63% figure may not mean a clear voting majority believes homosexuality should be discouraged by society. In addition, these numbers do not seem so disparate as to prove that a clear voting block of non-religious individuals exists in the states that include sexual orientation in their discrimination laws. However, the figures do suggest that advocates of gay rights legislation need to recognize the existence of certain population blocks that are, on average, nearly three times larger (Evangelical Christians) and nearly 20% larger (all non-Catholic Christians) than those in states with public accommodations protections.

This suggests that a larger percentage of the population in states that do not include sexual orientation in their public accommodations laws could potentially have a religious “dog in the fight” against gay rights. When a 60% voter turnout is considered high,\(^{82}\) siding against the beliefs of the majority of Evangelical Christians in these states—20% of the population—could mean the difference between primary or general election victory or defeat for any politician.\(^{83}\)

Another result worth mentioning from the data in Figure 3 is that states that include sexual orientation in their public accommodations antidiscrimination laws have, on average, approximately 10% more Catholics than “holdout” states. This is striking because the Catholic Church’s official position on homosexuality is condemnatory.\(^{84}\) A few factors may explain this anomaly. First, while many identify themselves as Catholics, many fewer Catholics actively attend church than do Evangelical Protestants.\(^{85}\) Simply put, assuming antigay doctrine is propounded at worship services, the religious arguments against gay rights are not resounded in the minds of most Catholics as often as Evangelical Christians. Second, data about churches’ moral attitudes suggest that Catholics, on the whole, are much more supportive of gay rights than most other mainstream religions: only 30% of Catholics believe homosexuality should be discouraged by society, whereas 64% of members of Evangelical churches believe so.\(^{86}\)
This suggests that gay rights advocates should look to the actual general beliefs of the religion’s members—not just whether the state has a large religious population—when using a state’s religious composition in analyzing what breadth of religious exemptions would be politically expedient to grant. Though some groups in the gay rights debate break party lines,87 Gallup recently completed a study indicating that gay rights are the moral issue over which Republicans and Democrats most disagree: 61% of Democrats believed gay or lesbian relationships to be “morally acceptable,” whereas only 35% of Republicans agreed.88 Even the ever-contentious issues of abortion and the death penalty did not reflect such a large difference in moral approval between the two parties.89 One obvious reason for this disparity is the high number of religious individuals who consider themselves Republicans.90 Further, many more Republicans than Democrats believe that organized religion should have more influence on the nation than it currently does.91

C. APPLICATION TO RELIGIOUS EXEMPTIONS

This empirical illustration of the demographic characteristics of the states based on their inclusion of sexual orientation in their public accommodations statutes underscores the need for larger religious exemptions in holdout states than in the states that currently protect gay individuals: the largest religious group in the states that currently have such laws (Catholics) is more than twice as supportive of societal acceptance of gay individuals than are the largest groups in the states that do not currently have such laws (Evangelical Protestants, and Mormons in Utah).92 Allowing stronger religious exemptions than have previously been utilized may ease passage of antidiscrimination legislation in a place like Utah, where state-level gay rights legislation will not likely pass in the near future without significant religious exemptions.93

87. See, e.g., Employment Discrimination, LOG CABIN REPUBLICANS, http://www.logcabin.org/site/ c.nsKSL7PMLpF/b.6417373/k.5D4F/Workplace_Discrimination.htm (last visited Apr. 18, 2012) (describing the organization’s support for the Employment Non-Discrimination Act in part because, “in matters of personal freedom and civil rights, the federal government must play a large part in guaranteeing fairness and equality for all citizens”).
89. Id.
92. See supra Figure 3 and accompanying text.
93. Though it is not the focus of this Note’s argument, beyond political expediency this data imply constitutional- and moral-respect rationales for including religious exemptions: the results suggest a
By some standards, Utah has been considered the “reddest state in the nation.” Based on data Gallup collected in 2008, Utah is the most solidly Republican state in the union. In Utah, religion permeates everyday life; the distinctions others may see between church life, family life, work life, school life, and civic life are blurred for many Utahans. Most local businesses, especially those outside of Salt Lake City, close on Sundays and do not serve alcohol. For example, in 2006, when the Academy Award-winning film “Brokeback Mountain” was released to theaters, a chain of Utah theaters planned to exhibit it—until the chain’s owner, Larry H. Miller, realized it was about a same-sex relationship. Miller pulled the movie and went back to pursuing his day job—owning and running the Utah Jazz NBA basketball team. Given the environment, passing legislation in Utah that protects gay individuals from discrimination in places of public accommodation, even with sizable religious exemptions, would still be a victory. Moreover, it would serve as a foothold for further advancement of gay rights in the future.

Religious exemptions may actually speed up the enactment of gay rights legislation. If religious individuals feel as though they are going to lose entirely their right to practice freely their religion (regardless of whether such a right exists in these circumstances), they will fight back more strongly and potentially introduce additional roadblocks to the progress of gay rights.

larger proportion of religious individuals in these states may hold views that statutes without exemptions might burden compared to states that already have such laws.


96. Based on the author’s personal experience growing up in Sandy, Utah, a suburb of Salt Lake City, from the age of ten to seventeen. The author’s family continues to live there and they are practicing Mormons.


98. Id.

99. See, e.g., Hakim, supra note 15 (noting the passage of the New York State gay-marriage law occurred only after religious exemptions were negotiated into the bill); Koppelman, supra note 60, at 136 (“Reasonable gay rights proponents should take [religious liberty] concerns seriously and seek to accommodate them where this is possible—not just because it is politically sensible (though it is), but because it is the right thing to do.”); Lupu & Tuttle, supra note 15.

100. Minow, supra note 16, at 783, 823–25, 847. Minow believes that “[a]voiding direct confrontation between the government and religious groups over antidiscrimination norms may also appeal to civil rights advocates who identify real risks of severe backlash in the broader community” and states that “[g]overnment officials, including judges, can rule for one side but they also then can prompt backlash, and constitutional amendments, as the same-sex marriage debates have shown.” Id. at 783, 847.
Maggie Gallagher, co-founder of the National Organization for Marriage, states that “traditional religious believers” do not feel in control of the debate over gay rights. However, many believe, as they should, that religious-liberty rights should not supersede the rights of gay individuals. But however unfounded some gay rights supporters might find the notion that the right to exercise religious beliefs should ever trump a gay individual’s rights, these religious beliefs are often deeply held; an individual may feel her religious beliefs are as much a part of her being as one’s sexual orientation. Recognizing the religious-liberty rights of individuals opposed to gay rights through religious exemptions disarms one crucial argument that these opponents can use to oppose gay rights. Furthermore, gay rights advocates “may find it wise to back off from direct governmental regulation of religious groups’ employment practices” because after working through the question without outside coercion, “changes would then be legitimate and meaningful if the religious group stands against discrimination in its employment practices and programs.”

Recognizing the opposing viewpoint may help build mutual trust instead of creating a backlash by ignoring it. Over time, gay rights advocates may also garner incremental respect from those opponents, propelling the movement forward.

III. A PROPOSED RELIGIOUS-EXEMPTION SCHEME THAT IS EASY TO NARROW OVER TIME

The above data suggest that any proposal to include sexual orientation in the public accommodations antidiscrimination laws of holdout states will likely need to include larger religious exemptions. Of course, simply allowing any business to discriminate against gay individuals because of the owner’s religious views would not be a solution—it would in effect amount to no law at all. Some believe that “[a]llowing even a self-identified Christian business to discriminate would serve only one goal—to sanction and perpetuate the ‘invidious discrimination in the distribution of publicly available goods’ that the government has a compelling interest to prevent.” The scheme, therefore, should be generous to small, intimate entities, but should also have clear cutoff points at which entities would not qualify for the religious exemption. These cutoff points can, and should, be grafted from existing federal legislation and applied to states. In so doing, state legislators may start with a framework that is currently operating on the federal level, which means its strengths and weak-

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104. See id. at 849.
nesses have been weighed by Congress, and their staying power is more assured than if starting from scratch. Federal legislation that has not passed but continues to be reworked through bills in successive congressional sessions may also play a similar role (though admittedly not as powerful in predicting how a policy will operate in reality). In its qualification criteria, the exemption scheme should ensure that all stakeholders enjoy the reliability of bright-line rules and definitions. The scheme’s bright-line cutoff points should be engineered in such a way that would allow incremental narrowing of the exemption as time goes on and public or legal opinion shifts. Next, the scheme should answer the problematic question of what should happen when the sole provider of a service in an area qualifies for and opts to use the religious exemption, causing a hardship on gay individuals. Finally, the exemption scheme should also include clear-cut guidance on whether an entity is considered a public accommodation. 106 The exemption scheme proposed in this Note would accomplish all of these goals.

A. WHOM TO EXEMPT?

The proposed exemption scheme should exempt entities based on the type and size of the entity, drawing on generally accepted, narrow religious exemptions as well as other forms of exemptions found across different federal legislation. The general components of the exemption scheme should be as follows:

1. Churches and church-run entities are exempt. A church-run entity is an entity in which the church has sole or majority ownership.

2. Private organizations with a stated mission that clearly would be inconsistent with compliance and private clubs are exempt.

3. Entities that have fewer than [X] employees, except those operating services the withholding of which would place one’s health, life, or material pecuniary interests in danger, are exempt. Examples include towing services, basic accommodations at motels and hotels, and emergency-medical technicians and emergency-room professionals.

The combination of these qualifiers for exemption protects religious organizations that are traditionally exempt from public accommodations civil rights laws (components 1 and 2) but offers a larger exemption than is typically seen in state public accommodations statutes by exempting non-church-owned, non-private entities below a certain size. The justification for the use of these three components follows below.

106. Id. at 600 (“In order to avoid confusion, public accommodation statutes must be clearly written, with their exceptions and exclusions plainly stated. There should be no question that a business like Elane Photography would be subject to such public accommodations laws since it is an establishment that offers its services to the public and does not fall under any of the common statutory exceptions, such as private clubs or religious institutions.”).
1. Type of Entity

At a minimum, the exemption scheme should reflect the commonly used exemptions for churches and church-run entities and private organizations. These exemptions are used on federal and state levels and are crucial for a public accommodations statute to actually be passed.107

a. Religious Entities. All religious entities would be exempt from the statute’s requirements. Such an exemption could be modeled after the Americans with Disabilities Act’s (ADA) religious exemption,108 as has already been done in public accommodations statutes in some jurisdictions:109

Religious entities are exempt from the requirements of title III of the ADA. A religious entity, however, would be subject to the employment obligations of title I if it has enough employees to meet the requirements for coverage.

. . . .

. . . A religious entity is a religious organization or an entity controlled by a religious organization, including a place of worship.

. . . .

. . . The exemption covers all of the activities of a religious entity, whether religious or secular.110

The statute should determine ownership by a religious entity using the tax-exemption-registration process rather than asking whether the entity itself is “religious” enough.111 This approach offers a bright line that would likely reduce administrative costs as well as reduce the ability of certain ventures that are not church-owned but that would like to discriminate to try to make their entity “more religious” to qualify for the exemption. Moreover, the Supreme Court jurisprudence discussed in Part I supports this exemption.112

107. See supra Part II.
108. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12113(d) (Supp. 2010) (exempting any “religious corporation, association, educational institution, or society” from prohibitions against giving preferences in employment to individuals of a particular religion “to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities” and allowing a “religious organization” to “require that all applicants and employees conform to the tenets of such organization”).
109. See, e.g., NY Exec. Law § 296(11) (McKinney 2011) (exempting religious organizations and educational programs that religious organizations operate from antidiscrimination statutes in employment-preference, housing, and admissions contexts). However, the discrimination must be related to religious purposes. See Scheiber v. St. John’s Univ., 638 N.E.2d 977, 980 (N.Y. 1994).
111. The ADA does not explicitly do this in its statute, whereas the Civil Rights Act of 1964 uses tax-exempt status as a determinant in its definitions, albeit for determining whether a private club is exempt from its requirements. See 42 U.S.C. § 2000e(b) (2006).
b. Private Organizations. The exemption scheme should also provide the generally recognized exemptions for private clubs. The ADA exempts entities from Title III obligations if they are a private club as defined under Title II of the Civil Rights Act. As the *ADA Title III Technical Assistance Manual Covering Public Accommodations and Public Facilities* notes, courts have been “most inclined to find private club status” when

1) Members exercise a high degree of control over club operations.
2) The membership selection process is highly selective.
3) Substantial membership fees are charged.
4) The entity is operated on a nonprofit basis.
5) The club was not founded specifically to avoid compliance with Federal civil rights laws.

Until a federal law prohibits sexual-orientation discrimination, and does so for all places, entities can change their practices to fit into the definition of a private club. Of course, changing practices to avoid liability may cause a hardship on certain businesses, but this is the price to pay by continuing to operate and discriminate.

As noted in Part I, the Supreme Court has recognized private organizations’ right to exclude certain individuals, whether based on claims of expressive association or free speech. Bearing these precedents in mind, the proposed exemption scheme should require that the private organization have a *stated* mission that the inclusion of gay members would undermine, as has been recognized in federal case law. Moreover, the statement should be consistent with Feldblum’s proposal that:

> [T]he enterprise must present itself clearly and explicitly as designed to inculcate a set of beliefs; the beliefs of the enterprise must be clearly set forth as being inconsistent with a belief that homosexuality is morally neutral and the enterprise must seek to enroll only individuals who wish to be inculcated with such beliefs.

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117. Feldblum, *supra* note 57, at 121.
With such a stated mission, only for “a compelling interest in eliminating the discrimination at issue” will courts generally allow an infringement on a private organization’s rights to expressive association.\(^\text{118}\) Requiring such a stated mission holds entities accountable, prevents entities from arbitrarily deciding to discriminate, and gives gay individuals notice.

2. Size of Entity

The proposed exemption scheme would allow all non-church-owned public accommodations with fewer than a certain number of employees to qualify for the religious exemption, without regard to the religiousness of the entity (contrary to one scholar’s approach).\(^\text{119}\) The exemption scheme’s qualification criteria could be based on schemes utilized by the Food and Drug Administration (FDA), the Civil Rights Act of 1964, and the ADA. The Employment Non-Discrimination Act (ENDA), though it has not passed in Congress, also utilizes a size-based scheme based on the number of employees in a business. Such an exemption scheme for public accommodations in relation to sexual orientation has found support in academia as well.\(^\text{120}\)

Under the FDA, small businesses are exempt from certain labeling requirements if the entity “claiming the exemption employs fewer than an average of 100 full-time equivalent employees and fewer than 100,000 units of that product are sold in the United States in a 12-month period.”\(^\text{121}\) The Civil Rights Act of 1964’s requirements do not apply to enterprises with fourteen or fewer employees.\(^\text{122}\) Private enterprises with fewer than fifteen employees are exempt from the ADA’s Title I requirements.\(^\text{123}\) Similarly, under ENDA, the bill’s sponsors propose exempting employers with fewer than fifteen employees.\(^\text{124}\) Such cutoffs based on an entity’s sales or size could be applied to state-level public accommodations exemptions as well. Lawmakers and advocates can debate what number of employees or total sales would be the most appropriate cutoff.

\(^{118}\) Abodeely, supra note 105, at 603 (citing Bd. ofDirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987), as an example of such a case).

\(^{119}\) See Minow, supra note 16, at 839–43 (discussing the benefits of negotiating exemptions with entities directly, taking into consideration their religious beliefs and desires but not the religiousness of the entity per se).

\(^{120}\) See, e.g., Berg, supra note 37, at 227 (“[A]ccommodation should extend to some individuals and organizations in the commercial context . . . . Small businesses that provide personal services tend to be direct embodiments of the owner’s identity.”); see also Douglas Laycock, Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 61, at 199 (discussing difficulties for establishing a size requirement).

\(^{121}\) Small Business Nutrition Labeling Exemption Guidance, U.S. FDA (May 7, 2007), http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm053857.htm [hereinafter Nutrition Labeling]. Small businesses with gross annual sales of less than $500,000 are exempt from certain labeling requirements. Id. An entity may also be exempt if its “annual gross sales of foods or dietary supplements to consumers [are] not more than $50,000.” Id.


a. Justification for a Blanket Exemption. It may seem strange to think of a civil right as comparable to the labeling requirements of a small business. However, Congress has often found it appropriate (or at least necessary politically) to include blanket exemptions from civil rights laws for employers based on size. In some contexts—the ADA and FDA’s exemptions, for example—Congress can cite the desire not to burden small business with costs associated with compliance to justify the size exemption. In the public accommodations holdout states, a parallel desire not to burden small businesses with the need to find and hire personnel who are comfortable with gay individuals (for example, North Coast Women’s Care hiring more doctors), or the need for a religious sole proprietor like Elane Photography to form a subsidiary or related entity to perform the photography services could justify an exemption. However, three more salient and convincing rationales exist for disregarding religiousness of entities below a certain size.

First, proposed exemption schemes that would consider religious views of the entity (beyond whether the entity is a church or church-run) or other subjective criteria are problematic. Martha Minow advocates for an approach utilizing the negotiation of religious exemptions on a case-by-case basis between the entity and the relevant government department. Holning Lau also proposes granting exemptions from public accommodations laws on a case-by-case basis; however, her approach would have courts looks to the “undue burden” placed on the business in providing equal services. Though both approaches admirably attempt to strike a balance between gay rights and a business’s own situation, they each face the pitfalls of not having a bright-line rule.

To start, these approaches will cost all parties—private and public—time and money in working through the process either in negotiation or in court. Furthermore, these approaches insert uncertainty into the operation of businesses that depend on predictability. Because these approaches leave the decision of granting an exemption to another actor through potentially lengthy processes, they would leave many entities, especially in places like Utah, where many somewhat religious entities exist, unsure of whether they will be held liable until the government makes a determination. Given inequities in economic wealth, these approaches may also lead to unjust determinations: if one business brokers a deal for a sizable exemption, while another does not, could this perhaps be due to one entity’s ability to afford counsel? “Mom and Pop” photographers who

125. See Minow, supra note 16, at 843–47. Minow narrates the conflict that arose in Massachusetts between the government and the Catholic Church vis-à-vis its policy of prohibiting same-sex adoptions contrary to state law. Id. at 831–43. Minow suggests the eventual decision by the Catholic Church to terminate its adoption program is an example of a failed opportunity to negotiate a specific exemption for the church. Id. at 839–843.
126. Lau, supra note 61, at 1313.
cannot afford an attorney may fare much worse than a larger store that has more
money to spend, ensuring they receive an exemption. 127

A bright-line rule is also preferable for the gay individuals whom the public
accommodations and exemptions scheme would seek to protect. Deciding the
issue in court leaves gay individuals uneasy, and in a less-than-ideal place they
must wait for a court’s determination of whether the entity in question is
sufficiently religious before they receive justice. Moreover, seeking answers in
court delays justice for everyone involved. By contrast, under the exemption
scheme this Note proposes, a government agency that receives a complaint
would have predetermined standards for whether an entity is entitled to an
exemption or has discriminated illegally. Additionally, any approach consider-
ing religiousness may create more red tape, discouraging small-businesses
growth.

Aside from the practical justifications for such a wide exemption, the poten-
tial inappropriateness of someone judging whether an entity is subjectively
“religious enough” to be worthy of an exemption suggests a second weighty
argument in favor of this Note’s proposed bright-line rule. Though a church
may not operate a business, a business’s owners could be highly religious and
view the business as an extension of themselves. Whether it is a small religious
bookshop, a small-town florist or tailor, or small stores selling Mormon temple
garments, religious individuals may feel personally involved with their business
and also may feel more directly concerned with sanctioning what they believe
to be sin, regardless of whether a church runs it. 128 Of this relationship, Berg
writes:

The small landlord may feel direct responsibility for providing the space for
intimate conduct to which she objects; the wedding photographer may feel
direct responsibility for using her artistic skills to present in a positive light a

127. Though the constitutional arguments are not taken up in this Note, it is important to note that
exemptions based on religious beliefs (beyond whether the entity is a church or is church run) may fall
prey to the critique that they favor religion in violation of the Establishment Clause. See Battaglia,
supra note 61, at 403 (noting that unless certain narrow circumstances apply, like those otherwise
compelled by the First Amendment, an exemption to a sexual-orientation-discrimination law that “only
benefit[s] religious organizations should be found to violate the Establishment Clause”). Using objec-
tive criteria irrespective of religious beliefs may help assuage those fears. See id. at 403 n.1246.
Moreover, laws construed neutrally towards religion but still protective of it might not be subject to
Establishment Clause criticism. See id.

128. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Defendants-
Intervenors-Appellants & in Support of Reversal at 3–19, app. at 14, Perry v. Brown, 671 F.3d 1052
(9th Cir. 2012) (No. 10-16696) (including Letter Sent to Senator Paul A. Sarlo (Dec. 4, 2009)) (“Some
assume that any religious objection to same-sex marriage must be an objection to providing goods or
services to gays as such: in other words, that a refusal represents animus towards gay couples. Yet many
people of good will view marriage as a religious institution and the wedding ceremony as a religious
sacrament. For them, assisting with a marriage ceremony has religious significance that commercial
services, like serving burgers and driving taxis, simply do not. They have no objection generally to
providing services, but they object to directly facilitating a marriage.”).
marriage to which she objects. Accommodation for these objectors, focused on such direct instances of facilitation, is sensible.129

Businesses across the country, particularly in Utah and the South, choose not to serve alcohol or to open on Sundays. Allowing all entities below a certain size to opt-in to the exemption takes into consideration that some individuals choose to run their businesses according to their religious beliefs.

On the other hand, the rationale for not allowing an exemption to any entity that deems itself worthy is obvious. Though a state may decide to protect religious liberty, such protection should not become a blanket reason for discrimination even in a state that is highly religious. Once an entity reaches a critical mass, the justification for an owner’s feeling that his or her religious freedoms have been infringed upon through a personal identification with his or her business, or through in-person interactions with same-sex individuals, becomes less credible. At this tipping point, the owner should no longer be entitled to an exemption that would allow him or her substantially to affect commerce while discriminating on the basis of sexual orientation, because often growth will mean the relationship between the owner’s role in the business and the justification for the exemption will be too attenuated.130 Owners who feel that their rights would be infringed no matter what their entity’s size can make a choice to forego growth and ensure the business stays under a certain size.131

Finally, basing the exemption on objective, quantifiable numbers rather than subjective, unquantifiable entity traits would enable gay rights activists to achieve incremental narrowing of the religious exemption over time. Rather than drafting entirely new legislation and debating the exact contours of the religiousness that should exempt an entity, the proposed exemption scheme would allow gay rights activists to focus on reducing the number of employees or maximum sales an entity may not exceed in order to remain exempt. While opponents may still fiercely debate these changes, focusing on relatively objective hard numbers rather than subjective thresholds, semantics and conflicts over ideology should simplify the debate process, possibly leading to a quicker resolution.

129. See Berg, supra note 37, at 227.
130. See, e.g., Laycock, supra note 120, at 199 (“Large businesses take up more market share, and an owner’s claim of personal responsibility for everything that happens in his business grows more attenuated as the business expands, so a sensible legislative provision would be to put a limit on the size of businesses eligible to claim an exemption.”).
131. Though this may discourage growth for a small portion of business owners, this is a consequence of balancing religious liberty and gay rights. However, the number of businesses that would take the exemption may be fewer than expected. See infra Part IV. Empirical studies could be conducted to determine the exact repercussions of this cutoff and to what extent, if at all, it could discourage growth, while at the same time determining whether the antidiscrimination statute may actually drive growth in the economy overall through tourism, for example.
B. ENFORCEMENT

Numerous possible public accommodations enforcement schemes can be used as tools for negotiating with the other side—varying approaches to enforcement are seen in the statutes of the states that already have these laws. Moreover, the scheme used will need to be specialized for the state’s own governance structure and abilities. For instance, whether enforcement is prophylactic or remedial may depend not only on the political realities of the legislature (with those favoring religious rights likely pressing for remedial enforcement), but also on the availability of resources to carry out either task. Consequently, this Note will not offer an ideal enforcement scheme but rather will address the various decisions that need to be made, all of which can be used to negotiate the passage of the statute.

Legislators first need to decide whether enforcement should be proactive or reactive. A proactive approach would involve the state logging employee statistics each year as collected through tax filings or requiring each establishment to fill out annual official registration information. The FDA’s labeling exemptions follow this latter approach. Of course, having such information on hand will deter businesses from discriminating if they are above the limit, especially if the public has access to the information. However, such an enforcement mechanism is cumbersome financially and administratively, and thus not likely to have much political support.

A more reactive type of enforcement would involve a citizen-complaint process. Individuals would file a complaint about a business’s practices, and the government would then conduct an investigation before making a threshold determination regarding an entity’s exemption. If the business is exempt, then the individual receives a response stating that the size of the business exempts it from the statute; if the business is not exempt, the government assesses the merits of the claim. This mechanism may not have the same level of deterrent effect as the proactive approach because entities may simply operate in ignorance of their noncompliance instead of affirmatively knowing they will not be considered exempt. However, the businesses would still be held accountable if

132. See Nutrition Labeling, supra note 121. For example, the FDA’s calculation of average employees in one year includes all “owner(s); officers; and all other personnel such as secretarial, production, and distribution,” employees of affiliates, and

\[ \text{Average number of full-time equivalent employees} \] determined by the following formula: Total number of hours of salary or wages paid to the employees of the firm and its affiliates divided by 2080 hours. For example 254,998 paid hours divided by 2080 = 122. If the total number of actual employees for your firm and its affiliates is less than 100, you may enter the total number of actual employees instead of calculating the average number of full-time employee[s]. For example, if a firm has 24 employees that work full-time, and 12 employees that work part-time, you may report 36 total actual employees instead of calculating the average number of full-time equivalent employees.

Id.
someone filed a complaint. Gay rights proponents might compromise for the latter approach to start to work towards a more comprehensive system. Next, legislators should negotiate whether the statute will grant a private right of action on behalf of the individual who alleges discrimination. Some states that currently have laws protecting gay individuals in public accommodations allow private rights of action in addition to state investigation of the allegations, while others reserve the entire process for a state commission. One can expect that holdout states may feel more comfortable not having a private right of action because private rights of action essentially mean that entities face two parties that can attempt to hold them responsible under the statute instead of just the government (and thus they face more of a risk of spending time and effort defending both valid and invalid claims). Nonetheless, this is something that can be imminently implemented and gradually changed. Part of this decision will entail deciding which part of the state government should be charged with enforcing and investigating violations. Many states that currently protect against discrimination in public accommodations-based sexual orientation have human rights commissions charged with fielding and investigating allegations of violation. Finally, the holdout states must determine the consequences of violation. Should jail be an option? What range of fines should be assessed?

Further, any enforcement regime will face enforcement challenges because discrimination based on sexual orientation is both intangible and hard to prove. For example, when the FDA evaluates whether a product meets its overall labeling requirements, it investigates tangible materials such as labels or websites. Here, unless state governments fund testers to ensure compliance, consumers themselves would need to initiate an investigation. Even then, many instances of discrimination may not be as obvious as the emails Todd Wathen received about his commitment ceremony—subtle discrimination would be difficult to prove.

However, these difficulties are not unique or novel; rather, they are typical to discrimination cases. Enforcement of the Fair Housing Act’s antidiscrimina-

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133. This type of reactive approach was used in Ocean Grove: the plaintiffs believed the entities discriminated against them based on their sexual orientation and filed a claim with a government investigatory agency that found sufficient evidence of discrimination to move the case forward. Bernstein v. Ocean Grove Camp Meeting Ass’n, No. PN34XB-03008, 1–2, 7–8 (N.J. Dep’t of Law & Pub. Safety, filed June 19, 2007).

134. See, e.g., Warning Letter from FDA to Dr. Elizabeth VanderVeer (Nov. 18, 2010), available at http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2010/ucm235714.htm (describing investigation of website’s claims leading to belief that FDA’s labeling requirements were violated); Warning Letter to Mr. William P. Bartkowski (Sep. 8, 2010), available at http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2010/ucm225181.htm (describing investigation of product’s labels and promotional materials leading to belief that FDA’s labeling requirements were violated).

135. See Hillig, supra note 1.

136. See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (holding that a decision to reject a rezoning application, which disparately impacted black families, was not unconstitutional because discriminatory intent was not proven); Washington v. Davis, 426 U.S. 229, 253–54 (1976) (Stevens, J., concurring) (noting that the line between discriminatory purpose and
tion policy experiences the same issues because discrimination by housing-related entities is usually hard to prove.\textsuperscript{137} Yet enforcement actions over the years have still led to justice for many individuals and documented reductions in discrimination against African-Americans in housing.\textsuperscript{138} States should take as many steps as possible to simplify and streamline the complaint process as well as give guidance to individuals who file complaints documenting the alleged discrimination in order to combat these difficulties. Though not as easily administrable as the FDA’s labeling requirements, the statute would still serve to prevent and punish discrimination against gay individuals.

C. WHAT IF THE ONLY ENTITIES WHO CAN SERVE GAY PEOPLE ARE EXEMPT?

One of the largest questions facing scholars is whether an entity should be eligible for an exemption if it is the only one capable of serving the gay individual, thereby putting a heavier burden on the gay individual than in situations where other options are available.\textsuperscript{139} This issue is a major, unanswered question in \textit{North Coast Women’s Care}: the majority reasoned that the medical practice could have avoided liability either by not performing any intrauterine fertilizations or by ensuring that the office had someone on staff who was not morally opposed to performing the fertilization.\textsuperscript{140} However, in his concurring opinion, Justice Baxter raised a question the majority failed to address: what if the business was so small that there was no doctor employed who would not object to the procedure?\textsuperscript{141}

\textsuperscript{137} See, e.g., Richard H. Sander, Comment, \textit{Individual Rights and Demographic Realities: The Problem of Fair Housing}, 82 \textit{U. L. Rev.} 874, 889–90 (1988) (noting that the primary federal authority charged with enforcing the Fair Housing Act, HUD, “collects evidence on the complaints, but does not use testers as part of its investigation” and “[a]s a result, HUD has usually been unable to verify whether alleged discrimination actually occurred”). This is in part due to the Fair Housing Act’s requirement to prove discriminatory intent. See John K. Lucey, \textit{The Redlining Battle Continues: Discriminatory Effect v. Business Necessity Under the Fair Housing Act}, 8 \textit{B.C. Envtl. Aff. L. Rev.} 357, 368 (1979) (noting that proving discriminatory intent can be “difficult and often insurmountable” in redlining practices in mortgage-discrimination cases). In fact, courts have allowed plaintiffs to provide evidence of the “discriminatory effects” of practices in both Fair Housing Act and under Title VII’s equal-employment requirements in lieu of providing direct evidence of discrimination. \textit{Id.} at 370–73, 385.


\textsuperscript{139} See, e.g., Berg, supra note 37, at 208.

\textsuperscript{140} N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 968–69 (Cal. 2008).

\textsuperscript{141} \textit{Id.} at 971 (Baxter, J., concurring).
1. Hardship Exception

Some scholars answer the question by proposing that a “hardship exception” should apply in such a circumstance.142 The idea is that if an entity is the only one capable of providing the good or service, and it would heavily burden the gay individual if the good or service were not supplied, the entity should no longer be exempt. Thomas C. Berg writes about such a hardship requirement in relation to gay marriage:

Accommodation should be made, I argue, unless the religious objector’s refusal of services would cause a concrete hardship on the ability of the same-sex couple to marry. This approach will protect religious conscience without causing substantial obstacles to marriage for same-sex couples. In most cases the market will generate willing providers; where it will not, for example in some rural areas, the hardship provision should apply.143

Although the need for such a hardship exemption is understandable, and thus is reflected in the proposed exemption exception, a broader exception than that proposed in this Note runs into a few issues. The first is the practicality of administering such an exception. It would require that each type of business be catalogued so as to keep abreast of its competitors and new additions or losses to the market. This puts a great burden on the business to remain cognizant of every new move, as well as to rely on its own judgment about whether a service or business is substantially similar enough to be considered a substitute. Moreover, businesses might be expected to take a potential customer’s unique financial situation into account. For someone with a high income, renting a more expensive reception hall may not be a burden. But for someone with a low income, if the hall is the only one in town that is affordable, this would produce a hardship. A hardship exception would require the legislation to dictate how the hardship will be measured, taking both financial and geographic restrictions into account. Of course, there are ways to accomplish this in court, such as relying on the court’s judgment that something is a reasonable substitute or that the financial situation of the plaintiff does or does not allow there to be other substitutes. However, this still leaves businesses and gay individuals without certainty, with lawsuits looming overhead, and with the only chance of achieving justice accomplished through courts.

In addition, other issues make the option seem less than desirable. On a political level, in the religious states like Utah, it is very unlikely that such an exception would pass as it is essentially placing the gay individual’s right to

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142. See, e.g., Berg, supra note 37, at 208 (supporting a hardship exception); Laycock, supra note 120, at 200 ("[O]utside the church itself, conscientious objectors to same-sex marriage can refuse to cooperate only when it doesn’t really matter because someone else will provide the desired service anyway. But when a particular merchant’s refusal to cooperate might actually delay or prevent the conduct he considers sinful, then he loses his rights and has to facilitate the sin.").
143. Berg, supra note 37, at 208.
public accommodation higher than the proprietor’s religious-liberty right. Also, from a fairness perspective, it does not make sense to punish one owner because he or she happens to have the only business of its type in town.

So, then, how would the proposed exemption scheme solve the issue? This exception should exist only in narrow circumstances, most of which are already prescribed by law. These circumstances are those in which the health, life, or material pecuniary interest of an individual is in danger. As noted earlier in the proposed exemption components, examples of nonexempt businesses include motel accommodations off a highway (meaning a refusal to rent rooms at all—the question of whether requiring the gay couple to rent separate rooms is a sufficient hardship is left open), privately run rescue teams, tow companies, or small gas stations in isolated areas. A material pecuniary interest would be reserved for situations in which the potential loss is quite large. For example, volunteer-fire-department members refusing to tend to a burning house would not be exempt. Unfortunately, this exception will only work so long as the entity is sufficiently deterred by the threat of administrative action or litigation, but the same would be true of any type of exception to the exemption.

2. Putting Gay Individuals on Notice of Potential Discrimination

Furthermore, steps can be taken through legislative directive or through civil-society pressures to put gay individuals on notice so they do not have to be surprised by discrimination. This could be accomplished through requiring, or encouraging, entities to state whether they discriminate based on sexual orientation in their advertising and informational materials. Although imperfect, it is still a possibility that could help cushion the blow of not having a wide hardship exemption.

There are many positives associated with requiring or encouraging entities that discriminate to disclose such discrimination. It puts everyone on notice and helps to solve the dilemma of there being only one place in town for certain non-necessities. It holds those who have discriminatory views accountable for them in the “court of public opinion.” Not only may it help gay individuals, but also there are likely others who would refuse to patronize the business because of its views.

However, some obvious downsides to such a notice requirement exist. The first is political: it is unlikely that legislators with such concerns about burden-
ing religious individuals would place this burden of essentially advertising discrimination on their constituents in order to qualify for an exemption. Additionally, for the gay rights movement, it may not be a positive thing to have such ubiquitous, obvious displays of disapproval. As Feldblum believes that a gay person’s dignity is damaged when he or she is turned away from a public accommodation without notice, it is possible that even knowing beforehand that a public accommodation will not accept him or her is damaging to the individual’s dignity and to the movement as a whole. Finally, just as Feldblum worries that giving an exemption to entities that only advertise in certain limited areas, “such as the bed and breakfast that advertises only on Christian Web sites,” would be “potentially subject to significant abuse,” so might an exemption that requires the entity to state in its advertising materials that it does not serve gay individuals in certain capacities. For example, verifying the day an entity posted the statement on its website could be difficult. 

Despite the possible negative repercussions, advocates and scholars should continue to explore the concept. Some entities already do this: a Canadian wedding company states on its website that “[d]ue to our Christian beliefs, we do not perform same sex marriages,” whereas a cruise company in Washington, D.C. has explicitly advertised its experience with same-sex weddings, representing that it “will be happy to help you make your day unforgettable!” Such notice could, at the least, be helpful if used as a defense or mitigating factor in litigation. At the most, it could be a requirement, and the analysis of whether an entity gave sufficient notice could be performed using tort- and contract-law principles.

D. WHY STATE GAY-MARRIAGE BANS DO NOT PRECLUDE SUCH A STATUTE

The multitude of gay-marriage and civil-union bans throughout the United States do not preclude states from adopting statutes protecting individuals from discrimination based on sexual orientation in places of public accommodation. The essence of these bans is that they prohibit the state from recognizing and giving legal effect to marriages other than those between one man and one woman. One plausible argument might be that in states with constitutional bans against recognizing gay marriage, the enactment of such a statute would,
in certain circumstances, be unconstitutional. For example, this statute would make it illegal for a hotel that does not qualify for an exemption to provide accommodations for heterosexual wedding ceremonies but to refuse to offer the same services to same-sex individuals. In such a scenario, one might argue that state enforcement of the public accommodation law would be unconstitutional because it implicitly recognizes a nonheterosexual marriage by legally recognizing a right to hold such a ceremony and by assisting couples in emulating heterosexual marriage in violation of the state constitution.

The first claim—that these public accommodations statutes grant a legally recognized right to hold a same-sex wedding ceremony—is disposed of easily. These statutes do not grant every gay couple a right to have a same-sex ceremony at any place of public accommodation. Rather, the gay couple has a right to not be discriminated against by being refused the same services as heterosexual counterparts. If all hotels in the state were to stop offering wedding services, the gay couples would not have a right to hold a ceremony at those hotels. Therefore, the state is not providing a “right” to hold same-sex weddings.

The second claim, that the state would be implicitly supporting and thereby recognizing gay marriage through its enforcement of the statute, is somewhat stronger. Nonetheless, First Amendment jurisprudence does not support this argument and provides an analogy that shows states may protect a person’s right without actually supporting the actions, words, or meaning exercising that right conveys. In *Cohen v. California*, a man was arrested for wearing a jacket that contained the phrase “Fuck the Draft.”152 The Supreme Court held that Cohen’s jacket was expressive speech protected by the First Amendment and overturned the conviction because the State’s interests were not compelling enough to justify limiting Cohen’s speech.153 More recently, the Court upheld the Westboro Baptist Church’s right to picket funerals, even those of fallen soldiers, while holding signs that read “Thank God for Dead Soldiers,” “God Hates Fags,” and “You’re Going to Hell.”154 Presumably, many of the Justices did not agree with the jacket’s or the signs’ messages, nor did the Court expect that prohibiting state infringement of expression meant that the state implicitly supported those messages. The Court solely upheld the right to convey those messages through lawful conduct, implicitly requiring the state to protect—or, at least, not obstruct—those messages in certain ways (like arresting Cohen or implementing overly strict funeral-protest regulations).155

Just as Cohen and Westboro Baptist Church exercised their First Amendment rights to convey messages, a couple’s exercise of its right not to be discriminated against while holding a same-sex wedding ceremony conveys a message;

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152. 403 U.S. 15, 16 (1971).
153. *Id.* at 26.
155. *See id.* at 1219; *Cohen*, 403 U.S. at 26.
in this case, the message is one of a marriage or marriage-like union between the two same-sex partners. Although not based on the Constitution but, instead, on a state statute, the legal and logical implications of *Cohen* and *Snyder* are applicable: a state may protect a person’s right to exercise a right despite the message it conveys without insinuating approval or support of the message itself. It follows that because a state’s protection or enforcement of a right does not support the message the exercise of the right conveys, then surely that protection or enforcement does not go even further by actually recognizing a legal state of being such as marriage. The couple would be just as unmarried under the state’s laws after the ceremony as it was before.

**E. CRITIQUES AND THE LIKELIHOOD OF PASSAGE**

Critics of this exemption scheme will exist on both sides. Aside from critiques of whether the exemption should exist in the first place, some will argue that the legislation simply cannot pass. These can be sorted into two broad arguments: first, that the religious populations in holdout states will simply not allow the statute to pass, regardless of the religious exemption, and second, that even if religious populations acceded to exemptions in theory, parties on each side would never agree on details like the appropriate number of employees for which to grant the exemption.

The first argument is entirely valid. No crystal ball can reveal whether *any* religious exemption scheme will be sufficient to garner support in holdout states. This Note simply argues that if legislation of this nature is to pass in holdout states, robust religious exemptions are likely a requirement. There will certainly be constituents and legislators who will not change their minds; however, these are not the people toward whom the exemption scheme is aimed. Instead, those on the fence or those whose opinions are slightly more malleable can make the difference. For example, New York State Senator Mark Grisanti, who had promised to oppose same-sex marriage as a candidate, changed his vote from “no” to “yes” after months of reflection. Senator Grisanti announced to his colleagues during the session in which the gay-marriage bill passed that one of the key reasons he felt comfortable voting “yes” as a Catholic was the religious protections the bill afforded.

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156. This debate is outside the scope of this Note’s argument.
158. State Senator Mark Grisanti, Speech Before the New York State Senate (June 24, 2011) (transcript available at http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011) (“[T]here’s another important point... that this bill brings up, and that’s its religious protections. Because I am Catholic. Under this bill the religious aspects and beliefs are protected, as well as for not-for-profits. There’s no mandate that the Catholic Church or any other religious organization perform ceremonies or rent halls. There cannot be a civil claim or an action against a church. It protects benevolent organizations such as the Knights of Columbus and many others. And as a lawyer, I feel confident that the religious organizations and the others are protected.”).
In addition, the unanimous passage of a local ordinance in Salt Lake City, Utah prohibiting discrimination based on sexual orientation in employment and housing provides support for the notion that religious exemptions—at least for nonmarriage statutes—truly can aid in the passage of these laws in holdout states. The ordinance contains the typical religious exemptions as well as a small-business exemption, and was supported by the Mormon Church, a representative of which stated at the public hearing:

> In drafting this ordinance, the city has granted common-sense rights that should be available to everyone, while safeguarding the crucial rights of religious organizations, for example, in their hiring of people whose lives are in harmony with their tenets, or when providing housing for their university students and others that preserve religious requirements.

> The Church supports this ordinance because it is fair and reasonable and does not do violence to the institution of marriage.

Since the passage of the ordinance, similar ordinances have passed in various municipalities around Utah. Although not statewide and not concerning public accommodations (the lack of inclusion of which likely signifies a tougher battle ahead for gay rights advocates in Salt Lake City), the legislation and support from the Mormon Church do suggest the possibility of compromise in holdout states.

The other argument—that gay rights advocates and religious objectors will not be able to agree on the size of the exemption—is also strong. Though valid, this argument fails to allow for the possibility of change over time. There may be a tipping point at which, like the New York legislators, legislators in holdout states’ views will be amenable to such legislation. In that event, religious exemptions provide a foothold for religious legislators to justify passing the law, both to themselves and their constituents. This is no easy task.

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160. Salt Lake City, Utah, City Code, chs. 10.04.050–060, 10.05.060 (2011).


162. Professor Douglas Laycock, although supportive of the idea of an exemption scheme based solely on the size of a commercial entity, asserts that such a scheme would be difficult to negotiate because of competing views of both sides. Laycock, supra note 120, at 199. He mentions the failed negotiation of federal legislation based on sexual orientation discrimination that only applied to landlords, not all businesses. Id. (“When legislators and activists tried to negotiate such a limit during congressional consideration of the proposed Religious Liberty Protection Act, the two sides had such radically different views of an appropriate limit that no agreement could be reached. And that negotiation addressed only landlords and the number of apartment units. A universally applicable cap for all businesses would be much more difficult to negotiate.”).

163. See Confessore & Barbara, supra note 157.
in any holdout state; however, state legislators are more likely to be on the same page in understanding the religious attitudes of their constituents and the effects of legislation on the state. It is possible that the religious data illustrated in this Note can help each side agree that broader exemptions are likely needed in holdout states than elsewhere.

IV. THE MARKET MAY PROTECT GAY INDIVIDUALS MORE THAN EXPECTED

Despite all of the religiosity data included in this Note, it is possible that discrimination in public accommodations based on sexual orientation is not as prevalent as both supporters and opponents of gay rights statutes may think. The market’s ability to provide goods and services to those who demand them might pleasantly surprise gay rights advocates who fear large religious exemptions would lead to substantial or even moderate levels of discrimination. Conversely, politicians who are opposed to gay rights may also be surprised that their business-owning constituents would not be as opposed to such a statute as the politicians may believe. Two reasons may explain these misconceptions: first, individuals operating businesses may not be as prejudiced against gay individuals as the general public believes; second, the operation of the free-market system itself may reduce or inhibit such discrimination. Economic theory supports the second reason, and anecdotal evidence collected by the author supports both explanations.

Scholars have discussed the theory that free markets reduce discrimination for decades.164 Voltaire even seemed to notice the phenomenon:

Take a view of the Royal Exchange in London, a place more venerable than many courts of justice, where representatives of all nations meet for the benefit of mankind. There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts.165

Two mechanisms are advanced to explain how the market may theoretically reduce discrimination. First, market participants that are focused on the bottom line, like those in Voltaire’s observation, may overlook their personal prejudices against employees, business owners, and consumers if they can assist in maximiz-

164. See, e.g., KAUSHIK BASU, BEYOND THE INVISIBLE HAND: GROUNDWORK FOR A NEW ECONOMICS 77–95 (2011) (noting the theory but ultimately finding it not entirely convincing); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108–18 (1962). Friedman believes that capitalism itself has been responsible for, or at least hastened, the breakdown of discriminatory practices over centuries. Id. at 108–09. Although Friedman believes discriminatory attitudes should be changed through person-to-person discrimination rather than government intervention, the idea that discriminators pay for their discrimination by less favorable circumstances in capitalism is applicable. Id. at 110–11.

165. VOLTAIRE, LETTERS ON ENGLAND 43–44 (Cassell & Co. 1894) (1734).
ing profits. Second, in a perfectly competitive market, firms that discriminate against employees or consumers based on race, religion, sexual orientation, and so on, instead of characteristics that have to do with job performance, ability to pay, or any other rational economic reason, will fare worse than other firms. This result occurs because another firm may hire the qualified employee or sell to the qualified consumer, thus enabling it theoretically to increase its profits above the discriminating firm, eventuating in the forced exit of the discriminating firm from the market over time.

Though these theories are most often applied to employment discrimination, their rationale is perhaps even stronger when applied to public accommodations. In the employment context, the relationship between the employer and employee is longer than most relationships with consumers in public accommodations. Moreover, the negative impact of discriminating (economically, not legally) is more obvious when refusing to take money from a willing customer than refusing to hire someone. Those whose religious beliefs make them feel uncomfortable associating with gay individuals might be more likely to believe that commercial services, like serving burgers and driving taxis, do not conflict with their beliefs as much as the employment context.

No data exist that reflects just how many businesses in holdout states would be opposed to the law—or how many currently discriminate against gay individuals. Anecdotal evidence suggests some of us, myself included, and the politicians who are not allowing such bills to pass, may be overestimating the conflict between religion and gay rights when it comes to public accommodations. Over the months of March and April 2011, I sent emails to five wedding photographers located in southern Utah, an area densely populated with Mormons, inquiring about pricing and availability for an upcoming commitment ceremony to my partner, “Sarah.” Not a single photographer declined—each was available to photograph the commitment ceremony. Though the fictional commitment ceremony was to be held on a Saturday, one photographer made sure to say she “typically [does not] photograph on Sundays,” but even if there were events on Sunday, she was “sure we could work something out.”

I also contacted seven bed-and-breakfast inns in southern Utah about holding the commitment ceremony and renting rooms; in the responses, three offered congratulations and necessary information about how they could accommodate

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166. BASU, supra note 164, at 78. Of this phenomenon, Koppelman writes, “Antigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so.” Koppelman, supra note 60, at 134.

167. See BASU, supra note 164, at 78.


169. Cf. Berg, supra note 37, at 233 (arguing that religious believers uncomfortable with assisting in gay marriages may be comfortable providing general commercial services that have no religious significance).

170. Emails on file with author.

171. Emails on file with author.

172. Email on file with author.
the ceremony, two did not reply, and two said they either did not have enough
rooms available or did not have any space for a reception. Though it is
logistically difficult to infer much because most of the inns did not advertise any
reception space, the lack of replies and statements that the inns were full or did
not have space for a reception could be genuine or fictitious. However, no inn
made any statement about the commitment ceremony itself.

Finally, I inquired about catering for the same-sex commitment ceremony
with local Utah chain Café Rio. Café Rio locations spread from Utah to
Arizona, Colorado, California, Idaho, and even Virginia, but the owners are
Mormons, and the chain may reflect Mormon values by not serving alcohol,
for example. The catering coordinator responded enthusiastically, stating
Café Rio “would love to be part of your festivities” and inviting me to a free
lunch to discuss the ceremony.175

Though the interactions may not meet social-science standards for surveys,
the anecdotes at least start to ask the question of whether this potential conflict
is not as ubiquitous as scholars fear. What if Elane Photography, North Coast
Women’s Care, and the inns in Illinois that discriminated against Todd Wathen
are truly outliers? If only a few individuals sprinkled throughout the economy
discriminate, it should be easier to pass legislation with narrow religious
exemptions. This is not happening—perhaps because the legislators have not
successfully quantified their constituents’ beliefs. Granting public accommoda-
tion rights, even if only a few would use an exemption, would be more of a
political statement. On the other hand, it is possible most businesses would not
utilize an exemption even if broad religious exemptions were passed. If the
dignity of the gay community is really what concerns us, perhaps a hard
compromise on religious exemptions that would allow legislation to pass would
be imperfect in principle, but the practical effect may be the same as if a
narrower exemption were used.

If only a few religious objectors would exist either way (Elane Photography,
North Coast Women’s Care, and the Illinois inn are all in states with these laws,
with narrow religious exemptions), it seems that conceding wider religious
exemptions to achieve a public accommodations law that protects against
sexual-orientation discrimination may not be as large of a compromise, at least
practically, as advocates believe. In the future, advocates should collect data on
the entities that would actually use the religious exemption; the statistics could

175. Email on file with author.
176. See N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959 (Cal. 2008); Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685 (Human Rights Comm’n of N.M. Apr. 9, 2008); American Civil Liberties Union, supra note 10; Hillig, supra note 1.
be used to buttress the push for legislation, as well as to illustrate to advocates that, for the most part, the religious exemption would be unused.

CONCLUSION

Gay rights are progressing at alarmingly slow rates: the same couple that can get married in Washington, D.C. and nine states does not even have legal recourse if refused simple services in public businesses in twenty-nine states.\textsuperscript{177} Data suggest that the religious composition of the states that currently do not include sexual orientation in their public accommodations antidiscrimination laws have higher proportions of Evangelical Protestants and Mormons, both of whom have evidenced stronger antigay rights beliefs than most other religions.\textsuperscript{178} In order to achieve even a bare minimum of gay rights in public accommodations, advocates need to recognize this difference in religious composition and accord wider religious exemptions than in other states. This Note proposes a way to do this using several federal exemption schemes to allow a wider exemption with well-defined edges. It is possible that such a concession on the part of gay rights advocates will lead to swifter passage of public accommodations laws and hasten society’s general acceptance of gay rights as human rights. Then, despite over sixty-five percent of the population being Mormon, couples like Todd Wathen and his partner might be able to navigate public accommodations in Utah—with less of a chance of being told it is not too late for them to change their “behavior” and more recourse if they are so told.

\textsuperscript{177} See National Conference of State Legislatures, \textit{supra} note 12. 
\textsuperscript{178} See \textit{supra} section II.B.
The Data for Figures 1–2, Footnotes 77–78, and Table 1 were taken from the Pew Forum on Religion and Public Life’s *U.S. Religious Landscape Survey*.179

The Pew Forum on Religion and Public life is part of the Pew Research Center, a nonpartisan ‘fact tank’ that provides information on the issues, attitudes and trends shaping America and the world. The Pew Research Center does this by conducting public opinion polling and social science research; by analyzing news coverage; and by holding forums and briefings. It does not take positions on policy issues.


**I. Table 1. Religious Traditions’ Views on Homosexuality**

<table>
<thead>
<tr>
<th></th>
<th>Homosexuality should be accepted by society</th>
<th>Homosexuality should be discouraged by society</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evangelical Churches</td>
<td>26%</td>
<td>64%</td>
</tr>
<tr>
<td>Mainline Churches</td>
<td>56%</td>
<td>34%</td>
</tr>
<tr>
<td>Historically Black Churches</td>
<td>39%</td>
<td>46%</td>
</tr>
<tr>
<td>Catholics</td>
<td>58%</td>
<td>30%</td>
</tr>
<tr>
<td>Mormons</td>
<td>24%</td>
<td>68%</td>
</tr>
<tr>
<td>Orthodox</td>
<td>48%</td>
<td>37%</td>
</tr>
<tr>
<td>Jehovah’s Witnesses</td>
<td>12%</td>
<td>76%</td>
</tr>
<tr>
<td>Other Christians</td>
<td>69%</td>
<td>20%</td>
</tr>
<tr>
<td>Jews</td>
<td>79%</td>
<td>15%</td>
</tr>
<tr>
<td>Muslims</td>
<td>27%</td>
<td>61%</td>
</tr>
<tr>
<td>Buddhists</td>
<td>82%</td>
<td>12%</td>
</tr>
<tr>
<td>Hindus</td>
<td>48%</td>
<td>37%</td>
</tr>
<tr>
<td>Other faith</td>
<td>84%</td>
<td>8%</td>
</tr>
<tr>
<td>Unaffiliated</td>
<td>71%</td>
<td>20%</td>
</tr>
</tbody>
</table>

(Data from *Pew: Religious Beliefs and Practices*, *supra* note 66, at 147)

**II. Data, Methodology, and Results for Figures 1–2 (Importance of Religion in Everyday Life, Frequency of Worship-Service Attendance), Footnotes 77–78 (Evangelical Protestant Population Data), and Data for Table 1 (Religious Traditions’ Views on Homosexuality)**

The Data for Figures 1–2, Footnotes 77–78, and Table 1 were taken from the Pew Forum on Religion and Public Life’s *U.S. Religious Landscape Survey*.179
For the survey, Pew conducted a survey in the summer of 2007 through telephone interviews with a nationally representative sample of 35,556 adults living in continental United States telephone households. The survey was conducted by Princeton Survey Research Associates International (PSRAI). Interviews were done in English and Spanish by Princeton Data Source, LLC (PDS), and Schulman, Ronca and Bucuvalas, Inc. (SRBI), from May 8 to Aug. 13, 2007. Statistical results are weighted to correct known demographic discrepancies.

The vast majority of the interviews (n=35,009) came from standard list-assisted random digit dialing (RDD) sample. This sample was provided by Survey Sampling International, LLC, according to PSRAI specifications.180

The margin of error for the entire sample was ±0.6 percentage points, meaning “that in 95 out every 100 samples drawn using the same methodology, estimated proportions based on the entire sample will be no more than 0.6 percentage points away from their true values in the population.”181

For figures 1–2 and footnotes 77–78, the state data were split into two categories: states with and without statutes prohibiting discrimination based on sexual orientation in public accommodations. The state data were averaged for the two categories for each question. To determine the statistical significance between categories, this Note utilized a standard chi-square analysis. Calculations used two-by-two chi-square tables.

A. RESULTS FOR FIGURE 1

Once respondents were split into two categories, the actual number of survey respondents that answered that religion was important to their everyday life was aggregated for each category. The other categories (somewhat important and not very important) were combined. The numbers were as follows:

| Table 2. Responses to Question “How Important Is Religion in Your Life?” |
|-------------------------------------------------|-------------------------------------------------|
| Religion is Very Important to Everyday Life: Total # Respondents | Religion is Somewhat Important/Not Very Important: Total # Respondents |
| States with the law | 7,273 | 7,804 |
| States without the law | 12,937 | 7,943 |

In a comparison between states with the law and those without it of the breakdown between those who responded that religion was important to their

180. PEW: RELIGIOUS BELIEFS AND PRACTICES, supra note 66, at 174.
181. Id. at 177. For a full explanation of the survey’s methodology, see id. at 174–272.
everyday lives and those who did not, the chi-square analysis resulted in a two-tailed p-value of much less than 0.0001.

B. RESULTS FOR FIGURE 2

Once respondents were split into two categories, the actual number of survey respondents that answered that they attended worship services at least once a week was aggregated. The other categories were combined. The numbers were as follows:

<table>
<thead>
<tr>
<th>Attend Worship Service Every Week: Total # Respondents</th>
<th>Do Not Attend Worship Service Every Week: Total # Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>States with the law 9,104 11,775</td>
<td>States without the law 5,046 10,030</td>
</tr>
</tbody>
</table>

In a comparison between states with the law and those without it of the breakdown of those who responded that religion was important in their lives and those who responded that it was not, the chi-square analysis resulted in a two-tailed p-value of much less than 0.0001.

C. DATA AND METHODOLOGY FOR FOOTNOTES 77–78

For the difference between those who responded that they attended worship services at least once a week and those who did not resulted in a chi-square statistic of 376.36 and a two-tailed p-value of much less than 0.0001. For the difference between those who responded that they attend worship services seldom or never and those who did not respond this way resulted in a chi-square statistic of 1095.58 and a two-tailed p-value of much less than 0.0001.

III. METHODOLOGY FOR FIGURE 3 (RELIGIOUS-AFFILIATION DATA)

Data for Figure 3 were taken from the Institute for the Study of Secularism in Society & Culture at Trinity College’s American Religious Identification Survey (ARIS). The ARIS survey was conducted from February through November 2008 and gathered answers from 54,461 respondents through random-digit-dialed telephone interviews (RDD). The methodology used, “which allows scientific monitoring of change over time, has been recognized by the U.S. Bureau of the Census. The Bureau itself is constitutionally precluded from such

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an inquiry into religion, and so has incorporated NSRI/ARIS findings into its official publication the *Statistical Abstract of the United States* since 2003.184

The state data were split into two categories: states with and without statutes prohibiting discrimination based on sexual orientation in public accommodations. The state data were averaged for the two categories for each question.

184. *Id.* at 2. For a full explanation of the survey’s methodology, see *id.*