A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage

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CONTROVERSY OVER RELIGIOUS LIBERTY, CIVIL
RIGHTS, AND SAME-SEX MARRIAGE

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ABSTRACT

In *Obergefell v. Hodges*, the Supreme Court ruled that state bans on same-sex marriage violate the principles of liberty, equality, and dignity that are enshrined in the Fourteenth Amendment. In the wake of this decision, the battle over marriage equality has shifted to a new front. Religious traditionalists assert that the legalization of same-sex marriage endangers their religious liberty, and they seek protections for those who object to such unions on religious grounds. For example, they contend that florists, bakers, and others who provide wedding-related goods and services should not be compelled to follow state civil rights laws that would require them to serve same-sex couples in the same way as opposite-sex couples.

This Article explores the conflict between religious liberty and civil rights in connection with same-sex marriage. The Article begins by looking at the worldviews that animate the opposing posi-

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tions. The concerns of religious traditionalists go far beyond a fear that they will be compelled to do particular acts against their consciences. Instead, they believe that the advent of marriage equality will severely impede their ability to live out their faith in a wide range of areas, from family life and economic activity to political participation and religious practice. For this reason, traditionalists regard the legal recognition of same-sex marriage as a fundamental assault on their identity and way of life. But this view brings them into direct conflict with the aspirations of lesbian, gay, bisexual, and transgender people to live out their own values and to fully participate in society. At the deepest level, the dispute over religious liberty and civil rights involves a clash between the identities of these two groups.

The crucial problem is how this conflict can be resolved in a way that enables both groups to live together within a liberal democratic society. After examining several other approaches, the Article argues that conflicts of this sort can be overcome only through mutual recognition—that is, only when the members of opposing groups recognize and treat one another as full and equal persons and members of the community, who possess all the legal and constitutional rights that inhere in this status. On this view, one has no right to infringe the rights of other persons simply because one believes (whether on religious or other grounds) that they are not entitled to enjoy those rights or the basic human goods that those rights serve to promote. This view has its roots in the Lockean natural rights theory that laid the foundations of the American constitutional order.

The Article then offers a general account of the rights that individuals have, and situates religious liberty and civil equality within that framework. Finally, the Article applies this approach to the current controversy. It argues that, while the principle of religious liberty protects the right to believe that same-sex relationships are immoral and sinful, that principle does not give religious traditionalists a right to act on that belief in a way that is incompatible with the basic civil rights of same-sex couples, including their rights to marry and to receive equal treatment in the commercial sphere. A legislature may choose to grant wedding-service providers a religious exemption from civil rights laws as a matter of prudence, charity, or
compromise. As a matter of principle, however, most providers are not entitled to demand such an exemption. But some providers are so closely involved with the wedding ceremony or the couple that they should not be compelled to take part.

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"It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."

- Justice Anthony M. Kennedy

"Relationships between two persons of the same sex are not, and can never be, marriages . . . . Far from serving the cause of civil rights, redefining marriage would threaten the civil right of religious freedom: it would compel everyone—even those opposed in conscience to same-sex sexual conduct—to treat same-sex relationships as if they represented the same moral good as marital relationships."

- United States Conference of Catholic Bishops (USCCB)

"We are in spiritual warfare."

- Pastor Ronnie Floyd, President of the Southern Baptist Convention

I. INTRODUCTION

In Obergefell v. Hodges, the Supreme Court ruled that same-sex couples have a federal constitutional right to marry. Writing for

3 Ronnie Floyd, President, Southern Baptist Convention, Now is the Time to Lead: President’s Address to the Southern Baptist Convention 2 (June 16, 2015), http://www.ronniefloyd.com/am-site/media/presidential-address-manuscript.pdf [http://perma.cc/FQ4D-2RLN].
5 See id. at 2602.
a five-member majority, Justice Anthony M. Kennedy declared that
state bans on same-sex marriage violate the principles of liberty,
equality, and dignity enshrined in the Fourteenth Amendment.\textsuperscript{6}

\textit{Obergefell} drew strong reactions from both sides. The decision
was celebrated not only by same-sex couples and advocates of
lesbian, gay, bisexual, and transgender (LGBT) rights, but also by
many other people, including liberal politicians\textsuperscript{7} and progressive reli-
gious denominations.\textsuperscript{8} By contrast, many social conservatives de-
nounced the decision in the strongest terms. Conservative religious
leaders condemned \textit{Obergefell} for departing from the traditional un-
derstanding of marriage as a union between a man and a woman.\textsuperscript{9}

\textsuperscript{6}See id. at 2593, 2598–05, 2608.


\textsuperscript{8}Among the religious groups that welcomed the decision were the Unitarian Universalist Association, the United Church of Christ, the Episcopal Church, the Presbyterian Church USA, and organizations representing Reform and Conservative Judaism. See, e.g., Tobin Grant, \textit{Ranking Religions on Acceptance of Homosexuality and Reactions to SCOTUS Ruling}, \textsc{Religion News Serv.} (June 30, 2015), http://tobingrant.religionnews.com/2015/06/30/ranking-churches-on-acceptance-of-homosexuality-plus-their-reactions-to-scotus-ruling/ [http://perma.cc/6LHJ-75E6]. Some of these groups had also filed amicus briefs urging the Court to strike down bans on same-sex marriage. See, e.g., Brief for President of the House of Deputies of the Episcopal Church et al. as Amici Curiae Supporting Petitioners, \textit{Obergefell v. Hodges}, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1057623.

\textsuperscript{9}For example, Archbishop Joseph E. Kurtz of Louisville, Kentucky, the president of the U.S. Conference of Catholic Bishops (USCCB), compared the decision to \textit{Roe v. Wade} and described \textit{Obergefell} as "a tragic error that harms the common good and most vulnerable among us, especially children." \textit{Supreme Court Decision on Marriage "A Tragic Error" Says President of Catholic Bishops' Conference, U.S. Conf. of Catholic Bishops} (June 26, 2015), http://www.usccb.org/news/2015/15-103.cfm [http://perma.cc/XB9N-VQQT]. Similarly, the National Association of Evangelicals denounced the decision for adopting a "legal definition of marriage . . . which is now at variance with orthodox biblical faith as it has been affirmed across the centuries and as it is embraced today by nearly two billion Christians in every nation on earth."
Conservative political figures asserted that the decision was wholly "lawless" and illegitimate, with no basis in the Constitution.\(^\text{10}\) Several Republican presidential candidates proposed that the Constitution be amended to overturn the ruling.\(^\text{11}\) Some same-sex marriage opponents went further and called for outright resistance to this act of "judicial tyranny," whether by the other branches of government, by individual acts of civil disobedience, or by organized "political revolt."\(^\text{12}\) Even before the decision was issued, more than 180 leading

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\(^{10}\) E.g., Ted Cruz, Constitutional Remedies to a Lawless Supreme Court, NAT’L REV. (June 26, 2015), http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment (contending that Obergefell “undermines not just the definition of marriage, but the very foundations of our representative form of government”).


religious conservatives pledged to do everything in their power to resist it.\footnote{13}

Determined opposition to Obergefell also appeared at the state and local level.\footnote{14} In Louisiana, state officials sought to delay compliance for almost a month.\footnote{15} Asserting that the Court had "ignored the text and spirit of the Constitution to manufacture a right that simply does not exist," Texas Attorney General Ken Paxton encouraged county clerks to disobey the decision if they had religious objections to same-sex marriage.\footnote{16} Across the country, some county clerks did, in fact, refuse to issue licenses to same-sex couples—or called culture war and is now under occupation, like the French under the Nazis, with nothing left to do but organize resistance and plot to overthrow the occupiers through a political revolt."); \textit{see also, e.g.,} Brian S. Brown, \textit{Statement Following US Supreme Court Decision on Marriage}, NAT'L ORG. FOR MARRIAGE BLOG (June 26, 2015), \url{http://www.nomblog.com/40488/} (comparing Obergefell to Dred Scott and Roe v. Wade, and contending that "Dr. Martin Luther King'[s discussion of] the moral importance of disobeying unjust laws . . . applies equally to unjust Supreme Court decisions"); \textit{After Obergefell: A First Things Symposium}, FIRST THINGS (Jun. 27, 2015), \url{http://www.firstthings.com/web-exclusives/2015/06/after-obergefell-a-first-things-symposium} (contribution by Robert P. George, who compared the decision to Dred Scott and declared that, like Lincoln, "we must reject and resist an egregious act of judicial usurpation"). \footnote{13} See \textit{Pledge in Solidarity to Defend Marriage}, DEFENDMARRIAGE.ORG, \url{http://defendmarriage.org/pledge-in-solidarity-to-defend-marriage} \footnote{14} See, \textit{e.g.,} David A. Fahrenthold et al., \textit{Opponents Divided on How—or Whether—to Resist Justices’ Ruling}, WASH. POST, (June 26, 2015), \url{http://www.washingtonpost.com/politics/opponents-divided-how-or-whether-to-resist-supreme-court-ruling/2015/06/26/3219f626-1c12-11e5-ab92-c75ae6ab94b5_story.html} \footnote{15} Julia O'Donoghue, \textit{Bobby Jindal Administration Says Louisiana Won't Recognize Gay Marriage Yet}, NOLA.COM (June 26, 2015), \url{http://www.nola.com/politics/index.ssf/2015/06/bobby_jindal_administratio_n_sa_1.html} \footnote{16} Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges, TEXASATTORNEYGENERAL.GOV (June 28, 2015), \url{https://www.texasattorneygeneral.gov/static/5144.html}.
sometimes to any couples at all. Other clerks resigned rather than comply with Obergefell. Some judges declined to perform same-sex weddings.

Despite this resistance, the Court's decision began to take hold fairly quickly. Federal courts made clear that recalcitrant states were bound to comply. Within days, same-sex weddings were taking place in all states. Clerks who initially refused to grant marriage licenses often backed down when faced with lawsuits. Although some states may look for new ways to oppose the decision in the future, same-sex couples generally are now able to marry throughout the country.

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22 See, e.g., Marc Ramirez, Gay Couple Gets Wedding License from Holdout Hood County, DALLAS MORNING NEWS (July 7, 2015), http://www.dallasnews.com/news/state/headlines/20150706-gay-couple-gets-wedding-license-from-holdout-hood-county.ece [http://perma.cc/YRV3-MUQJ]. The most dramatic exception was the case of Kim Davis, the clerk of Rowan County, Kentucky, which I discuss below. See infra text accompanying notes 38–53.

23 For example, less than three weeks after Obergefell was decided, it was reported that all but four of the 254 counties in Texas are either issuing marriage
That does not mean that the controversy has ended, however. For some time, religious traditionalists have contended that the legalization of same-sex marriage would endanger their religious liberty. This issue has now taken center stage.

Even before the Obergefell decision came down, the clash between religious liberty and LGBT rights gave rise to some pitched battles. During the spring of 2015, the legislatures of Indiana and Arkansas passed Religious Freedom Restoration Acts (RFRAs), which their supporters contended were necessary to protect such freedom from unjustified restrictions by government. This legislation ignited a firestorm of criticism from a broad range of people, including some leading public officials and corporate executives, who feared that these laws would authorize discrimination against LGBT people and other minorities. In the face of this criticism, both states retreated to some extent. A similar scenario had played out the pre-

licenses to same-sex couples or plan to do so soon.” Reuters, Texas County Clerk Opposed to Same-Sex Marriage Resigns, RELIGION NEWS SERV. (July 14, 2015), http://www.religionnews.com/2015/07/14/texas-county-clerk-opposed-to-same-sex-marriage-resigns/ [http://perma.cc/A4Z7-JSVG].

24 In this Article, I use the term religious traditionalists (or simply traditionalists) to refer to those who adhere to traditional (or what they often call “orthodox”) Christian, Jewish, or Islamic teachings regarding sexuality, marriage, the authority of scripture and tradition, and other theological matters. Because the most prominent traditionalist voices in this debate have been conservative Catholics and conservative evangelicals, my discussion of traditionalism focuses on those groups. Of course, the range of religious views is not limited to those held by traditionalists. As I have noted, for example, many religious progressives welcomed Obergefell. See supra note 8 and accompanying text.


28 See id. In Indiana, the legislature revised the law to make clear that it could not be used to justify otherwise unlawful discrimination. See An Act to Amend
vious year in Arizona. However, Mississippi did adopt a RFRA that year. Religious freedom bills were debated in a number of other states in 2015 and undoubtedly will return to the agenda in coming years. Measures to provide additional protections for religious liberty also have been introduced at the federal level.

Of course, the ongoing debate over religious liberty and LGBT rights was only heightened when Obergefell was decided. The Justices themselves offered starkly different perspectives on the problem. Justice Kennedy expressed respect for the religious convictions of traditionalists, and sought to reassure them that they would enjoy full First Amendment protection "as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." By contrast, the four dissenters accused Kennedy of "sully[ing] those on the other side of the debate" when


he contended "that 'the necessary consequence' of laws codifying the traditional definition of marriage is to 'demea[n] or stigmatiz[e] same-sex couples.'" Chief Justice John G. Roberts, Jr., found it "[o]minous[ ]" that the majority had merely acknowledged the right of religious opponents to "teach" their beliefs about marriage, but had said nothing about their freedom to "live out" those beliefs through the "exercise[ ] of religion." Justice Samuel A. Alito, Jr., prophesied that "those who are determined to stamp out every vestige of dissent" would use the Court's decision "to vilify Americans who are unwilling to assent to the new orthodoxy."

One of the first major post-<cite>Obergefell</cite> battles over religious liberty arose in rural Kentucky. A county clerk named Kim Davis steadfastly refused to issue marriage licenses to same-sex couples, on the ground that doing so would violate her Apostolic Christian beliefs. In a lawsuit brought by the American Civil Liberties Union of Kentucky, a federal district judge ruled that Davis's policy infringed the constitutional rights of same-sex couples, and he issued a preliminary injunction ordering her to comply with <cite>Obergefell</cite>. After her efforts to obtain a stay were rebuffed both by the United States Court of Appeals for the Sixth Circuit and by the Supreme Court, Davis, 

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34 Id. at 2626 (Roberts, C.J., joined by Scalia & Thomas, JJs., dissenting) (quoting id. at 2602 (majority opinion)).
35 Id. at 2625 (emphasis added).
36 Id. (quoting U.S. CONST. amend. 1) (emphasis added by Roberts, C.J.).
37 Id. at 2642–43 (Alito, J., joined by Scalia & Thomas, JJs., dissenting); see also id. at 2638–39 (Thomas, J., joined by Scalia, J., dissenting) (warning that the decision would have "potentially ruinous consequences for religious liberty").
39 Id. at *5–8, *15.
who saw herself as a "soldier for Christ," defied the injunction and served five days in jail for contempt of court. The Davis affair swiftly became a cause célèbre. At public rallies and in other forums, social conservatives lionized her as a martyr for religious liberty and traditional marriage. Davis was even invited to meet with Pope Francis, the head of the Roman Catholic Church, during his September 2015 visit to the United States.

Despite the international attention that it received, Davis's case was hardly an ideal one in which to make a stand for religious liberty. As an officer of the state, Davis had a sworn duty to comply with the law as well as with the United States Constitution, which is "the supreme Law of the Land." To be sure, a state may choose to

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44 See, e.g., id. (describing the rally that was held when Davis was released, and in which Huckabee played a central role); Jonathan Swan, Christian Group Honors Kim Davis with Award, THE HILL (Sept. 25, 2015, 9:38 PM), http://thehill.com/homenews/news/255051-christian-group-honors-kim-davis-with-award [http://perma.cc/U3L8-X8CP] (recounting that Davis "was compared to Abraham Lincoln, Martin Luther King and Rosa Parks" as she received the Family Research Council's "'Cost of Discipleship' award for her determined resistance to same-sex marriage").


46 U.S. CONST. art. VI, para. 3.
accommodate officials whose religious beliefs prevent them from performing certain duties, so long as it ensures that those functions are carried out by others; and some states recently have adopted such an approach in connection with marriage.47 But Davis took a more far-reaching position: she contended that her religious liberty entitled her to prohibit anyone acting under her authority from issuing marriage licenses.48 Clearly, an official's personal beliefs (whether religious or otherwise) can afford her no legal justification for obstructing implementation of the law within her jurisdiction, and this is especially true when the result is to infringe the constitutional rights of other citizens.49 Thus, it is scarcely surprising that Davis's broad position was rejected not only by the courts50 but also by much of the public,51 and even by some staunch defenders of reli-

47 See, e.g., Protections for Religious Expression and Beliefs about Marriage, Family, or Sexuality, S.B. 297, 61st Leg., Gen. Sess. (Utah 2015), http://le.utah.gov/~2015/bills/static/SB0297.html [http://perma.cc/FAV8-RXQZ] (amending Utah Code § 17-20-4(2) "to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued") (emphasis added). Kentucky has a state RFRA which might be interpreted to require making an accommodation of this sort. See KY. REV. STAT. ANN. § 446.350 (West 2015).
49 As the court of appeals succinctly observed, the injunction was directed against Davis not as an individual but rather "in her official capacity" as county clerk, and "it cannot be defensibly argued that the holder of [that office], apart from who personally occupies [it], may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Miller v. Davis, No. 15-5880, at 2 (6th Cir. Aug. 26, 2015) (denying stay pending appeal), http://pdfserver.amlaw.com/nlj/kentucky_ca6_20150826.pdf [http://perma.cc/E7KE-ASVG].
50 See supra text accompanying notes 39–41.
gious liberty. In the end, Davis was compelled to allow one of her deputy clerks to issue marriage licenses to same-sex couples, although she insisted on modifying the licenses to remove all references to her name and office.

http://www.usatoday.com/story/news/nation-now/2015/10/01/poll-ky-voters-say-kim-davis-job/73173522/ [http://perma.cc/UZV9-VGSS] (reporting Bluegrass Poll that found that, by a margin of 51 to 42 percent, Kentucky voters believed that Davis should be required to issue licenses).


A more difficult problem involves businesses that provide wedding-related goods and services. In several widely publicized cases, state courts and administrative agencies have held that conservative Christian bakers, florists, and photographers violated state anti-discrimination laws when they refused to supply such goods and services to same-sex couples in the same way they would to opposite-sex couples.\(^5\) Traditionalists contend that these cases demonstrate the grave danger that same-sex marriage poses to religious liberty,\(^5\) while many advocates of LGBT rights maintain that this liberty should not permit businesses to discriminate against others.\(^5\)


\(^{55}\) See, e.g., Katie Gluck, Cruz Preaches to the Field, POLITICO.com (Aug. 22, 2015, 12:21 AM), http://www.politico.com/story/2015/08/ted-cruz-religious-liberty-rally-iowa-121629 [http://perma.cc/SS8U-839D] (describing a rally for religious liberty that was organized by Cruz and attended by many of the defendants in these cases).

\(^{56}\) In addition to a great deal of discussion in the media and the blogosphere, the clash between religious liberty and gay rights is generating a rich academic literature. See, e.g., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock et al. eds., 2008); Thomas C. Berg, What Same-Sex Marriage and Religious-Liberty
This Article explores the conflict between religious liberty and civil rights in relation to same-sex marriage. Part II inquires into the nature of the conflict by examining the worldviews that animate the opposing positions. I begin by discussing the beliefs held by religious traditionalists regarding sexuality, marriage, and homosexual conduct, as well as traditionalists' efforts to embody those beliefs in law. I then focus on their concern that the legalization of same-sex marriage threatens their religious liberty. This concern goes far beyond a fear that they will be compelled to do particular acts against their consciences. Instead, they worry that the advent of marriage equality will severely impede their ability to live out their faith in a wide range of areas, from family life and economic activity to political participation and religious practice. For this reason, they regard the legal recognition of same-sex marriage as a fundamental assault on their identity and way of life. But this position brings them into direct conflict with the aspirations of LGBT people to live out their own values and to participate fully in the life of the community.

the deepest level, the dispute over religious liberty and civil rights involves a clash between the identities of these two groups.

The crucial problem is how this conflict can be resolved. After examining a variety of other approaches in Part III, I argue in Part IV that clashes of identity can be overcome only through mutual recognition—that is, only when the members of opposing groups recognize one another as full and equal human beings and members of the community with all the rights that inhere in this status. After sketching the basic concept, I show that its philosophical foundations can be found in the thought of John Locke, whose theory of natural rights had a profound influence on American constitutionalism and especially on our understanding of the relationship between religious liberty and civil rights. Finally, I apply the concept of mutual recognition to the current problem, and argue that the root of the conflict is that religious traditionalists do not recognize that LGBT people have the same capacity and right to marry that the traditionalists themselves have. Of course, this does not mean that the law should seek to force individuals to change their beliefs. But it does mean that while religious liberty includes the right to believe that same-sex relationships are immoral and sinful, it does not give traditionalists a right to act on this belief in a way that violates the civil rights of same-sex couples to equal treatment in the public sphere.

Although this discussion points to a general solution to the clash between religious liberty and civil rights in connection with same-sex marriage, it does not necessarily show how this conflict should be resolved in particular cases. To decide such cases, we need to carefully identify and assess the rights at stake on both sides. For this purpose, Part V offers a general account of the rights that individuals have and discusses where religious liberty and civil equality fit within this account. This part also sketches a method for resolving conflicts of rights.

Finally, Part VI brings this theory to bear on particular conflicts between religious liberty and civil rights. I focus on the widely debated issue of whether florists and other providers may refuse to supply goods and services for same-sex weddings. This is a difficult problem because it pits the florist's right to follow her conscience against the couple's right to equal treatment. In the end, however, I
believe that we can resolve this problem by applying a simple principle that flows from the concept of mutual recognition: an individual has no right to be excused from her duty to respect the rights of others merely because she believes (whether on religious or other grounds) that they are not entitled to enjoy those rights or the basic human goods that those rights serve to promote. It follows that the florist may not violate the couple’s basic right to equal treatment in the commercial sphere (a right that includes equal access to businesses that offer wedding-related goods and services to the public) simply because her religious beliefs tell her that the couple should not have a right to get married, or that it is inherently wrongful for them to do so. As I shall explain, in deciding what rights and duties to enforce, legislatures must take account not only of principle but also of other considerations such as prudence, charity, or a need for compromise. But as a matter of principle, the right to religious liberty generally does not entitle a person to infringe the civil rights of others. As we shall see, however, some providers are so closely involved with the wedding ceremony or the couple that they should not be compelled to take part.

II. RELIGIOUS LIBERTY AND THE CLASH OF IDENTITIES

This part seeks to develop a general understanding of the conflict between religious liberty and civil rights in relation to same-sex marriage. I begin by discussing the ways in which religious traditionalists understand sexuality and marriage, as well as the grounds on which they condemn homosexuality. I then sketch the history of their efforts to implement those religious beliefs within the American legal order. Next, I canvass the manifold ways in which they believe that legal recognition of gay rights and same-sex marriage threatens their religious liberty. Finally, I show how the traditionalist position conflicts with the efforts of LGBT people to live out their own identities.
A. The Religious Traditionalist View of Sexuality and Marriage

Religious traditionalists derive their understanding of sexuality and marriage primarily from the Bible—which they regard as the authoritative word of God—as well as from traditional Christian teaching.\(^5\) The first chapter of the book of Genesis describes how God created the world and all living things.\(^5\) After declaring that God made human beings in his own image and likeness, Genesis adds that he made them "male and female" and commanded them to "[b]e fruitful and multiply."\(^5\) The second chapter relates how God formed the first woman from a rib taken from the first man.\(^6\) When the man saw her, he recognized that she was "bone of my bones and flesh of my flesh."\(^6\) The story concludes: "Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh."\(^6\) In the Gospels, Jesus quotes these verses and declares that those who are married should not divorce.\(^6\) The Letter to the Ephesians also draws on Genesis when it describes marriage as "a great mystery" which can be used to represent the loving relationship between "Christ and the church."\(^6\)

For religious traditionalists, these scriptural passages have deep significance. They show that the "difference" and the "complementarity" between male and female are fundamental to the created order; that sexuality is ordered to the uniting of the partners and the creation of new life; and that sexual activity should be confined to

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\(^6\) All quotations from the Bible are taken from the New Revised Standard Version.

\(^1\) See id. 2:21–22.

\(^2\) See id. 2:23.

\(^3\) See Matthew 19:3–12; Mark 10:2–12.

\(^4\) Ephesians 5:31–32.
marriage, a relationship that by its very nature involves a union between male and female.65 In the words of the National Association of Evangelicals, this biblical conception holds that “marriage is a God-ordained, covenant relationship between a man and a woman through which the human race is propagated,” a “relationship which is intended to be lifelong and sexually exclusive,” and one which “is also iconic, intended to picture the relationship between God and his people.”66

From this perspective, neither the state nor anyone else “has authority to redefine marriage.”67 Same-sex relationships “are not, and can never be, marriages,”68 because they do not involve a bond between male and female which unifies the partners and which can naturally lead to procreation, nor are such relationships capable of serving as a sign of “the mystical union of Christ and his Church.”69

Of course, this view of sexuality and marriage is a deeply theological one. But traditionalists insist that their position is not “based solely on ‘sectarian’ religious truths.”70 Instead, because “[t]he truth of marriage” is “based . . . on the nature of the human person,” it is “accessible to everyone” through the use of “right reason”71 as well as through reflection on human experience, which shows that “[t]hroughout history and across all cultures, marriage

66 NAE, THEOLOGY OF SEX, supra note 57, at 10. For a similar definition, see CATHOLIC CATECHISM, supra note 57, § 1601.
68 USCCB, Defense of Marriage, supra note 2 (answer to question “Is marriage a basic human right?”).
69 One Flesh, supra note 65.
70 Id. at 28.
71 USCCB, Defense of Marriage, supra note 2 (answer to question “Where does marriage come from?”).
has been understood to be the union of male and female and is orga-
nized around the procreative potential of that union.\textsuperscript{72}

Traditionalists do not merely reject the idea of same-sex marriage; they also believe that it is immoral and sinful to have sexual relations with another person of the same sex. Again, this position is rooted in biblical passages that traditionalists take to condemn homosexual relations. For example, the story of Sodom and Gomorrah in \textit{Genesis}\textsuperscript{73} is often interpreted in this way.\textsuperscript{74} The book of \textit{Leviticus} decrees that “[i]f a man lies with a male as with a woman, both of them have committed an abomination [and] shall be put to death.”\textsuperscript{75} Likewise, several passages in the New Testament are commonly read to disapprove of homosexual acts. For example, in his \textit{First Letter to the Corinthians}, the Apostle Paul declares that “[f]ornicators, idolaters, adulterers, male prostitutes, sodomites, thieves, the greedy, drunkards, revilers, robbers—none of these will inherit the kingdom of God.”\textsuperscript{76}

As this passage indicates, homosexuality is far from the only form of sexual conduct that traditionalists regard as sinful. Many other acts fall into the same category, including fornication,\textsuperscript{77} adultery,\textsuperscript{78} prostitution,\textsuperscript{79} incest,\textsuperscript{80} and bestiality.\textsuperscript{81} Yet homosexuality

\textsuperscript{72} One Flesh, supra note 65, at 28–29.
\textsuperscript{73} Genesis 19:1–11; see also Jude 1:7.
\textsuperscript{75} Leviticus 20:13; see also id. 18:22.
\textsuperscript{76} 1 Corinthians 6:9; see also Romans 1:26–27; 1 Timothy 1:9–11; Jude 1:7.
\textsuperscript{77} See, e.g., Matthew 15:19; 1 Corinthians 6:9, 6:15–20; 1 Timothy 1:9–11.
holds a prominent place in the biblical account of sin on which traditionalists rely. In the first chapter of his Letter to the Romans, one of the foundational texts of the Christian tradition, Paul treats the "unnatural" intercourse between two women or two men as a prime illustration of the "degrading" and "shameless" conduct that fallen human beings come to engage in when they turn away from "the truth about God" as made known through the created order.82

For these reasons, traditionalists believe that homosexual conduct is gravely immoral, "intrinsically disordered," and "always wrong." That does not necessarily mean that they feel hatred for those who desire to engage in such conduct. Traditionalists hold that "[a]ll people, regardless of . . . sexual orientation, are created in the image of God and thus are due respect and love."84 Moreover, traditionalists believe that all human beings, including themselves, are sinners who can be saved only through the grace of God.85 Accordingly, traditionalists often say that while they hate the sin, they love the sinner, and that they want to do everything they can to bring him to Christ.86 At the same time, they firmly believe that homosexual

79 See, e.g., 1 Corinthians 6:9, 6:15–16.
81 See, e.g., id. 18:23, 20:15–16.
82 Romans 1:18–32.
83 CATHOLIC CATECHISM, supra note 57, § 2357; USCCB, Defense of Marriage, supra note 2 (answer to question "How is the love between a husband and a wife irreducibly unique?"); see also NAE, THEOLOGY OF SEX, supra note 57, at 15.
84 Southern Baptist Convention, “Same-Sex Marriage” and Civil Rights Rhetoric (2012), http://www.sbc.net/resolutions/1224/on-samesex-marriage-and-civil-rights-rhetoric [http://perma.cc/Q3NB-QDUE]. For this reason, while the Convention opposed same-sex marriage, it also called for "compassionate, redemptive ministry to those who struggle with homosexuality," and took a "stand against any form of gay-bashing, whether disrespectful attitudes, hateful rhetoric, or hate-incited actions toward persons who engage in acts of homosexuality." Id.
85 See, e.g., NAE, THEOLOGY OF SEX, supra note 57, at 6–8.
86 See, e.g., Floyd, supra note 3, at 11. As the sociologist Thomas J. Linneman observes, however, this position can lead to an inner struggle for traditionalists, for while "[t]hey know that they are supposed to respond with love," sometimes "what they are feeling is not compassion but revulsion." THOMAS J. LINNEMAN, WEATHERING CHANGE: GAYS AND LESBIANS, CHRISTIAN CONSERVATIVES, AND EVERYDAY HOSTILITIES 167–68 (2003).
conduct is profoundly immoral and that "[t]here are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family." \(^{87}\)

**B. The Embodiment of Traditional Beliefs in American Law**

Now let us consider how these traditional religious beliefs have been embodied in the law. As historian Nancy F. Cott has explained, from colonial times onward, the American law of marriage was based on a “Christian model” of “lifelong, faithful monogamy, formed by mutual consent of a man and a woman,” in which “the husband was to be the family head and economic provider [and] his wife the dependent partner”—a model that Americans found in the Scriptures as well as in the common law which they had inherited from England. \(^{88}\) This ideal entailed the rejection of other forms of family life such as Mormon polygamy, a practice that Congress targeted in a series of measures during the second half of the nineteenth century. \(^{89}\) In upholding one of those measures, the Supreme Court denounced polygamy as a “barbari[c]” practice that was “contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world.” \(^{90}\)

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\(^{90}\) Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).
The Christian model also led to the criminalization of some forms of sexual activity. As William N. Eskridge, Jr. has detailed, during the mid-seventeenth century, Massachusetts Bay and Connecticut followed *Leviticus* in adopting the death penalty for any man who lay with another man as with a woman.91 Taking a different route to the same result, the middle and southern colonies modeled their law on an act passed by the English Reformation Parliament in 1533 which "made 'the detestable and abominable vice of buggery committed with mankind or beast' punishable by death."92 By the early nineteenth century, American states generally had laws of the latter sort, although without the death penalty.93 In line with their English counterparts, American courts commonly interpreted those laws to outlaw "anal intercourse between two men or between a man and a woman (these acts are often referred to as 'sodomy') and any sexual intercourse between a human male or female and an animal ('bestiality')."94 Those laws appeared in the state statutes together with other "'crimes against public morals and decency'" such as "adultery, fornication, and incest."95 The anti-sodomy laws remained on the books for centuries. As late as 1961, they could be found in all states.96

In these ways, Christianity powerfully shaped traditional American law in matters of sexual morality. Christian leaders and activists were also at the forefront of efforts to limit the grounds for di-
to suppress sexually explicit expression, and to restrict contraception and information related to it.

This traditional regime of sexual regulation has substantially eroded over time. A major factor has been the sexual revolution that gained momentum during the 1960s and that has undercut the social norms that supported traditional regulation. More generally, those norms have been undermined by what the philosopher Charles Taylor has called the advent of an "Age of Authenticity": a way of life that is based on the principle of "expressive individualism," or the notion that individuals have a right to pursue their own happiness in a way that realizes their authentic identities.

These developments soon had an impact on American constitutional law. In the landmark case of Griswold v. Connecticut, the Supreme Court declared that the Constitution protected a "right of privacy"—a right that was not expressly stated in the document itself, but that could be inferred from other protections spelled out in the Bill of Rights (as Justice William O. Douglas wrote for the majority) or that was part of the "liberty" protected by the Fourteenth Amendment (as several concurring Justices argued). On these grounds, the Court struck down a Connecticut law that forbade even married couples to use contraceptives. Subsequent cases extended this protection to unmarried adults as well as to minors. In the

97 See, e.g., COTT, supra note 88, at 105–11.
100 See, e.g., D'EMILIO & FREEDMAN, supra note 98, chs. 11–14.
102 381 U.S. 479 (1965).
103 Id. at 485.
104 See id. at 482–85.
105 See id. at 486–87 (Goldberg, J., concurring); id. at 500 (Harlan, J., concurring in judgment).
106 Id. at 485–86 (majority opinion).
most controversial of all these cases, the Court ruled in *Roe v. Wade*\(^{108}\) that the constitutional right to privacy was "broad enough to encompass a woman's decision whether or not to terminate a pregnancy."\(^{109}\)

Decisions like these, together with the broader changes that were taking place in American society, provoked a strong backlash from social and religious conservatives and led to the rise of the Religious Right.\(^{110}\) At the heart of this movement has been an effort to defend a traditionalist conception of sexual morality, especially with regard to "homosexuality, teenage pregnancy, abortion, and pornography."\(^{111}\)

Conservative opposition to homosexuality prevailed when anti-sodomy laws first came before the Supreme Court in the 1986 case of *Bowers v. Hardwick*.\(^{112}\) In a 5-4 decision, the Court rejected the contention that those laws violated constitutional rights to liberty and privacy. Justice Byron R. White's majority opinion stressed that "[p]roscriptions against [sodomy] have ancient roots," and concluded that an adequate rationale for those proscriptions could be found in "the presumed belief of a majority of the electorate ... that homosexual sodomy is immoral and unacceptable."\(^{113}\) In a concurring opinion, Chief Justice Warren E. Burger emphasized that the "[c]ondemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards," and asserted that the Court could not "hold that the act of homosexual sodomy is somehow protected as a fundamental right" without "cast[ing] aside millennia of moral teaching."\(^{114}\) In these ways, the Justices in the majority sided

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\(^{108}\) 410 U.S. 113 (1973).

\(^{109}\) *Id.* at 153.

\(^{110}\) See, e.g., RUTH MURRAY BROWN, FOR A "CHRISTIAN AMERICA": A HISTORY OF THE RELIGIOUS RIGHT (2002); SUTTON, supra note 74.

\(^{111}\) BROWN, supra note 110, at 85.

\(^{112}\) 478 U.S. 186 (1986).

\(^{113}\) *Id.* at 194, 196.

\(^{114}\) *Id.* at 196–97 (Burger, C.J., concurring).
with social and religious conservatives, who had urged them to up-
hold anti-sodomy laws.\textsuperscript{115}

Within a decade, however, the Court began to chart a differ-
ent course. In \textit{Romer v. Evans},\textsuperscript{116} the majority struck down a ballot 
measure in which the voters of Colorado had barred the state and its 
localities from protecting individuals against discrimination based 
on sexual orientation. Because the measure "singl[ed] out a certain 
class of citizens for disfavored legal status," it constituted "a denial of 
equal protection of the laws in the most literal sense."\textsuperscript{117}

In its next major gay rights decision, \textit{Lawrence v. Texas},\textsuperscript{118} the Court overruled \textit{Bowers} and held that anti-sodomy laws violated 
the Fourteenth Amendment.\textsuperscript{119} Writing for the Court, Justice Kenne-
dy acknowledged that condemnations of homosexuality reflected the 
traditional "religious beliefs" and deep moral convictions that some 
people used to "determine the course of their lives."\textsuperscript{120} But it did not 
follow that "the majority may use the power of the State to enforce 
these views on the whole society through operation of the criminal 
law."\textsuperscript{121} Instead, Kennedy declared that "[t]he liberty protected 
by the Constitution allows homosexual persons the right" to choose to 
enter into intimate "personal relationship[s]" in "their own private 
lives and still retain their dignity as free persons."\textsuperscript{122}

In \textit{Lawrence}, as in \textit{Romer}, Justice Antonin Scalia filed an im-
passioned dissent, which denounced the Court for intruding into the

\textsuperscript{115} \textit{See, e.g.}, Brief for the Catholic League for Religious and Civil Rights, Amicus 
85–140), 1985 WL 667940; Brief of the Rutherford Institute et al., Amici Curiae, 
1985 WL 667943.

\textsuperscript{116} 517 U.S. 620 (1996).

\textsuperscript{117} \textit{Id.} at 633–34.

\textsuperscript{118} 539 U.S. 558 (2003). For a comprehensive account of this case, see \textit{Dale 

\textsuperscript{119} \textit{Lawrence}, 539 U.S. at 577–78.

\textsuperscript{120} \textit{Id.} at 571.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.} at 567.
Scalia insisted that "a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation," and added that the decision in *Lawrence* "called into question" the whole gamut of "traditional 'morals' offenses," including "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." Although many people welcomed the *Lawrence* decision, it "infuriated" many religious traditionalists, including the United States Conference of Catholic Bishops (USCCB), the Reverends Pat Robertson and Jerry Falwell, Pastor Fred Phelps, Jr., and Senator Rick Santorum.

Yet by the time *Lawrence* was decided in 2003, the legal battle over homosexuality already had shifted to a new front. A decade earlier, the Hawaii Supreme Court had issued a decision that made it likely that the state would legalize same-sex marriages. Congress responded in 1996 by passing the Defense of Marriage Act (DOMA). This law provided that even if one or more states were to permit such marriages, neither the federal government nor the other states would have to treat them as valid. Between 1996 and 1997, twenty-three state legislatures acted to ban same-sex marriage within their own jurisdictions. During the decade from 1998 to 2008, voters in thirty states passed constitutional amendments that reserved marriage for opposite-sex couples.

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124 *Lawrence*, 539 U.S. at 589–90 (Scalia, J., dissenting).
125 CARPENTER, supra note 118, at 249, 268.
128 Id.
These measures were adopted with strong support from religious traditionalists. In addition to public policy arguments—such as the claim that children do better when raised by a father and a mother—traditionalists relied on the same views I described above: that reason and revelation show that homosexuality is wrong, and that by its very nature marriage consists in the union of a man and a woman. In addition, traditionalists often argued that the adoption of same-sex marriage would threaten their religious liberty, for example, by compelling clergy to perform gay weddings.

In United States v. Windsor, a 5-4 majority of the Court struck down the provision of DOMA that barred federal recognition of same-sex marriages that were valid under state law. And in Obergefell v. Hodges, the same majority ruled that the federal Constitution guarantees same-sex couples the right to marry. The Court reasoned in these cases that the values that are promoted by marriage do not depend on the gender of the partners, and that bans on same-sex marriage are inconsistent with the constitutional rights of gays and lesbians to liberty, equality, and dignity.

Voters Supported Obama but Not Same-Sex Marriage, 119 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 46, 52 (2009)).

See, e.g., Perry, 704 F. Supp. 2d at 955–56 (discussing the broad coalition of conservative religious groups in 2008 that supported California Proposition 8, which banned same-sex marriage in the state).

See supra Part II.A.

See, e.g., Perry, 704 F. Supp. 2d at 965 (recounting statement by the sponsors of Proposition 8 that "'[t]he 98% of Californians who are not gay should not have their religious freedoms and freedom of expression be compromised to afford special legal rights for the 2% of Californians who are gay'" (quoting Protect Marriage, Honest Answers to Questions Many Californians are Asking About Proposition 8 (2008))).


135 133 S. Ct. 2675 (2013).


137 Id. at 2602.

138 See infra Part V.A.3.a (discussing Obergefell).
With the advent of marriage equality, the thrust of the religious traditionalists’ position has changed once more. Throughout much of our history, they supported the traditional regime governing sexuality and marriage, including laws that made sodomy a crime. After Lawrence, they argued that even though same-sex relationships were no longer illegal, the state should not accord them the status of marriages. Now, in the wake of Obergefell, traditionalists contend that there is an urgent need to adopt laws to protect their religious freedom against the threat posed by same-sex marriage.


141 This development can be traced in the work of Professor Robert P. George of Princeton University, who is a leading advocate of the traditionalist view. In 2003, he co-authored an amicus brief in Lawrence that defended the constitutionality of anti-sodomy laws, and he excoriated the Court’s decision after it came down. See Brief Amicus Curiae of the Family Research Council, Inc. and Focus on the Family in Support of the Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02–102), 2003 WL 470066; Robert P. George, Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage, 17 REGENT U. L. REV. 21, 27–29 (2004) [hereinafter George, Judicial Usurpation] (accusing the Lawrence Court of “Lochnerizing on a massive scale” by “impos[ing] a particular set of cultural leftist doctrines about the nature, meaning, and moral significance of sexuality and marriage”). After the demise of the anti-sodomy laws, George maintained that the defense of traditional marriage “certainly isn’t about legalizing (or criminalizing) anything,” for “[i]n all fifty states two men or women can have a [ceremony] . . . and share a domestic life” if they wish. ROBERT P. GEORGE, What Marriage is—and What It Isn’t, in CONSCIENCE AND ITS ENEMIES 126, 130 (2013). George’s recent defense of traditional marriage has stressed the danger that allowing same-sex couples to marry would pose to religious liberty. See ROBERT P. GEORGE, The Myth of a “Grand Bargain” on Marriage, in CONSCIENCE AND ITS ENEMIES, supra, at 142. On the eve of the Obergefell decision, George gave a talk that dwelled on those dangers. See Rick Plaster, Robert George Discusses Same-Sex Marriage and Its Social Consequences, CHRISTIAN POST (June 26, 2015), http://www.christianpost.com/news/robert-george-
C. Why Do Religious Traditionalists Believe That Same-Sex Marriage Threatens Their Religious Liberty?

This discussion leads to a central question: Why do religious traditionalists believe that the legal recognition of same-sex marriage, and of gay rights in general, endangers their religious liberty? In this section, I maintain that the answer to this question is much more complex than it may seem at first glance. We need to explore this subject in some depth if we wish to fully understand the tension between religious liberty and civil rights in this area and how it can best be resolved.

As a threshold matter, it is helpful to reflect on the concept of liberty. It is often said that liberty should be understood in purely negative terms—as the absence of interference or constraint—and that this was how the founders understood liberty. In my view, however, this position is mistaken in both historical and conceptual terms. From a conceptual standpoint, I believe that philosophers like John Rawls are right when they hold that liberty has a positive as well as a negative dimension. On this view, liberty consists in the ability to act in a particular way (the positive side) without interference by others (the negative side). As I have shown elsewhere, this is the understanding that characterized classical liberal thought and that prevailed at the time the Constitution was adopted. I believe that the traditionalists' demand for religious liberty also is best seen in this light: they seek to conduct their lives and to shape the world in accord with their religious beliefs, without unjustified inter-


143 See JOHN RAWL, A THEORY OF JUSTICE § 32, at 177–78 (rev. ed. 1999). In this regard, Rawls follows the position taken in G.G. MacCallum, Negative and Positive Freedom, 76 PHIL. REV. 312 (1967).


ference by other individuals or the state. Traditionalists contend that the rise of gay rights and same-sex marriage interferes with this freedom in a wide range of ways.

1. Compulsion to Act Contrary to Conscience

To begin with, religious traditionalists are concerned that the law may compel them to do particular acts that violate their consciences. This concern is exemplified by those cases in which state civil rights laws have been interpreted to require florists, bakers, and others to provide wedding-related services to same-sex couples—rulings that the providers contend would compel them to betray their religious convictions by participating in or facilitating events that celebrate relationships they regard as sinful and contrary to the divinely ordained nature of marriage.147

2. Compulsion to Recognize Same-Sex Marriages

Although these cases provide the most straightforward examples, traditionalists also believe that the advent of marriage equality endangers their religious liberty in many other ways. Suppose, for example, that a religious organization or other employer that opposes same-sex marriage provides benefits such as health insurance to the opposite-sex spouses of its employees. Under a law that prohibits sexual-orientation discrimination, the employer might be required to provide the same benefits to same-sex spouses.

Traditionalists regard this as an infringement of the employer's religious liberty.148 This infringement can be understood as another instance of the first category, on the ground that the employer is being compelled to perform a particular act that violates its reli-

146 On freedom as the activity of shaping the world in a particular way, see G.W.F. Hegel, Elements of the Philosophy of Right §§ 4, 8 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820) [hereinafter Hegel, Philosophy of Right].
147 See supra note 54 and accompanying text.
148 See, e.g., USCCB, Defense of Marriage, supra note 2 (answer to question “What’s the real threat to religious liberty posed by same-sex marriage?”).
igious beliefs by providing material support for a same-sex marriage. But traditionalists also contend that in this situation religious liberty is being violated in another way, by requiring the employer to recognize a same-sex relationship as a legitimate marriage. 149 Indeed, religious traditionalists sometimes suggest that this notion lies at the heart of their claim to religious liberty. As the Catholic Bishops have put it, "far from serving the cause of civil rights, redefining marriage would threaten the civil right of religious freedom [because] it would compel . . . even those opposed in conscience to same-sex sexual conduct" "to treat [a same-sex] relationship as if it were a marriage." 150

3. Impact on the Traditionalists' Own Marriages

Supporters of marriage equality often contend that it will simply expand the institution without causing any harm to those who have traditional marriages. 151 In response, religious traditionalists assert that redefining marriage will "change its meaning for everyone." 152 Instead of being understood as a natural relationship that unites male and female in a way that is oriented to procreation, marriage will become a "socially constructed unit" that is based on mere "personal desires" or emotions. 153 In turn, this will weaken the norms of "permanence and exclusivity" that traditionally have characterized marriage, as well as the partners' commitment to having

150 USCCB, Defense of Marriage, supra note 2 (answer to question "What about civil rights?").
153 Id. at 56–58; One Flesh, supra note 65, at 27.
and raising children.\textsuperscript{154} These concerns have led some prominent traditionalists to characterize same-sex marriage as an even "graver threat" to marriage than "widespread cohabitation" or an "easy acceptance of divorce."\textsuperscript{155} While it is true that those phenomena "damage[]" and "devalue[]" the institution, "what is now given the name of marriage in the law is a parody of marriage," a fundamental distortion of its very nature.\textsuperscript{156} The result is to "redefine the institution and, strictly speaking, abolish it."\textsuperscript{157}

From this perspective, same-sex marriage can be seen as the most recent and catastrophic stage in the ongoing "crisis of marriage culture" brought about by "the sexual revolution."\textsuperscript{158} As Pastor Ronnie Floyd, the president of Southern Baptist Convention, recently told the group, \textit{Obergefell} has the potential to "chang[e] the trajectory of our nation unlike anything we have seen since . . . the Roe vs. Wade decision," by "add[ing] more fuel to the already sweeping wildfire of the sexual revolution, and mov[ing] it beyond anyone's control."\textsuperscript{159}

On this view, the recognition of same-sex marriage does not merely allow more couples to marry. Instead, it transforms the institution in a radical way that involves "abandoning the possibility of restoring a sound understanding of marriage and, with it, the hope of rebuilding a healthy marriage culture"—a culture that is needed to sustain the marriages of everyone in the society, including religious traditionalists.\textsuperscript{160}

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\textsuperscript{155} One Flesh, supra note 65, at 27.

\textsuperscript{156} Id.

\textsuperscript{157} George, Judicial Usurpation, supra note 141, at 28–29.

\textsuperscript{158} One Flesh, supra note 65, at 24, 27.

\textsuperscript{159} Floyd, supra note 3, at 4.

\textsuperscript{160} Manhattan Declaration, supra note 154, at 5.
4. Impact on Their Child-Rearing

Religious traditionalists also believe that the normalization of homosexuality impacts their families in another way, by affecting their ability to raise their children. Those children may encounter LGBT people and same-sex couples in the course of everyday life, especially at school. The public schools may teach about same-sex marriage and may seek to promote tolerance toward those who differ in sexual orientation. And, of course, children may also encounter positive portrayals of same-sex relationships in popular culture. Moreover, because many traditionalists believe that homosexuality is not innate but is a voluntarily chosen lifestyle, they fear that such social acceptance may lead their children to experiment with or adopt that lifestyle. In all these ways, traditionalists believe that social recognition of homosexuality interferes with their ability to pass their religious values on to their children.

5. Impact on Their Educational Institutions

Traditionalists also are concerned that the advent of gay rights and marriage equality may impair their ability to promote

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162 See, e.g., Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).
their religious beliefs through their own educational institutions. In
this connection, they frequently point to *Bob Jones University v. United
States*, 165 in which a religious university and a religious elemen-
tary and secondary school challenged an Internal Revenue Service
policy that denied charitable tax exemptions under 26 U.S.C.
§ 501(c)(3) to educational institutions that discriminated on the ba-
sis of race. 166 In an 8-1 ruling, the Supreme Court rejected the plain-
tiffs' religious liberty claim and held that educational institutions
that engage in racial discrimination do not qualify as "charitable"
under the tax code. 167 Religious traditionalists fear that the federal
government will use similar reasoning to revoke the tax-exempt sta-
tus of educational institutions—and even of churches—that adhere
to traditional teachings on homosexuality, or that refuse on religious
grounds to accord same-sex spouses the same benefits as opposite-
sex spouses, such as access to married-student housing. 168

6. Impact on Their Charitable Work

Religious traditionalists believe that they are called not simp-
ly to obey God's will in their own lives, but also to carry out God's
mission in the world through service to others. 169 They are con-
cerned, however, that the movement toward LGBT rights and mar-

166 See id. at 579–85.
167 Id. at 592–96, 602–04.
168 See, e.g., Brief of the General Conference of Seventh-Day Adventists and the
Becket Fund for Religious Liberty as Amici Curiae in Support of Neither Party at
1022705, at *25 [hereinafter Adventists Brief]. Many traditionalists expressed
alarm after Solicitor General Donald B. Verrilli, Jr. conceded at oral argument
that the question of tax-exempt status was "certainly going to be an issue." Trans-
script of Oral Argument on Question 1 at 38, Obergfell, 135 S. Ct. 2584.
The Obama Administration recently declared that it would not seek to revoke
tax exemptions on this ground. See Sarah Pulliam Bailey, *IRS Commissioner
Promises Not to Revoke Tax-Exempt Status of Colleges That Oppose Gay Mar-
faith/wp/2015/08/03/irs-commissioner-promises-not-to-revoke-tax-exempt-
status-of-colleges-that-oppose-gay-marriage/ [http://perma.cc/T467-7KA5].
169 See, e.g., *Catholic Catechism*, supra note 57, § 1932.
Marriage equality will impair their ability to do this. A frequently cited example is the decision by Catholic Charities of Boston to cease providing adoption services rather than to comply with a state rule that prohibited foster-care and adoption agencies from discriminating against same-sex couples. In many other situations, religious traditionalists worry that their charitable and social service agencies will be denied government funding because of their refusal to serve such couples.

7. Impact on Their Ability to Engage in Business and the Professions

Another major concern is that traditionalists will be forced to choose between following their religious beliefs and engaging in business and the professions. In addition to the cases involving wedding-service providers, they point to incidents in which students have been dismissed from graduate programs in counseling because they refuse on religious grounds to counsel individuals involved in same-sex relationships.

8. Compelled Association

Traditionalists also maintain that their religious liberty is compromised by laws that require them to associate with LGBT people. For example, the Catholic Bishops assert that compelled association would result if “the government ... obligates wedding-related businesses to provide services for same-sex 'couples'” or “forces religious institutions to retain as leaders, employees, or members those who obtain legalized same-sex 'marriage.'” Similar objections have been raised against laws and policies that ban discrimination

170 See, e.g., Adventists Brief, supra note 168, at 22.
171 See, e.g., id. at 22–25.
172 See, e.g., id. at 25–26.
173 See supra note 54 and accompanying text.
174 See, e.g., USCCB Brief, supra note 140, at 24.
175 See, e.g., USCCB, Defense of Marriage, supra note 2 (answer to question “What's the real threat to religious liberty posed by same-sex 'marriage'?”).
176 Id.
within some community organizations. In a 1999 decision, the New Jersey Supreme Court ruled that the Boy Scouts of America were covered by the state law that barred sexual-orientation discrimination in public accommodations.\(^{177}\) Although the Supreme Court held in *Boy Scouts of America v. Dale*\(^ {178}\) that the New Jersey decision violated the organization’s First Amendment right to freedom of association,\(^ {179}\) some government bodies have severed their own connections with the Boy Scouts or declined to allow them to use certain forms of public property.\(^ {180}\) Moreover, some public educational institutions have adopted an “all comers” policy under which student organizations may not receive official recognition unless they are willing to allow any student to join.\(^ {181}\) In *Christian Legal Society v. Martinez*,\(^ {182}\) a narrowly divided Court upheld such a policy against a constitutional challenge brought by an evangelical student group that had required its members to sign a “Statement of Faith” that included an affirmation “that sexual activity should not occur outside of marriage between a man and a woman,” and that had the effect of “exclud[ing] from affiliation anyone who engages in ‘unrepentant homosexual conduct.’”\(^ {183}\)

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\(^{178}\) 530 U.S. 640 (2000).

\(^{179}\) Id. at 659.


\(^{182}\) 561 U.S. 661 (2010).

\(^{183}\) Id. at 672 (citation omitted).
9. Impact on Their Relationship with the Political Community

For the most part, the points that I have just discussed relate to the ability of religious traditionalists to follow their beliefs within the private sphere. This is the image that the term religious liberty is apt to call up in the minds of many people. But traditionalists often understand the term in a broader way: they see religious liberty as extending—or at least as closely related—to freedom of political participation as well. As the Catholic Bishops have expressed it, the American principle of "religious liberty... safeguards our right to bring our principles and moral convictions into the public arena."184

Many traditionalists believe that they have a duty to actively promote their beliefs in the political realm.185 In their view, a decision like Obergefell threatens this aspect of religious liberty in two ways. First, by imposing a judicial solution to the debate over same-sex marriage, the Court abrogates the democratic process and deprives all "citizens of the liberty to join with others in shaping" policy on one of the great public issues of the day.186 Second, such a decision "den[ies] religious believers equal citizenship by unfairly deeming the laws and policies they favor presumptively illegitimate."187 To put it another way, traditionalists worry that such a decision will "endorse the message that traditional religious beliefs about marriage and the family are—as a matter of constitutional law—akin to racism, a form of condemnation that will result in marginalization and ostracism of religious believers" not only in the political process but also in the broader culture.188

186 Major Religious Organizations Brief, supra note 140, at 36.
187 Id. at 18–19.
188 Catholic Answers Brief, supra note 164, at 30.
Finally, a decision like Obergefell may also affect religious traditionalists' relationship with the society in another important way. Traditionalists often strongly identify with America and believe that it is—or at least was founded to be—a Christian nation. By interpreting the Constitution to support same-sex marriage, such a decision tends to undermine traditionalists' sense of identity as American citizens and to heighten their feelings of alienation from the country. To put it another way, although traditionalists often have experienced some tension between their identity as Americans and their religious identity, a decision like Obergefell may exacerbate this tension and thus lead to a deep internal conflict in their sense of self.

10. Impact on Their Worldview and Identity as Believers

On the most fundamental level, the identity of religious traditionalists is formed by their faith in God and their commitment to follow God's laws. At the same time, they believe that those laws express "a universal morality, encompassing all peoples and cultures." It follows that violations of those laws should be stigmatized and condemned as sinful. When traditionalists encounter same-sex couples who appear to be leading flourishing lives, and whose relationships receive social acceptance and even legal recog-

189 See, e.g., Brown, supra note 110; Harder, supra note 184. For a critical assessment of this belief by three leading evangelical historians, see Mark A. Noll, Nathan O. Hatch & George M. Marsden, The Search for a Christian America (expanded ed., 1989).
nition, traditionalists experience a profound challenge to their beliefs and to the identity that has been formed around those beliefs. This experience may generate strong “existential anxieties” by undermining their sense of order in the world and of their place within it.193

As a result of the contradiction between the norms that apply within their religious world and the ones that prevail within the larger society, religious traditionalists face a difficult choice: either they must abandon (or at least modify) their beliefs, or they must adhere to those beliefs in the face of what they perceive to be a hostile society. Some traditionalists are concerned that taking the latter course will subject them to persecution. For example, they fear that their arguments against same-sex marriage may be outlawed as a form of hate speech or harassment, thereby restricting their freedom to advocate their beliefs.194 The end result, they warn, may be “the

193 The quoted language is taken from Lynn Davidman, Becoming Un-Orthodox: Stories of Ex-Hasidic Jews 144 (2015), which offers a similar account of the anxieties that individuals experience when they leave the community of Haredi (that is, ultra-Orthodox) Jews in which they have grown up. As Davidman explains, the ritual practices that Haredi Jews follow “create what social theorists Anthony Giddens and Bryan Turner refer to as a strong sense of ontological security—a comfortable sense of being in the world—and of being a member of the group.” Id. (citing Anthony Giddens, Modernity and Self-Identity: Self and Society in the Late Modern Age (1991); Bryan Turner, Regulating Bodies (1992); Bryan Turner, The Body and Society: Explorations in Social Theory (1984)). Departure from the community and its practices leaves individuals “vulnerable to existential anxieties that threaten[] their sense of self-identity.” Id. Davidman also invokes Peter Berger’s metaphor of “the sacred canopy,” which “refers to the overarching shelter enclosing and securing a religious community’s way of life and shielding its boundaries from outside intrusions.” Id. at 29 (discussing Berger, supra note 191). As Davidman shows, some experiences, such as “exposure to the secular world,” can “reveal[] holes in the seemingly solid sacred canopy” and thus lead individuals to question the way of life and worldview in which they have been raised. Id. at 31. This account may also provide valuable insight into the experiences that religious traditionalists may have when they encounter same-sex marriage.

criminalization of Christianity." This development would either separate them from God or require them to suffer martyrdom. As the late Francis Cardinal George of Chicago put it in a frequently quoted statement, "I expect[] to die in bed, my successor will die in prison and his successor will die a martyr in the public square." For these reasons, traditionalists sometimes describe the conflict over gay rights as a matter of "spiritual warfare" or an epic battle between the forces of good and evil.

11. Conclusion

In this section, we have explored what traditionalists mean when they assert that same-sex marriage, and gay rights in general, pose a threat to their religious liberty. By religious liberty, they mean the unimpaired capacity to live out their religious beliefs. Traditionalists seek to do this in the realms of family, education, charitable work, business and the professions, community affairs, politics, culture, and religion. But they believe that legal recognition of gay rights and same-sex marriage threatens their freedom in all of these realms: by compelling them to act against their consciences by participating in, facilitating, or recognizing relationships they consider...
to be sinful; by according legal status to those relationships in a way that undermines the “culture of marriage” that sustains their own unions; by interfering with their ability to inculcate their religious and moral values in their children; by endangering their ability to maintain educational institutions and engage in charitable work; by threatening to exclude them from business and the professions unless they abandon their religious beliefs; by compelling them to associate with others who do not share their values; by denying them full participation in, and alienating them from, the political and cultural life of the community; and by undermining their religious beliefs and threatening them with persecution.

In all these ways, religious traditionalists perceive the advent of gay rights and same-sex marriage as interfering not only with their freedom as individuals, but also with the culture that supports and sustains their religious practices. Over time, they have constructed a rich cultural world in which they seek to live out their beliefs—a world that is based on a shared faith in God and a commitment to follow God’s precepts. Moreover, traditionalists believe that this cultural world is, or should be, aligned with the legal, political, and social order of America, which they regard as a Christian nation, as well as with the cosmic order ruled by God. Decisions like Obergefell bring about a profound disruption of this traditionalist cultural world in all the ways I have discussed. For these reasons, traditionalists experience the advent of gay rights and same-sex marriage as a fundamental threat to their identity and their way of life.

D. The Clash with Lesbian, Gay, Bisexual, and Transgender (LGBT) Identity

Contrary to what religious traditionalists often assert, however, this threat does not necessarily stem from hostility toward them or their views. Instead, it results from the efforts of LGBT people to affirm and live out their own identities. In contrast to hyperbolic warnings about “the criminalization of Christianity,”198 the an-

198 See supra text accompanying notes 194–95.
ti-sodomy laws actually did threaten to imprison gay and lesbian individuals merely for engaging in sexual relationships.\(^\text{199}\) In *Lawrence*, the Court held that under the Constitution they have a right to enter into such relationships in "their own private lives and still retain their dignity as free persons."\(^\text{200}\)

As in the case of the religious traditionalists, however, the liberty that LGBT people claim goes far beyond the ability to perform particular acts. As the whole line of cases from *Romer* through *Obergefell* makes clear, LGBT people should be free to form socially and legally recognized relationships on the same terms as heterosexuals can; to raise their children in a stable and secure environment; to enjoy equal treatment in civil society, free from invidious discrimination; to participate openly in the political arena; and to lead their own religious and spiritual lives. Above all, they have a right to live in accord with their own values and identities while being treated as full and equal human beings and citizens. In all these ways, LGBT people make claims that are parallel to those made by religious traditionalists.

In a situation like this, one might expect that a common commitment to liberty would lead each group to acknowledge the other's right to pursue its own identity and way of life. Although some religious traditionalists may be inclined to adopt this position, it runs counter to the conception of liberty that many of them hold. This conception maintains that "[t]here is no true freedom except in the service of what is good and just," as found in the law of God and in the natural order God has created.\(^\text{201}\) By contrast, "[t]he choice to disobey and do evil is an abuse of freedom and leads to 'the slavery of sin.'"\(^\text{202}\) From this traditionalist perspective, the liberty that LGBT people claim is not "[g]enuine freedom," but rather is "a deceptive pseudo-freedom that degrades our humanity" by allowing us "to ex-

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\(^{199}\) See *supra* text accompanying notes 91-96.


\(^{201}\) *CATHOLIC CATECHISM*, *supra* note 57, §1733.

\(^{202}\) *Id.* (quoting *Romans* 6:17). Similarly, Harder explains that "[f]or the Christian Right, liberty was not the freedom to do whatever one wanted," but rather "the freedom to do what was right in God's eyes." Harder, *supra* note 184, at 10.
alt our personal desires and choices over the created order." To put it another way, only the truth can set us free. Religious traditionalists often believe that they have come to know "an unchanging and universal Truth . . . because God has revealed it to them," whereas their opponents go astray by attempting to "construct[their] own moral truths."

For these reasons, the conflict between religious traditionalists and LGBT people cannot easily be avoided by an appeal to a shared conception of freedom. Instead, there is a fundamental clash of identities between the two groups. At bottom, this clash arises because traditionalists understand the two identities as antithetical—a point that clearly emerges from some of the amicus briefs they filed in Obergefell. As one brief put it, the same-sex plaintiffs "seek affirmation of their own sexual identities, and corresponding condemnation of contrary religious identities in many ways." In a similar vein, a coalition of conservative churches maintained that a ruling in favor of same-sex marriage "might enhance the equal treatment of gays and lesbians, but only by subtracting from the First Amendment liberties of religious institutions and believers."

III. EFFORTS TO RESOLVE THE CONFLICT

In the previous part, I showed that the ongoing legal and political dispute over religious liberty and same-sex marriage is rooted in a deeper clash between the identities and ways of life of religious traditionalists and LGBT people. The central problem is how this

203 One Flesh, supra note 65, at 27.
204 See John 8:32.
205 SMITH ET AL., supra note 185, at 126.
206 One Flesh, supra note 65, at 27.
207 Catholic Answers Brief, supra note 164, at 37.
208 Major Religious Organizations Brief, supra note 140, at 31. Likewise, Linne- 
man reports that the religious traditionalists he interviewed "assume[d] that gays and lesbians are their natural antithesis." See LINNEMAN, supra note 86, at 157. For this reason, the traditionalists regarded any form of "gay progress," including the adoption of anti-discrimination laws or same-sex marriage, "as a sign of anti-Christian hostility." Id. at 38, 157–59.
dispute can be resolved in a manner that enables the two groups to live together within a liberal democratic society. In this part, I explore several leading approaches to this problem and argue that while each has some merit, none is fully satisfactory. In Part IV, I present an alternative approach based on the concept of mutual recognition, and show that this approach incorporates much of what is valuable in other views.

A. The "Culture War" Approach

The conflict between religious traditionalists and supporters of LGBT rights is commonly described as a culture war. In many ways, the metaphor is apt. At the same time, however, it suggests that conflicts of this sort ultimately must be resolved by force rather than by reason. Justice Scalia expresses a view like this in Romer when he excoriates the Court for intervening in the "culture war" in order to "take the victory away from traditional forces," which had fought to defend their "view of sexual morality . . . against the efforts of a . . . politically powerful minority to undermine it."209

In this regard, Scalia's outlook resembles that of Justice Oliver Wendell Holmes. For Holmes, society is made up of disparate groups, each of which has its own interests and beliefs and is "striv[ing] to make the kind of a world that [it should] like."210 This striving inevitably brings it into conflict with other groups—a conflict that in the end can be decided only by means of superior force.211

On this view, when there is a clash between different identities and ways of life, the group with the greatest power will prevail.

209 Romer v. Evans, 517 U.S. 620, 648, 652 (1996) (Scalia, J., dissenting); see also id. at 636 (describing a state effort to overturn civil rights protections for LGBT people as "a Kulturkampf"); Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (denouncing the Court for "taking sides in the culture war").

210 OLIVER WENDELL HOLMES, IDEALS AND DOUBTS, IN COLLECTED LEGAL PAPERS 303, 305 (1920).

Although there surely is something to this view, it is inadequate even as a descriptive matter, for it fails to recognize the impact that ideas of justice can have on public opinion. More importantly, this view should be rejected on normative grounds, for it is antithetical to the core liberal principle that conflicts should be resolved by reason rather than by force.\(^\text{212}\)

**B. The Majoritarian Approach**

A second approach holds that conflicts between groups should be resolved through the majoritarian political process. This is a pervasive theme in the conservative dissents in the Supreme Court's gay rights cases.\(^\text{213}\) Once again, this position has some merit. As Chief Justice Roberts writes in *Obergefell*, it is a valuable thing for individuals to seek to "persuad[e] their fellow citizens—through the democratic process—to adopt their view."\(^\text{214}\) At the same time, the limits of this position are obvious: the mere fact that a particular group comprises, or can gain the support of, a majority does not mean that it should be allowed to promote its own identity at the expense of another group.

**C. The Religious Liberty Approach**

In contrast to majoritarianism, which takes a procedural approach to group conflicts, the next four views focus on the substantive values at stake. The first of these views is what I shall call the religious liberty approach. This approach holds that the law should

\(^{212}\) See, e.g., Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (contrasting "the power of reason" with "force" and coercion); JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 1, 6 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, GOVERNMENT] (contrasting "Reason" with "Force and Violence").


\(^{214}\) *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).
recognize a strong presumption in favor of protecting religious liberty when it conflicts with other interests or values.

This position has been the subject of continuing controversy in American constitutional history. In an early free exercise case, Reynolds v. United States, the Supreme Court declared that while laws "cannot interfere with mere religious belief and opinions, they may with practices." To hold that an individual is entitled to violate the law on religious grounds would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." The Reynolds position was dominant until the 1960s, when the Court held in Sherbert v. Verner that government actions that had the effect of substantially burdening an individual's religious practice should be subjected to strict scrutiny. However, in the 1990 case of Employment Division v. Smith, Justice Scalia virtually overruled Sherbert and declared that so long as a law is generally applicable and does not single out religion, it may not be challenged as a violation of the Free Exercise Clause. On this basis, he concluded that the state of Oregon could ban all use of peyote, even by Native Americans who ingested the drug for sacramental purposes.

Three years later, Congress passed the Religious Freedom Restoration Act (RFRA) for the avowed purpose of rejecting Smith and returning to the Sherbert doctrine. Although the Act was held unconstitutional in 1997 as applied to the states, it continues to

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215 98 U.S. 145 (1878).
216 Id. at 166.
217 Id. at 166–67.
219 See id. at 406–08.
221 See id. at 879.
222 See id. at 874, 890.
apply to the federal government, and many states have passed their own RFRAs or have interpreted their state constitutions to incorporate the same standard. Under these provisions, the government may not impose a substantial burden on a person's exercise of religion, even by means of a religiously neutral and generally applicable law, unless the government can show that imposing that burden is the least restrictive means of advancing a compelling government interest.

It is easy to understand why Congress believed that such a demanding standard should apply in cases like Smith, which held that the First Amendment permits the government to apply its general laws in such a way as to outlaw a central practice of a minority religion. In this situation, RFRA's compelling-interest standard ensures that the government's decision has a substantial justification and is not a product of mere ignorance, indifference, or insensitivity with regard to a religious minority.

Even in cases like this, which pit minorities against the government, there is a good deal of disagreement about whether RFRA takes the right approach when it opens the door to granting religious believers an exemption to the laws that apply to all other citizens. Regardless of how one comes out on this issue, however, there are strong objections to applying such an approach to the problem we are considering now: whether religious opponents of same-sex marriage should be exempt from general laws that are intended to protect LGBT people from discrimination. As we have seen, this problem ultimately involves a clash between the identities of these two groups. Yet the approach represented by RFRA appears to place a heavy thumb on the scale in support of religious liberty, thus privileging the claims of religious traditionalists over those of LGBT people.


See Laycock, Culture Wars, supra note 56, at 844–45.


A defender of the RFRA approach might respond that this objection is unfounded because the government has a compelling interest in protecting LGBT rights, and so this approach places the two groups on the same level. But there are two difficulties with this response. First, while I agree that the government has a compelling interest in protecting LGBT rights, there is nothing in the language of the RFRA, or in the broader approach they represent, that makes this clear. And second, even when a law is found to promote compelling interests, it does not pass the RFRA test unless it also constitutes the least restrictive means of promoting those interests. If this requirement were to be interpreted in a stringent way, the RFRA approach would still tend to favor religious liberty over competing claims.

For these reasons, it is unclear whether the RFRA approach would hold an even balance between religious traditionalists and LGBT people, let alone whether it would protect the latter against religiously motivated discrimination. The RFRA itself, or the broader approach they represent, does not directly address this question, and the case law does little to clarify the matter. There are few judicial decisions on this issue, and the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.* suggests that the question is an open one on the federal level. Although Justice Alito emphasized that RFRA provides no "shield" for "racial discrimination," he conspicuously avoided any comment on other forms of discrimination such as those based on gender, sexual orientation, or gender identity.

Moreover, the high standard of justification is not the only way in which the RFRA approach tends to favor religious believers over other citizens. This tendency also results from the very way that this approach conceives of the problem of religious liberty—as a clash between the religious liberty of individuals and the interests of the government. As I have suggested, this is a reasonable way to conceptualize cases like *Smith*, which involve government measures that restrict religious liberty in order to promote public welfare in gen-

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229 As I have noted, Indiana’s law is now an exception. See supra note 28.
231 Id. at 2783.
eral. But it is not a reasonable way to conceptualize the present problem. Applying the RFRA approach here fundamentally distorts the nature of the issue, so that instead of a clash between two groups of individuals—religious traditionalists and LGBT people—it is seen as a clash between some individuals (traditionalists) and the government. In this way the rights of LGBT people are deprived of any independent standing in the analysis and instead are recategorized as mere "government interests"—interests which, under this approach, presumptively do not justify the imposition of burdens on religious liberty. Thus, the RFRA approach inevitably downplays the values on the equality side of the balance.232 This is problematic not only as a basis for legal doctrine, but also as a way of addressing the underlying social conflict between the two groups.

D. The Equality Approach

Alternatively, we could take a diametrically opposite tack and hold that the law should always, or at least presumptively, protect equality when it conflicts with religious liberty.233 Although this approach has the virtue of affording strong protection to equality, it suffers from the mirror image of the problem I just discussed, for it may unjustifiably sacrifice the value of religious liberty to that of equality.

In response, a defender of this approach might seek to refine it by focusing on the concept of civil rights, and by defining those rights in a strict sense to mean claims to equality that are justified and that should be recognized and protected by the law. The equality approach would then hold that the law should always, or at least presumptively, protect civil rights when they conflict with religious liberty. As I explain in Part V.C, I believe that this principle can find strong support in the liberal tradition. As a general rule, religious

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232 For an analogous critique of current free speech jurisprudence for failing to adequately consider the rights of individuals who are injured by some forms of speech, see STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 28–29, 96 (2008) [hereinafter HEYMAN, FREE SPEECH].

233 See, e.g., Gilreath, supra note 56.
liberty should not permit one to violate the civil rights of others.\textsuperscript{234} Yet this formulation goes only so far in resolving the problem. It is still necessary to determine precisely what civil rights individuals have, as well as to ascertain the boundaries between those rights and religious liberty. For example, while individuals should have a civil right to be free from discrimination based on gender or sexual orientation, it seems clear that the state would go too far if it sought to compel a minister to perform a same-sex wedding or a church to hire a female priest, contrary to the tenets of their faith.

\textit{E. The Balancing Approach}

Yet another approach would balance the values that exist on both sides. In the case of wedding-related services, that would mean weighing the interest of providers in following their religious convictions against the interest of same-sex couples in receiving equal treatment in the commercial sphere.\textsuperscript{235} There is much to be said for an approach of this sort. It is evenhanded and seeks to respect all of the competing values at stake as well as the groups that assert them. The approach is also valuable for its effort to take into account all relevant factors and to reach the best solution all things considered.

For these reasons, balancing will be one element in the approach that I develop in Parts IV and V. In my view, however, there are at least two reasons why we cannot rely solely on a balancing approach, at least as I have described it so far. The first is what may called the apples-and-oranges problem: it is impossible to balance two different values in a reasoned and coherent way unless one first identifies some feature that they have in common, or some standard by which they can be assessed. Second, as we shall see, balancing may reach the wrong results in some cases unless it is constrained by other principles which are rooted in respect for the rights of others.\textsuperscript{236}

\textsuperscript{234} See infra text accompanying notes 416–28.
\textsuperscript{235} See, e.g., Koppelman, \textit{Accommodations, supra} note 56, at 629–30.
\textsuperscript{236} See infra Part VI.A.2.
F. The "Live and Let Live" Approach

Finally, let me turn to an approach that has been developed by Thomas C. Berg, Douglas Laycock, Marc D. Stern, Robin Fretwell Wilson, and other scholars in a series of important academic writings, briefs, and letters to legislators. This approach, which is often referred to as "live and let live," begins with the insight that LGBT people and religious traditionalists have something essential in common: the members of each group seek to engage in activity that expresses their fundamental identity. The state should respect their ability to do so to the maximum extent possible. For these scholars, it follows that the law should recognize the right of same-sex couples to marry while at the same time protecting the right of religious traditionalists to follow their own beliefs. Many conflicts could be avoided if each group simply respected the other's liberty. As Laycock writes, "[i]n principle we can create private spaces in which each side can live its own values. Such a commitment to live and let live is the essence of civil liberty." For example, traditionalists should not fight against the legalization of same-sex marriage, while gay rights advocates should not seek to compel churches to recognize such marriage.

237 See, e.g., Berg, supra note 56; Laycock, supra note 56; Stern, supra note 56; Wilson, supra note 56.
238 See, e.g., Laycock Brief, supra note 149.
240 E.g., Berg, supra note 56, at 208, 226; Robin Fretwell Wilson, Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 56, at 77, 81 [hereinafter Wilson, Matters of Conscience].
On the other hand, conflict is unavoidable when same-sex couples and religious traditionalists encounter one another in "public spaces" such as the commercial sphere. In situations like this, Laycock and his colleagues hold that we must engage in "some balancing of conflicting interests," such as the couple's interest in equal treatment and the florist's interest in following her beliefs, which tell her that it is sinful to "facilitate, or help celebrate, what [she considers] to be a deeply immoral relationship." This balancing leads to the conclusion that the vendor's "right to [her] own moral integrity should generally trump the inconvenience [to the couple] of having to get the same service from another provider," except in cases where the couple would suffer substantial hardship because no other provider is available. "Live and let live" scholars unsuccessfully urged some states to adopt a model statute that reflected this analysis, and later advised other states to adopt a version of RFRA that might have the same result.

Like the balancing approach, "live and let live" has the merit of according respect to both sides of the current dispute. In addition, this view has the advantage of identifying what the two sides have in common: an interest in "liv[ing] their lives according to their own beliefs, values, and identity." This view offers a powerful argument for respecting the liberty of both groups, and it also identifies a common value or standard that would make balancing possible.

At the same time, I believe that this approach has serious flaws. To begin with, as Laycock's discussion suggests, the principle of "live and let live" has the greatest force in "private spaces" such as a church's decision about what marriages to solemnize. It is more difficult to see what that principle means in those "public

242 Id. at 194.
243 Id. at 195–98.
244 Id. at 198–99; see also, e.g., Berg, supra note 56, at 229.
245 See, e.g., Hawaii Letter, supra note 239.
246 See, e.g., Indiana Letter, supra note 239.
247 Laycock, Afterword, supra note 241, at 189.
248 For some other critiques of this position, see Curtis, supra note 56, at 196–200; Gilreath, supra note 56; Lupu & Tuttle, supra note 56.
249 Laycock, Afterword, supra note 241, at 192.
spaces" where members of the two groups interact with one another. In that context, the approach largely reverts to the religious liberty position discussed in Part III.C. That is, the approach holds that a vendor's refusal to serve same-sex couples on religious grounds presumptively should be protected—a result that the scholars seek to bring about through the adoption of specific statutory provisions, or at least to make possible through a more broadly worded RFRA.250

Of course, insofar as "live and let live" tracks the religious liberty approach, it is subject to the same objections I made above.251 In addition to these criticisms from the left, the approach also is vulnerable to criticisms from the right (that is, from strong advocates of religious liberty). For example, "live and let live" theorists would require vendors to provide services to same-sex couples in communities where no other providers are available, on the ground that in this situation "the merchant's right to moral integrity is outweighed by the same-sex couples' right to live in the community in accordance with their moral commitments."252 Although this position intuitively seems correct, the reasoning offered does not adequately explain why, in a case of inescapable conflict, the religious believer's claim is the one that must give way.

In short, the "live and let live" approach has difficulty explaining which interest should prevail in cases of conflict. But this approach also suffers from a deeper flaw: its basic solution to the conflict between religious traditionalists and LGBT people is to separate the two groups from one another, rather than to explore how they can interact in a positive manner. In this way, "live and let live" turns out to be a sort of "separate but equal" approach, which encourages (though it by no means requires) the two groups to live in separate and distinct spheres with a minimum of interaction. While the approach seeks to "create rules that enable Americans with fundamentally different views of marriage to live in peace and equality

250 See supra text accompanying notes 245–46.
251 See supra Part III.C.
252 Laycock, Afterword, supra note 241, at 199.
in the same society,\textsuperscript{253} that coexistence takes the form of living separately more than living together.

It is also difficult to see what "live and let live" should mean when the state is actively involved. For example, when it provides benefits—such as funding the provision of social services through private agencies, including religious organizations—the state cannot avoid making a judgment as to what rules will best promote justice and the common good. In such cases, the government must determine whether or not to allow participation by agencies that object to serving particular groups, such as Catholic adoption agencies which refuse to place children with same-sex couples. In this situation, "live and let live" theorists contend that such organizations should not be excluded from the public program.\textsuperscript{254} In itself, however, the principle of "live and let live" provides little justification for this result—one could argue with equal force that the principle requires organizations that receive public funding to serve and respect all citizens regardless of whether they hold the same moral or religious beliefs.

Finally, in both of these ways—in its prescriptions regarding the regulation of private conduct as well as the provision of government benefits—the "live and let live" approach deviates from the general position taken by modern civil rights law. As a rule, we do not grant exemptions from the civil rights laws to those whose religious beliefs require them to discriminate on other grounds such as race (or, for the most part, religion). To allow such exemptions for discrimination against LGBT people alone would tend to make them second-class citizens and to accord a measure of legitimacy to the traditionalist position that disapproves of them and regards their relationships as sinful and immoral.\textsuperscript{255}

\textsuperscript{253} Id. at 207.
\textsuperscript{254} See, e.g., Laycock Brief, supra note 149, at 25–26.
\textsuperscript{255} See Curtis, supra note 56.
IV. MUTUAL RECOGNITION AND THE CONFLICT OF IDENTITIES

A. The Basic Idea

Let us recur to the underlying problem. Religious traditionalists and LGBT people make opposing legal claims, and this conflict is ultimately rooted in a clash between their identities and ways of life. The question is whether there is any reasonable way to overcome these conflicts.

In this part, I argue that the best approach is one based on the concept of mutual recognition. On this view, such clashes can be resolved only if those involved recognize one another as full and equal persons and members of the community. In the present case, that means LGBT people should recognize the freedom of traditionalists to hold and live in accord with their own religious beliefs, while traditionalists should recognize LGBT people as full and equal human beings who are entitled to all the rights that go along with this status, including the rights to marry and to form families.256

The following three sections outline the theoretical basis for this view. They show that, while the term mutual recognition first appears in the work of nineteenth century theorists like G.W.F. Hegel,257 the basic idea—that individuals have an obligation to recognize the humanity and rights of others—is central to the whole modern natural rights tradition,258 a tradition which laid the foundations of American constitutionalism.259 Section B explores the work of John Locke, the natural rights theorist who had the most profound influence on America,260 especially in the area of religious liberty and civil rights.261 Sections C and D recount how the idea of recogni-

256 For discussion of these rights, see infra Part V.A.3.a.
257 See infra text accompanying notes 285–95 (discussing Hegel’s theory).
258 For a fuller discussion, see Heyman, Free Speech, supra note 232, at 171–72 (exploring the concept of recognition in the modern natural rights tradition).
260 See id.
A STRUGGLE FOR RECOGNITION

A struggle for recognition was further developed by Immanuel Kant and by Hegel, as well as by recent theorists of group conflict. Section E shows how this idea can illuminate the conflict over religious liberty and same-sex marriage. Finally, Section F discusses the relationship between the mutual recognition theory and the religious traditionalist view, as well as the approaches that we considered in Part III.

B. Freedom, Dignity, and Recognition in Lockean Natural Rights Theory

To ascertain the principles that should govern social and political life, Locke begins by imagining individuals in a state of nature, before the advent of organized society and government.262 According to Locke, every individual is naturally free to act as he likes and to control his own person and property.263 Because individuals are free, they are also equal in the sense that no one is naturally subordinate to anyone else.264

For Locke, the inherent freedom and dignity of the individual are “grounded on his having Reason.”265 Reason enables an individual to form a conception of his own good and to freely direct his actions in pursuit of that good, without encroaching on the liberty of others to do likewise.266

This last point is crucial. Reason, which Locke equates with the law of nature, teaches that other individuals also are free and

263 See id. § 4.
264 See id.
265 Id. § 63; see also JOHN LOCKE, OF THE CONDUCT OF THE UNDERSTANDING § 6 (1706), in SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING 163, 178 (Ruth W. Grant & Nathan Tarcov eds., Hackett 1996); JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 31 (1693), in SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING 1, 25 (Ruth W. Grant & Nathan Tarcov eds., Hackett 1996).
equal.267 It follows that "no one ought to harm another" by violating her rights to life, liberty, or property.268 On the contrary, Locke holds that the law of nature requires individuals not only to preserve themselves but also "to preserve the rest of Mankind" as much as they can.269

As this formulation suggests, Locke does not understand the law of nature and reason merely in negative terms. He describes reason as the "bond" between human beings, a bond that unites them into a single natural community.270 As members of this community, individuals not only should respect the freedom and equality of others, but also should interact with them in positive ways. This is what he means when he characterizes the state of nature as a condition of "Peace, Good Will, Mutual Assistance, and Preservation."271

Locke understands particular political societies in a similar way. The political community is formed through a social contract or "mutual agreement" between persons who regard one another as free and equal.272 By entering into society, individuals obtain not only protection for their rights but also the opportunity to benefit in many other ways "from the labour, assistance, and society of others in the same Community"—a community that is based on mutual "Trust" and "Friendship" among its members.273

In sum, while Locke sees individuals as inherently free, he does not understand this freedom in purely subjective terms, as the liberty to do whatever one likes. That sort of freedom would be self-defeating, for it would provide no security against aggression by others.274 To move beyond this purely subjective view, Locke appeals to the concept of reason. On one hand, reason enables individuals to freely determine their own actions, while on the other hand, reason—and the capacity for language through which it is ex-

268 Id. § 6.
269 Id.
270 Id. §§ 128, 172.
271 Id. § 19.
272 Id. §§ 4, 6, 87–89, 100, 102.
273 Id. §§ 107, 130.
274 See id. § 57.
pressed—enables individuals to form intersubjective relationships with one another, relationships that are founded on mutual recognition and respect. These principles are constitutive of our humanity, for they are what make us into a single natural community. Conversely, if I act in a way that is inconsistent with the freedom and equality of others, I degrade not only their humanity but also my own.

For Locke, one of the most important applications of these ideas involves the relationship between different religious groups. He holds that every individual has a natural and inalienable right to form his own religious beliefs and to associate with others who share them. At the same time, however, Locke maintains that every individual and religious community has a duty to recognize the equal right of others to do the same. When people refuse to acknowledge the rights of others, or when they “arrogate to themselves, and to those of their own sect,” rights that they are not willing to grant to others, the effect is to “undermine the Foundations of Society,” which is based on mutual respect. Of course, this duty of “mutual Toleration” means that no one should inflict “Violence [or] Injury” on others because of their religious beliefs. Again, however, this duty of toleration is not merely a negative one. Instead, Locke holds that, however much people may disagree about religious matters, they ought to treat one another with “charity” and good will in the civil sphere—a principle that he derives not only from “the Gospel” but also from “Reason” and from “that natural Fellowship we are born into.”

275 See id. § 77; Locke, Human Understanding, supra note 266, bk. III, ch. I, § 1, at 402.
277 See John Locke, A Letter Concerning Toleration (1690), in A Letter Concerning Toleration and Other Writings 1, 13–16 (Mark Goldie ed., 2010) [hereinafter Locke, Toleration].
278 See id. at 19–26, 51.
279 Id. at 49–51.
280 Id. at 20.
281 Id.
C. Recognition in Later Natural Rights Theory

The ideas regarding recognition that can be derived from Locke are elaborated and deepened in later natural rights theory. Kant finds a basis for these ideas in the concepts of human dignity and autonomy. According to Kant, humans are autonomous beings who are capable of giving laws to themselves.²⁸² By virtue of this capacity, Kant writes, an individual is a “person” who is “not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, . . . he possesses a dignity (an absolute inner worth) by which he exacts respect for himself” from all other human beings.²⁸³ This duty of respect applies not only in the moral but also in the legal realm, where it forms the basis of the legal duty to act in a way that is consistent with the freedom and rights of others.²⁸⁴

These themes play a key role in the work of Hegel, who develops the concept of recognition more fully than any other natural rights theorist.²⁸⁵ Unlike Locke, Hegel does not conceive of the state of nature as a condition of peace and good will.²⁸⁶ Instead, when two individuals encounter one another in this setting, each may regard the other as a threat to his selfhood.²⁸⁷ This existential confrontation leads to a “fight for recognition” in which each individual seeks to assert his superiority over the other.²⁸⁸ According to Hegel, this strug-

²⁸⁶ See HEGEL, PHILOSOPHY OF MIND, supra note 285, § 432.
²⁸⁷ See id. § 431.
²⁸⁸ Id. §§ 431–32.
gle ultimately can be resolved only when each comes to recognize the other as a free and independent being. Through mutual recognition, the two enter into an intersubjective relationship in which each finds himself in the other, thereby gaining affirmation for his own selfhood while according respect to the other person. In this way, two individuals who initially were "completely rigid and unyielding towards one another" come to see that, as human beings, they have a shared identity, "a single light so to speak." This relationship between individuals gives rise to a common ground or shared standpoint which enables them to reason with one another.

For Hegel, mutual recognition is the foundation of personhood, rights, and the state. Within the state, "man is recognized and treated as a rational being, as free, as a person; and the individual, on his side, makes himself worthy of this recognition" by according the same status to others. In this way, mutual recognition provides the basis for a state that is founded on "rational freedom and ... civic honour." Within the state and the legal order that it establishes, everyone has a basic duty to respect the personhood and rights of others.

D. Mutual Recognition and the Struggle Between Groups

What theorists like Locke, Kant, and Hegel describe on an individual level also can be applied to the relationship between groups. Indeed, as we have seen, Locke applies the concept of mutual recognition or "toleration" to the conflict between religious groups, each of which is inclined to assert that it alone possesses the ultimate

\[\text{289} \text{See id. §§ 431A, 436.}\]
\[\text{290} \text{See id. § 436.}\]
\[\text{291} \text{Id. § 430A.}\]
\[\text{292} \text{See id. §§ 436-39.}\]
\[\text{293} \text{Id. § 432A.}\]
\[\text{294} \text{Id.}\]
\[\text{295} \text{See Hegel, PHILOSOPHY OF RIGHT, supra note 146, § 36 (declaring that the basic principle of right is to "be a person and respect others as persons").}\]
truth and to condemn all others as heretical. As many scholars have pointed out, the concept of recognition also sheds great light on more recent events such as the anti-colonial movement that followed World War II; the civil rights struggles of African-Americans, Latinos, and other groups; and the women’s movement. The same thing is true of the gay rights movement: at its core, it involves a struggle to achieve full recognition of the humanity and rights of LGBT people.

E. Application to the Conflict Between LGBT People and Religious Traditionalists

In this part, I have argued that the liberal natural rights tradition offers a way to overcome conflicts between the identities of different groups. On this view, the ultimate solution lies in mutual recognition: the members of each group must recognize those who belong to the other as full and equal persons and citizens, with all of the rights that this entails.

From this perspective, it becomes clear that the clash between religious traditionalists and LGBT people does not simply involve two groups whose identities happen to conflict with one another. Instead, the root problem is that religious traditionalists define their own identity and way of life to include a commitment to beliefs that condemn the identity and way of life of LGBT people. Traditionalists believe that gay and lesbian sex “is harmful and always wrong.” For this reason, they historically supported anti-sodomy laws which treated those who engaged in same-sex sexual activity as criminals, and which were also used as a rationale for

296 See supra text accompanying notes 277–81.
298 For a valuable account of the gay rights movement, see LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2012).
299 USCCB, Defense of Marriage, supra note 2 (answer to question “How is the love between a husband and a wife irreducibly unique?”).
300 See supra text accompanying notes 91–96, 115.
subjecting gay and lesbian people to discrimination in virtually every area of life, from housing to employment to immigration. After the anti-sodomy laws were struck down in Lawrence, traditionalists often continued to oppose efforts to ban various forms of discrimination against LGBT people. They also strongly opposed the movement to recognize same-sex marriage. In taking these positions, they have asserted that their claims to be free from incidental effects on their religious liberty should prevent the legal system from extending protection to LGBT people for the most important interests in their own lives. Rather than accepting the Supreme Court's decision in Obergefell, many traditionalists have denounced it and vowed to continue the battle against the legalization of same-sex marriage. Because this approach stands little chance of success, the focus of the traditionalists' effort has now shifted to the contention that the legal system should protect their religious liberty by exempting them from an obligation to comply with anti-discrimination laws in jurisdictions that have them.

302 See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (striking down a state constitutional amendment that outlawed existing and future protections against sexual-orientation discrimination). Religious traditionalists often continue to oppose such protections on the ground that they will lead to violations of religious liberty. See, e.g., William L. Spence, Add the Words Hopes Dashed, Lewiston Morning Trib., Jan. 30, 2015 (describing how concerns about religious freedom helped to defeat a recent proposal to adopt such protections in Idaho); Senate Panel Tables Bill Adding Gay Protections to Law, Montana Kaimin, Jan. 30, 2015 (same in Montana). For the most dramatic recent example, see Juan A. Lozano, Houston LGBT Nondiscrimination Ordinance Rejected by Voters, Chron.com (Nov. 3, 2015), http://www.chron.com/news/texas/article/Houston-equal-rights-measure-in-hands-of-voters-6606689.php [http://perma.cc/5Z8U-84E6] (reporting that the Houston Equal Rights Ordinance was defeated in part through the efforts of social conservatives, [who] said it infringed on their religious beliefs regarding homosexuality”).
303 See supra Part II.C.
304 For amicus briefs that opposed same-sex marriage on religious liberty grounds, see Catholic Answers Brief, supra note 164; Major Religious Organizations Brief, supra note 140; USCCB brief, supra note 140.
305 See supra text accompanying notes 9–13.
As this history shows, the extension of legal protections to LGBT people in recent years has led religious traditionalists to shift from a defense of anti-sodomy laws to an opposition to same-sex marriage to a claim for religious liberty. But while their legal positions have evolved, their underlying beliefs about homosexuality have remained more constant.

This is the underlying source of the conflict we are considering. Religious traditionalists believe that homosexual conduct violates the natural order and the law of God, who ordained that sex can properly take place only within marriage, a relationship in which a man and a woman become "one flesh." For this reason, traditionalists regard the way of life followed by LGBT people as illegitimate. To use the language I developed above, traditionalists do not accord full recognition to LGBT people. To be sure, traditionalists do recognize their humanity and rights in many respects. But they deny that LGBT people have one vital human capacity that they themselves possess: the capacity to form a marital bond with another person.

To put the point another way, traditionalists "arrogate to themselves" a right that they are not willing to concede to LGBT people—the ability to marry and thus form one of the deepest and most meaningful relationships that human beings can enter into. In these ways, traditionalists do not recognize LGBT people as full and equal persons who are entitled to all the rights that inhere in this status. This is the ultimate basis of the clash between the two groups.

In response, a critic might say that recognition is a two-way street. What liberal theory calls for is mutual recognition, a condition in which each of the opposing groups recognizes the other. But (the critic would continue) the advocates of LGBT rights deny the legiti-

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306 See supra Part II.A.
307 More precisely, religious traditionalists contend that lesbians and gays can form a marital bond with a person of the opposite sex but not with one of the same sex. Yet by denying that they are capable of forming a marital bond that is consistent with their own sexual orientation, religious traditionalists in effect deny that most lesbian and gay persons have the capacity to form such a bond at all.
308 LOCKE, TOLERATION, supra note 277, at 50–51; see supra text accompanying note 279.
macy of the traditionalists’ identity and way of life just as much as the traditionalists reject those of LGBT people. It follows that one cannot lay primary responsibility for the conflict at the door of the traditionalists. Instead, both sides are equally responsible and must make an effort to accommodate the other’s identity. Now that the law has recognized the right of gays and lesbians to marry, the onus is on them and on the legal system to concede the right of religious traditionalists to live in accord with their own beliefs, which reject the legitimacy of same-sex marriage.

Although this objection may seem persuasive on its face, reflection shows that it is unfounded. The best way to see this point is to briefly look at a more extreme and clear-cut situation in which one group denies recognition to another. Consider the case of white supremacists during the 1960s who regarded black people as an inferior and degraded race that should be subjected to segregation, discrimination, or even violence. In this situation, we hardly would say that white supremacists and black civil rights activists were on a par, with each group improperly denying the other’s legitimacy. Instead, we would say that the conflict arose from the fact that white supremacists defined their identity and way of life in a manner that denied the equal humanity and rights of black people. It is true that a conflict of this sort is best resolved through mutual recognition. But that does not mean that blacks must recognize the legitimacy of the white supremacist identity and way of life. Instead, it means that white supremacists must abandon their commitment to treating black people as inferior and subordinate. Only then is it possible to achieve a state of mutual recognition, in which each group acknowledges the full and equal humanity of the other.

I should emphasize that, in making this comparison, I do not mean to accuse religious traditionalists of the sort of bigotry and hatred that characterizes white supremacy. In particular, I do not suggest that their position is fundamentally motivated by bias or animosity. In many cases, opposition to same-sex marriage stems from a good faith interpretation of religious texts and traditions that the opponents regard as authoritative, as well as from conceptions of
natural law that many people find reasonable. But that is not the
critical point. On the view I am taking, individuals have a duty to rec-
ognize the personhood and rights of others. Although denials of
recognition often stem from irrational hatred or animus, what ulti-
mately counts is not the actor's subjective motivation but rather the
conclusion that, as an objective matter, the position that she is taking
fails to afford appropriate recognition to other people and their
rights.

For the reasons I have given, I believe that this is true of the
position that traditionalists take with regard to the rights of LGBT
people to form relationships and to marry. In this situation, the path
to mutual recognition requires traditionalists to recognize that LGBT
people have these rights. At the same time, LGBT people should also
recognize the identity and way of life of religious traditionalists, but
only insofar as that identity and way of life do not deny recognition to
LGBT people themselves. This account is parallel to what we would
say about the racial example: the conflict can be resolved only if
white supremacists cease to deny recognition to blacks, and if blacks
recognize the identity of whites, but only insofar as that identity is
not based on a denial of recognition to black people.

This discussion allows us to clarify the concept of recognition
by observing that it takes place on more than one level. On the first
and most fundamental level, the concept requires one person to rec-
ognize the basic status and rights of the other—that is, to recognize
her as a full and equal human being and member of the community,
with the rights that flow from this status. On a second level, the con-
cept requires a person to recognize that it is legitimate for another to
embrace a particular identity and way of life, but only insofar as that
identity and way of life are consistent with recognition of the basic
status and rights of all persons. This explains why, in the racial ex-
ample, (1) both blacks and whites have a duty to recognize the oth-
ers as full and equal persons and citizens; but (2) blacks do not have
a duty to regard white supremacy as a legitimate form of identity,

309 See supra Part II.A; see also, e.g., Koppelman, Accommodations, supra note 56,
at 653 (observing that adherence to "longstanding religious traditions that con-
demn same-sex relationships...can't fairly be equated with irrational hatred").
since that identity is defined precisely in opposition to the basic status and rights of black people. By the same token, (1) both LGBT people and religious traditionalists have a duty to recognize the others as full and equal persons and citizens, with all the rights that flow from this status, including the right to marry; and (2) traditionalists have a duty to recognize that it is legitimate for LGBT people to have their own identity and way of life (since they are not inconsistent with the basic status or rights of others), while LGBT people have a duty to recognize that it is legitimate for traditionalists to have their own identity and way of life, except insofar as the latter are inconsistent with the basic status and rights of LGBT people.

Religious traditionalists might say that I am wrong to suggest that they somehow have defined their identity and way of life in terms of denying the morality of homosexuality. Instead, they might stress that Christianity is a rich and deep tradition that focuses on God's love and plan of salvation for the world, while the church's position on homosexuality plays only a minor role in its teaching as a whole. Although I am sympathetic to this point, it highlights the dilemma that traditionalists face. Insofar as they downplay the role that the condemnation of homosexuality plays in their body of beliefs, they also minimize the harm they would suffer if the law required them to respect the rights of same-sex couples. On the other hand, if traditionalists assert—as they often do—that the church's teachings on marriage and sexuality play a central role in their beliefs, then the condemnation of homosexuality does appear to be an integral part of their identity, and they do define that identity in a way that leads them to deny full recognition to LGBT people.

A further objection to the view I have presented would be directed against the very idea of a duty of recognition. It might be said that this duty compels individuals to hold or express a particular view—one that recognizes the humanity and rights of others. In this way, my position violates one of the cardinal principles of liberal theory and American constitutional law: that the state has no authority to control the minds of individuals or to require them to affirm beliefs they do not hold. As the Supreme Court declared in West Vir-
Virginia Board of Education v. Barnette, 310 "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 311

This objection requires us to further clarify what is meant by recognition. In one sense, it does indeed refer to a subjective attitude that acknowledges the full humanity and rights of others. This meaning of recognition has some relevance to the problem under consideration. Social and cultural conflict between groups can be overcome only insofar as they subjectively recognize one another. This form of recognition also can be relevant in situations that do not involve legal coercion. For instance, voters may and should reject candidates for political office who hold racist views, and it is perfectly appropriate for public schools to teach students the values of mutual tolerance and respect. Finally, and above all, it is generally accepted that the state itself should act in a way that recognizes all of its members as full and equal persons and citizens.

At the same time, it is quite true that a liberal state has no authority to coerce individuals to hold or express particular beliefs. Instead, all the state legitimately can do is to require individuals to act in a way that respects the rights of others. That is what the natural rights tradition means when it says that individuals have a legal duty to recognize others. On this view, the state has no authority (or indeed ability) to compel white supremacists to actually believe that black people are equal. But it does have the authority to forbid white supremacists from engaging in external conduct that disrespects black people by violating their rights—for example, by refusing them service at a lunch counter. Likewise, the state has no power to compel religious traditionalists to alter their beliefs regarding homosexuality. But if (as I shall argue) there are some situations in which merchants should have a duty to serve everyone regardless of sexual

310 319 U.S. 624 (1943).
311 Id. at 642.
orientation, then the law does not violate the Barnette principle when it requires them to engage in that external conduct.

F. Conclusion

I have argued in this part that the idea of mutual recognition offers a way to resolve the clash of identities that arises from the advent of gay rights and marriage equality. On this view, both religious traditionalists and LGBT people have a duty to recognize one another as persons and members of the community. It follows that while traditionalists have a right to hold and live out their religious beliefs, they have no right to treat LGBT people in a way that denies their full and equal humanity, including their ability to marry and have families.

The strength of this approach may be seen in the fact that the concept of mutual recognition appears in one form or another in many of the other views we have discussed. This is true even of the religious traditionalist view. Conservative Christians hold that all human beings, regardless of sexual orientation, are created in the image of God; that they are commanded to treat others as they wish to be treated; and that all people, including themselves, are sinners who have fallen short of the glory of God. In these ways, traditionalists see important commonalities between themselves and LGBT people—commonalities which require them to treat LGBT people with "respect and love."

Yet these views do not fully accord with the principle of mutual recognition that I have advocated here. Conservative Christians believe that they themselves have a hope of salvation through faith in Jesus Christ, but that gay and lesbian people can be saved only if they repent and turn away from the only forms of sexual conduct

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312 See infra Part VI.B.
313 See supra text accompanying note 84.
315 See supra text accompanying note 85; Romans 3:23.
316 Southern Baptist Convention, supra note 84.
317 See, e.g., Romans 3:21–26 (maintaining that sinners are justified through faith in Jesus Christ).
and relationships that accord with their orientations. In this way, traditionalists are willing to grant acceptance to LGBT people, but only on the traditionalists' own terms. Although this position accords some recognition to LGBT people, it cannot lead to mutual recognition between the two groups, for it does not provide a basis for the development of mutual understanding and acceptance.

Another version of mutual recognition can be found in the "live and let live" approach, which holds that we should recognize and protect the ability of both religious traditionalists and LGBT people to live out their core identities and beliefs. At times, "live and let live" theorists focus on the role of the state in this regard. In my view, however, it is not enough for the state to accord recognition to both groups. Instead, those groups also must recognize one another if they are to live together in a just and peaceful manner. Only in this way is it possible to either avoid or resolve the steady stream of social and political conflicts between them, including the ones that arise from legalization of same-sex marriage.

At other times, "live and let live" theorists move beyond a focus on the state and instead urge each group to respect the other. For example, Laycock contends that many conflicts could be avoided if each group would simply allow "the other side [to] live its own values," instead of "bitterly resist[ing]" this approach and "seek[ing] to impose its own view of marriage on everybody else." Although this form of the "live and let live" view would require the two groups to recognize one another, the recognition that

318 See, e.g., Carolyn Richards, What Are They Thinking!? Conservative Christians Talk About Homosexuality loc. 444–50 (2015) (ebook) (quoting a conservative Christian as saying that she does "not wish anyone to go to hell," but "that everyone who acts on homosexual attraction will go to hell if they don't repent"); see also id. at loc. 409, 435, 469, 509 (quoting similar statements). The biblical basis of this position may be found in passages such as 1 Corinthians 6:9 (listing the categories of individuals who will not "inherit the kingdom of God").

319 See supra Part III.F.

320 See, e.g., Berg, supra note 56, at 230–31 (contending that the best approach to the problem is to "focus on the state, which presumptively should not deny either same-sex civil marriage or the religious objector's ability to refuse participation in it").

321 Laycock, Afterword, supra note 241, at 192.
it calls for is merely formal: it urges the members of each group to respect the others' right to live out their values within their own separate domains, but it does little to resolve the problems that arise when the two groups interact with one another.\textsuperscript{322} In such situations, what the principle of mutual recognition calls for is not a mere formal acknowledgment that the other group is entitled to its own values, but the substantive recognition that comes about when the members of both groups actually do treat one another as full and equal human beings and members of the community.

V. RELIGIOUS LIBERTY AND CIVIL EQUALITY IN A FRAMEWORK OF RIGHTS

In Part IV, I argued that the concept of mutual recognition offers a promising approach to the dispute over religious liberty and civil rights in relation to same-sex marriage. However, what I have said so far is not sufficient to resolve particular issues, such as whether the law should require those who provide wedding-related services to serve same-sex couples. Issues of this sort involve a conflict between particular rights, such as the providers' right to religious freedom and the couples' right to equal treatment in places of public accommodation. To resolve such a conflict, we need to carefully consider the competing rights. I believe that the best way to do this is to sketch the broader framework of rights to which they belong, and then to situate them within this framework. In this way, we can develop a deeper understanding of the rights involved and avoid the confusions that might arise from a more ad hoc discussion.

In this part, I begin by outlining a framework of basic rights, highlighting the ones that are most at stake here. Second, I explore the relationship between religious liberty and civil rights, as well as the closely connected question of the relationship between church and state. Finally, I discuss the analysis that should apply when the exercise of one right conflicts with that of another. In this way, I hope to develop a general approach that will enable us to address in a

\textsuperscript{322} See supra Part III.F.
principled way the conflicts that arise from the legalization of same-sex marriage.

A. A Framework of Rights

There are many ways to give an account of the basic rights that people have. The view presented here is rooted in the natural rights tradition. As I have noted, this tradition had a deep influence on American constitutionalism. In particular, it is clear that those who adopted the Bill of Rights and the Fourteenth Amendment understood many of the rights that they secured—including the religious liberty protected by the First Amendment and the equality guaranteed by the Fourteenth—in the context of natural rights theory. Although this theory fell into decline after the Civil War, by the mid-twentieth century the fundamental rights tradition began to reassert itself. Decisions like Obergefell fall squarely within this tradition, as do many efforts to defend religious liberty.

For these reasons, we may be able to shed light on the problem of religious liberty and civil rights by viewing them within a broader framework of rights. In developing this framework, I shall draw not only on the classic Lockean thought that was influential during the founding and Reconstruction periods, but also on more recent developments in fundamental rights theory and jurisprudence.

As we saw in Part IV, the fundamental rights tradition is based on a principle of respect for persons. Individuals are entitled to respect because they are self-determining beings who are capable of directing their own actions in accord with reason. By virtue of this capacity, individuals are inherently free and possess an intrinsic dignity or worth. Thus, freedom and dignity provide the

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323 This view is developed more fully in HEYMAN, FREE SPEECH, supra note 232, chs. 3–4.
324 See id. at 11–15, 20–22.
325 See id. at 23–27.
326 See supra Part IV.A–C.
327 See supra text accompanying notes 265–66.
328 See supra text accompanying notes 265, 282–83.
foundation for human rights. The particular rights that we have reflect what it means for a person to enjoy freedom and dignity in different areas of human life. Those areas include: (1) the external world; (2) the internal realm of the self, together with its expression in the world; (3) the social, economic, political, and cultural spheres; and (4) the intellectual and spiritual domain. In this section, I explore the rights that arise in each of these areas. Finally, I explain how the right to equality is inherent in all the rights we have.

1. External Rights

The first category of rights relates to a person's existence as an embodied being in the external world. In this context, respect for his freedom and dignity means that he should be able to exercise control over his own mind and body without unjustified interference by others. More specifically, he should have a right to personal security or freedom from violence; a right to move freely without improper restraint; and a right to acquire, use, and dispose of external things. These are the classic natural rights to life, liberty, and property, which are secured by the Fifth and Fourteenth Amendments against violation by the government,329 and by ordinary state law against violation by private individuals.330

2. Personality Rights

Just as external rights protect our bodies, another category of rights protects our inner selves. This category includes two subsets of rights that are essential for the realization and development of personality. The first is what Justice Kennedy calls the "liberty ... to define and express [one's] identity" through both speech and con-

duct. This liberty enables individuals to act in ways that promote their own values and their conception of the good.

The second subset of personality rights protects against conduct that disregards the integrity and inviolability of the self. Such conduct includes actions that: (1) injure a person’s peace of mind by wrongfully inflicting severe emotional distress; (2) invade her privacy by unreasonably intruding into her inner life or exposing it to public view; (3) grossly violate her personal dignity; or (4) improperly disparage her reputation. These emotional and dignitary injuries are guarded against by tort and sometimes also by criminal law.

3. Social, Economic, Political, and Cultural Rights

Persons are entitled to respect not only as separate individuals, but also as social beings who should be free to form relationships with others and to participate in community life. This notion of social freedom encompasses several sets of rights that are of vital importance for the problem we are considering.

a. The Right to Form Personal and Family Relationships

As the Supreme Court has recognized, the Constitution protects the freedom to associate with others and to form relationships in the personal sphere. In Lawrence, the Court makes clear that this freedom allows adults to form consensual sexual relationships, and that this right may not be denied to LGBT people.

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332 See HEYMAN, FREE SPEECH, supra note 232, at 52–53.
333 See, e.g., id. at 54–59, 144–46, 149–63.
334 See id.
Obergefell holds that the same is true of the right to marry.\textsuperscript{337} In his majority opinion, Justice Kennedy identifies four reasons why marriage is a fundamental right. First, he asserts that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy,"\textsuperscript{338} which protects the freedom to make the deeply "intimate" decisions through which individuals define themselves and "shape [their own] destiny."\textsuperscript{339} Second, the right to marry allows two individuals to form a deep human bond based on mutual commitment.\textsuperscript{340} Third, although this right is not conditioned on having offspring, marriage provides important material and social benefits that can promote the "permanency and stability" of family relationships and thereby safeguard the well-being of children.\textsuperscript{341} Finally, marriage plays a central role in our "legal and social order."\textsuperscript{342} Because Kennedy finds that these four principles apply to same-sex couples no less than to opposite-sex couples, he concludes that there is no valid justification for banning same-sex marriage.\textsuperscript{343}

As Kennedy emphasizes, the right to marry has an important dignitary dimension. The union of a man and a woman has always conferred dignity upon them, and the law must recognize that the same is true of "the bond between two men or two women who seek to marry."\textsuperscript{344} No other result would be consistent with the "just claim" that "gays and lesbians" make to "equal dignity in the eyes of the law."\textsuperscript{345}


\textsuperscript{338} Obergefell, 135 S. Ct. at 2584, 2589.

\textsuperscript{339} Id. at 2599.

\textsuperscript{340} Id. at 2599–600.

\textsuperscript{341} Id. at 2600–01.

\textsuperscript{342} Id. at 2601–02.

\textsuperscript{343} Id. at 2599.

\textsuperscript{344} Id. at 2594, 2599.

\textsuperscript{345} Id. at 2596, 2608.
Just as *dignity* is a key term in the *Obergefell* opinion, so is *recognition*. In Kennedy’s words, “marriage is a keystone of our social order.”346 “For that reason, just as a couple vows to support each other, so does society pledge to support the couple” by offering not only “material benefits” but also “symbolic recognition.”347 Likewise, the law promotes the emotional and material welfare of children “[b]y giving recognition and legal structure to their parents’ relationship.”348 By denying such “recognition,” bans on same-sex marriage “impose stigma” upon and “diminish [the] personhood” of gays and lesbians, and “harm and humiliate” their children by teaching that “their families are somehow lesser.”349

In addition to marriage and sexual relationships, the Court has held that the Constitution also protects other forms of “intimate

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346 Id. at 2601.
347 Id.
348 Id. at 2600.
349 Id. at 2590, 2600–2602; see also id. at 2606 (stating that Tennessee may not deny one of the plaintiffs “the basic dignity of recognizing his New York marriage”).

As the dissenting Justices point out, Locke, like other thinkers of his time, “described marriage as ‘a voluntary compact between man and woman’ centered on ‘its chief end, procreation’ and the ‘nourishment and support’ of children.” Id. at 2613 (Roberts, C.J., dissenting); see also id. at 2636 (Thomas, J., dissenting). This position was consistent with Locke’s general understanding of nature in physical terms and his conception of natural law as directed to “*the preservation of Mankind*.”locke, *Government*, supra note 212, bk. II, § 135. Yet his position also contained elements that were capable of giving rise to a broader view. Locke maintained that marriage involved not merely procreation but also “mutual Support, ... Care, and Affection.” Id. § 78. Contrary to traditional religious and legal doctrine, he intimated that the partners should be free to choose how long their marriages should last. See id. § 81. More broadly, his natural rights theory accorded a central place to individual self-determination and “the pursuit of happiness.” *Locke, Human Understanding*, supra note 266, bk. II, ch. XXI, §§ 41–71; see also supra text accompanying notes 265–66. A commitment to such values has led current liberal thought and jurisprudence to focus less on external rights such as life, liberty, and property and more on the freedom of individuals to realize their personalities, to live in accord with their own values, and to form relationships with others. See, e.g., *Heyman, Free Speech*, supra note 232, at 42–43, 51. As Justice Kennedy explains in *Obergefell*, this conception of freedom provides strong support for a fundamental right to same-sex marriage. *See supra* text accompanying notes 338–43.
association," including the rights to raise and educate children, to live with family members, and to form other deeply personal relationships.\textsuperscript{350} The freedom of association also encompasses the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."\textsuperscript{351}

\textit{b. Economic Liberty and Participation}

The principles of freedom and dignity also apply in the economic sphere. As free persons, individuals have a right to economic liberty as well as a right to participate in the economic life of the community. In this section, I show how this view emerges from Lockean natural rights theory and Anglo-American legal history, and I explore the implications of this view for one of the central issues in this Article: whether individuals have a right to equal access to places of public accommodation without discrimination on the basis of characteristics such as sexual orientation.

The concept of economic liberty plays a vital role in Lockean theory. Because human beings have a right to life, they also have a right to acquire and use material things "for the Support and Comfort of their being."\textsuperscript{352} In this way, they come to possess property in external things.\textsuperscript{353} The duty to respect others includes an injunction to respect what belongs to them, including their property.\textsuperscript{354}

Like all other rights, however, property is insecure in a state of nature.\textsuperscript{355} To escape from this precarious condition, individuals establish a civil society that will protect their rights and allow them to pursue their economic and other well-being in peace and security.\textsuperscript{356} When they enter into the social contract, individuals relinquish some of their natural freedom and agree to obey laws made by the

\textsuperscript{353} \textit{See id.} ch. V.
\textsuperscript{354} \textit{See id.} § 6.
\textsuperscript{355} \textit{See id.} § 123.
\textsuperscript{356} \textit{See id.} § 95.
society for the good of all. At the same time, individuals receive two sorts of benefits in exchange for what they give up. First, they obtain protection under the law for their natural rights to life, liberty, and property. Second, they gain the opportunity to benefit from “the labour, assistance, and society of others” by participating in the economic sphere as well as in the broader life of the community.

This discussion enables us to understand the classical liberal conception of civil rights. The term refers to the rights that individuals are entitled to enjoy as members of civil society. The category of civil rights embraces (1) the natural rights that individuals retain when they enter into civil society, and that attain recognition and protection under the law; and (2) the positive benefits to which they are entitled as members of the society, including the freedom to participate in the economic life of the community.

There is an important connection between this account of civil rights and the concept of equality. Individuals in a state of nature are not only free but also equal, in the sense that they are equally entitled to their natural freedom and rights. When they enter into the social contract, they all stand on the same footing and have an equal claim to the civil rights that belong to members of the society. It follows that all citizens have an equal right to life, liberty, and property; to protection under the law; and to participate in the

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358 See id. § 131.
359 Id. § 130; see also 1 BLACKSTONE, supra note 88, at *125 (explaining that individuals enter into civil society to obtain “the advantages of mutual commerce”).
360 See, e.g., 1 BLACKSTONE, supra note 88, at *129 (stating that the basic rights of individuals under the law consist of (1) “that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience,” as well as (2) “those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals”). Blackstone’s formulation is one antecedent of the term “privileges or immunities” in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64 (1986).
361 See id. GOVERNMENT, supra note 212, bk. II, §§ 4, 6, 54.
362 See id. §§ 22, 59, 142; Heyman, Protection, supra note 145, at 563–65 (discussing the roots of equal protection in Lockean thought).
economic life of the society. The enjoyment of these rights defines what it means for a person to enjoy freedom, equality, and dignity within the sphere of civil society.

On this account, the category of civil rights includes the freedom to engage in several kinds of economic activity, subject to regulation for the common good.\footnote{Although American courts during the early twentieth century acknowledged that economic freedom was subject to regulation for the common good, they often afforded excessive protection to such freedom. See, e.g., Lochner v. New York, 198 U.S. 45, 53–64 (1905) (striking down a maximum-hours law as an unreasonable restriction on economic liberty). By contrast, current constitutional law appropriately recognizes that legislatures have broad authority to regulate economic activity. See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies § 8.2 (5th ed. 2015). I have argued elsewhere that, properly understood, Locke's natural rights theory fully supports the view that economic liberty and property are subject to reasonable regulation for the common good. See Steven J. Heyman, The Conservative-Libertarian Turn in First Amendment Jurisprudence, 117 W. Va. L. Rev. 231, 304–05 (2014).} First, individuals have a right to acquire, possess, use, and dispose of property.\footnote{See, e.g., Locke, Government, supra note 212, bk. II, ch. V; 1 Blackstone, supra note 88, at *138; 2 id. at *2–9.} Second, they have a right to make contracts with others for the exchange of property and services.\footnote{See, e.g., Locke, Government, supra note 212, bk. II, §§ 14, 46, 85, 194; 2 Blackstone, supra note 88, at *9–10.} Third, individuals should be free "to engage in any of the common occupations of life," including those that involve the provision of goods and services to others.\footnote{Meyer v. Nebraska, 262 U.S. 390, 399 (1923).} Fourth, individuals have a right to seek goods and services from those who provide them.

As a general matter, economic liberty gives one a right to freely choose whether or not to enter into contracts with others, including contracts regarding the provision of goods and services. But there are important exceptions to this principle that serve to protect the economic rights of other people. Two of these exceptions are relevant for our purposes.

First, although economic liberty generally gives one a right to decline to enter into a particular transaction, it does not follow that one has a right to categorically refuse to enter into transactions with others on the ground that they belong to an inferior group, or a
group that should not have the same rights as one’s own. Conduct of this sort does not merely deprive the potential buyer of an opportunity to obtain a particular benefit. Instead, it treats that person and other group members as if they lack the capacity and right to enter into economic relations with members of one’s own group. In this way, the refusal to transact can be understood to infringe the other person’s rights to make contracts or acquire property. Even more fundamentally, the refusal denies recognition to the other as a full and equal person and citizen who possesses all the rights that flow from that status. In these ways, the refusal to transact violates the individual’s civil rights.

The Supreme Court has interpreted a major federal civil rights law in a similar vein. After their defeat in the Civil War, many southern states enacted Black Codes that severely restricted the civil rights of African-Americans in an effort to restore slavery in all but name. The Reconstruction Congress responded by adopting the Civil Rights Act of 1866, the first section of which provided that all “citizens, of every race and color,” should have the same rights that white citizens have to personal security; “to inherit, purchase, lease, sell, hold, and convey real and personal property”; and “to make and enforce contracts.” As the Act’s supporters made clear, its goal was to protect the “natural” or “absolute rights of individuals” to life, liberty, and property—rights that were transformed into civil rights within organized society.

The 1866 Act clearly was meant to invalidate state action that denied equal civil rights to blacks. In an important series of decisions, however, the Supreme Court has held that the Act also bans

368 Ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. §§ 1981-1982 (2015)). The statute also protected the equal rights “to sue, be parties, and give evidence, . . . and to full and equal benefit of all laws and proceedings for the security of person and property.” Id.
racial discrimination by private persons. In Jones v. Alfred H. Mayer Co., Justice Potter Stewart reasoned that the right to acquire property "can be impaired as effectively by those who place property on the market as by the State itself." Accordingly, he held that the Act makes it unlawful for homeowners to refuse to sell to African-Americans. Likewise, in Runyon v. McCrary, the Court ruled that a private school that refused to admit black students infringed their parents' rights to make and enforce contracts. In these decisions, the Court also determined that Congress has the constitutional authority to ban such private conduct by virtue of the Thirteenth Amendment. As the Justices explained, that Amendment not only ended slavery but also empowered Congress to abolish "the badges and incidents of slavery"—that is, "its 'burdens and disabilities'"—by securing to all citizens "those fundamental rights which are the essence of civil freedom."

These decisions are consonant with the position I am defending in this section: that as a matter of principle, it is wrongful to refuse to enter into economic relations with the members of a group on the ground that they are inferior or should not have the same rights that you do. This is the first exception to the general principle that the right to economic liberty permits one to freely choose whether or not to deal with others.

The second exception relates to what our law has come to call public accommodations. On the theory of rights I am presenting, some goods, services, facilities, and accommodations ("goods") are appropriately regarded as public in the sense that they should be accessible to all members of the community. A provider of such goods is obligated to serve all persons on an equal basis and may not arbi-

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371 Id. at 420–21 (internal quotation marks and citation omitted).
372 Id. at 412–13.
374 Id. at 172–75.
375 See Jones, 392 U.S. at 439–44; see also Runyon, 427 U.S. at 179 (following Jones).
376 Jones, 392 U.S. at 440–41 (quoting The Civil Rights Cases, 109 U.S. 3, 22 (1883)).
trarily refuse to serve a particular individual. Such a refusal violates the individual's right of full and equal access to the good in question. Moreover, if the refusal is made on the ground that the individual belongs to an inferior group, or a group that should not have the same rights as one's own, the refusal also infringes that individual's right to equal participation in the economic life of the community. Most profoundly, such a refusal violates the person's right to be recognized and treated as an equal member of society.

The principle that some goods should be accessible to all has long been recognized in Anglo-American law. As Blackstone explained, under the common law:

[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller.377

Similarly, common carriers were liable at common law if they refused without just cause to accommodate a passenger or to accept goods for shipment.378

These rules were widely accepted in antebellum America.379 But they faced a crisis during the Reconstruction era, when blacks invoked them to challenge their exclusion from inns, public conveyances, and other places.380 In 1875, Congress adopted a new Civil Rights Act which provided that all persons in the United States "shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," free

377 3 BLACKSTONE, supra note 88, at *166 (footnote omitted).
380 See id. at 1348–49.
from discrimination on the basis of race, color, or previous condition of servitude. The Act's sponsor, Senator Charles Sumner of Massachusetts, explained that its goal was to implement the "great principle of equality" enshrined in the Declaration of Independence, as well as to prevent "[the] indignity, [the] insult, and [the] wrong" that blacks suffered when they were excluded from such places.

Eight years later, the Supreme Court invalidated the 1875 Act in *The Civil Rights Cases*. In his majority opinion, Justice Joseph Bradley assumed for purposes of argument that equal access to such places was "one of the essential rights" that belonged to all citizens. But he insisted that, even after the adoption of the Reconstruction Amendments, primary responsibility for enforcing this right remained with the states, and that Congress had constitutional power to act only when states failed to discharge that responsibility. In a powerful dissent, Justice John Marshall Harlan maintained that Congress did have the authority to ban racial discrimination in public accommodations, both as a "badge[] of slavery" under the Thirteenth Amendment and as a violation of the rights of equal citizenship guaranteed by the Fourteenth Amendment.

Although *The Civil Rights Cases* blocked federal action in this area, during the late nineteenth century many states enacted statutes, or applied their common law, to uphold the right of blacks to equal access to public accommodations. Today, all but a handful of

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381 An Act to Protect All Citizens in Their Civil and Legal Rights, ch. 114, § 1, 18 Stat. 335, 336 (1875).
382 See Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 62–64 (2011) (quoting 14 CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 375–76, 361 (1883)). Similarly, the Act's preamble indicated that its aim was to "recognize" and give force to the "great fundamental principle[]" of "the equality of all men before the law." 18 Stat. at 335.
383 109 U.S. 3 (1883).
384 Id. at 19, 24; see also id. at 14, 21–22, 24–25 (recognizing that state laws that deny blacks equal access to public accommodations arguably violate the Fourteenth Amendment).
385 See id. at 10–11, 13–14, 18–19.
386 Id. at 35, 43, 56, 59 (Harlan, J., dissenting).
states have adopted such laws. Moreover, in the mid-twentieth century, Congress passed a new public accommodations law, Title II of the Civil Rights Act of 1964. This statute was promptly upheld by the Supreme Court under its broad, post-New Deal understanding of the federal government’s power to regulate interstate commerce. At the same time, the Justices observed that “the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'”

In these ways, contemporary American law supports my contention that, as a matter of principle, there are some goods that should be available to all individuals on an equal basis. The scope of this doctrine depends on both (1) what constitutes a public accommodation, and (2) what constitutes prohibited grounds of discrimination.

It is often thought that the common law rule of equal access applied only to inns and common carriers, and that it was based on considerations such as necessity, local monopoly, or government licensing. As Joseph William Singer has argued, however, there is good reason to believe that the traditional common law took a broader view, and that the rule applied to many sorts of “common employments,” on the ground that those who performed them held themselves out as providing goods or services to the general pub-

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392 See Singer, No Right to Exclude, supra note 378, at 1291–92.
Singer suggests that during the late nineteenth century, the legal concept of public accommodations was narrowed in response to African-Americans' claims to equal treatment. In any event, the concept has expanded considerably since that time, and state public accommodation laws now commonly cover a wide range of establishments including "hotels, restaurants, transport facilities, places of entertainment, retail stores, lodgings, and state facilities."

The law's current position on the scope of the public accommodations doctrine is an appropriate one. As the passage quoted from Blackstone suggests, when providers hold themselves out as open to business with the public, it is reasonable to regard them as assuming a duty to serve all persons without arbitrary discrimination. Moreover, from a social contract perspective, this is a duty that reasonably can be imposed on business owners in return for the positive benefits that they themselves receive from the society and the government.

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393 Id. at 1303–31.
394 See id. at 1390–1412.
396 See supra text accompanying note 377; Singer, No Right to Exclude, supra note 378, at 1457–58.
397 A powerful contemporary articulation of the social contract view may be found in a speech given by Elizabeth Warren when she successfully ran for the U.S. Senate in 2012. See Steve Benen, "The Underlying Social Contract," WASH. MONTHLY: POL. ANIMAL (Sept. 21, 2011, 1:45 PM), http://www.washingtonmonthly.com/political-animal/2011_09/the_underlying_social_contract032342.php [http://perma.cc/SYX5-TZJH] (quoting speech of Elizabeth Warren). As Warren explains, when an individual builds a prosperous business, her success derives not only from her own efforts but also from her ability to hire educated workers, to use public roads and infrastructure, and to rely on public services like police and fire departments, all of which are paid for by the community in gen-
To put the point another way, commercial dealings have a dual nature. On one level, they involve private interactions between the parties involved. But on another level, they involve a form of social interaction between the parties, which takes place within a larger social order. The public accommodations doctrine can be understood as a reasonable effort to determine which dimension is more salient in a particular context—the private or the social. Individuals and businesses that do not offer to serve the public fall on the private side of the line. For the most part, they are entitled to choose whom to interact with, and they do no wrong to others merely by declining to do business with them.

By contrast, an enterprise that offers to serve the public becomes part of the social realm of commerce. Such an enterprise properly can be regarded as a place of public accommodation with a duty to serve everyone. When such a business denies service to individuals on an invidious basis, its conduct has the effect of improperly excluding them from "a sphere of social life to which everyone should have access." In addition to the material harm that this

eral. See id. On these grounds, Warren argues that "the underlying social contract" obligates the business owner to pay taxes in return for the positive benefits she receives from the society. Id. Similar considerations show that the law is justified in treating a wide variety of commercial businesses including retail stores as public accommodations. Because they rely on public services that are paid for by all of society's members, such businesses reasonably can be required to supply their goods and services to all without invidious discrimination.

For these reasons, I disagree with those "live and let live" theorists who object to what they see as "a concerted effort to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others." Wilson, Matters of Conscience, supra note 240, at 80; see also Laycock, Afterword, supra note 241, at 192 (endorsing Wilson's objection). From a social contract perspective, those who operate public accommodations should have a positive duty to afford equal access to all members of society, and the latter should have a positive right to such access.

For a systematic account of the dual nature of interactions within civil society, see Hegel, Philosophy of Right, supra note 146, §§ 189–208.

As we have seen, however, even such individuals and businesses properly can be forbidden to refuse to interact with others when this amounts to denying their capacity or right to contract. See supra text following note 366.

Singer, No Right to Exclude, supra note 378, at 1476.
conduct may cause, it also inflicts dignitary injury by treating them as though they were not "equal members of the community."  

At the same time, such refusals injure the social realm of commerce itself by carving out "no-go zones" where particular groups are not welcome. Of course, these injuries to individuals and society will be magnified if many enterprises refuse to interact with particular groups. But every denial of service on invidious grounds is wrongful, for it violates the principle of justice that should govern this social sphere: respect for the basic civil right that individuals have to participate on equal terms in the economic life of the society.

The second issue that arises in defining the scope of the public accommodations doctrine concerns the grounds on which discrimination should be forbidden. While Title II of the 1964 Civil Rights Act is limited to discrimination based on race, religion, and national origin, state and local laws generally go further and ban many other forms of discrimination. About twenty states, as well as numerous localities, recognize that individuals should be protected against discrimination because of their sexual orientation or gender identity.

\[c. \text{Rights of Citizenship and Political Participation}\]

Among the most important rights that individuals possess as members of the community are the ones they have in the political sphere. In addition to voting rights, this category includes the First Amendment freedom to take part in political discourse.

Like the other rights we have discussed, political rights have an important dignitary dimension. As Kant observes, "no man in a

\[\text{Bell v. Maryland, 378 U.S. 226, 311 (1964) (Goldberg, J., concurring).}\]

\[\text{See supra text accompanying notes 359–66.}\]


\[\text{See Singer, No Right to Exclude, supra note 378, at 1495–97; Lerman & Sanderson, supra note 395, at 260–72.}\]

state can be without any dignity, since he at least has the dignity of a citizen. In accord with this principle, individuals reasonably can insist that both the state and their fellow citizens should recognize and treat them as full and equal members of the political community.

d. The Right to Cultural Participation

Finally, in addition to social, economic, and political rights, community members have cultural rights. In particular, they have a right to form their own particular cultural worlds, such as the ones that religious traditionalists have developed, as well as a right "to participate in the building of the whole culture." 

4. Intellectual and Spiritual Rights

At the foundation of the liberal theory of rights is respect for the individual as a "rational Creature." It is by means of thought and expression that an individual is able to assert control over her own body and actions; to formulate and act in accord with her own values and conception of the good; and to take part in social, economic, political, and cultural life. Above all, thought or consciousness lies at the core of the self. For these reasons, the liberal tradition regards freedom of thought and expression as inviolable rights.

The same is true of freedom of religious, spiritual, and other forms of belief. Through such belief, an individual orients herself toward what she regards as the ultimate reality and source of meaning in the world. Beliefs of this sort are capable of shaping the self at its deepest level, and of infusing value and meaning into a person's life and actions. It follows that, like freedom of thought and expression, this form of freedom is also inviolable—a principle that is en-

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406 See KANT, METAPHYSICS OF MORALS, supra note 283 at *329-30.
408 LOCKE, HUMAN UNDERSTANDING, supra note 266, bk. IV, ch. XVII, § 24, at 687-88; see also LOCKE, GOVERNMENT, supra note 212, bk. II, §§ 12, 91, 98, 124, 131, 163-64, 230.
409 See HEYMAN, FREE SPEECH, supra note 232, at 8-9, 64-67.
410 See, e.g., Berg, supra note 56, at 215-16.

5. Equality Rights

In the classical liberal tradition, freedom and equality can be understood as two sides of the same coin: because all individuals are naturally free, they are also equal to one another.\footnote{See LOCKE, GOVERNMENT, supra note 212, bk. II, § 4.} In negative terms, equality means freedom from "Subordination" to others, while in positive terms, it means the "equal Right" that individuals have to their "Natural Freedom"—a right that within civil society becomes a right to equal protection under the law.\footnote{Id. §§ 4, 54.}

In a broad sense, then, equality is a right in itself. In another sense, equality is inherent in all the rights discussed in this part. Thus, individuals have equal rights to life, liberty, and property; to personality; to social, economic, political, and cultural freedom; and to intellectual and spiritual liberty.

B. Religious Liberty, Civil Equality, and the Relationship Between Church and State

Up to this point, I have been describing freedom of religion as one right among many. But there is also something special about religion. The liberal tradition draws a basic distinction between the civil and religious realms. As Locke explains, civil society is concerned with our interests in this world, while religion is ultimately concerned with our spiritual interests, and especially with our interest in eternal salvation.\footnote{See LOCKE, TOLERATION, supra note 277, at 12–16, 45–48.}
It may seem that, on this view, the civil realm is less important or valuable than the religious realm, and that the former should be subordinate to the latter. But the liberal view holds that the two domains are separate and that each has its own validity. On one hand, this means that the state must respect the freedom of individuals to form their own religious beliefs and communities, and that it may not invade the religious sphere by dictating what people must believe or how they must worship. On the other hand, the state is a distinct realm that is governed by its own principles, and it should not be dominated by any religious group or doctrine.

That is not to say that religious beliefs have no place in public discourse. Religious believers have the same right that others do to participate in public discussion. Moreover, public discussion would be impoverished if it did not include the whole range of beliefs that are held by citizens. Indeed, there are occasions, as with the antislavery and civil rights movements, when religious perspectives may play a crucial role in calling on the political community to reform itself.

At the same time, the liberal tradition insists that an argument or doctrine can be adopted in the civil realm only if it is capable of being reasonably accepted by citizens in general, and not simply by those who belong to a particular faith. This principle is another consequence of the idea that civil society is founded on mutual recognition. When individuals recognize one another, they transcend their exclusively subjective points of view and come to an intersubjective condition in which they can engage in reasoned discussion about the precepts that should govern their common life. Religious insights and perspectives can make invaluable contributions to this discussion, but they cannot appropriately form the basis of a law unless they are capable in principle of being accepted even by those who do not share the particular religious outlook from which they derive. Otherwise, from the standpoint of nonbelievers, they are merely the subjective or private beliefs of a particular group, rather than principles that properly can receive public acceptance.

415 See, e.g., JOHN RAWLS, POLITICAL LIBERALISM lecture VI (1993).
C. Conflicts of Rights

So far, this part has situated civil equality and religious liberty within a broader framework of rights and has also sketched the relationship between religion and the state. Now let us set out some general principles for resolving conflicts of rights.

For the liberal tradition, the most basic principle is that one must use one's own liberty in a way that respects the equal liberty of others. This means that one generally has no right to act in a manner that infringes the rights of other people.\footnote{416}{See supra Part IV.B.}

This principle applies to religious liberty no less than to other forms of freedom. As a general rule, the right to religious liberty does not authorize an individual to violate the civil rights of others. This principle has a central place in Locke's \textit{Letter Concerning Toleration},\footnote{417}{See \textit{LOCKE, TOLERATION}, supra note 277, at 19–20, 23, 39.} and it was widely accepted during the period when the First Amendment was adopted.\footnote{418}{See Michael W. McConnell, \textit{The Origins and Historical Understanding of Free Exercise of Religion}, 103 HARV. L. REV. 1409, 1464 (1990) (explaining that the accepted view was that religious liberty gave "a believer ... no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side").}

Indeed, Locke appears to hold that the right to religious liberty never entitles one to an exemption from a valid civil law. According to Locke, religious believers and churches should be allowed to do all "things [that] are left free by Law in the common occasions of Life," such as eating bread, drinking wine, or washing with water.\footnote{419}{\textit{LOCKE, TOLERATION}, supra note 277, at 57.} But they should not be permitted to do anything that is "not lawful in the ordinary course of life," such as "sacrific[ing] Infants."\footnote{420}{Id. at 37.} Only in this way is it possible to give effect to the fundamental principle that every person should \textit{enjoy the same Rights that are granted to others}.\footnote{421}{Id. at 57.}
In this regard, Locke’s position closely resembles the one that was adopted by the majority in Employment Division v. Smith, \(^{422}\) which held that the right to free exercise does not excuse an individual from complying with “a valid and neutral law of general applicability.” \(^{423}\) This position may have made sense within the state that Locke envisioned—a minimal state whose functions focused on the protection of life, liberty, and property. \(^{424}\) In such a state, acts that violated the law usually would also injure other people.

By contrast, the Locke-Smith position may be too restrictive under modern conditions, in which the state regulates private life in ways that go far beyond anything that Locke anticipated. Under these conditions, even a general and neutral law, such as the peyote ban in Smith, may impose serious burdens on religious minorities. \(^{425}\) In cases like this, which pit the individual’s right to religious liberty against the broad government interest in promoting the general welfare, it may be reasonable to hold that such liberty should be protected except when it conflicts with a compelling government interest. \(^{426}\) As I have argued, however, this strong presumption is not appropriate in cases that involve individual rights on both sides. \(^{427}\) In such cases, we should follow the position that has long been taken in the liberal tradition: as a general rule, one has no right to use one’s religious or other liberty in a way that infringes the rights of others. \(^{428}\)


\(^{423}\) Id. at 879 (internal quotation marks and citation omitted). Indeed, Locke’s position may be even stricter than that taken in Smith, since he seems to believe that it would be inappropriate for legislatures to grant religious exemptions, a course of action that Smith permits, see id. at 890.

\(^{424}\) See Locke, Toleration, supra note 277, at 12.

\(^{425}\) See Smith, 494 U.S. at 902–03 (O’Connor, J., concurring in judgment).

\(^{426}\) See supra text following note 227.

\(^{427}\) See supra text following note 228.

\(^{428}\) For some contemporary restatements of this position, see Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2790–91 (2014) (Ginsburg, J., dissenting) (asserting that “with respect to free exercise claims no less than free speech claims, ‘[y]our right to swing your arms ends just where the other man’s nose begins’”) (quoting Zechariah Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919)); Hamilton, supra note 228, at 16, 242–43, 300–01, 312–
At the same time, it is important to recognize that some situations involve a genuine conflict between rights. Conflicts like this can be resolved either by adjusting the boundaries between the conflicting rights or by allowing one right to trump the other. In either case, a similar analysis applies.429

The first and most obvious method of resolving conflicts is to balance the competing rights. This balancing process takes account of the value of each right under the circumstances as well as the extent to which it would be impaired if it were not upheld. The process also considers whether there are any alternatives that would avoid or mitigate the conflict. In addition to such balancing, the law may consider whether there is any internal relationship between the two rights, as well as what resolution is most consistent with the overall scheme of liberty and the framework of rights developed above. Ultimately, the question is what resolution would best accord with the principle that underlies all rights: respect for human freedom and dignity. This is the principle that emerged from our exploration of the concept of mutual recognition—the notion that individuals should recognize one another as free persons of intrinsic worth. This is a principle that applies not only to individuals themselves but also to the political community that they establish. This principle enables the process of resolving conflicting rights to be a reasoned and coherent one, rather than merely an ad hoc choice between competing values.

To illustrate how this process works, consider the case of an individual who is hiking in the mountains and is suddenly caught in a dangerous storm. Both tort and criminal law permit the hiker to in-

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13, 320 (maintaining that the right to religious liberty does not allow one "to inflict significant harm against others"); Letter from Katherine Franke et al. to Rep. Ed DeLaney, Indiana House of Representatives at 2–4 (Feb. 27, 2015), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf [https://perma.cc/HX92-LHCD] (contending that a "longstanding constitutional principle has held that neither the government nor the law may accommodate religious belief by lifting burdens on religious actors if doing so shifts those burdens to third parties").

429 For a fuller discussion of this approach to conflicts of rights, see HEYMAN, FREE SPEECH, supra note 232, at 69–80.
vade the property rights of another in order to save his own life, say by breaking into an unoccupied cabin and eating the food he finds there.\footnote{See, e.g., Ploof v. Putnam, 71 A. 188 (Vt. 1908); Model Penal Code § 3.02 (1962).} Under the approach to conflicts of rights that I have sketched, this is clearly the correct result. From a balancing perspective, if the hiker is not permitted to break into the cabin, he will suffer a total loss of his right to life, which is the most valuable of all rights. By contrast, if he is allowed to break in, the cabin owner will merely suffer a partial impairment of her right to property, which is a less valuable right.\footnote{See Hegel, Philosophy of Right, supra note 146, § 127.} It follows that in this situation the right to life should prevail. The same outcome emerges when we consider the internal relationship between the two rights, for the right to life provides a basis for property rights. Likewise, when we look to the scheme of rights as a whole, it clearly would make no sense to sacrifice the right to life—a right that lies at the foundation of the entire edifice—to protect the right to property.

Finally, this is the result that best conforms to the basic principle of respect for human freedom and dignity. To put the point in terms of mutual recognition, I have an obligation to regard others in the same way I regard myself, that is, as a free person of intrinsic worth. Just as I would view my life as having incomparably higher value than mere property, and would not hesitate to sacrifice my property to save my own life, so I must acknowledge that the life of another person has the same paramount value and that it should be preserved in a situation where it unavoidably comes into conflict with the preservation of my property.

In this way, the concepts of mutual recognition and respect for persons sometimes allow one right to trump another. At the same time, however, these concepts also impose important deontological constraints on the situations in which this can occur. In particular, these concepts dictate that one is never entitled to be excused for infringing the right of another person simply because one does not recognize that person or her rights. Thus, while the hiker may have a right to break into another’s cabin to save his own life, a Klansman
who burns down a house may not defend his conduct on the ground that he does not recognize the right of the homeowner, as a racial minority, to live in the neighborhood. As we shall see, this constraint and others like it have important implications for the problem of religious liberty and same-sex marriage.  

VI. APPLICATIONS

Part V outlined a framework of basic rights and offered an approach to resolving conflicts between them. With this background, we are now in a position to explore the clash between religious liberty and civil rights in relation to same-sex marriage. To focus the issues, I want to begin by marking out the boundaries of agreement and disagreement. To this end, I shall start with some cases in which almost everyone would agree, and then move on to the hard case presented by wedding-service providers.

A. Easy Cases

1. For Protecting Religious Liberty

Of course, religious traditionalists are free to form their own families as they wish. This is a fundamental right in itself, and it is also supported by other rights such as individual autonomy, privacy, and religious freedom. This point is so obvious that it might go without saying, except for the fact that this right was denied for so

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432 See infra text accompanying notes 440–45, 456–90.
433 This freedom is subject to reasonable limits, such as the laws that bar marriage between individuals who are closely related by blood. In the aftermath of Obergefell, there has been some debate about whether polygamous relationships should also receive legal recognition. See, e.g., Sarah Pulliam Bailey, Is Polygamy Next in the Marriage Debate?, WASH. POST (July 10, 2015), http://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/10/heres-why-people-are-arguing-over-whether-polygamy-is-the-next-gay-marriage-debate/ [http://perma.cc/VU8D-Q5T4].
434 See supra Parts V.A.2, V.A.3.a, V.A.4.
long to same-sex couples, first by anti-sodomy laws and then by bans on same-sex marriage.

Although traditionalists rarely assert that the advent of marriage equality will directly interfere with their ability to form their own families, they often express the fear that the law will force pastors to officiate at same-sex weddings. This fear is wholly unfounded, for the principle of religious liberty bars the government from either compelling or forbidding people to perform religious acts as such. Thus, even under Smith, the government would violate the Free Exercise Clause if it ordered pastors to perform such ceremonies. By the same token, churches cannot be coerced to alter their doctrinal opposition to same-sex marriage. As Justice Kennedy reaffirms in Obergefell, the First Amendment also guarantees traditionalists the freedoms to teach and advocate for their beliefs. Finally, churches generally should not be required to allow their property to be used for same-sex weddings or receptions.

2. For Protecting Civil Rights

At the opposite extreme, the clearest case for protecting civil rights would be one in which religious believers actively sought to interfere with a same-sex wedding ceremony. Although to my knowledge no such incident has yet occurred, we can learn a good deal from considering such a case. Suppose that a group of people

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435 See, e.g., Casey Harper, Pastors: We Don’t Have to Obey the Supreme Court on Gay Marriage, DAILY CALLER (June 10, 2015), http://dailycaller.com/2015/06/10/pastors-we-dont-have-to-obey-supreme-court-on-gay-marriage/ [http://perma.cc/2QV5-ZDQT].
436 See LOCKE, TOLERATION, supra note 277, at 33–38.
437 See Employment Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 877–78 (1990). At the oral argument in Obergefell, Justice Scalia insisted that if the Court found a constitutional right to same-sex marriage, “a minister who is authorized by the State to conduct marriage [could not] decline to marry two men.” Transcript, supra note 168, at 23–27. As Justices Elena Kagan and Stephen G. Breyer explained, however, this result clearly would be precluded by the Free Exercise Clause. See id. at 26–27.
438 See Smith, 494 U.S. at 877.
who believe that same-sex marriage is deeply sinful and immoral, and that they have a religious duty to protest against and prevent such unions from taking place, seeks to blockade the entrance to a venue in which a same-sex civil wedding is to be performed. Intuitively, it seems clear that any claim that the group’s conduct is protected by religious liberty should fail.

At first blush, it might seem that we could clearly reach this result through a straightforward balancing approach. In this situation, the group has infringed not only the couple’s right to marry, but also their rights to liberty of movement, to formulate and act in accord with their own values, and to enjoy personal dignity, as well as their freedom from unwarranted infliction of emotional distress. Yet the group’s members can also point to several rights that would be impaired if they were not allowed to blockade the venue, including their own liberty of movement and freedom to formulate and act on their values. Above all, they could argue that the law would interfere with their religious liberty if it prevented them from obstructing the wedding. In the end, we might conclude that the balance favored the same-sex couple in this situation. Yet the case could hardly be described as an easy one. This suggests that a balancing approach does not fully capture our intuitions in this situation.

This point becomes even clearer if we modify the hypothetical. Suppose that, instead of attempting to prevent the wedding, the group simply wished to demonstrate against it by blocking access for a symbolic period of ten minutes. In this instance, it is by no means clear that the group would lose under a balancing approach. Instead, that approach might endeavor to reconcile the competing interests by allowing the group to stage its brief protest, after which the couple could proceed with the wedding as planned. In my view, howev-

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441 See supra Part V.A.1–2.

442 See id.

443 See supra Part V.A.4.
er, this is clearly the wrong result. Instead, I believe that we would, and should, say that the group has no right to obstruct the wedding even for a few minutes.

Two important lessons emerge from this discussion. The first is that the force of religious liberty claims in this area derives almost entirely from the idea that individuals should be free to follow their beliefs in their own lives, and not from any notion that they should be allowed to interfere with other people’s ability to do so. In this way, the concept of religious liberty seems to parallel the Millian principle that liberty should be protected in the sphere of self-regarding action, but not when one person’s conduct infringes the legitimate claims of others.\textsuperscript{444}

Second, what makes the hypothetical an easy case is the sort of deontological principle that I discussed earlier\textsuperscript{445}—in this case, the principle that one may not use one’s religious liberty to actively interfere with the civil rights of others. In this way, the hypothetical shows the critical role that such constraints play in an appropriate analysis. On the other hand, a general balancing approach would regard this as a hard case, and in some instances might not even reach the correct result.

\textbf{B. A Hard Case: Wedding Services}

In contrast to the easy cases just discussed, the problem of wedding-service providers has generated a great deal of academic and popular controversy.\textsuperscript{446} The problem arises when the owner of a florist shop, bakery, photography studio, or other business declines on religious grounds to provide services in connection with a same-sex wedding. On its face, the owner’s refusal to provide the same-sex couple with the same services that he would provide an opposite-sex couple appears to be unlawful in a state or locality whose civil rights


\textsuperscript{445} See \textit{supra} Part V.C.

\textsuperscript{446} See \textit{supra} note 56.
law bans discrimination based on sexual orientation. The question is whether applying the law in this way would violate the owner’s religious liberty. I begin by addressing this question as a matter of principle, and then discuss how it should be resolved as a doctrinal or a political matter.

1. As a Matter of Principle

a. The General Argument for a Religious Exemption

For purposes of discussion, let us focus on a hypothetical case involving a florist. The florist contends that if the law were to require her to do the flowers for a same-sex wedding, she would be compelled to participate in or facilitate the celebration of a relationship that she believes to be profoundly immoral and sinful because it violates the law of God. In this way, she would be forced either to perform an action that violated her deeply held religious beliefs or to give up her florist shop. In terms of the framework of rights I laid out in Part V, such compulsion would violate not only her religious freedom, but also her freedom to live in accord with her own values and to follow her own business or profession. On these grounds, she argues that the law should exempt her from an obligation to comply with the civil rights statute in this situation.

Although the florist’s argument is a powerful one, there are also weighty considerations on the other side. By refusing to serve same-sex couples, the florist subjects them to precisely the kind of discrimination that the civil rights laws aim to prevent. In addition to any economic loss that may result, this discrimination may also impact the personality rights of the same-sex partners by subjecting

them to emotional distress, infringing their personal dignity, and interfering with their freedom to follow their own values. The denial of service also makes it more difficult for them to exercise their fundamental right to marry. Finally, if the wedding is a religious one, the refusal makes it harder for them to live out their own religious beliefs.

As this discussion shows, important values are at stake on both sides. This makes the case a very hard one, at least if one approaches it in terms of straightforward balancing.

The theory that I have presented allows us to cut through many of the difficulties presented. That theory holds that society is founded on mutual recognition, which makes it possible for people to live together in a just and peaceful way. Everyone has a duty to recognize others as full and equal persons and citizens with all the rights that inhere in this status. A vital corollary is that one has no right to be excused from this duty merely because one does not believe that another individual is entitled to this status or to the rights that derive from it.

This approach offers a solution to the florist problem. American law holds that individuals have a basic civil right to equal treatment in places of public accommodation. In light of the Supreme

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450 A dramatic example may be found in the Sweetcakes case, in which Aaron Klein, one of the bakery's owners, not only declined to make a wedding cake for Rachel Bowman-Cryer's same-sex wedding, but also explained his position to her mother by quoting Leviticus in a way that implied that the lifestyle followed by Bowman-Cryer and/or her gay brother was "an abomination" to God. Sweetcakes, supra note 54, at 5–6 (quoting Leviticus 18:22). Bowman-Cryer, who had been "raised as a Southern Baptist," testified that this conduct caused her to suffer deep shame and humiliation and to feel "as if God had made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven." Id. at 6.

451 See supra text accompanying note 333.

452 See supra Part V.A.2.

453 See supra Part V.A.3.a.

454 See supra Part V.A.4.

455 See supra Part IV.A.

456 See supra Part IV.A–C.

457 See supra text accompanying note 432.

458 See supra Part V.A.3.b.
Court’s decisions from Romer through Obergefell, this right should belong to LGBT people in the same way it does to other groups. In the case we are supposing, the applicable state or local law does ban discrimination against LGBT people. In this way, the law protects their right to participate on an equal basis in the economic sphere, as well as their fundamental claim “to be treated as equal members of the community.” For these reasons, business owners should have a legal duty to serve all customers without regard to their sexual orientation.

In response, the florist might say that although this may be true in general, the law should grant her an exemption in this instance, for her conscience does not allow her to provide services for same-sex weddings. The crucial problem with this argument emerges when we consider the grounds of her position. The florist contends that, where wedding-related services are at issue, she should not have a legal duty to act in a way that respects the same-sex couples’ right to equal treatment in public accommodations, for she believes as a matter of religious conviction that they should have no right to get married. Thus, the florist’s claim to a religious exemption from the civil rights law is premised on her denial that LGBT people have a fundamental right to marry—a right that flows from their

459 See supra text accompanying notes 116–38.
460 See Part V.A.3.b.
462 Just as the refusal to serve African-Americans can be regarded as a badge or relic of slavery, see supra text accompanying notes 376, 386, the refusal to serve LGBT persons may be seen as a badge or relic of the traditional legal regime that criminalized sodomy and subjected them to far-reaching discrimination. See supra text accompanying notes 91–96, 300–01.
463 In Arlene’s Flowers, for example, the florist asserted that, “as part of the Southern Baptist tradition,” she “is compelled to follow Resolutions of the Southern Baptist Convention,” which include “an explicit rejection of same-sex marriage as a civil right.” State v. Arlene’s Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *6 (Wash. Super. Ct. Feb. 18, 2015). Of course, the refusal of county clerks to issue marriage licenses to same-sex couples is also clearly based on a rejection of their right to marry. See, e.g., Emergency Application to Stay Preliminary Injunction Pending Appeal, Davis v. Miller, No. 15A250, at 1, 5 (U.S. Aug. 31, 2015), http://www.scotusblog.com/wp-content/uploads/2015/08/Kentucky-marriage-15A250-application.pdf
status as full and equal human beings. It follows that the florist's claim must fail, for it violates the principle that a person is not entitled to be excused from a duty to act in a way that respects the rights of others simply because she does not recognize those rights or the status from which they are derived.464

Although this argument may seem complex, it is ultimately based on simple ideas of equality and reciprocity. I cannot properly demand that you respect me and my rights unless I am willing to accord you the same respect. The florist is insisting that the same-sex couple recognize her basic rights at the same time that she refuses to recognize theirs.465 This position is inconsistent with basic concepts

[https://perma.cc/8JJ9-L25P] (explaining that Kim Davis "cannot authorize the marriage of same-sex couples because it violates her religious beliefs," which hold that "marriage is a union between one man and one woman" and "that same-sex unions are not and cannot be 'marriage'").

464 See supra text accompanying notes 432, 457. To put the point another way, an actor may not justify her violation of one basic right belonging to another person on the ground that she does not believe that the person is entitled to some other basic right. Here the florist is claiming that she should be allowed to violate the same-sex couple's right to equal treatment in places of public accommodation because her religious beliefs teach her that they should not have a right to marry. This position is incompatible with her duty to act in a way that respects the rights of others.

465 As I have explained, it is not the case that both religious traditionalists and LGBT people refuse to recognize the humanity and rights of the other group. See supra Part II.C-D. While traditionalists may acknowledge that LGBT people are entitled to many rights, they deny that LGBT people are entitled to at least two basic rights: (1) the right to marry; and (2) the right to equal treatment in public accommodations (in situations involving wedding-related services). By contrast, LGBT people do not hold that traditionalists lack a right to religious liberty or any other basic right; instead, they merely deny that religious liberty gives one the right to treat others in a way that is inconsistent with their status as full and equal persons who possess fundamental rights, including the right to marry.

Once again, the asymmetrical relationship between the two groups becomes clear when we consider a more extreme instance of discrimination—the racial segregation involved in Jim Crow. Suppose that a white business owner during the early 1960s asserts that his religious freedom would be violated if he were required to serve black customers on an equal basis with whites. See, e.g., Curtis, supra note 56, at 188–91 (recounting the religious arguments that were made for segregation). In this context, I do not believe that we would think it
of justice as well as with the principles that underlie a system of rights based on mutual recognition.466

Up to this point, I have described the florist's position as flatly denying that same-sex couples have a right to marry. Religious liberty claims often take this form.467 But they do not need to. For example, the florist might say that she does recognize that the law grants same-sex couples a civil right to marry, but that she cannot serve them because she disapproves of same-sex marriages or relationships as a moral and religious matter. On this ground, she might contend that the argument I have just made does not apply to her, because she does not reject the right of same-sex couples to marry. I would respond to this contention in two ways. The first focuses on the concepts of rights and recognition, while the second concerns the relationship between rights and morality.

First, on this revised account, the florist professes to be taking a purely hands-off approach to same-sex marriage: while she will not seek to interfere with the freedom of same-sex couples to marry, she wants nothing to do with such marriages because she regards

proper to simply balance the owner's religious liberty against the customers' right to equal treatment. Instead, we would hold that, however sincere the owner's beliefs might be, he has no right to be excused from the duty to serve African-Americans simply because he does not recognize them as equal persons who are entitled to such treatment. See, e.g., Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966) (rejecting claim to religious exemption from bans on racial discrimination in public accommodations), aff'd in relevant part and rev'd in part on other grounds, 377 F.2d 433 (4th Cir. 1967), aff'd and modified on other grounds, 390 U.S. 400 (1968). The same principle is at work in the present case: a provider of wedding-related services should have no right to an exemption from the general duty to afford equal treatment to LGBT people on the ground that, according to her religious beliefs, they should not be entitled to marry.

466 In this connection, it is worth noting that while conservative Christians argue that the civil rights laws should not compel them to serve LGBT persons in some situations, those laws do not allow LGBT persons to discriminate against Christians. See Lerman & Sanderson, supra note 395, at 263 (observing that all state public accommodation laws ban discrimination on grounds of creed or religion).

467 For some clear examples, see supra note 463 (discussing the Arlene's Flowers and Kim Davis cases).
them as profoundly immoral. In this way, she claims that she is not denying the right to same-sex marriage but only its moral legitimacy.\textsuperscript{468}

This claim may seem persuasive if we understand rights in purely negative terms, as an absence of interference. But on the view I am presenting, rights are also positive in nature. This is true in two respects. First, because rights are specific instances of liberty, they have the same two-fold structure I described above: a right to do X consists in (a) the ability to do X (the positive dimension of the right) (b) without unwarranted interference by others (the negative dimension).\textsuperscript{469} Second, rights are also positive in the sense that they are entitled to recognition and protection within the legal and social order.\textsuperscript{470}

We can illustrate these two points by considering the classic right to personal liberty or freedom of movement.\textsuperscript{471} This right consists of (a) an individual's ability to move as he likes without (b) improper interference.\textsuperscript{472} This right is recognized and protected under the law, which requires both the government and private individuals to respect the personal liberty of others.\textsuperscript{473} In these ways, the right to personal liberty is positive as well as negative in character.

\textsuperscript{468} See, e.g., Peter H. Schuck, Five Hard Issues, and How to Think About Them ch. 6, at 37 (Jan. 2016) (unpublished manuscript) (on file with author) (characterizing the florist's position as follows: "I fully recognize your right to marry, but because I oppose and am offended by it, I simply don't want to deal with you, so go in peace and find another provider who isn't.").

\textsuperscript{469} See supra text accompanying notes 142-46 (analyzing the concept of liberty in this way).

\textsuperscript{470} See Heyman, Protection, supra note 145, at 532-33.

\textsuperscript{471} See, e.g., BLACKSTONE, supra note 88, at *134–38 (discussing this right).

\textsuperscript{472} See id. at *134.

\textsuperscript{473} The Fifth Amendment forbids the federal government to deprive any person of "liberty . . . without due process of law," while the Fourteenth Amendment imposes the same limitation on the states. U.S. Const. amends. V, XIV, § 1. The Thirteenth Amendment's declaration that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" applies to private as well as to governmental action. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (citing The Civil Rights Cases, 103 U.S. 3, 20, 23 (1883)). Finally, tort and criminal law ban various forms of private conduct that violate the personal liberty of individuals. See, e.g., MODEL PENAL CODE, supra note 430, art. 212 (pro-
The same is true of sexual freedom. By striking down laws against sodomy, the Court in *Lawrence v. Texas*\(^{474}\) ensured that LGBT people would have the positive liberty to enter into sexual relationships without negative interference or punishment by the state.\(^{475}\) In *Obergefell v. Hodges*,\(^{476}\) the Court expanded and reinforced this liberty by holding that it is not enough to merely decriminalize same-sex relationships; instead, the state must also aff ord them the same positive recognition that it traditionally granted to those of the opposite sex.\(^{477}\)

Now let us bring this understanding of rights and recognition to bear on the florist problem. On her revised position, the florist concedes that the state's law now permits same-sex couples to marry. But she insists that she should not be required to provide services to such couples, for that would require her to facilitate or recognize relationships that she regards as gravely immoral. By taking this position, the florist may respect same-sex couples' right to marry in a negative sense, since she does not propose to directly interfere with their exercise of that right. But she rejects the positive side of their right to marry in two ways. First, she continues to insist that, as far as she is concerned, same-sex couples lack the *ability or capacity* to marry. That is what religious traditionalists mean they say that same-sex relationships "are not, and can never be, marriages."\(^{478}\) Second, the florist denies recognition to the marriages that same-sex couples enter into when she refuses to provide them with the same services as opposite-sex couples. In both these ways, the florist's conduct does imply that same-sex couples have no right to marry.

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\(^{474}\) 539 U.S. 558 (2003).

\(^{475}\) See supra text accompanying notes 118–22 (discussing Lawrence).

\(^{476}\) 135 S. Ct. 2584 (2015).

\(^{477}\) See supra text accompanying notes 337–49 (exploring Obergefell).

\(^{478}\) USCCB, *Defense of Marriage*, supra note 2 (answer to question “What about civil rights?”). As I have explained, in taking this position, traditionalists deny full recognition to the humanity of LGBT people. See supra text accompanying note 307.
Once again, it is essential to be clear on how the liberal natural rights tradition understands the duty to recognize others and their rights.\textsuperscript{479} In its broadest meaning, this duty applies to the subjective beliefs and attitudes that people hold. In this sense, all of society's members should regard one another as full and equal human beings and community members who possess the rights that flow from that status, for it is only in this way that different groups can live together in a condition of peace and mutual respect. But that does not mean that people can be forced to adopt such an attitude toward others. As I have said, the state may not coerce anyone to hold or express particular beliefs.\textsuperscript{480} Thus, I do not suggest that individuals or organizations can be compelled to recognize same-sex relationships in the sense of believing or affirming that they are legitimate. Instead, the duty of recognition simply requires that one should not engage in external conduct that treats others in a way that is inconsistent with their basic status or rights. For example, while landlords and employers need not actually believe in the validity of same-sex marriage, they violate the duty of recognition when they insist on treating same-sex couples as though they were not married, by refusing to rent to them or to grant them spousal benefits on the same terms as other married couples.\textsuperscript{481} The same is true of the florist: while the law cannot properly demand that she affirm the legitimacy of same-sex marriage, it may insist that, as the owner of a place of public accommodation, she provide wedding-related services to everyone without regard to sexual orientation. If she refuses to do so, she acts in a way that implicitly asserts that same-sex couples have no right to marry, by denying that they have the capacity to form conjugal bonds and that their unions in fact constitute marriages.

My second response to the florist's revised position focuses on the relationship between rights and morality. The florist contends that she does not deny that same-sex couples have a right to marry; she simply holds that it is inherently immoral for them to do so. This

\textsuperscript{479} See supra text accompanying notes 310–12.
\textsuperscript{480} See id.
\textsuperscript{481} See supra text accompanying notes 148–50 (discussing spousal benefits).
clear-cut distinction between rights and morality might be convincing if the right at issue were merely one that was created by positive law and that had no necessary relationship to what was morally right or good. But that is not the case here. Marriage is a fundamental right which is rooted in respect for human dignity and autonomy, and which is integrally related to the good for human beings. On the view I am taking, it cannot be inherently wrongful or immoral to exercise such a right. In other words, one cannot consistently hold (1) that an individual has a fundamental human right to engage in a particular activity, such as marriage; and also (2) that it is always and inherently immoral for him to engage in that activity. To assert, as the florist does, that it is always immoral for gays and lesbians to marry is tantamount to denying that they have a fundamental human right to do so. A right that can never be rightfully exercised is no right at all. Thus, even in this modified form, the florist's position violates the principle that one has no right to be excused from one's

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482 See, e.g., supra text accompanying notes 337–49 (summarizing Obergefell).
483 Of course, I do not mean to say that every exercise of a fundamental human right is morally permissible. For instance, an individual may act immorally by using the fundamental right to freedom of expression to engage in vicious but constitutionally protected hate speech. In such cases, it is perfectly consistent to say that the individual has a fundamental right while at the same time condemning a particular exercise of that right as immoral. By contrast, in the case we are supposing, the florist holds that it is always and inherently wrongful and immoral for LGBT people to marry (in the only way that they can consistent with their sexual orientations). My claim is that one cannot consistently take this position and also hold that LGBT people have a fundamental human right to marry, for it is of the essence of fundamental human rights that they enable individuals to participate in or realize the human good, and to do so is not immoral or wrongful.

Some religious traditionalists might respond that their conception of morality is based not on the human good but on the standards prescribed by God. Those who take this position either would deny the existence of fundamental human rights, or would maintain that religious believers are not obligated to respect such rights when they conflict with divine law. Neither variation of this position should excuse noncompliance with civil rights laws, for the position is inconsistent with the principle that one is not entitled to violate the fundamental rights of others simply because one does not accept the validity or the binding force of such rights.
obligation not to violate the rights of others merely because one believes that they do not have those rights.

To avoid this objection, the florist might concede that a same-sex couple has both a legal and a human right to marry, but assert that her religious beliefs preclude her from providing services for a same-sex wedding. If this position were tenable, the florist could persuasively argue that she is not denying recognition to the same-sex couple or their rights, but is merely claiming the freedom to follow her own beliefs.

One certainly can imagine cases in which this sort of position would be tenable. Consider a personal trainer whose religion forbade him to be alone with a client of the opposite sex. The trainer properly could argue that he does not deny that the client has a right to obtain training services; he simply believes that he himself may not provide them. In a case like this, I believe that it is appropriate to balance the competing interests, and to grant the trainer an exemption if there is no shortage of others willing to perform the same service.

The florist's case is fundamentally different, however. For if one asks why the florist believes that her religion forbids her to provide such services, the only answer seems to be that it condemns same-sex relationships as immoral. In this way, the florist's claim that she herself is prohibited from facilitating a same-sex wedding depends on her position that it is wrong for the couple to have one. And acting on this position is inconsistent with the principle that an individual has no right to disregard the rights of others merely because she believes on religious (or other) grounds that they are not entitled to enjoy those rights, or to realize the components of the human good that those rights serve to promote.

This discussion enables us to respond to what is perhaps the most persuasive argument in the literature for protecting the florist's religious liberty. As Laycock expresses it, "[w]hat is most importantly at stake for each side is the right to live out core attributes of personal identity."484 To compel the florist to act against her con-

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484 Laycock, Afterword, supra note 241, at 198.
victions would violate her right to "moral integrity"—an injury that Laycock regards as more substantial than "the inconvenience [to the couple] of having to get the same service from another provider nearby," as well as the dignitary harm that comes from being reminded of something that the partners already know: "that some fellow citizens vehemently disapprove of what they are doing." On this view, it follows that the law should grant a religious exemption to wedding-service providers, except in cases where the denial of service would cause the couple substantial hardship—for example, where "there is only one or a few relevant merchants in a community and none of them will serve same-sex couples." The fundamental problem with this "live and let live" argument is that it treats the interests of the two sides as equally legitimate. As a general matter, it is true that the law should protect each group's "right to live out core attributes of personal identity." But we should not take this position in situations where one group has defined its own identity in a way that denies the legitimacy of the other group's identity. Religious traditionalists do this when they hold that LGBT people are guilty of "wrongdoing" and "deeply immoral" behavior when they seek "to live out core attributes of [their own] personal identity" by marrying and establishing families. Although traditionalists generally should be free to live out their identity, they have no right to do so when this involves a refusal to respect the full humanity of others and the rights that flow from it.
b. The Argument that Providers May Not Be Forced to Participate in a Religious Event

In the previous section, I contended that the religious liberty of business owners generally does not entitle them to an exemption from civil rights laws that oblige them to serve all persons equally without regard to sexual orientation. In response, the florist might argue that even if this is true in general, it fails to appreciate the special nature of weddings. Weddings are inherently religious in nature. The principle of religious liberty prohibits the state from compelling anyone to perform a religious act, and that is what the florist would be doing if she had to participate in a wedding that violated her religious beliefs. I shall begin by discussing whether this argument is persuasive with regard to avowedly religious weddings and then turn to civil ones.

The major premise of the florist's argument is sound. To put the point in Lockean terms, the state's authority is limited to the civil realm and does not extend to religious matters. Although the state...
may require individuals to act in a way that respects the civil rights of others, it may not compel a person to perform a religious action. Of course, the same principle is firmly settled in free exercise jurisprudence. For example, the Supreme Court’s decisions make clear that the state may not force individuals to say prayers or to affirm religious beliefs.

This principle is what makes it easy to say that the law may not require pastors to officiate at weddings that violate their religious beliefs. Presiding at a wedding ceremony and pronouncing God’s blessing on the couple are religious acts. Pastors must be entirely free to engage in or to refrain from such acts without compulsion by the state.

Moreover, I believe it is fair to say that this principle is not limited to those who perform religious acts themselves, but also to those who participate in religious acts done by others. At a religious wedding, this includes not only the officiant but also the couple’s attendants, the witnesses, and the guests who sit in the congregation and observe the ceremony. To be sure, some of those individuals may not hold the religious beliefs that are expressed in the ceremony, and they may not take a religious attitude toward the event. Nevertheless, it is reasonable to say that all those who are present at the ceremony as either actors or guests become a part of the event and lend their affirmation and support by their very presence. If this is correct, then the state should have no power to compel anyone to take part in a religious wedding, whether as a guest or in a more active role.

It is difficult to see, however, how the florist can bring herself within this principle. Her role ordinarily would not require her even to be present when the ceremony is taking place. Furthermore, as a

492 See id. at 33–34.
493 See supra text accompanying notes 435–37.
495 See supra Part VI.A.1.
496 See, e.g., Lee, 505 U.S. at 599 (stating that a public school may not “compel a student to participate in a religious exercise” consisting of a graduation prayer offered by a clergy member).
business owner, she must frequently find herself providing flowers for events whose content she is indifferent to. In particular, she may provide flowers for weddings in which she hardly knows the couple and has no personal attitude toward their relationship. It follows that the mere act of preparing flowers for a couple's wedding cannot reasonably be taken to show that she personally affirms and supports their relationship or their choice to get married. In these ways, her situation is essentially different from that of the active participants or the guests at a wedding.

For all these reasons, it cannot be said that if the state compels the florist to provide goods and services in connection with a same-sex wedding, it has violated her religious liberty by compelling her to perform or participate in the religious acts that constitute the wedding. In this situation, the state has not overstepped its bounds and intruded into the religious sphere by requiring the florist to act in a religious manner. Instead, the state has merely carried out its proper function by requiring her to respect the couple's civil rights by supplying them with commercial goods and services on the same basis as all other citizens.

The position I am taking can find substantial support in the Supreme Court's recent decision in Town of Greece v. Galloway. In that case, several citizens challenged a town council's practice of beginning its monthly meetings with prayers offered by local clergy. Although the suit was brought under the Establishment Clause, a central issue was whether this practice compelled those citizens who were present to participate in a religious observance. The Court held that this was not the case. As Justice Kennedy wrote for the plurality, "[I]n the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." If individuals who are directly exposed to such prayers are

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497 134 S. Ct. 1811 (2014).
498 See id. at 1817.
499 See id.
500 Id. at 1827 (plurality opinion); see also id. at 1838 (Thomas, J., concurring in part and in judgment). Writing for the four dissenters, Justice Kagan agreed that
not subjected to "impermissible coercion" under the Religion Clauses, it is difficult to see how that could be true of people who are not even present at a wedding ceremony and who are not compelled to do anything other than to provide the couple with commercial goods and services which in themselves lack religious meaning.

For these reasons, the florist's argument for an exemption to the civil rights laws on the ground that she cannot be compelled to participate in a wedding that violates her religious beliefs should fail. Likewise, we should reach the same result with regard to many other providers of wedding-related goods and services, such as bakers, caterers, jewelers, bridal and formal-wear shops, and limousine companies. None of these providers is required to be present at the ceremony itself, nor do they generally supply goods and services that have any inherent religious meaning.501

Some other providers, such as wedding photographers, present a closer question. On one hand, the photographer obviously does not affirm and support the couple in the same way that the officiant, guests, and members of the wedding party do. On the other hand, the photographer not only needs to be present at the ceremony, but in some cases has a say in choreographing the event. Above all, the photographer's role is to take pictures or videos that capture the essence of the ceremony and present it in the most favorable light.502 In this way, it can be said that the photographer does direct-

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501 In general, this is true even of wedding rings, which do not attain any religious significance until they are blessed or exchanged during the ceremony. See, e.g., THE BOOK OF COMMON PRAYER 427–28 (The Episcopal Church, 1979). On the other hand, if a jeweler designed a ring to incorporate religious language or symbols, there would be a stronger argument for holding that he could not be compelled to sell it to be used in weddings of which he disapproved.

ly experience, and in that sense participate in, the wedding.\textsuperscript{503} Wedding planners have an even stronger claim for exemption on the ground that an essential part of their role is to affirm and support the couple who are getting married, and to help them make the event, including the ceremony, the best that it can be.

Thus far, I have been discussing whether an individual or business can be compelled to provide services for a religious wedding. But suppose that the wedding is a civil one. At first glance, that would seem to preclude any possible argument that requiring the provider to comply with the civil rights law would force him to participate in another person's religious act.

In response, the provider could argue that weddings have an inherent religious or spiritual dimension. But while this may be true from the provider's religious perspective, the individuals who are getting married may view the ceremony in purely secular terms. In a case like this, it is hard to sustain the claim that the provider is being forced to participate in someone else's religious or spiritual act.

I believe, however, that a more persuasive argument is available to the provider. Even if a civil wedding cannot be understood as a religious event, it certainly is a deeply personal one. As Justice Kennedy writes in Obergefell, "Decisions about marriage are among the most intimate that an individual can make.\textsuperscript{504} That is why the Court has held that choices about family life and other highly personal matters "are protected by the Constitution.\textsuperscript{505} A provider reasonably could argue that just as it would violate the Free Exercise Clause to require him to directly participate in a religious wedding, it would violate the liberty protected by the Due Process Clause to require him to directly participate in a wedding of any sort. To my mind, this is a convincing argument. For the reasons I have explained, however, while this argument might shield providers like

\textsuperscript{503} Because photography is a form of art, the photographer can also make a reasonable argument that his choice of whether to do an event is protected under the Free Speech Clause of the First Amendment. See Cato Brief, supra note 502.
\textsuperscript{504} Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015) (citation omitted).
\textsuperscript{505} \textit{id.} at 2599.
photographers and wedding planners, it should not protect most other providers, including florists.

2. As a Matter of Doctrine

In the previous section, I argued that, as a matter of principle, wedding-service providers generally are not entitled to an exemption from civil rights laws that ban sexual-orientation discrimination. In my view, we should reach the same results within the existing framework of legal and constitutional doctrine.

The problem of religious liberty and same-sex marriage can arise in three main situations. First, a provider who refuses to serve a same-sex couple and who is sued for violating an anti-discrimination law may raise a defense under the Free Exercise Clause, or under a state constitutional provision that is understood in the same way. Under Smith, this defense should fail so long as the civil rights law is generally applicable and neutral toward religion. However, the government may not compel an individual to perform or participate in a religious act.

In the second situation, the provider raises a defense under a state RFRA, or under a state constitutional provision that is held to incorporate the same standard. Under that standard, the state may impose a substantial burden on a person's exercise of religion only if it can satisfy the demands of strict scrutiny. If the provider can clear some important preliminary hurdles, the question is wheth-


507 See supra text accompanying notes 436–37.

508 See supra text accompanying notes 223–27.

509 If the case involves a lawsuit brought by a same-sex couple, the provider must convince the court that the state RFRA applies to lawsuits between private parties and not merely to suits between a private party and the state. See, e.g.,
er applying the anti-discrimination law is the least restrictive means of advancing a compelling government interest.510

Although this is an issue of state law, one source that a state court doubtless would consider is the Supreme Court's discussion of the federal RFRA in *Burwell v. Hobby Lobby Stores, Inc.*511 In his majority opinion, Justice Alito insists that his expansive interpretation of the statute would not permit "discrimination in hiring, for example on the basis of race, [to] be cloaked as religious practice to escape legal sanction."512 Instead, he declares that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."513 Although Alito carefully avoids discussing other forms of discrimination, I believe that a strong argument can be made for coming out the same way with regard to discrimination based on sexual orientation. In the only judicial decision that has reached the issue so far, the Washington trial court in *Arlene's Flowers* agreed.514

Finally, in a state without a RFRA or comparable constitutional provision, the question whether to allow wedding-service providers to refuse to serve same-sex couples is purely a matter for the legislature to decide. As I have explained, I do not believe that adopting a RFRA is an appropriate way to resolve conflicts between

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510 See supra text accompanying note 227.
511 134 S. Ct. 2751 (2014).
512 Id. at 2783.
513 Id.
514 See *Arlene's Flowers*, 2015 WL 720213, at *26–27; cf. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115U, ¶¶ 101–02 (applying rational basis review but suggesting that "states have a compelling interest in eliminating such discrimination").
relational liberty and other individual rights. And for the reasons given in this part, wedding-service providers generally cannot show that they are entitled to a religious exemption from civil rights laws.

3. Non-Ideal Considerations: Prudence, Charity, and Compromise

The previous sections argued that most wedding-service providers have no right to a religious exemption as a matter of principle. This view should govern the reasoning of courts, whose decisions must be based on principle. Of course, legislatures also should act in accord with principle. At the same time, however, they often must grapple with other factors, which I will call non-ideal considerations. Several of those considerations are relevant to the current problem, including prudence, charity, and compromise.

Let us begin with prudence. Although the Supreme Court has the authority to declare what the Constitution means, its decisions cannot become fully effective unless they are accepted by the society. Citizens generally know little about particular judicial decisions and have no strong feelings about them. But that is not true of landmark cases like Obergefell, which have a substantial impact on the identity and way of life of the society and its members. To be effective, decisions like this need to gain broad acceptance, at least over the long run. That is certainly true of the Court's ruling on marriage equality. As Justice Kennedy argues, one of the central benefits of marriage is the dignity that the partners have when their relationship gains social acceptance and recognition.

515 See supra text following note 228.
516 For an argument in favor of exemptions that effectively draws on each of these considerations, see Koppelman, Accommodations, supra note 56. Koppelman also supports exemptions as a matter of principle. See Koppelman, Love, supra note 56, at 135–36 (arguing that religious accommodations should be granted "not just because it is politically sensible (though it is), but because it is the right thing to do").
517 See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics ch. 6 (1962).
In recent years, public support for the legalization of same-sex marriage has grown dramatically. Yet there still are a number of states in which many or most people oppose legalization for reasons that are closely connected with their identity and their religious beliefs.

From the standpoint of prudence, the question is what implications, if any, these facts have for the problem of religious exemptions to anti-discrimination laws. On one side, it can be argued that many people will need more time to understand and accept a judicial decision that runs so contrary to their deeply held beliefs. Over time, opposition to same-sex marriage may fade as people come to know same-sex couples in everyday life and see that the dire predictions that have been made about the decline of marriage and society do not come to pass. Far from promoting social acceptance of same-sex marriage, the use of state power to coerce bakers and florists to violate their religious beliefs may have the opposite effect by transforming them into martyrs and provoking a backlash. Finally, some LGBT advocates have observed that they would hardly wish to

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519 For example, a recent Wall Street Journal/NBC News poll “found that 59% of Americans support allowing same-sex marriage, nearly double the 30% support reported in 2004.” Janet Hook, Support for Gay Marriage Hits All-Time High, WALL ST. J. (March 9, 2015), http://blogs.wsj.com/washwire/2015/03/09/support-for-gay-marriage-hits-all-time-high-wsjnbc-news-poll/[http://perma.cc/VJR5-HDQ5].

520 See Same-Sex Marriage Detailed Tables, PEW RESEARCH CENTER (June 8, 2015), available at http://www.people-press.org/2015/06/08/same-sex-marriage-detailed-tables/ [http://perma.cc/CUF9-MREM] (reporting survey data that showed that, as of May 2015, legalization of same-sex marriage was opposed by 70 percent of white, non-Hispanic Evangelical Protestants, as well as by 54 percent of respondents who lived in the eight states comprising the South Central United States). For the full report, see Pew Report, supra note 163.

521 See Pew Report, supra note 163, at 16 (finding that individuals who know many gay and lesbian people are far more likely to support same-sex marriage). Moreover, the data shows that younger people are much more likely to support same-sex marriage than are older people, and that each generational cohort (such as Millennials and Boomers) has also become more accepting over time, see id. at 3, 6–8, which suggests that overall support will continue to increase.

be served by—or pay money to—providers who reject their right to marry, and that it is better to know who their opponents are than to suppress them.\textsuperscript{523} For these and other reasons, some would contend that even if such providers cannot demand religious exemptions as a matter of principle, it would be prudent for a legislature to grant such exemptions at least for a transitional period.

Although these arguments have considerable force, there are also powerful arguments on the other side. To begin with, if religious exemptions are granted, same-sex couples will have to search for providers who are willing to serve them. At best, such searches may be inconvenient and time-consuming, while at worst they may prove fruitless, since there are some communities in which the couples may be unable to find anyone willing to provide particular goods or services. In any event, it is demeaning to know that some providers will refuse to serve you because of your identity and that the state upholds their right to do so.\textsuperscript{524}

A second concern relates to the difficult challenges that arise in drafting religious exemptions. Suppose that the state currently has a law that bans discrimination in housing, employment, and public accommodations on the basis of race, sex, religion, sexual orientation, gender identity, and other characteristics. If an exemption were drawn to apply only to same-sex marriage, the result would be to make LGBT people second-class citizens by depriving them alone of protection. On the other hand, if the exemption applied to all marriages, providers would be allowed to discriminate against interracial and interfaith couples, as well as couples who belonged to particular racial, ethnic, or religious groups. Moreover, if the exemption applied only to wedding-related services, the anti-discrimination law might still require traditionalists to violate their beliefs—for example, by renting an apartment to a same-sex married couple. Yet if the exemption were written broadly enough to cover such cases, the re-


\textsuperscript{524} See, e.g., Chai R. Feldblum, Moral Conflict and Conflicting Liberties, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra note 56, at 123, 152–53.
sult would be to authorize discrimination against same-sex couples throughout their lives.

Of course, the legislature could avoid confronting such drafting issues by passing a RFRA and adopting a compelling interest standard for all exemption claims. But in so doing, the legislature would simply be passing these difficult issues on to the courts. At a minimum, this would create great uncertainty about what the law was. At the same time, it would open up the possibility that the courts would shred the state's anti-discrimination laws by granting far-reaching exemptions, or, on the other hand, that the courts would uphold few, if any, religious liberty claims.

Finally, one of the most serious dangers from a prudential perspective is that granting religious exemptions would open the door to widespread resistance to the legalization of same-sex marriage.\textsuperscript{525} While bakers, florists, and other providers who refuse to serve same-sex couples are asserting a right to follow their own individual consciences, they frequently are guided by the teachings of their religious faiths and organizations.\textsuperscript{526} The leaders of some of those organizations, as well as prominent public figures and officials, have called on those who share their beliefs to strongly oppose the Supreme Court's decision.\textsuperscript{527} This raises the concern that, rather than establishing a truce in the cultural wars, the adoption of religious exemptions may fan the flames of conflict and dissension.

In sum, there are strong arguments on both sides of the question about what prudence dictates in this situation. Because it is a prudential matter, it cannot be resolved by any clear-cut formula, but only through the exercise of informed practical judgment under the circumstances that obtain at a particular time and place.

Now let us turn to a second reason that might be given for granting religious exemptions even if they are not required as a matter of principle. This view, which I shall call \textit{charity}, holds that the

\begin{footnotesize}
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\item \textsuperscript{525} For a forceful argument to this effect, see NeJaime & Siegel, \textit{supra} note 56. For skepticism that widespread resistance is likely, see Koppelman, \textit{Accommodations, supra} note 56, at 644.
\item \textsuperscript{526} See, e.g., \textit{supra} note 463 (discussing Arlene's Flowers).
\item \textsuperscript{527} See \textit{supra} text accompanying notes 9-13.
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marriage equality movement should be “magnanimous in victory” by declining to coerce those who disagree.528 Again, there is much to be said on both sides here. On one hand, the notion of magnanimity is a highly appealing one. On the other hand, it may be asked whether the battle for marriage equality is truly over at this point, or whether it has shifted to a fight over religious exemptions. More fundamentally, it may be asked whether charity should prevail over justice by allowing religious traditionalists to violate the civil rights of same-sex couples.529

The final non-ideal consideration I want to mention has to do with compromise. The controversy over same-sex marriage involves a clash between groups that are strongly committed to their own beliefs and ways of life. Although the central legal question has been resolved by Obergefell, other issues remain, such as whether a state that has not already banned various forms of sexual-orientation and gender-identity discrimination should do so, and, if so, whether it should allow any religious exemptions. With regard to such issues, a group may have to decide whether to enter into a compromise when neither the group itself nor its opponents have enough power to fully achieve their goals.

For a good example, consider the events that took place in Utah in early 2015—events that attracted national coverage at the time but that have been overshadowed by subsequent battles. For several years, representatives of the Church of Jesus Christ of Latter-day Saints and the LGBT community met behind the scenes in an effort to overcome the deep rift between them. These meetings result-

528 Koppelman, Accommodations, supra note 56, at 628. 529 Of course, even if charity did not provide a good reason to carve out exceptions to the civil rights laws, it might lead some same-sex couples or gay rights groups to choose not to seek legal redress in cases of this sort. See, e.g., Andrew Sullivan, Surrender Douthat!, THE DISH (Mar. 4, 2014), http://dish.andrewsullivan.com/2014/03/04/surrender-douthat/ [http://perma.cc/PZ5Y-9EED] (opposing legal exemptions, but arguing that “the gay rights movement” should not “seek[] to impose gay equality on religious groups by lawsuit”).

A STRUGGLE FOR RECOGNITION
ed in some common ground and even some personal friendships.\textsuperscript{530} A major breakthrough came in January 2015 when Mormon leaders came out in support of legislation to ban discrimination in housing and employment on the basis of sexual orientation and gender identity.\textsuperscript{531} At the same time, those leaders stressed the need to protect religious liberty.\textsuperscript{532} With the support both of the church and of gay rights groups, the Utah legislature managed to pass a bill that reflected both principles.\textsuperscript{533}

Of course, compromises of this sort are bound to be controversial. On one hand, some members of each group will believe that their side has given up too much and, more fundamentally, that it is wrong not to fully defend the principles that underlie their cause. On the other hand, some will believe that in situations like this compromise not only is necessary, but also offers the best way to find common ground.

4. Conclusion

This part has argued that one has no right to be excused from the duty to respect the rights of others simply because one believes


\textsuperscript{532} See id.

(whether on religious or other grounds) that they are not entitled to enjoy those rights or the basic human goods they serve to promote. It follows that, as a matter of principle, a wedding-service provider who has religious objections to same-sex marriage generally should have no right to an exemption from civil rights laws that ban discrimination based on sexual orientation. This principle should guide both judicial and legislative decision-making in the area. At the same time, a legislature reasonably may consider such considerations as prudence, charity, and compromise in deciding whether to grant exemptions.

These considerations cannot be reduced to a formula; they call for the exercise of informed practical judgment. Yet it is possible to offer a few observations to guide that judgment. First, as a default position, the legislature should follow the rule that is appropriate as a matter of principle. Thus, the legislature should grant religious exemptions in the wedding context only when there are persuasive reasons to do so. Second, in making this judgment, the standard should be whether such exemptions would promote the public good in a way that is consistent with principle, in the sense that they would help to bring about broader social acceptance of marriage equality. And finally, the ultimate end is to promote mutual recognition. That is the goal that supports the basic principle that individuals must respect the rights of others, as well as the non-ideal considerations of prudence, charity, and compromise. All of these factors are ultimately directed toward achieving a social condition in which individuals recognize one another as full and equal human beings and citizens with all the rights that flow from this status, including the fundamental rights to marry and to enjoy religious liberty so long as one does not violate the civil rights of others.

VII. CONCLUSION

In its landmark decision in Obergefell v. Hodges, the Supreme Court sought to resolve the longstanding constitutional de-
bate over whether the state must accord recognition and respect to same-sex relationships. At the same time, Obergefell shifted the focus of debate to another issue: the impact that the decision will have on the liberty of those who oppose same-sex marriage on religious grounds. Religious traditionalists regard the advent of gay rights and same-sex marriage as a grave assault on their identity and their ability to live out their faith. But this brings them into direct conflict with the claims of LGBT people to live their own lives and to fully participate in the society. In this way, it becomes clear that, at its core, the debate over religious liberty and civil rights involves a clash of identity between these two groups.

In this Article, I have argued that a conflict of this sort ultimately can be resolved only through mutual recognition—a concept that lies at the foundation of liberal political theory and the American legal order. This concept holds that the members of each group must recognize the others as full and equal persons and citizens, with all the rights that this involves. That means that while traditionalists must be free to hold and advocate their beliefs regarding sexuality and marriage, they may not act in a way that violates the civil rights of others, including the rights of LGBT people to marry and to be treated equally within the commercial sphere. It follows that those who provide wedding-related services can properly be required to comply with civil rights laws that prohibit discrimination based on sexual orientation and gender identity. But while religious liberty does not justify a general exemption from the civil rights laws, it does mean that the state may not compel individuals to participate in a wedding ceremony against their will. For this reason, the law should make an exception for those providers who are closely involved with the couple or ceremony itself, such as photographers and wedding planners. By taking an approach of this sort, we can afford recognition to the competing claims that are made in this area, and thereby give full effect to the principle of “equal dignity” that lies at the heart of Obergefell.535

535 Id. at 2608.