TOWARD A NEW AGE OF CONSUMER ACCESS RIGHTS: CREATING SPACE IN THE PUBLIC ACCOMMODATION FOR THE LGBT COMMUNITY

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INTRODUCTION

In New Mexico, the parents of a three-year old boy open the mailbox to find a letter from a prospective preschool saying that their son would not be able to enroll because his parents are gay.[1] Though the New Mexico Human Rights Act ("NMHRA") prohibits discrimination in employment, housing, and public accommodations,[2] the preschool, Hope Christian, is a private Christian school; thus, to determine whether or not the school violated the NMHRA, the question is whether this school is considered a "public accommodation" under the NMHRA.[3] This question goes to the heart of the civil rights debate and forces us to define the boundary between the "right to refuse service" and the "right to participate in society free from discrimination." This Article seeks to resolve the question of when and under what circumstances a business has the right to choose its customers. The answer will determine how and when a consumer's choices will be limited or directed, and it thereby defines the nature of civic life in America.[4] This Article seeks to include the lesbian, gay, bisexual, and transgender ("LBGT") community in this civic life and calls for a broad application of antidiscrimination laws in order to protect against the unique LGBT experience of discrimination; this is unique in that it occurs primarily in transactions that involve personal or cultural values, like the private school above.

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[1] Hailey Heinz, *Child with Gay Parents Can't Enroll at School*, ALBUQUERQUE JOURNAL, Jul. 28, 2012, at A1, *available at* http://www.abqjournal.com/main/2012/07/28/news/child-with-gay-parents-cant-enroll-at-school.html.

[2] *See* New Mexico Human Rights Act, N.M. STAT. ANN. § 28-1-7 (West 2012).

[3] Heinz, *supra* note 1.

[4] *See* Romer v. G. Evans, 517 U.S. 620, 631 (1996) (stating that antidiscrimination laws "are protections against exclusion from . . . transactions and endeavors that constitute ordinary civic life in a free society").

Many laws that prohibit discrimination are premised on the notion that many privately owned establishments are to some extent public, and, therefore, citizens have a legally enforceable right of access.[5] Under the law, this right of access is balanced against the rights of establishments to choose their customers and associations—rights that can overcome the consumer's right of access.[6] This Article focuses primarily on discrimination against consumers, as distinguished from discrimination in employment,[7] the military,[8] the institution of marriage, and access to medical information.[9] Accordingly, this Article will center on the denial of services based on "sexual orientation" in the public accommodation, credit, and housing contexts and seeks to highlight how the LGBT community has a unique situation in the consumer protection debate.

Most state legislatures prohibit discrimination through civil or human rights acts, which may contain any combination of provisions for housing, credit, and public accommodations.[10] Only some of these state civil rights acts prohibit discrimination against consumers based on their "sexual orientation."[11] The right

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[5] *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 218 (1978).

[6] *Id.*

[7] *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012) (the first federal law addressing discrimination on the basis of sex); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000(e)(17) (2012) (prohibiting discrimination and sexual harassment by employers, employment agencies, and labor organizations with 15 or more full-time employees on the basis of race, color, religion, sex, or national origin, but not sexual orientation.); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012) (amending the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy); The Pregnancy Discrimination Act and Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

[8] *See, e.g.*, 10 U.S.C. § 654 (2012), *repealed by* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516. The "don't ask, don't tell" policy implemented in the military in 1993 allows a serviceman or woman to be discharged if he or she publicly admits to being homosexual. This policy was upheld in 1998 by the Second Circuit Court of Appeals in *Able v. United States,* where the court found that "don't ask, don't tell" did not violate the First Amendment or the Equal Protection Clause of the U.S. Constitution. *See* Able v. United States, 155 F.3d 628 (2d Cir. 1998). The "don't ask, don't tell" policy was then repealed on December 22, 2011. Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516.

[9] It is beyond the scope of this paper to discuss access to information in the medical context or the ability of LGBT individuals to make medical decisions of behalf of their loved ones. For a discussion of the role of certain legal mechanisms like HIPAA authorization and medical power of attorney designations as a way of protecting access to loved ones, *see* Matthew T. Moore, *Long-Term Plans for LGBT Floridians: Special Concerns and Suggestions to Avoid Legal and Family Interference*, 34 NOVA L. REV. 255, 264-65, 272-73 (2009).

[10] *See, e.g.*, New Mexico Human Rights Act, N.M. STAT. ANN. § 28-1-1 to § 28-1-15 (West 2012).

[11] The states that include sexual orientation as a protected class are: California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *See* CAL. CIV. CODE §§ 51(b), 51(e)(6) (West, Westlaw through Ch. 25 of 2011 Reg. Sess. and Ch. 2 of 2011-2012 1st Ex. Sess.); COLO. REV. STAT. ANN. §§ 24-34-601(1), (2) (West, Westlaw through laws effective May 5, 2011); CONN. GEN. STAT. ANN. §§ 46a-63(1), 46a-81d(a) (West, Westlaw through Jan. 1, 2011); DEL. CODE ANN. tit. 6, §§ 4504(a), (b) (West, Westlaw through 78 Laws 2011); HAW. REV. STAT. §§ 489-2(2), 489-3 (West, Westlaw through 2011 Regular Session); 775 ILL. COMP. STAT. 5/1-102, 5/5-102(A), 5/5-102(B) (West, Westlaw through 2011 Reg. Sess.); IOWA CODE ANN. §§ 216.7(l)(a), (b) (West, Westlaw through 2011); ME. REV. STAT. ANN. tit. 5 § 4592(1) (West, Westlaw

of an establishment to refuse service based on "sexual orientation" has risen to the forefront of the civil rights debate, sparked by the growing conflict between consumers in the LGBT community and those who want the ability to choose their customers and thereby exclude LGBT individuals.[12] At the center of this debate is the definition of the term "public accommodation" under the state civil rights acts; it is the definition of this term that determines whether a state can enforce the civil rights law against private establishments like the Hope Christian preschool.[13]

In this Article, Part I provides an overview of the present law in the United States prohibiting sexual orientation discrimination and discusses the roots of consumer access law in the civil rights history of our nation to illustrate that the LGBT rights movement is the next impetus of change in public accommodation law. Furthermore, this Part tells the story of how racial discrimination led to the limited interpretation of the term "public accommodation" in the nineteenth century ("Nineteenth Century Interpretation") and summarizes the federal government's efforts to protect LGBT consumers. This Part also discusses Professor Nan D. Hunter's theory on the LGBT claim to cultural citizenship and how recent case law

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through 2011); MD. CODE ANN., STATE GOV'T § 20-304 (West, Westlaw through all chapters of the 2011 Regular Session of the General Assembly, effective through June 6, 2011); MINN. STAT. ANN. §§ 363A.03(34), 363A.1 l(l)(a)(l) (West, Westlaw through laws of the 2011 Regular Session through Chapter 10); NEV. REV. STAT. § 651.070 (Westlaw through 2010 Sp. Sess.); N.H. REV. STAT. ANN. § 354-A:17 (Westlaw through 2011 legislation); N.J. STAT. ANN. §§ 10:5-4, 10:5-5(/) (West, Westlaw through L.2011, c. 71 and J.R. No. 5); N.M. STAT. ANN. §§ 28-l-7(F), (H) (West, Westlaw through all 2010 legislation); N.Y. EXEC. LAW §§ 292(9), 296(2)(a) (West, Westlaw through 2011 legislation, chapters 1 to 18 and 50 to 54); R.I. GEN. LAWS ANN. §§ 11-24-2, 11-24-3(1) (West, Westlaw through chapter 321 of the January 2010 session); VT. STAT. ANN. tit. 9 §§ 4501(1), 4502(a), 4502(d) (West, Westlaw through 2011 legislation); WASH. REV. CODE ANN. §§ 49.60.030(1)(b), 49.60.040(2) (West, Westlaw through 2011 Legislation effective through May 31, 2011). *But see* Monson v. Rochester Athletic Club, 759 N.W.2d 60 (Minn. Ct. App. 2009) (holding that a same-sex couple failed to demonstrate differential treatment where health club refused to allow them to join at the family membership rate); (DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-95(b)(2), 28-96(b)(2) (1991), *cited in* Evans v. Romer, 882 P.2d 1335, 1345 (Colo. 1994)) (citing a municipal ordinance in Denver, Colorado, which provides an exemption for two unit dwellings where one of the units is owner-occupied). David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326, n.174 (2012). *See also Non Discrimination Laws: State by State Information – Map*, AMERICAN CIVIL LIBERTIES UNION (Sept. 21, 2011), http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map.

[12] *See ADF Will Appeal NM Court's Decision Against Photographer*, ALLIANCE DEFENDING FREEDOM (June 4, 2012), http://www.adfmedia.org/News/PRDetail/5538 ("Americans in the marketplace should not be subjected to legal attacks for simply abiding by their beliefs[.]"). *See also Elane Photography v. Willock Resource Page: NM Supreme Court Will Hear Case of Photographer Fined for Adhering to Her Faith*, ALLIANCE DEFENDING FREEDOM (Aug. 17, 2012), http://www.alliancedefendingfreedom.org/News/PRDetail/5537; *Elane Photography Plans Appeal of Negative Ruling by New Mexico Court*, SPEAK UP (Dec. 16, 2009), http://blog.speakupmovement.org/university/uncategorized/elane-photography-plans-appeal-of-negative-ruling-by-new-mexico-court/; Timothy Kincaid, *Elane Photography Follow-up*, BOX TURTLE BULLETIN (Dec. 19, 2009), http://www.boxturtlebulletin.com/2009/12/19/18579 ("Americans cherish individuality above almost all else. And gay people know more than anyone that coercion to conform to the expectations of government is by its nature oppressive and prone to abuse.").

[13] Although this paper focuses on the effect of the definition of public accommodation on the LGBT community, it equally affects all of the protected classes. *See, e.g.*, New Mexico Human Rights Act, N.M. STAT. ANN. § 28-1-7(F) (West 2012).

expands this theory beyond civic organizations to normal consumer transactions that involve cultural elements.

Part II compares the unique characteristics of LGBT discrimination to the characteristics of discrimination against other protected classes to discuss whether consumer protection laws can adequately protect them. Part II concludes that "sexual orientation" is indeed an identifiable class that deserves protection. It then encourages amendments to the current federal housing and credit laws to include sexual orientation as a protected class and highlights the constitutional issues that such amendments face.

Part III analyzes a case study as a means of demonstrating how the addition of "sexual orientation" as a protected class has reframed the social and judicial impact of public accommodation laws. The modern interpretation of the public accommodation—a departure from the limitations of the nineteenth century—is necessary to effectively prohibit LGBT discrimination in the consumer context. Part III of this Article also seeks to establish that public accommodation laws are expanding their scope to all commerce and argues that all jurisdictions should recognize the importance of this expansion.

I. THE ORIGINS OF CONSUMER ACCESS LAWS IN THE PUBLIC ACCOMMODATION

A. Overview of Protections for Sexual Orientation

Federal consumer protection laws do not prohibit discrimination on the basis of an individual's sexual orientation. Specifically, Title II of the Civil Rights Act of 1964[14] and Title III of the Americans With Disabilities Act of 1990[15] do not include sexual orientation as a protected class, but they prohibit discrimination in public accommodations against other classes of people. The two primary federal consumer protection laws, the Fair Housing Act[16] and the Equal Credit Opportunity Act,[17] also do not include sexual orientation as a protected class. Despite the lack of federal protection for the LGBT community, antidiscrimination laws have come a long way for other minority groups.[18] The story of consumer access is best understood in the context of the civil rights movement, and this history will reveal the contours of the legal environment in which the LGBT community struggles for acceptance.[19]

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[14] Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

[15] Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 (2012).

[16] The Fair Housing Act, 42 U.S.C. §§ 3601–19 (2012).

[17] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2012).

[18] *See* Lerman & Sanderson, *supra* note 5, at 217 ("As the most egregious forms of racial discrimination have been eliminated, numerous smaller movements have arisen[.]").

[19] *See* Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1617 (2001) ("[T]he deeply problematic questions that we face today [regarding public accommodations] echo from the race cases.").

This Nation's civil rights history demonstrates that antidiscrimination laws have several purposes: first, these laws protect *human dignity* by preventing the emotional degradation that discrimination in the public accommodation creates;[20] second, these laws guarantee *consumer access* by statutorily imposing a duty[21] on establishments not to discriminate against protected classes or suffer a penalty;[22] and last, these laws serve to define *citizenship* based on the idea that markets seek consumers and thereby bring individuals into central social dynamics that are a part of citizenship.[23]

Although the Constitution does not forbid discrimination against individuals based on their sexual orientation, the Supreme Court in 1996 held that gay individuals may be protected from unequal treatment under the Constitution's Equal Protection clause—states cannot categorically bar LGBT individuals from seeking the protection of antidiscrimination statutes.[24] The Supreme Court therefore implicitly held that state antidiscrimination statutes may include sexual orientation as a protected class, and historians will likely look at that moment as triggering the onset of legal reform with the aim of protecting the LGBT community from discrimination.[25]

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[20] *See* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 250 (1964) ("The Senate Commerce Committee made it quite clear that the fundamental object of Title II [of the Civil Rights Act of 1964] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'").

[21] Public accommodation laws do not impose a duty to serve, but rather, they impose a duty not to discriminate. A public accommodation can refuse service to anyone on other bases that are not discriminatory. For example, a business might be able to refuse service by saying something along the lines of "unfortunately we cannot photograph your wedding that day because we are already booked."

[22] *See* Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodation Laws*, 72 N.Y.U. L. REV. 1243, 1243 (1997) ("The public accommodations statutes of most states and many municipalities . . . were enacted to ensure that all members of society have equal access to goods and services."). *See, e.g.*, the public accommodations provision in the 1964 Civil Rights Act, which uses the term "equal access." 42 U.S.C. § 2000a (2012) ("Equal Access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation[.]"). Though the term "Equal Enjoyment" is also used, the Supreme Court has conflated the two terms, essentially defining enjoyment as access. *See* Daniel J. Trainor, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. ILL. L. REV. 971, 998 (1995) ("The Supreme Court has interpreted 'enjoyment' in [Title II of the Civil Rights Act of 1964] to mean access, not personal fulfillment or joy.").

[23] *See* Hunter, *supra* note 19, at 1634 (discussing cultural citizenship, noting that citizenship "is not purely a creature of the state . . . [i]mplicitly, the law has recognized that markets have a role in constituting citizenship. Indeed, public accommodations laws constitute one example of that acknowledgment. Markets seek consumers and thereby bring previously excluded individuals into central social dynamics"). *See also* Bell v. State of Maryland, 378 U.S. 226, 246-60 (1964) (suggesting that discrimination in public accommodations perpetuates a culture of second-class citizenship).

[24] Romer v. Evans, 517 U.S. 620, 635-36 (1996) (holding that an amendment to the Colorado constitution prohibiting legislation protective of the rights of gay individuals was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.). However, laws that differentiate between individuals based on sexual orientation like Amendment 2 are subject only to the "rational basis" standard, meaning that as long as the state has a rational reason behind its enactment, the law is constitutional. *Id.* at 631-32.

[25] *See* Elizabeth R. Cayton, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, Comment, 19 LAW & SEXUALITY 193, 199 (2010) ("Following the Romer decision in 1996, a number of states amended their antidiscrimination statutes

B. Who Can I Kick Out Of My Establishment? A History of Human Dignity and Consumer Access

Antidiscrimination laws are an innovation of the Reconstruction Era's struggle over the role of race in our political society and economy. The laws were based upon the idea that law could adjudicate political and civil rights, but not social rights or social equality.[26] This ideology, dominated by the discussion of race, shaped the limits of the public accommodation.[27] Absent a contravening statute, the common law general rule is that the owner or the agent of a public accommodation may refuse admission or service to anyone for any reason.[28] The only common law exception is that those involved in a public calling, like innkeepers and public carriers, are under an obligation to serve without discrimination.[29] The narrow definition of "public accommodation" only offers protection against discrimination in an inn, restaurant, or public carrier, which this Article will refer to as the "Nineteenth Century Interpretation."[30] This definition's conception of what is "public" is strictly limited, even historically excluding places of entertainment, such as theaters open to the public.[31]

In 1865, the wake of the Civil War, Massachusetts passed the first public accommodations law, and it later expanded on the common law categories to include "places of amusement."[32] These first antidiscrimination laws protected

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and added sexual orientation as a protected class.").

[26] *Bell*, 378 U.S. at 294 ("In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting 'civil,' as distinguished from 'social,' rights constantly recurred. Although it was commonly recognized that in some areas the civil-social distinction was misty, the critical fact is that it was generally understood that 'civil rights' certainly included the right of access to places of public accommodation for these were most clearly places and areas of life where the relations of men were traditionally regulated by governments.") (internal citations omitted).

[27] *See* Hunter, *supra* note 19, at 1617 ("[R]ace unquestionably dominated legal discourse from the mid-nineteenth to mid-twentieth century concerning the two most important questions related to public accommodations law: which physical spaces such law governed and whether there was a legal difference between exclusion and segregation.").

[28] *Id. See also* J. E. Keefe, Jr., *Exclusion of Person (for Reason other than Color or Race) from the Place of Public Entertainment or Amusement*, 1 A.L.R.2d 1165 (1948).

[29] *See* Lerman & Sanderson, *supra* note 5, at 218.

[30] *Id.* ("The scope of traditional public accommodations laws is defined by a narrow concept of what places would be open to the public, based on the common law obligation of innkeepers and 'common carriers' to admit all travellers [sic]."). *See also* Answer Brief of Appellee Vanessa Willock at 11, Elane Photography, LLC v. Willock, 2012-NMCA-086, __ N.M. __, 284 P.3d 428, *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012) [hereinafter Answer Brief] (referring to the principles in the nineteenth century statutes as "the nineteenth-century paradigm.").

[31] *See* Hunter, *supra* note 19, at 1618 n.131 (citing McCrea v. Marsh, 78 Mass. (12 Gray) 211, 212-13 (1858); Buenzle v. Newport Amusement Ass'n, 68 A. 721, 722 (R.I. 1908); Taylor v. Cohn, 84 P. 388, 389 (Or. 1906); Greenberg v. W. Turf Ass'n, 82 P. 684, 685 (Cal. 1905); Horney v. Nixon, 61 A. 1088, 1089 (Pa. 1905); Aaron, 96 N.E. at 737; Bowlin [v. Lyon, 25 N.W. 766], 767-68 [(Iowa 1885)].).

[32] The Supreme Court stated:

> After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. In prohibiting discrimination 'in any licensed inn, in any public place of amusement, public conveyance or public meeting,' 1865 Mass. Acts, ch. 277, § 1, the original statute already

against racial discrimination in public accommodations by codifying the common law principle or slight variations of it. These laws were extremely limited in their protections because they only prohibited discrimination in places providing "certain essential goods and services," and they were only concerned with prohibiting racial discrimination.[33]

Congress made its first attempt at protecting racial minorities against discrimination in public accommodations with the Civil Rights Act of 1875.[34] This Act prohibited race discrimination in a broader category of places by providing, in part,

> [t]hat all persons within the jurisdiction of 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; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[35]

In the 1883 *Civil Rights Cases*, the U.S. Supreme Court invalidated the public accommodations section of the Act when it held that Congress did not have authority under the Thirteenth and Fourteenth amendments to enact it.[36] The Supreme Court reasoned that the Fourteenth Amendment's protections only apply to "state action," not the private discriminatory action that the statute attempted to prohibit.[37] Furthermore, the Court held that the denial of access to an establishment did not amount to a violation of the Thirteenth Amendment because private discrimination was not slavery but merely amounted to an "ordinary civil injury," like breach of contract.[38] According to the Court, Congress had no power to protect African American consumers against private events of discrimination, but the Court did not rule on whether it would be possible to regulate public accommodations within the scope of interstate commerce.[39] Thus, it was left mainly to state legislatures to decide how African Americans were to be treated in the context of public accommodation.[40]

> expanded upon the common law, which had not conferred any right of access to places of public amusement (internal citations omitted).

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571 (1995). *See also* Lerman & Sanderson, *supra* note 5, at 238 ("The earliest legal recognition of the right of access was a statute passed by the Massachusetts state legislature in 1865, in the wake of the Civil War.") (internal citation omitted).

33 Lerman & Sanderson, *supra* note 5, at 238 ("The [Massachusetts] law prohibited discrimination based on race and color in places which provided certain essential goods and services.").

34 Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

35 *Id.*

36 Civil Rights Cases, 109 U.S. 3 (1883).

37 *Id.* at 10-19.

38 *Id.* at 24.

39 *Id.* at 19.

40 In the South, only Tennessee enacted a public accommodations law. On the other hand, in the

Left to the states, progress was slow for antidiscrimination law. In 1949, only eighteen states adopted legislation prohibiting race discrimination in the public accommodation.[41] These early laws, like the federal Civil Rights Act of 1875, narrowly defined "public accommodation" by prohibiting only a short list of places from excluding consumers on the basis of race.[42] Among the most common were "inns, taverns, hotels, public conveyances, restaurants, theaters, and barber shops."[43] At that time, the number of states with laws authorizing or requiring discrimination or segregation exceeded the number of states with laws prohibiting discrimination.[44] Absent a contravening statute, the common law of the time provided little or no protection against racial discrimination because it considered the issue to be one of contract.[45]

It was not until the peak of the civil rights struggle of the 1960s that legislation prohibiting race discrimination began to accelerate.[46] In 1963, President John F. Kennedy urged Congress to act by requiring "equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores."[47] Congress responded with the Civil Rights Act 1964,[48] this time

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North and West, eleven states passed public accommodation laws between 1883 and 1885. Most southern states did the opposite and passed segregation laws or codified existing racist social conventions. *See* Lerman & Sanderson, *supra* note 5, at 239 (internal citations omitted).

41 *Id.* at 239-40.

42 *Id.* at 240.

43 *Id.* (internal citation omitted). *See also* Brief in Chief of Appellant Elane Photography, LLC at 12, Elane Photography, LLC v. Willock, 284 P.3d 428, (N.M. Ct. App. 2012) *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012) [hereinafter Brief in Chief] ("Traditional public accommodations provide standardized products or ministerial services that are essential to the public at large. Lodging, traveling, and eating are essential needs that all members of the public must 'resort[] to . . . from time to time.'") (citing Cecil v. Green, 43 N.E. 1105, 1105-06 (Ill. 1986)).

44 *See* Lerman & Sanderson, *supra* note 5, at 240.

45 The Texas Court of Appeals articulated this principle where a man was refused admittance to the Terrell Wells Swimming Pool because he was of Hispanic or Mexican descent:

> [I]n the absence of Civil Rights Legislation to the contrary the proprietor of a place of amusement which is privately operated can refuse to sell a ticket to and may thereby exclude any person he desires from the use of his facilities for any reason sufficient to him, or for no reason whatever . . . The rule, as it exists in Texas, is well stated in 26 R.C.L. 704, as follows: 'In this country, the great weight of authority is to the effect that the right of a purchaser of a ticket to enter and remain at a theater, circus, race track or private park, is a mere revocable license. The proprietor of an amusement enterprise may deny admission to anyone, and a person having entered may be forced to depart on request, and if he refuse to depart, he may be removed with such force as is necessary to overcome his resistance. No action will lie, in the absence of some statute regulating admission to places of amusement, for refusal to admit any person. If the license to enter be revoked by the proprietor and a ticket holder ejected without unnecessary force, the only remedy of the holder of the ticket is an action for breach of the contract, and his damages are limited to the price of the ticket and any expenses incident to the purchase of the ticket and attending the place of amusement.'

Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824, 825-26 (Tex. Civ. App. 1944).

46 *See* Lerman & Sanderson, *supra* note 5, at 240.

47 President John F. Kennedy, *Report to the American People on Civil Rights, 11 June 1963*, JOHN F. KENNEDY: PRESIDENTIAL LIBRARY AND MUSEUM (June 11, 1963), *available at* http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6RolyEm74Ng.aspx.

based on the jurisdiction granted to Congress through the Commerce Clause, rather than the Thirteenth and Fourteenth Amendments.[49]

Title II of the Civil Rights Act of 1964, like its predecessors, continued to define "public accommodation" narrowly by requiring it to fall within one of four enumerated categories, mirroring the Nineteenth Century Interpretation of "public accommodation" as an inn, restaurant, or public carrier:

> Each of the following establishments which serves the public *is a place of public accommodation* within the meaning of this subchapter *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action:
> (1) any *inn*, hotel, motel, or other establishment which provides lodging to transient guests, *other than* an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> (2) any *restaurant*, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> (3) any motion picture house, *theater*, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.[50]

Notably, the statute follows the Nineteenth Century Interpretation closely, merely enumerating additional but similar or identical establishments. A possible complication for victims of discrimination is the statute's limitation to operations that affect commerce, which was Congress' commerce clause "hook" to establish jurisdiction. Also of particular interest is the "Mrs. Murphy exception," which excludes from section one's lodging category places that resemble a bed and breakfast.[51] Some states have incorporated this exception into their civil rights

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[48] Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012). *See also* Miller v. Amusement Enters., Inc. 394 F.2d 342, 352 (5th Cir. 1968) ("[This provision was] enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public.").

[49] Hunter, *supra* note 19, at 1621 ("Congress took the hint [from the Civil Rights Cases], specifically grounding Title II in its power over interstate commerce.").

[50] 42 U.S.C. § 2000a(b) (2012) (emphasis added). Part (a) of this section states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2012). The judicial interpretation of the statute reflected its narrow focus and the requirement that it fall within interstate commerce. *See, e.g.*, Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 252-57 (1964).

[51] *See* Forman, *supra* note 11, at 332 ("The Mrs. Murphy exception stems from a belief that the

statutes,[52] reflecting a policy that the nature of some establishments—like bed and breakfasts—are more "intimate and personal" and should therefore fall outside the scope of the statute in order to respect the privacy of home-like establishments.[53]

C. The Emergence of Consumer Access Consciousness For All But LGBT Consumers

Starting in the 1960s, Congress began passing new consumer protection laws.[54] For example, the handicapped are a group of minority consumers that have successfully obtained access rights over the past half-century.[55] In 1990, Congress guaranteed the disabled access to public accommodations with the passage of the Americans with Disabilities Act ("ADA"),[56] which provides the handicapped with similar protections in the public accommodation as the Civil Rights Act of 1964 provides to other protected classes.[57]

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nature of small B&Bs (and similar places of public accommodation for transient guests) is more intimate and personal than major commercial establishments."). *See also* James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 608 (1999) (describing the legislative history of the Mrs. Murphy exception as grounded in the First Amendment).

[52] The states that have adopted the Mrs. Murphy exception are: Delaware, Illinois, Iowa, Maine and Nevada. DEL. CODE ANN. tit. 6, § 4502(13) (West, Westlaw through 78 Laws 2011) (providing that the definition for "'place of public accommodation' . . . shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with *less than 10 rental units* catering to the transient public") (emphasis added); IOWA CODE ANN. § 216.7(2)(b) (West, Westlaw through 2011) ("The rental or leasing to transient individuals *of less than six rooms* within a single housing accommodation by the occupant or owner of such housing accommodation *if the occupant or owner or members of that person's family reside therein.*") (emphasis added); ME. REV. STAT. ANN. tit. 5, § 4592(3) (West, Westlaw through 2011) ("This subsection does not apply to the owner of a lodging place: *A.* That serves breakfast; *B.* That contains *no more than 5 rooms* available to be let to lodgers; and *C. In which the owner resides* on the premises") (emphasis added); NEV. REV. STAT. ANN. § 651.050(2)(a) (West, Westlaw through 2010 Sp. Sess.) ("[E]xcept an establishment located within a building which contains *not more than five rooms* for rent or hire *and* which is *actually occupied* by the proprietor of the establishment *as the proprietor's residence.*") (emphasis added); *see also* 775 ILL. COMP. STAT. 5/5-505(1) (West 2011) (quoting the exemption available under Illinois law). Forman, *supra* note 11, at n. 177.

[53] *See* Forman, *supra* note 11, at 329-32.

> According to Senator (and, later, Vice President) Hubert Humphrey of Minnesota: 'The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.'

Forman, *supra* note 11, at 331 (internal citations omitted)).

[54] *See generally Major Consumer Protection Laws*, THE FEDERAL RESERVE BOARD (May 17, 2007), http://federalreserve.gov/pubs/complaints/laws.htm.

[55] *See* Lerman & Sanderson, *supra* note 5, at 236-37 (discussing the Vocational Rehabilitation Act of 1973, the Urban Mass Transit Act of 1964, and the Architectural Barriers Act).

[56] The Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12300 (West 2012) (enacted July 26, 1990).

[57] The ADA states:

> No individual shall be discriminated against on the basis of disability in the full and equal

The introduction of "sex" as a protected class in some states' public accommodations laws reframed the scope and social impact of public accommodation laws.[58] Women began seeking entrance into private entities, like membership clubs, that functioned as sites for the informal exchange of social and economic capital; such private entities are beyond the scope of strict Nineteenth Century Interpretation statutes, which are limited to essential services.[59] *Roberts v. U.S. Jaycees* is a seminal U.S. Supreme Court case that captures the expanding scope of public accommodation statutes, and it held that the Jaycees Club is indeed a public accommodation under the broad Minnesota Human Rights Act.[60] This ruling acknowledged that civil rights statutes are no longer limited to venues for the sale of tangible goods and services, but also include intangibles, like membership benefits.[61]

Discrimination in other contexts, like credit, banking, and housing came to the forefront of congressional consciousness during the late twentieth century.[62] Racial minorities and women were known to be blatantly and egregiously excluded from participation in mortgage financing—"redlining" is an egregious example, referring to instances in which lenders would draw red lines around black neighborhoods and refuse to lend money to anyone within that red line.[63] In

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> enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (West 2012). The ADA defines public accommodation in nearly the same way as the Civil Rights Act of 1964. *Compare* 42 U.S.C. § 12181 (West 2012) *with* 42 U.S.C. § 2000a(b) (West 2012).

58 Hunter, *supra* note 19, at 1624.

59 *Id.* at 1624-25. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (Minnesota public accommodation act applied to Jaycees, a young men's club, to prohibit the exclusion of women); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (California public accommodation act applied to the Rotary Club, a professional business association, to prohibit the exclusion of women).

60 *Roberts*, 468 U.S. at 615 ("The term 'place of public accommodation' is defined in the Act as 'a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.'") (internal citations omitted).

61 The *Roberts* Court stated its approval of the idea that intangibles are goods within public accommodation laws:

> Thus, in explaining its conclusion that the Jaycees local chapters are "place[s] of public accommodations" within the meaning of the Act, the Minnesota court noted the various commercial programs and benefits offered to members and stated that "[l]eadership skills are 'goods,' [and] business contacts and employment promotions are 'privileges' and 'advantages' . . . " 305 N.W.2d, at 772. Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.

Roberts, 468 U.S. at 626.

62 Jared Ruiz Bybee, *Fair Lending 2.0: A Borrower-Based Solution to Discrimination in Mortgage Lending*, 45 U. MICH. J.L. REFORM 113, 113-14 (2011) ("The Fair Housing Act, the Equal Credit Opportunity Act, and other Civil Rights Era legislation designed to create racial equality in lending (Fair Lending Laws), have opened the door to credit that was once entirely closed to black and other minority borrowers.").

63 "Redlining" is the practice of denying loan services to racial minorities, based on assumptions about the race of the individual and the race's association with an economic class or neighborhood,

response, Congress designed laws to respond to this explicit type of discrimination.[64] The 1968 Fair Housing Act ("FHA")[65] sought to place all borrowers and homeowners on equal footing by prohibiting discrimination in all aspects of *residential real-estate* related transactions based on a person's "race, color, religion, sex, handicap, familial status, or national origin".[66]

> [I]t shall be unlawful—
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination[.][67]

Eight years later, gender discrimination in the credit context motivated the passage of the 1974 Equal Credit Opportunity Act ("ECOA") to prohibit discrimination in "*any* aspect of a credit transaction," and not just in real estate.[68] The Act originally only prohibited discrimination on the basis of gender and marital status.[69] Two years later, the protected classes were expanded in the

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rather than evaluating the financial capability of the individual. There is also "reverse redlining," which is the practice of targeting certain communities for the sale of loans "with particularly onerous and unfair terms." *See* Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch With Their Class*, 43 LOY. L. A. L. REV. 1339, 1345-46 (2010) (distinguishing redlining from reverse redlining). *See also* Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 180 (2009) ("Reverse redlining is lending discrimination. When it occurs in communities of color, it is the extension of credit on unfavorable terms based on a borrower's race. While there is a range of fair lending laws that address the issue of extension of credit on unfavorable terms, most of the attention paid to date with respect to the fair lending laws and their relationship to reverse lending has been on the Fair Housing Act (FHA)."); Bybee, *supra* note 62, at 129 ("As a result, minority borrowers were relegated to predatory and unscrupulous lenders who peddled loan products designed both to strip equity and lead to foreclosure.").

64 Bybee, *supra* note 62, at 126. *See also* Brescia, *supra* note 63, at n. 52 ("See, e.g., Truth in Lending Act (TILA), 15 U.S.C. § 1601-1615 (2006); Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. §§ 1639, 1648 (2006); Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(a)-(f) (2006).").

65 The Fair Housing Act, 42 U.S.C. §§ 3601-19 (West 2012).

66 42 U.S.C. § 3605(a) (West 2012).

67 42 U.S.C. § 3604 (West 2012).

68 Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (West 2012) (emphasis added).

69 The Senate Committee on Banking, Housing and Urban Affairs in 1976 stated:

> Hearings in the House of Representatives in 1974 produced testimony of discrimination against credit applicants on account of their sex or marital status, and also on account of

ECOA "to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Consumer Credit Protection Act" in order to establish a "clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness."[70] The FHA and ECOA are the two most important federal laws relating to consumer protection in the housing and credit markets.[71] Sexual orientation is not included as a protected class in either the ECOA or the FHA.[72]

> other characteristics unrelated to creditworthiness. The resulting legislation, the Equal Credit Opportunity Act of 1974 (Title V of Public Law 93-495), enacted at the end of the 93rd Congress, dealt only with discrimination on the grounds of sex or marital status[.]

S. Rep. No. 94-589, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 404. *See also* Andrea Michele Farley, *The Spousal Defense--A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?*, 49 VAND. L. REV. 1287, 1291 (1996) (stating that in response to findings of discrimination in the credit market, Congress's "redress quickly centered on married women, who were consistently required to obtain the signatures of their husbands in order to receive credit from financial institutions").

[70] The Senate Committee on Banking, Housing and Urban Affairs in 1976 stated:

> The bill expands the prohibitions against discrimination in credit transactions to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Consumer Credit Protection Act . . . the Committee believes it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.

S. Rep. No. 94-589, at 2–3, 1976 U.S.C.C.A.N. 403, 404-05.

[71] The Department of Housing and Urban Development describes just what these laws require of lenders:

> Because both the FH Act and the ECOA apply to mortgage lending, lenders may not discriminate in mortgage lending based on any of the prohibited factors in either list. Liability under these two statutes for discrimination on a prohibited basis is civil, not criminal . . . Under the ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction and, under both the ECOA and the FH Act, it is unlawful for a lender to discriminate on a prohibited basis in a residential real estate related transaction. Under one or both of these laws, a lender may not, because of a prohibited factor: Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards; Discourage or selectively encourage applicants with respect to inquiries about or applications for credit; Refuse to extend credit or use different standards in determining whether to extend credit; Vary the terms of credit offered, including the amount, interest rate, duration, or type of loan; Use different standards to evaluate collateral; Treat a borrower differently in servicing a loan or invoking default remedies; or Use different standards for pooling or packaging a loan in the secondary market.

Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01 (Dep't of Hous. & Urban Dev. et. al. Apr. 15, 1994). *See generally* Bybee, *supra* note 62 (critiquing the current effectiveness of these federal housing and credit laws at preventing racial discrimination).

[72] 15 U.S.C. §1691(a) (West 2011) (sexual orientation absent in ECOA); 42 U.S.C. § 3605(a) (West 2011) (sexual orientation absent in FHA).

D. Casting Off The Historical Limitations: The LGBT Claim to Cultural Citizenship and the Expansion of the Meaning of Public Accommodation

Some members of Congress have been concerned with the lack of protection for LGBT individuals, especially in the Civil Rights Act 1964, but their attempts at passing bills adding sexual orientation as a protected class have failed year after year.[73] Some states have filled the federal LGBT protection gap by including "sexual orientation" as a protected class in their own human rights laws.[74] Washington D.C. was the first jurisdiction to pass a law prohibiting sexual orientation discrimination, with twenty-one states following thereafter.[75] However, many states have not passed such laws, most likely due to a clash with what many states believe are more important First Amendment rights allowing for individuals to freely exercise religion, to freely associate, or to otherwise do business with whomever they choose.[76]

The addition of "sexual orientation" as a protected class in some state statutes, however, has had a profound social impact.[77] If the addition of "sex" as a protected class can be said to have "expanded" public accommodation law into the aforementioned "intangible" space, like membership organizations, "sexual orientation" has actually pushed public accommodation law into what Professor Nan D. Hunter[78] describes as "cultural" or "discursive" space.[79] The resulting

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[73] *See, e.g.*, Housing Nondiscrimination Act of 2010, H.R. 4828, 111th Cong. (2010); Kelly Catherine Chapman, *Gay Rights, The Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783 n. 21 (2012) (stating that, as of June 2012, HR 4828 is "the most recent effort '[t]o amend the Fair Housing Act to prohibit housing discrimination on the basis of sexual orientation or gender identity, to amend the Civil Rights Act of 1964 to prohibit such discrimination in public accommodations and public facilities, and for other purposes'") (internal citations omitted). *See also* Kenneth D. Wald et al., *All Politics is Local: Analyzing Local Gay Rights Legislation*, NATIONAL GAY AND LESBIAN TASK FORCE, 2 (1997), http://www.clas.ufl.edu/users/kenwald/main/allpoltc.pdf (stating that given the failure of federal civil rights initiatives, "the campaigns for municipal civil rights have steadily expanded the legal protection afforded to sexual minorities").

[74] *See, e.g.*, N.M. STAT. ANN. § 28-1-7 (West 2012) (establishing that it is unlawful to discriminate on the basis of sexual orientation as an employer or labor organization, in a public accommodation, in real property transactions, financing for property, or for any type of consumer credit).

[75] Chapman, *supra* note 73, at 1789 (citing the D.C. Human Rights Act, D.C. CODE § 2-1402.31 (2011)).

[76] *Id.* at 1788-89 (describing the constitutional claims that arise against the adoption and application of public accommodation laws prohibiting discrimination on the basis of sexual orientation).

[77] Hunter, *supra* note 19, at 1626 ("[T]here has been no statutory language change other than the addition of a new prohibited basis for discrimination to a pre-existing list, but the impact of this two-word addition has been substantial.").

[78] Associate Dean, Graduate Programs, and Professor of Law, Georgetown School of Law:

> After graduating from Georgetown Law, Dean Hunter was a litigator and project director with the ACLU's national legal staff for nine years. She began her teaching career at Brooklyn Law School in 1990, and has been a visiting professor at Harvard Law School and the University of Miami Law School. From 1993 to 1996, she was Deputy General Counsel for the U.S. Department of Health and Human Services, and later served as a member of the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry . . . In January 2011, she became Associate Dean for Georgetown's LL.M. and S.J.D. programs.

cultural tension is primarily driven by religious values: states that have not adopted "sexual orientation" as a protected class are, statistically speaking, more religious.[80] Two U.S. Supreme Court cases, described below, illustrate the struggle of the LGBT community's claim not to any form of property, but to "cultural citizenship," and both cases held that the application of public accommodation laws to cultural enterprises violated constitutional rights to free speech and freedom of expression.[81]

In the 1995 case of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court held that Massachusetts' public accommodation law requiring the private organizers of a parade to allow a gay group to join their St. Patrick's Day Parade violated the parade sponsors' First Amendment right to free speech.[82] Five years later, in *Boy Scouts of America v. Dale*, the Supreme Court held that New Jersey's public accommodation law requiring the Boy Scouts to reinstate assistant scoutmaster Dale after he announced his homosexuality violated the organization's First Amendment right to freedom of association.[83]

According to Professor Hunter, these cases:

> mark[] a moment when the law has moved from its initial concern with innkeepers and common carriers to, potentially, a willingness to carry the equality principle into civic organizations not linked in any obvious way to market forces or economic harm. It signals a new kind of rights claim, not to any form of property, however broadly conceived. It is a claim to cultural citizenship.[84]

However, cases have since arisen demonstrating that the LGBT claim to cultural citizenship is not limited to "civic organizations," but is moving into market transactions that involve cultural elements like artistic expression and marriage. For example, in *Elane Photography, LLC v. Vanessa Willock,*[85] an

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See Nan Hunter, GEORGETOWN LAW, http://www.law.georgetown.edu/faculty/hunter-nan.cfm# (last visited Mar. 4, 2013). Relevant to this paper, she filed an amicus curiae brief in Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000), in support of James Dale, on behalf of the Society of American Law Teachers. *See* Hunter, *supra* note 19, at n. d1.

[79] Hunter, *supra* note 19, at 1626-27. Cases like *Hurley* and *Boy Scouts of America* illustrate that "the claim has been of a right to presence, even where there is no material benefit at issue and a fixed space is either non-existent or irrelevant. These claims are not about access to either physical space or to an opportunity for material gain, but access to cultural or discursive space." *Id.*

[80] Chapman, *supra* note 73, at 1786 ("[T]he populations in the states that do not have public accommodations laws providing protection on the basis of sexual orientation ('holdout states') are more religious[.]").

[81] *See* Hunter, *supra* note 19, at 1627.

[82] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

[83] Boy Scouts of Am. v. Dale, 530 U.S. 640, 640 (2000). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire . . . [f]reedom of association therefore plainly presupposes a freedom not to associate.").

[84] Hunter, *supra* note 19, at 1627.

[85] Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012).

LGBT individual claimed that she was discriminated against based on her sexual orientation by a photography company's refusal to photograph her commitment ceremony to her partner.[86] The photography company argued that the First Amendment protected the artistic expression of its photography and thereby limited the scope of public accommodation laws.[87] The New Mexico Court of Appeals found that the First Amendment did not apply to the photography company because the business of taking photographs for hire is not inherently expressive but commercial, and it is therefore subject to the New Mexico Human Rights Act.[88] Despite the Court's holding, this case is not over—the New Mexico Supreme Court granted certiorari and heard oral arguments on March 11, 2013.[89]

The claim to "cultural citizenship" can only exist if the scope of the public accommodation is broadly defined. State legislatures define the scope of the public accommodation in a great variety of ways.[90] Some states and localities have cast off the historical roots and have expanded the definition of "public accommodation" itself beyond the Nineteenth Century Interpretation to the point that "any establishment which offers goods and services of any kind to the public may now be covered."[91] This expansion has been referred to as the "Modern Interpretation" of the public accommodation.[92]

For example, in New Jersey, a business of any type, carrying on any activity, falls within the state's definition of "public accommodation."[93] New Jersey is an example of a state whose definition of public accommodation is based on a "long qualified list," as it describes the covered establishments by their qualities while simultaneously listing examples.[94] The New Jersey statute is riddled with

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[86] *Elane*, 284 P.3d at 432.

[87] *Id.* at 438.

[88] *Id.* at 439-40 ("[T]he NMHRA regulates Elane Photography's conduct in its commercial business, not its speech or right to express its own views about same-sex relationships. As a result, Elane Photography's commercial business conduct, taking photographs for hire, is not so inherently expressive as to warrant First Amendment protections.").

[89] Elane Photography, LLC v. Willock, 284 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012).

[90] *See* Hunter, *supra* note 19, at 1614 ("'There is no underlying rationale which distinguishes private businesses from public businesses. Legislatures and courts have chosen to lump together whatever businesses they think ought to serve [a given group], without developing any clear-cut theory to justify such inclusions or exclusions.' As a result, there is great variance in the definitions of what constitutes a public accommodation.") (internal citation omitted). *See also*, Lerman & Sanderson, *supra* note 5, at 241 (stating that the variation of the scope of public accommodation laws "demonstrates the lack of any valid conceptual basis for the failure of many statutes to protect the rights of groups other than racial minorities").

[91] Lerman & Sanderson, *supra* note 5, at 218 ("[T]he current [interpretation of public accommodation] is so much broader, however, that the use of the word 'accommodations' is a misnomer; any establishment which offers goods and services of any kind to the public may now be covered.").

[92] *Elane*, 284 P.3d at 436 ("Jurisdictions that have recognized broader definitions for public accommodations acknowledge the changing landscape of modern commerce and that the definition of a public accommodation has been expanded over the years.").

[93] Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

[94] *See* Lerman & Sanderson, *supra* note 5, at 243 ("Most state legislatures have dealt with the

expansive language like "where any beverages of any kind are retailed for consumption on the premises" and the catchall provision that "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind" is a public accommodation.[95]

Some states prefer to simply enumerate the public accommodations covered, creating extensive lists: "[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."[96] In contrast to enumeration and "long qualified list" state statutes are "general" state statutes, like New Mexico's consumer protection statute, which defines public accommodation as "*any* establishment that provides or offers its services, facilities, accommodations or goods to the public," and contains only one exception: "a bona fide private club or establishment that is by its nature and use distinctly private."[97] Like New Jersey, New Mexico's statute has been held to apply to *any* business operating in public commerce.[98]

Broad laws like those adopted by New Jersey and New Mexico face constitutional challenge due to "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations[.]"[99] The U.S. Supreme Court has noted this conflict time and time again: "As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[100] There is little doubt to the

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problems of a 'list' definition by stating at the end of the list that coverage 'includes but is not limited to' the listed establishments or by using other qualifying language.") (citing N.J. STAT. ANN. § 10:5-5(l) (West 2010)). The New Jersey statute is also broad with respect to the classes of people covered. *See* N.J. STAT. ANN. § 10:5-4 (West 2007). The New Jersey list includes some establishments that are "traditional" in the sense that they are the "narrow" public accommodations in the Federal Act, and some of the establishments are "non-traditional" like summer camps. An example of a qualified description is "any place maintained for the sale of ice cream." New Jersey might also be considered "expansive" because it includes language like "any restaurant, eating house, or place where food is sold for consumption on the premises." This language is such that even businesses selling food incidentally are subject to the act. *Id.*

95 N.J. STAT. ANN. § 10:5-5(l) (West 2010). *See also* James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 967–68 (2011) (stating that laws like the New Jersey public accommodation law "come[] at a price").

96 Romer v. G. Evans, 517 U.S. 620, 628 (1996).

97 N.M. STAT. ANN. § 28-1-2H (2012) (emphasis added); Lerman & Sanderson, *supra* note 5, at 242 (describing New Mexico statute as "general").

98 Elane Photography, LLC v. Willock, 284 P.3d 428, 436 (N.M. Ct. App. 2012) ("The NMHRA was meant to reflect modern commercial life and expand protection from discrimination to include most establishments that typically operate a business in public commerce."), *cert. granted*, 2012-NMCERT-008, ___N.M.___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012).

99 Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

100 *Id. See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (stating that the Minnesota statute "reaches various forms of public, [and] quasi-commercial conduct"). For a critique of expansive legislative language and an argument for First Amendment Rights in general, *see generally* Gottry,

Supreme Court that "[t]his expansive definition reflects [the states'] recognition of the changing nature of the American economy."[101] The modern era of public accommodations no doubt seeks to apply antidiscrimination laws to non-traditional establishment—indeed, to *any* establishment acting in *public commerce.*[102]

II. THE UNIQUE CHARACTERISTICS OF LGBT CONSUMER ACCESS DISCRIMINATION

As described in Part I, LGBT individuals have experienced discrimination differently than minorities belonging to other protected classes. These differences do not justify their exclusion from civil rights and consumer protections statutes. This Part argues that sexual orientation is an identifiable class appropriate for protection under consumer protection laws. Given the lack of federal consumer protection laws for sexual minorities, state and local human rights laws currently provide the broadest protections, which may include any combination of protections in credit, housing, and public accommodations for LGBT consumers.[103] Furthermore, the addition of sexual orientation as a protected class in federal housing and credit laws would be especially beneficial for the LGBT community.

A. Are LGBT Consumers Identifiable? Yes, and Identity Includes More Than How You Look

Whether "sexual orientation" is an identifiable class has been the subject of legal debate,[104] and it is relevant to the question of whether sexual minorities

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supra note 95.

[101] *Roberts*, 468 U.S. at 626.

[102] *See, e.g.*, *Roberts*, 468 U.S. at 626; *Elane*, 284 P.3d 428; D'Amico v. Commodities Exch. Inc., 235 A.D.2d 313, 314, 652 N.Y.S.2d 294, 296 (1st Dep't 1997) ("[The New York public accommodation law states that] '[t]he provisions of this article shall be construed liberally for the accomplishment of the purposes thereof,' the purposes of which "are to ensure that every person in this State has 'an equal opportunity to enjoy a full and productive life.'"); Burks v. Poppy Constr. Co., 57 Cal.2d 463, 20 Cal.Rptr. 609, 370 P.2d 313, 317 (1962) (en banc) (antidiscrimination law applied to a construction company that was engaged in business of developing, building and selling a tract of housing accommodations and which operated business establishments for sale of houses in tract and offered them for sale to public by advertising and displaying a model home); Pa. Human Relations Comm'n v. Alto–Reste Park Cemetery Ass'n, 453 Pa. 124, 306 A.2d 881, 885-87 (1973) (antidiscrimination law applied to cemetery).

[103] *See* Wald, supra note 73, at 2. Given the failure of federal civil rights initiatives, "the campaigns for municipal civil rights have steadily expanded the legal protection afforded to sexual minorities." *Id.*

[104] The Sixth Circuit Court of Appeals stated:

> [In Equality Foundation I, 54 F.3d 261 (6th Cir. 1995),] [t]his court further observed that any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons 'by subjective and unapparent characteristics such as innate desires, drives, and thoughts'. . . Accordingly, because the Cincinnati Charter Amendment targeted no suspect class or quasi-suspect class, and divested no one of any fundamental right, it was not subject to either form of heightened constitutional scrutiny (namely 'strict scrutiny' or 'intermediate scrutiny.').

Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati ("Equality Foundation II"), 128 F.3d 289, 293 (1997), *on remand after cert. granted*, 518 U.S. 1001 (6th Cir. 1996) (internal citations omitted). *See also* Mark Chekola, *Equality Foundation v. City of Cincinnati: Invisibility and Identifiability of*

represent a constitutionally suspect class deserving of strict scrutiny protection.[105] Whether sexual orientation is an identifiable class, and what the characteristics of that class are, will inform us about which mechanisms of consumer law can protect LGBT individuals from discrimination and in what context. If sexual orientation is not an identifiable class, then consumer protection laws could not serve to protect them.

Some courts have refused to acknowledge the existence of sexual orientation as a class. For example, the Sixth Circuit Court of Appeals in *Equality Foundation I* stated that LGBT individuals "do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."[106] The court further explained:

> [T]he reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class.[107]

Oppressed Groups, 6 LAW & SEXUALITY 141 (1996) (disagreeing with the *Equality Foundation II* court and arguing that the general consensus is that homosexuals do indeed constitute an identifiable class).

[105] The *Equality Foundation II* court explains the law of strict scrutiny protection:

> Where a statute or ordinance uniquely and adversely impacts a "suspect class" such as one defined by race, alienage, or national origin, or invades a "fundamental right" such as speech or religious freedom, the rigorous "strict scrutiny" standard governs, whereby such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Where legislation singularly and negatively affects a "quasi-suspect" class (*i.e.* one defined by gender or illegitimacy), a somewhat less stringent evaluative norm (sometimes called "intermediate scrutiny") controls whereby such a legislative classification is deemed valid if it is "substantially related to a sufficiently important governmental interest" (gender classifications) or is "substantially related to a legitimate state interest" (illegitimacy classifications). *Id.* at 440-41, 105 S. Ct. at 3254-55. However, an ordinary enactment, such as the local initiative in the instant case, which does not impair the interests of members of any suspect or quasi-suspect class, and does not inordinately burden the plaintiffs' exercise of any fundamental constitutional right, is tested under the least demanding equal protection standard, the "rational relationship" inquiry. Under this deferential evaluation, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440, 105 S. Ct. at 3254. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* at 440, 105 S. Ct. at 3254 (citations omitted). *See also 37712, Inc. v. Ohio Dept. of Liquor Control,* 113 F.3d 614, 621-22 (6th Cir. 1997).

Equality Foundation II, 128 F.3d at 293 n. 1.

[106] Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati ("Equality Foundation I"), 54 F.3d 261, 267 (6th Cir. 1995) *cert. granted, judgment vacated,* 518 U.S. 1001 (1996)

[107] *Id.* On remand from the Supreme Court to consider this case in light of *Romer*, the Sixth Circuit Court of Appeals justified its previous refusal to grant suspect class protection to homosexuals by distinguishing the Colorado Amendment in *Romer* from the Cincinnati Charter Amendment. *See Equality Foundation II*, 128 F.3d at 296. For another example of this debate in California state courts,

This assessment is accurate only in the sense that the LGBT community is diverse—some LGBT individuals are extremely expressive of their orientations, some limit it to their private lives, and others may suppress it entirely.[108] However, the court's assessment improperly uses these characteristics as justification for its refusal to treat the LGBT community as an identifiable class. According to Professor Mark Chekola,[109] "[t]he court's understanding of what it is to be in a minority and be identifiable involves fallacious reasoning and a misunderstanding of the concept of minority, particularly of a minority that is oppressed and vulnerable to discrimination."[110]

The court's description of the LGBT class is deficient for many reasons,[111] the most important of which is that it does not appreciate the relational aspect of the sexual orientation class. As articulated by Professor Chekola, the legal determination of identifiablility should be based not on whether apparent features exist in the class, but on how society delineates these groups.[112] LGBT individuals experience discrimination not only based on their appearance, but mainly on their identities in sexual and romantic relationships.[113] It is not difficult for a potential credit lender, landlord, or business to discover the individual's sexual orientation either by directly asking, through the normal course of interaction, or through other means. This relational characteristic of sexual orientation does not require a visible appearance to trigger discrimination. Rather, the discrimination often occurs

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see In re Marriage Cases, 43 Cal. 4th 757, 841, 183 P.3d 384, 442 (2008).

[108] *See generally Sexual Orientation and Homosexuality*, AMERICAN PSYCHOLOGICAL ASSOCIATION, (2008), *available at* http://www.apa.org/helpcenter/sexual-orientation.aspx [hereinafter *APA Report*] (describing the different ways LGBT individuals deal with their sexuality under the heading "How do people know if they are lesbian, gay, or bisexual?").

[109] Ph.D., Professor Emeritus of Philosophy, Moorhead State University. *See* Chekola, *supra* note 104, at 141 n. a.

[110] Chekola, *supra* note 104, at 144.

[111] First, some people are more readily perceived as gay or lesbian than others, even absent a declaration of sexual orientation or displays of same-sex affection. *Id.* at 144. *See generally APA Report*, *supra* note 108. Second, it is not accurate to distinguish sexual orientation from other protected classes like race and gender on the basis of visible identification. Identification by sight is a weak distinction to make between the characteristics of the other protected classes; for example, historically speaking, even individuals that appeared "white" experienced discrimination and were treated as if they were "black" because a distant relative was black. This is known as the "one drop" rule. Chekola, *supra* note 104, at 145 (citing Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 30-31 (1993)).

[112] *See* Chekola, *supra* note 104, at 141 ("Gay and lesbian persons are 'identifiable' if identifiable is defined clearly.").

[113] *See APA Report*, *supra* note 108 ("Sexual orientation is commonly discussed as if it were solely a characteristic of an individual, like biological sex, gender identity, or age. This perspective is incomplete because sexual orientation is defined in terms of relationships with others."); Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx [hereinafter *Gallup Survey*] ("Sexual orientation can be assessed by measuring identity as well as sexual behaviors and attractions. Transgender status can be an identity but can also include consideration of behaviors regarding gender nonconformity and an individual's internal sense of gender."). *See generally* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2006) (introducing a theory of couples' aggregate rights that businesses should not distinguish between same-sex and opposite-sex couples).

during early stages of a transaction when the establishment learns of the consumer's sexual orientation merely by learning about his or her relationship status.[114] In *Elane Photography*, for example, the consumer experienced discrimination while trying to book a photographer for her commitment ceremony—revelation of her relationship status, and inevitably her sexual orientation, is not only expected in this type of transaction, but also difficult to avoid. This relational characteristic of LGBT individuals is therefore identifiable, in one way or another, and it defies rationality to exclude LGBT individuals from consumer protection on the basis of identifiability.

In whatever way LGBT individuals are identified, the LGBT community faces substantial discrimination in a variety of contexts. The LGBT community is an economically marginalized group of individuals, further supporting the conclusion that the LGBT community is an identifiable class of people.[115] Media stereotypes portray the LGBT community as "predominantly white, highly educated, and very wealthy," and these stereotypes have even been supported by some "limited" surveys.[116] However, a recent Gallup study of 121,290 interviews—"the largest single study of the distribution of the [LGBT] population in the U.S. on record"—demonstrates the contrary: that "identification as LGBT is highest among Americans with the lowest levels of education . . . [and a] similar pattern is found across income groups."[117] This and other research consistently demonstrate that "LGBT people are at a higher risk of poverty."[118] The fact that

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[114] *See* Elane Photography, LLC v. Willock, 284 P.3d 428, 432 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M.___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012). *See also* Forman, *supra* note 11, at 339-45 (describing examples of sexual orientation discrimination in the booking process at bed and breakfasts).

[115] Consumer protection laws, in general, target classes of people that are impoverished, economically alienated, or excluded from the market. *See supra* Part I.C (describing some of the most important federal acts in consumer protection).

[116] *Gallup Survey*, *supra* note 114.

[117] The *Gallup Survey* provides important data:

> Among those with a high school education or less, 3.5% identify as LGBT, compared with 2.8% of those with a college degree and 3.2% of those with postgraduate education. LGBT identification is highest among those with some college education but not a college degree, at 4.0% . . . A similar pattern is found across income groups. More than 5% of those with incomes of less than $24,000 a year identify as LGBT, a higher proportion than among those with higher incomes -- including 2.8% of those making $60,000 a year or more...Among those who report income, about 16% of LGBT-identified individuals have incomes above $90,000 per year, compared with 21% of the overall adult population. Additionally, 35% of those who identify as LGBT report incomes of less than $24,000 a year, significantly higher than the 24% for the population in general. These findings are consistent with research showing that LGBT people are at a higher risk of poverty.

Id. (citing Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, THE WILLIAMS INSTITUTE (Mar. 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf)

[118] *Gallup Survey*, *supra* note 113. Another survey, the first national comprehensive survey on transgender discrimination, reveals the extent of economic alienation for transgender individuals. According to this survey, transgender individuals experience:

LGBT individuals are economically marginalized from society is evidence that they are an identifiable class and that they therefore deserve the protections afforded to other classes in consumer protection laws.

B. LGBT Discrimination in Housing and Credit: A Distinct Problem With an Easy Fix

The alienation of the LGBT community is especially apparent in the housing market—in 2011, the Department of Housing and Urban Development ("HUD") acknowledged the problem of sexual orientation discrimination in the private housing market and created antidiscrimination policies for its own government housing programs.[119] The HUD based this action on evidence that found "disparate treatment in 32 out of 120 fair housing tests" conducted by Michigan fair housing centers and "significant levels of housing instability for transgender people" in general.[120] When a transgender individual is also a racial minority, the

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> Double the rate of unemployment: Survey respondents experience unemployment at twice the rate of the population as a whole.
> Near universal harassment on the job: Ninety-seven percent (97%) of those surveyed reported experiencing harassment or mistreatment on the job.
> Significant losses of jobs and careers: Forty-seven percent (47%) had experienced an adverse job outcome, such as being fired, not hired or denied a promotion.
> High rates of poverty: Fifteen percent (15%) of transgender people in our sample lived on $10,000 per year or less–double the rate of the general population.
> Significant housing instability: Nineteen percent (19%) of our sample have been or are homeless, 11% have faced eviction and 26% were forced to seek temporary space.

National Transgender Discrimination Survey, NATIONAL CENTER FOR TRANSGENDER EQUALITY AND THE NATIONAL GAY AND LESBIAN TASK FORCE 1 (Nov. 2009), *available at* http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf.

[119] The US Department of Housing and Urban Development ("HUD") states:

> Through this final rule, HUD implements policy to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. This rule follows a January 24, 2011, proposed rule, which noted evidence suggesting that lesbian, gay, bisexual, and transgender (LGBT) individuals and families are being arbitrarily excluded from housing opportunities in the private sector. Such information was of special concern to HUD, which, as the Nation's housing agency, has the unique charge to promote the federal goal of providing decent housing and a suitable living environment for all.

Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662 (Feb. 3, 2012).

[120] HUD cites the surveys:

> [A] 2007 study of housing discrimination based on sexual orientation conducted by Michigan fair housing centers found disparate treatment in 32 out of 120 fair housing tests it conducted. Testers posing as gay or lesbian home seekers received unfavorable treatment on issues such as whether housing was available, the amount of rent, application fees, and levels of encouragement as compared to testers posing as heterosexual home seekers. The gay and lesbian testers also were subjected to offensive comments. See Michigan Fair Housing Center's Report on "Sexual Orientation and Housing Discrimination in Michigan, January 2007 at http:// www.fhcmichigan.org/ images/ Arcus_web1.pdf . . . A recent survey of more than 6,000 transgender persons conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force (Task Force) indicated significant levels of housing instability for transgender people. Twenty-six percent of respondents reported having to find different

statistics are alarmingly disproportionate—for example, twenty eight percent of Latino/a transgender people live in "extreme poverty," seven times the general U.S. population rate of homelessness.[121] The Gallup Survey and HUD studies suggest that LGBT individuals suffer alienation and homelessness distinctly more than others. In light of these facts, the enactment consumer protection laws for LGBT individuals in housing and credit would substantially benefit the LGBT community.[122]

Aside from the HUD policy for its own programs, housing protections in the private market render LGBT individuals vulnerable in many jurisdictions, because only "[t]wenty States, the District of Columbia, and over 200 localities have enacted such laws."[123] Although these local successes are great accomplishments, LGBT individuals that live in communities that are not supportive of LGBT rights

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> places to sleep for short periods of time due to bias. Eleven percent of respondents reported having been evicted due to bias, and 19 percent reported becoming homeless due to bias. *See* November 2009, "Preliminary Findings, National Transgender Discrimination Survey," at http://www.thetaskforce.org/ reports_and_research/ trans_survey_preliminary_findings.

Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4,194, 4194–95 (Jan. 24, 2011).

[121] An analysis of the National Transgender Discrimination Survey reveals:

> Latino/a transgender people often live in extreme poverty with 28% reporting a household income of less than $10,000/year. This is nearly double the rate for transgender people of all races (15%), over five times the general Latino/a population rate (5%), and seven times the general US population rate (4%)[.]
> Twenty-seven percent (27%) of Latino/a respondents said they had experienced homelessness at some point in their lives, nearly four times the rate of the general U.S. population (7.4%).

Injustice At Every Turn: A Look At Latino/a Respondents in the National Transgender Discrimination Survey, NATIONAL GAY AND LESBIAN TASK FORCE (Apr. 18, 2012), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_latino_respondents_english.pdf. The problem of homelessness is especially bad for LGBT youths. According to the American Medical Association:

> About 40 percent of homeless or at-risk youths identify as gay or transgendered . . . Family rejection was most frequently cited as a reason for running away from home, and an alarming 43 percent reported being forced out of their homes because of their sexual orientation or gender identity.

News for Gay, Lesbian, Bisexual and Transgender Physicians: GLBT Homeless Youth Population Faces Major Challenges, Study Finds, AMERICAN MEDICAL ASSOCIATION (Aug. 29, 2012), *available at* http://www.ama-assn.org/ama/pub/amawire/2012-august-29/2012-august-29-glbt_print.html. *See also* Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Services Providers Working with Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless*, THE PALETTE FUND, TRUE COLORS FUND, AND THE WILLIAMS INSTITUTE (2012), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf.

[122] *See* Philip C. Aka, *Technology Use and the Gay Movement for Equality in America*, 35 CAP. U. L. REV. 665, 690-91 (2007) ("The failure to include homosexuals as a class of persons protected under the Fair Housing Act would have been appropriate if gay persons do not suffer discrimination in housing. However, homosexuals are discriminated against in housing and other real estate-related services.")

[123] Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4,194, 4194–95 (Jan. 24, 2011) (citing *Laws Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, INSTITUTE OF REAL ESTATE MANAGEMENT (IREM) LEGISLATIVE STAFF (Jul. 2007), *available at* http://www.irem.org/pdfs/publicpolicy/Anti- discrimination.pdf).

lack these protections.[124] LGBT individuals deserve the same federal protection granted to racial and gender minorities—access to housing is a vital part of success in our society, especially considering that where LGBT families live often determines where they may send their children to school.[125]

The question now becomes whether, at the federal level, it is constitutionally possible to protect sexual orientation as a class in the FHA and ECOA. Scholarship opposing the amendment of the ECOA to include sexual orientation as a protected class is nonexistent, implying that there would be little to no resistance.[126] However, amending the FHA to include sexual orientation as a protected class would likely face more opposition given the sensitivity surrounding private property rights.[127] However, since the FHA's enactment, property owners have not litigated their constitutional rights in the housing context to the extent that rights have been litigated in public accommodations establishments, implying that the constitutional cost of including sexual orientation as a protected class to the FHA is relatively minor or acceptable.[128]

Professor David Thomas[129] highlights three theoretical constitutional arguments in opposition to the application of the FHA against property owners.[130]

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[124] The single most important factor in the passage of sexual orientation anti-discrimination laws "has been the political mobilization of the gay community" at the local level:

> Given the effort required to adopt a local civil rights law or policy, it is not surprising that one of the essential ingredients was a committed and politically organized gay community. Even so, gay men and lesbians were rarely a large enough share of the population to single-handedly pass municipal anti-discrimination legislation and therefore had to rely for support upon a number of friends and allies.

Wald, *supra* note 73, at 10.

[125] *See* David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7, 15 (2001) ("[The housing exclusion] unjustly denies many Americans the freedom to gain access on equal terms with other Americans to good housing and good schools for their children, and proximity to good jobs. Such exclusion unjustly denies many Americans of an equal opportunity to better their lives.").

[126] *See generally* Laura Eckert, *Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act*, 103 COM. L.J. 311 (1998) ("Congress must amend the ECOA to proscribe credit discrimination based upon sexual orientation. Sexual orientation simply plays no role in a person's creditworthiness. Numerous states, cities, and counties have recognized and acted successfully upon this fact by offering gays and lesbians statutory protection from credit discrimination. Congress should follow suit in order to fulfill the ECOA's purpose."). *Id.* at 334. Furthermore, the lack of opposition in the credit context may be due to a lack of connection between religious rights and creditors, as compared to the connections between property owners and religious rights.

[127] *See* Thomas, *supra* note 125, at 8 (stating that, regarding the civil rights legislation of the late 1960s, "[i]n no area of civil rights reform was [the political] dilemma more intense than in housing rights reform").

[128] *Id.* at 48 (stating that the issues surrounding the constitutionality of the FHA application to property owners "have never been squarely confronted" since the FHA's enactment). Professor Thomas argues that, despite the acquiescence to the FHA, the FHA's constitutionality should be challenged because "any departures from constitutional restraints, regardless of how innocuous or acceptable at the time, lower the bar to similar departures at different times and in perhaps less acceptable ways." *Id.*

[129] *See David Thomas*, BYU LAW, http://www.law2.byu.edu/faculty/profiles2009/profile_fancy.php?id=33 (last visited Mar. 5, 2013) ("David A. Thomas is the Rex E. Lee Endowed Chair and Professor of Law Emeritus at Brigham Young University's J. Reuben Clark Law School, where he taught from 1974 until his retirement in 2010.").

First, the property owner may have an argument that the government committed a Fifth Amendment "taking" of a private property interest that should generate a right to just compensation for the property owner.[131] Second, prohibitions against discriminatory property advertisements, like the FHA provision,[132] are a violation of the property owner's First Amendment rights to free speech.[133] Finally, the property owner may have First Amendment free exercise rights to refuse to rent to certain couples because of a religious belief that LGBT cohabitation is sinful.[134]

Theoretically these defensive arguments may limit the application of consumer protection laws in housing and credit. However, these arguments have not created any real impediments to the application of the FHA.[135] The Fifth Amendment "takings" argument, despite the enormous amount of law on the subject, has never been analyzed in relation to the FHA.[136] Regarding the free speech argument, the Second Circuit has already held that housing advertisements are commercial speech entitled to diminished constitutional protection, thereby implicitly holding that the FHA advertising prohibition does not violate First Amendment rights.[137] Perhaps a more relevant issue to claims of sexual orientation discrimination is the possible conflict with religious freedom in the First Amendment. The FHA is violated when a property owner—*i.e.*, not a religious organization—denies selling or renting to someone whose conduct offends the owner's religious beliefs.[138] There is currently no consistent answer to the question of whether the landlord's denial is constitutionally protected by the First Amendment.[139] However, it is safe to say that the FHA has survived since 1968 without much complaint from property owners, and there is little law in opposition to its application. This is not to say that such opposition will not arise should the FHA be enforced against property owners on the basis of sexual orientation.

Advocates of LGBT equality should be particularly aware of the constitutional basis for adding sexual orientation as a protected class to federal

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130 *See* Thomas, *supra* note 125, at 42-47.

131 *Id.* at 42-43.

132 *See supra* note 67. Section (c) of the FHA provision prohibits discriminatory advertisements in the housing market.

133 *See* Thomas, *supra* note 125, at 44-47.

134 *Id.* at 47.

135 *See supra* note 128 and accompanying text; Thomas, *supra* note 125, at 61 ("[I]f the FHA remains unchallenged, no aspect of daily living can be free from federal regulation if a sufficiently idealist motivation can be cited.").

136 *See* Thomas, *supra* note 125, at 49 ("To raise takings issues is a reminder that the FHA directly infringes upon private property rights, the significance of which has never been analyzed by federal courts.").

137 Ragin v. New York Times Co., 923 F.2d 995 (2d Cir. 1991). *But see* Thomas, *supra* note 125, at 45 ("Unfortunately, the court failed to perceive that it was indeed being invited to examine Congress' power to prohibit such speech, and instead—and in place of any analysis—substituted its own strong statement of bias. Therefore, the case stands for the proposition that the FHA advertising prohibitions do not violate First Amendment rights[.]").

138 Thomas, *supra* note 125, at 47.

139 *Id.* at 47 n. 278 (citing inconsistent case law).

consumer protection laws that regulate private conduct, like the FHA.[140] Advocates might face opposition on the basis that Congress does not have the constitutional authority to include sexual orientation as a protected class in the FHA.[141] Courts have justified the FHA's constitutionality as an exercise of Congress' power under the Thirteenth Amendment to prohibit racial discrimination as a badge and incident of slavery.[142] However, the Thirteenth Amendment may be weak authority: it has been argued that the Thirteenth Amendment will not support an amendment for sexual orientation because it only protects against racial discrimination amounting to badges and incidents of slavery.[143] Although Thirteenth Amendment jurisprudence is not necessarily limited to African American slavery,[144] further justification for the sexual orientation amendment will likely be necessary under the Fourteenth Amendment and/or the Commerce Clause.[145]

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[140] Facial attacks have been made against the FHA arguing that Congress had no power to regulate the private conduct of landlords to dispose of their property as they wish. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968). However, the FHA has been consistently upheld by courts on the basis that Congress has the power under the 13th Amendment to regulate private discrimination of race. *See, e.g.*, U. S. v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972). *But see* Thomas, *supra* note 126, at 60. Professor David Thomas raises good arguments against the constitutionality of the FHA itself, and proposes a framework that might better comport with constitutional considerations. According to Professor Thomas, the case law "raises the possibilities that different provisions of the FHA have different sources of constitutional authority, that the authority is not what Congress thought it was, and that courts are forced to find the answer to this question by way of afterthought and without congressional guidance." Thomas, *supra* note 125, at 33.

[141] *See, e.g.*, Thomas, *supra* note 125, at 11-39 (raising doubt as to the constitutionality of government regulation of private property interests).

[142] *Id.* at 12.

[143] *See id.* at 34-36. Professor Thomas argues that the Thirteenth Amendment is insufficient and not acceptable as a justification for the FHA prohibition of racial discrimination. His arguments are four-fold: first, that housing discrimination is not realistically a badge or incident of slavery; second, that the Thirteenth Amendment's application to private conduct is a legal fiction created by the Supreme Court in Jones v. Alfred Mayer Co., 392 U.S. 409 (1968); third, that the Thirteenth Amendment is at best only uncertain authority to protect African Americans and not authority for protecting any other kind of discrimination; and lastly, that the Thirteenth Amendment was not even considered by Congress as authority for enacting the FHA, and therefore that is yet another judicial fiction. *Id.*

[144] *See* Bailey v. Ala., 219 U.S. 219, 240–41 (1911) ("While the immediate concern [of the Thirteenth Amendment] was with African slavery, the Amendment was not limited to that . . . [i]t was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.").

[145] Critics of the FHA's constitutionality, like Professor David Thomas, argue that the Fourteenth Amendment and the Commerce Clause are "mostly speculative" and provide only "patchwork" justifications because "none of the so-called sources of constitutional authority is a complete justification for the full range of FHA provisions." Thomas, *supra* note 125, at 34. The difficulties with the Fourteenth Amendment are of course that it applies only to state action, and not the private conduct that the FHA provisions apply to. U.S. CONST. amend. XIV, § 1; *Civil Rights Cases*, 109 U.S. 3 (1883):

> Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.

Civil Rights Cases, 109 U.S. at 11. There is no court decision citing the Fourteenth Amendment as constitutional authority for the prohibition of private conduct of the FHA. Thomas, *supra* note 126, at 36–40 (arguing that the Congressional Record improperly relied on the Fourteenth Amendment because

Another way to include sexual orientation as a protected class in the FHA or the ECOA is to include it in one of the other protected classes like "sex" or "marital status."[146] In the Title VII employment discrimination context, the Supreme Court in *Price Waterhouse v. Hopkins* held that sex discrimination occurred when a woman was not promoted because she failed to display sexually stereotypical traits.[147] There is an argument that sexual orientation discrimination is based on sex stereotyping and therefore constitutes sex discrimination. The theory is that the basis of discriminating against a gay male is that he is not acting manly enough. Under this rationale, courts should apply a sex stereotyping analysis to LGBT individuals if they bring claims under consumer protection acts like the ECOA or FHA.[148] However, the argument is considered to be weak even by its own advocates and has not been tested in any court; therefore it would be a better strategy to legislatively amend the FHA or ECOA to include sexual orientation as a protected class in its own right.[149]

To summarize the discussion of housing and credit law, there may be constitutional difficulties in amending existing law to include sexual orientation as a protected class in the FHA or ECOA; however, this appears to be the best approach in obtaining federal protection in housing and credit markets. This would guarantee that LGBT individuals across the nation are protected from discrimination in the housing markets in which they currently experience

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"[n]either Katzenbach [v. Morgan, 384 U.S. 641 (1966)] nor any other judicial precedent cited by the FHA proponents purported to authorize any legislation regulating purely private conduct"). Sexual orientation advocates will most likely find their best authority in the Commerce Clause, which has become more lenient towards allowing Congressional regulation of intrastate activity. Professor Thomas summarized the FHA proponents' factual arguments under the Commerce Clause as follows: first, that housing is a significant element of interstate commerce due to the complex interstate transactions that are involved in building and financing homes and evidence suggests American families often move across state lines; second, that discrimination discourages the interstate movement of minority families, materials, and financing. Professor Thomas also summarized the FHA proponents' legal arguments under the Commerce Clause: first, that the Commerce Clause extends to any and all activities which affect interstate commerce; second, that the authority applies even if the effects are minor; last, that Congress can act validly for moral reasons. Thomas, *supra* note 125, at 40-41. The Commerce Clause powers have been expanded since Professor Thomas' article. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the application of the Controlled Substances Act to purely intrastate manufacture and possession of marijuana did not exceed Congress' commerce power because authority exists to regulate intrastate activities that substantially affect interstate commerce, even if the activities only have a de minimus impact on inter-state commerce).

[146] *See* Eckert, *supra* note 126, at 317 ("Courts should read the ECOA's language broadly, including sexual orientation discrimination under the 'sex' category . . . to fulfill Congress's purpose in enacting the ECOA.").

[147] Price Waterhouse v. Hopkins, 490 U.S. 228, 234-35 (1989).

[148] *See* Eckert, *supra* note 126, at 324 ("The issue is not whether a credit applicant is a gay or lesbian or whether his or her co-signer is a gay or lesbian, the issue is whether this person was denied credit based on his or her perceived sexual orientation.").

[149] *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (citing cases for the proposition that the term "sex" as used in Title VII of the Civil Rights Act of 1964 is not synonymous with "sexual preference"); Eckert, *supra* note 127, at 334 ("[I]n light of relevant Title VII case law, it is unlikely that such an interpretation will materialize should a sexual orientation discrimination claim be brought under the ECOA . . . Accordingly, Congress must amend the ECOA to proscribe credit discrimination based upon sexual orientation.").

disproportionate homelessness, alienation, and discrimination.[150] Should federal protection be constitutionally infeasible, then state civil rights laws provide a relatively easy forum to gain protection due to their broad powers.

III. LGBT DISCRIMINATION IN THE PUBLIC ACCOMMODATION: A CULTURAL CONFLICT THAT REQUIRES A NEW ERA OF PUBLIC ACCOMMODATION LAW

In order to provide real protection for the LGBT community in the public accommodation, the Modern Interpretation of the public accommodation must be adopted. This Part discusses how the Nineteenth Century Interpretation of public accommodation fails to protect against the unique discrimination experienced by the LGBT community, and illustrates the courts' reluctance to recognize the Modern Interpretation. Furthermore, this Part analyzes the development of antidiscrimination law in New Mexico, which provides a salient example of state departure from the Nineteenth Century Interpretation. This Part concludes by applying the Modern Interpretation to a private Christian school to illustrate how a broader interpretation of public accommodation makes for good policy, and also to demonstrate that exceptions to the public accommodation statutes can ensure that the policy is acceptable for the religious community.

A. Market Incentives Do Not Fix Sexual Orientation Discrimination

State legislatures can offer LGBT advocates a great deal of protection because states have broad powers to pass such legislation. The discussion now turns to the public accommodation provisions of such acts. As discussed in the Introduction and in Part I, there are three important aspects to public accommodation provisions: (1) they ensure *consumer access* to services and products; (2) they protect human dignity by proscribing humiliating discrimination; and (3) they seek to ensure *citizenship* of alienated groups in society by guaranteeing the right of equal participation in markets.[151] Widespread religious opposition may render federal protection politically impossible, but LGBT advocates facing religious opposition in their own states may improve their political odds by offering to provide appropriate—*i.e.,* religious—exemptions.[152]

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[150] *See supra* Part II.B.

[151] *See supra* notes 20-23 and accompanying text.

[152] There are three main exceptions or exemptions to public accommodation statutes that sexual orientation advocates can use to gain political acceptance of including sexual orientation as a protected class, even in religious communities. The first is the Mrs. Murphy exception as seen in the federal Civil Rights Act of 1964 that guarantees that home-like establishments are not subject to antidiscrimination laws. *See supra* notes 51-53 and accompanying text. The second important (but controversial) exemption is to exempt small business, such as businesses with less than 15 persons, from the public accommodation statutes. *See* Chapman, *supra* note 73, at 1804-11. Lastly, most, if not all, public accommodation statutes include exemptions for establishments run by religious organizations. *Id.* at 1804, 1820-21.

But first, what is the extent of the discrimination against the LGBT community in the public accommodation context? One might argue that free markets already provide enough incentive against discrimination because establishments that discriminate against their customers lose business.[153] Another argument suggests that discrimination in the public accommodation is less of a problem than in the employment context because the sale of goods and services is a relatively minor and routine encounter compared to the extensive interaction between an employer and employee, and consumers may more freely choose which establishments to patronize.[154] Typically the market incentive to make money would seem to eliminate the tendency of businesses to discriminate.[155] Indeed, these market incentives exist and are powerful in reducing discrimination in the majority of consumer transactions—maybe even to the point that the conflict between religion and LGBT rights is overestimated.[156] However, market incentives insufficiently deter discrimination against LGBT individuals in the public accommodation.

The free market incentive fails to cure the problem of sexual orientation discrimination in the public accommodation because the typical LGBT experience with discrimination does not generally occur in simple consumer transactions like buying milk at the grocery store, but rather in transactions that involve cultural values and close personal interaction like wedding services, education, and housing. As Professor Hunter argues, the conflict between LGBT individuals and public accommodations consistently occur in "cultural space."[157] What kind of consumer transactions fall within this cultural space? The major cases arise in transactions that involve the personal beliefs of healthcare providers,[158] LGBT

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153 The arguments for the free market incentive are as follows:

> Two mechanisms are advanced to explain how the market may theoretically reduce discrimination. First, market participants that are focused on the bottom line...may overlook their personal prejudices against employees, business owners, and consumers if they can assist in maximizing profits. Second, in a perfectly competitive market, firms that discriminate against employees or consumers based on factors such as race, religion, and sexual orientation, instead of characteristics that have to do with job performance, ability to pay, or any other rational economic reason, will fare worse than other firms. This result occurs because another firm may hire the qualified employee or sell to the qualified consumer, thus enabling it theoretically to increase its profits above the discriminating firm, eventuating in the forced exit of the discriminating firm from the market over time.

Chapman, *supra* note 73, at 1820-21.

154 *See id.* at 1821 ("[T]hose whose religious beliefs make them feel uncomfortable associating with gay individuals might be more likely to believe that that 'commercial services, like serving burgers and driving taxis,' do not conflict with their beliefs as much as the employment context.").

155 *See id.*

156 *See id.* ("[We] may be overestimating the conflict between religion and gay rights when it comes to public accommodations.").

157 *See supra* notes 78-79, 84 and accompanying text.

158 The healthcare cases can be summarized as follows:

> Generally, however, lawsuits that allege sexual orientation discrimination in violation of state public accommodation statutes fall into three categories: (1) alleged discrimination

couples—with or without children—claiming to be a family,[159] services surrounding marital or commitment services,[160] civic or community associations,[161] health club environments,[162] and private schools.[163] These cases involve cultural transactions—*i.e.*, events that recognize LGBT individuals, couples, or families as being culturally acceptable—that compel service providers to do something they may consider morally unacceptable or that involve the exchange of personal values, like education.[164]

Due to the cultural context of LGBT discrimination, it is paramount for state legislatures to adopt the Modern Interpretation of the public accommodation to go beyond the nineteenth century limitations defining public accommodation merely as an inn, restaurant, or public carrier.[165] The Nineteenth Century Interpretation only prohibits discrimination in places where simple consumer transactions occur—the kind of transactions for which market incentives already ameliorate the problem because few people would turn down making a quick buck selling some

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> based on the personal beliefs of a health care service provider, (2) alleged discrimination to gay families and couples due to their lack of legal marriage, and (3) alleged discrimination based on a presumption that an individual's sexual orientation predisposes him or her to HIV infection.

CAYTON, *supra* note 25, at 204.

[159] *See, e.g.*, North Coast Women's Care Med. Group v. San Diego Cnty Sup. Ct., 189 P.3d 959, 963 (Cal. 2008) (two gay women wanted to become parents through insemination but were refused service by the fertility medical group); Monson v. Rochester Athletic Club, 759 N.W.2d 60, 62 (Minn. Ct. App. 2009) (lesbian couple who parented a child were denied family membership at a health club); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1217 (Cal. 2005) (country club denied family membership benefits to lesbian couple).

[160] *See, e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428, 432 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491, (No. 33,687, Aug. 16, 2012) (gay couple seeking photographers for their commitment ceremony was refused the services of a photography company); Forman, *supra* note 11, at 339–45 (describing examples of sexual orientation discrimination surrounding civil commitment or marriages at bed and breakfasts under the heading of "The Ongoing Culture War Pitting Equality Against Religious Conviction").

[161] *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

[162] *See, e.g.*, Potter v. LaSalle Court Sports & Health Club, 384 N.W. 2d 873, 874 (Minn. 1986) (discrimination against male weightlifter based on his sexual orientation by asking him to refrain from socializing in the weight room to get rid of a "gay atmosphere" in the weight room).

[163] *See, e.g*, *supra* note 1. Hope Christian, a private Christian school, is a perfect example of an establishment in the "cultural space" because it, like many educational establishments, subscribes to a certain system of values that it markets as part of the benefits of its services:

> Today, over 1,400 students annually, from preschool through 12th grade, are receiving a quality, Christ-centered education. While they are here, it is our privilege, honor, and responsibility to prepare them to be tomorrow's leaders . . . We do so through a combination of Biblical worldview curricula, faculty who love the Lord, programs designed to exercise the students' body, mind, and spirit, and an unwavering commitment to follow God's will for Hope Christian School.

About HOPE Christian Schools, HOPE CHRISTIAN SCHOOL, http://www.hopechristianschool.org/welcome_to_hope.cfm (last visited Nov. 18, 2012).

[164] Empirical research to support this statement is difficult to obtain because findings of discrimination by human rights commissions are confidential in nature. So we must rely on case law—the findings of discrimination by commissions that have been appealed to courts.

[165] *See supra* Part I.D.

groceries to a gay person. In "quick buck" transactions, few people would even know or care about the sexual orientation of their customers. Therefore, the Modern Interpretation of the public accommodation must be adopted to account for this unique LGBT experience of discrimination in transactions that are more cultural and personal.[166]

B. The New Era of Public Accommodations: Redefining the Public Accommodation to Ensure LGBT Protection

Courts are interpreting the legislative broadening of the public accommodation as a departure from the Nineteenth Century Paradigm—demonstrating that a new age of the public accommodation is upon us.[167] *Elane Photography, LLC, v. Vanessa Willock*[168] provides a prime illustration of this evolution to a modern interpretation of the public accommodation. This Section delves deeper into the *Elane Photography* case to demonstrate that without the broad definition of "public accommodation" in New Mexico's human rights law, the photography company would not have been deemed a "public accommodation" and LGBT individuals would most certainly have fallen outside the protections of the state's human rights law.

The scope of public accommodation laws is set by two parameters: first, by defining what constitutes a public accommodation, and second, by defining who is protected. New Mexico began its civil rights protection in its Public Accommodation Act ("PAA").[169] In its original form, "public accommodation" was defined by an explicitly enumerated list that essentially followed the Nineteenth Century Interpretation by listing establishments that fall into the following five categories: (1) hotels and other places of lodging, (2) restaurants and other places where food or beverages are served, (3) hospitals, clinics, and places

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166 *See, e.g.*, Romer v. G. Evans, 517 U.S. 620, 628 (1996). The case cited the Boulder ordinance that exhibits the Modern Interpretation by defining public accommodation as "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public." *Id.* (citing Denver municipal code that exhibits the Modern Interpretation by defining public accommodation as "shops and stores dealing with goods or services of any kind").

167 *See, e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428, 435 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 196 P.3d 491 (No. 33,687, Aug. 16, 2012) ("Willock points out, and we agree, that the expansive language of the current NMHRA 'extends protection to "services" and "goods" as well as "facilities" and accommodations,' making [it] clear that [the NMHRA] reaches commercial activity beyond the nineteenth-century paradigm of an inn, restaurant, or public carrier.' It should be emphasized that the legislature explicitly amended the wording of the statute to remove the narrow and specifically enumerated traditional places of a public accommodation relied upon by Elane Photography.") (internal citation omitted).

168 *Id.*

169 1955 N.M. Laws, ch. 192, §§ 1 to 7. *See also* Todd Heisey, *Human Rights Commission v. Board of Regents: Should a University Be Considered a Public Accommodation Under the New Mexico Human Rights Act?*, 12 N.M. L. REV. 541, 544 (1982) (describing the history of New Mexico public accommodation law).

for healthcare or medicine, (4) places of entertainment, and (5) common carriers or other places of public accommodation.[170]

Then, in 1969, the New Mexico Legislature made a drastic change by removing the enumerated list and replacing it with a general, inclusive clause in its Human Rights Act ("NMHRA"):

> "[P]ublic accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private[.][171]

Despite its broad language, the first case to interpret the scope of the NMHRA definition, *Human Rights Commission of New Mexico v. Board of Regents of the University of New Mexico College of Nursing* ("*Regents*"), refused to interpret the NMHRA amendment as an expansion of the Nineteenth Century Interpretation, narrowing the definition to the enumerated list found in the PAA.[172] The *Regents* court held that the University of New Mexico nursing program ("University") was not a public accommodation within the NMHRA definition and therefore overruled the New Mexico Human Rights Commission ("Commission"), which previously found that the University illegally discriminated against an African American nursing student.[173] The Commission argued that the legislature,

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[170] Brief in Chief, *supra* note 43, at 14. The actual text of the Public Accommodation Act statute was as follows:

> A place of public accommodation, resort or amusement within the meaning of this act shall be deemed to include inns, taverns, roadhouses, hotels, motels and tourist courts, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, restaurants, eating houses and any place where food is sold for consumption on the premises, buffets, saloons, barrooms and any store, park or enclosure where spirituous or malt liquors are sold ice cream parlors, confectioneries, soda fountains, and all stores where ice, ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; dispensaries, clinics, hospitals, bathhouses, theatres, motion picture houses, music halls, concert halls, circuses, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, public libraries, garages, all public conveyances operated on land, water or in the air as well as the stations and terminals thereof; public halls and public elevators of buildings and structures occupied by two (2) or more tenants, or by the owner and one (1) or more tenants. Nothing herein contained shall be construed to include any institution, club or place of accommodation which is in its nature distinctly private, or to conflict with existing federal statutes relative to the sale of intoxicating liquors to Indians.

Id. (citing N.M.S.A. 1953, § 49-8-5 (1955 Supp.)).

[171] N.M. STAT. ANN. § 28-1-2(H) (2012).

[172] Human Rights Comm'n of New Mexico v. Bd. of Regents of the Univ. of New Mexico Coll. of Nursing, 95 N.M. 576, 578, 624 P.2d 518, 520 (1981).

[173] Patricia Tyler, a black nursing student, filed a discrimination complaint with the Human Rights Commission claiming that the University had discriminated against her because of her race by giving her a failing grade in a clinical nursing program and then refusing to provide an opportunity for her to immediately retake the course. The University filed an appeal arguing that it is not a "public accommodation" under the NMHRA and the Commission was therefore without jurisdiction. *Regents*, 95 N.M. at 577, 624 P.2d at 519.

by enacting the NMHRA with a general inclusive clause and a specific exemption clause, intended to include all establishments not specifically excluded, including the University.[174] The University argued that the legislature, in replacing the explicit enumeration of the PAA[175] with the current definition, did not intend to extend the concept of public accommodation "significantly beyond that represented by the [PAA] and the other state and federal statutes."[176] Since "university" was not listed in the PAA, the University argued it was not intended to fall within the NMHRA.[177]

The *Regents* court chose to "look to the historical and traditional meanings as to what constitutes a 'public accommodation.'"[178] The court stated that "[w]e do not feel that the legislature, by including a general, inclusive clause in the [NMHRA], intended to have all establishments that were historically excluded, automatically included as public accommodations subject to the [NMHRA]."[179] Since the PAA did not include "university" in its enumerated list, and since a university is not a public accommodation in the "ordinary and usual sense" of the term, the court ruled that the University was not a "public accommodation" under the NMHRA.[180] The court limited its ruling to the particular nursing program at issue, and it reserved the question of whether the University would be a public accommodation under a different set of circumstances.[181]

Like many states, New Mexico began enacting civil rights protections by prohibiting against discrimination only on the basis of race, color, religion, ancestry, or national origin in the public accommodation.[182] Sexual orientation was not added as a protected class until 2003.[183] Nine years later, *Elane Photography, LLC, v. Vanessa Willock* came up to the New Mexico Court of Appeals.[184] Elane Photography ("Company") was a business that offered photography services on a commercial basis and primarily photographed significant

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174 *Id.*

175 *See supra* note 170.

176 *Regents*, 95 N.M. at 577, 624 P.2d at 519.

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *See supra* note 169.

183 N.M. STAT. ANN. § 28-1-7 (annotation noting the 2003 amendment to add "sexual orientation, gender identity" throughout the section). The amendment was sponsored by Senator Cisco McSorley. *See* Sexual Orientation or Gender Discrimination, S.B. 28, 46th Leg., 1st Sess. (N.M. 2012), N.M. STAT. ANN. § 28-1-7.

184 The case arose when Vanessa Willock, who was involved in a same sex relationship, emailed Elane to inquire about photographing her upcoming commitment ceremony for a "same-gender ceremony." Elane responded by thanking her for her interest but explaining that Elane only photographs "traditional" weddings, and in a second response, that "yes, you are correct in saying we do not photograph same sex weddings." Elane Photography, LLC v. Willock, 284 P.3d 428, 432 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491 (No. 33,687, Aug. 16, 2012).

life events such as weddings and graduations.[185] The Company solicited customers by offering services through its website, advertisements on search engines, and in the Yellow Pages.[186]

The first question in the case focused on whether the Company was a "public accommodation" under the NMHRA.[187] The arguments in *Elane Photography* capture the essence of this national debate over the expansion of the public accommodation to the Modern Interpretation. The Company argued that the court should look to the "ordinary and usual sense of the words" and that, as in *Regents*, the historical and traditional meanings of public accommodation determined that the "ordinary and usual sense" of the words was narrow and limited to the enumerated categories of the Nineteenth Century Interpretation.[188] The Company also argued that the court should look to the PAA for guidance to see that a photography company was not listed in the previous act and therefore the New Mexico legislature did not intend for it to be covered by the NMHRA.[189] The Company is correct in its argument that a photography company "does not fit within, or even remotely resemble, any of [the] five categories" accounted for in the older pubic accommodation law.[190] Historically speaking, public accommodations laws covered nothing but essential services.[191]

However, by replacing the enumerated list with an expansive inclusive clause in 1969, the New Mexico legislature opened the door for Willock's argument that all forms of commerce are covered in the NMHRA. Willock, taking the modern expansive position, argued that "*Regents* is fully consistent with a finding that the [NMHRA]'s broad statutory text applies to the sale of all commercial goods and services to the general public in New Mexico" because *Regents* emphasized that the NMHRA should be interpreted according to the "ordinary and usual sense of the words" and left open the question of whether a public university program constitutes a public accommodation.[192]

Willock argued that the language of the NMHRA text was broad because (1) there is no requirement of fixed physical place, (2) it extends to protection of "services" and "goods" as well as "facilities" and "accommodations" reaching commercial activity beyond an inn, restaurant, or public carrier, and (3) that it applied to the sale of goods or services "to the public" with only one exception—a

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185 *Id.*

186 *Id.*

187 *Id.* at 433.

188 Brief in Chief, *supra* note 43, at 14.

189 *Id.*

190 *Id.* at 15.

191 *Supra* Part I.B. and Part I.D.

192 *Answer Brief*, *supra* note 30, at 12 (citing Human Rights Comm'n of New Mexico v. Bd. of Regents of the Univ. of New Mexico Coll. of Nursing, 95 N.M. 576, 578, 624 P.2d 518, 520 (1981) for the proposition that it emphasized that the HRA should be interpreted according to the "ordinary and usual sense of the words" but that it left open the question whether a public university constitutes a public accommodation).

"bona fide private club."[193] This expansive language reflects the legislature's intent to eradicate discrimination from the commerce and business of New Mexico—not just essential services.[194]

The court agreed with Willock in a two-part rationale. It first looked to the language of the NMHRA and emphasized the fact that the legislature explicitly amended the wording of the PAA to remove the narrow, enumerated list of traditional places of public accommodation relied upon by the Company, replacing it with the broad definition in the NMHRA.[195] Since the Company did not argue that the language of the NMHRA was ambiguous, the court refused to "read into" the statute an artistic establishment exception the Company argued was necessary.[196] Second, the court further sought to establish that this broad language is in fact "ordinary and usual" by acknowledging the national trend of legislatures adopting the expansive definition and courts recognizing that this change is reflective of "the changing nature of the American economy."[197]

The 1969 legislative change from the PAA that embodied the Nineteenth Century Interpretation to the broad and modern NMHRA was critical to *Elane Photography*'s holding that the NMHRA had jurisdiction over Willock's claim against a photography company.[198] By adopting Willock's argument, the court agreed that the NMHRA "was meant to reflect modern commercial life and expand protection from discrimination to include most establishments that typically operate a business in public commerce."[199] For this reason, the court ruled that Elane Photography constituted a public accommodation.[200]

This decision demonstrates the importance of broad public accommodation laws in thwarting LGBT discrimination. It highlights that discrimination occurs in cultural space, not in essential services space; *Elane Photography* is a prime example of a cultural space conflict in that it involved the photographing of a gay commitment ceremony—an archetypal cultural consumer transaction, as contrasted with the types of simple consumer transactions involving food, transportation, or lodging historically covered by the Nineteenth Century Interpretation.[201]

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193 *Id.* at 10-12.

194 *Id.* at 12. Willock then cited a number of cases from other states with similar statutes that held that public accommodations include any business providing services to the general public. *See id.* 13-14.

195 Elane Photography, LLC v. Willock, 284 P.3d 428, 435 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008, ___N.M. ___, 296 P.3d 491 (No. 33,687, Aug. 16, 2012).

196 *Id.* at 434-35.

197 *Id.* at 435; Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984).

198 *Elane*, 284 P.3d at 435.

199 *Id.* at 436.

200 *Id.* ("As a result, Elane Photography constitutes a public accommodation under the NMHRA definition and cannot discriminate against any class protected by the NMHRA.").

201 *See supra* notes 157-164 and accompanying text.

C. The Modern Interpretation Applied: Policy for the Modern Age

To illustrate how the Modern Interpretation works in action, reconsider the New Mexican family whose son was denied admission to the Hope Christian preschool, a private Christian school, because his parents are gay.[202] Is Hope Christian a public accommodation within the NMHRA and therefore subject to its prohibition of discrimination? Courts answer this question through a four-step process. This Article will use the four-step process to illustrate the policy ramifications of the Modern Interpretation of the public accommodation, concluding that it is good policy for the modern age.

First, looking to the definition of public accommodation under the NMHRA, the NMHRA would presumably cover the private school as an establishment that provides its educational services to the public.[203] Second, the court will look to the *exception* to the definition—that "public accommodation" does not include an establishment that is "by its nature and use distinctly private."[204] This exception is extremely limited, and any establishment that provides services, facilities, or accommodations that are available to the general public in any way will not fit into the exception.[205] Therefore Hope Christian, if it were a school that advertises its services to the public in any way, would likely be ineligible for this exception.

Third, the court would look to the *exemptions* provided in the NMHRA. The New Mexico legislature has specifically exempted certain establishments from the

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[202] I assume that discrimination against a child for the sexual orientation of his parents is sexual orientation discrimination. As a matter of simplification for this example, I also ignore any issues of federal education funding that may come with antidiscrimination policies. *See supra* note 1 and accompanying text.

[203] *Supra* note 171 and accompanying text.

[204] *Id.* There is no New Mexico case law defining "distinctly private."

[205] The "distinctly private" exception does not apply when there are facts suggesting that the establishment is at all accessible to the public. According to the court in *Elane Photography*:

> Today, services, facilities, and accommodations are available to the general public through a variety of resources. Elane Photography takes advantage of these available resources to market to the public at large and invite them to solicit services offered by its photography business. As an example, Elane Photography advertises on multiple internet pages, through its website, and in the Yellow Pages. It does not participate in selective advertising, such as telephone solicitation, nor does it in any way seek to target a select group of people for its internet advertisements. Rather, Elane Photography advertises its services to the public at large, and anyone who wants to access Elane Photography's website may do so. We conclude that Elane Photography is a public business and commercial enterprise.

Elane, 284 P.3d at 436. Other jurisdictions with similar statutes also severely limit the exception. *See, e.g.*, Clover Hill Swimming Club, Inc. v. Goldsboro, 47 N.J. 25, 33-34, 219 A.2d 161, 165 (1966). Where a New Jersey statute had an identical exception as New Mexico, the Supreme Court of New Jersey held that an establishment which by advertising or otherwise extends an invitation to the public generally is not distinctly private and is a place of public accommodation. The swimming club at issue promoted their facilities through newspaper ads, a sign on the outside of the building encouraging inquiries, and promotional literature available upon request. Even though all the following advertisements contained a disclaimer that the club was "private", the court held that such a label does not make it "distinctly private" because that would be a self-serving statement where otherwise they are welcoming the public. *Id.*

NMHRA, most of which seek to protect the religious values of its constituents.[206] One of the exemptions states that the NMHRA does not:

> bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination . . . unless . . . on account of race, color, national origin or ancestry.[207]

Therefore, as long as the private Christian school is managed by a religious or denominational organization, and not merely by a for-profit institution, Hope Christian would be exempted from the requirements of the NMHRA and could therefore refuse to serve the child on the basis of sexual orientation without running afoul of the law.

Last, if Hope Christian did not fit into the exemption, Hope Christian's last resort would be in the state and federal constitutions: it would argue that the NMHRA, as applied to Hope Christian, violates its constitutional rights—most likely the First Amendment rights to free association, expression, religion—and that the NMHRA is facially unconstitutional. These rights make up the majority of the case law on discrimination in the public accommodation, some of which has already been discussed.

This four-step analysis demonstrates that the modern era interpretation of public accommodation, as embodied in the NMHRA, provides a great deal of certainty to businesses and consumers: businesses know that under a modern interpretation statute such as the NMHRA, the presumption is that the business is subject to its prohibition on discrimination. The exception and exemptions are designed such that a business must make efforts to remove itself from the public by avoiding public accessibility in any way, or by establishing itself as a religious institution. The statute, designed to have a general application with specific exceptions, places the burden on establishments to clarify to the public the width of their doors.

Once it is determined whether or not Hope Christian is covered by the NMHRA, the next question for the court would be whether Hope Christian actually discriminated and thereby violated the Act.[208] As noted above, antidiscrimination laws like the NMHRA do not force businesses to invite consumers contrary to their religious beliefs or values—rather, once a decision has been made to open up a business for commercial purposes, such laws require the business to refrain from

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206 N.M. STAT. ANN. § 28-1-9 (2012).

207 *Id.* at § 28-1-9(B). The New Mexico Legislature has exempted a number of institutions from the NMHRA, including the Mrs. Murphy exception. *See id.* at § 28-1-9(D).

208 *See, e.g.*, *Elane*, 284 P.3d at 436-37 ("Having determined that Elane Photography constitutes a public accommodation, we must next look at whether Elane Photography violated the NMHRA by discriminating against Willock on the basis of sexual orientation.").

inflicting dignitary harm upon their customers.[209] This highlights that antidiscrimination laws are about protecting consumers who are lured into an establishment by its public accessibility.

For example, in *Elane Photography* the consumer was lured by the Company's website to inquire for its services and only found that the company "does not offer its photography services to same-sex couples."[210] Similarly, the gay family here was lured by the public accessibility of Hope Christian as a school for their three-year-old son. Despite the public presence of these two establishments, both establishments discriminated after the consumer already reached out to the business. Discrimination after the consumer has already put one foot through the door is clearly the undesirable result that antidiscrimination laws seek to prohibit, but we excuse only Hope Christian in this example because it is run by a religious organization. The religious exemption—often a political necessity for the enactment of these types of laws—may not be a drastic limit on the LGBT community's protection in any event, and may even be a desirable tool for gay rights activists to facilitate enactment of antidiscrimination legislation.[211] The NMHRA therefore promotes a policy of clarity for the LGBT consumer and all New Mexico businesses by its natural language: that all commerce available to the general public should be free of discrimination *unless the establishment makes it obvious that they are not part of public commerce such that a consumer would not be lured into attempting access.*

CONCLUSION

The LGBT community is experiencing disproportionate levels of discrimination and alienation, yet Congress has refused to include the LGBT community as a class in its arsenal of consumer protection laws: the Civil Rights Act of 1964, the Federal Housing Act, and the Equal Credit Opportunity Act. There is little justification for this lack of protection and there are many ways to satisfy the religious opposition—*e.g.*, by offering certain exemptions—while still protecting LGBT individuals from discrimination in the consumer transactions in which they are most discriminated. These federal consumer protection laws should be amended to protect LGBT individuals because the majority of states still do not include sexual orientation as a protected class.

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209 *See* Forman, *supra* note 11, at 367; *see also supra* notes 20-23 and accompanying text.

210 *Elane*, 284 P.3d at 432. *See also* Brief in Chief, *supra* note 43 at 5 ("In September 2006, Willock discovered Elane Photography's website while searching on the Internet for photographers.").

211 *See generally* Chapman, *supra* note 73, at 1802-03 (discussing how the religious exemption to antidiscrimination laws make them politically feasible in religious states and actually speed up enactment of gay rights legislation, and how mutual cooperation between the gay rights movement and religious constituents is of the utmost importance to the protection of the LGBT community). I also suggest, that likely, the gay couple would have a "hunch" that a religious organization would not tolerate their sexual orientation and would not attempt access in the first place.

Once sexual orientation becomes a protected class, public accommodation laws should broaden their scope by adopting the Modern Interpretation of the public accommodation to account for the fact that LGBT individuals are facing discrimination in a unique context. LGBT discrimination claims occur largely in market transactions that involve cultural elements and personal values like education and services surrounding ceremonies that are historically religious. Public accommodation laws that follow the Nineteenth Century Interpretation of the public accommodation, like the federal Civil Rights Act of 1964, do not cover the LGBT community's unique context of cultural discrimination because the Nineteenth Century Interpretation is limited to essential services. Some state legislatures have already embraced the Modern Interpretation and expanded their public accommodations to include any establishment accessible to the public, with appropriate limited exceptions. The policy of the Modern Interpretation is the best way to ensure that all protected classes are free from discrimination, and may be the only way that the LGBT community can actually be protected. As legislatures expand the concept of public accommodation beyond the traditional scope of inns, restaurants, and public carriers, courts should recognize and respect that expansion and not constrain it to the historical definition as the New Mexico Supreme Court did in *Regents*. Anything less than the Modern Interpretation leaves the LGBT community without protection from discrimination in the consumer context because the Nineteenth Century Interpretation of the public accommodation does not include the establishments that are most prone to discriminate against LGBT individuals in modern society.