

RECOVERING THE RACE ANALOGY IN LGBTQ RELIGIOUS EXEMPTION CASES

Kyle C. Velte*

ABOUT THE AUTHOR

Associate Professor, University of Kansas School of Law. Various drafts of this Article benefitted from the thoughtful input of faculty members at the University of Oregon School of Law, as well as commentators and attendees at the 2019 LatCrit Biennial Conference, the 2019 Central States Law Schools Association Scholarship Conference, and the Hall Center for the Humanities Gender Seminar at the University of Kansas. For their invaluable feedback on various iterations of this project, thanks to Jessica Clarke, David Cruz, Jelani Jefferson Exum, Joshua Jones, Craig Konnoth, Catherine Smith, and members of the faculty at the University of New Mexico School of Law. Final thanks go to my research assistants, Cara Beck, Delaney Hiebert, and Alexis Pearson

TABLE OF CONTENTS

INTRODUCTION	224
I. RACE, RELIGIOUS EXEMPTIONS, AND PUBLIC ACCOMMODATION LAW: <i>NEWMAN V. PIGGIE PARK</i>	230
II. THE RACE ANALOGY IN THE WOMEN’S RIGHTS AND THE LGBT- RIGHTS MOVEMENTS	232
A. <i>Bostock v. Clayton County, Georgia</i>	232
B. <i>Overview of the Race Analogy in the Women’s Rights Movement</i>	234
C. <i>Overview of the Race Analogy in the LGBT-Rights Movement</i>	239
1. Permutations of the Race Analogy in LGBT Rights Cases	240
2. Masterpiece Cakeshop and the Race Analogy	242
III. RESPONSES TO OPPOSITION FROM THE LEFT, THE RIGHT, AND THE COURT	245
A. <i>Challenges from and Responses to the Left</i>	247

* Originally published at 42 CARDOZO L. REV. 67 (2020). The original version (with the original pagination) is to be cited if used in further publications.

- 1. Objections Centering on Movement Building, Movement Strategy, and Coalition Building..... 247
- 2. Objections Advocating for Relying on the LGBT Legal Canon Instead of the Race Analogy 248
- 3. Essentialism Objections 250
- 4. Concerns About Narrowing the LGBT Civil Rights Agenda and Creating a Static View of Civil Rights 253
- B. *Challenges from and Responses to the Right (and Court): “Race is different”*¹⁸⁴..... 256
 - 1. *Piggie Park* Is Not Analogous: Honorable Opposition v. Explicit Bigotry 257
 - 2. *Piggie Park* is Not Distinguishable..... 259
 - 3. LGBT-Rights Advocates Do Not Disparage Exemption Seekers’ Character 260
- C. *The Exemption Seekers of the 1960s Were Not Considered Fringe Bigots in Their Time* 262
- D. *Courts Need Not Assess the Normative or Moral Character of Religious Beliefs* 264
 - 1. Race Gets Strict Scrutiny; Sexual Orientation Gets Rational Basis Review..... 267
 - 2. Marriage Exceptionalism: “Marriage is Different” 273
- IV. THE CASE FOR THE RACE ANALOGY IN THE WEDDING VENDOR CASES..... 276
 - A. *A Note on the Scope of the Proposed Race Analogy* 276
 - B. *Pulling it All Together: A Comprehensive Argument for the Race Analogy* 278
 - C. *Why the Race Analogy Matters* 284
 - 1. The Race Analogy Exposes Errant Exceptionalism..... 284
 - 2. The Race Analogy May Encourage Coalition Building and the Integration of Intersectionality Among Civil Rights Movements 287
- CONCLUSION 288

INTRODUCTION

Our country has grappled with the tension between its commitment to equality principles as instantiated in antidiscrimination law and its commitment to religious liberty for over 150 years.¹ From the passage

1. Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J. CIV. RTS. & ECON. DEV. 233, 237–38 (2018) (describing historical disputes about the tension between religious liberty and equality, including: “during the enactment of the Civil Rights Act of 1964; during the controversy, in the early 1980s, involving the question of whether particular religious educational institutions we are entitled to tax breaks despite their race-based policies; during the 1980s and 1990s, as the courts grappled with the application of gender antidiscrimination laws to all-male organizations; and during the last forty

of the Reconstruction Amendments through the present day, opponents of equality for African-Americans, women, and LGBT people have argued that they should be exempt from federal and state antidiscrimination law based on their religious beliefs.² The national reckoning with these requests for religious exemptions vis-à-vis race is largely settled; from those legal battles emerged “time-tested, reasonable, and workable compromises”³ at the intersection of religious liberty and equality in the marketplace.⁴ Within this historical trajectory sits the current-day requests by wedding vendors for religious exemptions from state antidiscrimination laws with regard to same-sex marriages.⁵

years as the courts have developed and implemented the constitutionally-based ministerial exception to antidiscrimination laws.”) [hereinafter Ball, *Against LGBT Exceptionalism*].

2. See, e.g., *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400 (1968); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018); see also Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 236.

3. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 238 (“In fact, I think our country has reached time-tested, reasonable, and workable compromises arising from the intersection of race and gender equality, on the one hand, and religious freedom, on the other hand; generally speaking, how the nation’s laws have accommodated religious freedom in the pursuit of racial and gender equality has worked well for all sides.”).

4. *Id.* at 238–39 (“Well-established exemptions . . . have provided important protections to religious groups by allowing them, in some contexts, to pursue their spiritual missions without having to abide by antidiscrimination obligations applicable to other entities. At the same time, the well-established religious exemptions have not interfered, to any significant degree, with the ability of antidiscrimination laws to achieve their objectives. The ways in which our country, through the decades, has balanced the pursuit of equality for marginalized groups against the religious freedom rights of equality opponents constitute time-tested, reasonable, and workable compromises that we should use as guides in addressing contemporary disputes arising from the tension between the attainment of LGBT equality and the protection of religious freedom.”).

5. While wedding vendors have most often sought these sexual orientation-based religious exemptions, faith-based social services also have requested such exemptions. See, e.g., *Fulton v. City of Phila.*, 922 F.3d 140, 147 (3d Cir. 2019). *Fulton* involves a Catholic foster care agency in Philadelphia that refuses to consider same-sex married couples as foster parents based on its sincerely held religious beliefs. *Id.* at 148. The refusal to consider same-sex couples as foster parents violates a Philadelphia public accommodation—the Fair Practices Ordinance—which in part prohibits sexual orientation discrimination in public accommodations. *Id.* These non-wedding-vendor public accommodation cases such as *Fulton* raise the same questions presented but not answered in *Masterpiece*: whether requiring compliance with the public accommodation law violates First Amendment free exercise and free speech rights. On February 24, 2020, the Court granted certiorari in *Fulton*. See Supreme Court of the U.S. Question Presented Report, *Fulton v. City of Phila.* (19–123), <https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00123qp.pdf> [<https://perma.cc/S3WH-ZNF8>]. Because the issues are similar to those raised in the wedding vendor cases, the question of the applicability of the race analogy will arise in *Fulton*.

In the approximately twenty states that have public accommodation statutes⁶ prohibiting discrimination based on sexual orientation,⁷ marriage equality has strengthened the backlash against LGBT equality. Most recently, this backlash has manifested itself when for-profit wedding vendors, such as photographers, bakers, and florists, seek religious exemptions from complying with state antidiscrimination law. These vendors argue that the business owners' sincerely held religious beliefs about biblical marriage—that marriage is only between one man and one woman—exempt them from providing goods or services to same-sex couples as would otherwise be required by law.⁸

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,⁹ the U.S. Supreme Court had its first chance to resolve the religious exemption question vis-à-vis sexual orientation discrimination. In that case, Colorado baker Jack Phillips refused to sell a wedding cake to a same-sex couple based on the baker's religious beliefs about marriage; he argued that his First Amendment rights to free exercise of religion and speech exempted him from the Colorado Antidiscrimination Act (CADA).¹⁰ Justice Kennedy's majority opinion, however, declined to answer the central question of whether a religious exemption was warranted.¹¹ Instead of reaching the merits, the Court found in favor of the baker on free exercise grounds based on its conclusion that the *procedure* through which the baker's claims were adjudicated was infected with "religious hostility"¹² and tainted by statements by state officials that were "inconsistent with the State's obligation of religious neutrality."¹³

In addition to the central merits question, the Court left open important ancillary questions. One of the open ancillary questions is the extent to which an analogy to race is appropriate in religious exemption cases involving sexual orientation. The race analogy, as used in the wedding vendor religious exemption cases, proceeds as follows: Advocates and judges across the ideological spectrum widely agree that courts should—and would—reject a religious exemption claim by a

6. Throughout this Article, I use "antidiscrimination law" and "public accommodation law" interchangeably.

7. See *Equality Maps: Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Aug. 13, 2020) https://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations [<https://perma.cc/73EZ-MT52>].

8. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210–11 (Wash. 2019), *petition for cert. filed sub nom. Arlene's Flowers v. Wash.* (U.S. Sept. 12, 2019) (No. 19–333).

9. *Masterpiece Cakeshop*, 138 S. Ct. at 1719.

10. COLO. REV. STAT. § 24–34–601 (2020).

11. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 ("[I]t is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause").

12. *Id.* at 1723–24.

13. *Id.* at 1723.

wedding vendor seeking to turn away a different-sex African-American¹⁴ couple or an interracial different-sex couple based on the vendor's religious belief that Black people are inferior to white people or that the races should not mix.¹⁵ Analogizing to race means that courts similarly should reject religious exemption claims by wedding vendors seeking to turn away a same-sex couple based on the vendor's religious belief in biblical marriage.

There is a robust body of thoughtful scholarship about the race analogy in many contexts, most prominently (and voluminously) on the issue of marriage equality and the United States Military's Don't Ask, Don't Tell policy (DADT).¹⁶ This Article contributes to existing scholarship by analyzing the race analogy in its newest incarnation—the wedding vendor cases—and contending that the analogy should be deployed in context-specific ways, rather than blindly asserted in every legal context. In reaching this conclusion, the Article develops a taxonomy of the race analogy vis-à-vis discrimination based on sexual orientation and discrimination based on sex/gender. In recommending use of the race analogy in the wedding vendor cases, this Article addresses the concerns and arguments from the political left, the political right, and the Court.

LGBT-rights advocates are drawn to the race analogy because the Court has—in the 1968 case of *Piggie Park v. Newman*¹⁷—rejected a religious exemption claim in the context of racial discrimination.¹⁸ Today's exemption seekers make an argument similar to the one rejected in *Piggie Park*.¹⁹ Given that the Court rejected a religious exemption to a public accommodation law to discriminate based on race in *Piggie Park*, LGBT-rights advocates argue that today's exemption seekers should similarly be denied.

14. I recognize and acknowledge that the race analogy can be framed more generally as pitting LGBT couples against couples of color (and interracial couples). However, throughout this Article, I use African-Americans to frame the race analogy because it is how the race analogy most often is framed. This is because the two cases most often invoked for the race analogy are *Loving v. Virginia* and *Piggie Park v. Newman*, both of which involved African-American litigants.

15. See Transcript of Oral Argument at 22:1–7, *Masterpiece Cakeshop, Ltd v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [<https://perma.cc/N6HD-QHVN>].

16. See *infra* Section II.B.

17. *Piggie Park Enters. Inc. v. Newman*, 390 U.S. 400 (1968).

18. See *Newman v. Piggie Park Enters. Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966); *Piggie Park*, 390 U.S. at 400.

19. See, e.g., Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 101 (Douglas Laycock Jr. ed., 2008). Today's exemption seekers also make a claim for religious exemption under the First Amendment's Free Speech Clause.

LGBT-rights activists and advocates have deployed analogies to race since before Stonewall.²⁰ The use of the race analogy by mid-twentieth century activists “played a major role in altering gay identity (perceived from within and without the community) and thus gay litigation methods.”²¹ Beginning in the 1960s, the analogy was used in employment discrimination cases²² and First Amendment right of association cases.²³ The race analogy occupied a significant place in the modern marriage equality movement, with *Loving v. Virginia* as the central analogical vehicle.²⁴ The race analogy was also a central feature of the LGBT movement’s challenge to DADT,²⁵ in efforts to secure heightened scrutiny for sexual orientation under the Equal Protection Clause,²⁶ and in the efforts in some states to add sexual orientation to state antidiscrimination law.²⁷

Moreover, beginning in the antebellum period, the feminist movement used the race analogy in arguing for sex-based equality. Recounting

20. See Mary Ziegler, *What is Sexual Orientation?*, 106 KY. L.J. 61, 81 (2018); Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 339 (2009).

21. Konnoth, *supra* note 20, at 319 (describing the history of the race analogy’s use within the LGBT rights movement and its impact on gay identity, legal strategies, and legal outcomes).

22. See *id.* at 341–43 (describing the petition for certiorari filed with the U.S. Supreme Court by Frank Kameny, a gay man and movement activist who was fired from his job with the federal government because of his sexual orientation; noting Kameny’s “petition took blacks themselves as the lodestar: it conceded the existence of certain, harmless, difference between gays and heterosexuals that were analogizable to the black experience in similar contexts in order to construct gay identity”).

23. See *id.* at 344–45 (describing gay activists’ analogy to NAACP right-to-associate cases in seeking protection for LGBT organizations).

24. *Id.* at 371–72 (writing in 2009 and noting that “the only litigation the analogy would support was marriage litigation, resulting in a focus on marriage rights. This focus has continued in recent years, along with a reliance on the race analogy, sometimes with disappointing results. However, the historical context in which marriage litigation began must be remembered, even as it is criticized.”).

25. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1468 (2000).

26. See, e.g., *Pedersen v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 326 (D. Conn. 2012) (holding that “that sexual orientation should be considered a defining characteristic fundamental to one’s identity much like race, ethnicity or gender[.]” which “weighs in favor of the application of heightened scrutiny”); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) (holding that “[m]any of the factors the Supreme Court . . . identified as important to providing strict scrutiny to classifications based on race, alienage, and national origin and heightened scrutiny to classifications based on gender apply to classifications based on sexual orientation”).

27. See, e.g., *Amending the Law Against Discrimination to Prohibit Discrimination on Account of a Person’s Sexual Orientation: Hearing on HB 421 Before the Judiciary and Family Law Committee*, 1997 Sess. 91–0688 (N.H. 1997) (including testimony regarding the analogy between the immutability of race (already protected by the statute) and sexual orientation (proposed to be added to the statute)).

and analyzing the sex/race analogy of the women's movement is important to the contemporary LGBT rights movement for at least two reasons. First, lessons learned from the analogy's use in the context of the social movement for sex equality can inform LGBT rights advocates' strategic decisions regarding the race analogy, whether in litigation or in movement building. Second, the U.S. Supreme Court's recent decision in *Bostock v. Clayton County, Georgia*,²⁸ suggests that the acceptance of the race/sex analogy in past cases portends the acceptance of the race/sexual orientation analogy in the wedding vendor cases.

Across these legal settings, LGBT rights and women's rights activists faced opposition from all fronts to use of the race analogy: from some progressive activists and scholars on the political left, from activists and scholars on the political right, and from the U.S. Supreme Court itself.

Advocates and scholars opposing use of the race analogies have put forth different reasons for rejecting it depending on the claim asserted by the LGBT rights movement or the women's rights movement.²⁹

In the current-day wedding vendor cases, exemption seekers and their supporters rest their rejection of the race analogy largely on a normative claim: the vendors of the 1960s seeking to discriminate based on race under the guise of religious beliefs were actually racists, whereas today's exemption seekers are not actually homophobic but rather dedicated people of faith asserting honorable and sincere religious beliefs.³⁰ After setting up this "bigots versus honorable believers" dichotomy, today's exemption seekers argue that because they are not bigots and the vendors of the 1960s were, the race analogy must fail.³¹ Otherwise, they contend, today's exemption seekers will be improperly and inaccurately branded as bigots.³²

This Article explains how race furnishes an analogy that should help the Court fashion the best decision in today's religious exemption cases—one that avoids getting embroiled in normative critiques of who is supposedly virtuous or supposedly prejudiced. As explained below, constitutional law has no business singling out and then assessing the normative worthiness of religious beliefs vis-à-vis objections to antidiscrimination law if it does not also assess the normative worthiness of other, non-religious objections to antidiscrimination law. Moreover, the

28. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

29. See *infra* Parts II and III.

30. See *infra* Section III.B; see also LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 4 (Oxford University Press 2020) ("What history teaches about bigotry and how to draw analogies between past and present . . . is often controversial.") [hereinafter MCCLAIN, WHO'S THE BIGOT?].

31. See MCCLAIN, WHO'S THE BIGOT?, *supra* note 30.

32. *Id.* at 3 (noting that opponents of same-sex marriage "argued that comparing their religious opposition to same-sex marriage with religious opposition to interracial marriage wrongly 'branded' them as bigots and was itself a form of bigotry.").

Court's teachings in cases about reconciling free exercise with antidiscrimination principles vis-à-vis race should lead to a harmonious, stable, and consistent doctrinal framework.

Part I summarizes *Piggie Park*, which is the foundational case upon which LGBT-rights advocates base the analogy to race in the wedding vendor cases. Part II describes the history of the use of the race analogy by the women's movement and the LGBT movement, summarizes the contemporary wedding vendor religious exemption claims, and explores the Court's treatment of those claims in *Masterpiece*. Part III lays out and then responds to the objections launched against the race analogy by the political left, the political right, and the Court. Part IV makes the case for the use of the race analogy in the wedding vendor cases. In doing so, it does not contend that a single, controlling principle will suggest the same answer to the race analogy question for every LGBT-rights claim; rather, it endeavors to engage in a more nuanced and thicker analysis of the race analogy that may yield different responses to the question in different legal contexts. The Article then concludes with thoughts about the benefits to the civil rights movement generally—for racial, gender, and LGBT justice—of deploying and accepting the race analogy in the wedding vendor cases.

I. RACE, RELIGIOUS EXEMPTIONS, AND PUBLIC ACCOMMODATION LAW: *NEWMAN V. PIGGIE PARK*

Piggie Park is at the heart of the dispute over whether the race analogy ought to be accepted or rejected in the wedding vendor cases. In 1964, soon after the Civil Rights Act became law, African-Americans in South Carolina brought a class action alleging that the Piggie Park chain of BBQ restaurants refused them service on the same terms as white customers in violation of the CRA.³³ The defendants—the corporate entity of Piggie Park Enterprises, Inc., and its principal shareholder and manager, Maurice Bessinger—conceded that they discriminated against Black customers but argued that the CRA did not apply to them for several reasons.³⁴

As pertinent here, the defendants argued that they were exempt from complying with the CRA because that law violated Bessinger's First Amendment right to freedom of religion because his faith “compel[led] him to oppose any integration of the races whatever.”³⁵ The trial court quickly rejected this claim. It noted that while Bessinger “undoubtedly” had a “constitutional right to espouse the religious beliefs of his own

33. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 943–44 (1966); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400 (1968).

34. *Piggie Park*, 256 F. Supp. at 944.

35. *Id.*

choosing[.]”³⁶ he did not have “the absolute right to exercise and practice such beliefs” to discriminate against African-American customers.³⁷

Although the trial court rejected the religious exemption claim it nonetheless held in Piggie Park’s favor, finding that the restaurants were *not* public accommodations under the CRA.³⁸ Sitting en banc, the Fourth Circuit reversed, finding that Piggie Park’s restaurants were public accommodations.³⁹ The Court remanded the case to the trial court for a determination of whether the African-American plaintiffs were entitled to attorney fees, which are available to a “prevailing party” under the CRA at the discretion of the trial court.⁴⁰ The Fourth Circuit instructed the trial court to use a subjective test to decide whether any of Piggie Park’s defenses “were presented for purposes of delay and not in good faith.”⁴¹

In a concurring opinion, Judge Winter rejected the subjective test.⁴² Using a less deferential test, Judge Winter advised the trial court that Bessinger’s “contention that the Act was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the Defendant’s religion⁴³ was “clearly compensable”⁴⁴ in the form of attorney fees to the plaintiffs because it was “patently frivolous.”⁴⁵

The Supreme Court granted certiorari to resolve the dispute among the judges of the Fourth Circuit: should the subjective, honest belief standard apply or should Judge Winter’s more searching inquiry⁴⁶ apply? In a four-paragraph per curiam decision, the Court rejected the subjective standard for attorney fees under the CRA.⁴⁷ Finding that Congress included the attorney fees provision “not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to

36. *Id.*

37. *Id.* (“This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.”).

38. *Id.* at 953.

39. *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 434 (4th Cir. 1967).

40. *Id.* at 437.

41. *Id.* (explaining that a subjective test is proper because “no litigant ought to be punished under the guise of an award of counsel fees . . . from taking a position in court in which he honestly believes—however lacking in merit that position may be”).

42. *Id.* at 437 (Winter, J., concurring) (noting that defendants were “not entitled to the defense of good faith”).

43. *Id.* at 438.

44. *Id.* at 437.

45. *Id.*

46. *Id.* at 438 (Winter, J., concurring) (“To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.”).

47. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968).

seek judicial relief,”⁴⁸ the Court held that the prevailing CRA plaintiffs “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”⁴⁹ In a footnote, the Court noted that, on remand, an award of attorney fees to the African-American plaintiffs would be proper: “Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable.”⁵⁰ The Court pointed to the defendants’ argument that the CRA “was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the Defendant’s religion’” as an example of a “patently frivolous” defense properly subject to an award of attorney fees.⁵¹

II. THE RACE ANALOGY IN THE WOMEN’S RIGHTS AND THE LGBT-RIGHTS MOVEMENTS

Both the women’s rights movement and the LGBT-rights movement have deployed the race analogy when seeking formal equality. Exploring the use of the race-sex analogy in the women’s rights movement may assist LGBT-rights advocates in their decisions surrounding use of the analogy. Moreover, the U.S. Supreme Court’s recent decision in *Bostock* renders the race-sex analogy, and how it is perceived by courts, an important guidepost for LGBT-rights advocates.

A. *Bostock v. Clayton County, Georgia*

The *Bostock* case was one of three consolidated cases that presented the question of whether Title VII’s prohibition on sex discrimination in employment includes sexual orientation and gender identity (SOGI).⁵² That statute prohibits employers from engaging in employment discrimination “because of [an] individual’s race, color, religion, sex, or national origin.”⁵³ In a 6–3 decision written by Justice Gorsuch, the Court answered that question in the affirmative: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”⁵⁴ Justice Gorsuch reached this conclusion using a well-established rule of statutory construction, namely “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no

48. *Id.* at 402.

49. *Id.*

50. *Id.* at 402, n.5.

51. *Id.* (quoting *Piggie Park*, 377 F.2d 433, 437–38 (Winter, J., concurring)).

52. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020).

53. 42 U.S.C. § 2000e-2(a)(1).

54. *Bostock*, 140 S. Ct. at 1737.

contest. Only the written word is the law, and all persons are entitled to its benefit.”⁵⁵

Justice Gorsuch’s starting point was to determine the meaning of the term “sex” in Title VII, which he did by looking at what the ordinary public meaning of that word was in 1964 when Title VII was passed; he concluded that it “signified . . . biological distinctions between male and female.”⁵⁶ He next turned to Title VII’s causation requirement, reflected in the phrase “because of,” and reiterated that it means but-for causation.⁵⁷ Importantly, the Court emphasized that Title VII’s but-for causation requirement is not a *sole* but-for cause: “So long as the plaintiff’s sex was *one* but-for cause [of the challenged employment] decision, that is enough to trigger the law.”⁵⁸ He then considered the final clause of the operative phrase—“an individual’s”—and held that Title VII’s protections exist at the individual level rather than categorically or at a group level: “It’s no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex.”⁵⁹

Justice Gorsuch then applied the entire phrase “because of an individual’s . . . sex” to the LGBT plaintiffs in the case and concluded that the term “sex” includes SOGI; his reasoning, essentially, was that SOGI is downstream of sex. With regard to sexual orientation, he explained: “If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleagues.”⁶⁰ With regard to transgender employees, he reasoned: “If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female

55. *Id.*

56. *Id.* at 1738–39.

57. *Id.* at 1739.

58. *Id.* (emphasis added); *see also id.* (“Often, events have multiple but-for causes [A Title VII] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.”) (emphasis in original)).

59. *Id.* at 1741; *see also id.* (“The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. Instead of avoiding Title VII exposure, this employer doubles it.”) (emphasis in original)).

60. *Id.*

at birth.”⁶¹ In both of these instances, “but-for” the individual employee’s sex, the employee would not have been subjected to the adverse employment action.⁶² He thus concluded SOGI discrimination is per se sex discrimination: “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁶³

Bostock’s holding that SOGI is downstream of sex and, thus, that SOGI discrimination is per se sex discrimination is consequential to the race analogy question. Specifically, and as described more fully below, the Court’s decision offers two lessons—its emphasis on a statute’s plain language and the likely result that SOGI will now be afforded intermediate scrutiny in constitutional Equal Protection cases—that are relevant to use of the race analogy in the wedding vendor cases.⁶⁴

B. *Overview of the Race Analogy in the Women’s Rights Movement*

The race-sex analogy was deployed by women’s rights advocates as early as the antebellum period.⁶⁵ Use of the analogy continued after emancipation as women sought the right to vote.⁶⁶ It emerged again in the modern civil rights movement of the 1960s, during the second wave of the feminist movement and the national fight over the Equal Rights Amendment (ERA).⁶⁷ With regard to the ERA, which was embroiled in a divisive and contentious national debate, advocates of the race-sex analogy hoped that use of the analogy would “circumvent the counterproductive ERA dispute . . . by uniting behind a litigation strategy based upon the Fourteenth Amendment’s equal protection guarantee.”⁶⁸ In the context of the ERA, discussion about the propriety of the analogy largely occurred within the movement.⁶⁹ The race-sex analogy was also deployed in the movement to allow Black people and women to serve on juries⁷⁰ and to secure protections against sex-based employment discrimination.⁷¹

61. *Id.*

62. “For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms—and that ‘should be the end of the analysis.’”*Id.* at 1743 (internal citation omitted).

63. *Id.* at 1741.

64. *See infra* Sections III.A. and III.B.2.

65. *See* Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045, 1053 (2001).

66. *Id.* at 1054.

67. *Id.* at 1054–55.

68. *Id.* at 1060.

69. *Id.* at 1074–75.

70. *Id.* at 1067–68.

71. *Id.* at 1070.

In the 1970s, the most notable use of the race-sex analogy was the quest for heightened scrutiny for sex under the Equal Protection Clause.⁷² In *Reed v. Reed*,⁷³ which challenged an Idaho statute preferring male estate administrators, and *Frontiero v. Richardson*,⁷⁴ which challenged a military benefit rule preferring enlisted men over enlisted women, the race-sex analogy was used.⁷⁵

In *Reed*, Ruth Bader Ginsburg, then an attorney with the ACLU's Women's Rights Project, explicitly analogized sex to race in an effort to secure strict scrutiny for sex: "Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference."⁷⁶ The ACLU's brief also "characterized courts' unwillingness to recognize the injustice of sex discrimination as a mistake comparable to the Plessy decision"⁷⁷ and "drew the familiar parallel between slavery and women's status at common law."⁷⁸ While the ACLU was successful in striking down the Idaho statute in *Reed*, the Court did not adopt the strict scrutiny standard advocated by Ginsburg.⁷⁹

In striking down the sex-based discriminatory military benefits scheme, the *Frontiero* Court, through Justice Brennan, lamented the history of societal discrimination against women and compared it to similar discrimination suffered by Black people, noting that women's position in society was "in many respects, comparable to that of blacks under the pre-Civil War slave codes" and observing that "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children."⁸⁰ Scholars consider *Frontiero* to be the "apex" of the race-sex analogy,

72. *Id.* at 1073.

73. *Reed v. Reed*, 404 U.S. 71 (1971).

74. *Frontiero v. Richardson*, 411 U.S. 677 (1973). The military benefit scheme automatically granted enlisted men a housing allowance and medical care for wives but required that enlisted women prove their husbands' dependency before receiving the same benefits. *Id.*

75. See Mayeri, *supra* note 65, at 1073 (describing the use of the race-sex analogy in amicus briefs filed in *Reed*).

76. Brief for Appellant at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596, at *5.

77. Mayeri, *supra* note 65, at 1073.

78. *Id.*

79. *Reed*, 404 U.S. at 76-77 ("The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.").

80. *Frontiero*, 411 U.S. at 685. Justice Brennan also noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Id.* at 686-87.

because as the 1970s wore on, the analogy became a double-edged sword which forced many women's rights attorneys to retreat from it.⁸¹ Thus, when the Court declared that sex-based classifications were subject to intermediate scrutiny in *Craig v. Boren*,⁸² advocates "relied upon arguments independent of the race parallel."⁸³

The race-sex analogy appeared in the 1984 case of *Roberts v. United States Jaycees*.⁸⁴ In that case, the Minneapolis and St. Paul chapters of the Jaycees, a membership-based civic organization, admitted women as members contrary to the national organization's bylaws that restricted regular memberships to men.⁸⁵ As a result, the national organization threatened to revoke the charters of these two chapters.⁸⁶ The chapters responded that compliance with the national organization's bylaws would violate Minnesota's public accommodation law, which prohibited discrimination based on sex.⁸⁷ The national organization, in turn, contended that to enforce the public accommodation law would "violate the male members' constitutional rights of free speech and association."⁸⁸ The Court rejected the First Amendment claim for an exemption. It observed that state public accommodation laws began by originally prohibiting

81. See Mayeri, *supra* note 65, at 1076–77. In particular, women's rights advocates like Ruth Bader Ginsburg began to realize that "zealous promotion of racial analogies became hazardous to feminists when the racial baseline legal remedy did not comport with their conception of appropriate remedies for sex discrimination in a particular case." *Id.* at 1076. In retreating from the race-sex analogy, Ginsburg and her contemporaries sought to avoid "the use of remedial justifications for laws rooted in women's subordination and dependency. In short, Ginsburg had recognized the double-edged quality of race-sex analogies, and was attempting to invoke them in more selective and subtle ways." *Id.* at 1077.

82. *Craig v. Boren*, 429 U.S. 190 (1976).

83. Mayeri, *supra* note 65, at 1077. Although feminist attorneys retreated from using the race-sex analogies in the 1970s, courts picked up where attorneys left off because women's rights advocates' "reliance upon the Fourteenth Amendment made comparisons to race on the part of judges evaluating their claims virtually inevitable." *Id.* at 1078. Some scholars contend that courts' framing of sex-based equal protection claims within the race analogy constricted the equal protection clause's protection of women. See *id.* at 1078 ("Those comparisons could constrain judicial recognition of equal protection harms as easily as they could expand the scope of protection. For instance, though it is difficult to determine whether the lack of a ready analogy to race contributed to the Court's failure to regard pregnancy-related discrimination as sex discrimination for the purposes of equal protection analysis, a connection seems possible, if not likely. Similarly, the Court's disinclination to overturn the Third Circuit's decision in *Vorchheimer v. School District*, an unsuccessful challenge to sex segregation in Philadelphia's elite public high schools, may have stemmed from judicially perceived differences between race and sex segregation.") (internal citations omitted).

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

85. *Id.* at 613–14.

86. *Id.*

87. *Id.*

88. *Id.* at 615.

racial discrimination in the marketplace, then “progressively broadened the scope of [their] public accommodations law . . . with respect to the groups against whom discrimination is forbidden” to include women.⁸⁹ It held that the state had a compelling interest in eradicating sex-based discrimination in the marketplace that trumped the First Amendment rights asserted by the national organization.⁹⁰ In so doing, *the Court analogized to race*: “That stigmatizing injury [of marketplace discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”⁹¹

Although the use of the race-sex analogy in the modern civil rights movement is credited as having been the brainchild of African-American attorney and activist Pauli Murray,⁹² who used the works of Simone de Beauvoir and others to contend “that the gravity and nature of women’s subordination were comparable to racial oppression,”⁹³ it was met with opposition from various constituencies, just as it had been met with resistance in the antebellum period and beyond.⁹⁴

Some within the women’s rights movement objected to the race-sex analogy because “legitimate differences between the sexes barred an analogy to race.”⁹⁵ Other pro-equality critics of the analogy “simply did not find the analogy empirically accurate or morally compelling.”⁹⁶ Some in pro-ERA circles rejected the analogy because they suspected that Murray planned to “hijack[] the women’s movement on behalf of black civil rights.”⁹⁷ More recently, scholars such as bell hooks have decried the

89. *Id.* at 624.

90. *Id.*

91. *Id.* at 625; see also Linda C. McClain, “*Male Chauvinism’ is Under Attack from all Sides at Present*”: *Roberts v. U.S. Jaycees, Sex Discrimination, and the First Amendment*, 87 *FORDHAM L. REV.* 2385, 2404 (2019) (“While appellants and their amici asserted gender-specific harms resulting from exclusion from full membership in the Jaycees as part of the old boys network, they also drew upon race-based analogies to emphasize the wrongness of unequal membership within the organization [T]he Supreme Court’s majority opinion in *Jaycees* would contain the same analogy and historical reference.”).

92. Mayeri, *supra* note 65, at 1056–57 (“In a widely circulated memorandum [in 1962], Murray articulated a race-sex analogy that would profoundly shape women’s rights advocacy under the Fourteenth Amendment and through civil rights legislation well into the 1970s and beyond.”). Murray envisioned use of the race-sex analogy as one that would “legitimate women’s rights, link antiracist and feminist movements when their interests threatened to diverge, emphasize the interconnections as well as the parallels between race and sex discrimination, and expand the universe of available legal remedies for sex-based inequality.” *Id.* at 1072.

93. *Id.* at 1057–59.

94. *Id.* at 1059.

95. *Id.* at 1061.

96. *Id.*

97. *Id.* at 1062.

race-sex analogy as “support[ing] the exclusion of black women.”⁹⁸ hooks “perceived analogies between racial and sexual oppression—at least as articulated by white women who ‘used black people as metaphors’—as a quintessentially opportunistic, parasitic, and marginalizing practice.”⁹⁹

Moreover, while Murray’s early theorizing and use of the race-sex analogy intended to bring together the racial civil rights movement and the women’s rights movement in ways that recognized and built upon intersectionality,¹⁰⁰ it did not achieve that goal. Instead, courts built doctrines that put race and sex on parallel tracks, with race getting strict scrutiny and sex getting intermediate scrutiny.¹⁰¹ In response, Kimberlé Crenshaw coined the now-famous term “intersectionality” to “demonstrate the tendency ‘to treat race and gender as mutually exclusive categories of experience and analysis’ in both law and society.”¹⁰²

The trajectory of the race-sex analogy within the women’s rights movement may offer useful guidance to the LGBT-rights advocates who support use of the race-sexual orientation analogy. For example, in cases like *Jaycees*, where the Court accepted the race-sex analogy in a case rejecting a request for a First Amendment exemption from a state public accommodation law, there is a strong argument that courts should accept the sexual orientation-race analogy, particularly because the Court has declared that sexual orientation is downstream of sex in *Bostock*.

As with the sexual orientation-race analogy, numerous scholars have engaged in exploring the race-sex analogy.¹⁰³ And, as I argue below

98. BELL HOOKS, *AIN’T I A WOMAN* 140 (1981).

99. Mayeri, *supra* note 65, at 1045 (quoting HOOKS, *AIN’T I A WOMAN* at 141).

100. Caroline Chiappetti, *Winning the Battle but Losing the War: The Birth and Death of Intersecting Notions of Race and Sex Discrimination in White v. Crook*, 52 HARV. C.R.-C.L. L. REV. 469, 488–90 (2017); Preston D. Mitchum, *Screaming to be Heard: Black Feminism and the Fight for a Voice from the 1950s–1970s*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 151, 162 (2012) (“The race-sex comparison that emerged in the early 1960s was intended to improve divisions between the Black civil rights movement and women’s liberation movement and place Black women at the center of the civil rights and feminist debate.”).

101. Chiappetti, *supra* note 100, at 496.

102. *Id.* (quoting Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–67 (1989)).

103. See e.g., Mayeri, *supra* note 65; Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004); Chiappetti, *supra* note 100; Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Mitchum, *supra* note 100; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) (arguing that, in the constitutional context, “the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination”); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006); Samantha Barbas,

with regard to the race analogy in the wedding vendor cases, the use of the race-sex analogy varied depending on the era; its differing fate in particular cases “reveals the profound context-dependency of their social meaning and legal consequences.”¹⁰⁴

C. *Overview of the Race Analogy in the LGBT-Rights Movement*

Since the 1950s—well before Stonewall—LGBT-rights advocates have analogized to race.¹⁰⁵ In the days of the nascent LGBT-rights movement, “early activists generally focused on those issues where the law discriminated against both blacks and homosexuals.”¹⁰⁶ Because there was doctrinal uncertainty about the scope of protections for minorities under the Equal Protection Clause in the 1950s through the 1970s, “[t]o some extent, activists had no choice Activists could only rely on doctrine from—and form analogies with—cases arising from the racial justice movement.”¹⁰⁷ In addition, “focusing on those areas in which gays were discriminated against in similar ways as blacks in particular also gave additional resonance to the analogy.”¹⁰⁸

LGBT-rights activists next deployed the race analogy in the 1970s during the LGBT community’s first attempt to secure marriage equality.¹⁰⁹ It was again deployed as the LGBT-rights movement began to form

Dorothy Kenyon and the Making of Modern Legal Feminism, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 423 (2009); Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL’Y 235 (2019–2020); McClain, *Male Chauvinism*, *supra* note 91; Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -Isms)*, 1991 DUKE L.J. 397, 398 (1991).

104. Mayeri, *supra* note 65, at 1074.

105. For example, in the 1950s Frank Kameny and the Washington, D.C., chapter of the Mattachine Society that he led, analogized to race when seeking employment protections. See Ziegler, *supra* note 20, at 81 (noting that “[h]omophile activists began reasoning from race almost from the outset. By the early 1960s, when the civil rights movement was consistently making headlines, the benefits of reasoning from race seemed clear”). See also Konnoth, *supra* note 20, at 340–41 (“An activist who took up the cause for gay rights in the 1960s, Franklin Kameny, took the lead in introducing the race-sexuality analogy into gay advocacy, as well as the racial justice movement’s legacy of activism and litigation.”).

106. Konnoth, *supra* note 20, at 344.

107. *Id.*

108. *Id.*

109. See *id.* at 320 (noting that the “race-sex analogy [that had been argued by the women’s rights movement] allowed, and perhaps encouraged, gays to leapfrog demands for incremental same-sex relationship benefits (such as domestic partnership rights) and focus on the issue of marriage”); see also *id.* at 362 (noting that in the first marriage equality case in 1970, “the race-sex analogy would ultimately undergird the case”).

organizations, such as Lambda Legal, through which to pursue its civil rights agenda. Through use of the race analogy, “gay rights activists were able to frequently claim the right to utilize these organizational forms”¹¹⁰ because racial civil rights had won prior First Amendment right-to-associate cases for organizations such as the NAACP Legal Defense and Educational Fund.¹¹¹ The analogy went on to be used in both the modern marriage equality movement,¹¹² and the movement to end DADT.¹¹³ It has also been used to argue that sexual orientation should be afforded heightened scrutiny under the Equal Protection Clause.¹¹⁴

1. Permutations of the Race Analogy in LGBT Rights Cases

History shows that there are several ways to deploy the race analogy. First, advocates have used the analogy to analyze the equal protection question of whether sexual orientation should, like race, be subject to heightened scrutiny.¹¹⁵ Second, LGBT-rights activists have utilized the analogy in the legislative arena to lobby lawmakers to include sexual orientation as a protected class in state antidiscrimination law.¹¹⁶ Third,

110. *Id.* at 350–51.

111. *See, e.g., NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (finding a First Amendment right to engage in association for advancement of beliefs and ideas).

112. *See, e.g., Reply Brief of Petitioners at 1–2, Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14556, 14–562, 14–571, 14–574), 2015 WL 1776076, at *1–2 (“The State also attempts to drain all meaning from this Court’s landmark decisions regarding individual rights to liberty and equality. From *Loving v. Virginia* . . . , through *Bower v. Evans* . . . , *Lawrence v. Texas* . . . , and *United States v. Windsor* . . . this Court’s precedents make clear that Ohio may not, without even a legitimate, much less compelling, government interest, single out a disfavored group to deny recognition to their marriages.”).

113. *See, e.g., Holmes v. Cal. Army Nat. Guard*, 920 F. Supp. 1510, 1533 (N.D. Cal. 1996) (“The unit cohesion rationale proffered by the Federal defendants in support of the ‘Don’t Ask, Don’t Tell’ policy is nearly identical to the argument which was used by the military to justify the exclusion of African-Americans from military service.”), *rev’d*, 124 F.3d 1126 (9th Cir. 1997).

114. *See, e.g., Tanner v. Oregon*, 971 P.2d 435, 447 (1998) (“[W]e have no difficulty concluding that [lesbian and gay people] are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”).

115. *See, e.g., Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 326 (D. Conn. 2012) (holding that “sexual orientation should be considered a defining characteristic fundamental to one’s identity much like race, ethnicity or gender” which “weighs in favor of the application of heightened scrutiny”); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) (holding that “many of the factors the Supreme Court . . . identified as important to providing strict scrutiny to classifications based on race, alienage, and national origin and heightened scrutiny to classifications based on gender apply to classifications based on sexual orientation”).

116. Similarly, lawmakers supportive of including sexual orientation and gender identity protections within their jurisdiction’s antidiscrimination law may use the race

advocates have deployed the analogy in the policy arena—in the successful effort to overturn the military’s DADT policy.¹¹⁷ Fourth, the marriage equality movement relied on the analogy. In that context, the “*Loving* analogy” was simple and persuasive: just as the *Loving* Court struck down Virginia’s anti-miscegenation law because it embodied constitutionally offensive principles of racial subordination, so too should the Court strike down same-sex marriage bans because they embodied constitutionally offensive principles of subordination by denying LGBT people the dignitary and concrete privileges of civil marriage.¹¹⁸ Fifth, contemporary civil rights communities have engaged the race analogy to help build empathy across identities,¹¹⁹ to encourage an intersectional approach, to build coalitions, or to establish long- and short-term policy agendas.¹²⁰

This Article advocates for a sixth use of the analogy—in the wedding vendor cases. These wedding vendors take the position that they could *not* seek a similar religious exemption for African-American customers even though the statute enumerates race as a protected class, just as it does sexual orientation.¹²¹

In addition to advocates’ use of the race analogy in varied litigation and policy contexts, many scholars have addressed the race analogy across doctrinal contexts—from Colorado’s Amendment 2, overturned in *Romer v. Evans*¹²²—to DADT¹²³ and the modern marriage equality movement. Most of the legal scholarship addressing the race analogy from the

analogy to persuade their fellow lawmakers that such protections are proper.

117. See Carbado, *supra* note 25, at 1484.

118. See, e.g., Kim Forde-Mazrui, *Calling Out Heterosexual Supremacy: If Obergefell Had Been More Like Loving and Less Like Brown*, 25 VA. J. SOC. POL’Y & L. 281, 286–87 (2018).

119. See, e.g., Darren Lenard Hutchinson, “*Gay Rights*”for “*Gay Whites*”? *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1360 (2000).

120. *Id.* In some instances, however, using the race analogy within civil rights community dialogues risks essentialism and marginalizing people of color and LGBT people in ways that erase LGBT people of color and construct the LGBT community “as largely upper-class and white.” See, e.g., *id.* at 1360.

121. See, e.g., Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 22:1–7.

122. See, e.g., Hutchinson, *Gay Rights*, *supra* note 119, at 1358 (summarizing the advantages and perils of the race analogy in constitutional litigation, including *Romer*, and advocating a multidimensional approach to securing equal rights for subordinated groups); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “the Civil Rights Agenda,”* 1 AFR.-AM. L. & POL’Y 33 (1994) (discussing the use of the race analogy in *Romer*).

123. See Carbado, *supra* note 25, at 1468–69 (arguing that the use of the race analogy in the military context, namely that exclusion of LGBT soldiers was analogous to the historical exclusion and segregation of African-Americans is problematic because it “marginalized black gays and lesbians”).

early 1990s through 2015 was in the context of same-sex marriage;¹²⁴ this issue appears to have generated the most scholarly discussion regarding the “*Loving* analogy,” as the race analogy was framed in those cases.¹²⁵ This Article adds to that body of scholarship by analyzing the propriety of the race analogy in a new context: the wedding vendor cases.

The fact that the race analogy has been used by LGBT-rights advocates across a diverse range of legal, social, and policy issues suggests that there is no “one-size-fits-all” answer to the race analogy question, nor ought we seek a singular, blanket “rule” for use of the analogy.

2. Masterpiece Cakeshop and the Race Analogy

In 2012, David Mullins and Charlie Craig, along with Craig’s mother, visited the Masterpiece Cakeshop, a family-run bakery owned by Jack Phillips.¹²⁶ Craig and Mullins requested a cake for their wedding reception.¹²⁷ Phillips refused, stating that he was opposed to same-sex marriage on religious grounds.¹²⁸ Pursuant to the CADA, which prohibits discrimination in public accommodations based on several protected classes including sexual orientation, Craig and Mullins filed a discrimination complaint with the Colorado Civil Rights Division (“CCRD”), the agency responsible for investigating such claims under the CADA.¹²⁹

124. See Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOW. L.J. 117, 128–29 (2007) (noting that “between January 2000 and December 2006, at least sixty-six notable articles have been published in law reviews and journals asserting, endorsing, and promoting the *Loving* analogy to same-sex marriage, with another eighteen supportive pieces citing *Loving* were published, compared to eighteen pieces rejecting the *Loving* analogy and seven others critical of it”).

125. See generally *id.*; see also, e.g., David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998) (describing the use of the race analogy, through reference to *Loving v. Virginia*, in the same-sex marriage cases and legislation in Hawaii in the early 1990s); Neena Speer, *The Gay Rights Movement Rhetoric has Adopted Legal Rhetoric from the Civil Rights Movement: “Immutable Characteristic” and Controversy between Equating “Gay” and “Black”*, 11 S. J. POL’Y & JUST. 131 (2017); Kate Kendall, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133 (2005); Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 781 (2005); R. A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008) (describing the reliance on the California antimiscegenation case, *Perez v. Sharp*, by marriage equality proponents); Wardle & Oliphant, *supra* note 124, at 128–29 (describing the large number of articles endorsing the use of the *Loving* analogy in same-sex marriage cases).

126. *Masterpiece Cakeshop, Ltd v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724–25 (2018).

127. *Id.* at 1724. At the time, Colorado had not yet recognized marriage equality, so Craig and Mullens married in Massachusetts, which did allow same-sex couples to marry, but planned their wedding reception in their home state of Colorado. *Id.*

128. *Id.* at 1724.

129. *Id.* at 1725–26.

During the course of the multi-step administrative proceedings, which found actionable discrimination at each step, Phillips raised two defenses that became the constitutional questions presented to the Court: complying with the CADA would (1) violate his free speech rights under the First Amendment by impermissibly compelling him to send a message about same-sex marriage with which he disagreed based on his religious beliefs; and (2) violate his free exercise rights under the First Amendment.¹³⁰ These defenses were rejected at all stages of the administrative proceedings as well as by the Colorado Court of Appeals, which held in favor of Craig and Mullins.¹³¹ The U.S. Supreme Court, in an opinion authored by Justice Kennedy, reversed the Colorado Court of Appeals, holding that comments by some of the commissioners on the CCRD evidenced religious hostility toward the baker in violation of his First Amendment free exercise rights.¹³²

At the Supreme Court, LGBT-rights advocates urged the Court to recognize and implement the race analogy, while those supporting the baker urged the Court to reject it and thus distinguish between sexual orientation discrimination and race discrimination.¹³³ The opinion itself

130. *Id.* at 1726.

131. *Id.* at 1726–27. The relief ordered was that Phillips was to cease and desist from discriminating against same-sex couples, that he file quarterly compliance reports, and that he train his employees about the mandates of CADA. *Id.*

132. *Id.* at 1729, 1732. Several scholars, including the author, have written about the substantive merits of the First Amendment defenses asserted by the baker. See generally Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. FORUM 201 (2018); Nelson Tebbe, *Reply: Conscience and Equality*, 31 J. CIV. RTS. & ECON. DEV. 1, 33 (2018); Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Louise Melling, *Will We Sanction Discrimination? Can "Heterosexual Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2017–2018). This project is much narrower, exploring an issue ancillary to, but informative of, the substantive merits questions: the use of the race analogy within the *Masterpiece* litigation.

133. See, e.g., Brief for Respondents Charlie Craig and David Mullins at 22, 38, 49–50, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4838415, at *22, *38, *49–50 (analogizing to race via citation to *Piggie Park*); Brief for Respondents Colo. Civil Rights Comm'n at 6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4838416, at *6 (“During the civil rights era, proponents of segregation argued that businesses have a right to discriminate in selling goods and services. Those arguments never took hold. For example, some argued that public accommodation laws interfere with a business owner’s free exercise of religion. That argument was deemed ‘patently frivolous.’ *Newman v. Piggie Park*. Thus, ‘in a long line of cases’ the Court rejected the notion that public accommodation laws ‘interfere[] with personal liberty.’”) (alteration in original); Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Appellees at 18, *Masterpiece Cakeshop, Ltd. v. Craig*, 370 P.3d 272 (Colo.

did not expressly reject or adopt the race analogy. Given the posture of the opinion—its avoidance of the merits question and its decision for the baker on the ground that the baker did not receive a neutral *procedure* as required by the First Amendment’s Free Exercise Clause¹³⁴—the Court did not need to decide whether the race analogy is proper in the wedding vendor religious exemption cases. While Justice Kennedy cited *Piggie Park* in his opinion—“the leading precedent for the proposition that a religious commitment to segregation cannot justify a free exercise exemption from a public accommodations law”¹³⁵—that language is dicta.¹³⁶ As such, it is fair to say that there remains an open question about whether the Court will accept the race analogy the next time it considers

App.) (No. 14CA1351), 2015 WL 13622556, at *18 (“As with racial discrimination, religious beliefs cannot justify sexual orientation discrimination in places of public accommodation.”); Brief of Amici Curiae Ethics & Religious Liberty Comm’n of the S. Baptist Convention, Christian Life Comm’n of the Mo. Baptist Convention; John Paul the Great Catholic Univ.; Okla. Wesleyan Univ.; Spring Arbor Univ.; William Jessup Univ.; Am. Assoc. of Christian Schs.; Jews for Religious Liberty; and Imam Omar Ahmed Shahin in Support of Petitioners at 28, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4005657, at *28 (“There is no LGBT analog here to the *Piggie Park* case, where an owner refused to serve ‘barbecue meat and hash’ to African-American customers because of religious opposition to racial integration.”); Brief of Amicus Curiae Christian Bus. Owners Supporting Religious Freedom in Support of Petitioners at 30, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4005666, at *30 (arguing that *Piggie Park* is distinguishable from *Masterpiece*).

134. See *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24 (“Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality [T]he delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here.”).

135. Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 175 (2019).

136. As a result, while I agree with Sager’s and Tebbe’s assertion that Justice Kennedy’s citation to *Piggie Park* is “important,” I disagree that such citation “should permanently end the argument that the structural injustice experienced by LGBTQ customers is somehow less worthy of concern or more vulnerable to dissent than racial subordination.” *Id.* at 175. See also Austin Rogers, *A Masterpiece of Simplicity: Toward a Yoderian Free Exercise Framework for Wedding-Vendor Cases*, 103 MARQ. L. REV. 163, 190–91 (2019) (“By invoking precedent from the context of race, the *Masterpiece* majority indicated that public accommodation laws concerning sexual orientation would be analyzed through the prism of their race-based counterparts. Such an approach, even amid heightened protection for sincere religious objection, will often render a finding that the government’s heightened interest in ensuring equal access to goods in the marketplace trumps. Accordingly, while the Court’s dicta seems to place free exercise interests and dignitary interests in equipoise, its invocation of *Piggie Park* is telling.”) (internal citations omitted).

a religious exemption case involving sexual orientation discrimination in public accommodations.¹³⁷

III. RESPONSES TO OPPOSITION FROM THE LEFT, THE RIGHT, AND THE COURT

As every lawyer and law student knows, reasoning by analogy—using historical legal frameworks to solve current law debates¹³⁸—plays a central and distinctive role in legal reasoning.¹³⁹ Arguing from analogy is a “staple” of civil rights litigation.¹⁴⁰ Rather than asserting that two things are the same, analogical reasoning “involves a comparison of distinct, albeit arguably related, phenomena”¹⁴¹ to “compare items where we know the outcome of one and suggest that the outcome of the other will be the same.”¹⁴² The effect of deploying analogies in legal reasoning is predictive or explanatory—it helps us apply a theoretical rule of law to the particular facts of a dispute between specific parties to reach a resolution.¹⁴³ Cases like the wedding vendor cases are “seriously contested” because “more than one rule is claimed to be applicable”¹⁴⁴—public accommodations law and the First Amendment. In such cases, “the rules themselves are inert and require an analogical argument to bring the reasoning to closure.”¹⁴⁵

137. The next case that the Court will hear on this issue is *Fulton v. City of Phila.*, 922 F.3d 140 (3d Cir. 2019), No. 19–123 *See* Supreme Court of the U.S. Question Presented Report, *supra* note 5.

138. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 239.

139. Dan Hunter, *Reason is Too Large: Analogy and Precedent in the Law*, 50 EMORY L.J. 1197, 1202 (2001); Lloyd L. Weinreb, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 4* (Cambridge University Press ed., 2005). Weinreb notes that analogical reasoning “allows us to govern our lives according to general rules without disclaiming the singularity of human experience.” *Id.* at 161. Some scholars have critiqued the role played by analogy and questioned the centrality of analogy in legal reasoning. *See* Hunter, *supra*, at 1230 (summarizing these critiques by scholars such as Larry Alexander and of Ronald Dworkin). *See also* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249 (2017) (describing scholarly debates about the use of analogy in the law).

140. *See, e.g.*, Mayeri, *supra* note 65, at 1046 (“Analogies have both political and legal currency [They] not only dominate equal protection jurisprudence, but also play a crucial role in the construction and legitimation of legislative remedies for discrimination and violence against subordinated groups.”).

141. Kennedy, *supra* note 125, at 789.

142. Hunter, *supra* note 139, at 1206; *see also* Mayeri, *supra* note 65, at 1048 (“Analogical reasoning may go beyond direct parallels between various forms of inequality to engage in more nuanced comparisons that recognize differences as well as similarities and attempt to determine their moral and legal significance.”).

143. Hunter, *supra* note 139, at 1210; Weinreb, *supra* note 139, at 77–78 (noting that the “adjudicative task of a court is to determine the outcome of a specific, concrete controversy in all its particularity” and observing that analogy is useful in this task).

144. Weinreb, *supra* note 139, at 104.

145. *Id.* Thus, in the wedding vendor cases, the race analogy is a “heuristic device

Deployment of the race analogy in the context of LGBT civil rights “has engendered fierce controversy bordering on enmity, both within and outside of the loosely-defined ‘civil rights community.’”¹⁴⁶ Objections to the race analogy vis-à-vis LGBT civil rights come from the political left, the political right, and also, as is apparent from the oral argument in *Masterpiece*, from some members of the Court.¹⁴⁷ Not all of the objections described below are confined to use of the race analogy specifically in the wedding vendor cases, but rather are raised in various legal and social movement contexts.

Two objections common to both the political left and political right are the arguments that (1) while race is an immutable status, sexual orientation is chosen conduct, and (2) while sexual orientation usually can be concealed, race cannot; as a result, race and sexual orientation are not alike, and any analogy is thus misplaced.¹⁴⁸ Political conservatives have long attempted to use these purported differences as a “wedge” issue to divide communities of color from LGBT people.¹⁴⁹ Scholars on the political left have made these observations to highlight some risks of using the race analogy and thus to counsel caution and encourage careful analysis before deploying the analogy.¹⁵⁰

that acknowledges the distinctions but underscores the similarities between” race and sexual orientation when it comes to those who have sought exemptions from antidiscrimination laws, historically (race) and today (sexual orientation). See Kennedy, *supra* note 139, at 789.

146. Russell, *supra* note 122, at 37. See also Konnoth, *supra* note 20, at 321.

147. See generally Lenhardt, *supra* note 125, at 866–67 (noting, in the context of the marriage equality debate: “Those who take issue with the analogy constitute a strange collection of supporters and opponents of marriage rights for same-sex couples.”).

148. See, e.g., Russell, *supra* note 122, at 39 (summarizing the position of scholars who “argue further that minority sexual orientation raises concerns not of status but of behavior”); Konnoth, *supra* note 20, at 321 n.1, 322 (collecting articles); Russell, *supra* note 122, at 45–46; Wardle & Oliphant, *supra* note 124, at 143–57; Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 46 (1999).

149. Russell, *supra* note 122, at 44–45 (summarizing the efforts of the conservative group Colorado for Family Values to drive a wedge between people of color and LGBT people during the 1992 campaign to pass Amendment 2, an anti-LGBT amendment for the Colorado constitution); *id.* at 75.

150. See generally Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1016–17 (2014) (urging advocates and scholars to “attend to race carefully.”).

A. *Challenges from and Responses to the Left*

1. Objections Centering on Movement Building, Movement Strategy, and Coalition Building

In her seminal article, *Queer as Black Folk?*, Catherine Smith urges caution in the deployment of the race analogy.¹⁵¹ Three of Smith's objections to the race analogy, what she refers to as the "sameness" argument, are largely situated squarely within this strategic-movement-building frame (as opposed to a litigation frame): that the sameness argument (1) perpetuates racism by marginalizing and obscuring the different role that race plays in the lives of people of color and whites, (2) gives people of color a "pass" on sexism and homophobia and white people a "pass" on racism, and (3) triggers counterarguments from people of color about why and how sexual orientation is different than race.¹⁵² Rather than make "sameness" arguments via the race analogy, Smith recommends that the LGBT-rights movement "reframe the debate . . . in ways that are relevant to the overarching structures of oppression"¹⁵³— "not one of sameness but one of common interest."¹⁵⁴ She refers to these areas of common interest as "superordinate goals."¹⁵⁵

All three of these are important concerns that must be addressed before the anti-subordination promise of equal protection is realized for *all* marginalized groups. I contend, however, that the race analogy in the wedding vendor cases does not feed into these three specific concerns. First, by making the race analogy in the litigation context, as opposed to the movement-building context, the analogy allows for intercommunity dialogue about these three dynamics to continue. Moreover, the analogy

151. See Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379 (2007) [hereinafter Smith, *Queer*].

152. *Id.* at 386 (noting that "advocates have turned to sameness arguments that are problematic when it comes to building LGBT-black alliances"); *id.* at 382 ("I am critiquing the same-as mantra as a potential organizing strategy used by white mainstream LGBT organizations in their attempt to build meaningful coalitions with black people and sway public opinion."). See also Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 148, at 42 ("[C]omparisons between oppressed groups distort and hinder, rather than aid, the respective goals of cross-cultural understanding and social justice.").

153. *Id.* at 402.

154. Smith, *Queer*, *supra* note 151, at 403.

155. *Id.* at 402–03. In a subsequent article, Smith expounds on her position concerning superordinate goal identification across marginalized communities. See Catherine Smith, *Unconscious Bias and "Outside" Interest Convergence*, 40 CONN. L. REV. 1077 (2008). She offers a specific example that may unite the racial civil rights movement and the LGBT-rights movement around a superordinate goal: where "interests of people of color, gays and lesbians (and those at the intersections) converge to challenge the legal construction of 'family' under welfare legislation— legislation that serves to deny life-sustaining benefits to those who fail to conform to what is perceived to be a predominately white, heterosexual, middle-class family construction." *Id.* at 1080.

is *not* that race and sexual orientation are the same in all contexts, but rather that they are *analogous* in the limited context of the wedding vendor cases—an assertion that is buttressed by the fact that the legislature determined that sexual orientation and race should be treated the same in the public accommodations context, as evidenced by the plain language of the statute.

Framed in this limited and specific way, it is possible that the race analogy in the wedding vendor cases may highlight what Smith called a “superordinate” goal, or common interest, that can bring together the racial civil rights movement and the LGBT civil rights movement around an overlapping area of discrimination: denial of goods and services in the public square. In fact, Smith accepts that “sameness arguments may be effective and necessary in some instances—such as in courtrooms or legal briefs in which LGBT advocates are bound by legal precedent[.]” while contending that such arguments “are not the optimal approach to an *interracial dialogue* on LGBT issues.”¹⁵⁶ Equal access to goods and services in the marketplace, which the legislature has deemed necessary to protect by law for *both* race *and* sexual orientation (along with other protected classes) in order to secure equal standing vis-à-vis the government, is an example of common interest—a superordinate goal—that may soften the landing for the race analogy in the wedding vendor cases within the racial civil rights movement.¹⁵⁷ This legislative determination, as evidenced in the plain language of the statutes, does not preclude ongoing conversations between the racial civil rights movement and LGBT-rights movement about the perils and pitfalls of *general* sameness arguments.

2. Objections Advocating for Relying on the LGBT Legal Canon Instead of the Race Analogy

Smith, along with Craig Konnoth, suggest that the LGBT-rights movement should distance itself from the race analogy, contending, in essence, that at this point in the movement’s history there is a canon of LGBT-specific legal precedent, along with a well-established and well-recognized identity category of “LGBT people,” on which LGBT-rights advocates can and ought to rely.¹⁵⁸

156. Smith, *Queer*, *supra* note 151, at 382 (emphasis added).

157. *Id.* at 403.

158. *Id.* at 387; Konnoth, *supra* note 20, at 356–57 (“[D]octrinal developments, the development of a grassroots gay movement, and court reactions acted as interlocking, and mutually reinforcing, factors, which helped ultimately to make gay identity independent of the race analogy. For example, the basic elements of abstract equal protection doctrine—a focus on trait- immutability, political powerlessness, and histories of discrimination—reinforced the notion of a stable, separate identity, independent of a race analogy. Similarly, a movement that confidently self-identified as gay strengthened doctrinal abstraction by decreasing reliance on concrete analogies in litigation.”) (internal citations omitted). Smith has put this into practice: In an amicus brief filed in *Masterpiece*, Smith highlighted the legal and social harms to children of

Neither, however, argue that the race analogy should be completely abandoned.¹⁵⁹ In the context of state public accommodation law, however, this position holds less sway than it might in other areas, such as constitutional equal protection.¹⁶⁰ That is because when it comes to public accommodation law, the *legislature* has determined which individuals will be protected by the law, as opposed to the equal protection context, in which the Court is putting its interpretive gloss on a constitutional provision that does not explicitly enumerate its protected classes. There is thus a distinction between explicit statutory protections in the public accommodation law/wedding vendor cases and the constitutional interpretation context of equal protection in cases seeking heightened scrutiny for sexual orientation.¹⁶¹

The Colorado antidiscrimination law at issue in *Masterpiece* prohibited discriminatory conduct in the marketplace based on disability, race, creed, color, sex, sexual orientation, marital status, national origin, and ancestry.¹⁶² The statute's language is clear and unambiguous: African-Americans and LGBT consumers are equally protected by the CADA. The statute contains no language indicating a hierarchy between race and sexual orientation, directing that the denial of a religious exemption for race should result in a denial of a religious exemption for sexual orientation.¹⁶³ The statute's plain language thus renders race and sexual orientation the same in the context of public accommodation protections, which in turn supports use of the race analogy in the wedding vendor cases. LGBT-rights advocates need not look for their "own" law to argue for legal protections when the statute expressly provides that people of

LGBT parents that would result if the Court granted the baker a religious exemption. See Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), https://www.scotusblog.com/wp-content/uploads/2017/11/16–111_bsac_scholars_of_the_constitutional_rights_and_interests_of_children.pdf [<https://perma.cc/ZEB8-E48Q>]. She based her arguments on the LGBT canon—*Obergefell* and *Windsor*—rather than supporting her position by analogizing to cases finding associational discrimination based on race. *Id.*

159. Smith, *Queer*, *supra* note 151, at 382 (“[S]ameness arguments may be effective and necessary in some instances—such as in courtrooms or legal briefs in which LGBT advocates are bound by legal precedent “); Konnoth, *supra* note 20, at 357.

160. In the equal protection context, there may likely be enough LGBT-specific law to support a successful argument for heightened scrutiny for sexual orientation and gender identity without reference to the race analogy.

161. As noted below, the *Bostock* holding likely will result in a finding that SOGI receives heightened scrutiny in equal protection analysis, just as sex does. See *infra* Section III.B.2.

162. COLO. REV. STAT. § 24–34–601 (2020).

163. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) (noting that “when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.”).

color and LGBT people should be protected by the same statute from the same harm of discrimination in the public square.

This same line of reasoning addresses concerns from the ideological left that the race analogy risks erasing the drastically different social and legal histories of the African-American community and the LGBT community. In response to this important concern, I contend that “legislative” or “statutory” sameness is distinct from social or historical sameness. Of course, identities based on disability, race, creed, color, sex, sexual orientation, marital status, national origin, and ancestry all have a unique social, political, and legal history with discrimination and inequality. By passing a single antidiscrimination law, however, the Colorado legislature determined that these groups are similar enough vis- à-vis discrimination in public accommodations—that they all are vulnerable to similar harms in the public marketplace—to be treated the same under a unitary law.

Bostock supports this conclusion. Its textualist approach (and its concomitant rejection of legislative intent) repeatedly insists that “when the meaning of the statute’s terms is plain, our job is at an end.”¹⁶⁴ The Court declared that “people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”¹⁶⁵ *Bostock* thus supports this “statutory sameness” argument—the fact that the plain language of state laws list “sexual orientation” alongside “race”—as a reason to deploy the race analogy in the wedding vendor cases. Because the statute’s plain language creates no hierarchy of protection in which race sits above sexual orientation, case law like *Piggie Park* should be used to analogize the exemption seekers’ claims in the wedding vendor cases, and ultimately reject them.

In sum, statutory sameness in the public accommodations context does not erase the unique histories of each of these groups, nor should this legislatively-declared, plain language sameness discourage the important intercommunity dialogues advocated by Smith or signal that sameness arguments can or ought to operate in other legal contexts.¹⁶⁶

3. Essentialism Objections

Devon Carbado, Darren Hutchinson, and other scholars argue against the race analogy because it can lead to essentialism. These scholars correctly problematize “treating ‘people of color’ and ‘gays and

164. *Id.* at 1749.

165. *Id.*

166. In other contexts, such as, equal protection, perhaps there may be well-founded arguments against using the race analogy to argue for heightened scrutiny for sexual orientation and gender identity. See, e.g., Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 235 (2010) (“[A]s a matter of constitutional history, racial discrimination is unique: it is the only wrong over which we have fought a civil war, the only one that resulted in four amendments to the Constitution.”).

lesbians' as mutually exclusive groups, omitting gays and lesbians of color from analysis, and therefore implying a population of white gays and lesbians and heterosexual people of color."¹⁶⁷

These scholars are rightly concerned about essentialism. In the context of wedding vendor cases, that essentialism would manifest as an understanding of all LGBT customers who might be turned away as white and of all African-American customers who might be turned away as heterosexual; the experience of LGBT people of color thus could be "rendered invisible."¹⁶⁸ Given the distinctions between race and sexual orientation offered by today's exemption seekers, however, such essentialism is less likely in the wedding vendor cases than in other contexts, such as the more global policy arguments that embroiled the DADT controversy.¹⁶⁹

167. Carbado, *supra* note 25, at 1467; *see also* Grillo & Wildman, *supra* note 103, at 398; Hutchinson, *Gay Rights*, *supra* note 119, at 1368. LGBT-rights advocates challenging DADT often invoked the military's past discrimination against African-Americans in support of their arguments for overturning DADT: "Because it is illegal and immoral for the military to discriminate against blacks, it should be illegal and immoral for the military to discriminate against gays and lesbians." Carbado, *supra* note 25, at 1484. Carbado criticized the analogy in this context because it "falsely disaggregates race and sexuality," *id.* at 1485, which in turn "entrenches the perception that black identity and gay identity are mutually exclusive categories with separate and distinct social realities" and "contributes to the normalization of white gay and black heterosexual identities." *Id.*; *see also id.* at 1488 ("There are several problems with language comparability arguments. First, facial comparisons of language obscure the political and historical context in which the language is or was deployed. Second, in the context of the 'Don't Ask, Don't Tell' controversy, comparability arguments about language became comparability arguments about identity (black and gay) and discrimination (racism and homophobia). Third, comparability arguments about language, identity, and experience erase black gay and lesbian identities and, simultaneously, obscure white gay and lesbian racial privilege. This erasure and obfuscation of the racial dimensions to sexual identity, helped to produce and to legitimize a white gay and lesbian civil rights campaign.") (internal citations omitted). *See also* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 148, at 44 (contending that race analogies deployed by LGBT-rights advocates "all suffer from the same pit-falls—the erasure of gays, lesbians, bisexuals and the transgendered [sic] of color and the obfuscation of the effects of racial subordination and racial privilege By treating black subjugation . . . as the same as white gay oppression, the analogies mask the reality that social and economic power is racially distributed. As a result, many people of color have rightfully criticized the deployment of the analogies in gay and lesbian political discourse."). Hutchinson critiques use of the race analogy in progressive scholars' analysis of *Romer v. Evans*, the Court's first major pro-LGBT-rights case. *Id.* at 78. In particular, he lodges an essentialism criticism against the comparison of race and sexual orientation in the analysis of conservatives' "special rights" rhetoric. In that setting, he argues that "analogies of people of color and gays and lesbians have the effect of erasing gays and lesbians of color, thereby reinforcing the separation of colored and gay status." *Id.*

168. *See* Grillo & Wildman, *supra* note 103, at 404.

169. Carbado, *supra* note 25, at 1495.

The risk of essentialism is diminished in the wedding vendor cases precisely because of the distinction the exemption seekers propose; by arguing that “race is different” they concede that a wedding vendor would be compelled by the CADA to sell a wedding cake to an African-American different-sex couple or an interracial different-sex couple even if their religious beliefs about race would conflict with that sale. If the wedding vendors’ position on the race analogy is accepted, the other side of this concession would mean that the vendors could turn away *any* same-sex couple—monoracial white couples, monoracial African-American couples, or interracial couples when that sale conflicted with their religious beliefs about biblical marriage.

Put another way, the sexual orientation exceptionalism being argued by the wedding vendors actually *highlights* intersectionality—the notion that an individual may be both African-American *and* LGBT. An example illustrates this point. Under the position taken by the wedding vendors, they may refuse an African-American lesbian couple a wedding cake but may not refuse the same cake to an African-American different-sex couple. In this example, the lesbian African-American women present to the wedding vendor as the intersectional people that they are—embodying *both* identities (race and sexual orientation). If the wedding vendors are granted the religious exemption they seek, discrimination is permissible as to one of the women’s two salient identities: sexual orientation. Their salient racial identity is not erased or essentialized; in fact, it is foregrounded as the protected trait. Far from rendering invisible LGBT people of color, deploying the race analogy in the wedding vendor cases with examples such as the African-American lesbian couple, actually *highlights* intersectional identities—their Blackness is protected but their sexual orientation is not. These intersectional examples do the important work of revealing the lack of doctrinal coherence if the Court were to permit a religious exemption for one salient identity (sexual orientation) but not another (race).¹⁷⁰

Moreover, the proposed use of the race analogy here is cabined by the statute’s express language, which lists sexual orientation alongside race and is thus less likely to risk essentializing either race or sexual orientation.¹⁷¹ And in any event, rather than making policy arguments using

170. See generally *Bostock*, 140 S. Ct. at 1749 (rejecting employers’ argument that a plaintiff proving SOGI employment discrimination be held to a different causation standard: “Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are these reasons for taking sex into account different from all the rest? Title VII’s text can offer no answer.”).

171. In fact, *Carbado* does not fully reject use of the race analogy, but instead

the race analogy, the analogy as used in the wedding vendor cases is tied to the plain, express statutory language (which includes both sexual orientation and race) and thus does not squarely trigger the essentialism concerns that arise in purely policy-based arguments.

Thus, while it is “critically important to avoid false universalities and the dangers of essentialism[.]” civil rights advocates “should also beware of the false invocation of an ‘analogy problem’ fostering ‘differences’ which . . . are either not there or are quite irrelevant to the larger moral, legal and political concerns at hand.”¹⁷²

4. Concerns About Narrowing the LGBT Civil Rights Agenda and Creating a Static View of Civil Rights

Other scholars denounce the race analogy as reflecting “a broader failure to include racial, class, ethnic, and gender diversity within gay and lesbian discourse” that results in “the proposal of inadequate pro-gay policies.”¹⁷³ These scholars contend that LGBT-rights campaigns such as ending DADT and securing marriage equality reflect a narrow, privileged, and predominantly white agenda that does not reflect the reality of the LGBT community or the extent of its needs. To the extent that the race analogy was deployed to secure these rights, it was deployed in a way that ignored the needs of many LGBT people of color.¹⁷⁴

“simply urg[es] caution.” Carbadó, *supra* note 25, at 1496 (“Articulating the connections between race, sexual orientation, and military status on the one hand, and race, sexual orientation, and citizenship status on the other, is important. However, in doing so, we should examine the extent to which the role the military historically has played in restricting the rights and the duties of citizenship by race differs from the role the military currently plays in restricting those rights and duties by sexual orientation. Of course, there are similarities. Thus, I am not suggesting we should never advance language comparability arguments.”). As to Carbadó’s concern that the analogy, when deployed in the DADT debates, risked obscuring important history, it arguably may be assumed that state legislatures, when considering adding sexual orientation to the list of protected classes in public accommodation law, considered the history of discrimination in specifically the marketplace against LGBT people and found it sufficiently similar to the history of such discrimination specifically in the marketplace against people of color (and other protected classes) to warrant inclusion in the statute. Carbadó recognizes that “there are barriers to taking identity multiplicity seriously, not the least of which is current antidiscrimination law. Plaintiffs today have a hard time bringing compound discrimination claims—claims based on more than one aspect of a person’s identity, for example, the fact that a person is black and female and lesbian.”*Id.* at 1518.

172. Russell, *supra* note 122, at 76.

173. Hutchinson, *Gay Rights*, *supra* note 119, at 1369.

174. *Id.* at 1369–70, 1372 (“The immediate repercussion of this narrow construction of gay, lesbian, bisexual, and transgendered identity is the inadequacy of policies that advocates of gay and lesbian equality propose; these essentialist policies fail to confront the diverse oppressions that shape heterosexism. The racial and class normativity present in pro-gay and lesbian politics and theory has a broader, and perhaps more ominous effect: it lends credibility to a racialized and class-based depiction of the gay and lesbian community by anti-gay theorists, activists,

During the marriage equality debate, scholars observed that the race analogy, *particularly* in the marriage equality context, can result in a dispute among marginalized groups—gays and Black people—about which group is more oppressed.¹⁷⁵ Russell Robinson warns against “marriage equality post-racialism”—the “rhetoric that unnecessarily ranks antigay discrimination as more oppressive than antiblack discrimination; arguments that deny that antiblack subordination persists; and the marriage equality movement’s embrace of formal equality, which has done little to change the material realities facing many African Americans.”¹⁷⁶ While Robinson supports the use of the race analogy, specifically the *Loving* analogy, in the marriage equality context,¹⁷⁷ he does not endorse a blanket use of the race analogy in all contexts. Rather, he urges that those supporting marriage equality “attend to race carefully.”¹⁷⁸

Jane Schacter has looked at the use of the race analogy from another perspective—the risk that its use will create a stagnant vision of civil rights.¹⁷⁹ She cautioned LGBT-rights proponents against relying too heavily on analogies: “When . . . proponents of gay civil rights . . . invoke the experiences of other groups as a justification for gay civil rights protection, they bolster, by tacitly embracing, the myth of monolithic inequality. Doing so . . . diverts attention from the vital need for gay men and lesbians to convey the multiple realities of their own lives in support of their demand for equality.”¹⁸⁰

Using the race analogy in the limited context of antidiscrimination statutes, where there is unambiguous statutory sameness, does not directly feed into these concerns. Public accommodation laws prohibiting sexual orientation discrimination should be the floor from which the LGBT-rights movement (and the civil rights movement more generally) should construct its agenda and build its vision of a liberatory movement, not the ceiling. This most basic form of formal equality—full and fair access to the marketplace—certainly should not be the *only* goal of the LGBT-rights movement, nor should it provide the only frame for imagining a path to a more robust and liberatory equality than formal equality can provide. The fact is, however, that passing and enforcing such anti-discrimination laws often is the most accessible and pragmatic first step toward a larger vision of equality. And when we have such a law, as we do

and jurists in their arguments against legal protection of all gays and lesbians from discrimination.”).

175. See, e.g., Robinson, *Marriage Equality and Postracialism*, *supra* note 150, at 1016.

176. *Id.* at 1016–17.

177. *Id.* at 1044.

178. *Id.* at 1017.

179. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

180. *Id.* at 314 (internal citations omitted).

in the *Masterpiece* case, deploying the race analogy as a means to secure equal enforcement and stave off exceptionalism makes sense.

Libby Adler envisions an LGBT-rights movement that is “less consumed with achieving formal equality between gay and straight people, and more interested in using law to create the best possible conditions under which a broad array of people can make choices.”¹⁸¹ She challenges the movement to always ask “who is left behind, and to what extent have their interests been undermined?”¹⁸² when building an LGBT-rights agenda. We may simultaneously embrace the call of Adler, Schacter, and others to imagine a civil rights movement beyond formal equality, while at the same time ensuring that the mechanisms of formal equality, while not centered as the liberatory vision for equality, are nonetheless fully and robustly enforced. The race analogy assists in achieving that kind of enforcement while not precluding bigger and different visions for the movement.

Importantly, none of these scholars takes a bright-line position that rejects the race analogy in all circumstances.¹⁸³ As a result, the argument in favor of using the race analogy in the wedding vendor cases is not inherently inconsistent with the criticisms raised by these pro-LGBT-equality scholars. Rather, my argument attempts to respond to these criticisms by engaging in a layered and “thick” analysis of the race analogy in the wedding vendor cases, rather than generate a one-size-fits-all approach to deployment of the race analogy by LGBT-rights advocates.

181. Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 148 (2009).

182. Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN ST. L. REV. 1, 3 (2018).

183. See, e.g., Smith, *Queer*, *supra* note 151, at 382 (acknowledging that “sameness arguments may be effective and necessary in some instances—such as in courtrooms or legal briefs in which LGBT advocates are bound by legal precedent “); Konoth, *supra* note 20, at 371 (“To be sure, the analogy has its limitations, which have been explored by courts and commentators. However, it may be critical for the success of the gay rights movement in the immediate future for those invested in the struggle for gay—and racial—equality to at least understand, if not approve of, the historic connections of the gay rights and racial justice movements. This Note has sought to create a better understanding of this analogy’s past to help others analyze how future use of the analogy may affect the movement.”).

B. *Challenges from and Responses to the Right (and Court): “Race is different”*¹⁸⁴¹⁸⁴

On the political right, scholars,¹⁸⁵ advocates,¹⁸⁶ and conservative judges alike have taken the position that race is simply different than sexual orientation, rendering the race analogy inapposite.¹⁸⁷ They offer the following arguments to support that position.

184. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 22:24–25, 32:2–4.

185. *See, e.g.*, Speer, *supra* note 125, at 133–35 (criticizing the LGBT-rights movement’s use of the immutability argument and arguing that race and sexual orientation “are not synonymous and, in many cases, are not interchangeable” and that the two face “conceptually different challenges” and that there “are different pre-conditions for each group that must be acknowledged and are being fundamentally ignored and sterilized [by LGBT-rights advocates] by confusing the two as identical”).

186. For example, during oral argument in the *Masterpiece* case, the Solicitor General had the following exchange with Justice Ginsburg:

JUSTICE GINSBURG: if it’s a question of race? . . . [Y]ou have already said that you put—might put race in a different category, right?
GENERAL FRANCISCO: Yes, Your Honor.

. . .

GENERAL FRANCISCO: I think pretty much everything but race would fall in the same category, but as this Court made clear in the Bob Jones case, the IRS could withdraw tax-exempt status from a school that discriminated on the basis of interracial marriage, but I’m not at all sure that it would reach the same result if it were dealing with a Catholic school that limited married student housing to opposite-sex couples only.

Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 31:21–33:3.

187. *See, e.g.*, Berg, *supra* note 166, at 235 (“As a matter of social history, the movements for same-sex marriage and even gay rights are relatively new—while the passage of the race- discrimination laws in the 1960s and ‘70s responded to an oppression that continued for more than 100 years after the national charter had been amended to prohibit it as wrong. Dissenting from basic racial equality after that century showed an intransigence that bespoke a permanent dismissal of African-Americans as full humans. In comparison, the debate about same-sex marriage has just begun, in relative terms, and is already producing some shifts in public opinion.”) (internal citations omitted); Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 26 (2003) (arguing that the *Loving* analogy in the marriage equality movement was “preposterous”); Coolidge, *supra* note 125, at 204 (identifying problems associated with the *Loving* analogy in the marriage equality campaign, arguing that the analogy was of “vital *political* utility to the advocates of same-sex marriage precisely because it is more about politics than law. Indeed, those advocating ‘same-sex marriage’ are not making a legal argument; instead, they are ‘playing the *Loving* card.’”); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 75–82 (1996) (stating that the *Loving* analogy as used by marriage equality advocates should be unsuccessful because the main issue in *Loving* was racial discrimination, not same-sex intimate conduct, to which (at that point) the Court had held was not constitutionally protected); Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Traditional Marriages*, 32 CREIGHTON

L. REV. 147 (1998); Dale M. Schowengerdt, *Note, Homosexuality: Defending Marriage: A Litigation Strategy to Oppose Same-Sex Marriage*, 14 REGENT U. L.

1. Piggie Park Is Not Analogous: Honorable Opposition v. Explicit Bigotry

Opponents of using the race analogy in the wedding vendor cases argue that *Piggie Park* is not analogous. Specifically, they argue that while the religious argument asserted in *Piggie Park* was deemed “patently frivolous,”¹⁸⁸ the religious beliefs of the wedding vendors are just the opposite—*sincerely held*.¹⁸⁹ At the *Masterpiece* oral argument, Chief Justice Roberts expressed a similar sentiment:

[T]he racial analogy obviously is very compelling, but when the Court upheld same-sex marriage in *Obergefell*, it went out of its way to talk about the decent and honorable people who may have opposing views.

And to immediately lump them in the same group as people who are opposed to equality in relations with respect to race, I’m not sure that takes full account of that—of that concept in the *Obergefell* decision.¹⁹⁰

For Justice Roberts, then, the baker “presented a meritorious First Amendment claim whereas the *Piggie Park* owner did not.”¹⁹¹

Today’s exemption seekers understandably seek to elevate Justice Roberts’s concern into an analytic framework that rejects application of the race analogy. They thus echo Justice Roberts’s position when they scaffold their distinction of *Piggie Park* with language from Justice Kennedy’s *Obergefell* opinion: “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or

REV. 487, 491–92 (2001–2002) (“For all the hysteria produced by *Loving* analogists (who attempt to equate invidious racial discrimination with opposition to same-sex marriage), the analogy is good for little more than political posture and pressure. In truth, every court that has addressed the issue has rejected the right to same-sex marriage under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”)

188. *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433 437 (4th Cir. 1967) (Winters, J., concurring).

189. See, e.g., Brief of Amicus Curiae Christian Bus. Owners Supporting Religious Freedom, *Masterpiece Cakeshop*, *supra* note 133, at *30–31 (“The free exercise claim in *Newman* was only analyzed by the district court, where the court gave no weight to the factual validity of defendants’ argument that their faith actually required them to oppose racial integration. The appellate court also described the defendants’ religious exercise defense as ‘patently frivolous.’ Conversely here, the Petitioner’s religious convictions are sincere and well-evidenced.”) (internal citations omitted); see also, e.g., MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 196–98 (summarizing amicus briefs supporting the baker in *Masterpiece*); Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 654 (2019) (“The temporal nature of bigotry facilitated arguments on behalf of the baker, as his supporters distinguished his sincere religious beliefs about marriage from racist beliefs of the past.”).

190. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 73:16–74:3.

191. MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 204.

philosophical premises, and neither they nor their beliefs are disparaged here.”¹⁹² Taking this language from *Obergefell* and overlaying it upon the distinction they argue from *Piggie Park*’s “patently frivolous” finding, today’s exemption seekers argue that it is unfair and offensive to compare them to the racist and bigoted vendors who claimed religious exemptions from the CRA in the 1960s.¹⁹³ It is on this normative ground—how the world might view and describe them if the race analogy is permitted and accepted by the Court—that these wedding vendors “indignantly reject comparisons that place them on a moral or political par with racial segregationists.”¹⁹⁴ They insist that “race is different . . . because essentially all religious actors who believe it is proper to make racial distinctions always act in bad faith (i.e., they are racists). On the other hand, it is argued, many of those who, on conscience grounds, believe it is proper to make

192. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). See also NeJaime, *supra* note 189, at 2655 (2019) (“Those opposing LGBT equality attempt to distinguish history—distancing themselves from those who opposed racial equality in an earlier era. Justifications for past practices of racial subordination, they assert, have been properly rejected as bigoted. But, they contend, such practices have little in common with contemporary practices being challenged by LGBT individuals. In McClain’s description, those opposed to same-sex marriage ‘insist that their sincerely held views are nothing like odious racist views or opposition to interracial marriage.’”) (internal citation omitted).

193. See generally Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 B.U. L. REV. 891, 894 (2015) [hereinafter McClain, “Stateways”]; Ryan T. Anderson, *Disagreement is Not Always Discrimination: Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL’Y 123, 134 (2018) (“No doubt bigotry motivates some traditionalists. But not Phillips. It would be unfair to punish him and similar professionals who believe in conjugal marriage.”).

194. Kennedy, *supra* note 125, at 789. See also McClain, *Stateways*, *supra* note 193, at 893–94 (“Opponents of same-sex marriage strenuously object to any analogy between opposing same-sex marriage and opposing interracial marriage, and they warn that religious conservatives are at risk of losing their religious liberty if the conflation of conscientious objection with bigotry goes unaddressed. Supporters of broad, religious, conscience-based exemptions . . . argue that such exemptions from providing goods and services to same-sex couples are appropriate in a way that invocations of conscience in the context of race discrimination are not.”) (citing Rod Dreher, *Does Faith = Hate?*, AMER. CONSERVATIVE, Sept.–Oct. 2013, at 12, 14–15); see also *id.* at 894 (As a result, exemption seekers “often distinguish conscience-based objections to same-sex marriage as entirely different from earlier objections to interracial marriage.”); Wilson, *supra* note 19, at 101. *United States v. Windsor*, 570 U.S. 744, 776 (2013) (Alito, J., dissenting) (describing the majority’s opinion as one that could “tar the political branches with the brush of bigotry.”); *id.* at 796 (suggesting that the majority viewed opponents of marriage equality as “members of a wild-eyed lynch mob”); *id.* at 795 (accusing the majority of assuming that members of Congress who voted for DOMA had “hateful hearts.”); *id.* at 813 (cautioning that the majority’s acceptance of arguments supporting marriage equality created a risk that would “cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools”).

distinctions on the basis of sexual orientation, in particular when it comes to marriage, act in good faith (i.e., they are not homophobic).¹⁹⁵

Exemption seekers seek to elevate these *normative* distinctions grounded in subjective moral judgments—honorable versus “patently frivolous” (and thus bigoted)—to a *legal* principle that excludes use of the race analogy in today’s wedding vendor cases. Deeper analysis of the bigoted versus honorable distinction, however, disrupts, if not destroys, any potential persuasive work that might be accomplished with the argument.

As an initial matter, it is important to address exemption seekers’ reliance on Justice Kennedy’s statement in *Obergefell*.¹⁹⁶ Considering Justice Kennedy’s statement in context weakens its power as scaffolding for exemption seekers. That portion of Justice Kennedy’s opinion was immediately followed by the statement: “But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”¹⁹⁷

2. *Piggie Park* is Not Distinguishable

When Judge Winter concurred in that decision, his contention that the BBQ joint owner’s religious belief was “patently frivolous”¹⁹⁸ could not have been a normative judgment about the content of that belief.¹⁹⁹ That is because that type of factual, moral, and normative characterization of a litigant’s religious belief is outside the competence of judges and unconstitutional under the First Amendment. Instead, Judge Winter, and in turn, the Supreme Court in its affirmance, might have been commenting on the notion that a *business entity* could hold a religious belief, something foreign to 1960s Free Exercise jurisprudence, but which has recently been recognized by this Court in *Burwell v. Hobby Lobby Stores*,

195. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 239–40. For example, Robin Fretwell Wilson contends that the “religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.” Wilson, *supra* note 19, at 101. Lynn Wardle and Lincoln Oliphant contend that accepting the race analogy “means that those who oppose same-sex marriage are, like those who opposed inter-racial marriage, simply bigots.” Wardle & Oliphant, *supra* note 124, at 151.

196. “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.” *Obergefell*, 576 U.S. at 672.

197. *Id.*

198. *Newman v. Piggie Park Enters. Inc.*, 377 F.2d 433, 437 (1967) (Winter, J., concurring).

199. See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1517 (2015).

Inc.,²⁰⁰ under which “courts would have to entertain the [BBQ] chain’s claim for exemption.”²⁰¹ Or the Court might well have been commenting that a religious objection as a defense to the nondiscrimination law challenged in *Piggie Park* was patently frivolous.

Critical to the argument made herein, however, is that neither the Fourth Circuit nor the Supreme Court expressed a judgment about correctness of the religious belief asserted in that case. As a result, there is not a persuasive argument that *Piggie Park* is distinguishable because the *Piggie Park* courts declared that the *substance* of the religious belief to be “patently frivolous,” whereas in the wedding vendor cases the religious belief is sincere and honorable. Thus, the accusation by exemption seekers that opponents of religious exemptions are improperly casting them as bigots, rather than the accurate description that they seek an exemption in good faith,²⁰² is inaccurate as a matter of fact and represents a strategic ploy to enhance their litigation (and social movement) positions. It is also irrelevant as a matter of law.

3. LGBT-Rights Advocates Do Not Disparage Exemption Seekers’ Character

Most LGBT civil rights proponents oppose religious exemptions in the wedding vendor cases not because they consider the vendors bigoted, but because granting the exemption would produce unequal status regimes, would stigmatize LGBT consumers, and would create economic harms to LGBT consumers—all in violation of state antidiscrimination law.²⁰³ They further contend that established First Amendment law should

200. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014).

201. Sepper, *supra* note 199, at 1517; *see also* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 135 (2015) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5; *United States v. Lee*, 455 U.S. 252 (1982)) (“The rise of corporate religious liberty called into question long-stable distinctions that constitutional and statutory law has drawn between secular for-profits and religious non-profit organizations. In the past, courts easily dismissed the rare free exercise claim from for-profit corporations seeking to avoid legal obligations. The Supreme Court soundly rejected exemptions for for-profit businesses from social insurance and antidiscrimination requirements.”).

202. *See* Carlos Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 659–660 (2016) (“Proponents of broad religious exemptions from LGBT equality measures argue that religious- based objections to same-sex marriages are grounded in good faith understandings of religious doctrine and are not aimed at gay people as such.”).

203. *See, e.g.*, Nelson Tebbe *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* at 101 (Harvard University Press 2017) (noting that the principle of government neutrality is “not a matter of injured feelings; it protects against a change in the *legal* relationship between government and citizen.”) (emphasis in original); *id.* at 108 (“So although religious people who succeeded in enacting their opposition to same-sex marriage into law were not acting out of bigotry, they *were* drawing the government’s ‘imprimatur’ for an expression of disapproval.”) (emphasis in original); Kyle C. Velte, *Why the Religious Rights Can’t Have Its (Straight) Wedding Cake and Eat it Too*, 36 Law

reject the wedding vendors' free exercise and free speech defenses with ease.²⁰⁴ LGBT civil rights proponents take this position without regard for whether exemption seekers (or marriage equality opponents) are actual bigots or whether they are honorable citizens with no anti-LGBT animus.²⁰⁵ It is simply not the case, as some judges and anti-LGBT-equality advocates have argued or assumed, that "in order for state policies to demean or stigmatize members of a minority group, it is necessary for supporters of those policies to have intended to do so."²⁰⁶

& Ineq. 67, 92–93 (2018) (arguing that judicial recognition of a religious exemption "would allow our legal system to continue to enforce a social stratification"). *But see* Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 246 (2016) ("[T]he argument that anti-gay discrimination is somehow qualitatively different from anti-black discrimination is bunk. It is a convenient smoke screen enabling bigots to mask their true animus.").

204. *See, e.g.,* Velte, *All Fall Down*, *supra* note 132, at 35–53. Moreover, *Bostock* supports this legal conclusion. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) (holding that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule").

205. *See* MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 199 (noting that in *Masterpiece*, "[n]either the parties nor most of their amici called Phillips a bigot or motivated by 'animosity,' instead stressing that [the Colorado law] focuses on conduct") (emphasis in original); *id.* at 203 (noting that some amici in *Masterpiece* "shifted the inquiry away from animus or motive to putting the state's imprimatur on discrimination").

206. Ball, *Bigotry*, *supra* note 202, at 650; *see also* MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 182 (asserting that a "charge of bigotry" is not the logical or only inference to be drawn "simply from someone's asserting that society should learn from past appeals to religion to justify now-repudiated forms of discrimination[.]"). As a result, opposition to religious exemptions need not rest on an argument that exemption seekers are acting with animus; such opposition thus need not rest on the doctrine of *Romer v. Evans* and *United States v. Windsor*, which struck down laws because they rested on animus toward LGBT people or their relationships. Rather, in the wedding vendor cases, LGBT-rights advocates argue that the exemption seekers' First Amendment claims fail as a matter of well-established law, therefore rendering animus or honorableness irrelevant. *See, e.g.,* Velte, *All Fall Down*, *supra* note 132, at 35–53. In addition, whether someone is a bigot is contingent, unstable, and contextual, making it difficult (if not impossible) to definitively determine whether today's exemption seekers are, indeed, bigoted. *See* Ball, *Bigotry*, *supra* note 209, at 642 ("Our assessments of bigotry . . . change as society changes. A century ago, many Americans did not believe that those who argued for the legal separation of the races were bigots."); *id.* at 643 ("[A] strong social consensus will eventually emerge holding all of most arguments raised against granting same-sex couples the opportunity to marry reflect an inappropriate intolerance of LGBT people. But we are not there yet."); *see also* Kennedy, *supra* note 125, at 783 (noting that "rationales that were once passionately asserted [in opposition to interracial marriage] and widely believed, but that are now so thoroughly discredited that they no longer warrant extended rebuttal."); *id.* at 790 ("Today, Americans look back upon segregationist apologetics with disbelief, amazed that millions of apparently decent and sensible people could have accepted those rationalizations and misperceived (or ignored) the cruel reality of segregation. That they did, however, should caution us to the possibility that familiarity with traditional and widely accepted arrangements can blind people to forms of oppression that are

C. *The Exemption Seekers of the 1960s Were Not Considered Fringe Bigots in Their Time*

The purported bigotry versus honorable citizen distinction is wrong as a matter of historical fact.²⁰⁷ In her study of the passage of the CRA, Linda McClain discovered that the opponents of the law made religiously-grounded arguments similar to the religion-based arguments made by today's exemption seekers.²⁰⁸ They "insisted that God was the author of natural inequality and racial difference" and their insistence was mainstream, not an outlier.²⁰⁹ Supporters of segregation made "appeals to natural law, divine law, and unchanging moral principles in [their] opposition" to the CRA.²¹⁰ In addition, the religious objectors to the CRA, similar to today's exemption seekers, bristled when CRA supporters characterized them as bigots; they, too, considered their religiously-based opposition to the CRA honorable, right, and just.²¹¹ As Michael Kent Curtis notes:

inconsistent with fundamental legal and moral requirements."); MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 2 ("Once there is general agreement that . . . past beliefs and practices were bigoted, it becomes hard for people to understand that anyone ever seriously defended them."); *id.* ("[P]ast examples of bigotry on which there is consensus become the basis for prospective judgments about analogous forms of bigotry. People debate: Is this belief or practice bigotry because it looks like forms of discrimination that we have disavowed? The stakes are high because people worry about failing to learn from the past."); *id.* at 8 ("[I]deas about what is reasonable and unreasonable change over time."). In addition, "bigotry can be founded on sincerely held religious views. The categories of bigotry and sincere religious beliefs are not always mutually exclusive." Michael Kent Curtis, *A Unique Religious Exemption*, 47 WAKE FOREST L. REV. 173, 191 (2012).

207. See Gilreath & Ward, *supra* note 203, at 261 (summarizing the religious arguments made against segregation in the 1960s); *id.* at 278 ("Both the source of the opposition to black and gay rights and the structure of the principle arguments have been virtually identical. More broadly, anti-black and anti-gay discrimination come from the same source and operate in highly similar ways.").

208. See McClain, *Stateways*, *supra* note 193, at 892.

209. MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 105, 126.

210. *Id.* at 126.

211. McClain, *Stateways*, *supra* note 193, at 894–95 ("[O]pponents of interracial marriage resisted the label of 'bigot' and appealed to conscience, morality, religious teaching, and the Bible as bases for their stance."). See also MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 117 (noting that the argument offered by opponents of the CRA "was that there were decent, sincere people on both sides"); *id.* at 8 ("[C]lergy and politicians defending segregation vehemently rejected the label of 'bigot' and themselves appealed to religion and conscience."); Kennedy, *supra* note 125, at 791 ("[M]any segregationists believed, honestly, that keeping blacks in their 'place' would redound to their benefit as well as to the interests of white society."); James M. Oleske, Jr., *The Evolution of Accommodations: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 107–108 ("Religious leaders at the time warned of the evils of interracial marriage, and religious opposition to the practice was invoked by both state and federal judges."); *id.* at 109 (noting that President Truman publicly voiced his religious

Slavery, racial discrimination and segregation, and opposition to women's rights were all supported by strong religious arguments bolstered by citations to the Bible. As scholarly work has shown, these religious views were deeply held by many people. That Professor [Robin Fretwell] Wilson finds it impossible to marshal religious arguments for segregation is, to a great degree, a tribute to the success of the Civil Rights Movement and civil rights laws, generally without exemptions for religious objectors. Not only could religious arguments for segregation be marshaled, they were marshaled.²¹²

It was not just clergy who opposed integration on religious grounds; leading senators from both sides of the aisle, including Robert Byrd and Strom Thurmond made such arguments on the senate floor and their sentiments were shared by “educators, ‘housewives, sorority sisters, and Rotarians.’”²¹³ Thus, looking back with hindsight at the rhetoric deployed by exemption seekers in the 1960s does not change the fact that *at the time the arguments for exemptions were made*, they were *not* considered bigoted by most of American society.²¹⁴ It is only today, within our contemporary cultural moment and “thanks to civil rights laws and changing public sentiment (probably much influenced by those strong and general laws), [that] the issue of an exemption to allow racial discrimination is remote.”²¹⁵ As a result, those who in the 1960s opposed racial equality and integration “are entitled to the same presumption of sincerity as current opponents of gay equality. Many believed the religious argument against integration and interracial marriage, just as many people believe the religious arguments against gay equality and liberty.”²¹⁶

opposition to interracial marriage and “just like religious opposition to same-sex marriage in recent years, religious opposition to interracial marriage had a very strong foothold in society prior to *Loving*”).

212. Curtis, *supra* note 206, at 187–88 (internal citations omitted); *see id.* at 189 (summarizing statements of judges, members of congress, and movement leaders in which they used Christianity generally or specific citations to the Bible to justify segregation and antimiscegenation laws); *see also* MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 126 (noting that “religious beliefs about segregation were not ‘fringe’ in the mid-1960s and were sincerely and widely held”); *id.* at 203 (noting that at the time of the *Piggie Park* decision, the religious beliefs of its proprietor “‘were relatively mainstream’ and he was not viewed as ‘fringe or disingenuous.’ Indeed, that these religious beliefs were not marginal, but sincerely and widely held, made the Court’s ruling all the more significant”) (quoting Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Respondents at 14, *Masterpiece Cakeshop Ltd. V. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 5127302, at *14).

213. Gilreath & Ward, *supra* note 203, at 262 (internal citation omitted).

214. *See* MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 126 (noting that “religious beliefs about segregation were not ‘fringe’ in the mid-1960s and were sincerely and widely held”).

215. Curtis, *supra* note 206, at 176.

216. *Id.* at 191–92; *see also* Russell, *supra* note 122, at 76 (“The rhetoric that the Christian right uses against gays today is no different from the racist tactics they used against blacks in the 1960’s.”) (citing Evelyn C. White, *Christian Right Tries to*

D. *Courts Need Not Assess the Normative or Moral Character of Religious Beliefs*

Whether opponents of the CRA and today's religious exemption seekers ought to both be characterized as bigots based on the tenets of their religious beliefs, however, is irrelevant to the applicability and propriety of the race analogy. Both opponents of the CRA in the 1960s and today's exemption seekers ground their positions in the same source: their faith.²¹⁷ The social and normative characterizations of exemption seekers' reasons for seeking a religious exemption, whether cast as bigoted or honorable, is inconsequential because courts take at face value sincerely held religious beliefs, and do so *without attaching normative judgments* as to whether the asserted belief is "prejudiced."²¹⁸

This approach is proper as a normative, pragmatic matter and as a legal matter. As a normative, pragmatic matter, judges take the position that such determinations are beyond the ken of judicial competence, thus rendering courts "ill equipped" to make such inquiries.²¹⁹ As a legal matter, based on constitutional concerns, courts decline to look behind a sincerely held religious belief.²²⁰ As a result, "courts have been reluctant

Capitalize on Anti-Gay Views, S.F. CHRON., Jan. 12, 1994, at A6). In sum, because the "most common argument of the dissenters [opposing racial integration in the 1960s] was theological: integration encouraged miscegenation, which contradicted the divine word[. . .] [t]he claim that opposition to homosexuality . . . is religious, while opposition to integration and interracial marriage was not, is mistaken." Curtis, *supra* note 206, at 190; *see also* Russell, *supra* note 122, at 43 ("Slavery and racial segregation were defended from the pulpit using some of the same biblical texts, including Leviticus, that are used to stigmatize gays.") (internal quotation omitted); *see also* Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 139–40 (2010) ("[I]t turns out that similar arguments have been offered to justify the state's refusal to recognize interracial unions and same-sex unions. [A]nalogous arguments invoking God's Will have been used to justify prohibiting recognition of interracial and same-sex marriages."); Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 241–42 ("[C]laims based on the good faith of those who object to the application of LGBT equality mandates on religious grounds simply do not cut it.").

217. *See* McClain, *Stateways*, *supra* note 193, at 916–18 (summarizing religious objections to the passage of the Civil Rights Act of 1964); *see also* Kennedy, *supra* note 125, at 783 (noting that supporters of antimiscegenation laws claimed that such laws "gave voice to the will of God"); *see also* Curtis, *supra* note 206, at 178 ("Objections to expanding protection for civil rights of blacks and women were often religious and justified by citations to the Bible.").

218. Paul Barker, *Religious Exemptions and the Vocational Dimension of Work*, 119 COLUM. L. REV. 169, 171 (2019) ("The possibility of judicial examination of the sincerity of religious beliefs as a means of constraining when or for what they are invoked has vanished for all but the most frivolous claims.").

219. Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 86 (1997).

220. *Id.* at 86, n.3 (citing *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)); *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring in part and dissenting in part); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439,

to interpret theologies . . . because [they] lack *competence* on such matters and because they must guarantee government *neutrality* with respect to religions.”²²¹ Even when a particular faith takes inconsistent theological positions on a topic, or a litigant is inconsistent about his or her specific religious beliefs, courts nonetheless defer to the asserted belief and do not second-guess it.²²² Simply put, “[c]ourts are not arbiters of scriptural interpretation.”²²³ This has been true in wedding vendor cases as well as cases involving race-based discrimination.²²⁴

It would be problematic to try to distinguish between religious grounds for an LGBT exemption and one for a racial exemption because attempts to make those distinctions “contain unavoidable assessments of the reasonableness of the two sets of religious views.”²²⁵ Such attempts to distinguish between these two positions “fail from the beginning because they are grounded in the notion that some religious views are more reasonable than others.”²²⁶ Judges, like any outsider to a religion, find it difficult to “determine the degree of good faith with which individuals assert religious claims”²²⁷ because this kind of “determination usually requires intrusive inquiries into the nature of and justifications for particular religious values, inquiries made even more problematic by the fact that religious beliefs are by their nature grounded in considerations of faith rather than in those of reason.”²²⁸

As early as the 1940s, the U.S. Supreme Court made it clear in *United States v. Ballard* that the “truth or veracity” of one’s religious doctrines is not an issue that may be submitted to a fact-finder for determination.²²⁹ This is because the law “knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”²³⁰ “Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”²³¹ The *Ballard* Court went on to state that while the religious views held by the parties in that

457–58 (1988).

221. Tebbe, *Reply, supra* note 132, at 33 (emphasis in original).

222. Thomas v. Review Bd. of the Indiana Emp’t Sec. Div., 450 U.S. 707 (1981).

223. *Id.* at 715–16.

224. See MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 188 (noting that in a wedding vendor case denying a religious exemption, the New Mexico Supreme Court stated that “no one has questioned [the vendors’] devoutness or their sincerity” and that in *Loving*, “no one questioned” the sincerity of the trial court judge, who upheld Virginia’s antimiscegenation law on the ground that “Almighty God created [and separated] the races”).

225. Ball, *Against LGBT Exceptionalism, supra* note 1, at 240.

226. *Id.* at 241.

227. *Id.*

228. *Id.*

229. See *United States v. Ballard*, 322 U.S. 78, 86 (1944).

230. *Watson v. Jones*, 80 U.S. 679, 728 (1871).

231. *Ballard*, 322 U.S. at 86–87.

case “might seem incredible, if not preposterous, to most people[.]” those views could not be “subject to trial before a jury charged with finding their truth or falsity” because, if that were permitted in *Ballard*, “then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.”²³² As a result, courts are correct to be “appropriately hesitant to scrutinize either the sincerity of religious litigants or the reasonableness of their views.”²³³

This “reluctance of courts to second guess an individual’s religious beliefs”²³⁴ lends support to the race analogy because it insulates the religious beliefs of exemption seekers from normative characterization by the law (the Court) as either prejudiced or honorable.²³⁵ If we accept the proposition that courts do not assess the correctness of sincerely held religious beliefs, as we must, that approach neutralizes any claim by exemption seekers that courts should rank asserted religious beliefs on a continuum from honorable to racist and make substantive determinations on claims for religious exemptions based on such normative characterizations. For, when exemption seekers point to the “differing kinds of arguments that might be marshaled to justify discrimination [that] suggests that someone is deciding which arguments are good or bad”²³⁶—something that informed advocates and scholars who support exemption seekers are “presumably . . . not advocating”²³⁷ given that the “Constitution precludes the state from evaluating the truth of religious claims.”²³⁸

As such, “the suggestion that the same arguments cannot be offered against recognizing the different kinds of marriages is at best irrelevant.”²³⁹ That is the exact position taken by exemption seekers in the wedding vendor cases—that the various arguments concerning same-sex marriage must be judged as “bigoted” or “honorable,” with those arguments that make the race analogy falling on the “bigoted” side and those arguments concerning sincerely held religious beliefs about same-sex marriage falling on the “honorable” side. Because “it is extremely problematic to set policies, including religious exemptions from generally applicable laws, on ostensible distinctions between reasonable and unreasonable religious views[.]”²⁴⁰ the Court has rejected normative judgments about the correctness or reasonableness of sincerely held religious beliefs, so this purported distinction is irrelevant here and must

232. *Id.* at 87.

233. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 241.

234. Barker, *supra* note 218, at 199.

235. See MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 196 (“A court does not inquire into whether such sincere religious beliefs are reasonable or mistaken.”).

236. Strasser, *supra* note 216, at 139.

237. *Id.*

238. *Id.*

239. *Id.*

240. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 241.

be rejected. As Mark Strasser pointed out in the same-sex marriage context, even setting aside the fact that religious beliefs were, in fact, offered in opposition to *both* interracial marriages and same-sex marriages, “a separate question would still involve how one would go about justifying affording an exemption for one sincere religious belief but not another.”²⁴¹ The position argued by today’s exemption seekers would impermissibly “require[] the state to leave its perch of neutrality among religions because the position involves an assessment of which claims of conscience are correct.”²⁴²

Thus, even if it is factually true that “[w]edding vendors who turn their backs on same sex marriage on religious grounds have no evil in their hearts, in the overwhelming majority of cases,”²⁴³ that fact is not relevant given the legislature’s determination that LGBT people, like people of color (and members of the other classes of consumers protected by the statute), have experienced “stratification”²⁴⁴ and the statutes’ plain language proscribing discriminatory conduct against all protected classes without any hierarchy.²⁴⁵ Because “it is well settled that the law cannot judge religious beliefs by their comprehensibility[.]”²⁴⁶ the debate over the intentions of today’s exemption seekers is a detour from the merits of the legal questions and a distraction from meaningful consideration of the race analogy. While today’s exemption seekers may “bristle at the notion that religiously-based resistance to racial integration is of any relevance to present-day controversies[.]”²⁴⁷ whether they are similar or dissimilar to the opponents of the CRA in the 1960s in terms of the content of their character is irrelevant; the fact that both groups base their claims on religious beliefs is the fact that ties them together and opens up space to deploy the race analogy.²⁴⁸

1. Race Gets Strict Scrutiny; Sexual Orientation Gets Rational Basis Review

Although the wedding vendor cases involve statutory protections, today’s exemption seekers invoke the well-known constitutional tiers of

241. Strasser, *supra* note 216, at 140.

242. *Id.* at 141.

243. Sager & Tebbe, *supra* note 135, at 189.

244. *Id.*

245. MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 190.

246. Oleske, *supra* note 211, at 119.

247. McClain, *Stateways*, *supra* note 193, at 925.

248. Moreover, “[t]he mere step of drawing analogies between past and present forms of discrimination to point out how, over time, new insights and evolving understandings have led to recognition that such treatment is unjustified”—as is sought to be done by using *Piggie Park* to resolve the wedding vendor cases—“is not a charge of bigotry.” MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 209. *See also id.* at 201 (“[O]ne can concede religious sincerity while upholding the legitimacy of state anti-discrimination laws.”).

scrutiny to persuade courts to reject the race analogy. Those tiers include, as pertinent here, rational basis and strict scrutiny. Rational basis review dictates that when a law classifies according to a non-suspect or non-quasi-suspect class, such as sexual orientation,²⁴⁹ the state must only justify that law by presenting a legitimate state interest that is rationally related to the law in question.²⁵⁰ In contrast, the strict scrutiny standard, which is applied to laws that classify based on race, requires that a state articulate a compelling government interest in that racial classification that is narrowly tailored to that interest.²⁵¹

In their briefs and argument, the baker and his amici supported their general argument that race is “just different” than sexual orientation by referring to the fact that race receives strict scrutiny while sexual orientation receives rational basis review.²⁵² The United States, appearing as amici in support of the baker, argued that “not . . . every application of a public accommodations law to protected expression will violate the Constitution. In particular, laws targeting race-based discrimination may survive heightened First Amendment scrutiny”²⁵³ because a state’s “‘fundamental, overriding interest’ in eliminating private racial discrimination . . . may justify even those applications of a public accommodations

249. Colin Callahan & Amelia Kaufman, *Equal Protection*, 5 GEO. J. GENDER & L. 17, 48 (2004) (“[L]aws and other forms of government action that discriminate on the basis of sexual orientation must have a rational basis.”)

250. *Id.* at 49.

251. *See generally* Pamela S. Karlan, *Foreward: Loving Lawrence*, 102 MICH. L. REV. 1447, 1461–62 (2004).

252. *See, e.g.*, Reply Brief for Petitioner at 15, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 5644420, at *15 (“Respondents repeatedly invoke hypothetical cake artists who object to designing wedding cakes that celebrate interracial marriages. The record in a case like that would likely reveal that the cake artist engages in broader class-based discrimination against certain races. But assuming such a cake artist objects only to the message of those wedding cakes and otherwise serves people of all races equally, the compelled-speech doctrine would apply. The government, however, could potentially satisfy strict scrutiny because ‘racial bias implicates unique historical, constitutional, and institutional concerns.’”); *see also* Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 20:8–21:20; *id.* at 22:1–23:6; Brief for Lawyers’ Comm. for Civil Rights Under Law, Asian Am. Legal Def. and Educ. Fund, Ctr. for Constitutional Rights, Color of Change, the Leadership Conference of Civil and Human Rights, Nat’l Action Network, Nat’l Assoc. for the Advancement of Colored People, Nat’l Urban League and S. Poverty Law Ctr. as Amici Curiae in Support of Respondents at 18, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 5127306, at *18 (“Recognizing the unprecedented implications of the arguments advanced here, the federal government attempts to reassure this Court that a decision for the bakery would not (necessarily) open the door to race-based discrimination.”).

253. Brief for the U.S. as Amicus Curiae in Support of Petitioners at 32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4004530, at *32.

law that infringe on First Amendment freedoms.”²⁵⁴ The United States then argued that that same public accommodation law should face a different fate when sexual orientation discrimination is at issue: “The Court has not similarly held that classifications based on sexual orientation are subject to strict scrutiny or that eradicating private individuals’ opposition to same-sex marriage is a uniquely compelling interest.”²⁵⁵

Counsel for the baker made a similar argument at the *Masterpiece* oral argument. In response to Justice Kagan’s question, “[s]ame case or not the same case, if your client instead objected to an interracial marriage?,” counsel for the baker responded: “I think race is different for two reasons: one, we know that that objection would be based to who the person is, rather than what the message is. And, second, even if that were not the case, the Court could find a compelling interest in the race inquiry”²⁵⁶ In response to Justice Sotomayor’s question, “is your theory that . . . public accommodation laws cannot trump free speech or free-exercise claims in protecting against race discrimination?,” the baker’s attorney responded: “That is not my theory. That would be an objection to the person and the Court may find a compelling interest in that.”²⁵⁷ These references to a compelling interest are, of course, references to the argument that race gets strict scrutiny and sexual orientation does not.

Similarly, scholars supporting religious exemptions contend that the race analogy improperly compares “apples and oranges”—the notion that the racial civil rights movement, which arose from slavery, is simply not comparable to the LGBT-rights movement, as illustrated by the differing levels of equal protection scrutiny.²⁵⁸

As an initial matter, this argument seems out of place where the statute at issue—the public accommodation law—does not classify based on race, or on any protected class basis. The law declares that the prohibited conduct—discrimination in the marketplace—is prohibited vis-à-vis *all* protected individuals (race, sex, religion, sexual orientation, etc.); it is a neutral law of general applicability that even-handedly applies to all places of public accommodation. Moreover, the baker is not asserting a challenge to the law under the Equal Protection Clause, the claim most

254. *Id.*

255. *Id.*

256. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 22:1–23:6. Counsel’s reference to the “message” is opaque; its logical interpretation is that counsel is referring to conduct: a same-sex wedding. However, the Court has soundly rejected the argument that status (identity) can be separated from conduct when it comes to sexual orientation. See generally Velte, *Why the Religious Rights Can’t Have Its (Straight) Wedding Cake and Eat it Too*, *supra* note 203, at 92–93 (describing exemption seekers’ attempt to revitalize the “status-conduct” argument and arguing that it should be rejected under well-settled Supreme Court precedent).

257. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 21:12–20.

258. Wardle, *supra* note 187, at 144–45.

commonly associated with the “race gets strict scrutiny, but sexual orientation gets rational basis” framework.

The wedding vendors’ arguments on this front take two forms. First, because sexual orientation is subject to rational basis review when laws classify based on that identity, states like Colorado do *not* have a compelling interest in protecting against sexual orientation discrimination in the marketplace. In contrast, the argument proceeds, because race gets strict scrutiny when laws classify based on race, states like Colorado *do* have a compelling interest in protecting against racial discrimination in the marketplace.²⁵⁹

This argument turns antidiscrimination law on its head and contradicts Supreme Court precedent. The Court has declared that protecting against discrimination in public accommodations *is* a compelling state interest.²⁶⁰ As a result, when a statute’s plain language declares that both race and sexual orientation is deserving of the protection of a public accommodation law, there is necessarily a compelling state interest in enforcing the antidiscrimination statute the same way *regardless* of which protected individual is claiming the statute’s protection. Put another way, the state has a compelling interest in prohibiting the discriminatory conduct outlawed by the statute with regard to *all* of the individuals protected by virtue of the statute’s plain language.

Language from *Masterpiece* suggest that this argument concerning the level of scrutiny will not carry the day. Justice Kennedy wrote that it was “unexceptional” that states can protect LGBT people through public accommodation law, as Colorado did there.²⁶¹ Justice Kennedy’s “matter-of-fact” assessment of state antidiscrimination laws “is an important implicit rejection of both the argument that . . . the state’s interest in prohibiting race discrimination is far more compelling than addressing other forms of discrimination[,]” such as sexual orientation discrimination.²⁶²

Moreover, *Bostock*’s holding that sexual orientation discrimination is *per se* sex discrimination under Title VII—that “homosexuality

259. See Brief for Lawyers’ Comm. for Civil Rights Under Law et al., *Masterpiece Cakeshop*, *supra* note 252, at *18.

260. *Id.* (“This Court has repeatedly affirmed that a state has a valid and compelling interest in assuring equal access to public accommodations for all residents and may accomplish that goal by enumerating groups and characteristics ‘within the ambit of protection.’ *Rorner*, 517 U.S. at 628 (‘Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.’)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (declaring that there is no doubt that a state has a compelling interest in “ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (noting that “eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order”).

261. *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1728 (2018).

262. MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 207.

and transgender status are inextricably bound up with sex”²⁶³—has “far-reaching consequences” that spill over into constitutional law.²⁶⁴ Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause.²⁶⁵ Thus, “[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.”²⁶⁶ The consequence of having the same Equal Protection standard for SOGI and sex defeats exemption seekers’ argument that race is inapposite because race gets strict scrutiny while sexual orientation only gets rational basis review.

In fact, in *Jaycees*, the Court previously held that a public accommodation law that protected against sex discrimination served a compelling state interest, even though sex-based classifications received only intermediate constitutional scrutiny (as opposed to the strict scrutiny afforded to race-based classifications).²⁶⁷ After *Bostock*, that same conclusion should result with regard to public accommodation laws that protect against sexual orientation discrimination. Moreover, the Court has held that a state legislature had the authority to serve its compelling state interest in prohibiting sexual orientation discrimination in public accommodations by adding sexual orientation to its antidiscrimination law, even though sexual orientation receives only rational basis—or, more likely after *Bostock*, intermediate scrutiny—in constitutional inquiries.²⁶⁸ Thus, to accept the wedding vendors’ argument about strict scrutiny—to permit different religious exemption analyses for different statutorily-protected individuals based on an equal protection doctrine that is not implicated—is to defy the Court’s declaration that public accommodation laws serve a compelling government interest, even vis-à-vis classes that do not receive strict scrutiny.²⁶⁹

A second variation of this argument appears to be that the First Amendment claims being made by the wedding vendors require strict scrutiny; that fact, coupled with the fact that race receives strict scrutiny, supports the argument that “race is just different.”²⁷⁰ Thus, the argument

263. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020).

264. *Id.* at 1778 (Alito, J., dissenting).

265. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532–34 (1996).

266. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting).

267. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

268. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995).

269. *See generally* Brief for Lawyers’ Comm. for Civil Rights Under Law et al., *Masterpiece Cakeshop*, *supra* note 252, at *18–19; *see also* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2128 (2017) (“The assumption that protection against marital status discrimination is less compelling than protection against discrimination on the basis of race or sex is deeply problematic.”).

270. *See* Brief of Freedom of Speech Scholars as Amici Curiae in Support of

seems to be that because the First Amendment claims and race both get strict scrutiny, the public accommodation law is not narrowly tailored in a way to survive the double strict scrutiny inquiry.²⁷¹ However, because public accommodation laws are neutral laws of general applicability, they are considered under the rational basis test rather than the strict scrutiny test when challenged under the First Amendment.²⁷² Indeed, when the Court has “considered and rejected religious exemptions in the past, those precedents are not limited to the context of racial discrimination simply because they originally arose in that context.”²⁷³

In sum, these arguments are flawed because they “conflate[] states’ compelling interests in eradicating all forms of discrimination by *businesses* . . . with the level of scrutiny that applies when the *government* engages in discrimination on the basis of protected classifications.”²⁷⁴ It is therefore “irrelevant whether government-sponsored sexual orientation discrimination receives the same scrutiny as government-sponsored racial discrimination.”²⁷⁵ That is because the state interest in preventing discrimination is the appropriate interest to consider in evaluating a First Amendment claim, rather than the constitutional scrutiny that is afforded to those groups protected by the public accommodation law.²⁷⁶

Respondents at 16, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4876116, at *16.

271. *Id.*

272. See *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990); see also generally Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc., *Masterpiece Cakeshop*, *supra* note 212, at *16 (“First, as a threshold point, neutral laws of general applicability are generally not overridden by religious beliefs and need not be sustained by a compelling interest. See, e.g., *United States v. Lee*, 455 U.S. 252, 260 (1982) (unanimously holding that ‘[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.’)”).

273. Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc., *Masterpiece Cakeshop*, *supra* note 212, at *16.

274. See Brief of Lawyers’ Comm. for Civil Rights Under Law et al., *Masterpiece Cakeshop*, *supra* note 252, at *19 (emphasis in original); accord David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1186–89, n.63 (1994).

275. Brief of Lawyers’ Comm. for Civil Rights Under Law et al., *Masterpiece Cakeshop*, *supra* note 252, at *19 (“The federal government’s theory would upend our longstanding state and federal laws proscribing discrimination in places of public accommodation, and would invite discrimination not only against LGBT people, but people of color, religious minorities, people with disabilities, women, and more.”); see also Brief for Freedom of Speech Scholars, *supra* note 270, at *15–16 (“If preventing discrimination against a same-sex couple cannot meet the narrow tailoring test, neither can preventing discrimination against an interracial couple.”) (internal citation omitted).

276. Brief of Freedom of Speech Scholars, *supra* note 270, at *26, n.14.

2. Marriage Exceptionalism: “Marriage is Different”

Marriage exceptionalism is “the contention that marriage equality presents us with novel questions about the intersection of religious freedom and the scope of antidiscrimination laws that demand new forms of religious exemptions from the application of antidiscrimination laws”²⁷⁷ Supporters of religious exemptions in the wedding vendor cases invoke this exceptionalism argument in contending that goods and services relating to marriage are “just different” from other goods and services peddled in the public square.²⁷⁸ They also contend that a wedding cake holds special meaning that distinguishes it from other goods or services.²⁷⁹

Moreover, this objection to the race analogy contends that objecting to same-sex marriage is morally and normatively different than objecting to different-sex interracial marriage since the recognition of same-sex marriage requires a redefinition of marriage, whereas rejecting anti-miscegenation laws did not.²⁸⁰ More specifically, this argument contends that anti-miscegenation laws were “an outlier from the historic understanding and practice of marriage, founded not on decent and honorable premises but on bigotry”²⁸¹ and the fact that “support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of views about sexual orientation”²⁸² based on the biological reality that “a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father.”²⁸³ The argument concludes: “Whether ultimately sound or not, this view of marriage is reasonable, based on decent and honorable premises, and disparages no one.”²⁸⁴ As one amici in *Masterpiece* contended:

[I]f this Court were to rule against Phillips it would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. The Court would do what it said in *Obergefell v. Hodges* it was not doing, disparaging them and their decent and honorable

277. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 237.

278. *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1739–40 (2018) (Gorsuch, J., concurring) (“It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is just bread or a kippah [or yarmulke] is just a cap.”).

279. *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 155 (2018) (noting that “[baker] Phillips viewed the cake as inherently religious, or as having an inherently different message from a heterosexual wedding cake”).

280. Wardle & Oliphant, *supra* note 124, at 146.

281. Brief of Amicus Curiae Ryan T. Anderson, Ph.D., & African-American & Civil Rights Leaders in Support of Petitioners at 3, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4004529, at *3.

282. *Id.*

283. *Id.*

284. *Id.*

religious and philosophical premises. And in doing so, it would teach everyone else in America that Phillips and people like him are bigots, and that the only reason one could support conjugal marriage is because one is anti-gay.²⁸⁵

Another amicus brief argued that the baker's religious objections to same-sex marriage were limited and had "no relation to the unique issues of race, racism or interracial marriage."²⁸⁶ Amici urged the Court to reject comparing the baker's "measured objection to celebrating same-sex marriage and someone else's racist beliefs or opposition to interracial marriage"²⁸⁷ because such a comparison is "unfair and offensive. Glib analogies with racial discrimination ignore the fact that racism is uniquely 'odious' in our society."²⁸⁸

Finally, this line of argument asserts that a "major moral difference" exists between interracial and same-sex marriage because "[b]eing black is not a sin" but "homosexual relations are immoral."²⁸⁹

Many of the reasons for rejecting the marriage exceptionalism argument are subsumed within my larger, overarching arguments about why we should adopt the race analogy in the wedding vendor cases, which is largely a call to reject *all* forms of LGBT exceptionalism vis-à-vis public accommodations law. As a result, I lay out my position in depth in the following section rather than here.

Before doing so, however, I address the assertion that the exemptions sought by today's wedding vendors have "no relation to the unique issues of race, racism or interracial marriage"²⁹⁰ and that a "major moral difference" exists between interracial and same-sex marriage because "[b]eing black is not a sin" but "homosexual relations are immoral."²⁹¹ These positions are belied by the history of opposition to interracial marriage, which looked a lot like the opposition to same-sex marriage.²⁹²

285. *Id.* at *37.

286. Brief of Amici Curiae Ethics & Religious Liberty Comm'n of the S. Baptist Convention et al., *Masterpiece Cakeshop*, *supra* note 133, at *26.

287. *Id.*

288. *Id.*

289. Wardle & Oliphant, *supra* note 124, at 147–48.

290. Brief of Amici Curiae Ethics & Religious Liberty Comm'n of the S. Baptist Convention, *Masterpiece Cakeshop*, *supra* note 133, at *26.

291. Wardle & Oliphant, *supra* note 124, at 147–48.

292. Gilreath & Ward, *supra* note 203, at 267 ("[A]n examination of the history of religiously based opposition to racial equality reveals its tenor and strategy. There is simply no basis for the claim that religious animus toward same-sex marriage is unique when the facts are that deep-seated, presumably sincere religious opposition to integration and interracial marriage was every bit, if not more, aggressive than opposition to same-sex marriage has been."); *see also id.* at 266 (noting that in the 1950s and 1960s, "[t]hose who opposed eliminating segregation in the public school system and supported anti-miscegenation statutes often imagined potential threats to children to further support the biblical basis for these viewpoints" and providing as an example the position taken by the state of Virginia, which claimed its antimiscegenation statute

Like today's exemption seekers, white people who opposed interracial marriage sixty years ago often gave "lip-service to the equal moral status of blacks while at the same time opposing 'behavior,' like interracial marriage, that '[would] in the end imperil the stability of the social order,' which was based on the 'commandment of the law of God.'"²⁹³ Thus, the segregationists of yesteryear targeted conduct and activity "not personhood *per se*, so that Jim Crow's web of regulations controlled behavior: riding, swimming, drinking, eating, marrying . . ." ²⁹⁴ Today's exemption seekers ground their marriage exceptionalism position similarly: what LGBT people label as prohibited "discrimination"—denying same-sex wedding-related goods and services—is not discrimination based on sexual orientation. Rather, the refusal is a rejection of conduct—the act of marrying.²⁹⁵

Loving rejected segregationists' attempt to exceptionalize marriage in this way; so too should the Court vis-à-vis today's exemption seekers, and it may do so by analogizing to race. In fact, one scholar who *supports* religious exemptions for wedding vendors has invoked the race analogy, conceding that if the Court recognizes such wedding vendor religious exemptions, "[i]n more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago."²⁹⁶ *Loving* and *Piggie Park* squarely rejected this proposition with regard to interracial marriage; the same result should be reached for same-sex marriage, as argued more fully below.

was "in the interest of children" and "that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing" then juxtaposing that position with the similar arguments were replicated in the marriage equality era: "An amicus brief filed in 2014 by the Liberty Council claimed '[S]ame-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages "would undermined [sic] marital stability in ways that we know do hurt children."'").

293. *Id.* at 251 (internal citations omitted).

294. *Id.*

295. *See generally*, e.g., NeJaime & Siegel, *Conscience Wars*, *supra* note 132, at 2516 (describing the burgeoning requests for religious exemptions as "complicity-based conscience claims" and noting that such claims "focus on the conduct of others outside the faith community."); *see also* Gilreath & Ward, *supra* note 203, at 251–52 ("Proponents of religion-based opt-outs want to perpetuate the lie that it is not about gays *per se*, but rather about behaviors. We have segregation as our model. So do they.").

296. Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 200 (Douglas Laycock et al., eds. 2008).

IV. THE CASE FOR THE RACE ANALOGY IN THE WEDDING VENDOR CASES

A. *A Note on the Scope of the Proposed Race Analogy*

In advocating for use of the race analogy in the wedding vendor cases, I am not attempting to erase LGBT people of color;²⁹⁷ nor am I arguing that sexual orientation and race are the same. They are not.²⁹⁸ Further, by arguing for a doctrinally-specific, limited use of the race analogy, I recognize—and try to avoid—the risk that “simplistic and ahistorical comparisons can be more insulting than illuminating, and sometimes serve as little more than a ‘rhetorical prop’ for those who ‘have no use for Black people except to refer to them as the worst case at a pity party.’”²⁹⁹

As described in Section II.B., there is no “one” race analogy. Rather, the analogy has been used in a multitude of legal, social movement, and policy contexts by LGBT-rights advocates over the past four decades. Each of these contexts—political, legal, and social—raises different considerations, risks, and benefits when using the race analogy. Thus, distinguishing among the various ways in which the analogy may be used—doing an analogy analysis—is critical to addressing the important concerns raised by progressive scholars, advocates, and activists and central to assessing the analogy’s power as a legal tool of persuasion. For example, while the analogy may be harmful for coalition-building between African-American communities and LGBT communities,³⁰⁰ it

297. See generally Kendell, *supra* note 125, at 135 (noting that “had there been a greater visibility of queers of color in the lesbian, gay, bisexual, and transgendered movement, or had there been a sense that we as white queers understood the intersectionality of oppressions or been more outspoken regarding injustice based on race or class, these appropriations and historical references [to Rosa Parks and Martin Luther King, Jr., after San Francisco Mayor Gavin Newsome issued marriage licenses to same-sex couples in 2004] would have been met perhaps with amusement or, at worst, chagrin”).

298. See, e.g., Schacter, *supra* note 179, at 297 (“Discrimination against gay men and lesbians as a group has not mirrored the discrimination suffered by other groups protected under civil rights laws. The experiences of these protected groups have themselves, however, been far from identical. For example, the enduring legacy of slavery makes discrimination against African Americans distinct from the pervasive historic subordination of Native Americans or the social and economic subordination of women. None of these experiences replicates the others. And none replicates the social history of homosexuality.”). The marginalization and oppression of African-Americans throughout American history, from slavery to Jim Crow to the school-to-prison pipeline and mass incarceration has created “distinctions between hierarchies grounded on race and hierarchies grounded on sexual orientation.” Kennedy, *supra* note 125, at 789.

299. Russell, *supra* note 122, at 72 (quoting JULIANNE MALVEAUX, WE ARE NOT YOUR BOTTOM LINE: AFRICAN AMERICANS AND OTHERS AT THE PERIPHERY, in *SEX, LIES AND STEREOTYPES: PERSPECTIVES OF A MAD ECONOMIST* 127–28 (1994)).

300. Smith, *Queer*, *supra* note 151, at 382.

might have persuasive purchase in a legislative debate over whether to include sexual orientation in an antidiscrimination statute.

As relevant here, acceptance by the Court of the race analogy in the wedding vendor cases may carry dispositive weight on one or both of the First Amendment claims because if the Court accepts the race analogy, this is the result: there is no principled reason to *allow* wedding vendors to turn away same-sex couples while simultaneously *prohibiting* these vendors from turning away interracial different-sex couples or different-sex couples of color. As a result, the Court's acceptance of the race analogy should dictate the same result in both cases, namely the denial of a religious exemption.

I readily acknowledge that "questions of categorization and comparability are fraught with the potential for distortion and misuse."³⁰¹ I take seriously the call to "attend to race carefully"³⁰² when using it to analogize in the context of LGBT civil rights. It is because of the risks that I argue for a limited use of the race analogy in the wedding vendor cases. Moreover, while I appreciate the concerns about the race analogy expressed by those on the ideological left, I am also concerned about "throwing the baby out with the bathwater." It is helpful, then, to concede that "though racial and anti-gay discrimination certainly are not the same, the lessons learned from past civil rights struggles are relevant here."³⁰³ Any assertion that the experiences of (white) LGBT people and the experiences of (straight) people of color "have been the same does no justice to history and no service to the gay cause."³⁰⁴ As Robinson notes, "one can demonstrate a link between civil rights struggles without suggesting that they are generic and identical or, even worse, ranking one above another."³⁰⁵ That is my goal here. I agree with Russell, who counsels that "progressives need to revisit questions of 'non-comparability' with the knowledge that their answers have vastly different implications, depending on the legal and political contexts in which they are raised."³⁰⁶ Pursuant to Russell's contextual approach, I argue for a nuanced, intentional, and issue-by-issue approach to using the race analogy rather than endorse a wholesale, blanket application of it in all contexts in which sexual orientation is centered. Subordination is complex.³⁰⁷ While the race analogy may do powerful positive work in the narrow legal con-

301. Russell, *supra* note 122, at 74.

302. Robinson, *Marriage Equality and Postracialism*, *supra* note 150, at 1010. While Robinson issued that warning in the context of the marriage equality debate, it is no less important here in the context of religious exemptions.

303. Brief for Plaintiffs-Appellants, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 103434/04), at 49 n.20.

304. George Chauncey, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 87-136, 161 (2004).

305. Robinson, *supra* note 150, at 1058.

306. Russell, *supra* note 122, at 75.

307. Hutchinson, *Gay Rights*, *supra* note 119, at 1362.

text of the wedding vendor cases, it may do deeply destructive damage in inter-movement dialogues. We can, and ought to, recognize these tensions and use them as a springboard for deeper, more meaningful conversations within the larger civil rights movement. Our analogy analysis should thus incorporate and reflect this complexity.

B. *Pulling it All Together: A Comprehensive Argument for the Race Analogy*

In responding to the critiques of the race analogy from the left, the right, and the Court in its previous Parts, this Article attempted to lay the groundwork for the following affirmative argument for the race analogy in the wedding vendor cases.

As noted above, the plain language of approximately twenty state public accommodation laws include sexual orientation. Put another way, in these states, the discriminatory conduct outlawed by the statutes is expressly prohibited vis-à-vis LGBT consumers. As the attorney representing the CCRD in *Masterpiece* noted during oral argument:

And what the legislature decided after hearing from the faith community, after making an exception for places of worship and . . . making other exceptions[,] [it] decided we can't make exceptions here for same-sex people who deserve the same protections if we wouldn't make those same exceptions for discrimination based on race and sex and religion.³⁰⁸

In these states, then, utilizing the race analogy in the wedding vendor cases seems facially appropriate: it aligns with express legislative intent, as reflected in the plain language of the law as well as the legislative hearings.³⁰⁹

308. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 15, at 63:5–12.

309. Some might argue that reliance on legislative intent in this way is no longer persuasive after *Bostock* soundly rejected any reference to the intent of Congress in passing the Title VII. *Bostock*, 140 S. Ct. at 1749 (holding that “when the meaning of the statute’s terms is plain, our job is at an end” notwithstanding that “few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons”); *id.* at 1749 (“[I]t is ultimately the provisions of those legislative commands ‘rather than the principal concerns of our legislators by which we are governed.’”) (internal citation omitted); *id.* at 1751 (“[I]n the context of an unambiguous statutory text, whether a specific application was anticipated by Congress ‘is irrelevant.’”) (internal citation omitted). My response to this contention is two-fold. First, the question in *Bostock* (are LGBT people *included* in the statute’s coverage?) is different than the question in the religious exemption cases (should the outcome of requests for religious exemptions be the same vis-à-vis *all prohibited conduct*, including prohibited conduct directed at LGBT people who are expressly included within the statute’s protections?). Put another way, in the religious exemption cases, neither the parties nor the courts are arguing over whether the state public accommodation law applies to LGBT customers; the plain language clearly indicates that it does. Rather, the argument is whether a vendor will be given an exemption from complying with a law that otherwise clearly applies. Therefore, appeals to legislative intent in the religious

Even in those states in which the legislative history is silent on whether adding sexual orientation was accomplished with an analogy to race, and even if the Court were to reject my call to refer to legislative intent in light of *Bostock*'s rejection of that approach, the plain language of these statutes make the analogy to race and to *Piggie Park* appropriate. The plain language—on which *Bostock* rested its holding—of the state public accommodation statutes unambiguously list sexual orientation alongside race as equally within the statute's protections. The discriminatory conduct proscribed by these laws is equally prohibited regardless of whether a Black, heterosexual man is turned away from a restaurant or whether a white, gay man is turned away from a hair salon. Because the statute's plain language does not create a hierarchy of protections (or, put another way, does not create a hierarchy of prohibited conduct in the marketplace), discriminating based on sexual orientation is "just as intolerable as discrimination directed toward race, national origin, or religion." That intolerance of discrimination is not unreasonable and unwarranted.³¹⁰ Because "the meaning of the statute's terms is plain, our job is at an end."³¹¹

Moreover, the principle behind antidiscrimination laws supports a limited use of the race analogy in the wedding vendor cases. The goal of public accommodation laws is to preclude the promulgation of unequal status hierarchies through discrimination in the marketplace. The individuals protected by these statutes, including LGBT people and people of color, are similarly situated: but-for the statute's protections, both groups are vulnerable to invidious discrimination in the public square.³¹² Because of this fact, the focus of adding sexual orientation to public accommodation laws "was on the comparable irrationalities of sexual-orientation bias and racial prejudice, the irrelevance of both race and sexuality to

exemption cases serve a different purpose than they did in the Title VII cases, namely to determine whether the legislature created a hierarchy of protections within a state public accommodation law, whereby race would receive blanket protections while sexual orientation would receive only spotty protections. This distinction arguably makes a difference in terms of the purpose of and weight given to legislative intent. Second, the plain language of the state public accommodation laws do not create a hierarchy of protections, so even if cabined to the statute's plain language, we reach the same conclusion, namely that the race analogy should be used in the wedding vendor cases because the statute does not create any exceptions specifically for LGBT customers. See generally *Bostock*, 140 S. Ct. at 1747 ("[W]hen [a legislature] chooses not to include any exceptions to a broad rule, courts apply the broad rule.").

310. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 79–80 (N.M. 2013) (Bosson, J., concurring) (rejecting a wedding photographer's request for a religious exemption from the New Mexico public accommodation law that would allow the photographer to turn away same-sex couples).

311. *Bostock*, 140 S. Ct. at 1749.

312. Sager & Tebbe, *supra* note 135, at 173 ("The central aim of civil rights law is to protect members of vulnerable groups from the harms of structural injustice; that vital project would be undermined by a broad carve out for religious dissent.").

individual ability, and finally the history of physical, psychological and legal victimization shared by both groups.”³¹³ Although the historical, cultural, and political reasons for vulnerability to discrimination in the marketplace are different, the harms from which the statute seeks to protect these groups is similar enough to support the analogy in this context—the stigmatic and economic harm of discrimination in places of public accommodation.³¹⁴

Because public accommodation law “does not take sides in a purported culture war”³¹⁵ but instead “stipulates what citizens who are divided on questions of profound importance nonetheless owe to each other in order to live together as equals in our political community[.]”³¹⁶ a statute’s unambiguous inclusion of sexual orientation renders proper analogies to race, which is also unambiguously included. The Court itself has declared that a state legislature’s decision to include LGBT people within its laws is a decision that the Court and the Constitution should recognize and uphold.³¹⁷

In fact, the U.S. Supreme Court has analogized to race when analyzing a sex discrimination claim under federal antidiscrimination law that included both race and sex as protected classes. In *City of Los Angeles v. Manhart*, the Court faced a class-action challenge made by women alleging that the Department of Water and Power’s requirement that female employees make larger contributions to its pension fund than male

313. Russell, *supra* note 122, at 43; *see also id.* (“Gay rights advocates argued that in these respects, lesbians, gays and bisexuals were surely as entitled as racial minorities to explicit protection under the law; the issues were equality, not sameness, and justice, not privilege.”).

314. *Id.* at 44 (noting that “efforts to codify [in state antidiscrimination laws] notions of ‘comparability’ between race discrimination and sexual-orientation discrimination represented an assimilative strategy on the part of gay rights advocates—an attempt to draw comparisons not necessarily between the cultural identities of racial minorities and sexual minorities, but between the legacies of ignominious harms suffered by both at the hands of a white and/or heterosexual majority”).

315. Sager & Tebbe, *supra* note 135, at 173.

316. *Id.* at 173–74.

317. *See United States v. Windsor*, 570 U.S. 744 (2013) (emphasizing, in a challenge to the Defense of Marriage Act (DOMA), that New York’s recognition of same-sex marriages was a proper use of its “historic and essential authority to define the marital relation in this way” and that this legislative decision “enhanced the recognition, dignity, and protection of the class in their own community.” *Id.* at 768. In invalidating DOMA, the Court reasoned that “DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Id.* at 775.

employees violated Title VII of the CRA.³¹⁸ While Title VII prohibits discrimination in employment and the CADA prohibits discrimination in public accommodations, both statutes similarly enumerate several classes included within their protections—“race, color, religion, sex, or national origin”³¹⁹ for Title VII and “disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry”³²⁰ for the CADA.

The Court used the race analogy to support its decision that the city’s requirement was sex-based discrimination in violation of Title VII, and rested its analogy on the fact that Congress had determined that sex and race were similar enough in the employment discrimination context to warrant the same protections: “Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.”³²¹ After noting this legislative declaration of sameness, the Court noted that “[a]ctuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex[.]”³²² that would support a policy like the one challenged in the case. It concluded, however, that such a policy vis-à-vis race would be impermissible and, reasoning via the analogy, that the policy vis-à-vis sex must also fall: “But a statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification.”³²³

Because the Court found that the city’s pension rule would not be permissible as to race, it reasoned by analogy that it was not permissible as to sex.³²⁴ That the Court was comfortable with finding “statutory sameness” between race and sex should dictate that it find the “statutory sameness” between sexual orientation and race compelling in the wedding vendor cases. This is particularly true after *Bostock*: because sex includes SOGI, and because the Court analogizes race to sex, the Court therefore should analogize race to sexual orientation.

Moreover, since the 1960s the Court has unequivocally rejected requests for religious exemptions for race-based discrimination.³²⁵ In

318. *City of L.A. v. Manhart*, 435 U.S. 702, 704–05 (1978).

319. 42 U.S.C. § 2000e-2(a)(1).

320. COLO. REV. STAT. § 24–34–601 (2020).

321. *Manhart*, 435 U.S. at 709.

322. *Id.*

323. *Id.* at 709 (internal citations omitted).

324. *Id.*

325. From the 1960s to the 1980s, “litigation over new antidiscrimination laws raised the issue of whether business owners who sincerely believed the separation of the races to be divinely ordained had a religious liberty interest in noncompliance.” Oleske, *supra* note 211, at 108. The courts’ answer to this question was a resounding “no.” See *Newman v. Piggie Park Enters. Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966) (rejecting a restaurant owner’s argument that the 1964 Civil Rights Act “violate[d] his freedom of religion under the First Amendment ‘since his religious beliefs compel him to oppose any integration of the races whatever.’”), *rev’d* in part, 377 F.2d 433 (4th Cir. 1967), *aff’d* in part, 390 U.S. 400, 402 n.5 (1968) (dismissing the religious liberty claim

addition to *Piggie Park*, in *Bob Jones University v. United States*,³²⁶ the Court upheld a decision by the Internal Revenue Service (IRS) to revoke the tax-exempt status of Bob Jones University and rejected the university's request for an exemption based on its First Amendment right to free exercise.³²⁷ The reason the IRS withdrew the university's tax-exempt status was that the university prohibited interracial dating and interracial marriage in violation of IRS Revenue Ruling 71-447.³²⁸ The university justified its policy by its faith: "The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."³²⁹

In rejecting the university's request for a religious exemption from the IRS rule, the court referred to the antidiscrimination principles embodied by the CRA.³³⁰ It observed that "[w]hatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."³³¹ In rejecting the First Amendment free exercise defense, the Court reiterated that "[n]ot all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."³³² After holding that the elimination of racial discrimination was a compelling state interest, the Court concluded that that governmental interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."³³³ These cases illustrate that the race analogy is persuasive to the Court in a variety of antidiscrimination contexts—contexts that bear similarities to the wedding vendor cases. This precedent should be marshalled by LGBT-rights advocates to frame their use of the race analogy in the wedding vendor cases. This is particularly true now that the Court has declared in *Bostock* that sex discrimination includes SOGI discrimination. After *Bostock*, then, there is a clear through-line from the acceptance of the race-sex analogy in both *Manhart* and *Jaycees* to the sexual orientation-race analogy in the wedding vendor cases.

Public accommodation laws constrict business owners' liberty to exclude customers to serve the compelling government interest of complete and equal participation of all people—regardless of their race *or*

as "patently frivolous"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983) (rejecting a religious liberty argument brought by a private university that sought to retain its tax-exempt status while banning interracial dating and marriage).

326. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983).

327. *Id.* at 599.

328. *Id.* at 578.

329. *Id.* at 580.

330. *Id.* at 594.

331. *Id.* at 595.

332. *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257–58 (1982)).

333. *Id.* at 604.

sexual orientation—in the marketplace.³³⁴ Moreover, the goals of public accommodations law are multiple: material, dignitary, and expressive,³³⁵ and the plain language of these state laws declares that these goals apply equally to *all* people protected by the statute, LGBT and African-American alike. These statutes thus focus “on these generalized harms rather than on whether certain classes of people are identical to or like persons of color”³³⁶—meaning that the statute considers the harms to these protected individuals as similar enough to be included together within a single, unitary antidiscrimination statute.

Finally, these statutes enforce a shared social value, namely that “racial subordination and other forms of oppression are undesirable and injurious and . . . therefore warrant statutory . . . remedies.”³³⁷ This normative argument is thus also an important reason for LGBT-rights advocates to deploy the race analogy in the wedding vendor cases, and for courts to accept it. It may be used as a “persuasive tool—an attempt to impress upon skeptics the normative seriousness of . . . inequality, and the importance of devoting resources to its eradication.”³³⁸ As a result, use of the race analogy in the wedding vendor cases can be “a means of legitimating efforts to portray [sexual orientation] discrimination as an injury worthy of legal redress.”³³⁹

As a result, the race analogy is thus appropriate in the limited context of public accommodation statutes. To allow any other result creates incoherence in the law, violates that plain language of the statutes, and sends a normative message that discrimination against LGBT consumers is natural, normal, and acceptable.³⁴⁰

334. See generally Sepper, *Moralized Marketplace*, *supra* note 201, at 145.

335. *Id.* at 153–55 (noting that in terms of material equality, these laws ensure access to goods and services and thus decrease search costs; in terms of dignitary goals, these laws seek to abolish the “humiliation, frustration, and embarrassment” when a customer is turned away; and in terms of the expressive goal, these laws send a “message about citizenship” because they “signal commitment to the inclusion of groups that might otherwise face discrimination”).

336. Hutchinson, *Gay Rights*, *supra* note 119, at 1387.

337. *Id.*

338. Mayeri, *supra* note 65, at 1070. Moreover, to the extent that there are judges, legislators, and members of the public at large that continue to try to justify or minimize the subordination of LGBT people, “comparing [this] subordination to the recognized national problem of racial inequality [is] an attempt to lend legitimacy and moral weight to the cause’s shaky foundations.” *Id.*

339. *Id.* at 1071; see also MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 216 (“[L]aw has a role to play in closing the gap between professed values and practice.”).

340. Tebbe, *Reply*, *supra* note 132, at 61–62.

C. *Why the Race Analogy Matters*

1. The Race Analogy Exposes Errant Exceptionalism

What does deploying the race analogy in the wedding vendor religious exemption context accomplish? It highlights the exceptionalism being sought by today's exemption seekers and then illustrates why that exceptionalism is errant. It is errant exceptionalism because we have, as a nation, historically and coherently addressed requests for religious exemptions vis-à-vis race and gender; the framework previously employed to resolve requests for religious exemptions in these contexts works equally well in the context of sexual orientation.³⁴¹ We should thus look to what has worked historically when similar challenges to antidiscrimination laws—in the context of race and gender—have been raised; failure to do so is errant exceptionalism.³⁴²

This is where the race analogy does its work: it illustrates that courts have addressed the very same arguments presented by today's exemption seekers in the past, the only difference being the group about which those arguments have been made (about race in the 1960s, about sex in the 1970s, and about sexual orientation today).³⁴³ It reminds us that there is coherent doctrinal precedent that dictates an answer to the exemptions sought by wedding vendors today—an expansion of religious exemptions beyond those recognized for race and gender is, simply, errant exceptionalism. It thus reorients the frame of reference from one seeking to exceptionalize same-sex marriage to one of well-established antidiscrimination doctrines, from which there is no principled reason to stray in the wedding vendor cases, particularly considering *Bostock*.³⁴⁴

Because legislatures have determined that discrimination in the marketplace based on sexual orientation is closely analogous to discrimination based on race and sex, as evidenced by the plain language of state public accommodation laws, “the policy answer to the questions should be the same: exemptions should be allowed to religious discriminators in race, gender, and sexual orientation cases or exemptions should be denied to religious discriminators in each case.”³⁴⁵ As a result, the race analogy in this context makes sense; to conclude that LGBT customers may be treated differently under the statute from all of the other individuals protected by the law is nothing more than errant exceptionalism.

341. See Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 237–38.

342. I agree with Ball that because our country has “extensive experience grappling with the proper contours” of requests for religious exemptions from antidiscrimination laws, we do not need “new and expansive accommodations that depart significantly from the ways in which the nation has in the past accommodated liberty considerations while seeking to attain equality objectives in the context of race and gender.” *Id.* at 238.

343. *Id.*

344. *Id.*

345. Curtis, *supra* note 206, at 183.

As a result, the race analogy is appropriately deployed in the current religious exemption cases, and failure to recognize and apply the analogy will ignore the reality that the current arguments for LGBT religious exemptions “potentially destabilizes all antidiscrimination obligations, resulting in a marketplace segregated by moralized judgments of other citizens.”³⁴⁶ As Elizabeth Sepper aptly notes, the logic of exemption seekers’ arguments “extends far beyond same-sex marriage and sexual orientation antidiscrimination law”³⁴⁷ because “the cost to business religious exercise is identical in the context of marriage wedding vendors that refuse to serve a gay couple, the BBQ chain that denies a black person a table, and the landlady who rejects an unmarried couple.”³⁴⁸

LGBT-rights advocates thus need to pull the wedding vendors’ religious exemption claims away from the exceptionalism frame and back into an antidiscrimination frame.³⁴⁹ To approach the wedding vendors’ claims as presenting a *new* problem engages in errant exceptionalism. Using the race analogy is a powerful and effective way to do that reframing. Deploying the race analogy effectively disrupts the errant exceptionalism; it effects a pivot from the exemption seekers’ frame of “race is different”/“marriage is different” (exceptionalism) to LGBT-rights advocates’ frame of “denial of equal citizenship in the marketplace is the same” (coherence).

Theorists of legal reasoning and analogy note that “the stronger the reasons for a rule, the less compelling the similarity between the source and the target needs to be to sustain the analogy”³⁵⁰ I contend that the similarity between the source (insulating racial discrimination in public accommodations from requests for religious exemptions as exemplified in *Piggie Park*) and the target (the question of whether the law should insulate sexual orientation discrimination in public accommodations from requests for religious exemptions) is, in fact, strong given the statutes’ plain language protecting both LGBT people and people of color from discrimination in public accommodations. However, even if the Court were to find my argument for similarity to be less compelling than I contend it is, there is *no* dispute that the Court considers the antidiscrimination protections embodied through public accommodations law to serve a compelling state interest—a “strong[] reason” that supports the analogy.³⁵¹

Moreover, analogies are effective when the similarities between the source and the target are “pervasive and consistent.”³⁵² In the pub-

346. Sepper, *Moralized Marketplace*, *supra* note 201, at 160.

347. *Id.*

348. *Id.*

349. See Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 237–38.

350. Weinreb, *supra* note 139, at 97.

351. See *id.* at 97; *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

352. Weinreb, *supra* note 139, at 165; see also *id.* at 167 (“[T]he strength of the

lic accommodation context, they are. State legislatures have determined that race and sexual orientation are similar in these ways, as evidenced by the placement of sexual orientation alongside race in the laws' plain language. As a result, even if the Court were to decide that the statutory sameness between race and sexual orientation urged by this Article is not as unequivocal as I contend, there is unanimity that the reasons behind the rule (public accommodations law) are compelling and strong, thus favoring an acceptance of the analogy in the wedding vendor cases. As a result, embracing the race analogy in this limited context can reinvestigate the antistatutory goals of antidiscrimination law.

When it comes to using analogies in the law, "some similarities count for the matter and others do not."³⁵³ Critically, in the context of the wedding vendor cases, the plain language of the statutes reveals that both LGBT consumers and consumers of color are at risk of suffering similar kinds of subordination and discrimination in the public square; they are thus similar in ways that "count for the matter" vis-à-vis antidiscrimination law.

In sum, where prohibitions on race and sex discrimination have been upheld in the face of First Amendment challenges, to depart from these tested antidiscrimination frameworks would be errant exceptionalism. *Bostock* further bolsters this principle. Such errant exceptionalism not only improperly pulls the analysis away from the antidiscrimination frame,³⁵⁴ it likely is unconstitutional as a violation of the Equal Protection Clause, particularly after *Bostock*.³⁵⁵

analogy depends on the relevance of the similarities to the matter in question.").

353. *Id.* at 138.

354. Oleske, *supra* note 211, at 143–44 ("Exempting commercial business owners from the obligation to comply with antidiscrimination laws on religious grounds would not only be 'unusual,' it would be unique. Although many Americans had religious objections to interracial marriage in the 1960s, and although some still do today, federal and state antidiscrimination laws have never included exemptions that would allow business owners to deny services based on those beliefs.") (internal citations omitted). What Oleske characterizes as "unique," I characterize as exceptionalism; we both agree it is errant.

355. *Id.* at 135 ("The potential consequences of granting third-party-burdening exemptions would seem to be particularly acute in the case of carve-outs from antidiscrimination laws, as one of the specific third-party rights threatened by such carve-outs is the constitutional right to receive equal protection under the law."); see also Gilreath & Ward, *supra* note 203, at 277–78 (arguing that granting religious exemptions "would be a special dispensation by the state that applies both to existing anti-discrimination legislation and all such future legislation" which in turn would mean that LGBT people "would be perennial outcasts whose equality and dignity would always be subservient to the desires of religionists to brand them as abominable, with the state giving religionists that license under the law. This kind of blatant caste system, literally branding an underclass untouchable, defies not only *Romer* and *Lawrence*, but *Obergefell* itself—as well as the civil rights era decisions in which the promise of equal protection finally began to bloom.").

2. The Race Analogy May Encourage Coalition Building and the Integration of Intersectionality Among Civil Rights Movements

Careful, limited, and thoughtful use of the race analogy in the wedding vendor religious exemption cases has the potential to foster coalition-building between the LGBT community and communities of color. As Russell notes: “Despite the imperfections of analogical thinking, we need to work harder to build on the connections among all kinds of group subordination to create an expansive and inclusive civil rights agenda. Such an effort would incorporate awareness of the hazards of false categorization and false comparisons into an overall goal of broad-based coalition.”³⁵⁶

If we center our attention—as the claims for religious exemptions demand we do—on the subordination and stigmatization suffered by LGBT consumers when they are turned away in the marketplace, we see a superordinate goal that unites (straight) people of color and LGBT people: access to public accommodations and the attendant ability to live life as a public citizen.³⁵⁷ A wedding vendor refusing goods or services to a different-sex interracial couple or couple of color “amounts to discrimination [against people of color] because it emerges from and contributes to their subordination.”³⁵⁸ Analogously, wedding vendors’ “exclusion of same-sex spouses amounts to discrimination against gays and lesbians because it emerges from and contributes to their subordination.”³⁵⁹ State legislatures “have discretion to legislate against that form of refusal, insisting (as they often do) that it equates to discrimination on the basis of sexual orientation”³⁶⁰ in the latter example and to discrimination based on race in the former example. The same harm is redressed vis-à-vis both LGBT consumers and consumers of color: subordination in the marketplace. Resolving the question of whether LGBT-rights advocates should use the race analogy has the potential to “offer valuable lessons about the roles of both group solidarity and intergroup coalition in forging a common civil rights agenda for the decades ahead.”³⁶¹ As a result, centering the commonalities of the experiences of discrimination in the marketplace against LGBT people and people of color when deploying

356. Russell, *supra* note 122, at 75.

357. See generally Smith, *Queer*, *supra* note 151, at 402–03; Schacter, *supra* note 179, at 298 (“Seen in terms of subordination and stigmatization, the gay and lesbian civil rights claim is strong. Gay men and lesbians live in a regime of formal inequality, where it is lawful to deny people employment, housing, and access to public accommodations solely because of their sexual orientation under the law of all but eight states.”)

358. Sager & Tebbe, *supra* note 135, at 189.

359. *Id.*

360. *Id.*

361. Russell, *supra* note 122, at 41–42.

the race analogy in the wedding vendor cases may enhance coalition building and emphasize intersectionality.³⁶²

CONCLUSION

“When society has not yet reached a consensus about whether a treatment of a group is unjust or unreasonable, people reach for analogies to the past both to seek such a consensus and to resist it.”³⁶³ LGBT people do not need to be identical to (straight) people of color for these two communities to focus on the “structural links between different forms of subordination”³⁶⁴ based on race and sexual orientation. Because “the overlapping stereotypes used against subordinated groups and the overlapping political agenda pursued by opponents of social change are manifestations of these links[,]”³⁶⁵ a limited use of the race analogy in the public accommodations context can be a constructive method of making legible the intersecting interests of these groups in the marketplace.

The country and the Court have considered and rejected claims for religious exemptions from public accommodation laws before, in contexts

362. Russell counsels:

African-Americans . . . may need to reclaim the power of analogy even as we seek to critique and distance ourselves from its excesses. Even as we seek to prevent others from “stealing the center,” i.e., the antiracist commitment, of the civil rights agenda, we would benefit greatly from sharing that center with others persistently relegated to the periphery—and those others include the victims not only of racism/white supremacy, but also of sexism, classism and homophobia. Such a multi-pronged approach to formulating a new “civil rights agenda” would involve the hard work of confronting racism in gay, lesbian and bisexual communities, as well as homophobia in racially diverse communities—in other words, a concerted commitment to speaking out about the perhaps ineliminable differences that may permanently relegate us to different and unique “categories” in social relations, in politics, and in legal theory. But this approach would also entail acknowledging the power of analogy, empathy and coalition, for purposes of combating the many mainstream efforts to dismantle any broad-based “civil rights agenda” and to distance minority groups from one another.

Russell, *supra* note 1122, at 72–73 (internal citations omitted); *see also id.* at 77–78 (“[N]ormative comparisons between racial bias and anti-gay bias can be enormously helpful . . . in building coalitions among African-American and lesbian/gay/bisexual communities, so long as such comparisons do not conflate the uniqueness of racism and the uniqueness of homophobia.”); Russell, K. Robinson & David M. Frost, “*Playing it Safe*” with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases about Racial Justice and Marriage Equality, 112 NW. U. L. REV. 1565, 1602 (2018) (emphasizing the “importance of holistic, multidimensional representations of stigmatized groups rather than, for example, framing sexual minorities as only the same as or only different than heterosexuals” and explaining “how race and sexuality are intertwined and should not be understood as distinct struggles”).

363. MCCLAIN, WHO’S THE BIGOT?, *supra* note 30, at 214.

364. Schacter, *supra* note 179, at 314.

365. *Id.*

that are analogous to the claims asserted by today's exemption seekers. We do not need "new and expansive accommodations that depart significantly from the ways in which the nation has in the past accommodated liberty considerations while seeking to attain equality objectives in the context of race and gender."³⁶⁶ We should thus look to what has worked historically when similar challenges to antidiscrimination laws—in the context of race and sex—have been raised.³⁶⁷

The "legal, moral and political power"³⁶⁸ of the race analogy facilitates that historical consideration and reveals the errant exceptionalism embedded in the wedding vendors' claims. As a result, this Article has argued that the wedding vendor cases are one of the "particular contexts" in which deploying the race analogy "is not only appropriate but strategically effective . . . to stress similarities between racial bias and anti-gay bias, and to consider the extent to which both forms of prejudice collaborate in a larger context of minority subordination."³⁶⁹

Confining itself to the wedding vendor religious exemption cases, this Article contends that a failure by LGBT-rights advocates to advance the race analogy in the future, and any future failure by the Court to adopt it, will result in errant exceptionalism by ignoring the plain language of state public accommodation laws and removing just one legislatively-recognized protected class from a time-tested, well-established antidiscrimination framework.³⁷⁰

Deploying the race analogy in the wedding vendor cases is effective, if not compelling, in the way it allows judges to comprehend the errant exceptionalism sought by today's exemption seekers and in the way it may facilitate intersectional collaborations between the LGBT-rights movement and the racial civil rights movement.

366. Ball, *Against LGBT Exceptionalism*, *supra* note 1, at 238.

367. *Id.* at 245 ("In other words, there is no need to reinvent the exemption wheel. The bottom line is this: we should be suspicious of the contention that the push for LGBT rights, in particular as it relates to marriage equality, constitutes a unique threat to religious liberty that requires significant departures from the ways in which American antidiscrimination law has accommodated religious liberty in the past.")

368. Russell, *supra* note 122, at 40.

369. *Id.* at 76–77 (internal citations omitted).

370. *See generally* Ball, *Bigotry*, *supra* note 202, at 639; *see also* MCCLAIN, WHO'S THE BIGOT?, *supra* note 30, at 203 ("Racial segregation in the marketplace and elsewhere likely would have persisted had legislatures and courts allowed broad religious exemptions [i]f it isn't 1964 anymore, that is due in part to not having robust religious exemptions to Title II."); *id.* at 213 (noting that state antidiscrimination laws prohibit discriminatory conduct, "discriminating among customers, whatever their motivation"); *id.* at 214 ("Charges that someone is being branded a bigot by being required to comply with a civil rights law can be a distraction.").

