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Moral Conflict and Conflicting Liberties

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CHAPTER FIVE



Moral Conflict and Conflicting Liberties

*Chai R. Feldblum*¹

Imagine that you and your same-sex male partner got married last year in Massachusetts and are now planning a delayed honeymoon in Tennessee. You search the Web and find a lovely guesthouse in your price range. Nothing about the guesthouse's description on the website makes you think you will not be welcome there. You make reservations through the website.

The two of you arrive at the guesthouse, sporting your wedding rings and calling each other "honey." The owner of the guesthouse asks if you are gay. You answer that you are and explain that this is your delayed honeymoon. The owner is very gracious and courteous, but explains that you cannot stay in his guesthouse unless you agree to sleep in separate rooms and also agree not to engage in any sexual activity during your stay. He explains that his religion requires that he "love the sinner, but hate the sin." For this reason, you are welcome to stay at his guesthouse, but only if you do not use his facilities to carry out sinful activities.

The owner also gives you a list of guesthouses in town that do allow gay couples to stay in the same room. And, he quickly assures you, he has checked and there is no law that prohibits him from treating you in this way.

Let us assume all the other guesthouses are full and you decide to stay at the original guesthouse and abide by the owner's rules. No one can claim that the guesthouse's rules have prohibited you from "being gay." Your identity as a gay person has not disappeared simply because you have

been precluded from having sex with your partner during the weekend. But, presumably, you have experienced some dignitary harm. And, indeed, your identity as a gay person would have little real meaning if you were *consistently* precluded from having sex with your same-sex partner. This identity—or “identity liberty,” as I describe it below—is necessarily curtailed by the *absence* of a law prohibiting public accommodations from discriminating against gay people.

Now imagine that you and your opposite-sex wife have decided to open a Christian bed and breakfast. You view your guesthouse as a haven for God-fearing, evangelical Christians. You do not advertise generally on the Web, only on Christian sites. You make it very clear in all your advertisements that you run a Christian business and that you will not rent rooms to cohabiting, homosexual couples (married or not) or to cohabiting, heterosexual couples who are not married. One day you are sued because your state has a law prohibiting discrimination based on marital status and sexual orientation. The court rules that the law places no burden on your religious beliefs because your religion does not require you to operate a guesthouse. You are ordered to change your guesthouse’s rules.

No one can claim that the court order has prohibited you from “being religious.” As the court has explained, you may continue to hold whatever beliefs you want about sexual practices. You simply may not impose those beliefs on others. But you feel that your beliefs and identity as a religious person simply cannot be disaggregated from your conduct. Your religious belief—your “belief liberty” interest, as I term it below—is necessarily curtailed by the *existence* of a law that prohibits you from discriminating on the basis of sexual orientation or marital status.

We tend not to think of these conflict situations in the language of conflicting liberties, and certainly not in the language of liberties that have something in common, even as they conflict. Those who advocate for laws prohibiting discrimination on the basis of sexual orientation tend to talk simply about “equality.” Those who seek to stop such laws from coming into existence, or who seek religious exemptions from these laws, tend to talk about “morality” and/or “religious freedom.” And these groups tend to talk past each other, rather than with each other.

My goal in this chapter is to surface some of the commonalities between belief liberty and identity liberty and to offer some public policy suggestions for what to do when these liberties conflict. I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual, and transgender (LGBT)

people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws. I believe those who advocate for LGBT equality have downplayed the impact of such laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Second, I want to suggest that the best framework for dealing with this conflict is to analyze religious people's claims as belief liberty interests under the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than as free exercise claims under the First Amendment. There were important historical reasons for including the First Amendment in our Constitution, with its dual Free Exercise and Establishment Clauses.² But the First Amendment should not be understood as the sole source of protection for religious people when the claims such individuals raise also implicate the type of liberty interests that should legitimately be considered under the Due Process Clauses of our Constitution.³

My argument in this chapter is that intellectual coherence and ethical integrity demand that we acknowledge that civil rights laws can burden an individual's belief liberty interest when the conduct demanded by these laws burdens an individual's core beliefs, whether such beliefs are religiously or secularly based. Acknowledging that these liberty interests exist and can be burdened by civil rights laws does *not* necessarily mean that such laws will be invalidated or that exemptions from the law will always be granted to individuals holding such beliefs. Rather, as I hope to demonstrate below, Justice Souter's concurrence in *Washington v. Glucksberg*⁴ offers us a useful approach for engaging in an appropriate substantive due process analysis that provides us with a means of seriously considering the liberty interest at stake without necessarily invalidating the law burdening that interest.

Finally, I offer my own assessment of how these conflicts might be resolved in our democratic system. I have no illusions that either LGBT rights advocates or religious freedom advocates will decide I have offered the correct resolution. But my primary goal in this chapter is simply to argue that this conflict needs to be acknowledged in a respectful manner by both sides, and then addressed through the legislative processes of our democratic system. Whether my particular resolution is ultimately accepted feels less important to me than helping to foster a fruitful conversation about possible resolutions.⁵

I. Impact on Belief Liberty When Protecting LGBT Liberty

A. Postulating an Age of LGBT Liberty

In 2008, the most pressing question for LGBT people probably is not, “How can we be sure that we are adequately considering and taking into account the beliefs of those who believe we are immoral and sinful?” At the moment, it seems that people who hold that point of view are prevailing in any number of states, at the direct expense of LGBT people’s liberty. Over the past decade, forty-one states have passed statutory Defense of Marriage Acts, defining marriage as solely between a man and a woman.⁶ Twenty-six states have amended their constitutions to restrict marriage in a similar fashion.⁷ In thirty states, a person can be fired from a job, thrown out of his or her apartment, or refused service in a restaurant simply because he or she is gay, lesbian, or bisexual.⁸

Given the current state of affairs, I believe the primary focus and energy of the LGBT movement must be directed at fighting for legislation and judicial outcomes that will allow LGBT people to live lives of honesty and safety in today’s society. Indeed, I have spent a fair portion of the last twenty years of my professional life engaged in that struggle and I expect to do more of the same in the future.⁹

But I also believe it is only a matter of time before the world around us changes significantly. In some number of years (I do not know how many), I believe a majority of jurisdictions in this country will have modified their laws so that LGBT people will have full equality in our society, including access to civil marriage or to civil unions that carry the same legal effect as civil marriage. Or perhaps federal statutory changes, together with federal constitutional decisions, may result in LGBT people achieving full liberty across all states. At the very least, I believe it is worth postulating this outcome and considering now, rather than later, the impact that the achievement of such liberty might have on employers, landlords, and others whose moral values (derived from religious or secular sources) cause them to believe that same-sex sexual conduct is sinful for the individual and harmful to society.

Why do I believe an era of full LGBT liberty is simply a matter of time? A large part, I am sure, is due to my being an optimist who believes that simple truth and justice often win out in the long run and that truth and justice demand full liberty for LGBT people.

But my conviction also comes from observing changes in our society over the past twenty years and from reading opinion polls. The polling numbers indicate that an increasing number of people in this country simply do not believe homosexual orientation and conduct are as big a deal as they once were. These individuals may not particularly *like* homosexuality, nor do they believe

that homosexuality is morally equivalent to heterosexuality. But they do not seem as agitated about homosexuality as they have been in past decades.

No poll that I have seen asks the question directly: “Do you think homosexuality is a big deal?” But a reduced anxiety about homosexuality is the overall gestalt that emerges upon reviewing the myriad polls that have asked members of the American public about their views on homosexuality over the past thirty years. Karlyn Bowman, a resident scholar at the American Enterprise Institute (AEI) who specializes in polling data, has done a Herculean task of reviewing and compiling information from over 200 polls, conducted from 1972 to 2006, that have asked questions about the American public’s attitudes towards homosexuality.¹⁰ Bowman’s report is both illuminating and intriguing.

Bowman begins her report with a section called *Acceptance* and notes the following:

In 1973, when the National Opinion Research Center at the University of Chicago [NORC] first asked people about sexual relations between two adults of the same sex, 73 percent described them as “always wrong” and another 7 percent as “almost always wrong.” When the organization last asked the question in 2004, 58 percent called them always wrong and 5 percent almost always wrong. NORC interviewers have asked the same question about extramarital sexual relations over the period, and they find no liberalization in attitudes.¹¹

The Roper Center at the University of Connecticut, together with AEI, did a subgroup analysis of the NORC cohort data. Their analysis showed that in the age cohort of 30–44, there was an even more significant reduction in the percentage of respondents who believed homosexual relations were “always wrong.” In 1973, 74 percent of respondents in that age cohort believed homosexual sexual relations were “always wrong.”¹² In 2002, only 48 percent of respondents in that age cohort answered that homosexual sexual relations were “always wrong”—a reduction of 26 percent.¹³

Bowman’s compilation also indicates that an enduring half of the American public continues to believe that homosexuality is not morally acceptable, although that number appears to decrease slightly if respondents are asked about “homosexual relationships” or homosexuality as an “acceptable alternative lifestyle,” rather than about “homosexual behavior.”¹⁴ The number of people who say they personally know a gay person, however, or who say they have become more accepting of gays and lesbians over the past few years, has increased significantly over the past fifteen years.¹⁵

Of particular note is the number of people who seem to have discovered gay people in their own families. In a 1992 Princeton Survey Research Associates

(PSRA)/*Newsweek* poll, 9 percent of respondents said that someone in their family was gay or lesbian, while 90 percent reported that there was no one in their family who was gay or lesbian.¹⁶ In 2000, 23 percent of respondents said that someone in their family was gay or lesbian, while only 75 percent reported there was no one in their family who was gay or lesbian.¹⁷ Given that the number of gay people probably did not increase 14 percent between 1992 and 2000, one must presume that more gay people told their families about their sexual orientation during that time period.

Perhaps because of the greater familiarity that members of the American public are beginning to have with gay people (including their own family members), purging homosexuality from our society does not appear to be a huge priority for a significant segment of our public. What is particularly interesting about Bowman's polling compilation is the number of people who do not think homosexuality is a moral issue at all,¹⁸ and the significant percentage who do not think it would matter that much if there was greater acceptance of gay people in society. For example, in a 2003 PSRA/Pew Research Center survey, respondents were asked the following question: "Do you think more acceptance of gays and lesbians would be a good thing or a bad thing for the country—or that it would not make much difference either way?"¹⁹ Only 31 percent of respondents said that more acceptance of gay people would be bad for the country.²⁰ Twenty-three percent thought it would be good for the country and 42 percent felt it would not make much difference.²¹

In considering these poll data, it is useful to identify three possible views of gay sexual activity. The first view is that such activity is morally harmful (and/or sinful) both for the individual and for the community. In light of that view, gay sexual activity must be discouraged to the greatest extent possible in order to advance the moral health of these individuals and of the communities in which they reside. The second view is that gay sexual activity is not good, but is also not inherently harmful; it is more akin to an unfortunate, abnormal health condition that one does not wish for oneself (or for one's children), but is not a harmful element that must be purged from society. The third view is that gay sexual activity has the same moral valence as heterosexual activity and that gay people are basically similar to straight people.

To me, these various polls taken together indicate that there is a significant number of people (but substantially less than a strong majority of people) in this country who hold the first view of gay sexual conduct and who believe homosexuality is morally problematic and society must therefore do whatever it can to discourage, disapprove of, and reduce the incidence of homosexual behavior. There is also a much smaller group of people who hold the third view and who believe that homosexuality is as morally acceptable as heterosexuality.

And, finally, there is a significant group of people in the middle. These people adhere to the second view of gay sex and therefore hold conflicting views about public policy and homosexuality. They do not feel homosexuality is morally equivalent to heterosexuality and therefore they are not interested in conferring civil marriage on gay couples.²² But they also do not believe it would be terribly harmful to society if gay couples were acknowledged and permitted to have equal rights.²³ Thus, when given the choice between marriage or civil unions for same-sex couples, and no legal recognition for same-sex couples at all, support for “no legal recognition” never goes above 50 percent and, in most cases, hovers between 35 percent and 40 percent.²⁴ Conversely, when one combines the small public support for gay marriage with the more substantial support for civil unions, there is consistently a majority of support for some legal recognition of gay couples.²⁵

What this means to me is that the second view of gay sex holds significant sway in our society today. For example, I presume many parents today would prefer that their child not be gay. But if their child were gay, these parents may no longer believe they must desperately seek out professional “help” for the child. The large number of well-adjusted, happy, and successful gay people living openly and honestly in today’s society reinforces the medical profession’s current judgment that there is nothing psychologically wrong with being gay.²⁶ It is also possible that the horror value of discovering one’s child is gay has subsided. Although the majority of parents today may not want their child to be gay, they may be less horrified to find out their child is gay than they would be if they discovered their child were having sex with his or her sibling, having sex with a child, or having sex in public.

And, at bottom, these parents do not want their children discriminated against “just because they are gay.” Parents may not like the fact that their child is gay, but they also do not want American society to penalize their child unduly for that fact.²⁷

For purposes of this chapter, therefore, I am postulating that the coming decades will see a rise in legislation and judicial opinions that favor full liberty for LGBT people. Assuming that is the case, how should we think about the fact that granting such liberty to gay people might put a burden on people who feel that if they rent an apartment to a gay couple, allow a gay couple to eat at their restaurant, or provide health benefits to a same-sex spouse, they are aiding and abetting sinful or immoral behavior?

B. Impact of LGBT Liberty on Belief Liberty

To consider the question I pose above as even worthy of consideration, one must believe that a civil rights law that protects the liberty of LGBT people

by prohibiting discrimination based on sexual orientation or gender identity (or by conferring civil union or marriage status on same-sex couples) might place a burden on the liberty of some people regulated by the law. This belief is not self-evident. Many people assume that since such laws merely regulate the *conduct* of individuals governed by the law, they have little or no impact on such individuals' beliefs or identities.

But I believe such laws might, in certain circumstances, burden what I call "belief liberty."²⁸ What I mean by "burden" is that the law will require an individual to engage in conduct that he or she believes is inconsistent with his or her most deeply held beliefs.

From a liberty perspective, whether such beliefs stem from a religious source or from a secular source would be irrelevant. Certainly, in America today, religious people of certain denominations may hold more negative views of homosexuality and may feel more of a burden from such laws.²⁹ But we miss the mark, I think, if we analyze this burden solely as a burden on religious liberty, writ narrow, rather than as a burden on belief liberty, writ large.

Obviously, as a practical matter, the United States Supreme Court's decision in *Employment Division v. Smith*³⁰ limits the reach of the Free Exercise Clause's protection for religious beliefs from broadly applicable civil rights laws. But, as a theoretical matter, I believe it is more appropriate in any event to analyze these belief claims as liberty claims and not to elevate religious beliefs over other deeply held beliefs derived from nonreligious sources. From the perspective of a person holding a particular belief, the intensity of that belief may be as strong regardless of whether it has a religious or a nonreligious source.

What should be relevant for a liberty analysis is whether such beliefs form *a core aspect of the individual's sense of self and purpose in the world*. An individual may be able to meet this standard whether his or her beliefs are religiously based or secularly based.

Fully acknowledging the existence of a burden that may be imposed by civil rights laws (including marriage equality laws) requires two independent steps. First, we must consider what moral values are inherent in civil rights laws and whether these values might conflict with the deeply held beliefs of some individuals who are regulated by the law. Second, we must consider whether forcing someone to act (or not to act) in a certain way can burden a liberty interest in a manner that should be protected under the Due Process Clause.

1. *The Moral Values in Civil Rights Laws*

A major strand of liberal political theory postulates that "morality"—in the sense of a moral, normative view of "the good"—is not the proper object of governmental action. According to this view, individuals living in a pluralist

society will inevitably hold divergent normative and moral beliefs, and the role of law and government is to adequately safeguard the rights necessary for each individual to pursue his or her own normative view of “the good life”—not to affirmatively advance one moral view of “the good” over others.³¹

In a recent short comment on why government should not be involved in recognizing any marriages (for either same-sex couples or opposite-sex couples), Tamara Metz nicely captures this viewpoint. Metz posits that the goal of marriage as an institution is to have a couple’s relationship supported by an ethical authority outside the couple itself. And the “liberal state,” argues Metz, is “ill-suited to serve as an ethical authority.”³² Why? As Metz explains: “Ideally, the liberal state is relatively distant, more legal than moral, and more neutral than not among competing worldviews so as to protect individual freedom and diversity.”³³

I do not disagree that a liberal state must have, as its highest priority, the protection of pluralist ways of living among its citizens, subject to such ways of living not harming others in society. My argument is simply that when government decides, through the enactment of its laws, that a certain way of life does not harm those living that life and does not harm others who are exposed to such individuals, the government has necessarily staked out a position of moral *neutrality* with regard to that way of living. And that position of moral neutrality may stand in stark contrast to those who believe that the particular way of living at issue is morally laden and problematic.

I have both documented and personally watched as supporters of a gay civil rights bill have gone to great lengths to argue that they are not taking a position on the morality of homosexuality or bisexuality by supporting such a law.³⁴ I agree that supporting such a law does not necessarily convey a message that “gay is good.” But it is disingenuous to say that voting for a law of this kind conveys *no* message about morality at all. The only way for the state to justify prohibiting private employers, landlords, and business owners from discriminating against gay people is for the state to have made the prior moral assessment that acting on one’s homosexual orientation is not so morally problematic as to justify private parties discriminating against such individuals in the public domain. To return to the three possible views of gay sex, supporting a law that prohibits discrimination based on sexual orientation requires that the supporter hold, at a minimum, the second view of gay sex—even though it does not require that the supporter hold the third view.

For example, we do not have laws today that protect those who engage in domestic violence or pedophilia from employment, housing, or public accommodation discrimination. We do not ask about these groups of individuals: “Well, but can they type? Can they do the job?” I do not believe the lack

of such laws is due solely to the lack of an adequate “pedophile lobby” or “domestic violence abuser lobby.” Rather, I believe society (as reflected in its government’s public policy) has determined that actions of this kind hurt others and are thus morally problematic. For that reason, a private actor who uses the fact that an individual has engaged in these actions as grounds for exclusion is not viewed as engaging in unjustified discrimination.

This analysis works equally well to explain and describe the status quo in which LGBT people currently remain vulnerable to private and public discrimination. When the government *fails* to pass a law prohibiting nondiscrimination on the basis of sexual orientation, in the face of documentation that such discrimination is occurring on a regular basis, or *fails* to allow same-sex couples access to civil marriage when the practical need for that access is documented for scores of families, the government has similarly taken a position on a moral question. The state has decided that a homosexual or bisexual orientation is not morally neutral, but rather may legitimately be viewed by some as morally problematic. It is precisely that determination which provides the justification for legislators to continue denying full liberty to those who act on their homosexual or bisexual orientations and who are open and honest about their actions.

Granted, the issue is often framed in these cases as a question of “equality.” That is certainly true. The existence of civil rights laws, as well as the absence of such laws, certainly determines how much equality LGBT people will enjoy in our society. But let us be clear: the fact that this is a question of equality should not obscure the fact that this is *also* a question about morality. And that is because moral beliefs necessarily underlie the assessment of whether such equality is *justifiably* granted or denied.

Once we acknowledge how moral assessments necessarily underlie civil rights laws, it becomes easier to understand how a law prohibiting discrimination based on sexual orientation might shock the system of some members of society. For those who believe that a homosexual or bisexual orientation is not morally neutral, and that an individual who acts on his or her homosexual orientation is acting in a sinful or harmful manner (to himself or herself and to others), it is problematic when the government passes a law that gives such individuals equal access to all societal institutions. Such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such a law presumes the moral neutrality of homosexuality and bisexuality, while those who oppose the law believe homosexuality and bisexuality are morally problematic.

Conversely, for those who believe that any sexual orientation, including a homosexual or bisexual orientation, is morally neutral, and that an individ-

ual who acts on his or her homosexual or bisexual orientation acts in an honest and good manner, it is problematic when the government *fails* to pass laws providing equality to such individuals. The failure to pass such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such failure presumes homosexuality and bisexuality are morally problematic, while those who desire the law believe homosexuality and bisexuality are morally neutral.

This is why then—Professor (now Judge) Michael McConnell is correct to observe that disputes surrounding sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.”³⁵ McConnell believes that the debate over sexual orientation is best approached by the government extending respect to both of these positions, without taking sides on either position. Thus, using an analogy to the respect people seek from government for their religious beliefs, he urges the following:

The starting point would be to extend respect to both sides in the conflict of opinion, to treat both the view that homosexuality is a healthy and normal manifestation of human sexuality and the view that homosexuality is unnatural and immoral as conscientious positions, worthy of respect, much as we treat both atheism and faith as worthy of respect. In using the term “respect,” I do not mean agreement. Rather, I mean the civil toleration we extend to fellow citizens and fellow human beings even when we disagree with their views. We should recognize that the “Civil Magistrate” is no more “competent a Judge” of the “Truth” about human sexuality than about religion.³⁶

But what McConnell fails to appreciate in his analysis is that the government *necessarily* takes a stance on the moral question he has articulated every time it *fails* to affirmatively ensure that gay people can live openly, safely, and honestly in society.

Note, for example, how McConnell characterizes possible governmental actions (and inactions) under his recommended approach:

Under this approach, the state should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality, and should refrain from using its power to favor, promote, or advance one position over the other. The difference between a “gay rights” position and a “First Amendment” approach is that the former adopts as its governing principle the idea that homosexuality is normal, natural, and morally unobjectionable, *while the latter takes the view that the moral issue is not for the government to decide*. Thus, the government would not punish sexual acts by consenting gay individuals,

nor would it use sexual orientation as a basis for classification or discrimination, without powerful reasons, not grounded in moral objections, for taking such action. On the other hand, the *government* would not attempt to *project this posture of moral neutrality onto the private sphere*, but would allow private forces in the culture to determine the ultimate social response.³⁷

It seems apparent from McConnell's writing (although, for some reason, he fails to state so explicitly) that the "gay rights" position is one that calls for government intervention in the private sector through laws that make discrimination on the basis of sexual orientation illegal or that make civil marriage available to same-sex couples. I gather that is what McConnell is referring to when he argues that the government should not "project this posture of moral neutrality onto the private sphere."³⁸

But if that is the case, McConnell is simply wrong to assume that a government's failure to pass such laws rests on the view "that the moral issue is not for the government to decide." The government is taking a position on the moral question when it fails to extend access to civil marriage to same-sex couples. It is precisely because some people hold the view that homosexuality is immoral that gay people have been *denied* equal protection under the law up until this point. Government has not simply been sitting on the sidelines of these moral questions during all the time it has failed to pass laws protecting the liberty of LGBT people. Government has quite clearly been taking a side—and it has not been taking the side that helps gay people.

McConnell correctly diagnoses the opposing moral viewpoints, but his proposed solution is no more satisfying than the solutions proposed by gay rights leaders who characterize gay civil rights laws as simple "neutral" prescriptions of equality that have no impact on a person's religious or moral beliefs. Both McConnell and these gay rights leaders are trying to deal with the conflict by simply wishing it away. That is neither possible nor intellectually honest.

2. *The Burden on Liberty*

Passage of a law based on a moral assessment different from one's own can certainly make an individual feel alienated from his or her government and fellow citizens. But that is a far cry from accepting that such a law burdens one's liberty in a way that might require further justification by the state. I might disagree with my government's foreign policy or economic policy and think on some days that I would be happier living in some other country. But without something more, it is hard to argue that my liberty—even something as broad as my "belief liberty"—has been burdened.

The "something more," from my perspective, is a legal requirement that an individual *act*, or *refrain from acting*, in a manner that the individual can

credibly claim undermines his or her core beliefs and sense of self. Without such a trigger, a claim that one's liberty has been burdened cannot legitimately be maintained. Explicating this point requires a discussion of both belief liberty and the interaction between conduct and belief.

a. Three Forms of Liberty

It is way past time to get over the *Lochner* era's³⁹ baggage and embrace the full scope of our Due Process Clause's liberty interest. Numerous scholars over the past thirty years have produced compelling and thoughtful analyses of the liberty interest embodied in the Fifth and Fourteenth Amendments.⁴⁰ I have no such grand schemes here. My goal in this part is more limited: I want to focus on Justice David Souter's concurrence in *Washington v. Glucksberg*⁴¹ and suggest that we apply the lessons of his concurrence to thinking about belief liberty more generally.

In his *Glucksberg* concurrence, Justice Souter is clear that he believes the *Lochner* line of cases was incorrectly decided. But that is not because a person's "right to choose a calling" is not an essential "element of liberty."⁴² Rather, it is because the Court's decisions in the *Lochner* line of cases "harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused."⁴³ In other words, it is not that living and working where one will is not an essential part of liberty. But the government must have the ability to regulate that liberty in a reasonable manner in order to carry out its important interests.⁴⁴ The Court's failure in the *Lochner* line of cases was its failure to properly judge and apply the government's important interest in protecting the social and economic welfare of its citizens. It was not a failure in judging the importance of work as an element of liberty.⁴⁵

But Justice Souter's main priority in his *Glucksberg* concurrence is not to revive the importance of contract as a liberty interest. His main objective is to attack the Court's approach, over the past fifty years, of focusing almost exclusively on whether a proclaimed liberty interest is a "fundamental right," and then almost invariably invalidating any legislation burdening such a right. To Justice Souter, this approach not only represents a wrong turn from earlier substantive due process jurisprudence, but it also elides the key point that liberty interests naturally fall across a spectrum. Thus, many interests can be "liberty" interests and still be *justifiably* burdened by the government because of the needs of society.⁴⁶

Justice Souter finds guidance for this approach in Justice Harlan's dissent from dismissal on jurisdictional grounds in *Poe v. Ullman*:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere

provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁴⁷

For Justice Souter, the types of interests that would require particularly careful scrutiny would presumably be those described in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an opinion written jointly by Justices O’Connor, Kennedy, and Souter:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.⁴⁸

Drawing from a historical overview of substantive due process cases and Justice Harlan’s dissent in *Poe*, Justice Souter articulates two basic guidelines for courts engaging in a substantive due process analysis. First, a court “is bound to confine the values that it recognizes to those truly deserving constitutional stature”⁴⁹—an approach that enables a court to avoid engaging in piercing scrutiny of every conceivable burden on liberty that may arise across the spectrum.⁵⁰ Second, a court may not intervene “merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review.”⁵¹ As Justice Souter articulates the standard,

It is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right.⁵²

Justice Souter never directly repudiates the strict scrutiny standard requiring that governmental restrictions on fundamental rights be narrowly tailored to fit a compelling government interest.⁵³ But his emphasis that a court must consider whether a “legislation’s justifying principle, critically valued” is “*commensurate* with the individual interest”⁵⁴ appears clearly designed to argue that a court has flexibility in its substantive due process analysis. That

is, in order to be true to what Justice Souter sees as the spirit and design of the constitutional protection of liberty, while at the same time ensuring that government is able to regulate effectively in a complex world, he calls for an almost dialectical valuation of the government's interest against the particular liberty interest at stake.⁵⁵

Of course, Justice Souter's opinion in *Glucksberg* was only a concurrence. Justice Rehnquist's majority opinion offered a very different view of substantive due process. Under the majority approach in *Glucksberg*, there are a limited number of "fundamental rights" that can be clearly named and found, based on objective, historical facts, to be rooted in our nation's tradition.⁵⁶ With regard to legislative burdens on this very limited set of "fundamental rights," courts will apply strict scrutiny (not dialectical balancing) and will almost invariably invalidate the legislative burden.⁵⁷

But the Supreme Court's deployment of a liberty analysis to invalidate Texas's sodomy law in *Lawrence v. Texas*⁵⁸ opened the door to a revival of Justice Souter's more capacious understanding of substantive due process. Professor Robert Post observes that Justice Kennedy's "extravagant and passionate" opinion in *Lawrence* "simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which *Glucksberg* had sought to encase substantive due process."⁵⁹ And Professor Larry Tribe notes that the "*Glucksberg* gambit" to "collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalogue of privileged acts and which do not" could well have succeeded, had future cases followed its trajectory.⁶⁰ Instead, as Tribe notes, even the briefest examination of the *Lawrence* opinion makes plain that the Court steadfastly resisted a "reductionist procedure" that reduces the liberty interest to "flattened-out collections of private acts."⁶¹

Indeed, the Supreme Court's opinion in *Lawrence* triggered a revival of writing on liberty, much of it from people who had been writing and thinking about liberty for a long time. Among these scholars, Professor Nan D. Hunter was one of the first to explicitly connect the Court's analysis in *Lawrence* with Justice Souter's concurrence in *Glucksberg*, and to suggest that *Lawrence* may "mark[] the beginning of a substantive due process jurisprudence that examines negative liberty limits on state power before, or instead of, articulating a specific standard of review."⁶²

In her analysis, Hunter does not speculate on whether she thinks this move by the Court is a positive development for liberty jurisprudence; she is agnostic on that question. I have noted elsewhere that I believe Hunter is correct with regard to her prediction of how the Court may proceed with substantive

due process analyses in the future.⁶³ My point here is to argue that Justice Souter's approach is also the appropriate one for the Court to adopt.

I recognize that some might view Justice Souter's approach as a death knell for important fundamental rights, while others may view it as a simple and necessary correction to earlier substantive due process jurisprudence. But on its merits, Justice Souter's approach seems to me to properly reflect the reality of our complex society while staying consistent with the plain meaning of the Fifth and Fourteenth Amendments. Governmental laws constantly burden liberty, and to decide that only laws that cross a magic line called "fundamental rights" should ever be subject to claims of redress seems rigid and inappropriate. Justice Souter's approach permits courts to recognize realistically and honestly the myriad ways in which laws might burden the liberty interests of those subject to the laws, while not necessarily invalidating the laws.

In 2002, Professor Rebecca Brown offered a comprehensive and sophisticated analysis of the liberty interest embodied in the Fifth and Fourteenth Amendments, complete with a vigorous defense of the courts' responsibility to protect such liberty, an explanation of how such judicial review is consistent with, not destructive of, democracy, and a framework for considering liberty claims.⁶⁴ In explaining why protecting liberty interests is as important a constitutional goal as protecting equality interests, Brown observed:

[I]n a world of increasingly diverse personal and moral values, supporting very different notions of the good life, the communion of interests between representatives and represented can degrade even when laws nominally operate evenhandedly. For example, laws that provide that "no one may [blank]" can exploit difference as effectively as a classification, when the blank is an activity that "we," the political ins, have no wish to do, but that "they," the outs, claim a profound need to do in pursuit of personal fulfillment.⁶⁵

Brown uses laws prohibiting sodomy or assisted suicide as principal examples of the need to question a legislature's reasons for burdening liberty.⁶⁶ But the same framework that Brown proffers to scrutinize such prohibitions should apply as well to a legislature's prohibition of discriminatory conduct that might adversely impact a regulated person's liberty. The fact that we might need to be concerned in the coming decades with the potential liberty burdens imposed by a sexual orientation nondiscrimination law or a marriage equality law (rather than with the liberty burdens posed by a criminal sodomy law or a law that excludes same-sex couples from civil marriage) simply reflects the reality that moral values are beginning to shift in this country—as I believe they should.

Finally, in thinking about the types of liberties that rise to the level of requiring more searching government justification, I believe it is helpful to group the spectrum of liberty interests into three broad categories: bodily liberty, identity liberty, and belief liberty.

There is nothing magical about these categories, and I do not contend they are the only ones that make sense. But I believe this three-part categorization is an intellectually coherent manner in which to think about the spectrum of liberty interests that the Supreme Court has protected over the decades.⁶⁷

“Bodily liberty” is the easiest one to describe: the state should not invade the integrity of our bodies without a good reason for doing so.⁶⁸ Protecting members of the public from contagious diseases is a good reason to force someone to have his body invaded through a vaccination; fighting drug crime is not a good enough reason to force someone to vomit by pumping an emetic solution through a tube into his stomach.⁶⁹

“Identity liberty” is the term I would use to describe the liberty that the *Casey* plurality sought to capture in its “mystery of human life” description, a description repeated by Justice Kennedy in the *Lawrence* majority:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.⁷⁰

Despite Justice Scalia’s scoffing at this description as meaningless for purposes of law,⁷¹ I think it accurately captures a set of liberty interests that go to the core of a person’s identity. This may be a person’s identity as a parent (including the decisions whether to have a child and how to raise the child), a person’s identity as a spouse or a lover (deciding what form of sexual intimacy one wishes to engage in), a person’s racial, ethnic, or religious identity, or a person’s gender identity. As I have previously observed,

Not that many personal decisions rise to the level of “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” We should not let the lofty rhetoric mislead us to the conclusion that these words can mean everything and anything. They do not. The examples provided by the *Lawrence* majority give meaning to the type of personal decisions at play here—the choice to marry, the choice to have a child (or not have a child), the choice to have sexual intimacy with a partner, the choice to raise

a child in a certain fashion. These are not small decisions. These are those big decisions in life that go to the core, essential aspects of our selves.⁷²

Moreover, while the phrasing of the “mystery of human life” sentence reflects a twenty-first century language of human self-awareness, a similar sentiment regarding the importance of self-identity seems to underlie one of the Court’s earliest descriptions of the liberty interest, in *Meyer v. Nebraska*:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and *generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*⁷³

What was recognized at common law as essential to the “orderly pursuit of happiness by free men”⁷⁴ is no doubt different from what would be recognized as such today. But the underlying objective of the standard is the same—identifying an area of core identity for which the government needs a good reason before it may infringe upon it.

Finally, I use the category “belief liberty” to refer to the liberty to possess deeply held personal beliefs without coercion or penalty by the state. Belief liberty presumably could be subsumed under identity liberty, since our beliefs are very often constitutive of our identities. But I believe it is worth identifying this type of liberty separately because it is so often conflated with First Amendment rights to free speech, free expression, and free exercise of religion. That conflation is understandable; most cases dealing with “beliefs” naturally arise under the First Amendment. But is it necessary that such beliefs be protected *solely* under the First Amendment? Certainly, the ability to believe what one will seems “essential to the orderly pursuit of happiness by free men [and women].”⁷⁵

The First Amendment right to free speech necessarily protects any speech, no matter how trivial. The First Amendment right to free exercise necessarily protects (within the limits of current Supreme Court doctrine) any religious belief, no matter how trivial. By contrast, I believe it is appropriate that the belief liberty protected under the Due Process Clause be limited to those beliefs that occupy a position of significant importance to the individual. Even if those beliefs are not so constitutive of the person’s identity as to be

protected under “identity liberty,” the “mystery of human life” description of identity liberty offers us some guidance as to the type of beliefs that should demand more searching scrutiny when a burden on such beliefs is alleged.

Obviously, we all have many beliefs. If the government had to justify every burden on every belief caused by every law, it would presumably have little time to do anything else. But, certainly, we are capable of placing these beliefs in some sort of hierarchy. For example, I believe that heterosexuality and homosexuality are morally neutral characteristics (similar to having red hair or brown hair), and I believe that acting consistently with one’s sexual orientation is a morally good act. I also believe that flowers are necessary to happiness and that *Star Trek* is a great contribution to our culture. But I would rank my beliefs regarding sexuality as much more significant to my sense of self than my beliefs regarding flowers or *Star Trek*. Thus, in order for belief liberty to be situated at a point in the spectrum that requires greater government justification for infringement, such beliefs must constitute an important core aspect of the individual.⁷⁶

Analyzing belief liberty under the Due Process Clause (and not simply under the First Amendment) also serves to equalize deeply held beliefs that may derive from religious sources, from purely secular sources, or from spiritual sources that are not traditionally viewed as religious. If these beliefs are an integral part of the person’s sense of self, my argument is that they are protected by belief liberty. The particular source of the individual’s beliefs is not the barometer of their importance for due process purposes. For belief liberty, the source of the beliefs (be it faith in God, belief in spiritual energy, or a conviction of the rational five senses) has no relevance. A belief derived from a religious faith should be accorded no *more* weight—and no *less* weight—than a belief derived from a nonreligious source.

As the Supreme Court reflected on a somewhat related question in 1944:

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter’s prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.⁷⁷

b. Burdening Belief by Regulating Conduct

To understand the burden that an LGBT equality law might place on some people's belief liberty, one must start by acknowledging that a state necessarily takes a position of moral neutrality on sexual orientation when it passes such a law. For that reason, the logical underpinning of such a law will be at odds with the belief systems of some individuals who are subject to the law.

But, obviously, such a law does not require individuals subject to the law to change their beliefs. An employer who is required to hire a gay person or a hotel owner who is required to rent to a gay couple may continue to believe whatever he or she wishes about the immorality or sinfulness of homosexuality. To grasp the full impact of such laws, therefore, it is necessary to explicate and acknowledge the logical intertwining that many people (including religious people) experience between their conduct and their beliefs such that compliance with a neutral civil rights law may burden their belief liberty.

Obviously, in a complex society, conduct must be regulated in a way that belief need not be. That is a truism. From the Supreme Court's ringing protection of belief in *West Virginia v. Barnette*⁷⁸ to its consistent refrain that religious beliefs will be protected in a manner that religious conduct will not be,⁷⁹ the logical distinction between conduct and belief has been clear.

But it does not follow from that truism that conduct should always be viewed as completely and wholly distinct from belief. Certainly, courts have recognized that particular conduct may be used to communicate an expressive belief.⁸⁰ Why should it be so difficult to accept that engaging in certain conduct (or being precluded from engaging in certain conduct) might burden an individual's strongly held beliefs?

Indeed, I would argue that gay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. For years, gay people have been told by some entities that they should separate their status from their conduct. In the religious arena, this has been framed as “loving the sinner, but hating the sin.” That is, gay people have been told that their *status* as individuals with homosexual orientation is not inherently sinful—but that if they *act* in a way consistent with that orientation, then they are engaging in sin.

In the legal arena, this approach to a gay person's identity and being has been framed as the “status/conduct” distinction. Particularly as a means of dealing with the holding in *Bowers v. Hardwick*,⁸¹ some legal advocates had argued that their clients should not be discriminated against for the *status* of being gay, although they deliberately failed to claim equal nondiscrimination rights for their clients' rights to engage in gay *conduct*.⁸² From the moment I became aware of this legal approach, I have detested it and argued against

it.⁸³ It seemed to me the height of disingenuousness, absurdity, and indeed, disrespect to tell someone it is permissible to “be” gay, but not permissible to engage in gay sex. What do they think being gay *means*?

I have the same reaction to those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious *means*? Of course, at some basic level, religion is about a set of beliefs. But for many religious people across many religious denominations (Catholic, Protestant, Jewish, and Muslim—to note just the ones I have some personal understanding of), the day-to-day *practice* of one’s religion is an essential way of bringing meaning to such beliefs. And while religious beliefs on homosexuality may seem the most familiar to us, there may be people with strongly held secular beliefs who feel just as strongly on the issue.

Given this perspective, it makes sense to me that three born-again Christians who run a chain of sports and health clubs would feel that “[t]heir fundamentalist religious convictions require them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives,” and hence mandate them to hire only employees who conform to their views about proper sexual behavior.⁸⁴ It also makes sense to me that these same owners would feel their religion compels them to have these employees “talk[] to homosexuals about their religious views and sexual preference and [tell] them homosexuality [is] wrong.”⁸⁵ And I can well understand the elderly Christian woman who believes “God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.”⁸⁶

Whether such conduct should legitimately be permitted in a workplace or a public accommodation is a separate question. But at this stage of the analysis, we should be concerned solely with whether a burden on belief liberty *exists*, not with whether the burden is nevertheless *justified*. The relevant question at this stage is how a court or a legislature should respond to an allegation that engaging in certain conduct, in compliance with a neutral law, *burdens* an individual’s beliefs that constitute a core aspect of that individual’s sense of self.

My argument is that we should err on the side of accepting the person’s allegation for purposes of deciding whether a burden on liberty *exists*. (Again, this is different from the subsequent step of deciding whether the burden on liberty is ultimately *justified*.) In erring on the side of the person making the allegation, there must of course be some basis to the person’s claim that will situate the belief-liberty interest on the upper end of the liberty spectrum.

That is, the person must demonstrate that he or she holds a particular belief that is core to his or her sense of self and must make a credible claim that engaging in certain conduct would be inconsistent with that belief. But beyond that, I do not believe the government acts appropriately when it second-guesses the individual and concludes, for example, “Really, this isn’t such a burden on your belief.”

Many judges have been unsympathetic to religious individuals’ claims that a neutral law burdens their religious beliefs. As I describe below, sometimes judges wrap their justification for the burden into their analysis of whether a burden exists in the first place. Sometimes judges creatively construe a law so as to result in the absence of a burden and sometimes judges simply dismiss the religious person’s allegation that a burden exists.

For example, in *Smith v. Fair Employment & Housing Commission*, the Supreme Court of California considered whether a housing law that prohibited discrimination based on marital status imposed a “significant burden” on a religious landlady who did not wish to rent to an unmarried, heterosexual couple.⁸⁷ The court concluded that no such significant burden existed because the landlady could invest her capital in an enterprise other than housing.⁸⁸ The court also noted that the landlady’s religious beliefs did not “require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples.”⁸⁹ In light of that fact, the court concluded: “No religious exercise is burdened if she follows the alternative course of placing her capital in another investment.”⁹⁰

A similar analysis was advanced by a dissenting judge in *Donahue v. Fair Employment & Housing Commission*,⁹¹ a state court ruling in California that also concerned a religious couple who did not wish to rent to unmarried, cohabiting heterosexual couples. In concluding that the burden on the couple’s religious conduct was slight, the dissenting judge first observed that the couple “d[id] not contend that refusing to rent to unmarried cohabitants is a central tenet of their religious belief,” nor did they “contend that the burden imposed by the statute prohibits them from practicing their religion.”⁹² Rather, the couple’s only contention, observed the dissenting judge, was that “if they are compelled to rent to unmarried cohabitants, they would be—in effect—aiders and abettors in the commission of sin by others in violation of their own religious beliefs.”⁹³

The dissenting judge was unsympathetic to this concern. As the judge concluded:

The Donahues are the owners of a five-unit apartment building which they rent to members of the general public. They are engaged in secular commer-

cial conduct performed for profit. There are no religious motivations for their conduct. The statute does not require the Donahues to aid and abet “sinners,” it merely requires them “to *act* in a nondiscriminatory manner toward all prospective [tenants]. ‘A legal compulsion . . . to refrain from discriminating against [prospective tenants] on the basis of [marital status] can hardly be characterized as an endorsement’” or the aiding or abetting of sin.⁹⁴

In the case involving born-again Christians who owned and operated a chain of sports and health clubs in Minneapolis, a Minnesota court found no burden on the owners’ religious beliefs by offering a creative interpretation of the state’s gay civil rights law. The court observed that “based on his understanding of the Bible, Owens [the owner of the clubs] (the other principals agree with him) clearly is opposed to homosexual *acts*.”⁹⁵ For example, quoting from the trial transcript, the court noted that Owens had emphasized that, with regard to homosexuals, he has “a love, a heartfelt love for them, but not for the activity. The same way I would have a heartfelt love for anybody; but as God says in his word, we can hate the sin but we love the sinner.”⁹⁶

But, the court observed, the Minneapolis ordinance prohibited discrimination “based on affectional preference, not acts.”⁹⁷ Thus, the court concluded: “From [Owens’] words it would be difficult to conclude that his Christianity supports discrimination based on preference rather than acts. Thus, the Minneapolis ordinance as applied in this case does not impose a burden upon Owens’ free exercise of religion.”⁹⁸

Some of the more sophisticated judicial analyses of the burden that civil rights laws might place on religious beliefs are represented in the various opinions issued in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.⁹⁹ This case concerned the refusal of Georgetown University, a Jesuit school, to recognize gay student groups that had organized at the university and the law school.¹⁰⁰ The university administration permitted the gay student groups to exist and to use various school facilities.¹⁰¹ However, the administration drew the line at “endorsing” the student groups. The administration asserted that if it allowed the groups to use the Georgetown name, receive university funds, and have access to subsidized office space, telephone service, office supplies, and equipment, it would be connoting its endorsement of the groups.¹⁰² As the administration explained:

This situation involves a controversial matter of faith and the moral teachings of the Catholic Church. “Official” subsidy and support of a gay student organization would be interpreted by many as *endorsement of the positions taken by the gay movement on a full range of issues*. While the University supports and cherishes

the individual lives and rights of its students, it will not subsidize this cause. *Such an endorsement would be inappropriate for a Catholic University.*¹⁰³

Judge Pryor's concurrence provides a good example of a judge simply not accepting the allegations of a religious person (or, in this case, a religious institution):

I do not understand Georgetown to argue that discrimination against any persons or groups is a tenet of its faith. Rather, it claims that providing the disputed facilities and services to the gay student organizations infringes the University's religious interest in embracing a particular doctrine of sexual ethics. Therefore, to require the University to make available its facilities and services in an even-handed manner works, at most, an *indirect* infringement of its religious interest. For just as enforcement of the prohibition against discrimination on the basis of political affiliation does not signify endorsement of any particular political party, enforcement of the Human Rights Act's ban on discrimination on the basis of sexual orientation does not signify endorsement by the government or by the covered entity of any particular doctrine of sexual ethics.¹⁰⁴

In contrast to Judge Pryor's concurrence, the plurality opinion in the *Georgetown* case parsed the situation somewhat differently—acknowledging that the District of Columbia's law did place some burden on the university, but nevertheless refusing to accept fully the university's allegations with regard to that burden. The plurality first interpreted the D.C. Human Rights Act (which prohibited discrimination based on sexual orientation) as not requiring that any covered entity, including Georgetown University, endorse a gay group.¹⁰⁵ The plurality concluded: “[T]he Human Rights Act does not require one private actor to ‘endorse’ the ideas or conduct of another.”¹⁰⁶

Instead, the plurality focused on the “mere” conduct required by the law:

While the Human Rights Act does not seek to compel uniformity in philosophical *attitudes* by force of law, it does require equal *treatment*. Equality of treatment in educational institutions is concretely measured by nondiscriminatory provision of access to “facilities and services.” . . . Georgetown's refusal to provide tangible benefits without regard to sexual orientation violated the Human Rights Act. To that extent only, we consider the merits of Georgetown's free exercise defense.¹⁰⁷

Thus, the plurality held that the D.C. law required that the university simply engage in the conduct of providing funds, facilities, and services in an even-handed manner to the gay student groups. The plurality then simply asserted that providing such funds, facilities, and services did not translate into an en-

dorsement of the groups' beliefs on sexual ethics, despite the University's clear statement that it viewed precisely such actions as connoting endorsement.¹⁰⁸

As was apparent in the *Georgetown* case, a classic mark of judges who downplay the burden on religious people who are forced to engage in certain conduct is an unwillingness to err on the side of accepting the allegation that conduct can impair belief. For those of us who believe that government should err on the side of accepting such allegations (whether the allegation is that engaging in certain conduct will impair a person's religiously based belief or secularly based belief), the Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*¹⁰⁹ was particularly troubling.

The core argument of the law schools and law faculty in *Rumsfeld v. FAIR* was that forcing the schools to act in a certain way burdened their freedom of speech and freedom of expressive association.¹¹⁰ The cavalier manner in which the Court treated FAIR's allegations does not bode well for future claims made by those who feel their religious or secular beliefs are being burdened when they are forced to comply with neutral civil rights laws.¹¹¹

In *FAIR*, the law schools and law faculty claimed that the government burdened their freedom of speech and their freedom of expressive association¹¹² by requiring that they treat military recruiters better than other recruiters who discriminate based on sexual orientation.¹¹³ The schools and faculty argued that while military recruitment was a compelling government interest, forcing the schools to treat military recruiters similarly to other recruiters (with no symbolic or logistical differences to convey the schools' disapproval of the military's recruitment policy) was not narrowly tailored to fit the compelling government interest of military recruitment.¹¹⁴

What exactly was the burden about which the schools and faculty were complaining? Obviously, the government was not requiring that the law schools pronounce their support for the statutory policy of "Don't Ask, Don't Tell," which set the parameters of military recruitment and which prohibited the recruitment of openly gay law students as Judge Advocate General or JAG Corps officers. No such speech was being coerced. Nor was the government prohibiting schools from loudly expressing their belief that an appropriate legal recruitment policy would have placed no weight on the sexual orientation of law students. To the extent that a school viewed itself as creating an expressive community based on such a view of justice, the government was not standing in its way.

The "only" thing the government was requiring from the law schools was a simple act of *conduct*: it was requiring that schools *treat* military recruiters *equally* to all other recruiters, even though the law schools viewed the military recruiters as advancing, and possibly embodying, an unjust and perhaps immoral position. Where was the burden in requiring such conduct?¹¹⁵

As with some religious people's claims that the act of complying with a neutral civil rights law burdens their religious beliefs, the answer lies in the inherent entangling between conduct and practice *in some situations*.

In most situations, of course, conduct is not intended to convey expression. For that reason, we do not ordinarily feel that a requirement to engage in certain conduct (or not to engage in certain conduct) necessarily undermines our identity or beliefs. We engage in innumerable acts throughout the day. We might get on the subway in the morning, buy a newspaper, order lunch, give an exam or take an exam, fix a car, buy stock, or feed a baby. We rarely experience ourselves as expressing a belief system when we engage in these forms of conduct. Beliefs may underlie our actions (for example, public transportation is good; newspapers should be supported; babies should be cared for), but it is rare that we experience our conduct (or our lack of engaging in certain conduct) as inherently intertwined with our beliefs and identities.

But that is not always the case. Sometimes being forced to engage in certain conduct—or being precluded from engaging in certain conduct—*will* impinge on our beliefs or identities. This is not an overly difficult situation to perceive. It is certainly not beyond the sophistication of a legislature or a court to ascertain. It requires that an individual articulate a particular belief or identity, and then articulate how being forced to engage in an act (or how being prohibited from engaging in an act) will interfere with, or will undermine, that belief or identity.

This is precisely the situation that the law schools and law faculty faced in FAIR. The schools and faculty experienced the “mere” conduct of assisting military recruiters as undermining their expressive beliefs. The members of FAIR held two expressive beliefs: first, that law students should be hired without regard to their sexual orientation, and second, that aiding and abetting any recruiter who took sexual orientation into account in hiring was unjust. Thus, a mandate by the government that the schools assist military recruiters who did not hire openly gay law students was experienced by the schools as burdening that second belief. Because the belief itself related to *conduct* (*i.e.*, it is unjust to aid and abet a discriminatory recruiter), the mandate to engage in certain conduct (*i.e.*, treat military recruiters the same as other recruiters) necessarily burdened that belief.

The Supreme Court got around this difficulty by simply refusing to accept that the government's requirement that the law schools engage in certain conduct burdened their expressive beliefs—much as some judges simply refuse to accept that a requirement to engage in certain conduct burdens the religious beliefs of an individual or an institution. The Court first recast the schools' argument as a concern that assisting military recruiters would mean that students

would get confused and would not be able to differentiate the military recruiters' message from the schools' message. To that contrived concern, the Court wryly responded: "We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school."¹¹⁶

The schools' *actual* concern—that simply engaging in the conduct of hosting the military recruiters undermines the schools' expressive belief in nondiscrimination—was simply dismissed by the Court in a conclusory manner:

To comply with the [Solomon Amendment], law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "to accept members it does not desire."¹¹⁷

Thus, the Court asserted that the conduct of associating with military recruiters who are not members of the school did not undermine the law schools' expressive beliefs. The fact that the law schools experienced the association as causing precisely that result was simply ignored by the Court and dismissed.

Religious employers who do not want to provide health benefits to same-sex couples and religious schools who do not want to provide funding for gay rights groups might view themselves as far removed from law schools that do not wish to assist military recruiters who discriminate against gay law students. But the parallels between the two groups are stark: In each case, an individual or an institution experiences the coerced conduct (the "equality mandate") as burdening its beliefs. And in each case, the individual or institution runs the risk that the State and the courts will simply dismiss its experience of burden as not real.

C. Justifying the Burden on Belief Liberty

It may be cold comfort to those with strongly held beliefs regarding the immorality and sinfulness of homosexuality that I argue that the burden on their belief liberty should be acknowledged. After all, as I noted in the beginning of this chapter and as I hope to make clear in this section, I believe it will rarely be the case that a court should use the Due Process Clause to insert an

exemption to an LGBT equality law in order to accommodate the belief liberty of those who are regulated by the law.¹¹⁸

As Justice Souter contended in his *Glucksberg* concurrence, a court should not intervene “merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review.”¹¹⁹ Rather, “[i]t is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.”¹²⁰

Under this approach, I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed a LGBT equality law, with no exceptions for individual religious people based on belief liberty, has acted arbitrarily or pointlessly. If the “justifying principle” of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society from the nondiscrimination prohibition. This may not be the result a particular judge might have reached were she in the legislature, but it is certainly a “reasonable resolution of contending values” for a legislature to have reached.

Nevertheless, I believe explicating the burden that such civil rights laws may place on some individuals’ belief liberty is still worthwhile. While a court should not be permitted to re-strike a balance between competing liberties when the balance already struck by the legislature is reasonable, that does not mean the legislature should not choose to place certain exemptions in the law at the outset. The utility in acknowledging the burdens on belief liberty that might arise from the application of civil rights laws is that advocates of such laws might see their way to deciding that the legislature should protect belief liberty in a limited set of circumstances. Indeed, the best outcome would be for such decisions to be made in a negotiated setting with those whose beliefs will be adversely impacted by the law.

It probably seems dangerous to advocates of LGBT equality to acknowledge that a civil rights law might burden the liberty of those who are regulated by the law. This is because laws prohibiting discrimination based on sexual orientation that have been held to burden a constitutionally protected right have not fared well in Supreme Court jurisprudence thus far.¹²¹ The Supreme Court’s opinion in *Boy Scouts of America v. Dale*,¹²² creating an exemption for the Boy Scouts of America to New Jersey’s law prohibiting discrimination based on sexual orientation, is the classic example.

In *Dale*, the Court spent the bulk of its opinion explaining why it agreed with the Boy Scouts that forcing the organization to retain James Dale as an

assistant scoutmaster, after Dale had acknowledged that he was gay, would “significantly burden”¹²³ the Boy Scouts’ desire “to not promote homosexual conduct as a legitimate form of behavior.”¹²⁴

As can be deduced from what I have written thus far, I have only a small quarrel with the Court’s analysis in that regard. It seems eminently reasonable to me that a group that wishes to convey the message that homosexual behavior is immoral, wrong, and unacceptable would not want one of its leaders to be a happy, well-adjusted, and ordinary-seeming gay person. My small quarrel with the Court’s analysis is that the Boy Scouts failed to consistently and clearly convey such a message about homosexuality to its members. I have no difficulty accepting an organization’s statement of its beliefs and then deferring to that organization’s allegation that engaging in certain conduct will undermine those beliefs. Nevertheless, it does seem to me that the organization must clearly *state* its beliefs and then conform its actions to those beliefs in a logical fashion. The Boy Scouts’ position was problematic on both fronts: first, the organization’s public membership documents did not clearly state that homosexuality was inconsistent with the Boy Scouts’ oath, and second, the organization did not consistently remove heterosexual scoutmasters who publicly stated that homosexuality was acceptable.¹²⁵

But the fatal flaw in the Court’s *Dale* opinion, from my perspective, was its failure to truly examine whether the burden on the Boy Scouts was *justified*. This would have required, first, a careful analysis of the state’s interest in prohibiting discrimination based on sexual orientation in order to determine the importance of that interest. Next, it would have required an analysis of whether refusing to include an exemption in the law for entities whose expressive association beliefs would thereby be burdened was “so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied.”¹²⁶

If that analysis had been done, and if the Court had taken seriously the adverse impact on the identity liberty of gay people when a government fails to protect them from private discrimination, I believe the Court would have appropriately determined that a group as large and as broad-based as the Boy Scouts should not have been granted an exemption from the state law.

But the Court’s analysis in *Dale* regarding whether New Jersey’s interests in protecting gay people justified its burdening of the Boy Scouts’ expressive association rights was neither thorough nor thoughtful. The Court’s “analysis” consisted of the following three sentences:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s

right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. *That being the case*, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.¹²⁷

"*That being the case?*" The very lack of analysis in the Court's opinion—the simple reliance on these conclusory words—was a slap in the face of gay people. It was also an example of poor legal reasoning—or perhaps simply absent legal reasoning.¹²⁸

The plurality in the *Georgetown* case did a better job of analyzing the compelling interest a government might have in prohibiting discrimination on the basis of sexual orientation. After delving extensively into the literature regarding sexual orientation, as well as exploring the legislative history of the D.C. Council's ordinance, the plurality noted the following:

The Council determined that a person's sexual orientation, like a person's race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole. To put an end to this evil, the Council outlawed sexual orientation discrimination in employment, in real estate transactions, in public accommodations, in educational institutions, and elsewhere. Such comprehensive measures were necessary to ensure that "[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District, and to have an equal opportunity to participate in all aspects of life. . . ."¹²⁹

The plurality also invoked the majestic sweep of the federal constitutional liberty interest in underscoring the importance of a state interest in prohibiting discrimination based on sexual orientation:

The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of life, liberty and property that the Founding Fathers guaranteed to us all.¹³⁰

Ensuring that LGBT people can live honestly and safely in all aspects of their social lives requires that society set a baseline of nondiscrimination on the grounds of sexual orientation and gender identity. If individual business owners,

service providers, and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination. If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table, or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.¹³¹

Thus, for all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried straight couples and all gay couples, this is a point where I believe an inevitable choice between liberties must come into play. In making that choice, I believe society should come down on the side of protecting the identity liberty of LGBT people. Once an individual chooses to enter the stream of economic commerce by opening a commercial establishment, I believe it is legitimate to require that they play by certain rules.¹³² If the government tolerated the private exclusionary policies of such individuals in the commercial sector, such toleration would necessarily come at the cost of gay people's sense of belonging and safety in society. Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect the ability of LGBT people to live in the world.¹³³

But that is not to say that we should not acknowledge that this societal choice *has* resulted in a burden on some individuals' belief liberties and that we should not be forced to articulate why such a burden is appropriate. A government's reasons for burdening liberty should be, as Professor Rebecca Brown argues, "accessible to all in a meaningful sense."¹³⁴ Brown defines these as reasons that "have some public and secular component to them and [do] not rest entirely on personal moral belief systems not universally shared."¹³⁵ While I am not sure I would use Brown's formulation of a "personal moral belief system[] not universally shared," I do believe that the reasons given by the state must "reflect the public good."¹³⁶ And ensuring that members of the public who have a morally neutral characteristic will be able to live without fear of or vulnerability to discrimination based on that characteristic certainly seems to be a reason that reflects the public good.

The question remains, however, whether there are limited situations in which a *legislature* might legitimately choose to protect the belief liberty of

individuals or institutions over the identity liberty of LGBT people. I believe there are two situations that are worth exploring.

As a general matter, once a religious person or institution enters the stream of commerce by operating an enterprise such as a doctor's office, hospital, bookstore, hotel, treatment center, and so on, I believe the enterprise must adhere to a norm of nondiscrimination on the basis of sexual orientation and gender identity. This is essential so that an individual who happens upon the enterprise is not surprised by a denial of service and/or a directive to go down the street to a different provider. While I was initially drawn to the idea of providing an exemption to those enterprises that advertise solely in very limited milieus (such as the bed & breakfast that advertises only on Christian websites), I became wary of such an approach as a practical matter. The touchstone for any approach, I believe, needs to be whether LGBT people might be made vulnerable in too many locations across society. An "advertising exception" seemed potentially subject to significant abuse.

Nevertheless, I believe there might be a more limited exception that would be justified. There are enterprises that are engaged in by belief communities (almost always religious belief communities) that are specifically designed to inculcate values in the next generation. These may include schools, day care centers, summer camps, and tours. These enterprises are sometimes for-profit and sometimes not-for-profit. They are within the general stream of commerce, together with many other schools, day care centers, summer camps, and tours.

I believe a subset of these enterprises present a compelling case for the legislature to provide an exemption in a law mandating nondiscrimination based on sexual orientation. The criteria for an exemption should be as follows: the enterprise must present itself clearly and explicitly as designed to inculcate a set of beliefs; the beliefs of the enterprise must be clearly set forth as being inconsistent with a belief that homosexuality is morally neutral; and the enterprise must seek to enroll only individuals who wish to be inculcated with such beliefs.

The dignity of LGBT individuals would still be harmed by excluding such enterprises from the purview of a nondiscrimination law. But in weighing the interests between the groups, I believe the harm to the enterprise in having its inculcation of values to its members significantly hampered (as I believe it would be if it were forced to comply with such a law) outweighs the harm to the excluded LGBT members.

I am more hesitant regarding the second limited circumstance, but I offer it for analysis and critique.¹³⁷ I believe a legislature might legitimately offer an exemption for *leadership* positions in enterprises that are broadly repre-

sented in commerce. Many religious institutions operate the gamut of social services in the community, such as hospitals, gyms, adoption agencies, and drug treatment centers. These enterprises are open and marketed to the general public and often receive governmental funds. It seems quite appropriate to require that the services of these enterprises be delivered without regard to sexual orientation and that most employment positions in these enterprises be available without regard to sexual orientation.

But the balance of interests, it seems to me, shifts with regard to the *leadership* positions in such enterprises. Particularly for religiously affiliated institutions, I believe it is important that people in leadership positions be able to articulate the beliefs and values of the enterprise. If the identity and practice of an openly gay person would stand in direct contradiction to those beliefs and values, it seems to me that the enterprise would suffer a significant harm. Thus, in this limited circumstance, a legislature may legitimately conclude that the harm to the enterprise will be greater than the harm to the particular individuals who would be excluded from such positions. A legislature that came to this conclusion might legitimately provide a narrow exemption from a nondiscrimination mandate in employment for such leadership positions.

II. Conclusion

Professor Andy Koppelman, with whom I have been in dialogue on this issue for some time, correctly observes that my suggestions in this area are radical.¹³⁸ In one respect, this is true. My suggestion that there should be judicial and legislative acknowledgment of a “belief liberty” under the Due Process Clause that encompasses *any* sincerely held core belief can indeed be viewed as a radical departure from the more traditional judicial and legislative focus on solely religiously based beliefs.¹³⁹

As I hope my analysis has made clear, however, such an acknowledgment need not bring the mechanisms of our complex society to a screeching halt. For a court to invalidate a law based on its burdening of belief liberty, the court must first find that the legislature could not have legitimately enacted the law as a “reasonable resolution of contending values.”¹⁴⁰ By contrast, a legislature is permitted greater latitude and greater responsibility to consider and weigh these contending values when it enacts legislation in the first place—exactly as it should be in a democratic process.

My primary argument is that we gain something as a society if we acknowledge that a law requiring individuals to act in a certain way might burden some individuals’ belief liberties. Such an acknowledgment is necessary

if we wish to be respectful of the whole person. Protecting one group's identity liberty may, at times, require that we burden others' belief liberties. This is an inherent and irreconcilable reality of our complex society. But I would rather live in a society where we acknowledge that conflict openly, and where we engage in an honest dialogue about what accommodations might be possible given that reality, than to live in a society where we pretend the conflict does not exist in the first place.

But in dealing with this conflict, I believe it is essential that we not privilege moral beliefs that are religiously based over other sincerely held core moral beliefs. Laws passed pursuant to public policies may burden the belief liberty of those who adhere to either religious or secular beliefs. What seems of paramount importance to me is that we respect these core beliefs and do the best we can in this imperfect world of ours to protect both identity liberty and belief liberty to the greatest extent possible.