COMMERCIAL COMPLICITY

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Legal Theory Workshop
UCLA School of Law

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Bruce H. Spector Conference Room, 1314

Light refreshments will be available at 4:45 pm and you are welcome to come a little early to mingle.

Please Don’t Cite Or Quote Without Permission.
Dear Legal Theory Workshop Participants,

This is a first draft of a paper that aims to bring together various strands of work on complicity in the marketplace that have occupied me for the last few years. Here I aim offer my take on Masterpiece Cakeshop v. Colorado, the Supreme Court case involving a baker with religious objections to same-sex marriage who seeks an exemption from Colorado’s public accommodations, which forbid discrimination on the basis of sexual orientation.

Much of what follows is tentative. Those of you pressed for time might choose to focus on Parts I, II and V, not only because I am most uncertain about the material there and so would be most grateful for your feedback/pushback but also because they contain the paper’s more provocative theoretical moves. (With that said, I will be very grateful for comments on any parts of the paper.)

Very much looking forward to engaging with you on February 8,
Amy Sepinwall
“Complicit” was named the word of the year for 2017. No longer keen to restrict our reprobation to the principal wrongdoers, we aim as well to call out those who support them, or those who fail to prevent their wrongdoing. Thus a San Francisco activist group has staged a protest against Jack Dorsey, the founder of Twitter, for giving Donald Trump a platform for his oftentimes rash and sometimes offensive views. Chuck Schumer has railed against Republicans for their acquiescence in some of the President’s worst abuses, calling them complicit too. Saturday Night Live mounted a commercial for a fake fragrance from the Ivanka Trump brand, named – you guessed it – “Complicit,” designed for “the woman who could stop all this but won’t.” Nor are the President’s supporters the only targets in these charges of complicity. Alongside the outings of the sexual harassers and assailants in the #MeToo campaign are cries of complicity leveled against media corporations, the Hollywood elite, and even the offenders’ spouses.

It should perhaps not surprise us that these more expansive blaming practices coincide with an enlarged conception of our own complicity. Attuned to our “social connections,” we trouble over our moral responsibility for acts or initiatives that we deem wrong, and that life in a pluralist society nonetheless sometimes recruits us into supporting. The practical consequences of this inward turn are denial, protest, or efforts to dissociate. This paper focuses on the last – more specifically, bids to have the law recognize claims of conscience, and release objectors from legal requirements they deem contrary to conscience. As an example of the former, consider recently passed legislation, like Mississippi’s "Protecting Freedom of Conscience from Government Discrimination Act," which allows business owners with religious objections to same-sex marriage to deny wedding goods or services to gay couples. The law has been sustained against a constitutional challenge at the
appellate level, with the Fifth Circuit denying a rehearing en banc, and the Supreme Court denying a petition for certiorari. As an example of the second set of efforts, where objectors seek not new laws but exemptions from existing laws, consider challenges to the Affordable Care Act’s contraceptive mandate, or challenges to public accommodations laws requiring those who oppose same-sex marriage to nonetheless provide goods and services for gay weddings. Both sets of bids lie at the core of the “conscience wars” – efforts to have the rights of religious adherents keep pace with our rapidly liberalizing social and legal culture such that individuals with religious objections to contraception or same-sex marriage can remain free from having to contribute in any way to either one.

By some lights, “religious accommodation [has become] the single most important topic in academic and legal debates about religious freedom.” On one side, religious adherents – mostly Christians – face a legal order that departs from “man and one woman” to refuse to provide “accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage.” The Act goes on to list the kinds of goods and services a vendor might refuse to provide, including wedding photography, floral arrangements, limousine or other car service rentals, and “cake or pastry artistry.” For one who champions the law as “the kind of sensible accommodation that has long been the hallmark of religious liberty,” see Richard A. Epstein, Religious Liberty Under Siege in Mississippi, DEFINING IDEAS: HOOVER INSTITUTION, July 28, 2016, https://www.hoover.org/research/religious-liberty-under-siege-mississippi.

9 Barber v. Bryant, 872 F.3d 671, 673 (5th Cir. 2017).
12 See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53 (Sup. Ct. N.M. 2013) (holding that a photography company refusal to photograph a same-sex commitment ceremony violated the New Mexico Human Rights Act); State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Sup. Ct. Wash. 2017) (reasoning that the sale of wedding floral arrangements was not “expressive conduct” protected by the First Amendment).
13 Douglas NeJaime and Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J 2516, 2572-74 (2015)
14 Cf. Mark Tushnet, Accommodation of Religion Thirty Years on, 38 HARV. J. L. & GENDER 1, 32 (2015) (“proposals to accommodate religious concerns with respect to women’s abortion rights, marriage equality, and other modern equality agenda rights show, the issue of accommodations has now become bound up with much broader developments in the nation’s political culture.”).
their convictions on matters they take to be central to their faith. Unfortunately, some of these matters bear on the equal status of others in society. Thus Hobby Lobby v. Burwell, the 2014 Supreme Court mounting a religious freedom challenge to the Affordable Care Act’s contraceptive mandate, pitted conscience against reproductive rights. And a spate of wedding vendor cases pits LGBTQ individuals who wish to marry against business owners who harbor religious objections to same-sex marriage and so want to be released from public accommodations laws prohibiting discrimination on the basis of sexual orientation.

Most prominent among these is Masterpiece Cakeshop v. Colorado, which the Supreme Court is set to decide this term. In that case, Jack Phillips, a self-proclaimed “cake artist” seeks to challenge Colorado’s public accommodations law, which he was found to have violated when he refused to provide a cake for a gay couple’s wedding celebration. For the state to compel adherence to anti-discrimination norms is to have the believers undertake conduct they cannot in good conscience support. But to release the believers from compliance is to have the state grant them a license to discriminate.

numbers of a demographic majority group--White Christians--are now asking for accommodations in both the public and private sphere.”) (footnote omitted). Even though there is a sentiment that traditional Christians are besieged by a rapidly changing culture increasingly hostile to religiously conservative views, see, e.g., Steven D. Smith, Die and Let Live? The Asymmetry of Accommodation, 88 S. CAL. L. REV. 703, 725 (2015), there is also a thought that Christians have done well, relative to minority religions, when it comes to seeking judicial accommodations, see Mark Tushnet, “Of Church and State and the Supreme Court”: Kurland Revisited, 1989 SUP. CT. REV. 373, 381 (“the pattern of the Court's results in mandatory accommodation is troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do.”).

17 Andrew Koppelman, Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law, 88 S. CAL. L. REV. 619, 655–56 (2015) (the longstanding American tradition of accommodating religious objectors...has, however, now become controversial, for reasons that are tightly tied to the emergence of the gay rights movement. Disaffiliation with religion has become a cultural marker for solidarity with gay people.”).  

19 See Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at *3 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision) (“Phillips also believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way...Phillips believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be
Ideological commitments might tempt one into thinking that the contest between these two options is an easy one. To lay my cards on the table at the outset, my own commitments urge the conclusion that the state should not exempt religious business owners from public accommodations laws. These individuals should be compelled to provide goods and services for same-sex weddings no matter their opposition. And indeed that is just what I ultimately conclude here.

But it is not easy to defend this conclusion. It is not easy because, as courts and commentators have lamented, the law has not yet worked out the proper scope of exemptions from generally binding laws, and it is only since Hobby Lobby that for-profit businesses have been able to claim any kind of conscientious accommodation. It is not easy because there is no settled view on how we should understand complicity in these contexts – in particular, whether we should adopt the perspective of a third party judging the moral responsibility of the baker, or instead whether we should defer to his own assessment of his guilt. And it is not easy because, for every case that tugs on the heartstrings of those at one pole of the ideological divide there is a counterpart case – seemingly identical in all of its morally relevant facts – that tugs on the heartstrings of those at the other.

Let me begin to play out some of these difficulties here. First, should complicity be understood along subjective or objective lines? To see the relevance of this question, compare Hobby Lobby with PruneYard Shopping Ctr. v. Robins, an earlier case involving compelled hosting. In Hobby Lobby, individual owners of a for-profit corporation contended the Affordable Care Act’s contraceptive mandate would make them complicit in contraceptive use. Yet the mandate would have had the owners do no more than have their corporation subsidize a general insurance plan through which some plan subscribers might access contraceptives, which probably wouldn’t but theoretically could act by way of destroying nascent human life – the ground of the owners’ religious objection. No matter, the Court found.


Hobby Lobby’s owners took that “attenuated” connection to be implicating enough, and the Court took them at their word.\textsuperscript{23}

By contrast, in \textit{Pruneyard}, the Court addressed a shopping mall owner’s claim that, if the mall were compelled to host protesters, he would come to be complicit in whatever message the protesters sought to advocate. The Court refused to accept his concern. It reasoned that no one would attribute the protesters’ message to the mall owner and at any rate he was “free to publicly dissociate [himself] from the views of the speakers or handbillers.”\textsuperscript{25}

These conflicting precedents suggest diametrically opposed outcomes for \textit{Masterpiece}, depending on whether the Court pursues the objective understanding of attributability found in \textit{Pruneyard} or instead the subjective understanding of complicity adopted in \textit{Hobby Lobby}. If the Court were to conceptualize the cake as something like a venue for hosting others’ messages, it could then, in line with \textit{Pruneyard}, deny Phillips’s complicity claim. But if the Court were instead to apply \textit{Hobby Lobby}’s expansive view of complicity, it would defer to Phillips’s own views, and because he thinks furnishing a cake for a gay wedding is morally implicating, so too would the Court. Of course, even that approach would not yet determine the outcome of the case because there would then be the further difficult questions, identified above, about how to adjudicate between Phillips’s complicity claim and anti-discrimination norms, especially when dealing with a for-profit business that holds itself out to the public.

Nor is the issue simply that conflicting lines of precedent make it difficult to predict the outcome in \textit{Masterpiece}. Perhaps more troublingly, a searching inquiry that abstracts the complicity question from the marriage equality debate leaves one (or leaves me, at any rate) with genuine uncertainty about when, as a moral matter, we should excuse or instead compel conduct that contravenes conscience. To bring this difficulty to life, consider a hypothetical counterpart to Phillips’s case: What if the baker were instead, say, a secular woman and the couple she would turn away consisted of an older man and his child-bride-to-be, betrothed in line with the dictates of their religion.\textsuperscript{26} It is worth noting here that underage marriages are legal

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\textsuperscript{23} Elizabeth Sepper, \textit{Contraception and the Birth of Corporate Conscience}, 22 AM U J GENDER, SOC POL I 303, 314 (2014). \textit{See id.} at 314 n. 59 (listing cases prior to \textit{Hobby Lobby} denying exemptions from the contraceptive mandate precisely because the employers’ connection to contraceptive was deemed too tenuous).

\textsuperscript{24} As Professor Sanford Levinson puts it, “‘Because this is the way I feel’ seems to be a conclusive argument in the religio[us] realm.” Sandy Levinson, \textit{Justice Ginsburg’s Inexplicable First Two Pages} (Balkinization, June 30, 2014).

\textsuperscript{25} 447 U.S. at 88.

\textsuperscript{26} The example is hardly fanciful. A \textit{Washington Post} op-ed written by Fraidy Reiss, the founder of an advocacy group aimed at ending underage marriage in the United States, recounts two such incidents, one involving a 16-year-old whose Christian community pressured her into marrying her 19 year old boyfriend after she became pregnant and the second involving a 15-year-old whose Muslim father insisted she marry a stranger, who was 13 years older than her. Fraidy Reiss, \textit{Why can 12-year-olds still get married in the United States?}, WASH. POST, Feb. 10, 2017, https://www.washingtonpost.com/posteverything/wp/2017/02/10/why-does-the-united-states-still-let-12-year-old-girls-get-married/?utm_term=.e006828597db. Reiss’s organization found that,
in virtually every state, with or without the under-aged person’s consent. If the secular baker has reason to doubt the bride’s consent – because she is too young or, worse still, because she explicitly says that she does not wish to marry – must the baker nonetheless furnish the cake? Do exemptions from anti-discrimination laws not seem compelling here no matter one’s take on Phillips’s case?

Some legal academics evade worries about troubling hypotheticals by doubling-down on an absolutist no-exemption regime. I find their reasons for doing so unpersuasive. This paper aims to get clearer on why we should deny exemptions in the wedding vendor cases. But it also aims to recover a conception of business that champions business owners’ rights to refuse service on conscientious grounds where the refusal is not based on membership in a protected group.

In general, those who oppose granting exemptions adopt one or both of the following strategies: they deny that providing goods or services to a gay wedding renders the vendor complicit in same-sex marriage, or they argue that the marketplace is not an arena where conscience may take hold. So the wedding cake baker is not complicit either because he is not connected to same-sex marriage in the right way or because market transactions immunize him from what would otherwise be an implicating connection.

Both of these strategies are wrongheaded. The first misconceives complicity and the second misconceives the market. More specifically, exemption opponents tend to operate with an objective conception of complicity. On this conception, you are complicit in another’s act only if that act is attributable to you – typically, because you participated in it, or helped choose it, or belonged to the group on whose behalf it was performed. Which of these factors matter is not terribly relevant in the contraceptive mandate or wedding vendor challenges since none of them obtain. What is relevant is the underlying conception of complicity that each of them presupposes – namely, that complicity assessments are the prerogative of those who judge, not those who would bear the worrying connection. That is, the exemption

between 2000-2010, over 167,000 underage girls – some as young as 12 – were legally married in 38 states, most to men over the age of 18. , Reiss herself was coerced into an arranged marriage by the Orthodox Jewish community in which she was raised, and then pressured into remaining married to a man who routinely beat her and threatened her life. She eventually divorced him and was then shunned by her community. Samuel Freedman, Woman Breaks Through Chains of Forced Marriage, and Helps Others Do the Same, N.Y. Times, Mar. 20, 2015.

27 As I describe in greater detail below, all but three states permit underage marriage. See infra note and accompanying text.


29 See, e.g., Caroline Mala Corbin, Speech or Conduct? The Free Speech Claims of Wedding Vendors, 65 EMORY L.J. 241, 244 (2015) (“the business context essentially neutralizes any potential message of endorsement.”).

30 See, e.g., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) (arguing that, in assessing complicity claims, the Court must “distinguish[] between factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature, which a court must accept as true, and the legal conclusion that [plaintiffs’] religious exercise is substantially burdened, an inquiry the court must undertake.”); Bowen v. Roy, 476 U.S. 693, 701 & n.6 (1986) (“for the
opponents understand complicity as a matter of objective evaluation, rather than an inquiry into the subjective experience of guilt. As Michael Dorf puts it, “The Constitution does not protect people from \textit{feeling complicit} in what they regard as evil.’’\textsuperscript{31}

Whereas those who opposed exemptions to the contraceptive mandate relied on a conception of complicity that requires \textit{causal proximity}, the relevant objective factor for those who oppose the wedding vendor challenges might be termed \textit{personal proximity}: unless the vendor’s person – his deep self, most often drawn out in the form of speech or artistic expression – is somehow imbued in the event, the vendor has no reason to think that he is complicit. It is for this reason that parties on both sides of the issue focus on free speech.\textsuperscript{32} The underlying premise that both sides embrace is this: If the vendor’s contribution constitutes speech or art then he has a First Amendment claim that likely exempts him from public accommodations laws. If the contribution would not involve speech or art then the vendor has no such claim.

The focus on speech and the insistence on objective assessment foreclose complicity claims from those whose contributions to conduct they oppose would not count as expressive – chauffeuring the wedding couple in one’s limousine, for example. In Part I, I aim to show that the moral logic of complicity cannot sustain an expressive/non-expressive distinction. Part II offers a more sustained analysis of the relationship between speech, conduct and complicity. I urge that we treat complicity claims as morally serious whether the complicity arises from speech or conduct.

In Part III, I turn to the second misconception underlying some exemption opponents’ claims – namely, that complicity concerns have no place in capitalist markets. On this understanding of the marketplace, commerce and profits preempt whatever complicity there might otherwise be. Bake a wedding cake in your home that you gift for, say, a forced marriage and you are complicit; earn money from selling a cake for a forced marriage at your bakeshop, and you are not. After all, it is just business. I argue that the morally neutered conception of the market that one finds in the debate is not accurate, desirable, or necessary for staving off exemptions from anti-discrimination laws.


\textsuperscript{32} For Phillips’s own statements urging that his cakes are both speech and art, see infra, text accompanying notes _____. For the view that speech matters but that cake baking is neither speech nor art, see, for example, Caroline Mala Corbin, \textit{Speech or Conduct? The Free Speech Claims of Wedding Vendors}, 65 EMORY L.J. 241, 242 (2015) (“whether baking a cake ... counts as speech is pivotal. After all, the Free Speech Clause prohibits the “abridging of freedom of speech.”) (citation omitted).
Part IV turns to how the law should respond to the wedding vendors’ complicity claims. I argue that, without exception, anti-discrimination laws should prevail. But Part IV also leverages the conception of the market as a conscience-friendly zone developed in Part III to promote vendors’ rights to exclude customers for reasons other than the customers’ protected characteristics. In particular, I focus on cases where a would-be customer seeks the vendor’s goods or services for a project involving hate or oppression. I argue that the vendor need not lend herself to such projects, and I suggest that one might distinguish between Phillips’s refusal to serve the gay couple (impermissible, by my lights) and the secular baker’s refusal to provide a cake for the underage marriage (permissible) on this ground.

Part V concludes by retreating from considerations about how we should view the respective legal entitlements in these cases and urges their extra-legal resolution.

I. IS EXPRESSION MEANINGFUL IN THE WEDDING VENDOR CASES?

Jack Phillips, the cake baker at the center of the Supreme Court’s first foray into wedding vendor exemptions from anti-discrimination laws,33 styles himself an “artist” who uses “cake as his canvas with Masterpiece as his studio.”34 His cakes speak. His wedding cakes in particular “announce a basic message: that this event is a wedding and the couple’s union is a marriage.”35 More than that, “Phillips’s wedding cakes—endowed with all their grandeur—declare an opinion too: that the couple’s wedding ‘should be celebrated.’”36 Accordingly, he maintains that he “is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces—his custom wedding cakes— are just as worthy of constitutional protection as an abstract painting like Piet Mondrian’s Broadway Boogie Woogie, a modern sculpture like Alexander Calder’s Flamingo, or a temporary artistic structure like Christo and Jeanne-Claude’s Running Fence.”37

Unfortunately for Phillips, Colorado did not share his assessment. When Phillips refused to bake a cake for a gay couple’s wedding, citing his own conscientious objections, he was sanctioned by the Colorado Human Rights Commission for violating Colorado’s public accommodations law. He challenged the Commission’s determination on First Amendment grounds and the highest appellate court in Colorado to hear his challenge upheld the Commission’s decision.38

33 Several state supreme courts have also ruled on these issues, denying exemption claims. See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53 (Sup. Ct. N.M. 2013) (holding that a photography company could not refuse to photograph a same-sex commitment ceremony in violation of the New Mexico Human Rights Act on first amendment grounds); State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Sup. Ct. Wash. 2017) (reasoning that the sale of wedding floral arrangements was not “expressive conduct” protected by the first amendment).
35 Id. at 19.
36 Id.
37 Id. at 20-21.
Colorado’s anti-discrimination law provides that it is unlawful to deny “any individual or group ... the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation” because of that individual or group’s “disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.” Colorado defines “place of public accommodation” broadly to include “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.”

Phillips rests his claims on religious freedom and free speech principles, but his religious claims are hardly availing for him. Colorado is one among twenty or so states that do not offer religious freedom protections enhancing those already conferred by the Constitution, and the Constitution’s Free Exercise clause, as interpreted by the Supreme Court in Employment Division v. Smith, does not permit exemptions “if prohibiting the exercise of religion . . . is not the object of [the challenged law], but merely the incidental effect of a generally applicable and otherwise valid provision.” Since Colorado’s public accommodations law is generally applicable – it does not single out religion – it does not offend Free Exercise rights. Indeed, even the Department of Justice, which interceded on Phillips’s behalf, declined to take up religious freedom arguments, focusing only on the Free Speech issues.

The free speech arguments presuppose a particular view of complicity. This Part aims ultimately to draw out and argue against that view. To preview that argument: Both those who support and those who oppose granting Phillips an exemption think that speech matters. If Phillips’s work conveys a message or if his work is a form of artistic expression then his complicity claim should carry more weight -- by some lights, decisive weight. The wedding vendor debate thus transmutes into a debate about whether cake decorating (or flower arranging, or wedding photography, or make-up artistry for that matter) is or is not protected speech or expression.

Against the parties on each side of the debate, I argue that there is no reason to think that speech or artistic contributions are more implicating than are non-

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expressive contributions. That is, from the standpoint of complicity, we have no reason to distinguish between vendors who offer expressive wares and those whose services are entirely utilitarian. The argument proceeds in two stages. In Part I.A, I allow that decorated cakes convey a particular message but then argue that the reasons we have to protect individuals from compelled speech apply as well to compelled conduct. In Part I.B, I offer reasons for denying that artistic expression is morally relevant from the standpoint of complicity.

While one might well doubt whether Phillips’s creations count as art, let alone art as worthy of reverence as a Mondrian or Calder or Christo work, I assume for the sake of argument that Phillips’s cakes do so qualify.44 I argue that, even if they are works of art, that should make no difference in our assessment of the strength or merits of Phillips’s complicity claim.

For rhetorical purposes, it will be useful to imagine two wedding vendors: a wedding baker, like Jack Phillips, and a limousine driver, whom I will call “Linda Lorry.” I take it that Lorry’s contributions cannot in any meaningful way be considered to be speech or art.

A. Cake Speech

This Section argues that we should care no less about protecting Lorry from contributing to a wedding she opposes than we should Phillips. To defend that claim, I look to the existing rationales for protecting people from being compelled to speak and then argue that the legitimate interests we aim to protect in prohibiting compelled speech apply as well in the context of other forms of compelled support. Broadly speaking, there are three concerns that motivate restrictions on compelled speech.45 I address each in turn.

1. Misattribution

44 It may be worth noting here that the relevant distinction may not turn on the quality of the work but instead on its producer’s intentions – both for the work and its mode and place of consumption (e.g., to be seen in a gallery or enjoyed on a plate). What distinguishes Jeff Koons from Baronelle Stutzman (of Arlene’s Flowers) might well not be the beauty or creativity of their product. More pointedly, a urinal can count as a work of art if it graces the exhibit space of a gallery or museum. See Marcel Duchamp, Fountain (1917). (That same urinal in the restroom? Not so much). Insofar as one takes a creator’s intentions to be decisive, and insofar as these intentions can be ascertained, it may not exceed the scope of judicial ken for the question of, what is art?, to receive a definitive legal answer.

45 There are other concerns that one finds in the law and scholarship on compelled support that I do not address here. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (compelled speech is unconstitutional when applied to news organizations because they need to retain control over the content they disseminate); Seana Valentine Shiffrin, What Is Really Wrong with Compelled Association?, 99 NW. U. L. REV. 839, 861 (2005) (identifying compelled insincerity – and especially government-mandated insincerity – as a distinct reason to oppose compelled speech). Concerns about a free press are obviously inapt here. Concerns for sincerity are doubtlessly relaxed in the marketplace (though not entirely suspended, by my lights), and that relaxation might suffice to make the sincerity rationale one we need attend to less in this context.
Someone who is compelled to say words risks having those words attributed to her as her own. The compelled speech may cause others to attribute to her beliefs she does not hold, or it may cause others to misunderstand her when she endeavors to convey the beliefs she does hold.\(^{46}\) In either case, compelled speech exposes her to the risk of misattribution.\(^{47}\) Where it is the state that compels the speech, the state “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”\(^ {48}\)

Let’s assume for the sake of argument that Jack Phillips has a legitimate concern that some message will be attributed to him in virtue of his baking a wedding cake for Charlie Craig and David Mullins’s wedding celebration. And let’s suppose further that the cake in question has a clear message on it – for example, “Charlie and David will be forever in love.” Is the writing on the cake the message that Phillips has reason to think will be attributed to him? An affirmative answer would entail that bakers mean whatever it is that their baked goods say. As such, a baker committed to sincerity might well decline to bake a Valentine’s cake with the words, “I love you!” because he does not in fact love the customer (or the intended recipient of the cake).

But of course no one would think the actual words on the cake are the baker’s; nor should they. The words are intended to convey the message that the customer has chosen.\(^ {49}\) So the message the baker has reason to fear will be falsely attributed to him is not the specific one written on the cake.

With that said, the cake does stand for something, and in virtue of the baker’s having provided it, others may legitimately infer that the baker does not strongly oppose whatever it is that the cake stands for.\(^ {50}\) So, for example, if a baker agrees to provide a cake with the words, “Down with the gays!,” others may legitimately infer that the baker does not strongly oppose the cake’s message. Nor need the message in question consist of words: we would reasonably infer that a baker who knowingly provides a generic wedding cake for a union between a man and his 12-year-old...
trafficked bride does not strongly oppose that union. As Phillips himself says, wedding cakes “declare” that this is a marriage and, moreover, a marriage worthy of celebration. But note that the declaration in question arises from the wedding cake independent of any distinctive message it conveys (e.g., “Charlie and David forever” or a two-man topper.) The mere fact that this is a cake celebrating this union already contains an expression – namely, that the baker does not oppose this union; or, if he does, he is willing to set his opposition aside for the sake of turning a buck.51

Now, note that insofar as the legitimately attributable message is one of general support of the union, it is not only expressive artifacts that communicate it but so too other contributions. Take Lorry, our limousine driver, who is asked to ferry the wedding couple around on their wedding day. If she obliges, we may rightly infer that she does not oppose the union, or does not oppose it so strongly that she would be willing to forsake the job. More generally, any form of practical support for the wedding may be read as an expression of support for, or at least moral neutrality toward, the marriage. Speech is not special when it comes to attribution.

2. Thought Control

A separate line of thought, developed by Seana Shiffrin, identifies the wrong of compelled speech at least in part in its power to interfere with the compelled speaker’s thought process. As she writes,

[the] general concern at issue for protecting freedom of thought is that what one regularly says may have an influence on what and how one thinks. The things one finds oneself regularly doing and saying will have an understandable impact on what subjects one thinks about. The regular presence of specified statements in one’s speech and related action may predictably have an influence on which topics seem salient. Further, these statements may have an influence on what one thinks about and how.52

Shiffrin points to a wealth of examples in other contexts that amply demonstrate the ways that our thoughts can be redirected or even manipulated through subtle outside influences, of which compelled speech is a prominent

51 In their amicus brief, the Freedom of Speech Scholars contend that “the provision of a wedding cake does not constitute an endorsement of the marriage. Bakers, florists, and even ministers have offered their services to couples they may have thought were not right for each other.” Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents, Masterpiece Cakeshop v. Colorado, No. 16-111, at 9 (2017). In point of fact, though, the Freedom of Speech Scholars have in mind a different object of endorsement than the one I contemplate: They contend that the baker does not endorse this very union in providing a cake; I contend that the baker does endorse a union of this kind in providing a cake – that is, a same-sex marriage, independent of whichever two individuals of the same sex will wed.

The Court has noted as much, perhaps most famously striking down compelled recitations of the pledge of allegiance because they “invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

Assuming then that compelled speech genuinely risks thought control, the question for our purposes is whether compelled conduct poses that risk as well. Is Lorry, our chauffeur, likely to lose her grip on her opposition to same-sex marriage if she is compelled as a result of a public accommodations law, to drive gay couples around on their wedding days? It seems to me that routine exposure to same-sex couples reveling in their union in the backseat of her car might have a profound effect on Lorry’s perspective. In particular, Lorry might well hear and see in the same-sex couples’ exuberance the echoes of the happy heterosexual newlyweds whom she regularly drives around; as a result, she may come to believe that same-sex romantic love and commitment are quite like their heterosexual counterparts – so much so that her opposition to gay marriage seems to her less and less compelling. Now, salutary though Lorry’s change of heart may be, Shiffrin’s point is that compelling people to speak or act represents illicit interference with their beliefs, and violates their autonomy as a result. The compelled agent does not arrive at the belief in question through a process of reasoned deliberation; instead compulsion bypasses her reason, causing her to adopt beliefs in light of habitual performance. If compelled speech is wrong because it is a form of thought control, it remains wrong no matter how much belief reformation we might think its subject requires. More relevantly here, if thought control explains the wrong of compelled speech, and if compelled conduct has the power to control thought in the same way, then compelled conduct is wrong too.

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53 Id. at 855-61. See also Tamara R. Piety, Onslaught: Commercial Speech and Gender Inequality, 60 CASE W. RES. L. REV. 47, 66 (2009) (describing ways in which ads objectify, commodify, and debase women, and the real harms to women that these ads might produce, especially because of the ads’ tendencies to manipulate – that is, to influence thought without engaging our rational faculties).


55 Shiffrin thinks it does. As she writes, “The things one finds oneself regularly doing... will have an understandable impact on what subjects one thinks about.” Supra note ___ at 855.

56 See id. at 859; Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 CONST. COMMENT. 283, 302 (2011).

57 Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 578–79 (1995) (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”).

58 Now, one might think that both compelled speech and compelled conduct risk thought control but also hold that compelled speech is worse, because a more powerful influence over one’s beliefs. As Shiffrin writes, “Commonly heard sentiments may become comfortable sentiments. Commonly voiced sentiments bear an even more intimate relation to the self.” Id. at 855. Shiffrin goes on to postulate that we can more readily dissociate from words we hear than those we speak; being made to say things contrary to our beliefs or commitments can produce a “performative dissonance” pressuring us to abandon the thoughts contrary to the compelled speech. Id. at 859-60. That distinction usefully explains why compelled speech is worse for the speaker than the listener. But it does not explain why
3. Commandeering

A final reason to object to compelled speech arises once one recognizes that autonomous agents have “a right not to be used or commandeered to do the state’s ideological bidding by having to mouth, convey, embody, or sponsor a message… with one’s voice or body or resources….”\(^{59}\) The concern about commandeering does not depend on whether others will attribute the message the agent hosts to the agent herself.\(^{60}\) The wrong of compelled speech, on this account, is that it recruits one person, against her will, in the dissemination of another person’s message. Using a person in this way is itself a violation, even if everyone knows that the person so used disavows the message she is made to help disseminate.

The anti-commandeering rationale best explains the set of complicity claims one finds in the wedding vendor context. In order to justify a refusal of service, Jack Phillips need not argue that, in providing a cake for a same-sex wedding, he will be viewed as endorsing same-sex marriage. It is enough that he in fact opposes same-sex marriage and that providing a wedding cake furthers same-sex marriage – in particular, by furthering the signature event celebrating same-sex marriage. But once we recognize an interest in not being commandeered that is independent of the misattribution rationale, it is hard to see why that interest should arise only, or especially, when it comes to speaking on behalf of the project one opposes. For compelled speech is not the only way – or even the most powerful way – one can be commandeered to support a project one opposes. Forcing someone to contribute money to that project is another form of commandeering. Indeed, this was just the rationale the Supreme Court adopted in Hobby Lobby v. Burwell, where the Court recognized, and sought to protect, an interest in not having to subsidize contraception to which the would-be subsidizers had religious objections. As Nomi Stolzenberg astutely notes, the employers’ complaint was about “material support, not expressive support.”\(^{61}\) Even more paradigmatic is the pacifist who seeks a conscientious objection to the draft: he objects not only, or even principally, because going along with his conscription would otherwise express his agreement with the war; instead, he objects because he does not want to lend his body – or worse still, our speech would have a greater influence on our thoughts than would our conduct. And indeed some forms of (non-speech) compelled conduct might have other dimensions that augment their power to influence thought. For example, if Lorry is the kind of person who regularly cries at weddings, finding them inspirational and sublime, then witnessing a gay couple’s rejoicing over its nuptials might be especially dissonant for her, and so especially effective at shifting her beliefs about same-sex marriage. At any rate, even if speech generally works thought control more effectively than does conduct, the amount of thought control compelled conduct wreaks might well pass whatever threshold is necessary for us to restrict the government’s ability to demand it.

\(^{59}\) Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001). *See also* Abner Greene, NIMN (manuscript on file with author) (arguing that the right to “free speech…, at least presumptively, grants one the liberty to use one’s body or property… to foster or disseminate one’s own chosen messages and not those of others.”).

\(^{60}\) Tribe, *supra* note ______ at

his life – to a cause he abhors. (We can imagine that he would seek the exemption even if he had been drafted in secret such that no one would know that he was being made to further the war effort.)

Many exemption opponents conflate a desire to withhold material support and a desire to refrain from endorsing. In other words, the only complicity claims they recognize are those that express support in a speech-like way. For example, in endeavoring to explain why one might resist paying taxes, Jed Rubenfeld writes, “A person gets no special immunity from the tax code just because he objects to the federal government and wants to communicate this view by not paying.”62 But the tax resister might have no communicative ambitions at all; he might be concerned exclusively with not advancing the government’s ends whether or not anyone else knows that he has withheld his financial support. Conversely, where these exemption opponents see only a bid to withhold monetary support, they deny that such support amounts to complicity. Thus, some jurists would have denied exemptions from the contraceptive mandate because they found the link between insurance subsidization and contraceptive use too tenuous.63 I will have much more to say about complicity in what follows. The point for now is to insist that, contrary to much of the thinking about complicity claims, speech is just one source of implication. Understanding the wrong of compelled speech in terms of commandeering helps make this plain.

4. Compulsion and Complicity

All three of the foregoing rationales bear a connection to complicity. The commandeering rationale most straightforwardly connects up to complicity – the individual who would be commandeered objects because she does not want to lend her voice, her talents, her energy, her money, and so on to a project she opposes. But concerns about misattribution and thought control also relate to complicity.

To see this, consider first why one has reason to be concerned about misattribution. Why should one care that others read off one’s speech or one’s acts only commitments that one in fact endorses? The answer is twofold. First, one might hold the view that we instantiate right and wrong through our actions. The maxims or principles underpinning our acts express our convictions about what is morally permissible or required. We risk misleading others if some of our acts express moral principles we do not in fact hold, especially if we cannot concomitantly disavow these expressions. Second, and relatedly, in being made to say or do things we think morally troubling, we undermine our standing to censure others who say or do these things. We have reason to want to preserve the full force of our capacity for moral censure not because censoriousness is good in itself but instead because it is among

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the ways we help make the world one that conforms to our moral convictions.64 If we are compelled to act against conscience, then, we contribute to reducing the moral character of the world – that is, we are complicit in the normalization of conduct we have reason to think no one should pursue.

The relationship between thought control and complicity is less direct but not less important. For most of us, moral development is an ongoing process.65 We recognize that we have not yet attained full moral enlightenment; every day brings opportunities to scrutinize our commitments in an effort to become ever more virtuous. That scrutiny is, importantly, keenly present to mind – it involves introspection, self-reflection, judgment, empathy, moral imagination, weighing reasons, and so on. We might well, as a result of this scrutiny, revise our moral views but we would have well worked out reasons for doing so; we could give an account of why we had revised our views if called upon to do so. Thought control engages none of these critical or deliberative faculties. It is a silent training program, causing us to see things differently, to replace what our existing commitments would have taken to be salient with other pieces of information, thereby changing the beliefs we form and from there the commitments we have.66 Thought control does not credit us with the ability to reflectively alter or abandon or adopt moral commitments; instead, it implants them.67

A person who cares especially about the moral nature of her actions – that is, a person of conscience – has special reason to guard against thought control’s deliberative interference. If she is not vigilant, she will become someone who could act in ways her current self could never morally endorse. In particular, she could become someone who is complicit in acts she currently opposes.

Nor is the concern about thought control restricted to the person who cares that her moral commitments receive updating only through her own careful process of revision. Thought control might be upsetting too for the religious adherent who has relinquished the role of mapping her own moral universe and submitted instead to a recognized moral authority. Individuals in organized religious communities often insulate themselves from many aspects of secular society precisely in order to shield themselves from beliefs or practices that the community rejects. The Supreme Court has recognized the importance of insularity in its accommodations jurisprudence.68 Thought control jeopardizes the hold that the relevant authority figures have over the members of their community. In so doing it again threatens to influence people to do what they or their authorities oppose, without first getting these people to reflectively endorse the conduct they come to undertake. Religious adherents

64 These ideas are developed more fully in Nicolas Cornell and Amy Sepinwall, Hypocrisy and Complicity (draft manuscript on file with author).
65 See SHEFFRIN, supra note _____ at 174.
66 See Shifrin, supra note ____.
67 Cf. Barnette, 319 U.S. at 641 (“To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”).
therefore also have reason to worry that thought control will make them complicit in acts their current religious commitments reject.

So concerns to avoid complicity figure in the main rationales for prohibiting compelled speech. But those same rationales, as I have argued, also justify prohibitions on compelled conduct. In short, compelled support – whether in the form of speech or conduct – bears a connection to complicity on any of the rationales elucidating why compelled speech is wrong.

**B. Cake Art**

I have been arguing that none of the rationales for the wrong of compelled speech proffered in the case law or legal scholarship can justify our taking speech-like contributions more seriously than non-speech contributions. But perhaps there is still something distinctive about cake decorating (or flower arranging, or photography – two other areas where vendors have challenged anti-discrimination laws)\(^{69}\) that the compelled speech analyses do not capture. Consider that we tend to view creative contributions as intimate expressions of the self. Producing art is no mindless, alienating task. Instead, the artist is keenly attentive and authentic when producing his art. Given that picture of artistic creation, one might conclude that artistic contributions involve a kind of support that we have special reason to care about, even if non-artistic contributions should trouble us too. Accordingly, we should be more sympathetic to the baker’s claims for an exemption than the chauffeur’s.

To my mind, there are three problems with this line of thought: First, weighing artistic contributions against non-artistic contributions to see which is more worthy of accommodation necessarily privileges skilled work relative to unskilled work. This is because all artistic contributions involve skill while many non-artistic contributions do not (e.g., chauffeuring, setting up tables and chairs, serving food and drink, cleaning up after the festivities, etc.). But this is a morally troubling approach, not least of all because it reinforces class hierarchy: not only do we deprive many underprivileged individuals of meaningful work but we then add insult to injury by failing to take their complicity claims as seriously as those of skilled workers, precisely because the unskilled workers’ work is not meaningful (both in

\(^{69}\) See supra note ____.

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the sense of carrying a message and in the sense that it calls upon one's self (mind, creative energies, passions, etc.)).

At any rate, and second, wedding vendors who do not work in an artistic vein might contribute just as thoughtfully and meaningfully as a cake artist or florist or photographer does. Consider, for example, the wedding planner, who guides the couple through every phase of the wedding itself. His causal proximity to the wedding, the intensity of his connection, the extent to which his contribution bears his personal touch – on all these dimensions, the wedding planner looks not to be meaningfully different from the cake baker. It is hard to see why the wedding planner's contributions should count for less than the cake baker's even if the wedding planner's contributions are not artistic in nature.

But finally, there is already something troubling about assessing and ordering burdens along the lines of proximity, intensity, authenticity, and so on. That way of proceeding presupposes that we can arrive at objective judgments about just how much of an affront to conscience various kinds of contributions are, and then weight how compelling they are accordingly. But that is not how conscience-based complicity claims work, as we shall now see.

II. CONSCIENCE-BASED COMPPLICITY CONSIDERED

Conscience-based complicity claims are claims to be released from a law one opposes on moral grounds (even if religion is the source of their immorality). But why should government confer a “private right to ignore [a] generally applicable law[?]”? Why defer to conscience at all? The answer, as I argue at greater length elsewhere, is that we want to protect individuals from the experience of acting against conscience. Since we aim to respond to how they would feel were they required to participate in another’s (putative) wrong, we must take at face value their sincere assertions of the affront to conscience they would thereby sustain. It makes no sense for us to substitute our sense of right and wrong for theirs; nor does it make sense to super-impose our sense of the kind or degree of connection necessary to “in fact”

With that said, we should allow that even unskilled work can be ennobled where one pursues it meaningfully. Thus, for example, “[u]plifting the dignity and creativity in all work, Dr. Martin Luther King spoke of the “street sweeper” who could “sweep streets like Michelangelo painted pictures; sweep streets like Handel and Beethoven composed music; sweep streets like Shakespeare wrote poetry.” Mary Bonauto, Symposium: Commercial products as speech – When a cake is just a cake, SCOTUSBLOG, Sept. 15, 2017, http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake/. But the possibility that unskilled work might be noble is one that the wedding vendor cases implicitly reject, as each side presupposes that it is only if the vendor’s contribution is like speech or like art that the vendor will qualify for an exemption from the reigning public accommodations laws.


See Sepinwall, supra note _____ (Conscience and Complicity).
make one complicit.\textsuperscript{73} Instead, we have to allow that others may think some conduct wrongful even if we see it as innocent; and they may think their contribution to wrongful conduct morally implicating even if we might see that contribution as trivial or tenuous enough to make no moral difference at all.

Now, one might think this all well and good if we are dealing with a claim of religious freedom, but irrelevant if we are dealing with a claim of compelled speech.\textsuperscript{74} After all, something counts as speech (or meaningful expression) only if individuals other than the speaker can recognize it as such.\textsuperscript{75} So it makes no sense to defer to the putative speaker in determining whether the legal requirement she opposes compels her to speak; “feels like speech to me” is a non-starter.\textsuperscript{76} We need instead to evaluate whether there is speech, and what the content of that speech is, from an “external” perspective – in particular, one that contemplates what those who hear the speech will make of it.\textsuperscript{77}

In point of fact, though, only the misattribution rationale depends heavily on this intersubjective perspective. Neither the wrong of thought control nor the wrong of commandeering turn on what message anyone else gleans. Indeed, I might go so far as to say that the morally problematic feature that these two rationales illuminate is only incidentally connected to speech: Being compelled to utter or broadcast words is one way the government can improperly influence our thoughts, or one way the government can improperly coopt our bodies, our energies, our cars. But there is nothing special about this particular way of controlling our minds or

\textsuperscript{73} In Conscience and Complicity, supra note \_\_, I argue that complicity claims involve three dimensions – moral and relational (the two factors I identify above – right and wrong; and strength of connection) as well as factual. While I maintain that respecting conscience requires that we defer to the objector’s assessment of whether the conduct she opposes is morally wrong and whether the contribution she challenges relates her to that wrong in a way that would make her complicit, I deny that we must defer to her assessment of the facts. If Hobby Lobby’s belief that the four modes of contraception it opposed were abortifacients was false then the Court would have no more reason to defer to its complicity claim than if Hobby Lobby had claimed that contraception were lethal poison. Of course, while that approach would have entailed a loss for Hobby Lobby, the more general outcome – an opt-out of the contraceptive mandate for for-profit corporations with religious objections to contraception – would have emerged in some counterpart case, where the challenging corporation had religious objections to all forms of contraception.

\textsuperscript{74} Cf. Steven H. Shiffrin, What Is Wrong with Compelled Speech?, 29 J.L. & Pol. 499, 507 (2014) (“The First Amendment inquiry focuses on what is objectively conveyed through the photographs. That subjective belief might count strongly in an appropriate version of freedom of religion doctrine, but from an objective perspective, the contention that a photograph constitutes an endorsement by a photographer is unpersuasive.”) (footnote omitted).

\textsuperscript{75} The Court’s most stringent test for symbolic speech can be found in Spence v. Washington, 418 U.S. 405, 410-411 (1974). Elsewhere, the Court allows that works of art whose meaning is ineffable nonetheless qualify for protection under the Free Speech clause. See Hurley, 515 U.S. at 569 (“constitutional protection” can extend to works that do not contain a “particularized message,” such as the “unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”).

\textsuperscript{76} The Freedom of Speech Scholars make this point in their brief. See supra note \_\_\_ at 9 (“To be sure, a person might subjectively feel as though …making a salad for a wedding reception implicates him in the morality of that wedding …. But …feeling a certain way about one’s actions does not make these actions speech.”).

\textsuperscript{77} Id.
commandeering us. If I am right that compelled speech is not a special instance of thought-control or commandeering then objections to government compulsion that happens to involve words have illicitly enjoyed enhanced protection in virtue of that fact. They have hitched a ride on Free Speech protections when in fact they are no more worthy of constitutional concern than are forms of thought control or commandeering that do not involve speech.

This brings us to a second way in which compelled speech arguments might lead us astray. As we have seen, the features that make compelled speech implicating arise for compelled conduct too. As an analytic matter, then, there looks to be no moral justification for caring more about compelled speech on complicity grounds. (As a doctrinal matter, the Court may be more hospitable to compelled speech claims than compelled conduct (though *Hobby Lobby* might stand as an exception.).) At any rate, we are not Supreme Court advocates. We encounter these questions not in order to identify which argument will mostly likely convince a majority of the Justices. We confront these questions with an eye to deciding whose complicity claims warrant our attention.). This makes the compelled speech arguments awkward at best. The relevant wrong that they track – the ability of compelled speech to implicate – in fact has nothing to do with speech and everything to do with compulsion. Arguing that cake decorating is *not* speech is then not helpful (again as an analytic matter) because whatever cake decorating is, it might well still be implicating. And arguing that cake decorating *is* speech leaves the exemption supporter in the difficult position of justifying exemptions for cake decorating that do not swallow up every and any material contribution to the wedding.

At oral argument, the Justices were at pains to locate a stopping point if they were to find in Phillips’s favor. Hence, the slew of hypotheticals about “who else counts as an artist.” What about the jewelry designer? Hair stylist? Make-up artist? (Look, “artist” is in the job title!, Justice Kagan urged). The Court confronted these hypotheticals in a struggle to identify which of these trades should fall on the “speech” side of the speech/conduct divide. But that is the wrong struggle. These other trades emerge as possible analogs to cake decorating not because they too blend creativity and craft but because they too involve contributions of whatever kind to a venture some of these tradespeople oppose on conscientious grounds. Put differently, what makes Phillips’s cakes art – if they are art – has nothing to do with what makes contributing them to a same-sex wedding upsetting to his conscience.

If Phillips wins on Free Speech grounds, he will have won on the basis of the Court’s conceptual confusion – not about whether cake decorating is art but about

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78 Elsewhere, I seek to argue that, in complicity cases, the Court appears to be especially moved by money: For example, compelled subsidization seems to be a worse form of recruitment, at least in the conservative Justices’ eyes, than is compelled hosting, even though one might have thought that one who is compelled to host incurs a far more intimate connection to the conduct she opposes than is one who is merely made to pay for it. I develop this line of thought in Taint: Theorizing Complicity in First Amendment Doctrine.

79 Oral argument transcript at 11, lines 8-9 (Justice Ginsburg speaking).

80 See Oral argument transcript at 12, lines 18-19.
whether cake decorating is implicating. And in winning on this mistaken ground, the Court will have forsaken wedding vendors like Lorry, or the reception hall owner, or party favor maker even though their contributions are indistinguishable as a matter of complicity.

Finally, insisting too heavily on a speech/conduct divide obscures the fact that all forms of compelled support involve expression, even if not the kind of expression cognizable under the Free Speech clause. If Lorry agrees to chauffeur around the groom and underage bride from the human trafficking hypothetical, she expresses her moral indifference to the bride’s plight. Someone with a genuine objection to human trafficking would not agree to ferry this couple to the altar, even if refusing meant losing a day’s pay. Reading Lorry’s moral indifference from her chauffeuring does not require that Lorry say anything at all; it does not even require that Lorry intend to be communicating anything through her driving. We are in general licensed to make inferences regarding individuals’ moral characters on the basis of what they do. Our actions are already expressive of our deep commitments.

In short, because of the pain that acting against conscience can inflict, and because of the ways in which acting against conscience might subject us to others’ reprobation, we have reason to treat individuals’ complicity claims as morally serious. I defer an exploration of the implications of that treatment to Part IV. First, it will make sense to determine whether the commercial context should influence just how seriously we take these claims.

III. COMPLICITY IN THE MARKET

Those who are opposed to exemptions for businesses whose owners want no part in same-sex marriage advance a second rationale for rejecting the wedding vendors’ complicity claims. On this rationale, it matters little whether the wedding vendor bears the kind of connection that would, outside of the marketplace, render him complicit, for the marketplace is a conscience-free zone. One engages in market transactions with one and only principle – self-interest, narrowly construed. Beyond a very basic set of moral rules aimed at ensuring property rights and fair play, morality has no place. The market “is the archetype of the profane.” Relying on this conception, Colorado argues in Masterpiece that freedom of expressive

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81 Cf. United States v. O’Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968) (rejecting the “view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).
82 See supra text accompanying note ____
83 Cf. Arpaly, Sartre, Velleman.
85 See infra note ____.
association, which does permit some discrimination in non-profit organizations,\(^{87}\) is of no avail for “clearly commercial entities.”\(^{88}\)

This morally neutered conception of the market is not new to Masterpiece and the other wedding vendor challenges. In Hobby Lobby, the Court contended with the claim that for-profit corporations had no conscience rights because “the purpose of such corporations is simply to make money.”\(^{89}\) That claim could be found in the remarks of some commentators, lower courts, and Justice Ginsburg in dissent, who all subscribed to the thought – generally the calling-card of efficiency theorists\(^ {90}\) – that businesses have one and only one purpose, to maximize profits.\(^ {91}\)


88 Respondent Colorado’s brief at 31, http://www.scotusblog.com/wp-content/uploads/2017/11/16-11bs-ccrc.pdf (quoting Dale, 530 U.S. at 657). See also Brief for Respondents Craig and Mullins at 14-15 (detailing the Court’s historic refusal to allow retail entities to discriminate, no matter the source of the discriminatory motive (religion, freedom of association, etc.)).

89 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770 (2014). The Court’s opinion refutes this claim by rehearsing the various conscientious initiatives businesses undertake, oftentimes at a financial cost. Id. at 2771 & n.24.

90 As Milton Friedman, the Chicago economist famously wrote, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase profits . . . .” MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2002) (internal quotation marks omitted). This view has been championed by many a law and economics scholar, to the point where Henry Hansmann and Reiner Kraakman could triumphantly declare that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.” Henry Hansmann & Reiner Kraakman, The End of History for Corporate Law, 89 GEO. L.J. 439, 439 (2001). For an overview of the scholarly ascendancy of Friedman’s position, see Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 MICH. L. REV. 1, 39 (2004).

91 While Friedman himself allowed that the law would and should constrain businesses, such that they “engage[,] in open and free competition without deception or fraud,” Milton Friedman, A Friedman Doctrine--The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970, at 124, some of his acolytes go even further than him, arguing that managers might evade regulatory laws if doing so would enhance profits, see, e.g., Frank H. Easterbrook & Daniel R. Fischel, Antitrust Suits by Targets of Tender Offers, 80 MICH. L. REV. 1155, 1168 n.36 (1982) (“Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm . . . We put to one side laws concerning violence or other acts thought to be malum in se.” (citations omitted)). For a trenchant critique of this position, see Robert W. Gordon, The Return of the Lawyer-Statesman?, 69 STAN. L. REV. 1731, 1746-50 (2017).

92 See, e.g., Elizabeth Sepper, Taking Conscience Seriously, 98 VA. L. REV. 1501, 1547 (2012) (arguing that “[w]ithin for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking”); Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013), rev’d and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (“We do not see how a for-profit artificial being, invisible, intangible, and existing only in contemplation of law, that was created to make money could exercise [ ] an inherently “human” right.”) (internal quotations omitted); Grote v. Sebelius, 708 F.3d 850, 857 (C.A.7 2013) (Rovner, J. dissenting) (“So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere”); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2796–97 (2014) (Ginsburg, J., dissenting) (“religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. ... for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate
itself has erected a distinction between expressive and commercial enterprises according to which profit-making cancels out important First Amendment freedoms. As Justice O'Connor put it in Roberts v. Jaycees, “Once [an association chooses to] enter[ ] the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.” The Court’s treatment of commercial speech, which typically receives less protection than political speech or art, also reflects a general suspicion about the capacity of the market to further First Amendment values. In short, and as Craig and Mullins argue, the Supreme Court “has never before recognized what the Bakery seeks here: a First Amendment exemption for a business from a generally applicable regulation of commercial conduct.”

It behooves us to consider why the Court has drawn the line it has, permitting discrimination for churches and non-profit religious organizations but not for for-profit businesses. Central to the explanation will, of course, be a concern to eradicate discrimination against protected classes in the marketplace. The justifications for public accommodations laws prohibiting discrimination could not be more compelling. To rehearse them briefly here, these laws prevent the material harms that exclusion would inflict – for example, the expense of time and money to locate a willing purveyor, or worse still the complete denial of certain goods and services. They also protect individuals from the dignitary harm of being turned away, [the] religious value[s] [shared by a community of believers].”) (internal citations omitted). For an excellent analysis demonstrating that, in Hobby Lobby, the Justices’ ideological positions shift, with the progressive dissenters championing a capitalist vision of the market as amoral, see Stolzenberg, supra note ____.


94 For a long time, commercial speech was taken to be outside the First Amendment. While commercial speech is often crass, self-serving, and obfuscating, it nonetheless can serve valuable social ends. Along these lines, consider, for example, “those who farm organically for moral and political reasons, from concern for the environment, the health of consumers, or the humane treatment of animals,” and who wish to convey this information so that similarly minded buyers can distinguish the organic and conventional products. Seana Shiffrin, Compelled Association, Morality, and Market Dynamics, 41 LOY. L.A. L. REV. 317, 322 (2007). And, indeed, something like this was just the rationale for one of the first cases where commercial speech was recognized as valuable and so worthy of some First Amendment protection was, Bigelow v. Virginia, 421 U.S. 809 (1975), where the advertisement in question provided women about health centers willing to provide abortions, along with contact information for a referral service. As the Court noted there, “[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.” 421 U.S. at 826.

95 Brief for Respondents Craig and Mullins at 16. Presumably, the Respondents do not view the contraceptive mandate, from which the Supreme Court granted Hobby Lobby an accommodation, as a “commercial regulation.”

and they express the state’s commitment to equality.97 Equal access has additional benefits for all – for example, it “make[s] available to the state [the] full productive capacities [of all individuals].”98 Finally, some states and commentators adduce a democracy-reinforcing rationale for their public accommodations laws,99 since citizens who find that they have been recruited into a society that does not offer them fair terms of cooperation might well disengage,100 or even turn to antisocial means of attaining the goods that the existing distribution has unfairly denied them.101

Notice however that the reasons for public accommodations laws lose none of their force if we abandon the exemption opponents’ vision of the market as morally neutered. We need not rule out the possibility, let alone the legitimacy, of conscientious commitments on the part of business owners in order to ensure the full operation of public accommodation laws. To see this, consider first that many of the moral commitments market players seek to enact are compatible with and even sometimes supportive of the egalitarian and dignitary goals of public accommodations laws. When a store owner declines to sell anything but fair trade goods, or offers to pay well above minimum wage for what would typically be a minimum-wage position, cutting in to her own profit margins as a result, she is enacting commitments at least consonant with those underpinning public accommodations laws.

Second, recognizing that business owners bring their consciences to work need not pose a decisive threat to public accommodations laws, even if their conscientious commitments dictate that they not serve individuals with protected characteristics. It is one thing to acknowledge that it is true and good that many business owners act conscientiously; it is entirely another to grant them exemptions from a legal requirement because their conscience demands it. And indeed, in Part IV, I argue that, notwithstanding the real and serious difficulties that public accommodations laws might impose on individuals of conscience, we should have an exemption-free regime.

But a morally neutered conception of the market is pernicious in its own right, and we should pause to consider why. That conception invites moral complacency if not worse.102 It presupposes an atomism that both licenses self-interest and also

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97 See, e.g., Sepper, supra note _____ at 664; Koppelman, supra note _____ [S. Cal. L. Rev.] at 627-28. 98 FLA. STAT. ANN. § 760.01 (West). See also Elizabeth Sepper, The Role of Religion in State Public Accommodations Laws, 60 ST. LOUIS U. L.J. 631, 664 & n. 162 (2016) (collecting other statutes with similar language). 99 See generally Sepper, supra note ____ (collecting statutes). 100 Cf. Iris Marion Young, Political Responsibility and Structural Injustice, https://www.bc.edu/content/dam/files/schools/cas_sites/sociology/pdf/PoliticalResponsibility.pdf. 101 See, e.g., DANIEL HART AND JAMES YOUNISS, RENEWING DEMOCRACY IN YOUNG AMERICA (2017). 102 Cf. Seana Shiffrin, Compelled Association, Morality, and Market Dynamics, 41 LOY. L.A. L. REV. 317, 325 (2007) (“I’m not sure it is wise or desirable to adopt a theory that if publicly known, accepted, and implemented would not only treat market actors as amoral, but would encourage market actors—whether producers, advertisers, or consumers—to adopt this as a self-conception (that is, to think of themselves as amoral, apolitical agents.”).
overlooks much moralized market activity. Take, for example, Ann Verrill, a Portland, Maine, restauranteur who, in the aftermath of the Orlando nightclub killings, posted a message on Facebook stating that individuals who owned assault rifles of the kind used in the massacre were not welcome at her restaurant. Or again, consider that the clothing company Patagonia imposes an “Earth tax” on itself, donating a portion of its revenues in the form of grants for environmental activism, because, “[a]s a company that uses resources and produces waste, [they] recognize [their] impact on the environment and feel a responsibility to give back.”

Most relevant here, this conception may lead us to misconstrue the reason for which we have public accommodations laws in the first instance. We can conceive of businesses as rapacious and amoral, and public accommodations laws as a necessary corrective. On that conception, businesses may well live down to our expectations. Or we can conceive of businesses as sensitive and oftentimes responsive to moral considerations, driven to forego maximal profit or even sometimes to incur losses for the sake of some moral objective. On the latter view – perhaps more aspirational than descriptive, but not without some exemplars – public accommodations law could then be seen as a backstop for the business bad apples; or again, they might be seen as continuous with the ethos that underpins the good business itself.

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103 See generally Ronald K.L. Collins, Pissing in the Snow: A Cultural Approach to the First Amendment Carnival Culture: The Trashing of Taste in America. by James B. Twitchell. New York: Columbia University Press. 1992. 306 Pp. $24.95., 45 STAN. L. REV. 783, 806 (1993) (recounting how the profit motive has eviscerated the discourse that the First Amendment was designed to protect, replacing it with “mass media” in the most literal sense of that term). There may be much truth in a critique like Collins’s but it is also bleakly cynical, and so perhaps overly apologetic.


106 Cf. Robin West, The Zealous Advocacy of Justice in A Less Than Ideal Legal World, 51 STAN. L. REV. 973, 974 (1999) (“justice is not going to be the miraculous product of a system in which none of the actors are required to pursue it.”).

107 See supra note [Verrill, Patagonia].

108 There is some thought that businesses are of necessity maximally profit-driven, not only because their survival requires as much, see Baker, supra note ____ at ____, but also as a matter of fiduciary obligation to their shareholders, see, e.g., Jonathan R. Macey, An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, 21 STETSON L. REV. 23, 23 (1991) (stating that corporations and their directors “owe fiduciary duties to shareholders and to shareholders alone”). But the view that managers must run the firm exclusively, or even primarily, in the interests of shareholders is contestable. See, e.g., Lynn A. Stout, Bad and Not-so-Bad Arguments for Shareholder Primacy, 75 S. CAL. L. REV. 1190, 1190–92 (2002). Moreover,
Call the conception of business advanced here “business-with-integrity.” While that model acknowledges and celebrates morally responsive business practices, it is not meant to sound market triumphalism. Conscientious business, at least as it is currently instantiated, will hardly cure capitalist markets of their unfair distributive consequences; the pressures they impose to produce too much, too cheaply, wreaking too much harm on the environment; or most of the other ills for which they are rightly criticized. Still, there is no point in denying that businesses can and sometimes do do good. The morally neutered view of the market that exemption opponents advance is not necessarily accurate, certainly not unavoidable, and perhaps not even helpful to the progressive egalitarian agenda. At the very least, it is not helpful if one wants to take the complicity claims of wedding vendors seriously, even if one ultimately thinks the state should not heed them.

IV. THE MARKET AS AN EXEMPTION-FREE ZONE

Up to this point, I have been arguing that wedding vendors’ complicity claims should command our recognition and perhaps even our compassion. And I have argued that conscience has a proper role to play in the market. But I have not yet said anything about how these exercises of conscience should fare relative to anti-discrimination laws. I argue here that none of them warrants so much respect as to justify an exemption from anti-discrimination laws.

To begin, it is worth noting that every exemption is an accommodation that recruits the community in promoting the personal commitments of the exempted party. Exemptions confer two benefits. First, they release the exempted party from one of his political obligations. The rest of us must continue to obey the law, even if many of us might prefer not to. Second, the exemption may impose material costs on others. For example, if the government must subsidize contraception from its own coffers to cover the contributions of an employer who has been exempted from the contraceptive mandate, that may translate into an increased tax burden for the rest of us. Further, some exemptions impose costs on discrete individuals additional to those that the community as a whole might incur. For example, exemptions from the contraceptive mandate in the wake of Hobby Lobby imposed temporary out-of-pocket costs on female plan beneficiaries. The typical exemption case – e.g., from the draft, or Sunday Sabbath laws, or compulsory education -- should then involve a balancing test, weighing the burden of compliance with the challenged legal requirement against the strength of the obligation to obey laws of that kind and also

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even if true, the assumption that shareholders themselves care only about profits reproduces the same presumptions about amorality that the conception of morally-inflected business practices advanced here aims to displace.

109 See Seana Shiffrin, Speech Matters: On Lying, Morality and the Law 158 (2015) (defining accommodations as “social practices in which we absorb the costs of others’ free and morally relevant choices in order to acknowledge, create room for, lift barriers to, facilitate, or convey a message about their choices”).

110 See Tebbe, Schragger and Schwartzman, supra note ______.
the costs that an exemption would inflict on discrete third parties.111 But where the conscientious objector seeks an exemption from an anti-discrimination law, balancing has no place; the state should categorically refuse.

This is because the logic of anti-discrimination protections cannot sustain exceptions. Again, these protections convey that, in the public sphere, discrimination is categorically wrong. The Court in *Hobby Lobby* recognized as much when it said “there could be no alternative prohibitions on racial discrimination, which were precisely tailored to achieve th[e] critical goal [of eradicating racism].” In other words, the state cannot have a society wherein there is no racism if it sometimes permits racism. The same holds true for discrimination against members of other protected groups.

Anti-discrimination laws aim at equality. But equality can be cashed out in different ways. A regime in which everyone is entitled to turn others away on the basis of genuine and deeply held conscientious convictions enshrines a version of equality too: Each of us is equally empowered to exercise her conscience as she sees fit, which means, in particular, that each of us is equally empowered to decide, on the basis of conscience, whom she will or will not serve. Indeed, much current public accommodations law already operates in just this way, as we have seen.112

I think that there are at least three reasons to prefer a no-exemption regime to one that allows for conscientious refusals to serve members of protected classes. First, a regime permitting conscientious exemptions risks creating minority oppression. It would be one thing if the conscientious commitments in question were idiosyncratic and distributed randomly across the population. For example, the bar on that corner won’t serve Eagles fans; the bar on this corner won’t serve lawyers; and that bar over there won’t serve individuals with curly hair. Many people would then face occasional denials of service but these would feel arbitrary and so not stigmatizing. But if we allow people to deny service to members of protected classes we can expect that many will, and the aggregate effect will be to create or reinforce stigma. Indeed, it is just to prevent this outcome that we have protected classes.

Second, even setting apart concerns about stigma, a regime allowing for exemptions is a regime courting balkanization. Our world would devolve into a series of segregated enclaves, where each of us interacts only with others who share our beliefs, or our lifestyles, or our family values, or our race, religion, ethnicity, etc. There is perhaps something comfortable about that world but there is also something troubling about it: For one thing, it prompts us to reduce people to the traits we don’t like about them. The relevant fact about Charlie Craig is his sexual

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111 This is a gloss on Sepinwall, *supra* note ____ (arguing that current religious accommodations doctrine does not adequately attend to third-party costs and the doctrine should be revised such that it does) and Amy Sepinwall, *Complicitous Compliance* (draft manuscript on file with author). For other work urging more serious attention to third parties, see Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 Drake L Rev 433, 470-74 (2014).

112 See *supra* note ____ and accompanying text [Verrill].
orientation, not his job, his hobbies, the fact that he brought his mother to the bakery to help him select a wedding cake. By contrast, compelled service might weaken some of the existing divisions. Thus, interacting with Craig, rather than turning him away, might have allowed Phillips to see Craig more fully, in ways that would humanize him in Phillips’s eyes (and vice versa for the salutary effects that interacting with Phillips might have had for Craig). And, where the consideration separating vendor and customer is political or ideological, compelled interaction might have the further effect of enhancing each side’s understanding of the other, through the dialogue that ensues.

Finally, we should recognize that a refusal of service has a different meaning than a government requirement to serve. Phillips’s refusal can legitimately be read as an expression of contempt – and, for the reasons above, contempt not just for Craig and Mullins’s choice to marry but for who they fundamentally are (marriage being central to a reasonable conception of the good life). On the other hand, if the government compels Phillips to provide service, the government does convey that it privileges equality over religious freedom. But I suspect that the expressive sting is less acute. For one thing, there is something especially confronting about having another person tell you, to your face, that you are not the kind of person he will serve. For another, Phillips can broadcast his opposition to same-sex marriage in other ways, including communicating it directly to Craig and Mullins. But if Phillips has a right to eject gay couples from his store (which would follow if the law permitted him to deny service) they will not have a similar opportunity to preserve their sense of self. And what at any rate could they say?

One last thought on the need for an absolute no-exemption regime. Some have suggested that we should be more open to conscientious exemptions in markets where the person who would be turned away could readily find another business to serve him. I think this is wrongheaded. As Joseph Singer writes, “The idea that one can ‘just go elsewhere’ misses the point entirely. The question is not whether one can find a store willing to let you in and treat you with dignity. The question is whether

113 Cf. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (noting the “centrality of marriage to the human condition” and stating that “marriage is essential to our most profound hopes and aspirations”).
114 See, e.g., Heart of Atlanta Motel, 379 U.S. at 250 (stating that public accommodations laws “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”) (internal quotation marks omitted); Runyon, 427 U.S. at 179 (antidiscrimination laws “guarantee that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man”).
115 Sensitive to the sting of being turned away, Douglas Laycock has proposed “a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.” Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 198-99 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008). To the extent that the proposal would normalize opposition to same-sex marriage (which, for many, is tantamount to opposition to same-sex individuals), it is hard to see how the proposal would not wage a dignitary harm at least as severe.
116 See, e.g., Epstein, supra note ____.
one has a right to enter stores without worrying about such things.”

Every refusal of service is a “humiliation,” an assault on the “dignity” of the person turned away. Let there be plentiful alternatives; the wrong of refusal is in no way diminished.

V. HATE HAS NO HOME HERE

As we saw in Part III, some commentators, in their efforts to secure public accommodations laws from bids for exemptions, deny that complicity or ideological commitments have any traction in the marketplace. Once a storeowner hangs out his shingle, he must accept all who are willing and able to pay for his services. Period. This Part pushes back against this no-refusal policy and indeed champions the business owner’s right to deny service where the denial is not predicated on the would-be customer’s protected characteristics. In particular, this Part aims to protect storeowners from having to do business with those who promote hate or oppression, even when that hate or oppression is mandated by religion.

A. “We’ll Not Discriminate Great from Small” But Hate is Another Story

Recall the hypothetical around underage marriage presented in the Introduction. To flesh it out further, imagine one Mrs. Lovett, of Mrs. Lovett’s Pies and Cakes, who is approached by an elderly distinguished man and young woman and asked to bake a cake for their upcoming nuptials. In conversation, it comes out that the man, Judge Turpin, adopted his bride to be, Joanna, who is now 15, when she was just a toddler.

When Judge Turpin leaves the room, Joanna confesses that she has no romantic feelings for her father but she is consigned to go ahead with the marriage as she believes that her father knows best, and at any rate their religion

118 See Heart of Atlanta Motel, 379 U.S. at 292 (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . .” (internal quotation marks omitted)).
119 Roberts, 468 U.S. at 625.
120 The line is borrowed from Sweeney Todd’s “Have a Little Priest,” in which Mrs. Lovett, who figures prominently in this Part, describes her unconventional business plan. Stephen Sondheim (lyrics and music).
121 Those familiar with Thomas Preskett Prest’s Penny Dreadful novel, The String of Pearls (1846), or its contemporary adaptation as Sweeney Todd, The Demon Barber of Fleet Street by Christopher Bond (1973) (play) and then Stephen Sondheim, Hugh Wheeler and Patrick Quentin (1979) (musical), will recognize the characters’ names and the rough modification of the storyline for purposes of the hypothetical. Readers may assume that no human beings are harmed in the making of any of the pies or cakes of the Mrs. Lovett who appears here.
encourages girls to get married before age 16, to men who have already established themselves in the community.  

Mrs. Lovett, appalled at the thought of underage marriage, tells the couple that the law will permit no such thing, and she cannot possibly furnish a cake for an illegal marriage. But Mrs. Lovett is wrong, as Judge Turpin informs her: Currently, 25 states have no minimum marriage age. Another 8 states set the minimum age of consent at lower than 16. In all but three states, there are exceptions to the minimum marriageable age—typically, so long as the couple can obtain the approval of a judge or the underage party’s parents. Judge Turpin and Joanna’s marriage fits within the legal parameters. In addition, because their religion dictates unions of this kind, the state would be especially loath to intervene. Mrs. Lovett nonetheless refuses to supply the cake, citing her conscientious objection to underage marriage. Mrs. Lovett’s bakery is a public accommodation and, like Mr. Phillips, she lives in the state of Colorado, which prohibits discrimination in public accommodations on the basis of religion. Must Mrs. Lovett, like Mr. Phillips, set aside conscience and provide the cake?

Notice a parallel between Mrs. Lovett’s and Mr. Phillips’s opposition to providing service. Both respond to the nature of the marriage that is to be celebrated: Mrs. Lovett opposes underage marriage and Mr. Phillips opposes same-sex marriage. Mrs. Lovett might well contend that she would bake just about any celebration cake for members of Judge Turpin’s religious community; it is just that

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122 See, e.g., Carol Kuruvilla, In Some Evangelical Circles, Grown Men Pursuing Teens Isn’t All That Unusual, Huff. Post, Nov. 14, 2017, https://www.huffingtonpost.com/entry/roy-moore-evangelicalism_us_5a05f4f8e4b0e37d2f37573d (“young marriage is encouraged in some Christian communities because marrying young reduces the chance of people having sex outside of marriage, and increases the possibility of having more children. (These communities don’t have a monopoly on encouraging young marriage for religious reasons, of course; the same thing can be found in certain Jewish and Muslim traditions).”). Cf. Julia Zauzmer, Roy Moore allegations prompt reflections on fundamentalist culture in which some Christian men date teens, WASH. POST, Nov. 13, 2017. But cf. id. (“Randy Brinson, an influential evangelical pastor who ran against Moore in his primary race in this election, said that the evangelical Christians he knows in Alabama would generally not approve of [ ] a relationship [between a 31-year-old man and a 14-year-old girl]).


124 See, e.g., Ira C. Lupu, Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 NW. J. L. & SOC. POL’Y 274, 285 (2010) (“if the relevant religious community has norms with respect to who may marry within its traditions—and virtually all traditions have such norms—the state is disabled from substituting its judgment for that of the faith community on the content of those religious norms.”).

125 COLO. REV. STAT. § 24-34-601(1).
she does not want to be contributing to an underage marriage. In a similar vein, Mr. Phillips, along with other vendors who oppose gay marriage,\textsuperscript{126} has endeavored to argue that his refusal is not directed at gay or lesbian individuals; he would bake cakes, say, for a gay person’s birthday, but not for a same-sex marriage.\textsuperscript{127}

How ought the law to respond to the claims of these bakers? On its face, it looks to be difficult to distinguish the two. Nonetheless this Section aims to argue that Mrs. Lovett may turn Judge Turpin and his underage bride away even while Mr. Phillips may not refuse to provide cakes for gay weddings.

To begin, consider a real-life counterpart to \textit{Masterpiece}. In an effort to create a “gotcha” moment, a fundamentalist Christian sought to order two cakes from another Colorado bakeshop, Azucar Bakery. The first such cake was to have the image of an X-ed out gay couple and the second was to contain a biblical verse decrying homosexuality.\textsuperscript{128} When the owner of Azucar, Marjorie Silva, refused to provide either cake, the customer filed a complaint with the Colorado Civil Rights Commission. The Commission held that Azucar did not violate Colorado’s public accommodations law in refusing because Silva would not have supplied anti-gay cakes to anyone; her refusal was predicated on the nature of the cake that was sought, not the identity of the customer seeking it.\textsuperscript{129} Others on both sides of the issue have endorsed the distinction between the product and the person where the product is understood not generically – e.g., a wedding cake – but instead in light of the particular message it would contain.\textsuperscript{130}

\textsuperscript{126} See, e.g., Barronelle Stutzman, \textit{Why a friend is suing me: the Arlene’s Flowers story}, \textit{Seattle Times}, Nov. 9, 2015.

\textsuperscript{127} Alex Swoyer, \textit{Supreme Court case on same-sex wedding cakes: Artistic expression vs. civil rights}, \textit{Wash. Times}, Nov. 28, 2017.


\textsuperscript{130} For exemption opponents who insist on this distinction, see, for example Corvino, supra note \textsuperscript{129} (“Therein lies the crucial difference between the cases: [Silva’s] objection was about what she sold; a design-based objection. Phillips’s objection was about to whom it was sold; a user-based objection.”); Garrett Epps, \textit{Public Accommodations and Private Discrimination}, \textit{The Atlantic}, April 14, 2015, https://www.theatlantic.com/politics/archive/2015/04/public-accommodations-and-private-discrimination/390435/ (“a halal butcher shop, for example, would not be “discriminating” against anyone by not selling pork chops. Discrimination against \textit{customers} is forbidden; discrimination against meat products, not so much.”). Brief for Respondents Craig and Mullins at 27 (“While the bakeries that turned down Mr. Jack refused to sell him a product they would not have sold to anyone, the Bakery here refused to sell Mr. Mullins and Mr. Craig a cake that it would have sold to any heterosexual couple. That is discrimination on the basis of a protected characteristic….”). For an exemption supporter who agrees with the person/product distinction, see Vincent Natale, \textit{As A Gay Man, I Support Bakers Refusing To Decorate Gay Wedding Cakes. The Left Should, Too}, \textit{Indep. J. Rev.},
It is not clear, however, that the distinction between a particular product and the person who would buy it is stable or desirable. For one thing, it is often difficult to locate the requisite line. Does the religious window dresser who creates displays for heterosexual sex shops but refuses to create a display for a gay sex shop discriminate on the basis of the product or the person? If it seems far-fetched to think that there could be a “gay sex shop” as opposed to a sex shop catering to gay customers, consider the website misterbandb.com, which bills itself as renting “gay rooms” or “gay B and Bs.” See www.misterbandb.com. Apparently, then, “gay” can be a qualifier for a person or a product.

At any rate, even if there were a clear-cut distinction between the product and the person, one might well have sympathy for a vendor’s interest in refusing service on the basis of the identity of the putative customer, rather than the product he desires. An African-American baker might have reason to deny service to a known member of the Ku Klux Klan (KKK) even if the KKK member wants a generic cake, because the cake will be used at an event celebrating KKK activities. So even if the person/product distinction is a feasible one to draw, it may not track the distinction we want to draw as a moral matter.

A better strategy would pick up on a morally relevant asymmetry between the commission Silva, of Azucar Bakery, received and Phillips’s. William Jack, the fundamentalist Christian customer whom Silva turned away, sought a cake with a message communicating animus toward gays and lesbians. The cake Craig and Mullins sought from Phillips, by contrast, did not convey a message whose aim was to denigrate religion. Craig and Mullins wanted a cake celebrating their marriage. One can imagine that they hoped the baker who baked this cake would feel good, or at least neutral, about contributing to their celebration. But they did not seek out Phillips with an eye to challenging his practices or harassing him because of his identity or beliefs. So Craig and Mullins’s commission was not a true counterpart to William Jack’s. The true counterpart to the cake Silva was asked to bake would instead have been a cake with one or more religious figures X-ed out, or a cake with a message from a venerated source decrying religion or religious individuals.

Recognizing the distinction between a commission that unintentionally evokes a conscientious objection and one that is designed to provoke such an
objection points the way to a defensible distinction between Mr. Phillips and Mrs. Lovett: Commercial enterprises may, in the spirit of “hate has no home here,” refuse commissions communicating hate. Indeed, Marjorie Silva, the baker who refused to supply the cakes with anti-gay biblical language, described her reasoning in just this way: “If [a customer] wants to hate people, he can hate them not here in my bakery.”

How would this work? Consider a case involving hate promotion by someone who is not a member of a protected class – for example, a Neo-Nazi who approaches an African American baker to order a cake denigrating African Americans for an upcoming Neo-Nazi convention. Now consider the distribution of entitlements. The state cannot, consistent with the First Amendment, prohibit Neo-Nazis from undertaking their activities, however hostile to minority races and minority religions those activities may be. At the same time, the baker enjoys robust property rights. Among these is the right to deny service, for any reason, to anyone who is not a member of a protected class. In virtually every jurisdiction, Neo-Nazis would not

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133 The academics filing an amicus brief as Freedom of Speech Scholars might allow for something along these lines. They write, “serious constitutional questions would be raised if Colorado’s statute compelled a baker to affix an offensive message to a cake he or she was asked to bake. But then it would be the message affixed to the cake, rather than the cake itself, that was expressive.” It is possible that on their way of thinking it is the offensiveness that especially, or perhaps even exclusively, would allow the baker to deny service. But I suspect that the thought is broader. Elsewhere, they tentatively suggest that the Court could hold that “poets, singers, musicians, photographers, and painters for hire... must offer their services on a non-discriminatory basis, but they cannot be compelled to produce messages to which they are ideologically opposed.” So it is not just messages conveying hate that the poet-for-hire could oppose, but any message that the poet would reject as an ideological matter (e.g., an elegy for gas-guzzling cars). Two thoughts in response: The reason to protect the poet from that commission is because he would not want to lend his energies, environmentalist that he is, to glorifying gas-guzzling cars. But a vendor who is no less committed to the environment but whose line of work is not expressive surely has as much reason to want to protect herself from having to lend her energies to the glorification of gas guzzlers. (Assume she owns a body shop and restores old cars but not in ways that would reasonably count as artistry.) This is not to deny that the nature of artistic creation might lend itself to more autonomous modes of production, attuning the artist to her work, whereas other kinds of labor might be performed mindlessly. As such, the artist might have a harder time dissociating than would the unskilled laborer. Still, the better line to draw might arise not with regard to whether the commission involves an articulable message but instead with regard to whether the artist is one who has in fact put herself out for-hire. Any artist might sell her work; some artists may be so successful that their art can be their sole source of income. And any artist might accept a commission. But a commercial artist invites commissions; she holds herself out in the market to produce work whose content others dictate. She forsakes some amount of creative control. In doing so, we might hold that she has no more (or less) right than any other vendor to refuse service. But to the extent she may turn people away it is not because of the special communicative or creative nature of her contributions but because of the commercial nature of her work. By contrast, the fine artist might accept the occasional commission but he has forsaken the ready access to customers in exchange for retaining full artistic control. It is in this sense that he does not hold himself out as “for-hire.”

134 See Gathright and Lupher, supra note ____.

135 See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (vindicating the right of the KKK to hold events promoting hate so long as those events did not prompt “imminent lawless action”).
count as members of a protected class. So the African American baker is free to refuse to provide the Neo-Nazi a cake for the Neo-Nazi convention. Indeed, he is free to refuse to provide the cake for any purpose or event at all (e.g., the Neo-Nazi kid’s birthday party).

Two things to note here. First, the result would be the same if the requested cake contained no message at all. The baker could reasonably see himself as promoting hate were he to contribute any baked goods to a Neo-Nazi convention, regardless of whether the baked goods said anything. Second, the right in question could be exercised by any baker, of any skin color, race, ethnicity, and so on. Everyone has the right to refuse to promote hate.

The Neo-Nazi case is an easy one. But suppose now that our Neo-Nazi is replaced by an adherent of Christian Identity, a KKK group that subscribes to “a unique anti-Semitic and racist theology.” For this KKK member, hate is mandated by his religion. And suppose further that this KKK member approaches the same African-American baker, this time requesting a generic cake for a Christian Identity KKK event. This looks to pose a problem for the baker’s ability to oppose the commission. Would turning the KKK member away constitute impermissible discrimination on the basis of religion?

At this point, we need a fuller statement of the baker’s property rights. Those rights are constrained at the outset by the Constitution. By contrast, state public accommodations laws that extend or enhance what the Constitution requires are an after-the-fact add-on. Perhaps tendentiously, we can then conceive of the enhanced protections state public accommodations laws afford as a kind of right, but contingent upon state prerogative. That is, public accommodations laws confer a right to service upon a set of individuals, because those individuals possess characteristics that the state has judged worthy of protection. But the state is at liberty to decide just what those characteristics are. (Indeed, the state might judge no characteristic worthy of protection, which is just what Mississippi has done.) This is in contrast to everyone who is not a member of a constitutionally or state-designated protected class; for each such person, the store owner retains his right to

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136 Seattle’s public accommodations law is unusual insofar as it includes “political ideology” among the impermissible grounds of discrimination in places of public accommodation. See https://www.seattle.gov/civilrights/civil-rights. To the extent that Neo-Nazism constitutes a political ideology, our baker might be out of luck in Seattle. Elsewhere, he is free to turn the Neo-Nazi away. For an exhaustive list of public accommodations statutes extending beyond the traditional suspect classes, see Elizabeth Sepper, The Role of Religion in State Public Accommodations Laws, 60 St. Louis U. L.J. 631, 639 & n. 25 (2016).


138 MISS. CODE ANN. § 97-23-17 (2017). See also Joseph William Singer, We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B.U. L. Rev. 929, 933 (2015) (“To this day, Mississippi has a statute that gives all businesses the right to choose their customers at will.”). For a penetrating critique of this statute, see id.
exclude. Where he does serve someone who is not a member of a protected class, that is because he has chosen not to exercise his right to exclude, thereby conferring upon this customer a permission. The commonly displayed signs stating that “We reserve the right to refuse service” are inaccurate as a matter of law but they do capture the ethos that I mean to underscore here: Store owners generally enjoy the right to exclude. (I will defend this conceptualization of the respective entitlements in the next section.).

What are the constraints on that general right to exclude? The Constitution’s equality guarantees, as interpreted by the Court and codified in the Civil Rights Acts, tend to be far more limited than what many states afford. Most relevant here, LGBT individuals do not constitute a protected class for purposes of federal public accommodations law. (By contrast, about half of the states include provisions prohibiting discrimination on the basis of sexual orientation.) Further, Title II of the Civil Rights Act, which covers places of public accommodation, does not include retail establishments like bakeries and flower shops and clothing stores, and there is generally no conflict between these laws and the First or Fourteenth Amendments. Here too many states have gone beyond the floor set by federal law and adopted more capacious understandings of what constitutes a public accommodation, applying their anti-discrimination provisions not only to businesses plausibly connected to interstate travel and commerce (paradigmatically, hotels and restaurants) but to all retail establishments.

Our African-American baker’s store is in a state where retail establishments like bakeries may not deny service on the basis of religion. What to do about the Christian Identity KKK commission, then? One thought would be to have the baker insist that he is not denying service because of the KKK member’s religion but instead because of the event at which the KKK member would serve the cake – again, a KKK convention. But that looks to put us in a bind when it comes to Masterpiece. For Phillips too sought to argue that he was not denying service to Craig and Mullins because of their sexual orientation but instead because of the event at which they would have served the cake – a celebration of their (same-sex) marriage. Happily,

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39 See Wesley N. Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L. J. 16, 44 (1913) (“A license is merely a permission to do an act which, without such permission, would amount to a trespass....”) (italics in original).
390 See, e.g., Ira C. Lupu, Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 NW. J. L. & SOC. POL’Y 274, 287 (2010) (“Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.”).
393 See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 572 (1995) (“Provisions like these [state public accommodations laws] are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”).
394 While Title II of the Civil Rights Act prohibits discrimination on the basis of religion, Title II does not apply to retail establishments like a bakery.
looks are deceiving. If the African American baker would have refused to supply a cake for a KKK event where the Klan in question did not have a religious affiliation or take inspiration from the Bible,\textsuperscript{145} then the baker can persuasively sustain the distinction he draws. Phillips cannot do the same because he does supply cakes for other marriage celebrations. Thus if the Christian Identity Klansman were to file a complaint with a state human rights body, alleging that the African American baker had discriminated against him on the basis of his religion, the baker could defend himself by pointing to his unwavering refusal to provide his goods for any hate-based events. And given the anti-discrimination mission of these bodies, they should be especially attuned and sympathetic to refusals of service predicated on the hate-based activities of those who were turned away where those activities target members of protected classes. Nor need we consign ourselves to hypotheticals here – this is just how Colorado ruled when it found that Silva, of Azucar Bakery, did not discriminate on the basis of religion when she refused to bake the cakes containing anti-gay messages.\textsuperscript{146}

To sum up so far: a store owner can refuse service to someone who is a member of a protected group, notwithstanding public accommodations laws guaranteeing access, if the store owner can establish that the ground for refusal was not connected to the protected characteristic. Further, state human rights commissions have reason to be especially attentive to denials of service grounded on the hate-based projects of the would-be customer, especially those where the hate is directed at one of the groups that the state public accommodations laws protect. In these cases, even though the store owner excludes, she is acting in a way that is continuous with the aims of the law that the human rights commission is empowered to enforce.

I want to take the further step of now of enlarging the understanding of hate that can serve as a predicate for refusing service. The relevant notion of hate should encompass not just events whose explicit aim is an assertion or celebration of the supremacy of one identity-based group relative to another but also those that have the effect of creating or perpetuating supremacy. Therein lie the seeds of Mrs. Lovett’s right to turn away Judge Turpin and his underage bride.

Underage marriage is a tool for the suppression of women. In the vast majority of these unions, the husband is an adult and the wife is underage. She is frequently below the age of consent so her consent is not sought; instead, as we have seen, a parent or judge will substitute his consent for hers. Even where a state does recognize her consent, we might worry that that consent is not meaningful, because of her youth. In many of these unions, the wife is young enough such that were her

\textsuperscript{145} The original Ku Klux Klan, formed during the Reconstruction Era, had its roots in a social club for Confederate veterans, with no professed religious allegiance at any time in its operation. See American Experience, Grant, Reconstruction, and the KKK, THE PRESIDENTS, http://www.pbs.org/wgbh/amex/grant/features/grant-kkk/.

husband to have had sex with her before they were married, he could have been charged with statutory rape. So the unconsented-to marriage transforms sexual assault into a non-offense. Further, in many states the wife – while deemed old enough to marry – is not yet old enough to retain a lawyer or represent herself in court in order to seek a divorce. It is not difficult to see how these arrangements would satisfy at least some definitions of domination.

One might contend that in many of these cases, the couple’s religion commands or at least encourages the marriage. Neither the couple nor the community views the marriage as an assertion of male supremacy, or at least not in the invidious way that the term generally tracks. While outsiders might construe it as oppressive – perhaps even as a form of female bondage -- that is not how the couple, or their community, views it.

It should not be surprising that the community views these marriages as benign. If the religion’s acknowledged purpose were instead, for example, to enslave the community’s female members, the state might well step in to prevent this form of religious exercise. But it is hardly fanciful or intolerant for someone who does not share the community’s beliefs to find underage marriage troubling.

The question then is whether the state may compel those who oppose underage marriage nonetheless to foster it, whether by contributing to underage weddings or in some other way. As with the African American baker and the KKK commission, the fact that the oppressive activity has a religious basis makes no difference to Mrs. Lovett’s rights. Mrs. Lovett can forswear selling cakes to any couple with an underage bride – were Jerry Lee Lewis to have entered her store requesting a cake for his upcoming nuptials to his 13-year-old fiancée, Mrs. Lovett would have refused him too. And if Judge Turpin, now betrothed to a 15-year-old boy, were to request a wedding cake from Jack Phillips, Phillips would be well within his rights to refuse the commission – so long as his refusal was based on the youth of the betrothed and not the sexual orientation of the couple.

With all that said, one might worry that the distinction between discriminating on the basis of a protected characteristic (impermissible) and discriminating against a member of a protected class for reasons unrelated to his protected characteristic (permissible, as I have argued) will be wildly subject to abuse. Most relevant here, Phillips could revert to the claim he has insisted upon all

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147 See, e.g., Nicholas Kristof, 11 Years Old, a Mom, and Pushed To Marry Her Rapist in Florida, N.Y. TIMES, May 26, 2017, https://www.nytimes.com/2017/05/26/opinion/sunday/it-was-forced-on-me-child-marriage-in-the-us.html


151 Cf. Reynolds v. United States, 98 U.S. 145, 166 (1878) (“if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?”).
along – that he refused Craig and Mullins not because of their sexual orientation but because of his particular, religiously-informed conception of marriage as a union between one man and one woman. The response to this claim must be the one that marriage equality supporters offer – that the equal status of members of the LGBTQ community entails equal recognition of their rights to marry, which entails equal access in the wedding marketplace.\textsuperscript{152} Refusing to provide for a same-sex marriage is like refusing to provide for a marriage between, say, two Black people – each refusal is part and parcel of an underlying set of discriminatory attitudes that the state may prohibit.

But suppose now that instead of aiming to posit the unsustainable distinction between sexual orientation and same-sex marriage, a cunning Phillips identifies some other ground of refusal, one with no apparent connection to sexual orientation. He might say, for example, that he turned a gay couple away because the cake they wanted offended his artistic sensibilities or contained a flavor combination he found appalling. Importantly, this ground of refusal cannot be pretextual. If the gay couple suspect that what really motivated Phillips’s refusal is his opposition to same-sex marriage, they can file a complaint with the Colorado Human Rights Commission, and the Commission is empowered to ascertain whether Phillips’s asserted grounds for refusing are in fact sincere. To that end, Phillips might have to show that he had never before or since created a cake similar to the one the couple wanted. And if Phillips wanted to deploy this strategy for each same-sex couple that entered his store, he might find his palette shrinking ever more and more. Moreover, as I have said, the Commission has reason to be solicitous where a vendor refuses to contribute to the hate-promoting project of the would-be customer, even when the hate or oppression is religiously mandated. No such solicitude arises for generic reasons to refuse (“their chosen flavor combination was appalling”) where the couple who would be turned away belongs to a protected class. In other words, the Commission can be especially searching in its efforts to ensure that the proffered reason is no mere pretext.

\textbf{B. Discrimination and the State}

At this point, it will make sense to address two additional features of the account that might appear problematic. First, the account is unapologetically enthusiastic about store owners’ rights of refusal so long as those rights are not exercised in response to a would-be customer’s protected characteristics. This aspect of the account yields results in the cases thus far that an egalitarian might approve but he or she might nonetheless prefer an account that allowed for no refusals of service on any basis (other than one that bore a substantial relationship to the nature of the business in question – no one could fault the baker who, say, refused to satisfy a request for a brisket if the bakery served no meat at all).\textsuperscript{153} More needs to be said in

\textsuperscript{152} See, \textit{e.g.}, Corvino, supra note \underline{____}.  
\textsuperscript{153} This is but one example of an eminently reasonable refusal. That the baker was already overwhelmed with other commissions, or was going to be on vacation at the time an order was
defense of the policy advocated here, which conceives of the protections of public accommodations laws as exceptions to what are otherwise robust rights of exclusion.

A second feature of the account that might stand in need of defense, or at least examination, is the role of the state. In cases, like the KKK or Judge Turpin case, where the ground of refusal – hate-promotion or oppression – is bound up with religious conviction, I argued that the store owner could overcome a charge of discrimination by convincing the body charged with enforcing a public accommodations law that the refusal was not based on religion itself. But one might then worry that this involves one or more forms of impermissible state action. I address each of these worries in turn.

1. More Property Rights!

In a fascinating discussion of the historic origins of public accommodations laws, Joseph Singer pits a “monopoly” explanation against a “holding-out” explanation. The former -- now ascendant -- holds that common carriers were bound to serve all-comers only because they enjoyed a monopoly; as such, no such duty accrues to businesses operating in a market where there are competitors. The latter explanation -- now forgotten, Singer writes -- grounds universal access in a moral duty: one who “puts out a sign” or holds himself out to the public as a business open for customers is bound to accept everyone; to do otherwise would be to succumb to “‘prejudices [] unworthy of our better manhood.” Singer explains further that the monopoly rationale has a dubious origin, propelled as it was by Lochnerian economic liberty and Jim Crow racism. And it is morally dubious to boot, insofar as it locates the wrong of discrimination in the inconvenience it imposes rather than the dignitary harm of being treated as if one is a member of a lower caste.

In place of the libertarian picture, under which businesses have unfettered rights to refuse in a competitive marketplace, Singer urges a return to the holding-out picture. On this picture, store owners cannot for any reason refuse anyone willing to accept the commercial offer the store extends. This picture ensures not

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66 Singer, supra note [Nw] at 1410. The holding-out notion is not completely absent from recent doctrine. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (“Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please.”).
68 It is not even clear that an unfettered right for stores to discriminate would pass constitutional muster. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 377 (1967) (holding that state constitutional amendment authorizing discrimination in housing on any basis is not merely private action; instead, it involves the state in such a way as to make the amendment a violation of 14th Amendment).
only that members of protected classes will be guaranteed service but so too anyone with the means and willingness to pay for the store’s goods and services. By contrast, on the “business-with-integrity” picture I articulated in Part III, discrimination against protected classes is still forbidden, but everyone else is a legitimate target of exclusion. A famous jazz pianist can abruptly end his Carnegie Hall concert just because an audience member yields to a coughing fit;¹⁵⁹ the Soup Nazi can send a waiting customer away because she violates one of his arbitrary, ever-changing and often impossible-to-meet rules;¹⁶⁰ and Duff Goldman (the Jewish celebrity t.v. baker) can refuse to serve a neo-Nazi who wants a cake for the annual White Supremacist gala. More generally, so long as business owners do not violate public accommodations laws, they are free to welcome or exclude whomever they would like.

Singer’s “holding-out” picture conforms to the morally deflated conception of the market I described in Part III. As I urged there, we should want business owners to see themselves as engaged in an enterprise that is morally continuous with other spheres; to argue that the marketplace neutralizes complicity is to give business owners a too ready free pass.

But Singer might put the distinction between the two pictures differently. He writes, “civil rights laws do not limit property rights. They define what property rights can exist in a free and democratic society. They establish the structural baseline, the infrastructure of a society that is committed to granting equal protection of the laws.”¹⁶¹ The holding-out picture would then make civil rights laws conceptually and normatively prior to property rights, whereas the “business-with-integrity” model views state public accommodations laws as super-imposed upon existing property entitlements. There is undoubtedly something appealing in Singer’s genealogy: it allows us to say to the person who insists that anti-discrimination laws violate her property rights that her property rights never included the right to discriminate in the first instance.¹⁶² But that rhetorical advantage has to be balanced against the practical upshot of conceiving of business property as a belated development, beholden to Singer’s structural baseline. And the most egalitarian understanding of that baseline would prohibit every refusal of service. As I have argued, compelled universal access might be morally troubling in its own right and perhaps detrimental to the aims of equality to boot.

¹⁶⁰ See, for example, Kaja Whitehouse, No Soup for You, N.Y. POST, Jun. 22, 2012, for a profile on the real “Soup Nazi.”
¹⁶² Singer’s key contemporary foil is perhaps Richard Epstein. See, e.g., Richard A. Epstein, Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right, 66 STAN. L. REV. 1241, 1290 (2014) (arguing that business owners should be permitted to discriminate so long as would-be customers can be served elsewhere).
Compelled universal access recruits store owners into supporting projects they – oftentimes rightly – have reason to oppose (such as legally authorized but morally troubling marriages to underage girls). And it deprives individuals of meaningful work lives. Work can already be alienating, in any number of ways, even if one is self-employed. Even the most enriching of jobs can come with its fair share of grunt work and tedium. Business realities might compel the person who owns her own store or restaurant to put up with conduct that she would not otherwise tolerate (berating customers, leering suppliers, hot-tempered talent in the kitchen, and so on). Why shouldn’t she want to deny her blood, sweat and tears to individuals or endeavors she has reason to oppose? To be sure, many individuals lack the kind of workplace autonomy that would allow them to choose their clientele. This may well be a problem in its own right. But for those who do enjoy such autonomy, it seems desirable to allow them to exercise it.

With that said, the business-as-integrity picture does not rule out public accommodations that guarantee service to members of protected classes. We can join Singer in recognizing that no one should be treated as a “member of a lower caste” and still leave room for refusing service to people not on the basis of their “caste” – their protected characteristics, or identity-based features – but instead on the basis of the ways in which they do or would wrong others. If anything, we might see refusals that respond to the hate of putative customers as reinforcing identity-based anti-discrimination laws rather than undermining them.

2. Less State Action!

On the business-with-integrity picture, business owners may refuse service so long as they are not responding to a would-be customer’s protected characteristics. Where the person who is turned away is a member of a protected class, however, the business owner might be called upon to defend her refusal, by demonstrating that she refused service on some basis not related to the protected characteristic. If a state human rights’ body sustains the business owner’s refusal, should we worry about undue state involvement in discrimination?

The worry might take two forms. First, if the state sustains the store-owner, it effectively releases her from the requirements of a public accommodations law for the sake of protecting the owner’s conscience. Why should the state prefer the baker’s convictions to those of the religious customer? Second, I have also suggested that the body charged with enforcing a public accommodations law might be especially receptive, or even deferential, to refusals of service predicated on hate. This might look to implicate state action in a different way, to the extent that it involves impermissible viewpoint discrimination.

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To begin with the apparent conflict of consciences, let us revert back to the case involving the Neo-Nazi, whose white supremacy is not rooted in religion, and then draw out a necessary parallel between the two cases. The Neo-Nazi might contest the refusal of service, on the ground that his white supremacy reflects his deepest convictions. Even if he lives in a jurisdiction with no protections for ideology (and most jurisdictions do not include ideology among their protected characteristics),\footnote{See supra note _____ [Seattle].} he might nonetheless challenge the refusal, since it pits conscience against conscience. Whose conscience-based rights should the state prefer? There are several ways for the state to justify a finding in favor of the baker. First, the state can rely on the existing entitlements: where there are no protected characteristics at play, the baker may refuse anyone on any grounds. That the would-be customer will have his deep projects frustrated as a result of the refusal is of no moment since he does not have a right against others that they help advance those projects. Second, even if the human rights body were to approach the matter as one that genuinely did recruit the state in a contest between two conflicting conscientious commitments, the state would still have reason to support the baker: The Neo-Nazi patron would be asking the state to override the baker’s right of refusal for the sake of enacting a particular set of projects – one that the state has reason to find odious. In other words, the Neo-Nazi would be asking the state for a benefit in the furtherance of a project the state itself has no reason to support. The state is well within its rights to deny this benefit. Just as the state could revoke Bob Jones University’s tax-exempt status because of Bob Jones’s racist anti-miscegenation policies, so too the state can deny groups promoting hate or oppression other kinds of benefits to which these groups have no constitutional right. In particular, the state can refuse to override the baker’s right of refusal for the sake of furthering the Neo-Nazi’s project.

Now, return to the Christian Identity KKK case. Should the religious basis for the discriminatory project make a difference to the state’s disposal of the case? Should the state find for him as a result? An affirmative answer would, as others have argued, create an intolerable inequality between the Neo-Nazi and the KKK patrons. The state would be treating two parties engaged in the same conduct – the promotion of white supremacy, which the state has no reason to approve – differentially, favoring one party only because of his religion. One might see in this a violation of the Establishment Clause.\footnote{See, e.g., Frederick Mark Gedicks and Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv CR-CL L Rev 343, 356-72 (2014); Micah Schwartzman and Nelson Tebbe, Obamacare and Religion and Arguing off the Wall (Slate, Nov 26, 2013).} Or one might see in it a violation of a principle of “equal regard.”\footnote{Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1282-1306 (1994).} On either way of understanding what the state may permissibly do, it may not reach a result different from the result it reached in the Neo-Nazi case.
Notice that in both of these cases, the state acts in ways that promote some viewpoints and frustrate others. Is there impermissible viewpoint discrimination here, then? To motivate the question, let us shift retail entities – instead of a bakery, the Neo-Nazi or the Christian Identity KKK member seeks the services of a printing shop for purposes of producing leaflets he will distribute at a white supremacist rally. If the state protects the printing store owner’s right to refuse service, would this count as an undue state restriction on speech? To be sure, the state is not prohibiting the white supremacist speech; nor is the state mandating that printing shops refuse to publish white supremacist speech. But one might still worry that state action sustaining the rights of printing shops to refuse service because the printed material would express a particular set of viewpoints constitutes an impermissible restriction on speech. The state appears to be acting in a way that impairs dissemination of some viewpoints but not others. More specifically, one might worry about favoritism and one might worry about curating.

Does the state impermissibly favor the printer’s anti-white supremacy stance in finding that she has permissibly refused service? I do not think so. The state sustains her right to withhold her energies from promoting hate, but it does not do so because of the particular brand of hate she refuses to serve. So long as the state would have been just as willing to sustain the rights of a printer to withhold printing services from, say, a Black supremacist group, then it does not act in order to promote or impede particular viewpoints.

Still, in virtue of permitting printers to turn anyone away on ideological grounds, one might worry that the state is limiting the diversity of views made available for others’ consideration. A few thoughts in response. First, if this is a genuine and widely felt concern, citizens of the state can advocate to have “ideology” included as one of the categories that the state’s public accommodations law specifically protects. Second, even if the effect of these refusals is to reduce the variety of views citizens encounter, one could deny that state action produced this reduction in just the same way that the Court denies that there is state action in, say, school voucher cases. There, the claim is that the state does not impermissibly support religion even if it permits parents to use vouchers for religious school tuition since it is the parents themselves that have chosen the place of education for their children. By the same token, one could claim here that the state does not impermissibly restrict the number of ideological views on offer or the relative

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167 Cf. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006) (“One may also argue that the government must treat all viewpoints as equal in the eyes of the law, at least where private speech... is involved, because the government must remain subservient to, rather than dominant over, public opinion.”); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (“private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”).

168 “A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).
prominence of those views since it is the printers themselves who choose which views they will or will not publish.

V. CONCLUSION: LOVE WILL FIND A WAY

On the proposal that I have been advancing, businesses may not refuse service to members of protected classes, no matter the assault to conscience that compelled service might wage. But consistent with the sympathetic construction of complicity I sought to offer in Part II, and the business-as-integrity model I offered in Part III, I want here to propose that individuals in the market who unwittingly find themselves in the midst of the conscience wars forbear from turning to the law as their first resort. Instead, I want to suggest that on-the-ground civil discourse should be a first line of response. Thus, for example, the baker who opposes same-sex marriage can let the gay couple know that she will provide their wedding cake if they insist, consistent with her legal obligations. But she would ask that they release her from her obligations if they felt comfortable doing so.

Public accommodations laws confer a rhetorical advantage on the customers they protect. These customers cannot be ejected from a place of business simply on the basis of their possessing a protected characteristic. Privileged to stay, they might as well engage the owner who would otherwise turn them away in a civil dialogue. Thus, the gay couple would aim to make their request relatable and the business owner would have a chance to try to explain the ground of her discomfort or opposition. Hopefully these dialogues would produce a compromise or, at the very least, they might humanize the parties on each side. To be sure, the couple always retains the power to compel service or else file a legal complaint; the business owner will then have to identify a sincere basis for having refused service that does not advert to a protected characteristic. But again that power should function as a backstop. There is much more to be gained from efforts at compassionate engagement than civil rights bullying.