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Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples

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HALF-BAKED: THE DEMAND BY FOR-PROFIT BUSINESSES FOR RELIGIOUS EXEMPTIONS FROM SELLING TO SAME-SEX COUPLES

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Should bakers be required to make cakes for same-sex weddings? This Article unravels the eclectic arguments that are offered in support of a religious exemption from serving gay customers in the wake of Obergefell.

Preliminary issues first consider invocations of a libertarian right to exclude. Rather than being part of our concept of liberty, this right to exclude from commercial premises is a new rule devised to prevent African Americans from participating in free society. Instead of expanding this racist rule to likewise bar gays from the marketplace, it should be reset to the antebellum standard of free access to all public places of commerce. A second background strategy defends discrimination for conduct (like marriage) rather than status such as sexual orientation. This approach has found no positive reception in the courts because of the close relationship between same-sex marriage and the status of being homosexual.

The principle legal arguments consider first the free speech claim that cakes send unwilling messages of support for homosexuality. Although courts have rejected these defenses, the possibility of a coerced speech defense contextualized to the receiving audience and read against background social norms should be recognized. The marquee free exercise claim presents an even less likely chance of success, especially in states without a RFRA law. In jurisdictions that do have such a law, it is unclear how judges will assess the government's compelling interest to prevent sexual orientation discrimination. That analysis will involve a description of the harms threatening both sides of the conflict. While the injuries arising from the violation of sincerely held religious beliefs are to be assumed, the dignitary harms to the same-sex couple should not be mischaracterized and trivialized as a "minor inconvenience."

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I. INTRODUCTION

The religious right declared a culture war to preserve its dominance within American society,[1] and to the surprise of many suffered major setbacks. A watershed moment arrived with the U.S. Supreme Court's decision in *Obergefell v. Hodges*,[2] which held that same-sex marriage was protected by the Fourteenth Amendment.[3] With the failure of one of their lead agenda items, the best that opponents of marriage equality can now hope is to frustrate the exercise of this new constitutional rule. Almost immediately, county clerks were urged to defy the law by refusing to issue marriage licenses to same-sex couples,[4] or to anyone at all in hopes of avoiding a charge of discrimination.[5] Others have resigned *en masse*.[6]

The rhetorical framework for this resistance was offered by *Obergefell*'s dissents. Justice Thomas, for example, expressed concerns about the impact of the decision's "consequences for

1. Patrick Buchanan, *Culture War Speech: Address to the Republican National Convention*, VOICES OF DEMOCRACY (Aug. 17, 1992), http://voicesofdemocracy.umd.edu/Buchanan-culture-war-speech-speech-text; Patrick Buchanan, *The Cultural War for the Soul of America*, PATRICK J. BUCHANAN—OFFICIAL WEBSITE (Sept. 14, 1992, 12:00 AM), http://buchanan.org/blog/the-cultural-war-for-the-soul-of-america-149.

2. No. 14-556 (U.S. June 26, 2015).

3. *Id.* Other significant defeats included the failure to overturn "Obamacare," the Affordable Care Act. *See* King v. Burwell, 135 S. Ct. 2480 (2015) (Affordable Care Act Section 36B's tax credits are available to individuals who purchase health insurance on an exchange created by the federal government); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (holding individual mandate in Affordable Care Act was a constitutionally permissible tax).

4. *Rep. Womick Asks County Clerks to Marry Only Couples That Include a Man and a Woman*, CHATTANOOGAN.COM (July 28, 2015), http://www.chattanoogan.com/2015/7/28/305071/Rep.-Womick-Asks-County-Clerks-To-Marry.aspx.

5. Proposed Class Action at 2, Miller et al. v. Davis, 123 F. Supp. 3d 924 (Aug. 12, 2015), http://www.aclu-ky.org/wp-content/uploads/2015/07/Rowan-complaint.pdf; Sean Moody, *Group Rallies Behind Whitley Clerk's Decision Not to Grant Same-Sex Marriage Licenses*, WKYT NEWS (July 9, 2015, 10:12 PM), http://www.wkyt.com/home/headlines/Group-rallies-behind-Whitley-clerks-decision-not-to-grant-same-sex-marriage-licenses-312653641.html. The Supreme Court of Ohio Board of Professional Conduct explicitly denies judges the options of both not officiating for same-sex marriages, and refusing to perform any at all, reasoning that "[a] judge's decision to decline to perform some or all marriage ceremonies, when grounded on the judge's personal beliefs, may reflect adversely on perceptions regarding the judge's performance of other judicial duties." Supreme Court of Ohio Bd. of Prof'l Conduct, Opinion Letter on Judicial Performance of Civil Marriages of Same-Sex Couples (Aug. 7, 2015), http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf.

6. Heather Clark, *Entire Staff of Tennessee County Clerk's Office Resigns over Supreme Court 'Gay Marriage' Ruling*, CHRISTIAN NEWS NETWORK (July 5, 2015), http://christiannews.net/2015/07/05/entire-staff-of-tennessee-county-clerks-office-resigns-over-supreme-court-gay-marriage-ruling.

religious liberty,"[7] while Justice Alito bemoaned that with this decision "the majority facilitates the marginalization of the many Americans who have traditional ideas."[8] Chief Justice Roberts noted, "Today's decision . . . creates serious questions about religious liberty. Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage."[9]

The underlying reasoning appears to be that allowing same-sex couples to marry will infringe the religious freedoms of those who dislike such families. While some of the more hysterical rhetoric invoking fears of preachers forced to solemnize nuptials has led to the quick introduction and passage of so-called "Pastor Protection" acts,[10] the more contentious controversy centers on whether, in the name of religion, for-profit businesses can refuse to serve gay men and lesbians, especially those planning a wedding ceremony.

The possibility of surging discrimination in the marketplace is not a mere hypothetical. In the hours after *Obergefell* was handed down, Ken Paxton, the Texas Attorney General, as part of his criticism of the opinion, moved immediately to these concerns: "The truth is that the debate over the issue of marriage has increasingly devolved into personal and economic aggression against people of faith who have sought to live their lives consistent with their sincerely-held religious beliefs about marriage . . . . We should ensure that people and businesses are not discriminated against by state and local governments based on a person's religious beliefs."[11] Governor Greg Abbott assured Texans that "[n]o Texan is required by the Supreme Court's decision to act contrary to his or her religious beliefs regarding marriage."[12] A summary of the day's reactions from conservatives shows the invocation of religious

7. *Obergefell*, No. 14-556, slip op. at 16 (Thomas, J., dissenting).

8. *Id.* at 7 (Alito, J., dissenting).

9. *Id.* at 28 (Roberts, C.J., dissenting).

10. TEXAS S.B. 2065 (2015). These acts confer no protections not already recognized under the First Amendment. Churches have always been free to choose their own rituals. *See* Liz Crampton*, Abbott Signs "Pastor Protection Act" into Law*, THE TEX. TRIBUNE, June 11, 2015.

11. Ken Paxton, *Following High Court's Flawed Ruling, Next Fight Is Religious Liberty*, ATT'Y GEN. OF TEX. (June 26, 2015), https://www.texasattorneygeneral.gov/oagnews/release.php?id=5142.

12. Greg Abbott, *Statement on Supreme Court Ruling on Same-Sex Marriage*, OFF. GOVERNOR GREG ABBOTT (June 26, 2015), http://gov.texas.gov/news/press-release/21131.

accommodation of antigay positions to be a recurring theme.[13] In a rhetorical turn that has become a signature move of the right, those who would wish to discriminate are now portrayed as innocent victims.[14]

Numerous conflicts between couples and service providers have resulted in court decisions, administrative rulings, and popular attention in the blogosphere. The first such case, *Elane Photography*, anticipated the current furor by several years when an Albuquerque photographer refused to make her services available for a lesbian commitment ceremony.[15] The New Mexico Supreme Court held that the refusal violated the state's Human Rights Act and, most relevantly for the present discussion, that the application of the antidiscrimination statute did not violate the First Amendment rights of the photographer.

Other instances soon followed: a Richland, Washington, florist withheld wedding flowers,[16] while a Georgia print shop refused to print wedding invitations.[17] In Bloomsburg, Pennsylvania, the local bridal shop refused to sell wedding dresses to a lesbian couple.[18]

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13. Sandy Fitzgerald, *Bush, Carson, Walker: Protect Religious Liberty, State's Rights*, NEWSMAX (June 26, 2015, 10:48 AM), http://www.newsmax.com/Headline/supreme-court-gay-marriage-reaction-bobby-jindal/2015/06/26/id/652373.

14. *Cf.* Jay Michaelson, *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*, POL. RES. ASSOCIATES 21 (2013), http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA_Redefining-Religious-Liberty_March2013_PUBLISH .pdf. Today, the conservative "religious liberty" frame claims that the real victims are not gay students being bullied, women denied accessible health care, or nonreligious students coerced into participating in a religious ceremony. Conservative "religious liberty" rhetoric says that true victims are the university, the bully, the woman's employer, and the graduation speaker who is not able to recite a prayer. Instead of a conflict between civil rights, this rhetoric focuses only on the rights of the person doing harm to another.

15. Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

16. Kelsey Harkness, *State Says 70-Year-Old Flower Shop Owner Discriminated Against Gay Couple. Here's How She Responded*, THE DAILY SIGNAL (Feb. 20, 2015), http://dailysignal.com/print/?post_id=177383; Washington v. Arlene's Flowers, Inc., No. 13-02-00871-5 WL 94248 (Wash. Sup. Ct. Jan. 7, 2015), http://www.adfmedia.org/files/ArlenesFlowersCapacityRuling.pdf.

17. Rebecca Lindstrom, *Suwanee Business Refuses to Print Gay Wedding Invitation*, 11 ALIVE (Apr. 27, 2015), http://www.11alive.com/story/news/local/suwanee/2015/04/24/Suwanee-alphagraphics-franchise-gay-wedding/26318959.

18. David Ferguson, *Pennsylvania Bridal Shop Won't Sell Gowns to Lesbian Couple, Sparking Backlash*, RAW STORY (Aug. 8, 2014, 10:49 AM), http://www.rawstory.com/2014/08/pennsylvania-bridal-shop-wont-sell-gowns-to-lesbian-couple-sparking-backlash. A similar incident occurred in 2011 in New Jersey. Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: "That's Illegal,"* ABC NEWS (Aug. 19, 2011), http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333.

Wedding planners similarly have turned away same-sex couples,[19] as have venues cited for declining to book gay couples.[20] While churches are protected from suits demanding that they officiate at gay weddings, for-profit chapels may not share this immunity and have indeed attracted attention.[21]

But the complaint most vivid within the popular imagination concerns bakers and wedding cakes. Throughout the nation, bakeries turn away same-sex couples seeking cakes for their ceremonies.[22] A Portland, Oregon, bakery that refused service was ultimately forced to pay $135,000 in damages for emotional and mental suffering.[23] Similarly, a Denver, Colorado, shop that ceased making wedding cakes altogether rather than comply with an order to provide them

19. Caitlin MacNeal, *AZ Wedding Planner Denies Lesbian Couple: What About 'My Freedom'?*, TALKING POINTS MEMO (Nov. 17, 2014, 11:39 AM), http://talkingpointsmemo.com/livewire/arizona-wedding-planner-refuses-gay-couple.

20. Lina Batarags, *Couple Fined $10,000 After Refusing to Host Same-Sex Marriage on Their Farm*, OPPOSING VIEWS (Oct. 4, 2014), https://www.opposingviews.com/i/religion/couple-fined-10000-after-refusing-host-same-sex-marriage-their-farm; Jean Ann Esselink, *Restaurant That Refused Gay Weddings Closing for Lack of Business*, NEW C.R. MOVEMENT (June 24, 2015, 11:11 AM), http://www.thenewcivilrightsmovement.com/uncucumbered/restaurant _that_refused _gay_weddings_closing_for_lack_of_business?recruiter_id=17; Trudy Ring, *In Settling Bias Case, Wedding Venue to Pay for Couple's Nuptials*, THE ADVOCATE (Aug. 25, 2014, 3:24 PM), http://www.advocate.com/politics/marriage-equality/2014/08/25/settling-bias-case-wedding-venue-pay-couples-nuptials. Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo, 339 F. App'x 232 (3d Cir. 2009), denied access to a beachfront property managed by a Methodist organization, but which was run as a public accommodation.

21. David Badash, *Almost Everything You've Been Told About the Idaho Wedding Chapel Story Is a Lie*, NEW C.R. MOVEMENT (Oct. 21, 2014, 12:20 PM), http://www.thenewcivilrightsmovement.com/davidbadash/how_many_lies_is_the_religious_right_willing_to_tell_in_the_idaho_for_profit_wedding_chapel_story.

22. A scheme to turn this pattern of requiring bakers to make cakes for gays on its head by suing pro-gay bakers who refuse to make antigay cakes has failed. Peter Holley, *Colorado Bakery That Refused to Bake Anti-Gay Cakes Did Not Discriminate, State Agency Says*, WASH. POST (Apr. 4, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/04/04/colorado-bakery-that-refused-to-bake-anti-gay-cakes-did-not-discriminate-state-agency-says; Jack v. Azucar Bakery Charge, No. P20140069X (Colo. Civil Rights Div. Mar. 25, 2015), http://perma.cc/5K6D-VV8U.

23. *In re* Melissa Elaine Klein, Nos. 44-14 & 45-14, 2015 WL 4503460 (Or. Div. of Fin. & Corp. Sec. July 2, 2015). The order awards the sizable penalty less for the refusal to bake the cake than for the subsequent "doxing" of the lesbian couple by the bakers and their ongoing push to publicize the complaint—exposing the couple to continual harassment and endangerment of their children. Libby Ann, *Sweet Cakes by Melissa Didn't Just Deny a Lesbian Couple Service, They Also Doxxed Them and Their Kids*, PATHEOS (July 9, 2015), http://www.patheos.com/blogs/lovejoyfeminism/2015/07/sweet-cakes-by-melissa-didnt-just-deny-a-lesbian-couple-service-they-also-doxxed-them-and-their-kids.html. This distinction has been largely obscured by the conservative blogs.

for gay couples has also lost a court challenge.[24] A third baker in Indiana denied a cake to a couple celebrating fourteen years together, although the shop has been willing to disregard its policies on other kinds of cakes regarding depictions of alcohol, drugs, and violence.[25] Saying she had first "talked to Jesus for two weeks," a Schuylkill Haven, Pennsylvania, baker refused even to meet with the couple requesting her services.[26] The more untempered speakers for the religious right have compared these conflicts over cakes with the Holocaust.[27]

These merchants share the belief that religion forbids their participation in an act they judge to be sinful.[28] While that claim may suffice to generate media attention, the legal question is triggered not by the mere refusal of services, but by the exercise of that choice in a jurisdiction with a public accommodations antidiscrimination law that includes sexual orientation.[29] Lacking a federal law of comparable scope,[30] the flashpoints will continue to be scattered selectively throughout the nation, centering on the twenty-one states

24. *Colorado Baker Must Make Cakes for Gay Wedding, Panel Rules*, N.Y. DAILY NEWS (May 30, 2014, 3:25 PM), www.nydailynews.com/life-style/colorado-baker-cakes-gay-weddings-panel-rules-article-1.1811676 (affirming the administrative decision that the baker's refusal to sell a wedding cake violated the Colorado Anti-Discrimination Act).

25. Tom Boggioni, *Indiana Bakery Refuses to Make Gay Commitment Cake, Exception Made for Gun Cake*, RAW STORY (Mar. 14, 2014, 1:41 PM), http://www.rawstory.com/2014/03/indiana-bakery-refuses-to-make-gay-commitment-cake-exception-made-for-gun-cake.

26. Zack Ford, *Pennsylvania Bakery Latest to Refuse Service to Same-Sex Couple*, THINKPROGRESS (Aug. 14, 2014, 1:12 PM), http://thinkprogress.org/lgbt/2014/08/14/3471220/pennsylvania-bakery-discrimination.

27. Travis Gettys, *Tony Perkins: Christians Forced to Bake Cakes for Gays Like Forcing Jews into Nazi Ovens*, RAW STORY (June 6, 2014), www.rawstory.com/rs/2014/06/06/tony-perkins-christians-forced-to-bake-cakes-for-gays-like-forcing-jews-into-nazi-ovens; Charles J. Dean, *Alabama Chief Justice Moore: Gay Marriage 'Not in Accordance with Constitution'*, AL.COM (June 30, 2015, 6:44 PM), http://www.al.com/news/index.ssf/2015/06/Alabama_chief_justice_moore_ga.html ("Could I do this if I were in Nuremberg [war crimes trials after WWII] say that I was following the orders of the highest authority to kill Jews? . . . Could I say I was ordered to do so?" When told that trial was about killing human beings, not gay marriage, Moore asked, "Is there a difference?").

28. Although we will take these claims on their face as offered in good faith, we can observe the selectivity of their objection. In the religious tradition to which most of these defendants belong, divorce and other acts are equally sinful, yet no record exists of resistance to participating in marriage rituals of these other sinful persons.

29. Earlier cases were also strengthened if the service withholding occurred in jurisdictions that recognized same-sex marriages. Since *Obergefell* applies to all localities, only a sufficiently expansive antidiscrimination law could serve to trigger future complaints."

30. A federal nondiscrimination bill, H.R. 3185, 114th Cong. (2015), was introduced on July 23, 2015. Its prospects for passage in the current Congress, however, are not favorable.

and the multiple municipalities that have included sexual orientation within their public accommodations statutes.[31]

The prototypes for such laws are those that forbid racial discrimination in public accommodations. These antidiscrimination laws arose in American society as a response to its brutal history of slavery and subsequent racial segregation. Although designed to correct an intolerable situation in which citizens were blocked from full participation in community life, these equal access measures possess an inherent tension with other deeply-held values.

> The antidiscrimination project represents a claim of enormous moral power: the demand that society recognize the human worth of all its members, that no person arbitrarily be despised or devalued. Yet as soon as we begin to try to carry it out, we find ourselves in collision with other moral considerations, equally powerful, that demand that the project be a limited one: social order, efficiency, communal solidarity, individual liberty . . . . [A]cknowledging that it would be terrible if government were to pursue the antidiscrimination project single-mindedly, we must also acknowledge how terrible it would be if government did not pursue it at all.[32]

The result is that even those who would oppose discrimination in the public square as a jurisprudential matter cannot reject the claim out of hand. Not, at least, without first weighing the competing interests and countervailing rights. How strong is this right to exclude whole groups of others to whom one has religious objections (gays today, very likely Muslims tomorrow,[33] and Jews[34] and

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31. Lists of jurisdictions with antidiscrimination laws that include sexual orientation as a protected class are maintained online. *See List of Cities and Counties in the United States Offering an LGBT Non-Discrimination Ordinance*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_cities_and_counties_in_the_United_States_offering_an_LGBT_non-discrimination_ordinance (last visited Oct. 9, 2015); *Non-Discrimination Laws: State by State Information Map*, ACLU, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited Oct. 4, 2015).

32. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 10 (1996) [hereinafter ANTIDISCRIMINATION LAW].

33. Abby Ohlheiser, *A Florida Gun Range Owner Has Declared a 'Muslim-Free Zone,'* WASH. POST (July 21, 2015), http://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/21/a-florida-gun-range-owner-has-declared-a-muslim-free-zone; Brianna Bailey, *Oklahoma Survival Store Says Muslims Not Welcome*, NEWSOK (Aug. 13, 2015, 3:26 PM), http://newsok.com/article/5439970.

Catholics[35] in the past)? If such a right to exclude does exist, how does it rank against the rights of others to participate in social and economic life on an equal and respectful basis?

Andrew Koppelman suggests that these claims to discriminate do not merit deference, but not because they are trumped by other rights. Rather, they are inconsistent with the basis on which the demand has been asserted in the first place:

> The justification for antidiscrimination law is that certain preferences are so malign that they contradict the whole point of counting preferences in the first place. We respect choices only because we respect people, and therefore we are justified in disregarding choices when such choices manifest and reinforce disrespect for people.[36]

In other words, claiming a right to discriminate carries weight only to the extent society recognizes the individual's worth as a person deserving dignified respect. An asserted privilege that disregards respect for others leaves the appeal without a philosophical foundation.[37]

Those asserting the claim, however, may believe they hold a trump in that their need to exclude flows from their sectarian beliefs, which are granted high deference in our constitutional system. Despite this presumptive position of strength, these claimants should still lose. Even granting the sincerity of the conflict between religious belief and public duty, the governmental interest in assuring a free marketplace is sufficiently high to rule out tolerating a weakening of confidence in open trade by allowing a potentially

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34. *A Sensation at Saratoga*, N.Y. TIMES (June 19, 1877), http://query.nytimes.com/mem /archive-free/pdf?res=9802EFD6123FE63BBC4152DFB066838C669FDE.

35. *Adoption Agency Rejects Catholic Parents*, USA TODAY (July 16, 2005), http:// usatoday30.usatoday.com/news/nation/2005-07-16-adopt-catholics_x.htm. Under public pressure, the adoption agency later changed its policy. *Christian Adoption Agency Will Allow Catholics*, WND [WORLDNETDAILY] (July 22, 2005, 1:00 AM), http://www.wnd.com/2005 /07/31416.

36. ANTIDISCRIMINATION LAW, *supra* note 32, at 31.

37. This same inconsistence offers an adequate response to another common rhetorical ploy in these debates. When opposed for their intolerance, discriminators reply that their critics are hypocrites for not tolerating their intolerance. But Karl Popper dispelled this "paradox of tolerance":

> If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them . . . . We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.

1 KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO 265 n.4 (Routledge & Kegan Paul LTD 1952).

limitless and idiosyncratic exemption from general law. Against that background, the balancing of interests in most cases will find that the plaintiff's burden is the lesser than what would be imposed upon the gay couple. Let there be cake.

The discussion begins with Part I dispensing with two preliminary arguments often lurking behind claims for a religious exemption from nondiscrimination laws. First, a common assumption is that the business is private property from which the owner has a perfect right to exclude anyone he or she desires, and for any reason. Although framed as a self-evident conclusion from property rights, this position, in fact, misrepresents the understanding of property rights at the time of our nation's founding, and thus is not woven into our fundamental concepts of liberty. Moreover, to the extent such statements reflect the current principles of property law, these came into existence specifically in the years after the Civil War so as to enable businesses to exclude racial minorities from their premises. Those who assert a property right to exclude—a power that should be protected against interference by antidiscrimination laws—are seeking the protection of an overtly racist principle, and the demand should be evaluated in that light.

A second background premise is invoked largely to mitigate the scope of the exemption sought. Rather than seeking a sweeping exclusion of all gay people, the defendants profess an antipathy only toward gay couples seeking to marry. This argument fails for two reasons, one practical and the other conceptual. The pragmatic observation is that those asserting the claim are unable to point to any of their own practices that support this description of their actual business conduct. The problem edges into the abstract concession that it is not intelligible to claim to tolerate gay people but only so long as they are not behaving "gaily." To reject a gay couple exercising the mature fulfillment of their personal identities by seeking to make a lifelong and loving commitment is to reject gay people in just the same way as one cannot claim to tolerate Catholics but only so long as they never attend mass. Because there is no meaningful way to both respect the gay individual while also discriminating against gay couples, the present argument will treat the desired exemption as targeting all gay persons despite its current framing as concerning only those in relationships.

Although glossed as a dispute involving religious exercise rights, the formal legal complaints invariably include a free speech claim. Part II outlines the argument that when merchants are forced to provide services to same-sex weddings, those actions constitute coerced speech in support of homosexuality. Uniformly rejected when considered by the courts, the assertion may be failing because it has not been properly argued. Whether actions signal messages depends on the background normative expectations about what is proper. Catering a gay wedding sends no particular message when the environment renders such occasions uncontroversial. In settings where homosexuals are still an object of disparagement, however, catering would send a message of support. Full consideration of the coerced speech argument, then, should identify the relevant standard of comparison and then ascertain the prevailing norms within that group.

Part III sketches free exercise jurisprudential trends from *Reynolds* to *Hobby Lobby*. Two different standards of review exist. For states without a RFRA statute, the rule is that of *Smith*, which holds that no exemption is required from neutral laws of general applicability. Suits involving federal laws, and those in states with RFRA laws, will apply the compelling interest test of *Sherbert* and *Yoder*. Thus far, litigated cases involving merchants seeking an exemption to discriminate against gay couples have been in non-RFRA states. Because nondiscrimination laws are neutral in their scope, these merchants will invariably lose their free exercise complaints. As a first attempt to anticipate how a court might treat such a case in a jurisdiction applying the compelling interest test, Part IV lays out the respective burdens such an exemption, or lack thereof, would impose upon each of the parties. Part V weighs the competing injuries to identify who is more likely to prevail.

II. PRELIMINARY MATTERS

Although often framed as a question of religious liberty, the full statement of the case for exemptions includes two other premises with varying degrees of explicitness. The first is the assertion that the business is the private property of the owner, and thus he or she has an absolute right to decide who can enter. The suggestion that anyone else holds a superior right of access violates this fundamental liberty claim. The simple belief, that because this is my property I

have a right to restrict access if I choose, may be offered as a self-evident truth about a free society: if you don't control your own property, in what way can you claim to be "free"?

This section shows that this account of the right to exclude is an error—an absolute right to exclude is not an original part of the American understanding of the attached rights of private property, and thus it is not rooted in our inherited concept of freedom and fundamental liberty. The claimed right is neither natural nor inevitable, weakening the demand that storeowners should be able to refuse access to gay men and lesbians. Moreover, to the extent that the claim does capture the current strains of property law, it is because of the adoption of Jim Crow laws designed to grant a new right to exclude African Americans where no such power had existed before. Although couched as an uncontroversial and traditional description of what it means to own property, the touted right to exclude is a modern invention overtly crafted to allow businessmen to refuse service to former slaves. The merit of this defense should be judged from that perspective.

The second undercurrent anticipates a criticism of the sought-after exemption—that it is broader than it needs to be and is likely to lead to discrimination against entire swaths of the public on any number of attributes. A religious right to exclude gays will be functionally indistinguishable from a religious right to exclude women, African Americans, or Jews. A more limited right to exclude may receive more favorable consideration, and thus many proponents stress that the target is not gay men and lesbians per se, but only those in relationships, and especially those in lawful marriages. To a certain extent, this argument is perverse. For years the religious right criticized homosexuals for being promiscuous and unable to establish stable relationships; now these same conservatives say they will happily accept sexually active but single gays but are resolute in their wish to ostracize committed couples.[38]

38. *See* Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Marriage or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 197 (2012) ("The idea of discriminating against committed, recognized relationships, as opposed to uncommitted, potentially transient ones, is bizarre."). One possible explanation is offered by KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 90 (2007) ("What is galling [to conservatives] is to see a gay couple demonstrate that their relationship works, that they are happy.").

This argument, however, presumes that a clear line can be drawn between the status of being gay and the conduct of being in a gay relationship. This section will review the weaknesses of that viewpoint, both psychologically and legally.

A. The Right to Exclude

Appeal to an absolute right to exclude can be critiqued on both descriptive and normative grounds. To the extent such a right is offered as flowing naturally and inevitably from the idea of private property and was the dominant understanding at our nation's founding, that account is descriptively inaccurate. If the claim's validity is not self-evident, the speaker then bears a burden to defend this asserted right. Even assuming that this hurdle can be successfully managed, the outcome still lacks the rhetorical power of a reliance on a fundamental principle of reasoned jurisprudence.

Claimants are on stronger ground when they characterize the right as a rough summary of the current default rule of property law. But to the extent such a rule exists, it owes its rise not to the logic of property but to the post-Civil War frenzy to exclude African Americans from public accommodations. The rule, in other words, comes explicitly from our racist past, not our liberty understanding of property. As such it serves as a dubious and tainted foundation upon which to base a freedom to exclude gays.

Although descriptively inaccurate, the right to exclude is not asserted cynically. While the rule is inherently racist, the speakers rarely intend it that way and may be surprised to learn the actual histories of their beliefs. We should instead assume most advocates genuinely believe that such a right exists, and that it is normatively good that such a right exists. Any effective reply to this conviction must therefore offer some insight into this phenomenological aspect to the appeal, and show why it, too, does not support the desired conclusion.

1. Racist Lineage of the Right to Exclude

Bundled in with the religious liberty claim to discriminate against gay couples is an appeal to the free association right to exclude. The rhetorical work this claim is intended to perform is to effect a burden shift: Because I have a right to exclude anyone I wish from my business premises, I do not have to defend a choice to

exclude gays; the burden is on you to show why my property rights should be abrogated. The speaker implies a rightness about this arrangement such that to invoke its authority is not simply to seek shelter in an arbitrary rule, but rather to rely upon a set of relationships that approach the moral correctness of natural law[39]: I can exclude not because the law presently tells me I can, but because that is what it means to own property, and to say otherwise is to attack this fundamental precondition for liberty. In this, the asserted right to exclude serves the same intended function as the "time immemorial" appeals against same-sex marriage. Given such an unchallenged status quo, what could possibly be sufficient reason to disturb the established order?

This strategy, however, fails for two reasons. First, it does not have roots in the property rules of our nation's founding and thus lacks the expected common sense inevitability flowing from what it means to own "property." Second, to the extent that it is an accurate description of the current rule, it is a late development specifically fashioned to advance racial segregation. According to the present position of legal historians, "the idea that property entails an absolute right to discriminate is not embedded in the common law from time immemorial but is an artifact of the Jim Crow era."[40] That would not be itself a sufficient basis to reject such a rule, but those claiming its benefits must recognize its tainted history and racist intent, and decide for themselves whether that is the banner under which they wish to wage this battle.

The right to exclude survived the Civil Rights era perhaps because the main goal of the rules was mooted by federal antidiscrimination legislation. It was rarely invoked thereafter in any consistent manner. Its resurrection to target gay men and lesbians should motivate a push to remove this lingering vestige of Jim Crow, and return us to the rule of free access that prevailed before the Civil War.

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39. Douglas W. Kmiec, *The Coherence of Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991) ("Insofar as the right to acquire or possess property was embedded by reason in the common law or natural law, there was little need to create additional parchment protections.").

40. ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF Boy Scouts of America v. James Dale WARPED THE LAW OF FREE ASSOCIATION 3 (2009).

a. Antebellum property rights

Most readers will find uncontroversial a claim that a core meaning of owning property includes a right to exert control over it, and that this extends to a right to exclude others from its use. This prerogative has, in fact, been singled out "as the most significant right held by an owner."[41] Some go even farther, saying that the right to exclude is not merely one among other attributes of owning property, it is synonymous with the idea of ownership itself: "[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."[42]

The right to exclude is strongest in the context of private property, or property such as one's home that is used and controlled for personal purposes. More contentious is the extent to which the right applies to commercial property when an owner has issued a general invitation to the public to enter the premises in order to conduct business. Does the owner still possess an unfettered right to exclude the person at the door based upon irrelevant group attributes such as race, sex, disability, or sexual orientation?[43] This asserted power becomes even more contentious when the offending attributes are protected in antidiscrimination laws.

The most explicit articulation of an unlimited right to exclude comes from libertarian political principles, which draw upon two different premises. First, libertarians hold the right to private property in the highest regard, and second, they express great skepticism concerning any governmental regulation, but especially those that would curtail property rights. In this view public accommodations antidiscrimination laws present just such an attack on private property, leading libertarians such as Senator Rand Paul to view the Civil Rights Act of 1964 as a mistaken intrusion.[44]

The philosophical infrastructure for these libertarian positions builds upon the writings of John Locke. The starting point for

41. SIMON DOUGLAS & BEN MCFARLANE, DEFINING PROPERTY RIGHTS IN PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 219, 223–24 (James Penner & Henry E. Smith eds., 2013).

42. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

43. Even those who would deny a right to exclude based upon group attributes would tend to recognize a right to exclude specific individuals based upon individualized qualities, such as prior bad behavior.

44. *Rand Paul on 'Maddow' Defends Criticism of Civil Rights Act, Says He Would Have Worked to Change Bill*, HUFFINGTON POST (May 25, 2011, 4:30 PM) http://www.huffingtonpost.com/2010/05/20/rand-paul-tells-maddow-th_n_582872.html.

Locke's philosophy is first that "every man has a property in his own person."[45] This principle is today formally expanded to clarify that individuals inherently enjoy "full self-ownership," defined as consisting:

> [O]f a full set of the following ownership rights: (1) *control rights* over the use of the entity: both a liberty-right to use it and a claim-right that others not use it, (2) *rights to compensation* if someone uses the entity without one's permission, (3) *enforcement rights* (e.g., rights of prior restraint if someone is about to violate these rights), (4) *rights to transfer* these rights to others (by sale, rental, gift, or loan), and (5) *immunities to the non-consensual loss* of these rights. Full ownership is simply a *logically strongest* set of ownership rights over a thing.[46]

This suite of rights occurs most clearly in the person's ownership of his own body.[47] From this initial condition Locke explains how such a fully self-owned person can create "property" by mingling the exertions of his self-owned body's labor with the natural external world:

> The labour of his body, and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath

45. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (J.W. Gough ed., Basil Blackwell 1976).

46. Peter Vallentyne & Bas van der Vossen, *Libertarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 5, 2002), http://plato.stanford.edu/archives/fall2014/entries/libertarianism.

47. Locke's depiction of our property interest in our own bodies as a natural endowment can be contrasted with Hegel's account in which ownership of one's self is an uncertain accomplishment: "it is only through the *development* [*Ausbildung*] of his own body and spirit, *essentially* by means of *his self-consciousness comprehending itself as free*, that he takes possession of himself and becomes his own property as distinct from that of others." G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 57 (Allan W. Wood ed., 1st ed. 1991). Although Locke's approach is more democratic in assigning ownership of one's self, Hegel's provides a better foundation for the value-added theory of property. In Hegel, the creation of ownership via labor is present from the beginning, making its application to the external world an organic extension needing no special argument; for Locke it comes in later as a separate species of ownership wholly dissimilar to the natural ownership that preceded it.

> by this labour something annexed to it that excludes the common right of other men.[48]

Under this value-added theory of property, a person owns her fruits because she first owns herself and by mixing her owned self with the external world she comes to own that piece to an equal extent. No one can have those claims infringed without compensation or preferably permission any more than one person can exert ownership over another.[49]

Whatever the technical weaknesses of such a model, it possesses an intuitive appeal and can be readily grasped by most people. We are, in truth, naturally inclined to claim as "mine," and to defend against incursions with vigor.[50] In this light the insistence that business owners must open their stores to everyone—African Americans, gays, women, or whatever—arguably offends the basic fabric of ordered society.

Despite such natural intelligibility, the fact is that our received common law recognized a quite different arrangement between merchants and the general public. This alternative history belies the implied argument that an absolute right to exclude is the uncontroversially American default against which those who would require free and nondiscriminatory access must inevitably crash.

The original rule of the law of access to commercial property has been summarized by Joseph Singer. He concludes his deep historical review of the common law rule with the observation that the best evidence supports the view that "before the Civil War, the law probably required all businesses that held themselves out as open to the public to serve anyone who sought service."[51] The threshold for public access was the advertising of services and solicitation of customers in an indiscriminate manner. He reads Blackstone's discussion of the duties of "common callings" in the manner of contracts with the advertised services being the offer, and the customer appearing as acceptance: "In effect, Blackstone treated the

48. LOCKE, *supra* note 45, at § 27.

49. This brief summary admittedly oversimplifies the varied forms that libertarianism can assume, but it serves to sketch the main principles driving the current argument concerning services to gay persons.

50. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 288 (1990) ("[T]he instinct of ownership is fundamental in man's nature.").

51. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292 (1996) [hereinafter *No Right to Exclude*].

act of hanging out a sign as an invitation to come on the premises to do business of a certain kind, the act of stepping inside and offering money as an acceptance, and the refusal to do business as a breach of contract."[52] He finds a similar implied contract for common carriers in Parson's 1853 *Law of Contracts*.[53] In all such treatises and cases[54] summarizing the common law understanding in the antebellum years, it is the "holding out" that determines one's duties. While later times would devise different theories to justify the demand on innkeepers and common carriers such as monopoly and license, Singer is adamant that "*none* of the antebellum cases bases the duty to serve" on such special circumstances.[55]

Underscoring the complexity of the legal record, Singer summarizes his research:

> [T]he most plausible construction of antebellum legal materials would extend the right of access to all businesses that hold themselves out as ready to serve the public. Moreover, the formal law exempting businesses other than inns and common carriers from the duty to serve did not come into being until the late 1850's. In other words, the current common-law rule did not crystallize until around the Civil War.[56]

The best evidence, therefore, supports an expectation of equal treatment in the public square by merchants advertising their services as available to all, and this had become the general understanding. "At common law before the Civil War, every business that held itself out as open to serve the public arguably had a legal obligation to serve anyone who sought service."[57]

The main point to be drawn from this historical overview is that those who characterize the contemporary insistence that merchants treat gay people with respect as governmental overreach into the sacred foundations of our national founding are gesturing toward a

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52. *Id.* at 1310.

53. *Id.* at 1314.

54. *E.g.*, Markham v. Brown, 8 N.H. 523, 528 (1837) ("An innkeeper holds out his house as a public place to which travellers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travellers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.").

55. *No Right to Exclude*, *supra* note 51, at 1319.

56. *Id.* at 1331.

57. KOPPELMAN & WOLFF, *supra* note 40, at 5.

mythic period that never existed. Even extending into the initial years after the Civil War, the U.S. Supreme Court:

> [D]id not identify the private realm as coextensive with the realm of private property: property could be privately owned and yet be part of the public sphere. Thus, for example, the Court held that businesses' constitutional immunity from regulation was attenuated if the business was "affected with a public interest." More to the point, the Court observed in the *Civil Rights Cases* that innkeepers had a common-law duty to serve all who sought to patronize them, regardless of race.[58]

In the words of one renowned economist, "Property rights are not private."[59] The right to exclude in the commercial context was not part of our nation's background legal understanding. Such a right is neither inevitable, traditional, nor uncontroversial. Those claiming this privilege bear the burden to argue why, in an environment of growing equality in the public square, they should be allowed to discriminate. A simple assertion that "It's my property" will no longer suffice.

b. Rise of the current rule

While lacking the imprimatur of logical inevitability or traditional practice, the right to exclude invoked by antigay business owners does approximate the current rule. As part of his sweeping review Singer found that, with few exceptions such as innkeepers and common carriers, business owners today in almost all jurisdictions enjoy the presumption that they "have the right to exclude non-owners unless that right is limited by statute."[60] On first blush this means that stores seeking to exclude gay couples would appear to be on strong footing so long as they are not covered by nondiscrimination statutes extending protections to sexual orientation.

While this concession may offer some practical assistance to those intending to discriminate, the background of this change should preclude believing both that one can invoke this rule to restrict access while also viewing oneself a moral citizen. Concisely framed

58. ANTIDISCRIMINATION LAW, *supra* note 32, at 188.
59. ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK 324 (1977) (citation omitted).
60. *No Right to Exclude, supra* note 51, at 1290.

by Koppelman, "The libertarian right to exclude . . . is racist at the core."[61] The racist associations of the practice are not an accidental consequence of a rule devised for a different purpose; rather its only goal was to empower one group to dominate and marginalize another.

While Mississippi is presently the only state with a state law expressly granting business owners the absolute right to exclude that libertarians would extend to all commercial property owners,[62] in practice most states do employ some version of this rule. In seeking to explain this shift, Singer notes that "the replacement of a general right of access with a general right to exclude redistributed property rights [from the public to the private property owner] in order to promote a racial caste system."[63] Unlike his reading of the pre-Civil War law, in this instance the facts are clear: "The case law that emerged after 1865 is absolutely consistent in affirming a common-law right of access to places of public accommodation without regard to race until the time of the Jim Crow laws of the 1890s."[64]

The details Singer offers suggest the dynamic that played out between the postwar efforts to extend civil liberties to the newly freed slaves, and the entrenched southern majorities that sought new ways to limit African Americans in their ability to exercise their new condition. For example, "Tennessee and Delaware responded to the federal public accommodations act of 1875 by passing state laws affirming the power of places of public accommodation to choose their customers as they wished. South Carolina repealed its public accommodations law in 1889, effectively leaving businesses the power to choose their customers."[65] The end result, however, went much further. Rather than allowing white merchants to decide for themselves whether to serve black customers, when all was said and done that option was removed. By "1900 every state in the former

61. KOPPELMAN & WOLFF, *supra* note 40, at 6.

62. MISS. CODE. ANN. § 97-23-17 (2011) ("Every person, firm or corporation engaged in any public business . . . is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve.").

63. *No Right to Exclude*, *supra* note 51, at 1295.

64. *Id.* at 1357.

65. *Id.* at 1386.

Confederacy, as well as Kentucky, had adopted new statutes instituting the Jim Crow policy of forced racial segregation in public accommodations, validated by *Plessy v. Ferguson*[66] in 1896."[67] From a prior practice where anyone, including blacks, could go into any store and expect to be served, by the turn of the century racial segregation had become the legal requirement.

This reversal was not without its own philosophical tensions. On the one hand, the era saw "increasing protections for property rights as well as a narrowing of the duty to serve" which might support a version of the change as being about the increased sensitivity to the entailments of property ownership.[68] But an alternative reading takes fuller account of the available facts. This was also:

> [T]he Jim Crow era when the courts found valid substantial *regulations* of property designed to promote racial segregation. Although the narrowing of public accommodations law appears, on the surface, to cohere with emerging protections for property owners [e.g., in *Lochner*], the inconsistency between property rights as conceived in this period and Jim Crow statutes suggests that changes in public accommodations law are far more tied to racial politics than to *laissez-faire* philosophy or the protection of property from government regulation.[69]

In sum, "white Americans were willing to suffer intrusions on property rights in order to maintain white supremacy."[70]

This historical finding that the claimed right to exclude in the context of commercial properties is a recent innovation designed wholly to effectuate the exclusion of African Americans, and is not, as some might today believe, a neutral statement about the meanings of property ownership, alters the dynamics of an appeal to property rights as a rebuttal to nondiscrimination requirements. Even as a summary of the current rule the right to exclude is not absolute and thus any characterization otherwise misstates the facts. Antidiscrimination laws exist primarily to supersede the alleged superior right of property owners in the public marketplace to

66. 163 U.S. 537 (1896).
67. *No Right to Exclude*, *supra* note 51, at 1388.
68. *Id.* at 1395.
69. *Id.*
70. *Id.* at 1389–90.

exclude others on irrelevant and protected criteria. Racial discrimination is prohibited everywhere. The existence of laws against discrimination by race has already dispelled the popular libertarian characterization of property rights, and thus the "absolute" right exists nowhere absolutely. Some libertarians are frank about this tension between property rights and discrimination, and often side with allowing discrimination. This is why "Senator Rand Paul famously said on the *Rachel Maddow Show* that civil rights laws are problematic because they impinge on both the property rights and the free speech rights of owners."[71] Given these exceptions, the only question is the extent to which commercial property owners should be further required to serve those who present themselves in response to their public solicitations.

2. Philosophical Difficulties in a Right to Exclude

The asserted right to exclude lacks roots in our constitutional founding and emerged only as a proxy for slavery so as to maintain domination over African Americans after the Confederacy lost the Civil War. Some might read these facts as missing the point from the perspective of supporters of a right to exclude. To argue that the historical presumptions about the right are wrong too easily dismisses the sincere commitment many feel toward this viewpoint. Correcting the background details will rarely respond to the subjective motivations of those invoking this right, however misunderstood it may be. Due to the frequent rhetorical and emotional reliance by antigay activists on the right to exclude, we should briefly consider the argument from their perspective.

We have every reason to believe that these advocates of the right are earnest and sincere in the conviction that such a right exists, and that great stakes are at risk from what they see as a direct attack on a fundamental liberty. Given that description, the endowment effect alone predicts many of the dynamics of the present debate. The endowment effect is an empirical observation that "people seem to attach additional value to things they own simply because they

71. 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) [hereinafter *We Don't Serve Your Kind Here*].

belong to them."[72] The perceived loss "looms larger" than the gains someone else might realize from obtaining that same good which they currently do not own. This outcome offers "a rejection of one of the fundamental assumptions in standard economics, namely the assumption that preferences are independent from endowments [e.g., the Coase theorem]," [73] and is "among the best known findings in behavioral economics." [74] The endowment effect suggests not only that the property owners will value the right to exclude more because they already have it, but also that in the utilitarian calculus infringement of the right will be more costly to them than any gains enjoyed by gay couples.

Recognizing the threat that merchants perceive pertaining to the possible loss of a valued privilege does not, however, mean that asserting the existence of the right gets supporters very far. The implied argument, fleshed out, follows something along these lines: I own this property, which means I have a right to exclude others from its use; I wish to exclude gays, *and therefore* excluding gays is my moral prerogative—to say otherwise constitutes an affront to the fabric of society. A legal claim about property exclusions transmutes into a confrontation of moral worldviews.

Most recognize this slide from statements of facts into conclusions about morality to be a form of the naturalistic fallacy. While the philosophical debate continues on the ability to move from empirical observations to ethical statements (notable skeptics include Hume,[75] Moore,[76] and Popper[77]), the general thrust is that unlike classic syllogisms, no necessary relationship exists between the

72. Keith M. Marzilli Ericson & Andreas Fuster, *The Endowment Effect*, 6 ANN. REV. ECON. 555, 556 (2014).

73. *Id.* at 559.

74. *Id.* at 555.

75. DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., Oxford at the Clarendon Press 1896) ("For as this *ought* or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.").

76. G.E. MOORE, PRINCIPIA ETHICA 10 (1962) ("It may be true that all things which are good are *also* something else . . . . And it is a fact, that Ethics aims at discovering what those other properties belonging to all things which are good. But far too many philosophers have thought that when they named those other properties they were actually defining good; that these properties, in fact, were simply not "other," but absolutely and entirely the same with goodness. This view I propose to call the "naturalistic fallacy" and of it I shall now endeavor to dispose.").

77. POPPER, *supra* note 37, at 64 ("To sum up, *it is impossible to derive a sentence stating a norm or a decision or, say, a proposal for a policy from a sentence stating a fact*.").

factual premises and the ethical conclusions. The claim that a right to exclude is a traditional "stick" in the "bundle" of property rights supports equally the moral claims that things should stay this way (the intended conclusion) and its opposite, that change is overdue. The only way to avoid arbitrarily favoring one direction over the other is to plump the argument with additional premises which tend to include the conclusion in the premises. This strategy, however, renders the assertion less an argument intended to persuade and more a polemic to rally the like-minded.[78]

In the end, the dispute centers on one's concept of property. If one holds with libertarians that property constitutes an irreducible fundamental fact of healthy human living, one will tend to favor the rights of merchants to discriminate against anyone they choose, for whatever reason. If, however, one believes that property is the creature of the law—one owns something only when the law is prepared to defend interests against third parties—then "property rights are created by the law for reasons and should not be defined in a way inconsistent with those reasons."[79] The social commitment to democratic equality is at least as deep as that to private property, and accordingly a simple appeal to ownership, even when earnest and heartfelt, should not be sufficient to explain or justify broad discrimination against whole segments of the citizenry.

B. Scope of Desired Exemption

A small pizzeria in Indiana became a flashpoint for the roiling debate over the right of businesses to discriminate against customers in the name of personal religion. When asked by a journalist whether the shop would serve a same-sex wedding couple, its owners said they would refuse such a request.[80] The report provoked a backlash that forced the restaurant to temporarily close, which prompted the creation of a GoFundMe page that raised over $800,000 "[t]o relieve

78. *See, e.g.*, A.C. MacIntyre, *Hume on "Is" and "Ought,"* 68 PHIL. REV. 451, 453 (1959) ("If you wish to pass from a factual statement to a moral statement, treat the moral statement as the conclusion to a syllogism and the factual statement as a minor premise. Then to make the transition all that is needed is to supply another moral statement as a major premise.").

79. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 641 n.109 (2015) [hereinafter *Gay Rights*].

80. Alyssa Marino, *RFRA: Michiana Business Wouldn't Cater a Gay Wedding,* ABC 57 NEWS (Mar. 31, 2015, 7:40 PM PDT), http://www.abc57.com/story/28681598/rfra-first-business-to-publicly-deny-same-sex-service.

the financial loss endured by the proprietors' stand for faith."[81] During the furor the vendors attempted to make a distinction between ordinary gays, whom they would serve, and those who asked them to cater a wedding, whom they would refuse.[82]

The suggestion seems to be that the objection is not to homosexuals themselves, who would be welcome in the business, but only to those gays who seek to marry and use the business's services to further that goal. This reasoning appears frequently during such debates, and can be read as having the purpose to mitigate the harshness of the intended discrimination. Those seeking to exclude are not targeting all gay men and lesbians, but only those getting married. Carving out this smaller subset of the whole of homosexuals puts a natural limit on the reach of the desired exemption from nondiscrimination laws. Even those who oppose such exemptions might then be persuaded that this small concession would not inflict irreparable harm on the body social. It gives the merchant the appearance of compromise between extreme positions: allow a religious exemption, but limit it only to the narrow instance of the gay wedding.

This strategy, however, must fail for two reasons. First, as a practical matter, it is not clear that such businesses are in fact open and welcoming to unmarried gays, which undermines their claim that they do not intend to discriminate against gays generally but only against those getting married. This would be an empirical claim, with the burden on the business to show that it indeed treats gay customers identically with heterosexuals. Given, however, that the basis of the complaint is that they intend not to treat gay customers identically, this seems an insurmountable hurdle. Second, courts have not been persuaded by arguments that one can accept a group while discriminating against a behavior or attribute closely aligned with the group itself. Since only gays will take advantage of the new right of same-sex marriage, to discriminate against the latter is necessarily to discriminate against the former. As far as the law is

81. Lawrence Billy Jones III, *Support Memories Pizza*, GOFUNDME, https://www.gofundme.com/MemoriesPizza (last visited Mar. 28, 2016).

82. Tom Coyne, *After Anti-Gay Controversy, Indiana's Memories Pizza Reopens to a Packed House*, HUFFINGTON POST (Apr. 10, 2015), http://www.huffingtonpost.com/2015/04/10/indiana-memories-pizza-reopens_n_7039644.html.

concerned, it makes little sense to claim to welcome gays while discriminating against those seeking same-sex marriages.

1. A Slippery Slope Toward Generalized Antigay Discrimination

Those seeking a right to exclude bear the responsibility to detail the scope of the religious-based belief that the business holds out as requiring protection. What, exactly, do they believe their religions demand of them? The fear is that, despite being initially framed as limited only to those seeking marriage services, acceding to this demand would easily allow an unbounded freedom to refuse to serve anyone perceived as gay. In that case the demand is arguably too broad, and identical to the eschewed practices that prompted the passage of the nondiscrimination laws. The primary purpose of nondiscrimination laws is to forbid just such sweeping maltreatment based on personal characteristics irrelevant to the commercial transaction.

Some like Slate columnist Mark Joseph Stern "fear . . . that if there is any religious accommodation, 'inevitably, it will soon stretch to restaurants, hotels, movie theatres—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation.'"[83] Andrew Koppelman remains confident that society will not slide down this slippery slope. "Yet hardly any of these cases have occurred . . . . There have been no claims of a right to simply refuse to deal with gay people."[84] Despite Koppelman's reassurances, others have indeed taken advantage of the debate to refuse service to gays in a wide variety of contexts:

- A doctor declined to treat an infant with lesbian parents;[85]
- A Massachusetts law student sued after he failed the bar exam because he refused to answer a question concerning the right to same-sex marriage. He argued that requiring him to "'affirmatively accept, support, and promote homosexual

83. *Gay Rights*, *supra* note 79, at 643 (quoting Mark Joseph Stern).

84. *Id.* at 643.

85. Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it.

marriage and homosexual parenting' . . . violated his First Amendment right to exercise his religion."[86]

- "An Indiana business owner went on a local radio station and said that he had discriminated against gay or lesbian couples even before Gov. Mike Pence (R) signed a law . . . protecting business owners who decide to discriminate for 'religious liberty' reasons . . . . The business owner . . . said he had told some LGBT 'people' that equipment was broken in his restaurant and he couldn't serve them even though it wasn't and other people were already eating at the tables."[87]
- An East Tennessee hardware store owner posted a "no gays allowed" sign.[88] He later turned this slogan into a line of caps, t-shirts, and bumper stickers.[89]
- A Nashville school refused to admit children with gay parents;[90]
- When the Arlington, Virginia, Human Rights Commission ordered Bono Film and Video to duplicate pro-homosexual videos presented by lesbian activist Lilli Vincenz, the company "contested the order, claiming a right not to process material that is obscene, could embarrass employees, hurt the company's reputation, or violates the company's Christian and ethical values, including material that promotes homosexuality."[91] Contrary to the characterization of these films as obscene, in fact they were

86. Sheri Qualters, *Failed Applicant Sues Bar Examiners over Test Question on Gay Marriage*, NAT'L L. J. (2007), http://www.nationallawjournal.com/id=900005484994/Failed-applicant-sues-bar-examiners-over-test-question-on-gay-marriage?slreturn=20160229020237.

87. Kay Steiger, *One Restaurant Already Celebrated 'Religious Liberty' by Turning Away Gays*, THINKPROGRESS (Mar. 29, 2015), http://thinkprogress.org/lgbt/2015/03/28/3640221/indiana-business-owner-admits-discriminating-lgbt-people.

88. Travis Gettys, *Baptist Pastor Bans Gays from His Tennessee Hardware Store: 'No I'll Never Regret This,'* RAW STORY (July 1, 2015, 10:38 AM), http://www.rawstory.com/2015/07/Baptist-pastor-bans-gays-from-his-tennessee-hardware-store-no-ill-never-regret-this; German Lopez, *A Tennessee Store Put up a "No Gays Allowed" Sign and It's Totally Legal*, VOX (July 1, 2015, 12:30 PM), http://www.vox.com/2015/7/1/8877903/tennessee-lgbtq-nondiscrimination-law.

89. Curtis M. Wong, *'No Gays Allowed' Store Owner Now Sells Homophobic Hats, Bumper Stickers*, HUFFINGTON POST (Sept. 9, 2015, 2:17 PM), http://www.huffingtonpost.com/entry/no-gays-allowed-hardware-store_55f06811e4b002d5c07793d9.

90. Joey Garrison, *Private School Rejects Children Because Parents Are Gay*, USA TODAY (Jan. 22, 2015), http://www.usatoday.com/story/news/nation/2015/01/22/private-school-children-parents-gay/22197625.

91. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 570 (2007).

important historical images Vincenz had made of the nation's first gay pride parade in 1970.[92]

- Summarizing reports from callers to his radio program, Michelangelo Signorile tells of "people from all over the country who had been told to leave restaurants, clothing stores, or other establishments, or who were told they couldn't even come in because they were perceived to be gay or transgender. One woman described being called a 'dyke' when she entered a shop in Ohio, and being told there was 'nothing here' for her. A transgender woman in Florida said she was asked to leave a beauty salon, told that it was for 'women only.' A gay man said he and his partner were turned away from a hotel in North Carolina, though he knew there were vacancies there; the owner said they could get separate rooms if they liked."[93]

Joseph Silk, an Oklahoma state senator who has introduced several antigay bills, claims that gays "don't have a right to be served in every single store."[94] And the problem is not limited to private businesses: despite assertions that "no state has yet been willing to grant public officials or vendors of goods and services related to weddings . . . exemptions from state-created obligations to serve without discrimination based on sexual orientation,"[95] government officers have now been granted the right to discriminate against gays by North Carolina[96] and Texas.[97] Even when not officially

92. Annie Gowen, *Gay Activist, Va. Firm Spar over Protest Films*, WASH. POST (May 27, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601943.html; *see also* Sarah Miller, *Virginia Is for ~~Lovers~~ Business Owners Who Feel the Human Rights Commission Poses a Threat to Their Religious Liberties*, 14 WM. & MARY J. WOMEN & L. 659 (2008).

93. MICHELANGELO SIGNORILE, IT'S NOT OVER: GETTING BEYOND TOLERANCE, DEFEATING HOMOPHOBIA, AND WINNING TRUE EQUALITY 28 (2015).

94. Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 5, 2015), http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html?_r=0; *see* H.R. 1597, 55th Leg., 1st Sess. (Okla. 2015) ("No business entity shall be required to provide any services, accommodations, advantages, facilities, goods or privileges related to any lesbian, gay, bisexual or transgender person, group or association.").

95. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 275 (2010).

96. To avoid having to perform same-sex marriages, the North Carolina legislature passed Senate Bill 2, which allows magistrates and other state officials to recuse themselves from having to perform any marriage ceremonies. S.B. 2, 2015 Gen. Assemb., Reg. Sess., 2015 N.C. Sess. Laws 75, http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S2v3.pdf. Although designed to relieve them of a duty of officiate for gay couples, during the time of their recusal they may

authorized, state officers in several states such as Indiana[98] and Kentucky[99] have taken it upon themselves to selectively dispense government privileges according to their individual religious beliefs.[100]

Despite evidence of a rising backlash against gay men and lesbians, many businesses claim they have no problem with gay individuals, but draw the line at any act that requires them to recognize as valid a gay marriage. For example, a Catholic school in Georgia hired a band director it knew to be gay and in a long-term relationship, but acted to fire him only years later when he intended to marry.[101] Being gay and sexually active has now become tolerable, but legally wedded a step too far.

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perform no ceremonies at all. The bill was vetoed by the Republican governor, but the veto was overridden by both the House and the Senate. According to most recent data, 5 percent of North Carolina magistrates have filed the recusal form. *See Five Percent of North Carolina Magistrates File Marriage Recusals*, LGBT NATION (Sept. 3, 2015), http://www.lgbtqnation.com/2015/09/five-percent-of-north-carolina-magistrates-file-marriage-recusals.

97. Ken Paxton, *Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Same-Sex Wedding Ceremonies*, ATT'Y GEN. OF TEX. (June 28, 2015), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf. The federal district court has called Attorney General Paxton to explain why he should not be held in contempt for failing to recognize same-sex marriage. Guillermo Contreras, *Judge Orders Paxton to Court over Gay-Marriage Order*, HOUS. CHRON. (Aug. 5, 2015, 4:41 PM), http://www.chron.com/news/houston-texas/houston/article/Judge-orders-Paxton-to-court-for-failing-to-6427132.php.

98. *Ind. Clerk Denies Marriage Licenses to Gay Couples Because of 'Biblical Beliefs,'* LGBTQ NATION (June 27, 2014), http://www.lgbtqnation.com/2014/06/ind-clerk-denies-marriage-licenses-to-gay-couples-because-of-biblical-beliefs.

99. Rowan County clerk Kim Davis has become the national face of refusing to comply with the *Obergefell* decision, going so far as being jailed for her refusal to obey court orders to issue marriage licenses. Proposed Class Action at 4, Miller et al. v. Davis, 123 F. Supp. 3d 924 (Aug. 12, 2015), http://www.aclu-ky.org/wp-content/uploads/2015/07/Rowan-complaint.pdf.

100. Law professors "Robin Fretwell Wilson and Douglas Laycock have defended the notion that public employees such as marriage license clerks . . . should be afforded a 'right . . . to refuse to facilitate same-sex marriages, except where such a refusal imposes significant hardship on the same-sex couple.'" Lupu & Tuttle, *supra* note 95, at 286 (citation omitted).

101. Patrick Saunders, *Fired Gay Macon Band Director Files Federal Discrimination Lawsuit Against School*, GA. VOICE (July 1, 2015, 10:30 AM), http://thegavoice.com/fired-gay-macon-band-director-files-federal-lawsuit-against-school. This constellation of features—a blind eye to individual homosexuality followed by punitive dismissal upon marriage—was at the core of Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993) *aff'd in part*, *vacated in part*, 70 F.3d 1218 (11th Cir. 1995) *reh'g en banc granted*, *opinion vacated*, 78 F.3d 499 (11th Cir. 1996), and *on reh'g en banc*, 114 F.3d 1097 (11th Cir. 1997) and *aff'd*, 114 F.3d 1097 (11th Cir. 1997). Although Georgia Attorney General had "constructive knowledge of plaintiff's sexual orientation through plaintiff's disclosures to various Department employees" when he offered her a position, *Shahar*, 836 F. Supp. at 867, her later firing upon a religious marriage ceremony with her partner was upheld by the courts. Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997).

But the supposed equal treatment of unwed gays these merchants report is a factual claim yet to be supported. On their own terms the suits for exemption have merit only if they can first demonstrate that they do not discriminate against ordinary gay customers, and that their concern is limited to only the narrow instance of service to weddings. Such a baseline assertion would be valid only if gays frequenting those premises enjoy the same freedoms and receive identical treatment as heterosexuals. The details of that analysis will vary according to the nature of the business. In the pizzeria, for example, this means that gay customers on a date can sit close in the booth, hold hands, and indulge in other innocuous public displays of affection to the same extent that straight couples are permitted.

Anything less and the declaration that gays are served without discrimination reduces to a statement of invisibility: the business will serve people who may be gay but who refrain from actually "doing" anything identifiably "gay." We saw a recent example of this line-crossing in the public reactions to Michael Sam, a football player who, in the emotional exuberance of the NFL draft kissed his boyfriend on national television. "Accepting Sam as gay was an act of tolerance. Being expected to see him in even a fleeting moment of intimacy was beyond tolerance."[102] Closer to the present issue, in *Elane Photography* the defendant likewise pled that they would take "photographs and perform . . . other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings."[103] Upon closer examination, however, the business conceded that in reality it "would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other."[104]

The divergence between surface tolerance for gays and negative reactions to overt behaviors is not unusual. Research "[r]esults show that heterosexuals are as willing to extend formal rights to same-sex couples as they are to unmarried heterosexual couples. However,

102. SIGNORILE, *supra* note 93, at 84.
103. Elane Photography, LLC v. Willock, 309 P.3d 53, 61 (N.M. 2013).
104. *Id.*

they are less willing to grant informal privileges" such as public displays of affection.[105]

The intended limitation on the exemption encounters another difficulty in the inherent contradiction between the self-portrait of equal treatment and the need for an exemption to practice unequal treatment. In *Elane Photography*, perhaps the first court analysis of the question of a religious exemption to a nondiscrimination law in this context, the court considered a complaint from a lesbian couple after the defendant refused to photograph a commitment ceremony.[106] In response to a similar argument that she does not discriminate against gays but only against gay weddings, the court expressed the view that "if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers . . . . Elane Photography's willingness to offer some services to [the plaintiffs] does not cure its refusal to provide other services that it offered to the general public."[107] In essence, such defendants argue that they will treat gays decently *so long as they do not overstep their assigned place*. That stipulation alone defeats the premise of their claim to otherwise treat gays equally, save for weddings, since only gays are burdened with the need to monitor their actions in order to prevent offense.

We thus have ample reason to be skeptical about self-professed equal treatment of homosexuals by businesses seeking a religious-based right to discriminate against marrying gays. They either do not tolerate from gays the same range of behaviors uncontroversial in straight customers, or gays censor themselves so as not to create an uncomfortable situation.[108] Moreover, because they are offering services to heterosexuals that they withhold from gays and lesbians, then on that basis alone they do not treat both groups equally.

Whatever the case, the fact remains that the argument itself misses the larger point from the perspective of their gay and lesbian customers:

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105. Long Doan et al., *Formal Rights and Informal Privileges for Same-Sex Couples: Evidence from a National Survey Experiment*, 79 AM. SOC. REV. 1172, 1172 (2014).

106. *Elane Photography*, 309 P.3d at 59–60.

107. *Id.* at 62.

108. *Cf.* YOSHINO, *supra* note 38, at ix ("To cover is to tone down a disfavored identity to fit into the mainstream.").

> Some of the religious objectors are wont to say that they are more than willing to have LGBT employees and customers; the objectors just draw their religious line at marriage. However authentically this posture captures their religious sentiment, it is spectacularly tone-deaf and insulting. The act of marrying represents a high point in the lives of many couples, particularly those same-sex couples who have lived for many years deprived by law and custom of such opportunities. Their actual and perceived status as being married, with the identical social, moral, and legal force as different sex couples, is of profound significance to their sense of equal citizenship. For a vendor, employer, or public official to discriminate them with respect to their wedding or marital status is a deep insult on their full and equal place in American society.[109]

Because these businesses spare their heterosexual customers this insult, any assurance that gays will be treated equally is a delusion.

2. Relating Status and Conduct

On its face the demanded religious exemption to discriminate in commercial settings promises to set off a flood of prejudice against gays and lesbians. Even those sympathetic to the requests may view this as a step too far, and thus the promise is given that the exemption is needed only for those entering same-sex marriages and does not offer a broader justification to discriminate against all gays and lesbians. This argument, however, has failed to convince those courts that have considered it.

Masterpiece Cakeshop, a Lakewood, Colorado, bakery, refused the gay plaintiffs' order for a cake for their wedding.[110] The plaintiffs sued under the Colorado Antidiscrimination Act (CADA).[111] The bakery argued that "it did not decline to make Craig's and Mullins' wedding cake 'because of' their sexual orientation"[112] as the law

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109. Ira C. Lupu, *Moving Targets:* Obergefell*,* Hobby Lobby*, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 79 (forthcoming 2015), http://ssrn.com/abstract=2602233 [hereinafter *Moving Targets*].

110. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 COA 115, at *1 (Colo. App. Aug. 13, 2015).

111. *Id.* at *3.

112. *Id.* at *14.

required.[113] Relying on the distinction considered in the previous section, the defendant stated that "it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake."[114]

The success of this argument depended on maintaining a principled distinction between status, which is protected by CADA, and conduct, which is not. In its view, Masterpiece does not discriminate because of the plaintiffs' sexual orientation—it will sell them other baked goods—but only because of the conduct of having a same-sex wedding. In some contexts this distinction might be persuasive. If the shop had a policy to discriminate against anyone who requested a red velvet wedding cake, and only same-sex couples placed such orders, then even though all gay couples would be refused service it could not be said to be "because of" their sexual orientation.

The question for the court, then, is whether the relationship between the status of sexual orientation and the conduct of planning a same-sex wedding is sufficiently accidental to support Masterpiece's defense, or whether the protected status bears a close and even exclusive relationship to the targeted conduct such that one cannot reasonably discriminate on the latter without necessarily discriminating on the former.

In reaching its decision, the court pointed to prior U.S. Supreme Court decisions that had considered this question in similar contexts. In 2010's *Christian Legal Social Chapter of the University of California, Hastings College of Law v. Martinez*,[115] the Court notes that "CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' Our decisions have declined to distinguish between status and conduct in this context."[116] In support of this conclusion, Justice Ginsburg cited both to the majority opinion in *Lawrence v. Texas*,[117] which found, "When homosexual *conduct* is made criminal by the law of the State, that

113. COLO. REV. STAT. § 24-34-601(2)(A) (2014).
114. *Masterpiece*, 2015 COA 115, at *14.
115. 561 U.S. 661, 689 (2010).
116. *Id.*
117. 539 U.S. 558 (2003).

declaration in and of itself is an invitation to subject homosexual *persons* to discrimination,"[118] as well as to Justice O'Connor's even more on-point concurrence: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."[119]

Finally, *Masterpiece* notes that the *Obergefell* Court explicitly rejects the bakery's assertion that discrimination against same-sex marriage is distinguishable from discrimination on sexual orientation. Because the two are so inextricably bound, *Obergefell* "equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation."[120]

> In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is "engaged in exclusively or predominantly" by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.[121]

The *Masterpiece* decision is not unique in holding that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation."[122] A

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118. *Id.* at 575 (emphasis added).

119. *Id.* at 583 (O'Connor, J., concurring).

120. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351 2015 COA 115, at *6 (Colo. App. Aug. 13, 2015) (observing that the "denial to same-sex couples of the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them").

121. *Id.* at *6.

122. *Id.* at *7. *See also* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 213 (2010) [hereinafter *Same-Sex-Marriage*]. It reads:

> One argument was that pursuit of a same-sex relationship is conduct, not an orientation or other personal characteristic; opposite-sex marriage laws are open to persons of both heterosexual and homosexual orientations. The courts rejected this claim, holding that same-sex intimate conduct correlates so greatly with same-sex orientation that the

similar result was reached in *In re Klein*.[123] On facts identical to those found in *Masterpiece*, Sweet Cakes by Melissa, a Portland, Oregon, baker, refused a wedding cake order from two lesbians.[124] Here, too, the defendant sought to distinguish her discriminatory actions from the plaintiffs' sexual orientation.[125] Citing the same Supreme Court opinions reviewed in *Masterpiece*, *Klein* concluded that "[t]here is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple. The conduct, a marriage ceremony, is inextricably linked to a person's sexual orientation."[126]

While claiming to be against same-sex marriage but not against gays may seem a kinder, more moderate position than wholesale prejudice, thus far this position has been viewed as a distinction without a difference. "[N]obody should be mistaken about the underlying reason for their opposition to same-sex marriage: they 'disapprove of homosexuality.' As Justice Scalia observed in his *Lawrence* dissent, 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."[127]

C. Summary

The debates concerning the wisdom of granting a religious exemption to nondiscrimination laws in the marketplace involve an eclectic assortment of rhetorical feints over and above the strictly legal arguments in defense of that claimed exemption. Examples include suggestions that merchants have a default right to exclude anyone they wish, and that the exemption desired is a *de minimis* concession because it would be invoked against a small subset of the broader gay community.[128]

> discrimination runs against the orientation. The courts' rationale rested on the centrality of the conduct to the homosexual person's identity.

Id.

123. Nos. 44-14 & 45-14, 2015 WL 4503460, at *1 (Or. Div. of Fin. & Corp. Sec. July 2, 2015).

124. *Id.* at *11.

125. *Id.* at *51.

126. *Id.*

127. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 123 (2015) (citation omitted).

128. See *supra* Part I.A.

Both of these prove problematic in their effective use to support the claim for exemption. The right to exclude is a new and tainted legal norm, and thus its invocation does not serve as the trump card intended. Because exclusion from commercial property reflects neither our founding tradition, nor the inevitable entailments of property ownership,[129] the speaker must still defend the assertion that this new effort to discriminate against gays should fall within the racist rule. Aware of its historical roots, many may decline to invoke the rule so as to avoid a need to explain why they hope to justify their antigay actions by analogizing them to Jim Crow bigotry.

The attempt to defend discrimination based on conduct rather than status similarly fails to deflect concern that the exemption, if granted, would provide a basis for unrelenting discrimination against gay men and lesbians generally. Granting the tight relationship between the targeted conduct and the protected status, no reasonable person can assert that to discriminate against same-sex marriage is not necessarily discrimination against gays.

Given this discussion, the remainder of this essay shall assume that no general right to exclude exists in the commercial context, such that it would remove from the claimant the burden to articulate why this particular discrimination is warranted. It also accepts that those who seek the exemption are in principle seeking a protected freedom to discriminate against all gays and lesbians. The legitimacy of the exemption therefore depends on the direct legal arguments and not on indirect strategic maneuvers.

III. IS BAKING A CAKE FORCED SPEECH?

Although framing their cases in terms of religious exercise, defendants inevitably invoke free speech rights as well. The reasoning typically tracks some form of the following: The services at issue involve an expression of approval for or endorsement of the nuptials; being forced to provide cakes (or dresses, or flowers, etc.) compels speech in violation of the constitutional protections of the First Amendment. Although no court has accepted this argument, thus far it has not been offered in its strongest form, which ties the perception of messages to the background social norms.

129. See *supra* Part I.A.

A. The Legal Species of Coerced Speech

Masterpiece offered such a compelled speech argument, one that was summarily rejected by the court.[130] In its analysis, the opinion noted that the compelled speech doctrine had originated in *West Virginia Board of Education v. Barnette*,[131] which had ruled that Jehovah's Witnesses could not be forced to offer the pledge of allegiance in school.[132] Thereafter, the jurisprudence has split along two different lines. The first follows *Barnette* in "prohibit[ing] the government from requiring that an individual 'speak the government's message.'"[133] This prong of the coerced speech doctrine was more recently addressed by the Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights*,[134] in which law schools argued that a federal law mandating the presence of military recruiters violated school policies prohibiting discrimination against homosexuals and compelled them to speak the government's message of gay prejudice as if it were their own.[135] The second line of cases holds that government cannot "require an individual 'to host or accommodate another speaker's message.'"[136] This conclusion follows *Miami Herald Publishing Co. v. Tornillo*,[137] a case that found unconstitutional a Florida statute that gave a "right to reply" to any political candidate who had received negative editorial treatment by the newspaper,[138] and was the basis for recent decisions in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[139] and *Boy Scouts of America v. Dale*.[140]

While exemption-seekers have argued that enforcing a nondiscrimination rule violates both lines of the compelled speech doctrine, the threshold inquiry according to the *Masterpiece* analysis is whether the baker has any First Amendment rights at issue. Since

130. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 COA 115, at *25–26 (Colo. App. Aug. 13, 2015).
131. 319 U.S. 624 (1943).
132. *Id.* at 642.
133. *Masterpiece*, 2015 COA 115, at *26 (Colo. App. Aug. 13, 2015) (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 63 (2006)).
134. 547 U.S. 47 (2006).
135. *Masterpiece*, 2015 COA 115, at *51.
136. *Id.* (quoting *Rumsfeld*, 547 U.S. at 63).
137. 418 U.S. 241 (1974).
138. *Id.* at 256.
139. 515 U.S. 557 (1995).
140. 530 U.S. 640 (2000).

no actual speech is involved in supplying a wedding cake, the defendant bears the burden of showing that their activities are such as would trigger First Amendment protections. Because almost any act can contain an expressive element that would stymy efforts at governmental regulation, the Supreme Court has sought to limit this shelter "only to conduct that is 'inherently expressive.'"[141] If cake baking does not rise to the level of being "inherently expressive," then the requirement that bakery shops provide equal service will not infringe any speech rights they may have.

According to the *Masterpiece* court, the questions are "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[142] Masterpiece argued that wedding cakes inherently communicate "a celebratory message about marriage, and that, by forcing it to make cakes for same-sex weddings, the Commission's cease and desist order unconstitutionally compels it to express a celebratory message about same-sex marriage it does not support."[143]

The court did not need to reach this question because although it acknowledged that "creating a wedding cake involves skill and artistry," Masterpiece had refused the order before learning any details of the intended cake's design.[144] It was therefore not possible to "determine whether [the] desired wedding cake would constitute symbolic speech subject to First Amendment protections" since the record does not reflect the intentions of the plaintiffs as to design.[145] For example, a cake with only icing flowers would communicate no particular message, but requiring the shop to write, "Gay Marriage is Wonderful" would prove more problematic.[146]

The need for fuller details before finding a speech violation can be illustrated by the suit against Hands On Originals (HOO), a

141. *Masterpiece*, 2015 COA 115, ¶ 52 (quoting *Rumsfeld*, 547 U.S. at 66).

142. *Id.* at *28–29 (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)).

143. *Id.* at *31.

144. *Id.* at *31–32.

145. *Id.*

146. For example, no suit arose after a grocery refused to provide a cake with the writing, "Happy Birthday, Adolf Hitler." Larry McShane, *Happy Birthday, Adolf Hitler! Boy with Nazi Leader's Name Denied ShopRite Cake*, N.Y. DAILY NEWS (Dec. 16, 2008), http://www.nydailynews.com/news/world/happy-birthday-adolf-hitler-boy-nazi-leader-denied-shoprite-cake-article-1.358050.

Lexington, Kentucky, t-shirt shop.[147] Asked to produce the official shirt for the annual gay pride festival, the shop refused due to its religious objections to the message.[148] While the store lost in early hearings, it succeeded in final arguments before the Fayette Circuit Court.[149] According to the court, the shop was entitled to reject the order without violating the city's fairness ordinance because it was rejecting the message, not the customer.[150] "[P]roducing the t-shirts as requested would require HOO to print a t-shirt with the words 'Lexington Pride Festival' communicating the message that people should take pride in sexual relationships or sexual activity outside a marriage between a man and a woman."[151] At oral argument HOO showed that it had "declined to print at least thirteen (13) orders for message based reasons. Those print orders that were refused by HOO included shirts promoting a strip club, pens promoting a sexually explicit video, and shirts containing a violence related message."[152] Consequently, HOO was found not to have declined the order "because of" sexual orientation, but because the message conflicted with its religious beliefs.[153]

Because the planned cake was never discussed, the *Masterpiece* court did not need to fully delve into the legal details of the free speech dimensions of the complaint. One case that does offer that analysis is *Elane Photography v. Willock*.[154] The facts describe a pattern that has become predictable. Plaintiff Willock contacted Elane Photography seeking its services for a commitment ceremony with her female partner. After being told that the shop "photographed

147. *See* Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n et al., No. 14-CI-04474, at 15–16 (Ky. Cir. Apr. 27, 2015), https://perma.cc/75FY-Z77D.

148. Scott Sloan, *Commission Sides with Gay Group Against Hands On Originals*, LEXINGTON HERALD-LEADER (Nov. 26, 2012), http://www.kentucky.com/2012/11/26/2421990/city-rules-hands-on-originals.html.

149. *Hands On Originals*, No. 14-CI-04474, at 15–16.

150. *Id.* at 10.

151. *Id.* at 5–6.

152. *Id.* at 9.

153. *Id.* at 8–9. A structurally similar case, with the roles reversed, arose when a woman went into an Office Depot to order copies printed of a pro-life flyer. The business refused on the ground that company policy prohibits "the copying of any type of material that advocates any form of racial or religious discrimination or the persecution of certain groups of people." Scott Shackford, *Does Office Depot Have the Right to Refuse to Print Anti-Abortion Fliers?*, REASON.COM (Sept. 11, 2015, 3:15 PM), https://reason.com/blog/2015/09/11/does-office-depot-have-the-right-to-refu. She is suing, although when offered to use the self-service printers she declined because that would be an "inconvenience." *Id.*

154. 309 P.3d 53 (N.M. 2013).

only 'traditional weddings,'"[155] Willock filed a discrimination suit under the New Mexico Human Rights Act (NMHRA).

As part of its defense, Elane Photography argued that "by requiring it to photograph same-sex weddings on the same basis that it photographs opposite-sex weddings, the NMHRA unconstitutionally compels it to 'create and engage in expression' that sends a positive message about same-sex marriage not shared by its owner."[156] The court, however, rejected this argument, providing analysis on both lines of the compelled speech doctrine.

On the first, or government message prong, unlike *Barnette*, the NMHRA does not require that the photographer "recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if [she] operates a business as a public accommodation, [she] cannot discriminate against potential clients based on their sexual orientation."[157] As for the second prong protecting a party from being forced to accommodate the message of a third party, Elane Photography made two arguments: First, as an expressive, even artistic service, Elane Photography should receive the same deference to its message that the Supreme Court extended to parades in *Hurley*.[158] Second, the photographer argued that if she were required to photograph same-sex unions, observers would attribute to her messages of approval and support for these relationships.[159]

In *Hurley* the Supreme Court had considered whether the organizers of Boston's annual St. Patrick's Day parade should be forced to allow a gay Irish group to march.[160] The Court sided with the organizers, reasoning that while individual gay persons were not excluded from marching, the inclusion of the gay group would alter the message the parade was intended to communicate.[161] Elane Photography analogized its position to that of the parade with a particularized expression that gay couples hoped to co-opt to broadcast their own message.[162]

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155. *Id.* at 60.
156. *Id.* at 63.
157. *Id.* at 64.
158. *Id.* at 65.
159. *Id.*
160. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 566 (1995).
161. *Id.* at 577.
162. *Elane Photography*, 309 P.3d at 68.

The argument is not wholly unreasonable. *Hurley*, especially when combined with *Boy Scouts of America v. Dale*,[163] had significantly expanded "new expressive association right[s] . . . [such that] [a]lmost any association is eligible for the protection from antidiscrimination laws that the Court provides" in these opinions.[164] While announced in the context of nonprofit organizations, extending the impact of these decisions to businesses is easily done.[165] If "commercial business enterprises can have substantial expressive dimensions,"[166] then Elane Photography's defense enjoys a certain surface coherence.[167] But because the NMHRA extends only to the "photographs that Elane Photography produces for hire in the ordinary course of its business as a public accommodation, [the scope of the law] has no relation to the artistic merit of photographs produced by Elane Photography."[168] "While photography may be expressive, the operation of a photography business is not."[169]

The court then takes up the second argument that if the business does the photo shoot, "observers will believe that it and its owners approve of same-sex marriage."[170] Perceived message did play a factor in the *Hurley* outcome: "in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."[171] Given the practical realities of hiring wedding photographers, the court is skeptical that such for-hire vendors are assumed to offer any particular approval of the event along with their delivery of services. In any case the business is "free to disavow, implicitly or explicitly, any messages

163. 530 U.S. 640 (2000).

164. KOPPELMAN & WOLFF, *supra* note 40, at 27.

165. *Cf.* Richard Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139 (2000) ("Only the bold and foolhardy would claim that current law allows business associations, large or small, public or private, out from under the thumb of the antidiscrimination laws.").

166. Michael Stokes Paulsen, *Scouts, Families, and School*, 85 MINN. L. REV. 1917, 1927 n.49 (2001).

167. For a contrary view, however, *see* Dent, *supra* note 91, at 573 ("[I]t also seems unlikely that a for-profit business corporation would qualify as an expressive association under *Hurley* and *Dale*.").

168. Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M. 2013).

169. *Id.* at 68.

170. *Id.*

171. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 577 (1995).

that it believes the photographs convey."[172] *Masterpiece* reaches a similar result, concluding that providing a wedding cake on a nondiscriminatory basis does not convey a "celebratory message about same-sex weddings," and that were any such message inferred it would be "more likely to be attributed to the customer than to Masterpiece."[173]

B. Social Norms and Perceived Messages

Like *Masterpiece*, *Elane Photography* decides the issue by pointing out that given the context, a "reasonable observer" is likely to attribute any perceived message of a wedding cake to the couple and not to the baker.[174] Stated generally, context determines whether a purported message of endorsement is reasonable under those circumstances. For example,

> [w]hen the newspaper prints an advertisement for a fee, readers generally do not consider it an endorsement of the advertisement by the paper. No one buys an Oldsmobile because she saw an advertisement for it in her trusted newspaper, the *Oakland Tribune*, and believed that the *Tribune* endorsed or vouched for the automobile.[175]

The broad gesture toward context, however, is not sufficiently granular to instruct us what to look for when evaluating such claims. Neither court offered a detailed roadmap showing how it arrived at this sociological and linguistic insight. Because similar defenses are likely to continue to be offered, a more textured consideration of the background variables that impact the perception of implied messages is well worth our effort.

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172. *Elane Photography*, 309 P.3d at 70.

173. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 COA 115, at *33–34 (Colo. App. Aug. 13, 2015); *see also* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 27 (D.C. 1987) ("One nondiscriminatory reason asserted by Georgetown for its denial of the tangible benefits contained in 'University Recognition' was that it could not give its accompanying 'endorsement' to the student groups without violating its religious principles. But as the Human Rights Act, properly construed, requires no direct, intangible 'endorsement,' Georgetown cannot avoid a finding of discrimination on that ground."). If, according to the court in *Gay Rights Coalition*, the provision of tangible benefits such as funding and meeting space did not constitute an "endorsement" of homosexuality contrary to the Catholic university's religious beliefs, then the selling of a wedding cake should not rise to the level of "endorsing" any specific marriage.

174. *Elane Photography*, 309 P.3d at 69.

175. Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 338 (1987).

Koppelman offers the key insight in this regard when he suggests that "[f]ollowing the unspoken norm endorses nothing; only departing from the norm sends a message."[176] With this observation, he ties into the research on scripts and similar ways of processing social information. Culture—whether institutional, social, or organizational—provides "a basis for the organization of activities, responses, perceptions, and experiences by the conscious self."[177] These internalized norms offer a default set of responses for frequently-encountered situations.[178] Because much of what we do and say draws upon this stock of prefabricated responses, the performance signals little more than the lack of motivation to blaze an individualized message.[179] If every man wears a tie and jacket to the office, then wearing that clothing signals only that one is a member of the community and follows the expected forms. Wearing shorts and a tropical shirt to an important business meeting, however, sends a specific and deliberate message. It is deviation from expectation that sends a message, not conforming to conventional practice.

The Supreme Court in *United States v. Windsor*[180] acknowledged this tendency for signals to arise from deviations from expected routines. The opinion "taught that an 'unusual deviation from the usual tradition' that 'operate[s] to deprive same-sex couples' of customary benefits available to others is 'strong evidence of a law having the purpose and effect of disapproval of that class.'"[181] Accordingly, service for same-sex weddings would send a message of the kind that triggers free speech concerns only if the background social norms pervasively reject that acceptance.

This perspective generates two related conclusions. First, whether or not an action (such as providing a wedding cake) sends a message from the baker will be a fact-specific inquiry taking into consideration the background social norms in the relevant

176. KOPPELMAN & WOLFF, *supra* note 40, at 37. *See also* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 257 (2015) ("[A]n old tradition communicates less about current attitudes than a new governmental endorsement.").

177. Michelle Z. Rosaldo, *Toward an Anthropology of Self and Feeling*, *in* CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION 137, 140 (Richard A. Shweder & Robert A. LeVine eds., Cambridge Univ. Press 1984).

178. *Id.* at 140–41.

179. *Id.* at 141.

180. 133 S. Ct. 2675 (2013).

181. Oleske, *supra* note 127, at 104 (citing *Windsor*, 133 S. Ct. at 2693) (citation omitted).

community. Even from the broader perspective of national trends, this assessment will vary over time as social attitudes change.

These conclusions offer a more receptive opening for a defendant's complaints of forced speech than the courts have thus far been willing to recognize. Although the legal outcome may still be the same, it is important that the concerns from both sides be heard in their most generous lights.

For purposes of the present discussion, we must concede that even twenty or thirty years ago the social prohibition on homosexuality was sufficiently pervasive as to support a plea that serving openly gay couples would constitute departure from the social baseline and thereby send a message of support and endorsement. The first challenge for the court will be to identify the relevant community of "right-minded" individuals that constitute the normative standard against which the discriminatory service provider is to be evaluated.[182] This may be limited to the likely customers of the business, or broadened to consider the opinions of the general community.

The second question then asks whether the cultural climate within that relevant community has sufficiently changed as to remove the implied message of support when providing services. Defendants like Masterpiece and Elane Photography offer the argument that the background conventions have not changed to this degree, and that an act that would unquestionably have been interpreted as a demonstration of approval ten years ago does so still today. If true, this fact may be insufficient for an ultimate victory, but if they can establish that their speech rights have been infringed, the burden then shifts to the plaintiff to demonstrate a compelling interest in the requirement. In no case thus far have defendants successfully overcome the first hurdle to reach this later phase.

A brief description of two examples of changing legal attitudes toward homosexuality will illustrate the changes these background norms can undergo, and show how the judgment of what constitutes a message-sending "departure" cannot be a uniform or stable determination. What sends a message at one point, in one

182. The formal criteria to identify the relevant community will itself be a problematic issue, and one not dealt with here. For example, how should we determine whether it is the baker's community (e.g., church) that matters, or the people attending the wedding? Even within small towns, these two segments can vary significantly on touchstone norms.

community, may be simple compliance with social convention at another time or in a different locale.

1. Defamation Per Se

The tort of defamation seeks to protect personal reputation from false imputations that would cause "a 'substantial and respectable minority' of the population [to] think less of [the] plaintiff."[183] While most instances of alleged defamation require that the plaintiff prove damages, some statements have been deemed so inherently damaging that injuries are presumed. The law has traditionally recognized four broad categories of such per se defamation: "(1) statements accusing plaintiff of a criminal offense, (2) statements that plaintiff has a loathsome disease, (3) statements incompatible with plaintiff's business, trade, profession or office, and (4) statements accusing plaintiff of serious sexual misconduct."[184]

For some, even the words referring to homosexuality are so fraught with explosive danger that they must be avoided.[185] Unsurprisingly, then, the question whether imputations of homosexuality qualify as defamation receives sporadic popular attention when male celebrities are quick to initiate lawsuits whenever their heterosexual credentials have been impugned. Few stars have exerted more effort than Tom Cruise[186] to sue anyone who

183. DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 1:7 (2003).

184. Randy M. Fogle, *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 LAW & SEX. 165, 168 (1993).

185. For example, during the Bush administration the Substance Abuse and Mental Health Services Administration first asserted that sponsored events should not include the words "Gay," "Lesbian," "Bisexual," or "Transgender" in program titles, although the administration later permitted the use of those terms in the agency's sponsored events. *HHS Backs Down on Gay Funding Threats*, 365GAY.COM (Feb. 18, 2005), http://www.indybay.org/newsitems/2005/02/19/17225631.php. After vanity car tags saying "GAYSROK" and "GAYRYTS" were rejected by the Utah Department of Motor Vehicles, the State Tax Commission was asked to rule "whether a reasonable person would believe the terms 'gays are OK' and 'gay rights' are, themselves, offensive to good taste and decency." *Utah Woman Can Keep "GAYSROK" License Plate*, NBC NEWS (July 28, 2005), http://www.nbcnews.com/id/8734642/ns/us_news-weird_news/t/Utah-woman-can-keep-gaysrok-license-plate/#.VfXuKZdSSSo. While earlier New York had sought to prevent the use of "Gay" in a nonprofit corporation, Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973), it later attempted a similar ban on use of the word "queer." John Caher, *First Amendment Raised in Battle for "Queer" Group Title*, 230 N.Y. L. J. 1, 7 (2003).

186. *See* Steven M. Silverman, *Cruise Wins $10 Million in Gay Lawsuit*, PEOPLE (Jan. 16, 2003), http://www.people.com/people/article/0,,625389,00.html; *see also* Cindy Wang, *A Chronological History of Tom Cruise Lawsuits*, DOT429 (July 24, 2014), http://dot429.com/articles/4722-a-chronological-history-of-tom-cruise-lawsuits.

suggests he might be gay. Former Madonna lover James Albright sued after a picture in a book confused another man, an "outspoken homosexual," with Albright.[187] Sean "Puffy" Combs[188] and singer Robbie Williams[189] likewise have histories of threatening libel suits against anyone suggesting they may be homosexual. Although an element of a defamation claim is that the statement must be false, individuals have threatened defamation suits despite being later revealed to be gay.[190]

Some courts have determined that accusations of homosexuality do fall into the category of per se defamation. Examples include *Head v. Newton*,[191] which held that "the statement that someone was a 'queer' is slanderous per se because it imputes the crime of sodomy,"[192] and *Schomer v. Smidt*'s[193] ruling that "a false imputation of the commission of a homosexual act is slanderous per se."[194] To the extent that calling someone "gay" constitutes per se defamation

187. Amrak Prods., Inc. v. Morton, 410 F.3d 69, 71 (1st Cir. 2005). Other instances of suits arising from photographs rather than words include model Ben Massing suing after his photo was used in a gay magazine, leading to "the false and defamatory impression that Plaintiff is sexually lustful and promiscuous, poses nude and subscribes to homosexuality." Verified Complaint at § 111, Messing v. Avalon Equity Partners, LLC et al., Index No. 113039-2008 (Sup. Ct. N.Y. Cnty. 2008); *see also* Palmisano v. Modernismo Publ'ns, Ltd., 470 N.Y.S.2d 196 (App. Div. 1983) ("Plaintiff also alleged libel in that the advertisement contained false and imaginary first person statements which conveyed thoughts and feelings which were not his, and knowingly conveyed the impression that plaintiff is a homosexual, which he alleged he is not.").

188. Andy Towle, *Lawyers for P. Diddy: For the Record, He's Not Gay*, TOWLEROAD (Apr. 26, 2010, 2:56 PM), http://www.towleroad.com/2010/04/lawyers-for-p-diddy-for-the-record-hes-not-gay. (copy of complaint on file with author).

189. Ciar Byrne, *William Wins Big Libel Damages over Reports He Is Gay*, THE INDEP. (Dec. 7, 2005), http://www.independent.co.uk/news/uk/crime/williams-wins-big-libel-damages-over-reports-he-is-gay-518476.html.

190. Perhaps the most notorious was Liberace's successful suit in 1959. Roy Greenslade, *The Meaning of 'Fruit:' How the Daily Mirror Libelled Liberace*, THE GUARDIAN (May 26, 2009), http://www.theguardian.com/media/greenslade/2009/may/26/daily-mirror-medialaw. More recently, Olympian Ian Thorpe threatened to sue artists who implied his homosexuality in a collage. Allan Maki, *Thorpe No Fan of This Artwork; Swimmer Angry over Gay Label, But Artists Say It's All in Fun*, GLOBE AND MAIL (TORONTO) (July 20, 2004), at S3. Thorpe later admitted that he is in fact gay. Amanda Meade, *Ian Thorpe: I'm Finally Comfortable Saying I'm a Gay Man*, THE GUARDIAN, (July 13, 2014, 7:56 EDT), http://www.theguardian.com/sport/2014/jul/13/ian-thorpe-comfortable-saying-im-a-gay-man-parkinson.

191. 596 S.W.2d 209 (Tex. 1980).

192. *Id.*

193. 170 Cal. Rptr. 662 (Ct. App. 1981).

194. *Id.* at 666. *See* Dally v. Orange Cnty. Publ'ns, 497 N.Y.S.2d 947 (App. Div. 1986); Murphy v. Pizarrio, No. 94 CIV. 0471 (JFK), 1995 WL 565990 (S.D.N.Y. Sept. 22, 1995); Thomas v. BET Sound-Stage Rest./Brettco, Inc., 61 F. Supp. 2d 448 (D. Md. 1999).

because it "imputes the crime of sodomy,"[195] as laws and attitudes change, we would expect courts to gradually reflect the more liberalizing trends.[196]

Accordingly, the court in *Moricoli v. Schwartz*[197] declined to rule that accusations of homosexuality are per se injuries due to "the changing temper of the times."[198] Similarly reflective of the changing views on whether homosexuality constituted per se defamation are the changes between editions of Prosser's classic text on torts. In the 1971 fourth edition he states that "it appears very likely, in view of popular feeling on the matter, that the imputation of homosexuality to either sex would be held to constitute a fifth category, actionable without proof of damage."[199] But by the fifth edition, in 1984, the text correctly summarizes the existing case law saying that "there have been some indications that imputation of deviate sexual behavior would be actionable on the part of either a man or a woman"[200] while lacking the prognosis that homosexuality was well on its way toward becoming an established fifth category of per se defamation.

The differing currents of legal and cultural opinions have resulted in a conflicted state of the law on this question:

> Courts generally hold that (1) false statements of homosexuality are defamatory *per se*, and damages are presumed, either because they either imply criminal conduct, unchastity, or expose a plaintiff to public hatred, contempt or ridicule; (2) false imputations of homosexuality are not defamatory *per se*, requiring a plaintiff to allege and prove actual damages; or (3) such statements are not defamatory at all because of the Supreme Court's decision

195. Prior to *Lawrence*, "[c]ourts typically avoid the issue of whether an imputation of homosexuality is defamatory in terms of a person's reputation. Some courts held that an imputation of homosexuality is defamatory per se because it infers the commission of sodomy." Fogle, *supra* note 184, at 180.

196. *See* Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?*, 18 N. ILL. U. L. REV. 99, 101 (1997) ("The actionability of the alleged defamatory words has depended in large part on the temper of the times and the contemporary opinion, so that what may be actionable in one age may not be in another.").

197. 361 N.E.2d 74 (Ill. App. 1977).

198. *Id.* at 76.

199. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 760 (4th ed. 1971).

200. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 793 (5th ed. 1984).

> in *Lawrence v. Texas*, as well as society's increasing acceptance of homosexuality.[201]

The tides of change influence the kind of harm encompassed by the defamation tort. A "statement is defamatory only if it prejudices a person in the eyes of a substantial number of 'right-minded' people."[202] Once antigay prejudice becomes recognized as wrong, courts will be unlikely to find accusations of homosexuality defamatory because the "plaintiff in this case could only be injured in the eyes of homophobic individuals. Therefore, allowing a person to recover in such a defamation action would contradict public policies to treat people equally regardless of sexual orientation and to combat homophobia in our society."[203] Consequently, as *Moricoli* implied, the "social climate within a community at the time the statement is made must be considered in determining whether or not a particular statement is defamatory."[204] These trends culminated in the New York Court of Appeals overturning its prior rule and now holding that:

> In light of the tremendous evolution in social attitudes regarding homosexuality, the elimination of the legal sanctions that troubled the Second Department in 1984 and the considerable legal protection and respect that the law of this state now accords lesbians, gays and bisexuals, it cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome disease.[205]

2. Gay Panic Defenses

Criminal law also contains an example of the evolving background norms concerning homosexuality against which claims of coerced speech must be evaluated. Just as accusations of

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201. Holly Miller, Article, *Homosexuality as Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POL'Y 349, 356 (2013) [hereinafter *Homosexuality as Defamation*].

202. Fogle, *supra* note 184, at 172 (citing LAURENCE ELDREDGE, THE LAW OF DEFAMATION 32–36 (1997)).

203. *Id.* at 176.

204. *Id.* at 170; *see also Homosexuality as Defamation*, *supra* note 201, at 363–64 (reviewing literature arguing that the need not to legitimate homophobia outweighs the harms to the plaintiff from being falsely labeled gay).

205. Yonaty v. Mincolla, 945 N.Y.S.2d 774, 778–79 (App. Div. 2012).

homosexuality were once deemed so outrageous as to be defamatory per se, being the focus of homosexual interest has been held by some courts as sufficient provocation to justify murder.

As chronicled by Cynthia Lee, the label "homosexual panic" was first coined in 1920, and was listed in the 1952 edition of the *Diagnostic and Statistical Manual* to describe latent homosexuals who experienced extreme anxiety in situations that stimulated their homosexual interest.[206] While later discredited as a mental illness, the constellation resurfaced as an urban myth to plead mitigation or even exoneration on the grounds that "the victim's (homo)sexual advance triggered in [the defendants] a violent psychotic reaction, causing them to lose control over their mental abilities."[207] These defenses, according to Lee, "have been relatively successful."[208]

The flavor of these cases can be found in *People v. Cain*.[209] Runcorn, a 73-year old geophysicist, was found dead in 1995. "A strap taken from one of Runcorn's pieces of luggage was tied tightly around his neck. There were lacerations, abrasions, and bruising on his face, neck, ears, back of the head, and left shoulder, damage to the gums and tongue, and broken teeth."[210] Cain, the defendant, was a twenty-four year old competitive kickboxer whose pager was found under the victim's bed.

At trial Cain described the night's events:

> Runcorn put his hands on Cain's chest and pushed him down on the bed, saying something to the effect of, "You know you want it, you want to suck my dick." Cain tried to leave, but Runcorn grabbed him by the shirt. From the look on Runcorn's face, Cain feared he was going to be raped. He tried to break Runcorn's hold on him by elbowing him and punching him in the face. When he saw Runcorn "ball up" in an aggressive stance, Cain claimed everything "went black," and he experienced a "black rage" as the two of them fought. Cain recalled Runcorn slammed him into a chair and looked angry when he was holding onto Cain's

206. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 482–83 (2008) [hereinafter *Gay Panic Defense*].

207. *Id.* at 491. *See* Michael A. Smyth, *Queers and Provocateurs: Hegemony, Ideology, and the "Homosexual Advance" Defense*, 40 L. & SOC. REV. 903, 906 (2006).

208. *Gay Panic Defense*, *supra* note 206, at 478.

209. No. D036023, 2002 WL 1767583 (Cal. Ct. App. July 31, 2002).

210. *Id.* at *1.

> leg as he tried to leave. When he regained control of himself, Cain said he found Runcorn lying on the floor with a strap tied around his neck. Cain could not recall using the strap.[211]

This tale was sufficient to help get his conviction reduced from an initial charge of first-degree murder, carrying a twenty-five year sentence, to second degree and fifteen years. While the jury seemed receptive to this story of the innocent victim needing to put down the homosexual predator, for most people the thought that a young experienced martial artist would be unable to escape an unwelcome sexual advance from someone fifty years older would be incredible.

Cain is not an isolated instance of odd decisions by juries:

> On February 28, 2003, a Cobb County jury acquitted Roderiqus Reshad Reed of the May 2001 brutal murder and robbery of [Ahmed] Dabarran despite Reed's own admission at trial that he repeatedly struck [Ahmed] on the head with a pot in [Ahmed's] home, and then left with the victim's car, wallet, and cell phone. Reed's attorneys used the "gay panic" defense alleging that Reed killed [Ahmed] to protect himself from unwanted sexual advances. However, a medical examiner testified that [Ahmed] was struck over a dozen times on the head while he slept.[212]

In a case that received much media attention, fifteen-year old Lawrence King was shot in the back of the head by his classmate, who later claimed that King's provocative behavior led him to commit the murder.[213]

The gay panic defense ties into a generalized idea that gay sexuality, especially when turned toward heterosexuals, reasonably provokes extreme disgust and violence. The BBC was forced to apologize in 2009 after it treated the pending Ugandan legislation that would make gay acts a capital offense as a position on which

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211. *Id.* at *3.

212. *Acquittal of Georgia Man's Killer Sparks Candlelight Protest*, GAY TODAY (Mar. 20, 2003), http://gaytoday.com/events/032003ev.asp.

213. David Alan Perkiss, Comment, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 792 (2013) ("Thus, the defense argued gay panic at trial: By painting a picture of King as a sexual aggressor and McInerney as the emotionally troubled target of King's advances, [the defense attorney] attempted to garner sympathy for McInerney and argued that McInerney's crime was voluntary manslaughter, not murder.").

reasonable people could disagree.[214] A recent documentary shows the Fort Worth, Texas, police chief offering as a reason for a 2009 brutal raid on the Rainbow Lounge that patrons made suggestive gestures toward the officers.[215] Because these ideas permeate society, the gay panic defense may strike jurors as a plausible description of events, one that warrants a lesser judgment against the murderers.

This trend has not gone unopposed. The judge in the Matthew Shepard case refused to allow the defendants to plead gay panic.[216] In response to the murder of a transgender teen, then-governor Arnold Schwarzenegger signed the Gwen Araujo Justice for Victims Act, which required that juries not consider bias based on sexual orientation.[217] This first step was then followed in 2014 by Governor Jerry Brown signing Assembly Bill 2501, which "for purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable . . . under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant."[218] Despite urging from the ABA that states enact legislation to curtail use of the gay panic defense,[219] most states do not formally exclude the gay panic defense,[220] leaving its admission to the individual judge's discretion.[221]

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214. *BBC Boss: Sorry for Online Debate on Killing Gays*, PRIDESOURCE (Dec. 31, 2009), http://www.pridesource.com/article.html?article=39331 ("Lynne Featherstone, an opposition lawmaker with the Liberal Democrats, said she was deeply offended that the BBC thought it legitimate to debate killing gays.").

215. RAID OF THE RAINBOW LOUNGE (Camina Entertainment 2012). To his credit, the Police Chief later softened his characterization.

216. Robert W. Black, *Wyo. Judge Bars 'Gay Panic' Defense*, WASH. POST (Nov. 1, 1999), http://www.washingtonpost.com/wp-srv/national/daily/nov99/shepard110199.htm.

217. Gwen Araujo Justice for Victims Act, ch. 550, 2006 Cal. Stat. 3553.

218. Assemb. B. 2501, ch. 684, 2014 Cal. Stat. 95 (amending Cal. Penal Code § 192 (West 2014)).

219. *Report to House of Delegates Resolution 113A*, ABA CRIM. JUST. SEC. (2013), http://www.americanbar.org/content/dam/aba/publishing/abanews/1373479339_31_1_1_9_resolution_summary.docx; *see* Terry Carter, *"Gay Panic" Criminal Defense Strategies Should Be Curtailed by Legislation, ABA House Resolves*, ABA J. (Aug. 12, 2013), http://www.abajournal.com/news/article/resolution_on_gay_panic.

220. In New Jersey, the legislature introduced Bill A4083 to ban the gay panic defense, although it remains in committee. Assemb. 4083, 216th Leg., Reg. Sess. (N.J. 2015), http://www.njleg.state .nj.us/2014/Bills/A4500/4083_I1.PDF.

221. Cynthia Lee believes that the panic defense should be permitted, because otherwise "[d]isallowing defendants from arguing gay panic simply forces such arguments underground and into the subconscious where stereotypes about gay men as deviant sexual predators, and norms that favor heterosexuality over homosexuality, are likely to have greater impact." *Gay Panic Defense*, *supra* note 206, at 536.

3. Summary

Defendants such as Elane Photography and Masterpiece argue that the nondiscrimination laws they are charged with violating compel them to communicate messages of support for same-sex marriage against their religious objections. While the courts have soundly rejected this argument, to the extent communicating a message is a sociological fact to be investigated rather than a legal claim to be vetted in the abstract, the defendants' position may deserve more attention than ordinarily allowed. Against a background of societal disapproval of homosexuality, actions that treat gays and lesbians as ordinary folk does send a signal of tolerance and perhaps even approval; in an environment of social acceptance of gay couples, however, providing services for same-sex weddings sends no particular message about the business transaction. The parties in suits such as those represented by Elane Photography and Masterpiece differ on the more accurate description of the background social norms, and thus of the communicative signal from providing wedding services.

Supporting the defendants' point of view is the fact that in both the civil and criminal laws, homosexuality has a history of not only being criminalized itself, but of creating legal rules that assume that even the idea of same-sex intimacy is sufficiently shocking that its suggestion rises to per se defamation, or a justification for murder in the gay panic defense. Favoring the plaintiffs is that all three of these points have seen improvement in recent years: Sodomy became legal after *Lawrence v. Texas*[222] in 2003 and the trend is resolutely in the direction of holding that calling someone "gay" is not defamatory at all, or at least not defamatory per se. And while gay panic remains a viable defense in most jurisdictions, formal efforts have gained traction to remove it from the kinds of provocation that will excuse the murder of a gay victim. Throughout society, "gay" no longer carries a negative moral connotation to the extent seen in earlier times. Using social survey data from 1973 through 1998, Loftus was able to conclude that while negativity toward homosexuality increased through 1990, thereafter "attitudes have become increasingly liberal."[223]

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222. 539 U.S. 558 (2003).

223. Jeni Loftus, *America's Liberalization in Attitudes Toward Homosexuality*, 66 AM. SOC. REV. 762, 762 (2001). A summary of polling data is available in Karlyn Bowman, Andrew Rugg,

This improvement, however, has not gone so far as to remove the need for protections against lingering prejudice. "Americans have become more tolerant of gay people than ever before, but this tolerance has definite limits."[224] Recently a California lawyer attempted to put on the ballot a Sodomite Suppression Act "mandating, among other things, that any person who has sexual relations with someone of the same gender be 'put to death by bullets to the head.'"[225] Even while gay men and women are receiving new rights at unprecedented rates, sexual orientation remains second only to race as the cause of hate crimes.[226]

> [A]t the same time that all the great strides have occurred, discrimination, violence, and tragic horror stories—in addition to the daily slights that all of us who are gay, lesbian, bisexual, or transgender have experienced for years—have not only continued, they've sometimes become more blatant. Rather than dissipating, reports of violence against LGBT people have surged, even in the most liberal, gay-accepting cities, spiking 27% in New York City alone from 2013 to 2014.[227]

The record is thus mixed, a mélange of ongoing antigay prejudice in the midst of new rights and normalized social status for gays now able to serve openly in the military and get married. Whether servicing a same-sex wedding signals approval, therefore, will depend upon the community of "right-minded" persons

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& Jennifer Marsico, *Polls on Attitudes on Homosexuality and Gay Marriage*, AEI (Mar. 2013), http://www.aei.org/wp-content/uploads/2013/03/-polls-on-attitudes-on-homosexuality-gay-marriage_151640318614.pdf.

224. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTIONS IN CONTEMPORARY AMERICAN LAW 72 (Univ. of Chicago Press 2002).

225. Adam Nagourney, *Gays Targeted in a California Initiative*, N.Y. TIMES (Mar. 24, 2015), http://www.nytimes.com/2015/03/25/us/california-initiative-would-kill-gay-people.html?_r=0. Although state officials expressed skepticism concerning their ability to prevent the proposal going forward, a judicial order ruled it "patently unconstitutional on its face." Hailey Branson-Potts, *Judge Strikes Down Proposed "Sodomite Suppression Act" Calling for Killing of Gays*, L.A. TIMES (June 23, 2015), http://www.latimes.com/local/lanow/la-me-ln-antigay-sodomite-suppression-act-struck-down-20150623-story.html; *see* Matthew S. Bajko (@politicalnotes), TWITTER (June 23, 2015, 12:53 PM), https://twitter.com/politicalnotes/status/613434830919831552.

226. *Latest Hate Crime Statistics Report Released*, FED. BUREAU OF INVESTIGATION (Dec. 8, 2014), https://www.fbi.gov/news/stories/2014/december/latest-hate-crime-statistics-report-released ("Of the 5,922 single bias incidents reported, the top three bias categories were race (48.5 percent), sexual orientation (20.8 percent), and religion (17.4 percent).").

227. SIGNORILE, *supra* note 93, at 3 (citing data from the Anti-Violence Project).

identified as recipients of the alleged message. Central to the analysis is the general reminder that it is the "role of tort law . . . to make the injured whole, not to change social mores."[228] We are not interested in describing the social world we would like to find, but the world in which the parties to the suit actually exist. We must be open in all good faith to the possibility that the defendants are justified in their coerced speech argument if we wish to have confidence in the result should we ultimately reject it.

IV. FREE EXERCISE CLAIMS

A. The Legal Background

Despite the possible importance of other claims, the marquee complaint is that enforcing nondiscrimination laws against public businesses infringes their right to the free exercise of religion. Before *Hobby Lobby*, this assertion would have been received with great skepticism by the courts. Leading up to that controversial case, a different decision, *United States v. Lee*,[229] "had appeared to lay down a hard and fast rule that business entry constituted a form of waiver of religious objection to general business regulation."[230] *Lee* involved an Amish employer who refused to pay social security taxes for his Amish employees.[231] Although the U.S. Code makes a religious exemption from these taxes for the self-employed,[232] Lee could not claim this relief because he had employees; if he were to be granted an exemption, it would need to come from the Constitution.[233] The Court found no such requirement. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[234] Following *Lee*, businesses were expected to follow the laws and regulations imposed upon everyone else in that situation, whatever their private religious convictions.

228. Arend, *supra* note 196, at 112.
229. 455 U.S. 252 (1982).
230. *Moving Targets*, *supra* note 109, at 64–65.
231. *Lee*, 455 U.S. at 254.
232. 26 U.S.C. § 1402(g) (2012).
233. *Lee*, 455 U.S. at 256.
234. *Id.* at 261.

The track of judicial pronouncements on free exercise rights is not a topic for the timid. The main trunk of the story begins in the nineteenth century when, in *Reynolds v. United States*,[235] the Supreme Court held that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[236] From the beginning of the Court's interpretation of the First Amendment's religion clauses, then, the thrust was to avoid civil anarchy by restricting constitutional protection from legal interference to the right of belief, but less to the right of action.[237] The severity of this initial distinction between belief and conduct would later be softened. Several decades later, the Court recognized that the free *exercise* of religion was not limited to belief, but included a presumptive right to adhere to religious norms through conduct: Observance of a Saturday Sabbath as in *Sherbert v. Verner*,[238] and education and upbringing of Amish children as in *Wisconsin v. Yoder*.[239] But the belief-conduct distinction roared back in *Employment Division, Department of Human Resources of Oregon v. Smith*,[240] which held that the government may prohibit religiously motivated conduct through "neutral law[s] of general applicability." Although *Smith* is subject to varying interpretations, under its most vigorous reading it holds that the Free Exercise Clause prohibits only those regulations of conduct that single out or target conduct motivated by religious belief—as they found to be case in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[241] In effect, the constitutional objection is to the state's focus on belief, not the state's incidental impact on conduct.[242]

While *Lee* had earlier announced this standard uncontroversially in the commercial context, *Smith* expanded it broadly to include individuals. Even if, "in reality, *Smith* really just changed the phrasing of the doctrine of the free exercise clause to reflect the

235. 98 U.S. 145 (1878).

236. *Id.* at 166.

237. *Reynolds*, 98 U.S. at 166–67 ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself.").

238. 374 U.S. 398 (1963).

239. 406 U.S. 205 (1972).

240. 494 U.S. 872, 879 (1990).

241. 508 U.S. 520 (1993); *Same-Sex-Marriage*, *supra* note 122, at 214.

242. *Id.*

actual pattern of decisions,"[243] popular opinion only then noticed how greatly judicial rules differed from its own understanding of the meaning of free exercise rights. The nation was shocked, and the reaction was vigorous.[244]

First Congress passed the Religious Freedom Restoration Act (RFRA),[245] which had the goal "to restore the compelling interest test as set forth in *Sherbert v. Verner*[246] and *Wisconsin v. Yoder*[247] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[248] The law, however, was declared unconstitutional as applied to the states in *Flores*,[249] prompting several states to enact their own versions of the law.[250] For suits at the federal level, the compelling interest test remains. Under that standard plaintiffs must first demonstrate the existence of a burden on a sincerely held central tenet of religious belief, thereby requiring the government next to argue that the burden furthers a compelling interest in the least restrictive manner.[251] At the state level, however, most jurisdictions still fall under the *Smith* rule, which finds no free exercise harm if the burden is caused by a rule of general applicability.[252] If the state does have its own version of the federal RFRA, the criteria become more variable.

As a technical matter, then, without a state RFRA law it would be difficult to argue any free exercise complaint.[253] The business must show under the *Smith* standard that the nondiscrimination law it is violating is not a "neutral law of general applicability," an understandably difficult case to make. Three states with published

243. Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, GEO. L. J. (forthcoming 2015–16), http://ssrn.com/abstract=2654487.

244. *See id.*

245. Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993).

246. 374 U.S. 398 (1963).

247. 406 U.S. 205 (1972).

248. Pub. L. No. 103-141, § 2(b)(1).

249. City of Boerne v. Flores, 521 U.S. 507, 509 (1977).

250. As of 2015, twenty-one states have enacted state versions of RFRA. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (June 5, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [hereinafter *State Religious Freedom*].

251. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566 (1993).

252. *State Religious Freedom*, *supra* note 250.

253. According to Christopher Lund, state RFRA laws have been largely ineffective at their intended purpose to expand free exercise protections. Christopher Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010) ("[I]n many states, state RFRAs seem to exist almost entirely on the books.").

court decisions between wedding service providers and same-sex couples—Colorado (*Masterpiece*), Oregon (*Klein*), and New Jersey (*Ocean Grove Camp Meeting*)—have no RFRA statutes. A fourth, New Mexico, has such a law, which the court in *Elane Photography* declined to address because its version of RFRA does not apply to disputes between private individuals.[254] We therefore have limited insight into the probable success of such complaints under the RFRA-required *Sherbert* compelling interest test.[255]

For about fifteen years this was the legal landscape. But *Hobby Lobby* changed matters, although there is disagreement whether the changes are more legal or political.[256] Litigated under the federal RFRA rules, the facts involved the Affordable Care Act's contraceptive mandate, which required employers to cover birth control costs in insurance plans with no co-pay for the employee. Hobby Lobby, a closely-held craft store, claimed that because the family owners' religious beliefs deemed such services to be the equivalent of abortion, the mandate violated the company's religious liberties. The major outcome for present purposes is the holding that commercial enterprises can claim religious beliefs.[257] This outcome appears to upend *Lee*, and although the decision itself explicitly says that it does not provide a shield to evade nondiscrimination requirements under the guise of religious freedom,[258] *Hobby Lobby* has been read by businesses like Masterpiece as supporting the

254. Elane Photography, LLC v. Willock, 309 P.3d 53, 76–77 (N.M. 2013).

255. *Moving Targets*, *supra* note 109, at 57 ("The case has yet to arise that presents the perfect conflict between strong vendor-supportive norms of religious exemption, and strong consumer-supportive norms of anti-discrimination.").

256. *Id.* at 3 ("My overarching thesis is that the political impact of *Hobby Lobby* may be much greater than its legal impact.").

257. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) ("we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."). For a summary of the case holdings, *see* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 75 (2015) [hereinafter *Dubious Enterprise of Religious Exemptions*]. First, is a for-profit corporation a "person" who can "exercise religion" within the meaning of RFRA? [YES] Second, if so, does the mandate to include all forms of pregnancy prevention services in health insurance "substantially burden" the firm's religious exercise? [YES] Third, if so, is application of that burden to the firm "in furtherance of a compelling governmental interest"? [ASSUMED] Fourth, if so, is the requirement of such coverage in the employer-purchased health coverage "the least restrictive means of furthering that compelling governmental interest. [NO].

258. *Hobby Lobby*, 134 S. Ct. at 2783 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield.").

position that their own religious preferences should receive similar exemption from general laws.[259]

B. The Argument

Against this background of free exercise jurisprudence, businesses like Elane Photography and Masterpiece seek to assert their religious liberty claims to secure exemption from nondiscrimination laws. To argue under the federal Constitution's *Smith* standard, which "does not require the accommodation of commercial or public actors who have religious objections to serving same-sex couples," the parties "would need to show that anti-discrimination rules from which they seek exemption are not 'neutral, generally applicable regulatory law[s].'"[260]

Masterpiece attempted such an argument, claiming that because the law "provides exemptions for 'places principally used for religious purposes'" but not for Masterpiece, the law is not generally applicable.[261] The court was unpersuaded: "A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct."[262] CADA does not limit the exercise of religion. The law's exemptions are a commonplace means to "reduce legal burdens on religious organizations and comport with the free exercise doctrine."[263] Masterpiece would have had a stronger argument had CADA exempted secular organizations from its application, but that was not the case.[264]

The court followed a similar analysis in *Elane Photography*, and we can expect that anyone attempting to characterize nondiscrimination ordinances as targeting religious faith while exempting secular beliefs, or even preferring one religious form over another, will be similarly unsuccessful. For that reason, disputes in

259. *Id.* at 2759.

260. Lupu & Tuttle, *supra* note 95, at 287 (citations omitted).

261. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 COA 115, at *48–49 (Colo. App. Aug. 13, 2015).

262. *Id.* at *49.

263. *Id.* at *49–50.

264. Masterpiece proceeds to offer a different argument under the "hybrid" rights claims described by Smith. *Masterpiece*, 2015 COA 115, at *53–55. This doctrine, however, has been severely criticized, and characterized as mere dicta. *See* Grace United Methodist Church v. Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006). Consequently this strategy was given short shrift by the court, and will not be discussed here.

non-RFRA states are likely to enjoy no better success than these early attempts. More ambiguous, however, are the probable results of similar cases in states with RFRA laws that require a weighing of the relative burdens and interests in enforcement of the nondiscrimination laws. While no such case has yet presented itself, we can give some consideration to the nature of the burdens borne by each of the parties.

V. BURDENS

In most instances, the demand for a free exercise exception is neither neutral in terms of costs imposed, nor does it take care to restrict those costs to those enjoying the exception. "[T]here is not a single 'religious liberty' claim that does not involve abridging someone else's rights."[265] Rational limits to free exercise protection claims require that any inconveniences or costs arising from exemptions from general laws be placed on the believer rather than on society.[266]

Legal analysis on the merits of granting religious exemptions has been sensitive to the need to avoid shifting burdens onto third parties. Any such shift raises potential Establishment Clause worries as the cost of one person's religious observances is paid by nonbelievers.[267]

> There was very good reason, [then], for the earlier consensus that owners of for-profit businesses must comply with secular laws regardless of their religious beliefs. In the commercial context, religious exemptions will almost always impose burdens on third parties, whether employees, customers, or business competitors. As a result, such exemptions implicate a rule "with a long history in libertarian thought"—that rights are limited by the need for "prevention of tangible harm to specifiable others without their consent."[268]

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265. MICHAELSON, *supra* note 14, at 27.

266. *See* James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of* Smith, 17 N. ILL. U. L. REV. 1, 35–36 (1996).

267. *Dubious Enterprise of Religious Exemptions*, *supra* note 257, at 77 ("[T]he Establishment Clause requires a construction of RFRA that does not permit the imposition of significant harms on third parties.").

268. Oleske, *supra* note 127, at 132 (quoting Mark Galanter).

Several Supreme Court opinions underscore this sensitivity to the proper placement of any costs, including *Lee*[269] and *Prince v. Massachusetts*.[270] According to some of its supporters, RFRA rests on the same expectation that "government should not restrict religious practice, including that of minority and politically powerless religions, unless the practice in question causes a direct, individualized harm to specifically identifiable, non-consenting third parties or a serious threat to public health, safety and order."[271] As Oleske explains, *Hobby Lobby* ended as it did because the majority was able to persuade its more cautious members that this principle of nondisplacement of costs would be respected:

> The Court emphasized that, because the government had already developed an accommodation for religious nonprofit organizations that ensured their female employees would receive full contraceptive coverage direct from insurers, the accommodation could be extended to Hobby Lobby with "precisely zero" effect on its female employees. And Justice Kennedy, who provided the fifth vote for the majority opinion, explained in a separate concurrence that religious liberty rights cannot be permitted to "unduly

269. United States v. Lee, 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

270. 321 U.S. 158, 177 (1944) (Jackson, J., concurring) ("Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders . . . . [L]imits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."); *see* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 53 (2015).

> Court precedent gives the principle against burden shifting the force of law. In *Estate of Thornton v. Caldor, Inc.*[, 472 US 703 (1985)], for instance, the Court reasoned that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform to his own religious necessities." And in *Cutter v. Wilkinson*[, 544 US 709 (2005)], the Court returned to that principle, holding that in applying voluntary accommodations, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . ."

Id. (citations omitted).

271. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5 (1994) [hereinafter *What Hath Congress Wrought?*].

> restrict other persons, such as employees, in protecting their own interests, interests the laws deems compelling."[272]

Any exemption from nondiscrimination laws for merchants will undermine this standard expectation that costs for religious exceptionalism will not be allocated to those outside the faith, creating a threefold challenge. The first two are to describe, respectively, the self-imposed burdens on merchants who seek to run their public accommodations according to private and exclusionary religious principles, and the costs transferred onto third parties seeking only to transact the advertised business but who are refused for failing to satisfy those exclusionary principles. The third task will be to weigh these two burdens against one another.

A. On Merchants

No one doubts that business owners who testify that serving a segment of the population will violate religious principles will incur a personal cost if forced to do so. Under the rule of *Thomas v. Review Board of Indiana Employment Security Division*,[273] religious beliefs are not to be scrutinized by the court before they are recognized as worthy of receiving First Amendment protections.[274] If such declarations of faith are to be taken on their face as sincerely held central tenets of religious belief, then it necessarily follows that being required to act contrary to that belief will be a burdensome duty.

In the context of denying marriage licenses to same-sex couples, Kim Davis, the clerk of Rowan County, Kentucky, has spoken in the strongest terms of what she feels to be at stake:

> To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience. It is not a light issue for me. It is a Heaven or Hell decision. For me it is a decision of obedience. I have no animosity toward anyone

272. Oleske, *supra* note 127, at 133–34 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014)).

273. 450 U.S. 707 (1981).

274. *See id.* at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

> and harbor no ill will. To me this has never been a gay or lesbian issue. It is about marriage and God's Word.[275]

Given the presumed sincerity of the belief and the great magnitude of the perceived penalty of violating that belief, attention shifts to the countervailing need to demand such a cost. The only guidance on this point that we presently have comes from the history of enforcement of nondiscrimination laws in the face of religious beliefs concerning the inferiority of the nonwhite races. When confronted with the question of whether a restaurant could refuse to serve African Americans because of the owner's religious beliefs, the Supreme Court rejected that argument:

> Neither is the court impressed by defendant Bessinger's contention that the judicial enforcement of the public accommodations provisions of the Civil Rights Act of 1964 upon which this suit is predicated violates the free exercise of his religious beliefs in contravention of the First Amendment to the Constitution. It is unquestioned that the First Amendment prohibits compulsion by law of any creed or the practice of any form of religion, but it also safeguards the free exercise of one's chosen religion. The free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society. Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.[276]

In this holding we find the themes discussed earlier: the belief-conduct dichotomy that originated in *Reynolds*, and the need to avoid externalizing the burden of complying with religious beliefs

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275. Kim Davis, *Statement of Kentucky Clerk Kim Davis*, LIBERTY COUNSEL (Sept. 1, 2015), https://www.lc.org/newsroom/details/statement-of-kentucky-clerk-kim-davis.

276. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd* 390 U.S. 400 (1968).

onto outsiders. If courts follow this precedent, pleas to avoid nondiscrimination laws protecting sexual orientation on account of religious beliefs will receive the same chilly reception as those seeking to avoid nondiscrimination laws protecting race due to religious beliefs.

While that would appear to conclude the matter, some would insist that racial discrimination is not comparable to sexual orientation prejudice, and that laws forbidding the first should not be extended to encompass the second. There exists much disagreement over the extent to which racial prejudice and its social history serves as an appropriate analogy for sexual orientation discrimination, and whether we should expect to expand the holdings that protect against racial discrimination to protect gays.[277] On the one hand, the similarities seem hard to overlook. The refusal of state officials in Kentucky to perform their duties regarding same-sex couples, for example, echoes the refusal of a Louisiana justice of the peace to officiate the wedding ceremony for an interracial couple.[278] *Loving v. Virginia*,[279] which struck down the nation's laws against interracial marriage, offers an obvious similarity to *Obergefell*, which struck down the laws preventing same-sex marriage.

On the other side, however, Brownstein argues, "Racial discrimination provides an inappropriate analogy, because racism plays such a uniquely invidious role in U.S. history."[280] Dent agrees concerning "the unique enormity of racial discrimination in American history," and deems the "[d]iscrimination against homosexuals . . . not of equal magnitude."[281] Finally, others seek a middle course, arguing that "it is far from clear that the exceptional nature of the nation's struggle for racial equality should lead courts to treat race as occupying a *sui generis* constitutional category into which entry is barred for all other victims of discrimination. The more fitting approach might well be to honor that original struggle

277. For an overview of this question, *see* Curtis, *supra* note 38, at 209 ("The best way to think about the claim that gay marriage requires expanded exemptions from existing laws for religious discriminators is in the larger context of both race and gender discrimination.").

278. *2009 Louisiana Interracial Marriage Incident*, WIKIPEDIA, https://en.wikipedia.org/wiki/2009_Louisiana_interracial_marriage_incident (last visited Oct. 12, 2015).

279. 388 U.S. 1 (1967).

280. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U. S.F. L. REV. 389, 414 (2010).

281. Dent, *supra* note 91, at 618.

for civil rights by giving full force to its lessons in other relevant areas."[282]

On one point at least, the histories of mistreatment of African Americans and of gays are almost identical in that religious belief has served to promote both forms of prejudice.[283] Just as *Obergefell* provoked a visceral antagonism, the response to *Brown v. Board of Education*[284] "was almost psychotic,"[285] and in that case, as in the present one, the "most common argument of the dissenters was theological: integration encouraged miscegenation, which contradicted divine Word."[286] In each case the proponents of discrimination attempted to buttress their positions by arguing that "such relationships are not 'natural,' and thus may be legitimately prohibited, [and this] is 'perhaps the most striking parallel between the rhetoric of interracial marriage opponents and the rhetoric of opponents of same-sex marriage.'"[287] Whatever their differences in many other ways, it would be difficult to maintain that religious-based discrimination against homosexuals should be exempted from general antidiscrimination laws, but religious-based discrimination against miscegenation should not.

B. On Same-Sex Couples

The formal analysis under the *Sherbert* test required by most RFRA laws does not directly require identification of the burdens imposed on the party experiencing the discrimination. After a burden on the discriminator's religious beliefs has been shown, attention would then shift to the governmental interest in enforcing the law, and whether the means chosen is the least restrictive available. We have two related reasons, however, to focus on the costs borne by the same-sex couple rather than on the technically necessary interests of the government. First, to a large extent, this debate is waged in the

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282. Oleske, *supra* note 127, at 120–21.

283. *See, e.g.*, STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY 8 (2002) ("By the 1830s . . . the scriptural defense of slavery had evolved into the 'most elaborate and systematic statement' of proslavery theory.").

284. 347 U.S. 483 (1954).

285. MARK ETHRIDGE, A CALL TO THE SOUTH 13 (Nieman Rep. 9 Apr. 1959).

286. Jane Dailey, *Sex, Segregation, and the Sacred After* Brown, 91 J. AM. HIST. 119, 126 (2004).

287. Oleske, *supra* note 127, at 118 (quoting Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. GENDER RACE & JUST. 105, 119–20 (2009)).

popular imagination and on social media. While there have been quite a few complaints, only a small number go through the process of full litigation. In the meantime, sides are chosen, attitudes formed, and positions taken based on lay characterizations of the conflict. Looking at the costs to victims in the same way we look at burdens on discriminators thus respects the conflict's framing in public fora.

Second, while this alternative view does not inquire into the government's interest specifically, it does view it through the eyes of the persons the government seeks to protect. In that light, the question becomes, "Protect from what?" If there is a compelling interest in shielding gay men and lesbians from the vagaries of bigotry in the public arena, it must be because if that action is not taken they are exposed to a significant injury. If there were no cognizable harm, there can be no compelling interest. Looking at the burdens inflicted on customers excluded from the marketplace, then, will be an essential first step should later proceedings ask the question concerning governmental interests. For that reason, this section looks not at the formal arguments of governmental interests in promoting equality, but instead at the prior issue of the harms inflicted when such equality does not exist.

When examining the costs imposed upon same-sex couples, the general trend of commentators has been to suggest that these slights are but minor inconveniences—nothing more burdensome than finding another dress shop or cake baker, when compared to the violation of conscience risked by the merchants. "Proponents of exemptions have typically framed religious objectors' compliance with LGBT antidiscrimination laws as pitting one person's religious conscience against another person's mere inconvenience and mild sense of offense."[288] Examples include:

- "This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will

288. Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodation Laws*, 22 J. L. & POL'Y 705, 707 (2014).

nearly always be able to readily obtain these services from others who are happy to serve them."[289]

- Koppelman believes that "the burden on [the discriminating business] outweighs the burden on" the gay couple . . . . "[*Elane Photography*'s] Willock had no difficulty finding another photographer in Albuquerque . . . . On the other hand, assuming that Huguenin's religious beliefs really forbid her to photograph same-sex weddings, the court's decision might mean that she must abandon her business."[290]
- "The same-sex spouse who asks a department store employee for assistance in buying a suit for his wedding and the same-sex couple who orders a wedding cake from a small bakery will often have alternative choices available to them to obtain the goods and services they are seeking."[291]
- "What's the balance of burdens in these cases? The discrimination involved here doesn't plausibly deny the gay couples effective civic equality: There are plenty of bakers and photographers who would be only too happy to take their money."[292]
- "In New Mexico, there was no evidence that Vanessa Willock and her partner incurred any costs in finding another wedding photographer."[293]

There are two fundamental errors in such statements. The first is factual. Any claim that shoppers can easily go from one merchant to another assumes an underlying fungibility, that the good or service being denied the same-sex couple is indistinguishable from a similar goods or services elsewhere. In that view, the only harm endured is the inconvenience of going to the next bakery to order the wedding cake. The second error is that it overlooks the real dignitary harms that arise from identity-based discrimination in the public marketplace.

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289. Douglas Laycock, *Re: SB 0010, Religious Liberty Implications of Same-Sex Marriage*, U. VA. SCH. L. (Mar. 12, 2013), http://mirrorofjustice.blogs.com/files/Illinois-republicans-2013.pdf.

290. *Gay Rights*, *supra* note 79, at 629.

291. Brownstein, *supra* note 280, at 416.

292. Conor Friedersdorf, *Should Mom-and-Pops That Forgo Gay Weddings Be Destroyed?*, THE ATLANTIC (Apr. 3, 2015), http://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be-destroyed/389489.

293. *Same-Sex-Marriage*, *supra* note 122, at 207.

1. Assumed Fungibility of Goods and Services

Although many assume the interchangeability of goods and services, that belief does not describe market practices. Bakers rarely advertise their confections as indistinguishable from the cakes and cookies available from the grocery store or other bakeries. No one puts a sign in their window saying, "Our cakes are no better than what you'll get at the chain grocery." More representative are the boasts by Sweet Cakes by Melissa, the Oregon bakery fined $135,000 for refusing to sell a wedding cake to a lesbian couple.[294] She posted on her website that "[w]hen you order a cake from us you are getting the best quality ingredients for such a wonderful price. Our prices almost beat anyones [sic]."[295] As a rule, all services are advertised as unique in either quality or price, such that an alternative is presumptively inferior in some way. This assessment may not be objectively true, but if we take the businesses at their own words, customers who are turned away suffer a measurable deprivation when they cannot obtain items from the preferred provider. As Brownstein wryly notes, anyone believing "that all caterers are comparable in cost, menu, and quality has never arranged a wedding reception or bar mitzvah."[296]

We should also consider that such writers might suffer from a lack of imagination. Assuming an availability of alternative sources of equivalent quality and value might simply reflect the speaker's privileged urban environment in which a plethora of shops compete in the same business niche. More rural settings might have only one wedding dress boutique, and both bakers might be members of the same fundamentalist church. To design a legal rule that ignores the range of community resources available to the same-sex couple is one unlikely to address the underlying issues.[297] The common law

294. *In re* Melissa Elaine Klein, Nos. 44-14 & 45-14, 2015 WL 4503460 (Or. Div. of Fin. & Corp. Sec. July 2, 2015).

295. SWEETCAKES, http://www.sweetcakesweb.com/4.html (last visited Oct. 4, 2015).

296. Brownstein, *supra* note 280, at 419.

297. Laycock suggests an exception to the exemption if the refusal imposes what he would deem a significant burden on the rejected customer. Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 199 (Douglas Laycock et al. eds., 2008) ("Hardship is obvious when there is only one or a few relevant merchants in a community and none of them will serve same-sex couples. In that case . . . the merchant's right to moral integrity is outweighed by the same-sex couples' right to live in the community in accordance with *their* moral commitments.") (emphasis in original). This suggestion, however, seems only to invite yet more litigation to decide whether a hardship is sufficiently burdensome.

has not ordinarily allowed the availability of alternative establishments to release a merchant from the duty to provide services.[298]

In any event, pointing out the availability of alternative service providers misses the primary injury inflicted when an unsuspecting consumer is told that she is inherently reprehensible to the clerk and will find no assistance there:

> The question is not whether one can find a store willing to let you in and treat you with dignity. *The question is whether one has right to enter stores without worrying about such things* . . . . The question is whether a storeowner has a right, in a free and democratic society, to treat a customer like a pariah. The answer is no.[299]

Acts of discrimination send a pernicious message concerning the social value of the rejected patron.

> A person's relationship with the community can be altered with respect to equal citizenship even if adequate alternative venues exist . . . . A fundamental insight of antidiscrimination law is that equal citizenship in a community can be infringed not just by government discrimination, but also by exclusion from nongovernmental public accommodations that is tolerated by a legal regime.[300]

As portrayed in a particularly vivid example, "the hardship Jackie Robinson suffered when on the road with the Dodgers was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates."[301] The courts, then, should not bother with trivial issues such as available alternatives, but focus directly on the dignitary injuries inflicted by intentional acts of public discrimination.

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298. Even in the early English cases on public accommodations such as *Lane v. Cotton*, 88 ENG. REP. 1458 (K.B. 1701), "the existence of competition *does not immunize innkeepers from their common-law obligations*." *No Right to Exclude*, *supra* note 51, at 1306.

299. *We Don't Serve Your Kind Here*, *supra* note 71, at 938, 941 (emphasis in original).

300. Tebbe, *supra* note 270, at 38, 39.

301. Oleske, *supra* note 127, at 138.

2. Dignitary Harms Inflicted by Identity-Based Prejudice

Besides the inaccurate assumption that all goods and services are equivalent and fungible so that being denied the product of your choice inflicts no cognizable injury, a second error arises from the facile mischaracterization of the only harm inflicted on same-sex couples as nothing more than the time and effort to go down the street to a different baker. Speakers can be cavalier in their opinions that persons turned out of a store for no better reason than their personal identities feel nothing more than a mild pique at the need to find a different shop. But these are real people planning for what society deems one of the most significant milestones in life, who unexpectedly find this uniquely special event denigrated by the prejudices of a merchant they contacted to discuss an economic opportunity and not to exchange religious opinions. As but one example, even when otherwise recognizing that the harm from "being turned away . . . should not be lightly dismissed," Robin Wilson herself trivializes those harms when she describes the "dignitary interests of same-sex couples [as the right] not to be embarrassed, not to be inconvenienced, not to have their choice questioned."[302]

Contrary to such petty characterizations, the severity of injury to personal dignity was recognized in the legislative history of the 1964 Civil Rights Act:

> The primary purpose of [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. 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.[303]

"Beginning with *Brown v. Board of Education*,[304] the Supreme Court has consistently understood the harm to dignity that

302. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 100–01 (Douglas Laycock et al. eds., 2008).

303. *Senate Commerce Committee Report on the Civil Rights Act of 1964*, S. REP. NO. 88-872, at 16 (1964).

304. 347 U.S. 483 (1954).

discrimination causes, and recognized it to be distinct from the more 'tangible' harm of being unable to access a particular benefit or entitlement."[305] Cases reflecting this principle include *Heart of Atlanta Motel v. United States*,[306] *Curtis v. Loether*,[307] *Roberts v. United States Jaycees*,[308] and *J.E.B v. Alabama ex rel. T.B.*[309] Although these earlier cases dealt specifically with the dignitary injuries due to race, the underlying reasoning was extended to include LGBT persons in *United States v. Windsor*.[310]

While gesturing broadly to the insult such bigotry inflicts, we can attempt to specify the magnitude of the injury. Within international law, at least, dignity is the fount of all the human rights.[311] Beginning with the Universal Declaration on Human Rights, which begins with the pronouncement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"[312] the International Covenant on Civil and Political Rights,[313] and the International Covenant on Economic,

305. Lim & Melling, *supra* note 288, at 712.

306. 379 U.S. 241, 250 (1964) ("The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'") (citation omitted).

307. 415 U.S. 189, 195 n.10 (1974) ("[I]t has been suggested that 'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.'") (citation omitted).

308. 468 U.S. 609, 625 (1984) ("[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

309. 511 U.S. 127, 153 (1993) ("The injury is to personal dignity and to the individual's right to participate in the political process.").

310. 133 S. Ct. 2675, 2694 (2013) ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person.").

311. Philosopher Jeremy Waldron surveys the sundry versions of this assertion, and while he finds that the claim of a foundational role for dignity as the source of human rights can be problematic in some versions, depending on the context, as a general conclusion he finds that "some such claim is true and helpful." Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 117, 137 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015).

312. G.A. Res. 217 (III), Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

313. International Covenant on Civil and Political Rights, Preamble, Dec. 19, 1966, 999 U.N.T.S. 172.

Social and Cultural Rights,[314] add to that statement that "these rights derive from the inherent dignity of the human."[315]

If we accept this characterization of the role of human dignity in justifying a scheme of inalienable and intrinsic rights that no sovereign civil or religious authority can ignore, then the dignitary harms of the kind intended by discriminating merchants are of a most serious nature. They injure not merely the individual person that has been unjustly excluded, but also weaken the wider certitude that there do exist fundamental and inviolable rights that must be respected by both state and other persons. The coherence of the merchant's claim to a right to religious liberty rests upon the prior acceptance that each individual possesses an intrinsic dignity from which subsidiary rights, such as those of religious exercise, flow. Everyone who possesses that intrinsic dignity, including gay men and lesbians, has a right of free access to public accommodations, and should be allowed to trade for advertised services without hindrance.

Granting that dignitary injuries should not be underestimated, some writers have suggested one way by which these harms can be avoided while still allowing the shop to exercise a right to exclude. As a condition to claim a privilege to discriminate, businesses must provide prior notice as to the kinds of services they will refuse, and to which people. For example, Masterpiece would be permitted to exclude gay customers if it first posted a sign on the door that it does not provide cakes to same-sex couples.

Jennifer Gerarda Brown, in reaction to *Dale*, suggests that in the context of membership organizations, states should require these groups to publicize their discriminatory policies as the price for exemption from antidiscrimination laws.[316] Her arguments easily extend to commercial enterprises. If, as the owners say, the kinds of people served constitute part of a broader message by the business, then everyone choosing to patronize that shop is, by the owner's argument, endorsing that message. Without sharing knowledge beforehand of the message its customers are implicitly supporting,

314. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, pmbl. (Dec. 16, 1966).

315. *Id.*

316. Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 483–84 (2002).

the store perpetrates "a kind of associational fraud."[317] "Permitting 'expressive' associations to opt out of the public accommodations statute, but requiring them to do so publicly, would achieve three goals: promote the state's interests in nondiscrimination, uphold the organizations' right of expressive association, and protect the public from unknowing association with discriminatory organizations."[318]

Other commentators, like Koppelman, have echoed her suggestions: "Businesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminating."[319] Such a requirement was added to a proposed Oklahoma "Religious Freedom Act,"[320] leading to its legislative defeat.[321]

Not everyone, however, has applauded the idea to publicize the amount of prejudice within society, especially one built on a national myth of equality and democracy. "The cumulative expressive impact of such declarations may have far more serious consequences than the decisions of the providers themselves acting independently and outside of the public eye."[322] Especially problematic would be Lim and Melling's suggestion that posting such signs may cut against the argument of the dignitary harms they are designed to alleviate.[323] If those injuries are the primary concern, then such signs may be a counterproductive solution. The difficulty appears in the externalities associated with openly allowing group-based discrimination. In addition to the harm done to the specific targets, society itself incurs the costs of reduced cohesiveness among its citizens, more fear and suspicion between groups, and less commitment to the foundational ideals that were intended to unite a population that does not share race, religion, ethnic background, or even language.

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317. *Id.* at 482.

318. *Id.* at 496–97.

319. *Gay Rights*, *supra* note 79, at 620.

320. H.B. 1371, 55th Leg., 1st Sess. (Okla. 2015), http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/hB/HB1371%20INT.pdf.

321. David Hudson, *'Religious Freedom' Bill Ditched After Amendment Is Added to Prevent Gay Couples Being Humiliated*, GAY STAR NEWS (Mar. 13, 2015), http://www.gaystarnews.com/article/%E2%80%98religious-freedom%E2%80%99-bill-ditched-after-amendment-added-prevent-gay-couples-being-humiliated1.

322. Brownstein, *supra* note 280, at 434.

323. Lim & Melling, *supra* note 288, at 722 ("Even accepting the assertion that 'Heterosexuals Only' signs would not crop up across many segments of the country, the question remains: why should this be acceptable anywhere, even where motivated by religious belief?").

The merchants' exercise of their religious rights, even if reasonable when considered in isolation, appears excessive when factoring in the externalized costs imposed upon everyone else, much like a polluting factory in a residential neighborhood. "Beyond the humiliation and degradation of such actions, allowing this discrimination opens the door, legally and morally, to larger acts of discrimination against LGBT people—and other people—for purported religious reasons."[324] Merchants seek to use their religious freedom to undermine the human dignity of others, without which there is little basis to deem religious freedom a right at all.

VI. THE BALANCE OF COMPETING BURDENS

No easy answer is available when seeking to balance the injuries alleged to arise from either enforcing or circumventing nondiscrimination laws. According to the account offered here, religious objectors have a sincere belief that same-sex marriage is sinful, and that they must not offer support to same-sex marriages. On the other side, allowing the dignitary harm to go unchecked inflicts serious injury to the person denied access to public accommodations, and threatens the intelligibility of the idea of fundamental rights, including the right to religious exercise.

Two arguments favor defendants like Masterpiece, Sweet Cakes, and Elane Photography when they insist that the injury inflicted by a demand to serve contrary to their religious beliefs outweighs any benefit to the same-sex couples. First, if all goes as the law says it ordinarily should—the customer enters the shop, receives service, and leaves—the customer will be unaware that anything unusual has happened. But the shopkeeper will be keenly aware of the dynamics at play. In this sense, then, the resentment within the merchant will prove more burdensome than the unperturbed enjoyment of the consumer. Second, as discussed earlier, the endowment effect suggests that losses are always valued more highly than gains. Even should the customer become aware of the underlying conflict, common expectations suggest that the perceived transgression of religious identity and property right to exclude will be more dearly valued than a newly acquired ability to enter a shop that previously

324. SIGNORILE, *supra* note 93, at 32.

denied services to gays.[325] Both seem to support a conclusion that the burden is greater for the merchant than for the couple, and that the exemption should be granted.

The plaintiff couples have their own arguments to bring forward. They may assert a principle that when multiple rights are in conflict the court should favor the more fundamental liberty whose injury would have a wider ripple effect than that from infringing a less basic right. Courts generally avoid ranking rights, but some hierarchy certainly exists. The right to life, for example, necessarily precedes a right to education, and any conflict between them should be resolved in favor of the former. Similarly, religious liberties presuppose an intact respect for human dignity, and therefore they cannot be preserved against an attack upon that foundation.

We should also favor those exercises of rights that unintentionally conflict with another's liberties over those actions that overtly frustrate the rights of another. Same-sex couples do not enter bakeries for the purpose of placing the owner in a difficult situation. This is an accidental outcome arising from their primary purpose of obtaining a wedding cake from a public merchant. The merchant, however, when he denies a couple the right of free access, has specifically targeted the victims "because of" their sexual orientation. This imbalance of intentions favors the customers. The party that deliberately, rather than incidentally, obstructs the exercise of a fundamental liberty cannot then claim to have incurred the greater harm.

Although I believe that the long-term interests of society are better served by enforcing nondiscrimination laws in the public marketplace even against sincere religious beliefs, however the question is decided, the result will alienate some faction of the citizenry. Pragmatists will continue to offer compromise solutions that purport to respect the most important concerns of each side. The posting of signs announcing discriminatory intent offers one such possibility, but may prove to have unintended consequences. Another

325. Although phrased here for convenience, this statement is not a technically accurate description of the possible role of the endowment effect, which looks to losses and gains of the same good rather than, as here, comparative enjoyments of different goods or rights. The more formal comparison would look to the value of the breached liberty to the party that experiences its loss, with the value assigned to the other party for receiving the benefits of the breach. Since each side of the debate sees itself as having a right that is being threatened (e.g., the right of free access vs. the right to exclude), complete analysis would involve multiple findings of relative values.

that is sometimes offered suggests that governmental regulation of bigotry is entirely the wrong approach. Granting that everyone should be able to enter the marketplace without fear of irrational prejudice, the position posits that government sanctions are an inappropriate tool to remedy the evil of discrimination. Instead, market forces will punish bigots when their more fair-minded customers refuse to do business with them.

Two observations render this scenario unlikely. First, it too easily dismisses the price exacted from specific gay couples in favor of abstract business interests. Real people should not endure an avoidable but irremediable injury—there is only one wedding, and the fear of discrimination in an ostensibly open marketplace will be lingering—in the hope that eventually, perhaps long after their deaths, society will inch toward a more tolerant view of its members. That seems unfair, especially when other means exist to lighten the demand upon people experiencing discrimination today. Second, reliance upon market forces assumes without justification that there will always be sufficient people of good will to impact the market in the way described. Yet when the antigay pizzeria expressed its intent to discriminate against gay couples, although it did suffer a short-term economic penalty, in the end the owners received a greater reward of $842,387 from supporters.[326] "[T]he idea that the market controls all invidious discrimination is, and always has been, demonstrably false. The market responds to the attitudes of customers,"[327] and if those customers applaud the discriminatory actions, we will in fact see more of them unless an external force such as governmental regulation intervenes.

A more feasible and pragmatic compromise allows the possibility that a small number of service providers will fall into the category of artisans that Elane Photography attempted to carve out for itself. If the contracted service falls within the class of artistic

326. Lawrence Billy Jones III, *supra* note 81; Valerie Beaumont, *Indiana Pizza Shop Is First to Publicly Deny Same-Sex Service: Thanks, Religious Freedom*, ADDICTING INFO (Apr. 1, 2015, 8:25 AM), http://www.addictinginfo.org/2015/04/01/indiana-pizza-shop-is-first-to-publicly-deny-same-sex-service-thanks-religious-freedom-video; *see, e.g.*, *Help Sweetcakes by Melissa*, CONTINUE TO GIVE, https://www.continuetogive.com/4811392 (last visited Oct. 4, 2015) (Also benefited from a funding campaign in excess of $200,000. Antigay bigotry is proving to be a lucrative business strategy, suggesting that relying upon market forces to rein in such undemocratic tendencies may not be prudent.).

327. *We Don't Serve Your Kind Here*, *supra* note 71, at 937.

expression, then its activities would garner a higher degree of constitutional protection than would the mere provision of for-hire services. The New Mexico Supreme Court, however, resisted taking this step, saying that "[w]e decline to draw the line between 'creative' or 'expressive' professions and all others . . . Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws."[328]

In this, though, the court overstates the situation. Although the *Elane Photography* court hesitated to venture into this determination, judges have been doing something similar for a long time. "The Free Press Clause of the Constitution protects a newspaper against demands that it comply with nondiscrimination ordinances and thereby publish same-sex union announcements when such compliance undermines the editorial autonomy of the newspaper."[329] The finding of editorial judgment flows from the presence of choices "made independently, oriented to the audience's needs as well as preferences."[330] We need not argue an analogy between the editorial judgments of newspapers and bakers. The *Elane Photography* court takes that step itself when it labels what she does as "editorial judgment."[331] While the nondiscrimination law is not requiring that the photographer speak the government's message in the manner of *Barnette*, it arguably might rise to interference on the level of *Tornillo*. In that case it was found that if the newspapers had to print the political candidate's reply message, the impact on the paper would appear in several ways, including censuring itself in by refusing to offer negative editorials, and shouldering the additional costs to add additional pages to its publication. While I do not expect that Elane Photography could meet this threshold showing of editorial judgment within its ordinary taking of wedding photographs, other wedding service providers might.

In such instances we can imagine a court finding a shop to be shielded from nondiscrimination laws when the offered service entails significant, nontrivial, and necessary judgments as an exercise of professional expertise. A baker who offers established options

328. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013).

329. James M. Donovan, *Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 BROOK. L. REV. 721, 772 (2003).

330. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 830 (1999).

331. *Elane Photography*, 309 P.3d at 67.

(e.g., number of cake tiers, flavors) would receive less exemption from antidiscrimination law than one who offers individualized nonstandard personal services. Applying this standard to the list of service providers that have already expressed a preference to discriminate (bakers, photographers, venues, dress shops, florists, print shops, planners), only wedding planners appear well positioned to expect deference in this matter.[332] If a dressmaker designs and individually tailors the outfit rather than working from patterns, she too may fall within this narrow exception. While offering a safe harbor to only the most creative and artistic of providers will not satisfy those who demand blanket permission to discriminate, it would offer a principled response that takes seriously the stated reasons for the desired exemption.

VII. CONCLUSIONS

With the announcement of a constitutional right to same-sex marriage in *Obergefell*, one of the next confrontations in the struggle for expanded equality will involve the demand for religious exemptions from nondiscrimination laws in the public marketplace. According to a recent poll, 59 percent of those responding believe businesses should be allowed to refuse selling to gay couples

332. According to Wikipedia, the duties of the wedding planner include the following, many of which require nonroutine responsibilities and the exercise of professional judgment orchestrating the event:

- Interviewing the couple and the parents to identify their needs
- Budget preparation
- Event design and styling
- Venues scouting
- Planning detailed checklist (from about a year in advance to a few days after the wedding)
- Attendee list preparation
- Identification of event venues (hotels, wedding manor etc.)
- Identifying and hiring of wedding professionals and service providers (caterers, photographers, videographers, beautician, florists, bakers etc.), and preparation and execution of contracts
- Procurement of customized decorations such as a journey map
- Coordination of deliveries/services on the wedding day
- Have a back-up plan in the event of a disaster
- Manages the schedule, often with software
- Assist and prepare legal documentation and translations—especially for destination weddings

Wedding Planner, WIKIPEDIA, https://en.wikipedia.org/wiki/Wedding_planner (last visited Mar. 29, 2016).

planning a wedding.[333] The present discussion has attempted to unravel the eclectic arguments that are repeatedly offered in support of such an exemption. The initial feint invokes a fundamental right to exclude. If successful, the asserted right removes the special animus of targeting gays and frames the exemption as one narrowly tailored to respond only to same-sex marriages. The strategy fails for two reasons. First, the right to exclude is a fundamentally racist rule devised to prevent African Americans from participating in free society. Rather than attempt to revive it in order to likewise bar gay men and lesbians from the marketplace, the rule should be reset to the antebellum standard of free access to all public places of commerce. A second ploy attempts the appearance of a reasonable compromise by offering assurances that the discrimination will target only marrying gays and not all of them. Unfortunately, those wishing an exemption from nondiscrimination laws will need to rely upon the naked legal precedents unembellished by rhetorical stratagems that minimize the enormity of what is being asked.

The principle legal conclusions are twofold. First, although free speech defenses have been easily rebuffed, the possibility of a coerced speech defense that has been contextualized to the receiving audience and read against the background social norms should be recognized. Messages arise when actions cut against stereotyped expectations as they currently stand. To evaluate a forced speech claim we must know what are the routine understandings of same-sex marriage within the relevant community. Only then can a court ascertain whether the service provider has been asked to send a message about same-sex marriage against its will.

The free exercise claim presents a less likely chance of success, especially in states without a RFRA law. In those settings the court will analyze the religious exercise argument under the *Smith* criteria, which invariably find the contested nondiscrimination law to be of general applicability. In jurisdictions that have enacted a local version of RFRA, it is unclear how judges will assess the government's compelling interest to prevent sexual orientation discrimination. That analysis will involve a description of the harms threatening both sides of the conflict. While the injuries arising from

333. David Crary & Emily Swanson, *AP-GfK Poll: Sharp Divisions After High Court Backs Gay Marriage*, AP-GFK POLL (July 18, 2015), http://ap-gfkpoll.com/featured/findings-from-our-latest-poll-22.

the violation of sincerely held religious beliefs are to be assumed, the dignitary harms to the same-sex couple should not be mischaracterized and trivialized as a "minor inconvenience." Because the injuries to the customer are likely to spread wider throughout society than the burdens on the private religious beliefs of the owners, my own judgment is that social interests are better served by enforcement of the nondiscrimination laws than by granting piecemeal exceptions that will tend to devalorize the conviction that all citizens merit equal respect in the public square.

For those that do insist on concessions to the demand for religious exceptions, the most defensible compromise approach may carve out a small group of professionals who exercise "editorial judgment" in the same manner as the courts have described for newspapers. While most providers of wedding services will fail to meet this bar, its existence would embody the most substantive objections to the requirement to obey the law, and demonstrate that those complaints have been heard and acted upon in good faith to the greatest extent possible without infringing on the rights of all others to enter freely and without fear into the marketplace.