NOTES

RELIGIOUS LIBERTY, DISCRIMINATION, AND SAME-SEX MARRIAGE: ESCAPING THE *OBERGEFELL* CATCH-22

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Introduction

In the course of holding that same-sex couples have a constitutional right to marry, the Supreme Court in *Obergefell v. Hodges* reassured opponents of its majority decision that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[1] The Court's opinion was released on June 26, 2015.[2] Earlier that year, the owners of a small pizza parlor in Walkerton, Indiana, became embroiled in a national media controversy after telling a reporter from half an hour up the road in South Bend that, if asked to cater a same-sex wedding ceremony with pizza, they would have to decline because participating in or facilitating such a celebration would violate their Christian faith.[3] In so declining, Crystal and Kevin O'Connor explained, they would not intend to discriminate against anyone but would merely seek to operate their business

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1 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

2 *Id.* at 2584.

3 *See RFRA: Michiana Business Wouldn't Cater a Gay Wedding*, ABC57 (Apr. 1, 2015), https://www.abc57.com/news/rfra-first-business-to-publicly-deny-same-sex-service.

in a manner consistent with the tenets of their faith.[4] The owners further clarified that they would never refuse service to anyone—gay or straight, Christian or atheist—who came into their restaurant to eat on account of their individual identity.[5] In other words, the owners simply sought to avoid complicity with an activity—same-sex marriage—that they deemed immoral, a falsification of what they understood marriage to be. Yet the O'Connors were forced to close their pizzeria for eight days due to the national media attention, protests, and threats they received after the story broke.[6] After reopening for a few years when the controversy died down a bit, the pizzeria closed for good in the spring of 2018.[7]

Episodes like this one call into question whether the majority's words of consolation in *Obergefell* are anything more than a parchment barrier protecting those who dissent from the understanding of marriage ratified in that decision and who seek to live out that dissent with integrity in their daily lives. The national reaction to the O'Connors' hypothetical refusal to serve pizza for a same-sex marriage vividly illustrates that many Americans do not believe the principles and judgments motivating refusals to participate in same-sex marriages to be "decent and honorable." For many, the issue is black and white: disagreement in this arena constitutes invidious discrimination that the law should root out, or at least not protect.[8] In the case of Memories Pizza (the O'Connors' shop), not a single person was denied goods or services or suffered any kind of material harm due to the proprietors' religious objections to serving pizza for same-sex weddings. Further, since the situation arose from a reporter's hypothetical question rather than a sincere request from a flesh-and-blood couple, no same-sex couple suffered any dig-

4 *Id.* Crystal O'Connor elaborated that she supported the proposed Indiana Religious Freedom Restoration Act because it would help religious believers avoid complicity in the wrongdoing of others, adding, "I do not think [the bill is] targeting gays. I don't think it's discrimination . . . . It's supposed to help people that have a religious belief." *Id.*

5 *Id.* (noting that the owners told the reporter that if a gay couple or a couple belonging to another religion came into the restaurant to eat, they would never deny them service).

6 *See Walkerton Pizzeria Once at Center of National Controversy Has Now Closed*, SOUTH BEND TRIB. (Apr. 23, 2018), https://www.southbendtribune.com/news/business/walkerton-pizzeria-once-at-center-of-national-controversy-has-now/article_83b23989-40ef-554f-b4ab-d4657cf0a150.html; *see also* Melissa Hudson, *High School Coach Suspended After Tweet About Pizzeria*, ABC57 (Apr. 1, 2015), https://www.abc57.com/news/high-school-coach-suspended-after-tweet-about-pizzeria (noting that a coach from a nearby high school was suspended after tweeting that she felt like driving to Walkerton to burn down the O'Connors' pizzeria because she was upset by the fact that the couple did not want to be associated with same-sex wedding ceremonies).

7 *See Walkerton Pizzeria Once at Center of National Controversy Has Now Closed*, *supra* note 6. It was unclear at the time whether the pizzeria's closure stemmed from the fallout of the 2015 controversy or whether instead the owners were simply ready to retire. *See id.*

8 Kevin O'Connor lamented in an interview with the *South Bend Tribune* that "[o]ut of anger, there seems to be no getting along anymore . . . . If your opinion isn't what somebody else's is, then I'm a dirtbag. Just because I don't agree with you doesn't mean I have to hate you." *See id.*

nitary harm from interacting with pizzeria owners who judged their relationship immoral. Despite this absence of legally cognizable harms, cultural pressures led to the temporary closure of a small-town business.

This Note will explore the tension between Justice Kennedy's words in *Obergefell* regarding the decent and honorable premises behind the judgment of many Americans that same-sex marriage is immoral (or, strictly speaking, impossible),[9] and the treatment afforded to those who attempt to live out those supposedly decent and honorable beliefs in the public square—bakers,[10] florists,[11] photographers,[12] pizza connoisseurs,[13] and more. It will assess the relationship between religious liberty, freedom of speech, and antidiscrimination laws by focusing on issues in the realm of sex and marriage, though complicity claims like the ones explored here arise in various other contexts, including at the intersection of health care, abortion, and contraception.[14]

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9 Americans' views on same-sex marriage have undergone a substantial shift in the past fifteen years. The Pew Research Center reports that in 2004 Americans opposed same-sex marriage by a margin of sixty percent to thirty-one percent, while polling in 2019 revealed that the ratio has flipped, with sixty-one percent of Americans supporting same-sex marriage and thirty-one percent opposing it. *See Attitudes on Same Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

10 *See, e.g.*, Mark Hemingway, *The Neverending War on Jack Phillips*, WKLY. STANDARD (Sept. 5, 2018), https://www.weeklystandard.com/mark-hemingway/masterpiece-cakeshop-the-neverending-war-on-jack-phillips (explaining that Phillips "has spent the last six years in and out of courtrooms, defending his right to run his bakery in accordance with his religion"). Phillips's predicament will be discussed in greater detail in Part III of this Note.

11 *See, e.g.*, Jane C. Timm, *Another Gay Wedding Case That Could Go to the Supreme Court. This One's About Flowers*, NBC NEWS (June 4, 2018), https://www.nbcnews.com/politics/politics-news/other-gay-wedding-case-could-go-supreme-court-one-s-n879906 (describing the litigation that enveloped Barronelle Stutzman, owner of Arlene's Flowers and Gifts, after she refused to provide flowers for the wedding of two men in 2013, one of whom was a longtime customer).

12 *See, e.g.*, Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony*, N.Y. TIMES (Nov. 18, 2013), https://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html (describing the experience of Elaine Huguenin, a photographer, who objected to photographing a same-sex marriage and was subjected to a discrimination complaint under a New Mexico law forbidding businesses open to the public to discriminate against gay people).

13 There are differences between the pizza parlor operators' claim and those of the baker, florist, and photographer that become relevant when the issue is one of making a *constitutional*—as opposed to a merely policy-based—argument for exemption from the kind of antidiscrimination laws discussed in this Note. A constitutional argument rooted in the freedom against compelled speech carries weight for individuals making expressive products that convey a message, but less weight for a pizzeria, whose product is not expressive in the same way.

14 *See* TIM BRADLEY, CHARLOTTE LOZIER INST., UNCONSCIONABLE: THREATS TO RELIGIOUS FREEDOM AND RIGHTS OF CONSCIENCE IN THE ABORTION DEBATE (2016), https://s27589.pcdn.co/wp-content/uploads/2016/10/Conscience-Wars-10.19-1.pdf.

The Note advances two main arguments for honoring complicity claims—claims against being made complicit in others' conduct that one judges to be immoral or in expressing a message that one judges to be false—such as those advanced by Jack Phillips, the proprietor of Masterpiece Cakeshop. First, the Note argues that those making such complicity claims have a strong interpretive and conceptual argument that their conduct, rightly understood and described, falls outside the scope of the relevant antidiscrimination laws. Second, even if one disagrees with that argument and concludes that such cases *do* come within the ambit of the relevant antidiscrimination laws, there are strong reasons, rooted in the nature of religious liberty and the purpose of antidiscrimination law, *against* applying those laws to these actors and instead exempting them from their coverage by amending such laws and providing for such exemptions in future laws.[15]

Part I will examine the underpinnings of the right to religious freedom and defend its continued relevance and importance in the American constitutional order. Part II will discuss the purpose of antidiscrimination law generally and focus in particular on a type of antidiscrimination law aimed at protecting gay, lesbian, bisexual, and transgender people from discrimination: sexual orientation and gender identity (SOGI) laws. Part III will explore two cases concerning conscience-based refusals by bakers to supply goods for celebrations of same-sex marriages—*Masterpiece Cakeshop v. Colorado Civil Rights Commission*[16] and *Lee v. Ashers Baking Co.*[17]—and argue that complicity claims in such cases are best understood as not constituting discrimination based on a protected trait. Such complicity claims are thus outside the scope of typical SOGI laws. Part III will conclude by applying the insights gleaned from the first two Parts by underscoring the importance of enacting additional protections into law to reinforce the protections provided by the First Amendment and Religious Freedom Restoration Act so that those who object to being made complicit in the celebration of same-sex marriages are not pressured to do so as a condition of remaining in business.

The great task and challenge of our political order, Michael McConnell writes, "is to distinguish between the freedom that must be left to human

15 This Note will not address in any great detail the merits of the constitutional defenses—based on free exercise of religion and freedom of speech—at play in these cases but will instead focus on the underlying rationales for such freedoms and explore how those rationales can inform the shaping of a statutory scheme addressing these issues. This is not because those defenses are unimportant. Indeed, in the case of an antidiscrimination law explicitly defining complicity claims such as those discussed in this Note to be within the bounds of its proscribed "discrimination," and one in which the policy arguments for exemptions outlined in this Note go unheeded, an individual raising a complicity claim is left to these constitutional defenses. This Note also does not engage in analysis of the original meaning of the Free Exercise Clause of the First Amendment and the relationship between it and freedom of conscience, though it does treat freedom of conscience as an important value to consider when crafting laws to govern this area.

16 Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

17 Lee v. Ashers Baking Co. [2018] UKSC 49, [12] (appeal taken from N. Ir.), https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf.

beings if they are to exercise the virtue of freely choosing the right, and the elements of justice that must ultimately be enforced and compelled by government."[18] Determining which side of that line complicity claims fall on—whether the state must honor them so that men retain freedom to choose the right, or whether justice requires that the state punish these conscience-based refusals to facilitate activities protected by law—is an important and timely task.

I. Religious Liberty: Our First Freedom

Before relegating complicity claims rooted in religious and moral ideas to second-class status relative to claims under SOGI laws, we ought to at least be clear on why religious liberty mattered so much to those who shaped our constitutional order and why the goods protected by religious liberty are worthy of continued and even special protection.

This Part proceeds by first situating religious liberty in our broader political history before discussing the individual interests protected by it and some of the social benefits that flow from prizing it. Those incidental benefits include the capacity of respect for religious liberty to unsettle political victories, lead to cultural and legal change, and cause one to scrupulously reexamine one's own views due to opposing arguments from others. While one prong of the argument in this Note aims to establish that complicity claims do not fall within the scope of SOGI laws, in which case there is no need for religious exemptions for those raising the claims, the discussion in this Part provides relevant reasons why such claimants *ought* to be granted exemptions from such laws *if* the laws, absent explicit exemptions, are instead read to cover their conduct.

A. Situating Religious Liberty

Religious liberty is often referred to as our first freedom.[19] While its appearance first in the Bill of Rights is historically only an accident,[20] there is nevertheless a strong argument that religious liberty has a sort of priority among our sundry freedoms.[21] James Madison argued in his *Memorial and*

18 Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1252 (2000).

19 *See, e.g.*, Rick Warren, Opinion, *Religious Liberty Is America's First Freedom*, Wash. Post (Mar. 21, 2014), https://www.washingtonpost.com/opinions/religious-liberty-is-americas-first-freedom/2014/03/21/498c0048-b128-11e3-a49e-76adc9210f19_story.html?utm_term=.f1f55b00db62 (noting that religious liberty is our first freedom because "if you don't have the freedom to live and practice what you believe, the other freedoms are irrelevant").

20 Our First Amendment was the third in the list of proposed amendments submitted for consideration during the First Congress. *See* McConnell, *supra* note 18, at 1243. The first two were not adopted with the Bill of Rights, but the second later became the Twenty-Seventh Amendment. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8–9, 16–17 (1998).

21 McConnell, *supra* note 18, at 1244.

Remonstrance that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is *precedent both in order of time and degree of obligation*, to the claims of Civil Society."[22] Religious liberty is grounded not so much in personal autonomy but in the *duty* of man to live in harmony with whatever greater-than-human source of meaning and order exists in the universe.[23] Madison's grounding of religious freedom in the duty of each man to worship the Creator as he sees fit is not dissimilar to the argument put forward in *Dignitatis Humanae*, the Second Vatican Council's Declaration on Religious Freedom.[24] There the fathers of the Council explain that it accords with the dignity of man as a being endowed with reason and free will that he "should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth," and that men are "bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth."[25] For men to discharge these obligations they must "enjoy immunity from external coercion as well as psychological freedom," and this right to religious freedom protects even those who are deficient in pursuing the truth or who do not realize the fullness of truth, "provided that just public order be observed."[26] This proviso that just public order be preserved is important and reminds us both that there are limits to the scope of the right to religious liberty and that protection of the political common good can sometimes require the state to decline to honor a religious liberty claim.[27] The free-

22 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 184–85 (Gaillard Hunt ed., 1901)).

23 An example of the conception of personal autonomy driving much of modern constitutional rights-making is Justice Kennedy's famous "mystery of life" passage: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). This understanding of liberty is focused on personal autonomy divorced from any concept of duty stemming from man's obligation to seek the *truth* and is thus deficient as a ground for justifying rights like the freedom of religion.

24 *See* SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAE [DECLARATION ON RELIGIOUS FREEDOM] para. 2 (1965) [hereinafter DIGNITATIS HUMANAE], http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. For a worthwhile recent survey of the origins of religious liberty, see ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM (2019). Wilken's historical work challenges the conventional view that religious liberty is a product of the Enlightenment and indicates that the origins of religious liberty are "not political but religious." *Id.* at 2. Wilkens shows "how Christian thinkers came to consider religious freedom, or liberty of conscience, a natural right that belongs to all human beings, not an accommodation granted by ruling authorities." *Id.* at 5.

25 DIGNITATIS HUMANAE, *supra* note 24, para. 2.

26 *Id.*

27 According to *Dignitatis Humanae*, the degree to which the right to religious liberty will be protected in a given society at a given time can vary depending on empirical facts,

doms of religion and conscience are intrinsically valuable and socially beneficial. These benefits will be addressed in turn.

B. Intrinsic Benefits

As both James Madison and the fathers of the Second Vatican Council affirmed, civil liberties of conscience and religion protect one's ability—and duty—to fulfill one's moral and religious duties in the way one deems best. Absence of coercion in matters of conscience and religion protects one's integrity by fostering harmony between one's convictions and actions and between one's self and the transcendent. This integrity is good in itself, but the harmony signified by it is authentic only if freely chosen. Harmony between one's actions and one's convictions is good in itself even if one's convictions about right and wrong are misguided and even if moral duty compels one to reestablish harmony rooted in *different* (more upright) convictions. This good gives rise to rights of conscience (because practical reason, grasping this good, directs one to pursue it and instills in one a *duty* to do so). Relatedly, the good of harmony between one's self and the transcendent is central to what religion *is*. Because such harmony is only possible on a free and willing basis—in other words, because religion is a reflexive good—it follows that freedom of religion is inescapably built into any sound understanding of what religion is. Religious freedom is a natural right, even for those who ultimately do *not* establish harmony, let alone upright harmony, with that source of transcendence. These forms of personal integrity are real dimensions of human well-being, and as such, the good of one's integrity "gives the rest of us *some* reason to respect and promote it."[28]

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such as the degree to which religious faith that is *not* the true faith predominates and the extent to which such religious faith deviates in its moral code from the requirements of just public order. So, in a society housing a prominent number of people who are religiously motivated toward human sacrifice, the right to religious liberty will be correspondingly narrowed as the state rightly prohibits the practice of human sacrifice because it is immoral. Note here, though, that it is not quite right to say that man's right to religious liberty is in such a circumstance justifiably *infringed* by the state because the public good requires infringement of the right. Such balancing of individual rights claims against the requirements of the public good—as if the two were in opposition—misunderstands the nature of rights. The misunderstanding stems in part from the modern tendency in rights talk to speak of rights as two-term realities—*X* has a right to *A*—rather than the three-term realities that they are—*X* has a claim of right to *A* that *Y* has a duty to respect. Once fully specified as a three-term relationship, the right is not defeasible. *See generally* GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 10–14 (2018). Thus, when the state prohibits human sacrifice despite the religious liberty claim of some members of the society that their religion requires or permits the practice, the state is not, properly speaking, infringing anyone's rights. Rather, the right to religious liberty does not extend to cover the claim of the human sacrifice practitioners. The right, here, is not defeasible; there simply is no fully specified, three-term relationship entailing that a person has a right to slaughter another innocent person, claims to the contrary notwithstanding.

28 Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, *in* JOHN CORVINO ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108,

Ryan Anderson and Sherif Girgis explain that political morality requires "concern and respect" for these goods and all other basic—that is, inherently, intelligibly motivating—human goods, such that "trampling some basic goods on our way to others" by intending harm to someone's most basic interests as a means to other benefits is ruled out.[29] The state ought to allow each of us to pursue basic goods adequately and fairly "without imposing onerous and gratuitous burdens on some," and its goal should be to "empower without encumbering."[30] But the state protects our ability to pursue basic goods adequately in different ways. For example, the civil liberty ensuring freedom of speech is a mere *means* to the end of pursuing basic goods. Speech does not as such have inherent value, but the ability to communicate freely is necessary for our pursuit of a number of important goods—friendship and knowledge, to name just two.[31] But rights of conscience and religious liberty (such as the protections offered to religion in the First Amendment to the U.S. Constitution)[32] provide direct protection for basic goods themselves and not just means to their pursuit.

Why should these goods—those of conscience and religious integrity—receive special protection? The instrumental benefits of protecting these goods will be discussed in greater detail below.[33] More centrally, though, these goods are basic aspects of human flourishing, and respecting them requires respecting people's freedom to pursue them by their best lights. Further, these goods are particularly *fragile*. As Anderson and Girgis note, "when it comes to moral and religious integrity—obeying your conscience and adhering to God as you understand God—you need to avail yourself of *particular* options to avoid becoming deficient."[34] Having a wide range of options is not enough to pursue these goods adequately. Unlike the good of friendship, for example, where a policy making it harder to travel to see a certain friend would not necessarily force you into *deficiency* with respect to the good of friendship so long as you had adequate options for pursuing other relationships, when it comes to religion and conscience, a policy forcing you to violate an aspect of your faith or moral system would force you into deficiency with respect to that good.[35] The fragility of these goods mer-

126 (2017). Again, that the good of personal integrity gives us *some* reason to respect and promote it—both as it is instantiated in our own lives and the lives of others—does not entail that our reasonable choices in pursuit of other goods (or other instantiations of the same good) will not sometimes include as a *side effect* some harm to individuals' personal integrity. But in those instances we do not or ought not *intend* to harm the good of personal integrity, which in itself gives us only reasons to respect and promote it.

29 *Id.* at 127.

30 *Id.* at 128.

31 *See id.*

32 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

33 *See infra* Section I.C.

34 Anderson & Girgis, *supra* note 28, at 135.

35 *See id.* at 136 ("If the law pressures someone into flouting her Muslim obligations, she can't make up for that—and escape deficiency in religion—by fulfilling a Mennonite

its their special protection, and as such law should clear the way for individuals to obey conscience and religion unless doing so would violate some aspect of the common good or otherwise work injustice.[36] This explains why the presumption in law should be *for* exemptions for claims of conscience and religion.

C. Instrumental Benefits

The grounding of religious liberty in one's duty to seek the truth by living in harmony with one's best judgment about the proper relationship required between mankind and the Creator (or whatever more-than-human source or principle of order and meaning in the universe is "out there") explains why the idea of religious liberty is conducive to the flourishing of civil society. Michael McConnell writes that long before liberalism was conceived, "the division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of a civil society, as apart from government."[37] Madison's admonition that religious duty is precedent both in order of time and degree of obligation makes sense in this context. The separation of the proper spheres of jurisdiction of Church and state (an idea rooted in the Gospels and taught by popes of the early Church)[38] "is the most powerful possible refutation of the notion that the political sphere is omnicompetent—that it has rightful authority over all of life."[39] The very idea of limited government and of politics being a *partial* and not *totalizing* aspect of the common good springs from man's duty to obey higher powers and his corresponding right to religious liberty.

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duty instead. There are no alternative channels for *her* to pursue religion in full. The same is true if the law pressures her into violating only *one* religious duty. She can't make up for violating the teaching against eating pork by redoubling her efforts to live out her separate duty to pray at certain times. Her religious life still suffers.").

36 The natural law argument for respecting, and not intending damage to, the goods of conscience and religion offered in this paragraph echoes in conclusion the words of *Dignitatis Humanae* that men must "enjoy immunity from external coercion as well as psychological freedom" in matters of religion "provided that just public order be observed." DIGNITATIS HUMANAE, *supra* note 24, para. 2. But we should not, from the fact that both arguments arrive at similar conclusions, judge or infer that the natural law arguments offered by scholars such as Anderson and Girgis are actually theological arguments and rely on divinely revealed authority.

37 McConnell, *supra* note 18, at 1244.

38 *See Matthew* 22:21 (Jesus told the crowd to "give back to Caesar what is Caesar's, and to God what is God's."). Michael McConnell relates that since the time of Pope Gelasius (who was pope from 492 to 496 A.D.), "standard legal thinking in western Europe was based on the theory of Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state." Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8.

39 McConnell, *supra* note 18, at 1247.

Religious liberty can thus be seen as essential to a healthy civil society, which grows out of the fact that freedoms of conscience and religion "distinguish in theory, and . . . protect in practice, private associations from the state."[40] These private associations—those "little platoon[s]" that mediate between the individual and the state[41]—are valuable in themselves because they serve as vehicles for the expression of individual responsibility and determination, and together with freedoms of conscience and religion they fence in the power of the state.[42]

Complicity claims are a species of the freedoms of conscience and religion. That complicity claims are not different *in kind* from other conscience claims means that just as courts do not assess the *validity* of the claimant's underlying moral or religious theory in other contexts where religious or conscientious objectors seek exemptions from generally applicable laws,[43] so too here courts should not seek to put to their own test of truthfulness whether a claimant is *really* being made complicit in conduct he objects to. In other words, whether a baker is *right* that making cakes for same-sex marriages makes him complicit in an impermissible way with something he objects to is *not* the question courts should be answering in such cases; rather, they should simply assess whether honoring the claim would have undue costs according to relevant legal tests.

These complicity claims, which are claims against being made complicit in others' conduct that one judges to be immoral, are made by both individuals and institutions (acting as legal persons) and can impose costs on third parties.[44] For example, a complicity claim and subsequent refusal to provide a specific service by a baker for a same-sex wedding ceremony might impose some material cost on the same-sex couple insofar as they do not get the cake they want from the baker they have chosen—they must go elsewhere for their material needs to be met. Further, as the number of such complicity claims grows, they might impose another material cost by shaping policies and

40 Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J.F. 399, 407 (2016).

41 *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 47 (L.G. Mitchell ed., Oxford Univ. Press 1993) (1790).

42 *See* Girgis, *supra* note 40, at 409.

43 For example, in considering a pacifist's claim to a draft exemption courts do not judge the truth of the underlying moral or religious claim. The success of the claim for an exemption does not turn on whether the court judges that the objector is right on the merits of whether participation in the war is immoral. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what [the objector] believes cannot be questioned. . . . [T]hese are inquiries foreclosed to Government.").

44 *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2566 (2015) ("The impact [of complicity-based conscience claims] is not only material. When a religious claim objecting to others' sinful conduct is based on a traditional norm that is reiterated by a mass movement over time and across social domains, accommodating the claim has the distinctive power to stigmatize and demean third parties.").

threatening the legal status quo.[45] Besides potential material costs, complicity claims can—and often do—send a message to others that they are acting immorally. This sort of message is often referred to as a "dignitary harm."[46]

The costs potentially imposed by honoring complicity claims can thus be enumerated to include (1) the material harm of being denied access to goods or services, (2) the material harm of shaping policies and undermining political victories, and (3) dignitary harm. In light of these harms, even if we grant that respecting complicity claims serves an important good by reinforcing the very idea of limited government and setting aside a realm of conscience and religion into which the power of the state presumptively should not intrude, one might still ask whether the costs imposed on third parties by respecting these claims are too great for the state to abstain from intervention.

This is an important question, but there is a difference between the second and third costs noted above and legally cognizable *harms* (meaning legal harms serious enough that avoiding them provides the government with a compelling interest to regulate),[47] and these costs only count *against* bakers and florists and other raisers of complicity claims at the expense of important liberal values.[48] "[T]hese effects—the 'material' harm of shaping policy, and the 'dignitary' harm of expressing moral opposition—are *features*, not *bugs*, of a healthy regime of civil liberties," Girgis writes.[49]

The material harm of shaping policy should not count against complicity claims. As a species of conscience and religious claims more generally, complicity claims contribute to the development and maintenance of a sphere of civil society separate from the state and provide a buffer against it.[50] To count the material harm of shaping policy against complicity claims would signal that in our constitutional republic we respect conscience claims only when they are relatively insignificant—that the Amish can be granted exemp-

45 *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (noting that if a "long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons," the resulting "community-wide stigma" would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations").

46 *See* Brief of *Amicus Curiae* Sherif Girgis Supporting Petitioners at 2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), https://www.aclu.org/sites/default/files/field_document/16-111_tsac_sherif_girgis.pdf (explaining the argument that complicity claims convey "the idea that same-sex marriage is wrong" and "therefore impose[ ] 'dignitary harm'—the harm of being told (even by polite refusals) that decisions central to your identity are wrong").

47 The first type of harm—the material harm of being denied access to goods and services from a business that has opened itself to the public—is, of course, a legally cognizable harm. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce" when it enacted the Civil Rights Act of 1964).

48 *See* Girgis, *supra* note 40, at 403.

49 *Id.* at 400 (emphasis added) (footnote omitted).

50 See *supra* notes 37–42 and accompanying text.

tions from laws and have their freedoms of religion and conscience respected because they are a fairly powerless minority whose witness to conscience is unlikely to change the cultural status quo, but that Evangelicals or Roman Catholics are to be coerced because their witness might spur cultural change on account of their numbers and political coalition-building capabilities. Such an approach is problematic for at least two reasons.

First, it is inconsistent with the foundations of religious freedom and draws unprincipled lines. If the right to religious freedom is grounded in one's duty to seek the truth about the divine and live in harmony with that truth as one best understands it, it should not count *against* the free exercise of that right that an individual is part of a politically relevant or powerful faith group rather than a politically irrelevant fringe group. The value of religious liberty is the same, on this understanding, whether one is politically effective in one's witness or not. As such, it would be arbitrary to discount claims coming from politically effective coalitions but not from politically irrelevant ones.

Second, because one of the instrumental social benefits of religious liberty is that respecting it creates breathing room for dissenting views and leaves open the possibility of moral reform, punishing religious claimants for being politically effective is counterproductive. After all, respecting such claims provides an avenue for moral and social reform. Entrenching political victories and stifling dissent is a dangerous course for any polity, and humility alone counsels against doing so. "As long as civil society's ideological currents are allowed to run freely," Girgis explains, "we all enjoy a steadier flow of fresh ideas about morality, religion, and politics."[51] Counting such exemptions' potential for instigating moral and social reform against them runs contrary to the roots of such claims and their historical place in the American political project.

Further, dignitary harm should not count against complicity claims. In the first place, both sides in a dispute can claim that a decision against them will morally stigmatize them. If a baker is permitted to refuse to provide a cake for a same-sex wedding ceremony, the same-sex couple is confronted by the fact that the state is permitting action communicating the message that someone else finds their conduct immoral. Conversely, if the baker is forced to either provide the cake or shutter his wedding cake business, he is sent the message by the state that his religious or moral convictions are discriminatory, bigoted, and unfit for expression in the public sphere. Dignitary harm to one side or the other is inevitable when it comes to morally important and controversial issues that relate to aspects of life crucial to individuals' identities.[52] But it is unclear how the state could go about fairly weighing the

51 *See* Girgis, *supra* note 40, at 409.

52 It is worth mentioning here that "dignitary harm" is in some ways an inapt label for the kind of harm being discussed. Dignity is, and is often thought of as being, intrinsic to human nature. Dignity in that sense cannot be harmed by the fact that someone expresses moral disapproval of one's conduct. But in another sense of the word—the sense in which one's sense of honor and sense of self are tied to one's measure of one's dignity—it makes

potential dignitary harm to each side in determining which will suffer more dignitary harm should the other side win. Second, as Girgis notes, "counting [dignitary harm] can be self-undermining because fear of it can be self-fulfilling."[53] Social meaning depends on social facts, and the more we say a policy—say, respecting complicity claims by bakers and florists in the context of same-sex weddings—ratifies disdain for a group of people because of their identity rather than their actions, the more such a policy will *actually* take on that meaning in the eyes of the public. This is the case *even if* no one taking advantage of the policy to avoid complicity with same-sex weddings *intends* to disparage same-sex attracted persons as such. Thus, whatever dignitary harm someone like Jack Phillips might be said to impose on potential customers by raising complicity claims risks being exacerbated by attempts to impute a social meaning to his actions that inaccurately characterizes his actual choice and reasoning. Girgis emphasizes the difference between dignitary harm, which the law should not take into account, and the pain of being excluded from public life and markets for goods and services, which the law should zealously protect against:

> There is a vast difference between the humiliation of being denied a seat at the table of public life and the pain of sitting by people who oppose decisions you prize. The first, rooted simply in others' contempt, can and must be avoided. The second, stemming from their consciences, is unavoidable in free societies and conducive to reform. It is the latter sort of offense that we should not punish. We should brook no *freestanding* right not to be offended.[54]

Religious liberty and liberty of conscience offer a safeguard against the hegemonizing ambitions of the state by imposing *limits* on government—and they provide important avenues of moral and social reform. The fact that respecting these civil liberties can unsettle political victories, lead to cultural and legal change, and cause one to scrupulously reexamine one's own views due to opposing arguments from others—even if the result is only to confirm what one previously thought—should not count against protecting them. These social and incidental benefits are *part of the point* of these liberties.

Justice Robert Jackson wrote in *Barnette* that our "[f]reedom to differ is not limited to things that do not matter much," as "[t]hat would be a mere shadow of a freedom."[55] He continued, "The test of [freedom's] substance is the right to differ as to things that touch the heart of the existing order."[56] Jackson earlier argued, in oft-quoted words, that the purpose of the Bill of Rights "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials."[57] This

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sense to speak of dignitary harms, and so the label will be employed as a useful shorthand here.

53 *See* Girgis, *supra* note 40, at 404.

54 *Id.* at 413.

55 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

56 *Id.*

57 *Id.* at 638.

attitude reflects the attitude of those founders known as the Antifederalists, whose efforts in raising objections to the proposed Constitution led to the passage of the Bill of Rights during the First Congress. The Federalist defenders of the Constitution argued that a Bill of Rights (including a protection for freedom of religion) was unnecessary because the whole premise of the federal government was that it was one of limited, enumerated powers, and that nowhere in the Constitution was Congress granted the power to enact laws inhibiting, for example, the free exercise of religion. The Antifederalists, on the other hand, saw little harm, even if that principle were granted, in making *very sure* that sacred liberties like freedom of religion were not vitiated over time. One of the pseudonymous Antifederalist writers argued "that a declaration of those inherent and political rights ought to be made in a BILL OF RIGHTS, *that the people may never lose their liberties by construction.*"[58]

II. THE PURPOSE OF ANTIDISCRIMINATION LAWS

How should we balance the interests served by antidiscrimination laws against the interests protected by liberties of conscience and religion? To determine whether exemptions for complicity claims undermine the purpose of antidiscrimination laws we must first explore what that purpose is.

The Declaration of Independence affirms that all men are created *equal* and endowed with inalienable rights.[59] This equality, the Declaration states, is a self-evident truth.[60] Our norms against discrimination are rooted in this basic equality among and between persons. "Discrimination" is wrong when it is arbitrary; that is, when it treats people differently without any sufficiently justificatory reason.[61] But the real picture is more nuanced than popular lexicon sometimes suggests. Discrimination in many cases means the same thing as "choosing and acting in accord with or with reference to particular criteria."[62] There need be nothing wrong with this kind of discrimination. For example, some forms of discrimination are morally acceptable and even necessary, such as discrimination against blind people when hiring truck drivers.

Problems arise when we discriminate based on criteria that are irrelevant to the question at hand. This is what people usually mean when they speak about discrimination. Anderson helpfully explains the dichotomy between invidious and harmless discrimination as one between *discriminating* and *dis-*

58 1 HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *For* 64 (1981) (emphasis added) (quoting A Confederationist, Letter to the Editor, PA. HERALD & GEN. ADVERTISER, Oct. 27, 1787).

59 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60 *Id.*

61 *See* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 194, 196 (Austin Sarat ed., 2012).

62 *Id.* at 197.

tinguishing, respectively.[63] "We 'distinguish' based on relevant factors—as when we require recipients of driver's licenses to be able to see. We 'discriminate' based on *irrelevant* factors—as when many states once required voters to be white," Anderson writes.[64] There is real danger in applying the morally charged label of "discrimination" to conduct that merely "distinguishes," for there is no reason—no compelling interest—for the state "to ban, regulate, or disapprove 'discrimination' generally, as opposed to discrimination that has been shown, with reference to factors other than the mere use of criteria, to be wrong."[65]

Further, it is not always the case that the state can or should regulate or prohibit discrimination even when it *is* wrongful.[66] The state should only regulate wrongful discrimination when it is within the state's limited power to do so, taking into account the difficulty of identifying some forms of discrimination, the possible impositions on legitimate choices imposed by the blunt instrument of legal coercion, and other relevant considerations.[67] Anderson argues that "antidiscrimination policies should serve as *shields*, not *swords*."[68] Such laws, he continues, "are meant to shield people from unjust discrimination that might prevent them from flourishing in society, not to punish people for acting on reasonable beliefs."[69]

When are laws against wrongful discrimination required? The bar should be set high, given our presumption in favor of liberty and the general baseline rule that "the law leaves people free to deal with others on their own terms, by their own lights."[70] American law recognizes a small number of

63 *See* Ryan T. Anderson *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 128 (2018).

64 *Id.*

65 Garnett, *supra* note 61, at 197.

66 *See id.* For example, discrimination on the basis of eyelash length would be wrongful in most circumstances (it would be acceptable if one were filling a position for a mascara model). It would be wrongful to discriminate on the basis of eyelash length in most employment settings because eyelash length is irrelevant to one's ability to perform good work. But just because the discrimination is wrongful does not mean the law should prohibit it. It might not make sense for the law to do so. Discrimination on the basis of eyelash length might not be widespread enough to justify the intervention of the law. People with short eyelashes might not constitute an identifiable group that needs the law's protection to have adequate access to the marketplace for goods and service and work. And in any event, market forces will tend to drive out of the market those who discriminate foolishly based on irrelevant factors, because in doing so they will miss out on beneficial transactions and competitors will reap those benefits. If nonlegal forces are doing the work of eliminating wrongful discrimination, it is often unnecessary for the law to get involved. The example is drawn from Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Laws*, 88 S. CAL. L. REV. 619, 640–41 (2015).

67 *See id.*

68 Anderson, *supra* note 63, at 127 (emphasis added).

69 *Id.*

70 Anderson & Girgis, *supra* note 28, at 175. At common law, private property owners who enter the sphere of public accommodation thereby grant the public a license to enter their property for the purpose of acquiring the goods or services on offer, but "[t]hat

protected traits upon which refusals to deal cannot legally be based.[71] Antidiscrimination laws (which historically have been narrowly drawn) are *exceptions* from the general rule. Andrew Koppelman explains that the "general rule that governs business transactions, both public accommodation and employment, is contract at will. In most states, most businesses have the privilege of refusing service to anyone for any reason or no reason."[72] Antidiscrimination laws alter the status quo by preventing economic actors from discriminating based on certain protected specific traits, while they remain free to be as arbitrary as they like in respect of nonprotected traits.[73] The fact that antidiscrimination laws ban private discrimination on just a few select grounds and only in limited contexts suggests that nonlegal forces must push back against most forms of wrongful discrimination and that there are real costs to banning even wrongful discrimination that justify the state's reluctance to do so absent serious need.[74]

To rebut the presumption in favor of liberty reflected in our baseline rule of free dealing, the need for a ban on a form of wrongful discrimination

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license can be refused or terminated for a 'good reason.'" Brief of *Amicus Curiae* Legal Scholar Adam J. MacLeod in Support of Petitioners at 6, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 571 (1995)), https://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_adam_j_macleod.pdf. Thus, at common law a business owner has the right to refuse service, but he or she must have a valid reason for doing so. As Adam MacLeod explains, cases raising complicity claims such as the ones addressed in this Note concern private property that "is held open for a particular business purpose," and in such cases "the public's license to enter and conduct business is neither terminable at will nor a vested right to be served. It is a license carved out of the owner's estate by the owner's purpose for opening to the public." *Id.* at 6–7. A reason related to the owner's purpose for opening his or her property to the public "will generally suffice to justify the owner in terminating a particular customer's license," unless that reason is singled out by a public accommodations law as a categorically invalid reason to exclude. *Id.* at 7–8. Elsewhere, MacLeod notes that "[w]here the business owner is religious, those valid purposes for serving and refusing to serve may lawfully include religious purposes." Adam J. MacLeod, *Equal Property Rights for All, Including Christian Wedding Cake Bakers*, PUB. DISCOURSE (Nov. 30, 2017), https://www.thepublicdiscourse.com/2017/11/20584/.

71 For example, Title II of the Civil Rights Act of 1964 forbids discrimination in places of public accommodation based on race, color, religion, or national origin. 42 U.S.C. § 2000a (2012). Laws forbidding discrimination based on sex and disability in various contexts are also common. *See, e.g.*, *id.* § 2000e-2 (forbidding discrimination in employment based on sex); *id.* § 12101–12213 (prohibiting discrimination against individuals with disabilities in all areas of public life).

72 Koppelman, *supra* note 66, at 640.

73 *See id.* ("So long as economic actors do not engage in the enumerated types of discrimination, they have the privilege of being as arbitrary as they like. I can, for example, absolutely refuse to hire or do business with anyone whose eyebrows are not at least three inches long."). Koppelman points out that while the law might decline to prevent discrimination based on arbitrary characteristics such as eyebrow length, market forces will tend to drive out of the market those who discriminate based on irrelevant factors. *See id.* at 641.

74 *See* Anderson & Girgis, *supra* note 28, at 177–78.

must be great, and the cost of enforcement in terms of trampling on legitimate choices must be comparatively minimal. Anderson and Girgis offer a framework that balances these considerations: an antidiscrimination law is warranted when (1) private actors' treatment of a particular (discrete and identifiable) group imposes material or social harms, or both, that can best be cured by the law, and (2) the law is narrowly tailored to successfully stifle interactions causing those harms without banning too many legitimate interactions along the way or trampling too far on important interests related to the freedoms of conscience, religion, and speech.[75]

This framework makes sense of the central *purpose* of antidiscrimination law, which is "an intervention that aims at *systemic effects* in society, dismantling longstanding structures of dominance and subordination."[76] Koppelman notes that some advocates have misunderstood the legal harm of discrimination "as a particularized injury to the person, rather than the artifact of social engineering that it really is."[77] Antidiscrimination laws aim at structural problems reflecting widespread and systematic stigmatization and unequal treatment of a particular group, rather than isolated instances of individual harm. They aim at destabilizing deeply rooted unfair and debilitating attitudes about individuals' basic worth and social status.

While antidiscrimination laws serve important and legitimate purposes, their scope is limited and the bar for justifying them is high. These laws reflect our commitment to basic human equality, and they fight the harm that results from a group's exclusion from the public square, but they ought not enforce a right not to be offended. Moreover, the complicity claims at issue here do not seriously undermine this purpose of antidiscrimination laws. Whereas invidious discrimination is about avoiding contact with groups of people based on unfair and debilitating ideas about their inferiority, complicity claims are about denying *services*, regardless of *who* requests them, because the service contributes to *activities* or expresses a message to which the service provider objects on moral or religious grounds.

As was discussed above,[78] some of the harms ascribed to honoring complicity claims are features rather than bugs of fostering a healthy regime of civil liberties, and even those material harms that should count against complicity claims—the exclusion of some customers from access to goods and services—have not been shown to be prevalent enough in American society to establish that those harms can *best* be cured by law. When the need for laws to counteract the complicity claims at issue in this Note are weighed against the risks that such laws pose to freedoms of conscience, religion, and speech, the balance favors excluding such claims from the scope of antidiscrimination laws.

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75 *See id.* at 179.

76 Koppelman, *supra* note 66, at 639 (emphasis added).

77 *Id.* at 620.

78 *See supra* notes 47–54 and discussion in the accompanying text on material and dignitary harms.

III. Complicity Claims Do Not Constitute Invidious Discrimination and Should Be Protected in Law

The remainder of this Note will argue that complicity claims like the one offered (hypothetically) by the owners of Memories Pizza in Walkerton, Indiana, do not fall within the scope of SOGI laws, properly understood. It will conclude by arguing that, even if one stipulates that such claims *do* fall within the scope of such laws, there is a strong case for not banning them. This Part will proceed by first analyzing *Masterpiece Cakeshop* and *Ashers Baking Co.* and then addressing statutory protections for complicity claimants.

A. Masterpiece Cakeshop v. Colorado Civil Rights Commission

Jack Phillips owns and operates Masterpiece Cakeshop, a bakery in Lakewood, Colorado. He is also a Christian.[79] In 2012, a same-sex couple visited Phillips's bakery to order a cake for their wedding reception. Phillips told the couple he could not in good conscience create a cake for their wedding because he was opposed to same-sex marriage on religious grounds.[80] The couple filed a complaint with the state's Civil Rights Commission, which found that Phillips had discriminated on the basis of sexual orientation in violation of Colorado antidiscrimination law.[81] Several years later, the case reached the Supreme Court, where Phillips argued that the Commission had violated his freedom of speech by compelling his speech *and* violated his free exercise rights by treating him differently because of his religion than secular bakers who had *also* refused to create cakes carrying messages they rejected.

The Court ruled in Phillips's favor on narrow grounds: that the officials who ordered him to provide cakes for same-sex weddings exhibited impermissible hostility toward Phillips's religious beliefs, violating the neutrality toward religion required by the Free Exercise Clause of the First Amendment.[82] The Court has interpreted the First Amendment to not require judicially crafted exemptions from neutral laws of general applicability since it decided *Employment Division, Department of Human Resources of Oregon v. Smith* in 1990.[83] But it has nevertheless affirmed that if the government fails to act neutrally toward the free exercise of religion, it must satisfy strict scrutiny (a standard the government almost always fails to satisfy).[84] *Masterpiece* followed in the wake of the Court's neutrality-protecting precedents. While the ruling in *Masterpiece* was helpful for people like Phillips who hold traditional views about marriage (not least because it indicates that traditional views on mar-

79 *See Jack Phillips*, Alliance Defending Freedom, https://adflegal.org/detailspages/client-stories-details/jack-phillips (last visited Nov. 11, 2019).

80 *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

81 *Id.*

82 *Id.* at 1723–24.

83 494 U.S. 872, 878–79 (1990).

84 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

riage are not akin to racism),[85] it was nevertheless fact bound and contingent; the majority cautioned that it reached the result it did "whatever the outcome of some future controversy involving facts similar to these."[86]

One important aspect of the issues contained in *Masterpiece* that could have a broader effect if addressed squarely by the Court in a future case was debated in concurrences by Justices Gorsuch and Kagan. Justice Gorsuch focused on the impermissible double standard adopted by the Commission. Phillips refused to make a cake for a same-sex wedding requested by a same-sex couple (and then by one of the men's mothers). Three other bakers refused to make cakes bearing messages denigrating same-sex marriage requested by a religious individual.[87] Despite both sets of cases' sharing "all legally salient features," Justice Gorsuch wrote, "the Commission failed to act neutrally by applying a consistent legal rule."[88] The effect in both cases on the *customer* was a refusal of service. But, Justice Gorsuch noted, in both cases the bakers refused *intending* only to honor their convictions, that is, to live with integrity, even if they *knew* that doing so would have the unfortunate effect of leaving a customer in a protected class unserved.[89] But because all the bakers involved testified that "they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else)," Justice Gorsuch was confident that none of the bakers refused service *because* of the customers' identity.[90]

While the law sometimes recognizes the distinction between intended and knowingly accepted effects,[91] it sometimes conflates intent and knowl-

85 As Sherif Girgis notes, "[i]f Phillips deserved to be treated like a racist . . . the majority would not have balked at Colorado officials' dismissiveness towards his religion" because hostility towards racism is not offensive to constitutionally protected values. Sherif Girgis, *Filling in the Blank Left in the* Masterpiece *Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), https://www.thepublicdiscourse.com/2018/06/21831/.

86 *Masterpiece*, 138 S. Ct. at 1724.

87 *See id.* at 1735–36 (Gorsuch, J., concurring).

88 *Id.*

89 *Id.* at 1735.

90 *Id.* Of course, whether Justice Gorsuch is correct here depends in part on what the "requested cake" was. Symbols (and referential statements) are critically context dependent for their meaning. A cake that is identical in terms of icing, design, and even text can carry different meanings depending on context. To borrow an example from Sherif Girgis, a cake bearing the text "Banks are a Blessing from the Lord" will mean something different at a convention of investment bankers than it will at a convention of fishermen. Sherif Girgis, *The Christian Baker's Unanswered Legal Argument: Why the Strongest Objections Fail*, PUB. DISCOURSE (Nov. 29, 2017), https://www.thepublicdiscourse.com/2017/11/20581/.

91 An example of the distinction between intention and foresight (even of effects that seem certain to occur on account of my actions) is that of jogging: when I go jogging, my intention is to be fit and to get healthier; I know with certainty that an effect of my going jogging will be the wearing out of the soles on my shoes, but I do not *intend* that wearing out as either a means or an end. If I went jogging and found the soles of my shoes resistant to wearing out, I would be glad and would not consider my purpose in jogging to have been thwarted in any way.

edge or presumes intent from a showing of knowledge.[92] But the law should not recognize that distinction with respect to one case and ignore it with respect to another, similar case. Like cases should be treated alike. In *Masterpiece*, the Colorado Civil Rights Commission distinguished between intended and knowingly accepted effects when it came to the secular bakers' refusing to make cakes denigrating same-sex marriage, but did not do so in Phillips's case, finding instead that intent to disfavor a protected class should be presumed from a knowing failure to serve someone belonging to that class.[93] This double standard gets at the heart of a crucial point: either both sets of bakers were discriminating based on a protected trait, or neither was. As Justice Gorsuch explained:

> If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in [the Christian patron's] case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic.[94]

The Commission "cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies," Gorsuch went on to note.[95] Whatever the Commission does, it must be consistent and treat like cases alike.

Justice Kagan agreed with Justice Gorsuch on the basic point that bakers (and other providers of creative goods) can choose *what* to make, but not for *whom* to make it—they must treat customers the same regardless of traits protected by antidiscrimination law.[96] But Justice Kagan believed the Colorado Civil Rights Commission was correct to treat the secular bakers differently than it treated Phillips because she has a different understanding of

92 *Masterpiece*, 138 S. Ct. at 1736 (Gorsuch, J., concurring) ("Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge.").

93 *See id.* Of course, the Commission would not hold that in all circumstances in which one knowingly denies someone in a protected class, one must be discriminating against them *because of* their protected trait. For example, imagine one lives in a jurisdiction recognizing sexual orientation as a protected trait for employment purposes. If one fires an employee whom one knows to be same-sex attracted because that employee missed more days of work than the company's policy permits, one is not firing that employee *because* he is same-sex attracted even though one knows that the employee possesses that protected trait, so one would not be liable for violating the employment law. Here, the Commission's conflation of intent and knowledge was based on its determination that sexual orientation and one's choice in marriage are so bound up together that they cannot be meaningfully distinguished. Thanks to Sherif Girgis for discussion on this point and for providing the example.

94 *Id.*

95 *Id.* at 1737.

96 *See id.* at 1733 n.* (Kagan, J., concurring) ("A vendor can choose the product he sells, but not the customers he serves—no matter the reason.").

what the relevant "product" is in such cases. Justice Kagan argued that the relevant product in the case of Phillips is simply a wedding cake (with no words or explicit message)—one "suitable for use at same-sex and opposite-sex weddings alike."[97] Kagan explained, "Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples."[98] In the case of the other bakers, Kagan argued, the product was a cake with words disparaging same-sex marriage. It makes sense by her lights to treat the two sets of bakers differently.

Justice Gorsuch disagreed. Not mincing words, he countered that "[t]o suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in [the Christian patron's] case while penalizing Mr. Phillips—is irrational."[99] Justice Gorsuch does not think anyone can reasonably doubt that a wedding cake without words nevertheless conveys a message. "Words or not and whatever the exact design, [the cake] celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding."[100] The Commission (or the Supreme Court rationalizing after the fact) cannot play with the level of generality at which the "product" is to be defined (using a very general definition in one case and speaking of "wedding cakes" writ large, and sliding down to a more specific level of generality and speaking of "wedding cakes denigrating same-sex marriage" in another) to justify outcomes treating like cases differently. It is true, of course, as Justice Gorsuch acknowledged, that under *Smith* a vendor cannot escape the clutches of an antidiscrimination law just because his religious beliefs run contrary to the demands of the law, but such laws must nevertheless be applied in a manner that treats religious beliefs with neutral respect.[101] So the government must apply the same level of generality across cases.

The Court's free speech jurisprudence supports Justice Gorsuch's argument and clarifies the debate. In *Spence v. Washington*, the Court explained that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."[102] Free speech is woven into the religious liberty issues raised by those who sell or provide expressive products.[103] Free speech law affirms that an expressive item's con-

97 *Id.*

98 *Id.*

99 *Id.* at 1738 (Gorsuch, J., concurring).

100 *Id.*

101 *Id.* at 1739.

102 Spence v. Washington, 418 U.S. 405, 410 (1974) (per curiam). The Court in *Spence* cites *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), another free speech case, for support of its point.

103 The fact that context gives meaning to symbols is important in delimiting the extent to which complicity claims should be honored on compelled speech grounds. For example, it is expressive activity for Jack Phillips to create a cake for a wedding ceremony, but it would not be expressive activity for him to sell a generic off-the-shelf (already prepared) cake to a customer who then serves the cake at a same-sex wedding. The context in that circumstance would not suggest that Phillips created expression celebrating a same-sex

text shapes its meaning, and this insight supports Justice Gorsuch's argument about impermissible double standards.[104] Given that most states will not be willing to coerce economic actors who object to creating expressions denigrating same-sex attracted persons or same-sex marriage, those states will also be unable to coerce people like Phillips, so long as the Court adopts the insights of its free speech cases and applies them to complicity claims in future cases involving expressive products.[105]

A recent example of the application of free speech doctrine to complicity claims involving expressive products constituting artistic speech is the Eighth Circuit's 2019 decision in *Telescope Media Group v. Lucero*.[106] There, the Eighth Circuit applied strict scrutiny to a Minnesota statute that prohibited discrimination because of sexual orientation in public accommodations.[107] The court reversed dismissal of a wedding videographer's claim for preenforcement injunctive relief from the statute, which the state read to require the videographer to produce both opposite-sex and same-sex wedding videos, on grounds that the statute impermissibly compelled speech.[108] "[R]egulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be," the court noted.[109]

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wedding. If a same-sex couple entered a Dairy Queen and bought a generic ice cream cake at the counter and served it at their fifth wedding anniversary party that weekend, Dairy Queen would not thereby have created an expressive item carrying a pro-same-sex marriage message. The importance of context is not of relevance to delimiting the extent to which complicity claims should be honored on statutory religious freedom grounds under the Religious Freedom Restoration Act (RFRA), however. For RFRA purposes, what matters is that the individual has a sincere religious objection to selling the product.

104 Thomas Berg argues that this is "potentially a powerful principle." Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139, 152 ("Left-leaning states and cities will be unwilling to force socially liberal vendors to produce goods with conservative religious messages in violation of their consciences. Those states cannot then turn around and require religiously conservative vendors to produce goods in violation of their consciences. Religious objectors facing litigation can send testers to smoke out such uneven enforcement of anti-discrimination law.").

105 *See* Girgis, *supra* note 85. For an analysis of the overlaying of the free speech argument on top of the religious liberty argument at stake in *Masterpiece*, see Scott W. Gaylord, *Is a Cake Worth a Thousand Words?* Masterpiece Cakeshop *and the Impact of Antidiscrimination Laws on the Marketplace of Ideas*, 85 TENN. L. REV. 361, 362 (2018) (asking what happens when a state attempts to require either individuals or for-profit businesses to "design and create expressive works that foster or promote a message with which the business and its owners disagree" and explaining that at that point "antidiscrimination laws collide with the Supreme Court's laissez-faire approach to the marketplace of ideas, which eschews virtually all governmental regulation of free speech").

106 936 F.3d 740 (8th Cir. 2019).

107 *Id.* at 748, 754.

108 *Id.*

109 *Id.* at 755.

B. Lee v. Ashers Baking Co.

The Supreme Court of the United Kingdom decided a case similar to *Masterpiece* on October 10, 2018.[110] In 2014, Ashers Baking Co., located in Northern Ireland, refused to fill an order from a same-sex-attracted man for a cake bearing the message "Support Gay Marriage" and bearing the images of the familiar *Sesame Street* characters Bert and Ernie.[111] The customer planned to bring the cake to a meeting of same-sex marriage supporters in Northern Ireland, which does not grant legal status to such unions.[112] The owners of the bakery are Christians and object to same-sex marriage on religious grounds.[113] After a Belfast court initially held that the bakery had discriminated on the basis of sexual orientation and fined the owners of the bakery, and the Northern Ireland Court of Appeal upheld the lower court's decision, the UK Supreme Court in October sided with the bakery and overturned the finding of invidious discrimination.[114]

The UK Supreme Court's analysis helpfully illuminates the relationship between discrimination and complicity claims that is at play, but is not decided, in *Masterpiece*—and the UK court's reasoning, while not applicable in the United States as legal precedent, could have persuasive force as a matter of reason. The fundamental basis for the UK court's decision to protect the bakery's refusal to provide the cake supporting same-sex marriage was that "there was no discrimination on grounds of sexual orientation."[115] The bakery would have supplied the same customer (who was gay) with a cake that lacked the message supporting gay marriage, *and* it would have refused to supply to a *heterosexual* customer the cake that *was* requested in this case. The bakery's objection was to the *message*, not the *messenger*.[116] The customer's sexual orientation was not relevant to the deliberation of the bakery and its ultimate decision to refuse the cake order *at all*.[117]

The court considered not only whether the bakery directly discriminated based on sexual orientation—concluding that it did not—but also whether the criterion used by the bakery to refuse the order was "indissociable" from the protected characteristic of sexual orientation and thus a proxy for direct discrimination based on a protected trait.[118] The court argued that "there is

110 Lee v. Ashers Baking Co. [2018] UKSC 49 (appeal taken from N. Ir.), https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf.

111 Ed O'Loughlin, *Belfast Bakery Was Free to Refuse Gay-Marriage Cake, Court Rules*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/world/europe/northern-ireland-cake-gay.html.

112 *See id.* Nor did the state of Colorado recognize same-sex unions as marriages in law at the time that Jack Phillips refused to create a custom cake for a same-sex couple's wedding ceremony.

113 *Id.*

114 *Id.*

115 *Ashers*, [2018] UKSC at [62].

116 *See id.* at [11].

117 *See id.* at [23].

118 *See id.* at [25] (noting that the lower court concluded that support for same-sex marriage *was* indissociable from sexual orientation).

no such [indissociable] identity between the criterion and sexual orientation of the customer."[119] It explained, "People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation."[120] The owners of Ashers Bakery regard same-sex marriage as contrary to their religious beliefs, and the fact that the customer was gay was irrelevant to their decision to adhere to their religious beliefs and refuse the order.[121]

The court was not dismissive of the problem of discrimination on the basis of sexual orientation.[122] But, the court explained, discrimination on the basis of sexual orientation "is not what happened in this case and *it does the project of equal treatment no favours to seek to extend it beyond its proper scope*."[123]

The UK Supreme Court mentioned *Masterpiece* in a postscript to its opinion, noting—not entirely persuasively—that "[t]he facts are not the same" and that there might be relevant differences between the two cases relating to the messages the requested cakes sent (the cake in *Ashers* featured words and an image whereas the cake requested of Phillips was wordless, for example).[124] But the court emphasized that "there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics."[125] Each case that arises can be judged individually, the court suggested, but the situation in *Ashers* was clear: the bakery would have refused to bake the cake

119 *Id.*

120 *Id.*

121 *But see* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1170 (2012) (arguing that those who conclude that complicity claims need not entail discrimination on the basis of sexual orientation are mistaken because "same-sex relationships are an expression of identity" and "religious objections largely relate to that identity" in such a way that "impermissible discrimination based on sexual orientation includes discrimination against same-sex relationships"). NeJaime thus collapses identity and conduct and holds that one cannot object to someone's *conduct* without thereby objecting to *who they are* in terms of *identity*. But this obscures a common and proper distinction that we make all the time in disapproving of particular *actions* without condemning a person's very *identity* or demeaning their human dignity. NeJaime's argument has unwelcome implications: by his logic, a state that punishes religiously motivated, complicity-based refusals to provide products for same-sex wedding ceremonies is thereby punishing religious *identity* because the *conduct* of refusing to serve is an expression of the individual's *identity*, and discriminating on the basis of religion is generally prohibited.

122 *See Ashers*, [2018] UKSC at [35] ("It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics.").

123 *Id.* (emphasis added).

124 *Id.* at [59].

125 *Id.* at [62].

requested for any customer, so there was no discrimination based on grounds of sexual orientation.[126]

C. Complicity Claims Fall Outside the Scope of SOGI Laws

The analyses provided in *Masterpiece* and *Ashers*, addressing the intersection of legal doctrines governing freedom of religion, freedom of speech, and antidiscrimination, paint a telling portrait of the landscape surrounding complicity claims.

The discussion between Justices Gorsuch and Kagan in *Masterpiece* illustrates the importance of accurately *describing* the actions of those bringing complicity claims and attentiveness to their *reasons* for action. A proper analysis of Jack Phillips's complicity claim reveals that sexual orientation does not have explanatory power for why he refused to create a cake for a same-sex wedding. His objection to same-sex marriage, on the other hand, does have explanatory power.

The UK Supreme Court's opinion in *Ashers* recognized that the fact that Ashers Baking Co.'s customer was gay was irrelevant to their decision to adhere to their religious beliefs and refuse the order for the cake expressing a message of support for same-sex marriage. In arguing that the bakery's refusal to create a cake expressing support for same-sex marriage was not indissociably linked to discrimination based on sexual orientation, the Court recognized that discrimination based on sexual orientation and discrimination based on an objection to same-sex marriage are analytically distinct concepts. *Ashers* is of no precedential value in the United States, and the UK Supreme Court went out of its way to distinguish it from *Masterpiece*, but for the limited point that discrimination based on sexual orientation and disagreement about the nature of marriage are analytically distinguishable, *Ashers* provides helpful analysis and an example of a court of law recognizing a distinction that is often elided.

Parties on all sides of the issue agree that complicity claims can impose costs on third parties—namely, the material cost of being denied a good or service. But many parties *also* agree that the material costs imposed by complicity claims are quite low in current circumstances, and that persons are not being *excluded* from markets for goods or services because of them. Andrew Koppelman notes:

> Hardly any of these cases [of complicity claims] have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. *There have been no claims of a right to simply refuse to deal with gay*

126 *Id.* This argument is familiar to that offered by Justice Gorsuch in his *Masterpiece* concurrence—namely, that Jack Phillips would not bake the requested cake (specifically, a cake celebrating a same-sex marriage) for *any* customer, regardless of sexual orientation, and thus was not discriminating on the grounds of sexual orientation. *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1735–36 (2018) (Gorsuch, J., concurring).

> *people.* Even in the large number of states with no antidiscrimination protection for gay people, I am unaware of any case where a couple was unable to conduct a wedding.[127]

Further, Koppelman acknowledges that "the dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech."[128]

It might be the case that the need for SOGI laws is not great under current circumstances, given that the costs they impose on religious liberty and freedom of speech can be considerable. But that question is not decided here. The discussion in this Note is aimed at making two, more limited points, both of which have purchase in settings in which SOGI laws *are* enacted.

The first point is that situations like Phillips's refusal to create a custom wedding cake celebrating a same-sex marriage should not be read to be within the scope of those laws,[129] since those refusals are not discrimination on the basis of sexual orientation. The text of Minnesota's Human Rights Act, at issue in the Eight Circuit's opinion in *Telescope Media Group*, is typical of the language of SOGI laws: "It is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation . . . ."[130] Discrimination because of sexual orientation entails taking sexual orientation into account in one's decisionmaking, such that the sexual orientation of the person one is dealing with has explanatory power of one's decision to refuse service. In cases like *Masterpiece* and *Ashers Baking Co.*, where the proprietor has indicated and established a willingness to serve all customers regardless of sexual orientation but has refused to provide services conveying messages of approval of same-sex marriage, sexual orientation does not have explanatory power. "Discrimination based on opposition to same-sex marriage" is analytically distinct from "discrimination based on sexual orientation." Thus, a law prohibiting the latter does not necessarily also serve to prohibit the former absent an explicit definition of the discrimination aimed at by the law that includes conduct that is best described as stemming from disagreement about the nature of marriage. One might still conclude that complicity claims grounded in opposition to same-sex marriage still ought not be honored, but greater attentiveness to the exact nature of such claims—what grounds they rest on and what grounds they do not rest on—at least serves to clarify the

127 Andrew Koppelman, *A Zombie in the Supreme Court: The* Elane Photography *Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 91–92 (2015) (emphasis added) (footnote omitted).

128 Koppelman, *supra* note 66, at 628.

129 Some SOGI laws contain exemptions for religious actors, but these are quite limited. *See* Ryan Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Are Not Fairness for All*, HERITAGE FOUND. (Nov. 28, 2018), https://www.heritage.org/gender/report/sexual-orientation-and-gender-identity-sogi-laws-are-not-fairness-all?fbclid=IWAR2tAShV9LTb2jESvW-DB0bzButXbfYpaw-SR3i4ufkmwsNrSPXUynbgmXU.

130 MINN. STAT. ANN. § 363A.11, subdiv. 1(a)(1) (West 2019).

public conversation. Accurately characterizing complicity claims underscores that in many cases what is at issue is a disagreement about the nature of marriage rather than any sort of animus or bigotry toward same-sex-attracted persons as such. Reasonable disagreement about the nature of marriage is not the same thing as discrimination on the basis of sexual orientation. If legislators enacting SOGI laws desire those laws to cover conduct such as Jack Phillips's, the statutory language of SOGI laws should say so explicitly.

The second point is that even if one grants that such refusals *do* fall under the definition of "discrimination because of sexual orientation,"[131] there are strong policy reasons for not banning them and for including exemptions for such conduct in SOGI laws themselves. These reasons are rooted in the value of religious liberty as discussed in Part I and in the purpose of antidiscrimination law as discussed in Part II. Because states and localities can interpret the text of their SOGI laws more broadly than a plain reading suggests, independent statutory protections for people like Phillips are warranted to provide explicit protection for the goods of religion and conscience in these situations.[132]

131 The basic argument against this Note's conceptual and interpretive argument is a "purposivist" one that would read SOGI laws in their context and judge that the purpose served by such laws is to ensure equal access to the marketplace for same-sex-attracted persons, which purpose is thwarted by allowing places of public accommodation to discriminate against *conduct* (same-sex marriage) or messages (celebration of this particular marriage) that are closely related to the *identity* of same-sex-attracted persons. Against this argument, one might note that antidiscrimination laws do not always define *precisely* what constitutes discrimination based on a protected trait, and the reasoning above might therefore help to inform policy debate about and limit the interpretive boundaries of broad statutory language.

132 One might ask why statutory protections are warranted if the rights to religious liberty and freedom of speech are already enshrined in the Constitution itself. One could have asked the same question in response to the passage of the Religious Freedom Restoration Act. That legislation responded most directly to a Supreme Court decision that many legislators disagreed with. *See* Brian Miller, *The Age of RFRA*, FORBES (Nov. 16, 2018), https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/#41c2996d77ba. Thus, one reason to enact legislation to provide protection to interests already protected in the Constitution is to respond—retroactively or preemptively—to adverse rulings by courts disparaging those rights. Another reason to do so is in response to the passage of laws by states or ordinances by localities that could come into conflict with constitutional rights. Another is to further specify the general and unspecified rights enshrined in the Constitution to give them fuller meaning in specific circumstances. Statutory protections are warranted here because available constitutional defenses may prove to be uncertain harbors for complicity claimants. Free speech claims may only be availing for a select subset of these cases—those involving expressive products constituting a form of artistic speech whose regulation is subject to strict scrutiny. Free exercise claims in this area do not appear to fit neatly into the Court's reigning jurisprudence in this area. See *infra* note 143 for a discussion of these issues in the Eighth Circuit's opinion in *Telescope Media Group*.

D. Opponents of Same-Sex Marriage Should Be Protected Like Pro-Life Citizens Have Been

Some statutes provide categorical protections for certain moral convictions because coercion is not needed (or justified) to ensure the public interest is met. This is what the United States has done with respect to abortion. Just months after the Supreme Court decided *Roe v. Wade* in 1973, Congress passed the Church Amendment, legislation that protects abortion-related conscience rights of both individuals and institutions.[133] *Roe* protected women's right to procure abortions, but the Church Amendment protected medical professionals' right to not be involved in such procedures by insisting that healthcare entities receiving federal funds could not force their employees to perform or assist at abortions.[134] The Coats-Snowe Amendment protects medical students who object to performing abortions from discrimination.[135] And the Hyde-Weldon Amendment prevents the government from discriminating against healthcare institutions that refuse to offer abortion services.[136]

There is little reason the law should not provide the same protections for religion and conscience in the marriage arena as it has in the abortion arena. After all, accommodations for pro-life beliefs affirm that opposition to becoming complicit in abortion is not tantamount to discrimination on the basis of sex. As Anderson notes, "[p]ro-life convictions need not flow from or communicate hostility to women. A ruling in favor of a pro-life citizen sends no message about patriarchy or female subordination; it says simply that pro-life citizens are not bigots and that the state may not exclude them from public life."[137] Similarly, First Amendment protections "for people who act according to the conjugal understanding of marriage need not undermine any of the valid purposes of laws that ban discrimination on the basis of sexual orientation . . . because support for conjugal marriage is not anti-gay."[138] While it is beyond the scope of this Note to explore in detail the possible statutory schemes that could be enacted to protect people like Phillips or the O'Connors, in this arena the state "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs," as the Supreme Court wrote in *Zorach v. Clauson*.[139]

Remembering that the default presumption should be in favor of exemptions and accommodations for religion and conscience,[140] the appro-

133 *See* BRADLEY, *supra* note 14, at 3.

134 *See* Anderson & Girgis, *supra* note 28, at 122.

135 *Id.*

136 *Id.*

137 Anderson, *supra* note 63, at 126.

138 *Id.* at 137.

139 343 U.S. 306, 314 (1952).

140 Religion is singled out for special treatment in the Constitution and thus has the firmest basis for zealous protection. *See* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 42 (2014) ("The text of the Constitu-

priate question to ask in evaluating complicity claims is this: Are accommodations and exemptions being extended "in as many cases and to as many persons and entities as possible, in a sincere effort to welcome religious minorities, objectors, and dissenters as fully as we can into what Justice Harlan called 'the dignity and glory of American citizenship'?"[141] The balancing of interests in cases like *Masterpiece* weighs heavily in favor of protecting the goods of religion and conscience. Legislation like the First Amendment Defense Act or a model statute proposed by a group of notable scholars of religious liberty indicate the correct balance: individuals and businesses should not be required to provide goods or services that assist or promote the celebration of any marriage if doing so would cause the provider to violate sincerely held religious beliefs, unless it would cause *serious* hardships to the party seeking marriage and they could not otherwise obtain similar goods or services.[142] Such a statutory solution provides broader relief than is available under free speech doctrines, since the strongest arguments in defense of complicity claims on free speech grounds are those based on the rule against compelled speech and apply to cases of expressive products, which is a narrower category of cases than is covered by the universe of complicity claims. And it provides broader, more explicit relief than is available to complicity claimants under the Free Exercise Clause.[143]

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tion treats religion as 'special' and so governments may, should, and sometimes must treat it as 'special' too."). But rights of conscience ought to be respected as well given their connection to the good of integrity.

141 Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 498 (2015) (quoting Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting)).

142 The text describes the model statute proposed by religious liberty scholars as related by Andrew Koppelman. Koppelman, *supra* note 66, at 639. The First Amendment Defense Act would prohibit the federal government from taking discriminatory action against a person on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage should be between one man and one woman. *See* First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).

143 The Eighth Circuit's discussion of the Free Exercise Clause in its decision in *Telescope Media* is illuminating. The court noted that complicity claims do not present typical free exercise claims. "Those seeking relief under the Free Exercise Clause of the First Amendment will ordinarily argue that their religion requires them to engage in conduct that the government forbids or forbids certain conduct that the government requires." Telescope Media Grp. v. Lucero, 936 F.3d 740, 759 (8th Cir. 2019). When a case falls into one of those two categories, courts simply apply "the rule that neutral, generally applicable laws that incidentally burden 'a particular religious practice' do not have to be 'justified by a compelling governmental interest.'" *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)). But complicity claims do not fall into either category—claimants in such cases argue that they are prevented from freely exercising their religious beliefs because the relevant law requires them to show support for same-sex marriage or else refrain from engaging in their chosen profession. *Id.* at 758–59. The court permitted the plaintiffs to develop their free exercise argument on remand because their allegation that the state law burdened religiously motivated *speech* rather than *conduct* rendered the claim a hybrid-rights one, in which "'the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech,' can 'bar[ ] application

CONCLUSION

This Note began by pondering what it would mean for Justice Kennedy's words in *Obergefell*—that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here"[144]—to be taken seriously in the context of claims by opponents of same-sex marriage that they could not in good conscience be complicit in the solemnization or celebration of such unions. For in his very next sentence, Justice Kennedy complicated matters by cautioning that "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[145] Can these statements be reconciled? Can "decent and honorable religious or philosophical premises" become "demean[ing] and stigmatiz[ing]" when protected by law? Justice Kennedy appears to leave us in a Catch-22 situation: honoring the religious and moral convictions of those who oppose same-sex marriage results in state-sanctioned stigmatization of same-sex attracted persons, but honoring same-sex marriage in law leads to state-sanctioned stigmatization of religious believers.

This Note has attempted to show that there are win-win options available that take religion and conscience seriously while not disparaging anyone's legal rights. The balance of interests at stake supports robust protections for complicity claims in the context of marriage. Accepting this requires digesting and accepting "the messiness of civil society."[146] Division and disagreement are unavoidable, but a principled pluralism nevertheless respects the rights of association, religion, and conscience. These rights and the mediating institutions they foster grant vibrancy to society and help us to flourish in pursuing human goods. If we are able to come to peace with the "crooked timber of free society" and recognize the state's limited competence to resolve the variety of disagreements that are bound to arise in such a polity,[147] we can continue to respect religious liberty as our first freedom and ensure, as the cultural landscape continues to change, that individuals like Jack Phillips are not disparaged but continue to enjoy the "dignity and glory of American citizenship."[148]

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of a neutral, generally applicable law.'" *Id.* at 759 (alteration in original) (quoting Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990)). The Eighth Circuit noted that it was not clear, in any event, whether the application of the hybrid-rights doctrine would "make any real difference in the end," given that the free speech claim "already require[d] the application of strict scrutiny." *Id.* at 760.

144 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

145 *Id.*

146 Girgis, *supra* note 40, at 414.

147 Garnett, *supra* note 61, at 223.

148 Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).