

# TENDER AND TAINT: MONEY AND COMPLICITY IN ENTANGLEMENT JURISPRUDENCE

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*Because liberalism is concerned with individual freedom, it finds that one person is responsible for the conduct of another only under very narrow circumstances. To a large extent, the law reflects this narrow conception of complicity. There is however one glaring exception to the law's general resistance to complicity claims: where one actor becomes connected to another's act through a pecuniary contribution, the law's liberalism falls away. Money forges a cognizable association no matter how tenuous the causal connection and no matter the subsidizer's attitudes toward the subsidized act. For example, in *Burwell v. Hobby Lobby*, the Supreme Court recognized complicity arising from an employer-subsidized health plan, even though the employer had no role to play in the ways its employees chose to spend their healthcare dollars. Pecuniary association explains material support cases where donors to the peaceful wing of an advocacy group can nonetheless be guilty of the crime of supporting a foreign terrorist organization if the group has a violent wing; after all, money is fungible, and no matter that the donor might oppose the group's violence. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, where an employee successfully contested his union dues, even though they were not going to fund the union's political activity, can be understood on similar grounds.*

*The first aim of this piece is to trace the law's divergent approaches to shared responsibility. On the one hand, the law's atomism generally constrains complicity. But the doctrine tells a very different story where money is the means of association. I*

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*aim to draw out this divergence across numerous doctrinal areas, including compelled hosting, campaign finance, public accommodations, and school choice.*

*Given that religion pervades many complicity claims, a second aim of the piece is to survey Christian conceptions of complicity to see if they share secular law's special solicitude for money. Two findings emerge. First, Christian concerns with purity—along with the inevitable intermingling with the profane that market interactions involve—prompt a heightened focus on pecuniary association. But, second, the understanding of the evil of pecuniary complicity in Christian thought is far more defensible than the one embodied in secular law.*

INTRODUCTION.....	1624
I. COMPLICITY, IN LIBERAL AND CHRISTIAN THOUGHT.....	1628
A. <i>Complicity in Liberal Thought</i> .....	1629
B. <i>Complicity in Christian Thought</i> .....	1633
II. COMPELLED HOSTING .....	1635
A. <i>FAIR Versus Farmers</i> .....	1636
B. <i>Tobacco Versus Medicine</i> .....	1639
III. COMPELLED SUPPORT.....	1642
A. <i>Money Versus Creative Labor</i> .....	1643
IV. FUNGIBILITY.....	1647
A. <i>Material Support</i> .....	1647
B. <i>Union Dues</i> .....	1648
C. <i>Campaign Finance</i> .....	1650
V. PECUNIARY COMPLICITY IN LIBERAL AND CHRISTIAN THOUGHT.....	1651
A. <i>Secular Concerns About the Self</i> .....	1651
B. <i>Christian Concerns for Purity</i> .....	1653

## INTRODUCTION

When is one person implicated in the conduct of another? Given its commitment to individualism, liberalism provides a narrow answer to this question.<sup>1</sup> One individual shares responsibility for another individual's act only if the first made a significant causal difference to the second's act. Further, the contributing actor must at least know that they stand to make this causal difference; on an even narrower version, the first must also endorse the second's end, or contribute precisely with an eye to seeing the end succeed.<sup>2</sup>

1 See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1942–44 (2015).

2 See, e.g., Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1409–12 (2016) (“Selling a gun to someone with the purpose of helping him commit a crime makes the seller liable for the crime under an aiding and abetting theory. The same conduct done merely with the knowledge that the buyer will commit a crime, or will very likely commit a crime, is generally not seen as aiding and abetting . . .”). The

To a large extent, the law reflects the narrow conception of complicity. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, the Supreme Court held that a law school may be made to host military recruiters who violate the school's non-discrimination policy on the ground that the military's discrimination is not attributable to the law school, even though it takes place on school grounds.<sup>3</sup> The fact that the law school did not seek to foster the military's end sufficed to negate any attribution of responsibility to the school for the military's conduct. A similar resistance to complicity claims can be found across virtually all of the cases considering—and ultimately rejecting—wedding vendors' bids to evade public accommodations laws on religious freedom grounds.<sup>4</sup> Standards requiring "active complicity" have saved corporations from liability for the human rights abuses of their suppliers.<sup>5</sup> We can even see limits on the doctrine of standing as embodiments of a liberal commitment to individualism.<sup>6</sup>

There is, however, one glaring exception to the Court's—or perhaps more accurately, to the Roberts Court's<sup>7</sup>—general resistance

standard for accomplice liability under federal criminal law is somewhere between knowledge and intent. The complicit actor must have had *foreknowledge* of his associate's crime, such that the complicit actor could have withdrawn from their shared scheme in time. See *Rosemond v. United States*, 572 U.S. 65, 77–78 (2014).

3 547 U.S. 47 (2006).

4 See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (denying exemption to a wedding photographer who refused services for a lesbian couple's wedding); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016) (denying exemption to wedding venue owners who refused to host a lesbian couple's wedding); *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (denying exemption to a bakery owner who refused to take a wedding cake request from a lesbian couple), *review denied*, 434 P.3d 25 (2018), *vacated*, 139 S. Ct. 2713 (2019).

5 See Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 208, 225 (2008) (describing and critiquing government advocacy to the effect that courts should reject aiding and abetting liability for corporations under the Alien Tort Statute).

6 See, e.g., Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 151 (2011); Gloria Chan, *Reconceptualizing Fatherhood: The Stakes Involved in Newdow*, 28 HARV. J.L. & GENDER 467, 473 (2005).

7 Virtually all of the caselaw I leverage in the analysis is subsequent to 2005, the year of Roberts's appointment. My speculation is that the dynamic I trace might not have emerged with a Court constituted by other Justices. In this respect, the analysis aligns with, and reinforces, a trend others have identified about the ways in which the First Amendment has increasingly been used over the last few decades to protect economic interests. See, e.g., Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 176–77 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1219 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1468–70 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 198–201. While

to complicity claims: where one actor becomes connected to another's act through a pecuniary contribution, the Court's liberalism falls away. According to the caselaw, money forges a cognizable association no matter how tenuous the causal connection and no matter the subsidizer's attitudes toward the subsidized act. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court recognized complicity arising from an employer-subsidized health plan, even though the employer had no role to play in the ways its employees chose to spend their healthcare dollars.<sup>8</sup> Pecuniary association also explains material support cases, where donors to the peaceful wing of an advocacy group can nonetheless be guilty of the crime of supporting a foreign terrorist organization if the group has a violent wing; after all, money is fungible, and no matter that the donor might oppose the group's violence. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, where an employee successfully contested his union dues even though these were not going to fund the union's political activity, can be understood on similar grounds.<sup>9</sup>

The first aim of this piece is to trace the law's divergent approaches to shared responsibility. On the one hand, the law's atomism generally constrains complicity. But the doctrine tells a very different story where money is the means of association. I aim to draw out this divergence across numerous doctrinal areas, including compelled hosting, campaign finance, public accommodations, and school choice.

Given that religion pervades many complicity claims, a second aim of the piece is to survey Christian conceptions of complicity to see if they share secular law's special solicitude for money. Two findings emerge. First, while Christianity understands complicity broadly, its concerns with purity—along with the inevitable intermingling with the profane that market interactions involve—prompt a heightened focus on pecuniary associations. Second, there is nonetheless an important difference in the way that the law and Christian theology treat these associations. Legal doctrine views money as implicating because it views money as an extension of the self. This elision resolves the apparent inconsistency between liberalism and the caselaw

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I largely restrict the analysis to decisions emerging from the Roberts Court, I note that even the canonical earlier cases in which the Court was more hospitable to nonpecuniary complicity claims bear the seeds of the Roberts Court's turn. Many of these cases analogize the injury of implication to the injury of commandeering or co-optation—i.e., to a violation of property rights. See *infra* note 88 (discussing *Tornillo*, *Wooley*, *Hurley*, etc.). In this way, they presage the privileging of pecuniary interests that my analysis aims to highlight.

8 573 U.S. 682 (2014).

9 138 S. Ct. 2448 (2018).

recognizing pecuniary association: if I am my money, then my spending money really does connect me in ways more significant than, say, my devoting my institutional home (*FAIR*) or my labor or my talents (the wedding vendor cases) would. To be sure, one ought to think that one's home, labor, and talent are far more personal than money. That the doctrine gets this wrong just is the mark of its profanity. But Christian doctrine, focused as it is on purity rather than personhood, avoids this sin. As I will argue, that makes Christian doctrine more defensible than secular law's implicit equation of one's person and one's purse.

The Article begins, in Part I, with liberal and Christian conceptions of complicity. The next three Parts present the Article's doctrinal survey, which aims to draw out the differential treatment complicity claims receive, depending on whether money is the mode of implication. Parts II and III offer contrasting lines of doctrine in cases involving compelled hosting and compelled support, respectively. Part IV extends the analysis by describing the Court's strikingly expansive conception of money's reach through caselaw in which money's fungibility is taken to an extreme. Part V concludes by assessing the liberal and Christian thought that might explain concerns about money's taint.

Several words of caution before embarking on the analysis: first, the analysis treats compelled speech and complicity claims together, even while the former are always rooted in free speech concerns, whereas the latter are often rooted in concerns for religious freedom. Running them together is not undue, I believe, because, in many cases, they nonetheless appeal to the same illicit state action. As Jessie Hill notes, "both compelled speech claimants and complicity claimants argue that, by virtue of the challenged law or its implementation, they are forced into guilt by association."<sup>10</sup> Further, even where the compelled speech claim is not about guilt by association,<sup>11</sup> it still concerns a kind of implication, as I describe below.

Second, the analysis is transsubstantive, and so vulnerable to the following objection: the rationales for the law's treatment of complicity claims within one doctrinal area need not align with the rationales in another; any divergence in outcomes is then explainable because there are different values or considerations at stake within different doctrines. Be that as it may, I am not convinced that the proffered

10 B. Jessie Hill, *Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 *IND. L.J.* 913, 914 (2022).

11 See the compelled commercial disclosure cases, *infra* notes 81, 83. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

explanation *justifies* the different outcomes. One way to read the analysis I offer is precisely as an effort to call into doubt the fact that the law *does* operate with different values or considerations within different doctrines. I aim to show that the considerations the law heeds in one doctrine might give undue weight to the underlying interests while the considerations underpinning a different doctrine might give the underlying interests short shrift. One sees the law's differential treatment where, for example, the doctrine treats pecuniary implication more seriously than expressive implication.<sup>12</sup> So while the analysis sometimes glosses over the rationales underpinning the doctrines it addresses, this is because I do not take the rationales themselves to be justificatory.

Finally, and again given the transsubstantive nature of the analysis, there will inevitably be cases that appear to defy the account I offer. In some instances, I aim to dispel the appearance, by recasting the apparent counterexamples in ways that harmonize them with my account.<sup>13</sup> But I acknowledge that not every outlier is susceptible to this recasting. At the end of the day, I shall be satisfied if, through an accretion of examples, a compelling pattern emerges, even if it is one that does not capture all of the cases perfectly. That pattern is instructive—for insights into the sacred and the profane.

## I. COMPLICITY, IN LIBERAL AND CHRISTIAN THOUGHT

Complicity is traditionally understood as sharing moral responsibility in a wrong by virtue of a culpable contribution to that wrong. Culpable contributions can arise where one induces, commands, assists or encourages a wrong;<sup>14</sup> they can also arise where one praises, ratifies or acquiesces in, or fails to prevent, a wrong.<sup>15</sup> Someone who contributes in one of these ways is *implicated* in the act to which they contribute. Extensions of the notion of complicity occur where one is implicated in an act that one *subjectively* views as wrong but that most people would think morally neutral. The conscientious objector to a military draft worries about his complicity in war even if the state and most of its citizenry think war, and this war in particular, morally justifiable. The owners of Hobby Lobby take themselves to be complicit in contraceptive use if they are compelled to fund contraception even though most people think contraceptive use morally neutral.

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12 See Part II.

13 See *infra* notes 88, 109.

14 See GREGORY MELLEMA, *COMPLICITY AND MORAL ACCOUNTABILITY* 19 (2016).

15 *Id.*

Sometimes litigants object to being made to contribute in one of the ways listed above even though they have no moral objection to the act to which they are being made to contribute. Cigarette companies object to having to host graphic warning labels on their packages, but presumably this is not because they judge the content of the warning to be morally wrong.<sup>16</sup> Instead, it seems probable that they have nonmoral reasons to oppose their compelled contributions—most plausibly that the message they would be made to host threatens their business interests. Still, these worries also concern implication; like the complaints of those who refuse to buy clothing manufactured in sweatshops, or the Hobby Lobby owners, the complainants in the compelled commercial disclosure cases also object to being made to advance a project that they eschew. For that reason, I will refer to all of these objections as “complicity claims.”

With that said, it remains true that worries about moral implication are different in kind from worries about nonmoral implication. In particular, there is arguably a reason to be more concerned about moral implication, at least because one who is implicated in a wrong is liable to blame, whereas one who is implicated in a morally neutral act is not. Accordingly, there is reason for courts to treat moral implication as worse than nonmoral implication. But this is not how the caselaw goes, as we shall see. First, though, it is worth surveying liberal and Christian conceptions of complicity.

### A. *Complicity in Liberal Thought*

The law is pervasively liberal.<sup>17</sup> Liberalism takes the individual to be the foundational unit of analysis,<sup>18</sup> and the insistence on the indi-

16 Perhaps some among the objectors do hold the view that the graphic nature of the warnings is manipulative, and so morally objectionable. If so, then their complaint is the standard complicity complaint.

17 For just a handful of relevant sources, see BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (urging a retreat from more critical modalities and a revitalization of neo-Kantian liberal political thought); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 69 (1987); Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 495–96 (1996) (acknowledging “the liberal individualism on which so much of our legal system rests”); Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 YALE L. & POL’Y REV. 351, 352 (2016). *But cf.* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 554, 609–22 (2001) (arguing that American property has betrayed its distinctively liberal foundations, at least as compared with other western legal regimes). *See generally* Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 320–21 (2005) (collecting scholarship describing the influence of liberalism on numerous doctrinal areas).

18 Writing in 2001, roughly corresponding to the start of the time frame at issue here, George Fletcher proclaimed: “A single methodology dominates the legal discourse

vidual necessarily constrains the scope of any person's responsibility. The implications can be salutary for many social justice programs. For example, narrowly drawn bounds of responsibility ground the liberal critique of racism and other group-based animus.<sup>19</sup> But other instantiations of liberal individualism are appropriately bemoaned for their atomism.

In its more right-leaning instantiations,<sup>20</sup> liberalism repudiates efforts to make people responsible *to* one another, thereby opposing socializing medicine,<sup>21</sup> charitable tax subsidies,<sup>22</sup> rent control and price control,<sup>23</sup> and many other initiatives that would have one person provide financial support to another through redistributive taxation.<sup>24</sup> Liberalism's individualism, in both right- and left-leaning instantiations, also militates against making people responsible *for* one another, thereby frustrating efforts to hold some wrongdoers accountable—for example, when it comes to corporate crime<sup>25</sup> or

of our time. Whether the talk is of law and economics, of constitutional law, of corrective justice, or of human rights, the methodology remains the same. What counts is individuals, their rights, their preferences, their welfare." George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1503 (2002); see also David Luban, *The Self: Metaphysical Not Political*, 1 LEGAL THEORY 401, 402 (1995).

19 See, e.g., Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1631 (2020).

20 I am here assimilating the right-leaning version of classical liberalism with libertarianism. For the view that this is the right way to understand the analytic relationship between the two, see John Tomasi & Matt Zwolinski, *A Bleeding Heart History of Libertarianism*, CATO UNBOUND (Apr. 2, 2012), <https://www.cato-unbound.org/2012/04/02/matt-zwolinski-john-tomasi/bleeding-heart-history-libertarianism/> [https://perma.cc/6JFW-A7HM].

21 See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 626–34 (2010); Josh Blackman, *The Libertarian Challenge to Obamacare*, REASON (Sept. 24, 2013, 7:00 AM), <https://reason.com/2013/09/24/the-libertarian-challenge-to-obamacare/> [https://perma.cc/A45R-9ENS].

22 See, e.g., Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1361 (2015) (noting that minimal state libertarianism could plausibly imply that "any charitable tax subsidies are unjust—certainly including the broad array of groups currently subsidized").

23 Jeffrey Rosen, *What if We Wrote the Constitution Today?*, FED. LAW., Nov./Dec. 2021, at 40, 42.

24 See generally Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 978–79 (1993) (describing then-Chief Justice Rehnquist's jurisprudence as marked by an "individualism [that] springs from a conception of individual autonomy which does not allow sacrifices of the rights of some individuals to advance the rights (much less the welfare) of other individuals").

25 See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting) (articulating foundational principle of personal guilt); *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) (same).



torts.<sup>26</sup> And this is as true for morality as it is for law. On a standard liberal account, the bounds of moral complicity are narrowly drawn.<sup>27</sup> Liberalism's "conditions of moral responsibility" include "making a difference, having control, intentionality, and voluntariness."<sup>28</sup> Or again, "liberal premises . . . hold that only individuals can have the mens rea and tender the malice necessary to be held guilty for wrongdoing."<sup>29</sup>

Given these conditions, one can readily see why liberal thinkers would eschew many of the conscience-based complicity claims. By the lights of liberalism, the conscientious objectors contribute to the acts they oppose in ways that are just too trivial, or attenuated, or devoid of the objectors' own intentions and volition to count as theirs.<sup>30</sup>

That liberalism in its paradigmatic form must deny the complicity claims of the key protagonists in the conscience wars does not entail that liberalism has no place whatsoever for complicity.<sup>31</sup> To the

26 Cf. Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 548 (2003) ("On moral issues, as on legal ones, Americans often emphasize personal fault. This may be yet another remnant of Puritan thought in American culture. Whatever the origins, this emphasis on personal moral culpability parallels American law's liberalism, which seems to deny remedies unless a victim can trace fault back to an identifiable perpetrator." (footnote omitted)).

27 See, e.g., Sepinwall, *supra* note 1; cf. Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183, 189 (2006) (first quoting H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI 119, 121 (Peter A. French ed., 1972); and then quoting Fletcher, *supra* note 18, at 1546) (noting that collective responsibility, because it deviates from the law's individualism, has been deemed collective responsibility, "barbarous" and "perverse").

28 Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 377 (2011); see also Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 674 (1968) ("[I]n the standard case of responsibility for harm, there can be no liability without contributory fault."); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 3–7 (2000) (describing the paradigmatic principle of responsibility in Anglo-American law and ethics as the "Individual Difference Principle," which holds that "I am only accountable for a harm if something I did made a difference to its occurrence," and arguing, convincingly, that this principle is gravely in need of supplementation); Lewis, *supra* note 27, at 121 ("[N]o one can be responsible, in the properly ethical sense, for the conduct of another."). See generally Sepinwall, *supra* note 1, at 1942 n.174, 1943.

29 Fletcher, *supra* note 18, at 1504; see also Herlinde Pauer-Studer, *Complicity and Conditions of Agency*, 35 J. APPLIED PHIL. 643, 643 (2018) ("[C]omplicity in moral wrongdoing presupposes [the agent]'s intentional support of [the principal]'s moral transgressions.").

30 See, e.g., Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 330 (2014) ("[C]ourts have consistently dismissed the burden imposed on religious objectors by insurance programs as both attenuated and justified by compelling government interests."). See generally Sepinwall, *supra* note 1, at 1942–48.

31 I am grateful to Micah Schwartzman for pressing me to consider this point.

contrary, liberalism has ample resources to recognize the kind of complicity that arises when one *culpably* furthers another's wrongdoing. The clearest cases involve the person who intentionally assists or encourages wrongdoing—in other words, the person who would satisfy the legal definition of acting as an *accomplice*.<sup>32</sup> But eminent liberal thinkers have sought to advance notions of complicity that extend beyond the legal definition—e.g., finding complicit those who comply with the rules in a rotten system,<sup>33</sup> or those who knowingly further evil ends they disavow.<sup>34</sup>

There are nonetheless two important distinctions between the accounts these liberal thinkers advance and the notion of complicity animating the protagonists in the conscience wars. First, on a liberal account, the connection between the complicit actor and the wrongdoing has to be wrong in itself, on an objective account of wrongdoing. One is guilty of complicity on such an account only if one acted in the way the moral community should view as culpable. By contrast, those with conscience-based objections to legal regulations do not take themselves to be beholden to the moral community's conception of right and wrong; it is sufficient that *they* deem wrong the conduct they would be supporting, and their connection to that conduct. Second, individual freedom functions as a hard constraint on the scope of complicity within liberal thought,<sup>35</sup> whereas it has no necessary role to play for those raising complicity claims in the conscience wars. It is perhaps for this reason that the latter are relatively unmoved by the third-party burdens that accommodating them might impose; the conscientious objectors in the conscience wars operate with a hierarchy of values opposite to the liberal's—conscience first, freedom second.

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32 See, e.g., *Waddington v. Sarausad*, 555 U.S. 179, 185 (2009) (quoting Joint Appendix at 16–17, *Waddington v. Sarausad*, 555 U.S. 179 (2009) (No. 07-772)).

33 Tamar Schapiro makes this case, see Tamar Schapiro, *Compliance, Complicity, and the Nature of Nonideal Conditions*, 100 J. PHIL. 329, 333–34 (2003), while working within the nonideal theory articulated by John Rawls, who is arguably the foremost liberal thinker of the twentieth century. See, e.g., Julian Coman, *John Rawls: Can Liberalism's Great Philosopher Come to the West's Rescue Again?*, GUARDIAN (Dec. 20, 2020, 2:13 PM), <https://www.theguardian.com/inequality/2020/dec/20/john-rawls-can-liberalisms-great-philosopher-come-to-the-vests-rescue-again> [<https://perma.cc/PV6V-A579>].

34 See KUTZ, *supra* note 28, at 156–64.

35 See Sepinwall, *supra* note 1, at 1943 (noting that liberalism, with its emphasis on individual freedom, is keen to restrict the scope of an individual's responsibility because “more-expansive conceptions of responsibility . . . threaten to limit too much action and therefore to be too restrictive”).

### B. *Complicity in Christian Thought*

In contrast to liberalism, Christian thinking about complicity is markedly less narrow—perhaps unsurprisingly for a religion with the concept of original sin.<sup>36</sup> And indeed across the history of Christian thought, one sees concerns about taint through others' wrongs. Christ was castigated for dining with “sinners and tax collectors”<sup>37</sup>—an indication of guilt by simple association. Saint Augustine wrote at length about supporting sin, eventually distinguishing between, on the one hand, fostering or endorsing barbarianism (impermissible) and, on the other, merely using products associated with the barbarians without “giving them honor” (permissible).<sup>38</sup> Contemporary Christians living in a secular polity face the ever-present worry of participation in sin—for example, through medical technologies developed with embryonic stem cell research,<sup>39</sup> or the quiescence that some contend allowed for slavery and the Holocaust.<sup>40</sup>

The apparent constant in Christian concerns about complicity is the premium placed on avoiding sin, with a particular focus on distancing oneself from the sinner and dissociating from the sin. This is consonant with the early accommodation cases, which can be seen as claiming rights to withdraw from civil society for the sake of religious preservation.<sup>41</sup> But market society does not allow for the isolationism that purity demands. So it is crucial to look at the Christian understanding of market complicity<sup>42</sup>—all the more so given the focus on pecuniary implication here.

36 Cf. John Witte, Jr., *A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion*, 42 EMORY L.J. 523, 543 (1993) (“The Christian theological doctrine of humanity’s fallen sinful nature is rooted in legal concepts of agency, complicity, and vicarious liability.”).

37 *Mark* 2:16.

38 Anton Sorkin, “*Them*”: *Bridging Divides Between Distant Neighbors After Masterpiece Cakeshop*, 54 U. S.F. L. REV. 117, 159–60 (2019).

39 Carolyn Pura, *Moral Complicity—A Christian Perspective*, CTR. FOR BIOETHICS & CULTURE NETWORK (Nov. 11, 2006), <https://cbc-network.org/2006/11/moral-complicity-a-christian-perspective/> [https://perma.cc/6RVD-PZPV].

40 On Christian complicity in slavery, Jim Crow, and other forms of racism, see, for example, JEMAR TISBY, *THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH’S COMPLICITY IN RACISM* (2019); for Christian complicity in the Holocaust, see, for example, Robert F. Drinan, *The Christian Response to the Holocaust*, ANNALS AMER. ACAD. POLIT. & SOC. SCIENCE, July 1980, at 179, 182.

41 *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involving an Amish family who wanted an exemption from a law compelling public high school attendance, is the paradigm here.

42 For a far more comprehensive overview of this history, see Nomi Maya Stolzenberg, *It’s About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 753 (2015).

In the early Christian era, markets were local;<sup>43</sup> Christian thinkers had no occasion to worry about supply chains or other kinds of unwitting connections we might bear to wrongdoing far away. Still, early Christian theology taught that markets were zero-sum games: one participant's enhanced wealth portended enhanced suffering for another.<sup>44</sup> This conception of a direct connection between winners and losers grounded a sense of moral responsibility for each person's market activity.<sup>45</sup>

That sense deepened through St. Thomas Aquinas's articulation of a two-tiered economy—one that recognized that a person's ability to gain in the market depended not only on their own entrepreneurship but also on “the emergent properties of the economic system as a whole.”<sup>46</sup> Mary Hirschfeld effectively illustrates the point in her Thomistic defense of the market: take the most productive person you know—say, a stunningly successful entrepreneur—and imagine whether they could recreate their innovations, and existing lifestyle, if they had been dropped onto a deserted island.<sup>47</sup> The point of the thought experiment is to reckon with how much of an individual's success rests on existing structures, practices, and advantages for which they cannot take credit. The insight follows from the Thomistic framework, which

loosens our sense that an individual benefits *only* as a result of her own efforts in the marketplace. Instead, we see that the individual [also] benefits as a result of . . . the social aspect of economic production. By the same token, it would seem that an individual . . . also has a responsibility as a member of society for the impact the system as a whole might have on other[s].<sup>48</sup>

Contemporary Christian thinkers inherit this sense of interconnection through commerce. Thus Albino Barrera calls our attention to the way today's economic arrangements “expand[] the occasion for our complicity in or indifference to one another's economic misconduct.”<sup>49</sup> Barrera is sensitive to the way in which the wrongs result-

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43 Brian J. Matz, *Early Christian Philanthropy as a “Marketplace” and the Moral Responsibility of Market Participants*, in DISTANT MARKETS, DISTANT HARMS: ECONOMIC COMPLICITY AND CHRISTIAN ETHICS 115, 117–18 (Daniel K. Finn ed., 2014).

44 *Id.* at 132.

45 *Id.*

46 Mary Hirschfeld, *How a Thomistic Moral Framework Can Take Social Causality Seriously*, in DISTANT MARKETS, DISTANT HARMS: ECONOMIC COMPLICITY AND CHRISTIAN ETHICS, *supra* note 43, at 147.

47 *Id.* at 157–58.

48 *Id.* at 158.

49 ALBINO BARRERA, MARKET COMPLICITY AND CHRISTIAN ETHICS 3 (2011); *see also* Stolzenberg, *supra* note 42, at 753 (“[E]conomic activity enmeshes us in webs of social relationships that make it impossible to maintain strict standards of religious purity.”).

ing from market activity may be ones in which our contributions are minimal or over-determined and yet he does not think that these features are exculpatory.<sup>50</sup> Perhaps unsurprisingly, this expansiveness goes hand-in-hand with a repudiation of individualism in favor of a more communitarian ethos.<sup>51</sup>

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Those who recognize our interconnectedness—Christians, to be sure, but also adherents of other comprehensive doctrines keen to live conscientiously—have reason to safeguard their souls, or their selves, even as they live in society with others. Efforts to avoid complicity through the courts often fail, however, given a liberal judiciary that is generally hostile to most complicity claims. But there is one place where conscience and the courts converge—in cases where one person’s association to another’s wrong arises through money. In those cases, the Court shows an unexpected solicitude for the conscientious objector—or so the next Parts aim to show.

## II. COMPELLED HOSTING

In the realm of property, there is a canonical distinction between the property central to personhood and that of a more instrumental variety. The distinction is distilled in Margaret Jane Radin’s seminal article, *Property and Personhood*,<sup>52</sup> which has been cited by legions of scholars since its publication forty years ago.<sup>53</sup> It is also arguably enshrined in the Fourth Amendment, which recognizes a “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”<sup>54</sup> and it has antecedents in Warren and Brandeis’s work on property and privacy.<sup>55</sup> The asserted relationship between personhood and property erects a hierarchy among the kinds of things one can own. On the one hand, property necessary to elaborating a sense of self and securing one’s autonomy receives the highest levels of protection;<sup>56</sup> property used

50 BARRERA, *supra* note 49, at 95–97.

51 *Id.* at 251, 271, 281.

52 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

53 *See, e.g.*, Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL’Y 93, 94 (2011) (collecting sources).

54 U.S. CONST. amend. IV; *see also* Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 923 (2010).

55 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890); *see also* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 344 (1992).

56 As Carol Rose puts it, “the property that is especially close to people’s self-definition (e.g., their homes) deserves special protections from the law and precedence

primarily as a means of exchange receives relatively less protection. That hierarchy echoes the one that reigns in free-speech jurisprudence, where government restrictions on speech that touches collective self-governance, or speech that is crucial to self-expression, receive the most exacting scrutiny,<sup>57</sup> while regulation of commercial speech receives at best intermediate scrutiny,<sup>58</sup> and sometimes no more than rational basis review.<sup>59</sup>

It is striking, then, to survey the Court's jurisprudence on compelled hosting and see that it inverts these hierarchies, denigrating forced intrusions into one's proverbial home while bewailing forced incursions on one's profit-making products.<sup>60</sup> This Part illustrates the inversion through two pairs of cases.

### A. *FAIR Versus Farmers*

The view that law schools are expressive associations is commonplace.<sup>61</sup> One therefore would have expected that the government

over other property rights." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 628 (1998); see also Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 147 n.42 (1999) ("[T]he intensity of our connection of reflection-and-attachment with resources we possess varies according to the particular resource.").

57 See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940) (noting that the First Amendment both fully protects and implicitly encourages "matters of public concern"). Laws that burden political speech are accordingly "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)).

58 See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (opinion of Stevens, J.); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464–65 (2018) ("[C]ommercial speech has been thought to enjoy a lesser degree of protection . . ."). But cf. Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 499 (2015) ("Today [i.e., as of 2015], the Supreme Court's commercial speech doctrine is deemed 'an amalgam of strict scrutiny and intermediate scrutiny,' leaning ever further in the direction of strict scrutiny." (quoting Seth E. Mermin & Samantha K. Graff, *The First Amendment and Public Health, at Odds*, 39 AM. J.L. & MED. 298, 299 n.11 (2013))).

59 See, e.g., *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 29 (D.C. Cir. 2014).

60 For a different critique of the Court's receptivity to compelled speech claims when the speech interferes with profit-making—there because the compelled speaker was a corporation—see Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1439–44 (2017).

61 See, e.g., Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2615 (2019); Dale Carpenter, *Unanimously Wrong, 2005–2006 CATO SUP. CT. REV. 217, 249–50*; cf. Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767,

would permit forced intrusions into law schools only for the most compelling reasons.<sup>62</sup> But the Solomon Amendment cases defy this expectation. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), the Supreme Court held that law schools could be made to host military recruiters even though the recruiters would not adhere to the law schools' nondiscrimination policy.<sup>63</sup> The Court reasoned that hosting recruiters would not interfere with the law school's speech. "Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . . ."<sup>64</sup> Further, while recognizing limits on "the government's ability to force one speaker to host or accommodate another speaker's message,"<sup>65</sup> the Court denied that this was a case involving compelled hosting "because the schools are not speaking when they host interviews and recruiting receptions."<sup>66</sup> In short, then, the law schools suffered no cognizable interference with their right to control their message or their premises, because they could offer counterspeech, and hosting wasn't expressive anyway.

But now compare *Cedar Point Nursery v. Hassid*,<sup>67</sup> a case also involving compelled hosting, and also involving access to workers. In *Cedar Point*, commercial farm owners challenged a nearly fifty-year-old California law requiring agricultural employers to "allow union organizers onto their property for up to three hours per day, 120 days per year."<sup>68</sup> Under the challenged law, the organizers were permitted to enter the employers' property only during nonworking hours, and to gather only in spaces where the employees generally congregate before and after work or on lunch breaks.<sup>69</sup> As the dissenting Justices noted, that kind of access looks to be far afield from an "appropriation," or "easement," let alone the permanent physical occupation that had been the touchstone of physical takings jurisprudence.<sup>70</sup>

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1770 (2007) ("[L]aw schools may be expressive associations for certain limited purposes . . .").

62 Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding for the first time that the right of expressive association trumps an antidiscrimination law); Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 230 (2009); David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 624 (2001).

63 547 U.S. 47 (2006).

64 *Id.* at 60.

65 *Id.* at 63.

66 *Id.* at 64.

67 141 S. Ct. 2063 (2021).

68 *Id.* at 2069.

69 *Id.*

70 *Id.* at 2082–87 (Breyer, J., dissenting).

Nonetheless, the Court ruled that the requirement constituted a *per se* physical taking, thereby violating the Fifth Amendment.<sup>71</sup>

How should we understand the diverging results? Why must the law schools in *FAIR* admit military recruiters at great expressive cost (and with no accompanying compensation) but employers may be compelled to admit labor organizers only if adequately compensated? One thought might be that the law schools faced a threat of invasion only because of, and in exchange for, the benefit of federal funding; had they been willing to forego that funding, they would have been free to deny access. Cedar Point Nurseries, by contrast, faced an outright trespass, with no benefit it could forswear as the price of protecting its property. But *FAIR* was not in fact an unconstitutional conditions case, as the Court concluded that Congress could have mandated access to military recruiters absolutely, and not merely conditionally.<sup>72</sup>

The more plausible, though less principled, ground of distinction is that the Court prizes property more than expression or association. The implicit priority is crystallized in *Pacific Gas & Electric Co. v. Public Utilities Commission*.<sup>73</sup> In that case, California had authorized an independent third party to have its newsletter included in the envelope Pacific Gas & Electric (PG&E) used to send utility bills, in which it often included its own newsletter.<sup>74</sup> The constitutional infirmity lay in part in concerns about compelled speech. But it also lay in part in concerns about PG&E's *property* being made to host speech that it opposed. "The envelopes themselves, the bills, and [PG&E's newsletter] all remain [PG&E's] property. The Commission's access order thus clearly requires [PG&E] to use its property as a vehicle for spreading a message with which it disagrees."<sup>75</sup> A property right was the central rationale for finding the Commission's order unconstitutional in each of the concurring opinions. As Chief Justice Burger wrote,

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71 *Id.* at 2076 (majority opinion) ("Because the government appropriated a right to invade, compensation was due.")

72 *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60. A second explanation might point to the extended access the agribusinesses had to provide the organizers relative to the time-limited use of the military recruiters, who would occupy the law school only for a few recruiting days each year. But it is doubtful that that disparity would justify a difference in outcomes so stark: Cedar Point suffers a taking while Yale Law School experiences no injury at all? And at any rate the cases described in the text following this note cannot be explained on the ground that the incursion suffered by the parties that prevailed was more extended, in time or space, than the one sustained by the parties that lost.

73 475 U.S. 1 (1986).

74 *Id.* at 5–6 (plurality opinion).

75 *Id.* at 17.



To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources.”<sup>76</sup>

Or, again, as Justice Marshall put it in his concurrence, “California ha[d] taken from [PG&E] the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes.”<sup>77</sup>

Importantly, in both *Cedar Point* and *PG&E*, the challenger’s property was not merely being coopted to broadcast a message it opposed; that message also threatened the challenger’s *pecuniary* interest.<sup>78</sup> Therein lies the difference with *FAIR*. Labor organizers threaten to achieve higher pay and better conditions for workers, thereby costing the employer more money. The alternative newsletter PG&E would have had to include in its envelopes would have been used, inter alia, to “challenge [PG&E] in the Commission’s ratemaking proceedings in raising funds,”<sup>79</sup> thereby costing PG&E more money. But military recruiters were not going to cost law schools any money. (If anything, law school rankings depend in part on graduates’ job placements,<sup>80</sup> so in theory anyway, the more recruiters, the better.) What the Court appears to be responding to, then, is compelled support for a message one opposes not on moral grounds but instead simply because the message threatens one’s business prospects. That is hardly a lofty approach to complicity claims.

### B. *Tobacco Versus Medicine*

The same dynamic emerges if one contrasts, on the one hand, the cases involving compelled commercial disclosures with those involving noncommercial disclosures. Cigarette and cigar companies

76 *Id.* at 21 (Burger, C.J., concurring).

77 *Id.* at 22 (Marshall, J., concurring).

78 *PruneYard Shopping Center v. Robins* might be distinguished on this ground. 447 U.S. 74 (1980). The mall owner in *PruneYard* raised a free speech and takings challenge to a California law requiring the center to host advocacy groups. The mall owner lost. While the case appears to involve an infringement of commercial property, and in that sense resembles *Cedar Point*, there was nothing in *PruneYard* “to suggest that preventing appellants from prohibiting this sort of activity [would] unreasonably impair the value or use of their property as a shopping center.” *Id.* at 83.

79 *Pac. Gas*, 475 U.S. at 13 (plurality opinion).

80 See, e.g., Robert Anderson, *Ranking Law Schools by “JD Advantage” Jobs*, WITNESSETH: L., DEALS, & DATA (May 9, 2019), <https://witnesseth.typepad.com/blog/2019/05/ranking-law-schools-by-jd-advantage-jobs.html> [<https://perma.cc/7ASF-Z52A>].

have won in cases challenging graphic warning labels;<sup>81</sup> doctors have lost in cases challenging laws requiring that they graphically describe to women the state of development of the fetuses the women seek to abort.<sup>82</sup> Or again employers have staved off requirements that they post notices about labor rights,<sup>83</sup> mining companies have staved off requirements that they notify consumers if their diamonds were procured in the Democratic Republic of the Congo,<sup>84</sup> but individuals or entities wishing to disseminate foreign-produced “political material intended to influence the foreign policies of the United States” have not succeeding in casting off the requirement that they explicitly label the material as “political propaganda.”<sup>85</sup>

One might contend that the distinction between the successful and unsuccessful challenges can be explained by the fact that the regulations overturned in the successful challenges would have recruited the challengers into fostering speech that specifically undercut them. This is just the way the Court understood what was at issue for PG&E: “The Commission’s order requires [*PG&E*] to assist in disseminating *TURN*’s views; it does not equally constrain both sides of the debate about utility regulation.”<sup>86</sup> In a similar vein, we might imagine that cigarette companies have special reason to complain if they are forced to disseminate the graphic warnings on their own property, at their own expense.<sup>87</sup> By contrast, the thought might go,

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81 See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Cigar Ass’n of Am. v. FDA*, 964 F.3d 56 (D.C. Cir. 2020).

82 See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (finding that the First Amendment provides no constraint if required disclosures are “truthful, nonmisleading, and relevant”); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc); cf. *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, 954 F. Supp. 2d 1205 (D. Kan. 2013) (declining to issue a preliminary injunction against enforcing a Kansas law that compelled abortion providers to tell patients about capacity for fetal pain). For a brilliant critique of the law’s divergent treatment of graphic warnings in the cigarette and abortion cases—premised on the law’s playing fast and loose with what constitutes an emotional rather than a factual appeal—see Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2433 (2014).

83 *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

84 *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015), *overruled on other grounds by Am. Meat Inst.*, 760 F.3d 18.

85 *Meese v. Keene*, 481 U.S. 465, 470 (1987) (quoting 22 U.S.C. § 611(j) (1982) (repealed 1995)).

86 *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 14 (1986). The employers objecting to compelled hosting of NLRB posters expressed a similar concern: They saw “the poster as one-sided, as favoring unionization.” *Nat’l Ass’n of Mfrs.*, 717 F.3d at 958).

87 Cf. *Cigar Ass’n of Am. v. FDA*, 964 F.3d 56, 62 (D.C. Cir. 2020) (“[T]he warnings will cost over \$100 million to implement.”); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“[The First] Amendment may prevent the government from compelling

the law schools in *FAIR* do not have as their *raison d'être* the message that the speech they are compelled to host, or utter, undermines; Yale Law School is not centrally in the business of ensuring nondiscrimination.

Yet while the asserted distinction is analytically sound, it is hardly one that could justify the *judiciary's* divergent treatment of the two sets of cases. For one thing, courts should not be in the business of discerning what is central or instead peripheral to an individual's or institution's core mission. Why couldn't Yale Law School see itself as fundamentally dedicated to preserving the law's core values, with equality central among them? If it did, it would have every interest in frustrating its students' ability to practice the profession with an employer that insisted on preserving the inequality of a historically oppressed group. Further, for the law to assume that the hosting imposed on cigarette manufacturers or diamond sellers is worse than the hosting imposed on law schools is for it to embody the very problem I mean to illuminate: a setback to economic interests counts as undercutting one's core purpose but a setback to other sets of interests does not. The sanctity of the bottom-line matters more than the sanctity of self.<sup>88</sup>

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individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object." (citations omitted)).

88 At this point, one might be inclined to point to cases where the Court ruled in favor of the party bringing a compelled speech claim even though no money appeared to be at issue. Among the canonical cases that fit this description are *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper wins challenge against right-of-reply statute); *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire citizen wins exemption from requirement to affix "Live Free or Die" license plate); and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (parade organizers win exemption from anti-discrimination law, thereby freeing them to exclude an Irish-American Gay, Lesbian and Bisexual group from their St. Patrick's Day parade). All of these cases predate Chief Justice John Roberts's appointment, which marks the beginning of the time period under analysis here. See *supra* note 7 and accompanying text. But even these cases contain the seeds of the divergent treatment that the Roberts Court has produced for, in each of them, the Court understood the interest of the party challenging the compelled speech as a kind of property right. As such, in each instance, it was a kind of pecuniary or material interest that seemed to propel the Court to its outcome. This is most clear in *Tornillo*, where the Court identified "the penalty resulting from the compelled printing of a reply" as "the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." 418 U.S. at 256. It then continued, "as an economic reality, a newspaper can[not] proceed to infinite expansion of its column space to accommodate the replies that a . . . statute commands the readers should have available." *Id.* at 257. *Wooley's* interest in dissociating himself from New Hampshire's motto was cast as an interest in protecting his "private property" from being used as a "mobile billboard" for the State's ideological message." *Wooley*, 430 U.S. at 715. And there is a property strand even in *Hurley*: having received the permits to use the Boston streets for their parade, the organizers

### III. COMPELLED SUPPORT

*Burwell v. Hobby Lobby Stores, Inc.*<sup>89</sup> and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>90</sup> are often paired together, with the latter the apparent heir of the former. Both involved for-profit corporations whose owners have religious objections to certain conduct connected to sex, and both therefore sought exemptions from regulations that would have compelled them to violate their religious commitments. But Hobby Lobby won on the merits, while the baker in *Masterpiece* did not.<sup>91</sup> Further, lower courts have for the most part

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might well have had a quasi-property interest in those streets, for the duration of the permits. *Hurley*, 515 U.S. at 560–61. Cf. Abner S. Greene, “*Not in My Name*” *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1493 (2018) (“Perhaps we can ground the invalidations in a free speech theory that, at least presumptively, grants one the liberty to use one’s body or property (broadly conceived, to cover . . . the car in *Wooley*, the newspaper in *Tornillo*, the billing envelope in *Pacific Gas*, [and] the parade in *Hurley* . . .) to foster or disseminate one’s own chosen messages and not those of others.”). *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), decided by the Roberts Court, is harder to dispel. In *NIFLA*, crisis pregnancy centers, which “aim to discourage and prevent women from seeking abortions,” brought a compelled speech challenge to a California law requiring them to post information about the availability of state-funded abortion services. *Id.* at 2368 (quoting Joint Appendix at 85, Nat’l Inst. of Fam. & Life Advocs. v. *Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140)). The Court agreed that the notice requirement violated the centers’ rights against compelled the speech. *Id.* at 2378. The decision appears to upset the analysis here since there is, concededly, no obvious economic or property interest at stake. But it is possible to understand that the Court ruled the way it did not so much because it was vexed by compelled speech in a nonpecuniary context but instead because the California law compelled speech only of a distinct minority of health centers, rather than all of them. In particular, the Court bemoaned the fact that the notice requirement seemed to unfairly single out clinics with a pro-life agenda. As the Court noted, “California has ‘nearly 1,000 community clinics’ . . . that ‘serv[e] more than 5.6 million patients.’” *Id.* at 2375 (alteration in original) (quoting Joint Appendix at 58, Nat’l Inst. of Fam. & Life Advocs. v. *Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140)). But most of those clinics were excluded from the licensed notice requirement without explanation. “Such ‘[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.’” *Id.* at 2376 (alteration in original) (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 802 (2011)); see also *id.* at 2379 (Kennedy, J., concurring) (“[T]he history of the Act’s passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.”). One wonders then whether it was the compelled speech itself that moved the Court rather than the apparent targeting. If the latter, then the case would look to be orthogonal to my analysis, and so not a strong counterexample.

89 573 U.S. 682 (2014).

90 138 S. Ct. 1719 (2018).

91 The Court punted on the central questions in *Masterpiece*—namely, whether Colorado’s antidiscrimination law violated the baker’s rights to religious freedom or free speech—and instead vacated the lower courts’ rulings against him on the ground that they had not treated his case fairly. For the view that the Court issued a narrow ruling in *Masterpiece*, see, for example, William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV.

rejected claims like the baker's,<sup>92</sup> and the Supreme Court has denied cert to all other wedding vendors with only religious objections to public accommodations provisions.<sup>93</sup>

This Part argues that the differential treatment *Hobby Lobby* and the wedding vendors receive can be traced to the fact that the Hobby Lobby owners' connection to the conduct they deem immoral arises through a monetary contribution while the wedding vendors' does not.

### A. Money Versus Creative Labor

Liberal theorists and jurists have denied that the contraception mandate renders employers complicit in contraceptive use.<sup>94</sup> The employers are not being asked to pay for contraception; they are being asked to pay for a healthcare plan through which women, if they (and their doctors) so choose, could receive contraception. The fact that a woman would receive contraception only through her own free choice—the exercise of her autonomy—is believed to obviate any complicity the employer might bear.<sup>95</sup>

One might have said the same thing about, say, a wedding cake. The fact that a customer chooses to serve the cake at a same-sex wed-

155, 170 (2019). See generally Marc Spindelman, *Masterpiece Cakeshop's Homiletics*, 68 CLEV. ST. L. REV. 347, 349 n.2 (2020) (collecting news sources to this effect).

92 See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (holding that a photography company could not refuse to photograph a same-sex commitment ceremony in violation of the New Mexico Human Rights Act on First Amendment grounds); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 560 (Wash. 2017) (reasoning that the sale of wedding floral arrangements was not "expressive conduct" protected by the First Amendment). But cf. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (finding a constitutional violation because wedding invitations are pure speech); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (same for wedding videography).

93 This term, the Court will decide a website designer's challenge in *303 Creative LLC v. Elenis*, but that case presents only a free speech, and not a religious freedom, question. See 142 S. Ct. 1106 (2022). The Court clearly remains loath to weigh in on the religious freedom issues, remanding two wedding vendor cases in the wake of *Masterpiece* to ensure they were not infected by the religious bias the Court had found the cake baker suffered. See *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (remanding the case to the Supreme Court of Washington); *Klein v. Or. Bureau Lab. & Indus.*, 139 S. Ct. 2713 (2019) (remanding case to the Court of Appeals of Oregon).

94 *Sepinwall*, *supra* note 1, at 1915–16 & nn.64–68. See generally Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1252 n.355 (noting that a "number of scholars have . . . argued that whether a law places a 'substantial burden' on a claimant's religious exercise depends on the distance between the regulated conduct (of the claimant) and the ultimate conduct of another to which the claimant objects" and collecting sources on each side).

95 See *Sepinwall*, *supra* note 1, at 1915–16.

ding is a matter of his free choice—an exercise of his autonomy—which should also, by the same logic, obviate any complicity the wedding vendor should bear.<sup>96</sup> Some liberals have said as much.<sup>97</sup> But others have wrestled much more with the expressive dimensions of some of the wedding vendors' wares.<sup>98</sup> They worry that the wedding vendors have irreversibly invested themselves in their products, such that the vendors remain connected to their cakes, or photographs, or websites, notwithstanding the choices customers make.<sup>99</sup>

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96 Cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (acknowledging that the commercial context might foreclose wedding vendors' rights to refuse service to protected classes).

97 See, e.g., John Corvino, *Drawing a Line in the 'Gay Wedding Cake' Case*, N.Y. TIMES (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/opinion/gay-wedding-cake.html> [<https://perma.cc/K2TL-YMCP>] (“[B]usiness owners generally do not have discretion over how their products are later used.”).

98 For a poignant discussion of the difficulty in dealing with claims of freedom of expression in the wedding vendor context, see Joseph William Singer, *Public Accommodations & Human Flourishing: Sexual Orientation & Religious Liberty*, 29 CORNELL J.L. & PUB. POL'Y 697, 706–10 (2020).

99 This was just how Jack Phillips, the baker in *Masterpiece*, articulated his concern. He claimed that it would be “sacrilegious to *express through his art* an idea about marriage that conflicts with his religious beliefs.” Brief for Petitioners at 9, *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (emphasis added). Baronelle Stutzman, a florist bringing a challenge similar to *Masterpiece Cakeshop's*, articulated a similar sentiment in rejecting the legal requirement that “she invest herself creatively and emotionally in their wedding ceremony, but also that she dedicate herself artistically to memorializing and formalizing it in three-dimensional form.” Petition for a Writ of Certiorari at 4, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (No. 17-108).

For commentators who think speech or artistry is decisive, see, for example, Brief of Amici Curiae Cato Inst., Eugene Volokh & Dale Carpenter in Support of Petitioner at 18–19, *Elane Photography LLC v. Willock*, 572 U.S. 1046 (2014) (No. 13-585) (arguing that “if a person’s activity is protected by the First Amendment against a ban, for instance because it involves writing or photography, then it likewise may not be compelled” but denying that commercial photography should receive this protection); Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 242 (2015) (“[W]hether baking a cake . . . counts as speech is pivotal. After all, the Free Speech Clause prohibits the ‘abridg[ement] of freedom of speech.’” (quoting U.S. CONST. amend. I)); Sherif Girgis, *The Christian Baker's Unanswered Legal Argument: Why the Strongest Objections Fail*, PUB. DISCOURSE (Nov. 29, 2017), <http://www.thepublicdiscourse.com/2017/11/20581/> [<https://perma.cc/38XG-ERUD>] (“[I]nterfer[ing] with freedom of expression would require drilling through decades of cases to shatter what the Supreme Court has said is the ‘bedrock principle underlying the First Amendment, [which] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’” (alterations in original) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); Andrew Koppelman, *The Gay Wedding Cake Case Isn't About Free Speech*, AM. PROSPECT (Nov. 27, 2017), <https://prospect.org/article/gay-wedding-cake-case-isn%E2%80%99t-about-free-speech> [<https://perma.cc/GD7J-969P>] (arguing that requiring the baker to disseminate a distinct message he opposed “would clearly violate the First Amendment” but denying that the cake Craig and Mullins sought from *Masterpiece*

I have elsewhere expressed skepticism about the claim that creative input somehow makes dissociation more difficult.<sup>100</sup> But I see that the claim follows from standard liberal conceptions of the self and self-expression.<sup>101</sup> If the purpose of the constitutional right to free speech is to allow individuals the proper scope for autonomy,<sup>102</sup> or self-realization,<sup>103</sup> then speech intended to exteriorize one's internal experiences, as the speech contained in much art does, would seem to lie at the very core of the right.<sup>104</sup>

What is striking, then, is that the Court appears to be more sympathetic to the contraception mandate cases than to the wedding vendor cases it has thus far considered.<sup>105</sup> While as a theoretical matter, expressive contributions seem to implicate the self more than pe-

Cakeshop would have had a distinct message); *cf.* KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 170–71, 179 (2016) (arguing that exemptions should be granted where the wedding vendor would be directly involved in the nuptials and identifying wedding photography and custom cake baking as forms of direct involvement while denying that, for example, driving a couple to their wedding venue connects the driver only remotely).

100 Amy J. Sepinwall, *Free Speech and Off-Label Rights*, 54 GA. L. REV. 463 (2020).

101 *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 48 (1989) (maintaining that “key first amendment values” are “individual self-fulfillment and participation in change, or self-realization and self-determination”); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 425 (1980) (reflecting on the “growing emphasis on the function of the first amendment in protecting individual self-fulfillment reflects an emerging concern with the tendency of modern society to inhibit the growth of the individual personality and the individual’s autonomy and self-respect”); Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795, 818 (1991) (reviewing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) and STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)); Valerie M. Fogleman & James Étienne Viator, *The Critical Technologies Approach: Controlling Scientific Communication for the National Security*, 4 BYU J. PUB. L. 293 (1990); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982); Eric J. Cleary, Note, *In Finley’s Wake: Forging a Viable First Amendment Approach to the Government’s Subsidization of the Arts*, 68 FORDHAM L. REV. 965, 981 n.147, 1010 (1999) (defining liberalism as “an attitude or philosophy favoring individual freedom for self-development and self-expression.” (quoting *Liberalism*, WEBSTER’S THIRD NEW INT’L DICTIONARY 1303 (Philip Babcock Gove ed., 1986))); John Lawrence Hill, *Law and the Concept of the Core Self: Toward A Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289, 390 (1997).

102 Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204 (1972). A version of this understanding of the right undergirds *West Virginia State Board of Education v. Barnette*, which rested on a “right of self-determination in matters that touch individual opinion and personal attitude.” 319 U.S. 624, 631 (1943).

103 Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

104 *See, e.g.*, Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting); Ryan J. Walsh, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1071 (2011) (discussing same).

105 Will 303 *Creative LLC v. Elenis* upend this contrast? I consider this question *infra*, note 109.

cuniary ones do, the Court's disposition takes just the opposite form. Thus in *Hobby Lobby*, the Court found compelling the business owners' concern that subsidizing health insurance from the corporate coffers would make the owners' complicit in the sin of (some) contraceptive use.<sup>106</sup> Yet in *Masterpiece Cakeshop* the Court expressed doubt about the merits of the wedding vendor's claim.<sup>107</sup> Specifically, the Court contended that, in general, objections such as the baker's "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."<sup>108</sup> Thus the contrast emerges: the state may not compel someone to *pay* for goods or services that will be put to an end they oppose, but it may compel someone to *provide* someone goods or services that will be put to an end they oppose. Money implicates, but the blood, sweat, tears, and creative juices of the wedding vendor apparently do not.<sup>109</sup>

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106 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Joseph Singer objects to the *Hobby Lobby* decision precisely because it rests on an expansive, and mistaken, view of property rights.

The close corporation—no matter how big, no matter how many employees, no matter how much it dominates a local economy—represents the property of the owners and is subject to their control. The Court assumed that owners have a right to decide how to spend their own money and the conditions on which they will—and will not—allow non-owners onto their premises.

Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 932 (2015) (footnote omitted).

107 *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018).

108 *Id.* at 1727.

109 Two possible outliers here: First, in *Zubik v. Burwell*, religious non-profits challenged the procedure (essentially, filling out a one-page form) allowing them to opt out of the ACA's contraception mandate, claiming that even that minimal requirement implicated them in sin. 136 S. Ct. 1557, 1559 (2016) (per curiam). The Court declined to decide the case, sending it back to the lower courts with instructions to work out a compromise. *Id.* at 1561. But the conservatives on the Court evinced some sympathy for the challengers' claim. To that extent, the case might appear to be a counterexample—the sympathetic Justices looked poised to honor the complicity claim, even while the non-profits' association with contraceptive use would have no pecuniary component. Their reasoning, however, tells a different story. As revealed during oral argument, they were able to see the implication only by analogizing it to compelled use of property or money. Thus they likened the requirement to complete the form to compelling the non-profits to rent space on their property for a Title X family planning clinic dispensing contraception. *See, e.g.*, Transcript of Oral Argument at 63, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). So even though the conservatives appeared sympathetic to the religious non-profits' position, they seemed to be able to understand it only by analogizing it to the kinds of cases that the Court views as implicating—i.e., pecuniary ones.

A second possible outlier emerges in *303 Creative LLC v. Elenis*, a case pending before the Supreme Court. 142 S. Ct. 1106 (2022) (order granting petition for certiorari). *303 Creative* involves a website designer who would like to offer wedding websites, but only to



## IV. FUNGIBILITY

The prior two Parts reveal the Court's solicitude for pecuniary complicity claims by contrasting cases where money is at stake with those where it is not. This Part extends the analysis by describing the Court's expansive view of money's reach, as illustrated in three different lines of cases.

A. *Material Support*

Congress has criminalized the provision of any kind of support to organizations that the State Department has deemed terrorist because these organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."<sup>110</sup> Beginning in 1998, and through a complicated string of cases, two American citizens and four domestic organizations challenged the provision as applied to their intended activities. In particular, they sought to support Kurdish and Tamil liberation movements that had been deemed Foreign Terrorist Organizations (FTOs) by providing "training," "expert advice or assistance," "ser-

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opposite-sex couples. Restricting her clientele in this way would violate Colorado's anti-discrimination statute, and so she has filed suit for declaratory relief, permitting her an exemption from the statute. Based on oral argument, commentators predict that the website designer will prevail. See, e.g., Robert Barnes, *Supreme Court Seems to Side with Web Designer Opposed to Same-Sex Marriage*, WASH. POST (Dec. 5, 2022, 6:44 PM), <https://www.washingtonpost.com/politics/2022/12/05/colorado-creative-supreme-court-lgbtq/> [<https://perma.cc/A7K9-TPUK>].

Would that outcome undercut the contrast between *Hobby Lobby* and *Masterpiece Cakeshop* for which I have argued in the text accompanying this note? I do not believe it would. The asymmetry between those two cases arises because each involves compelled support, but neither necessarily involves speech. (In *303 Creative*, the website designer's lawyer conceded that her client's free speech arguments would not extend to "hairstylists, landscapers, . . . caterers . . ." and others, all of whom arguably work in a creative vein, and yet none of them seek to convey a message through their work. Reply Brief for the Petitioners at 15, *303 Creative LLC v. Elenis*, No. 21-476 (U.S. 2022). I assume that a decorated cake is like a fancy hairstyle, a garden design, or a beautifully plated meal—creative, but not expressive.) By contrast, the Court in *303 Creative* agreed to consider *only* the Free Speech claims that the website designer brought. See Barnes, *supra*. *303 Creative* is "about the message," to use Justice Barrett's characterization. Transcript of Oral Argument at 19, *303 Creative LLC v. Elenis*, No. 21-476 (U.S. Dec. 5, 2022). That makes *303 Creative* distinguishable, and leaves untouched the contrast between *Hobby Lobby* and *Masterpiece Cakeshop*: in those two cases, you have two parties, each of which would be compelled to advance a project they oppose, but neither would be doing so through speech. The first advances the project by spending its money, the second advances the project by expending its labor. The first prevails; the second loses (on the merits, anyway). Money seems to matter.

<sup>110</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 301(a)(7), 110 Stat. 1214, 1247 (codified at 18 U.S.C. § 2339B (2018)).

vice,” and “personnel.”<sup>111</sup> The intended support was directed exclusively at the liberation movements’ humanitarian initiatives.<sup>112</sup>

The Court nonetheless rejected the constitutional challenge. It reasoned that “[m]oney is fungible,” and thus it “could be redirected to funding the group’s violent activities.”<sup>113</sup> Further, even nonmonetary contributions, like the provision of training, were the equivalent of a cash grant in the Court’s eyes: “‘Material support’ is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends.”<sup>114</sup> Even something as benign as “train[ing] members of [the liberation movements] on how to use humanitarian and international law to *peacefully* resolve disputes” was sinister for the Court,<sup>115</sup> as the movements could “pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.”<sup>116</sup> So the Court concluded that the Americans who wished to work with the Kurdish or Tamil groups by, say, speaking in favor of their independence could rightfully be prosecuted for materially supporting terrorism. This represents a significant departure, especially as regards the mental state of the prosecuted actor, from the standard for accomplice liability typical of criminal law.<sup>117</sup>

### B. *Union Dues*

Fungibility also spelled the death knell for union dues. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court held that non-union members could not be made to pay for the collective bargaining activities of the unions that would negotiate the terms of their employment.<sup>118</sup> Importantly, the Court had already ruled, in an earlier case that *Janus* overruled, that nonunion members need not contribute at all to the political or ideological activities of the union.<sup>119</sup> So the money *Janus* objected to paying

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111 *Holder v. Humanitarian L. Project*, 561 U.S. 1, 14 (2010) (quoting *Humanitarian L. Project v. Mukasey*, 522 F.3d 916, 929–30 (9th Cir. 2009)).

112 *Id.* at 14–15.

113 *Id.* at 37.

114 *Id.* at 30.

115 *Id.* at 36 (emphasis added) (quoting *Humanitarian L. Project*, 552 F.3d at 921 n.1).

116 *Id.* at 37.

117 *See Rosemond v. United States*, 572 U.S. 65 (2014); David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 778 (2007).

118 138 S. Ct. 2448 (2018).

119 *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977), *overruled by Janus*, 138 S. Ct. 2448 (holding that the First Amendment prohibits unions from requiring a public

would have gone to fund only the labor negotiations from which he, like all of the employees the union represented, benefitted. Still, even that expenditure, the Court concluded, constituted compelled speech.

Two features of the case are notable for our purposes. First is the Court's easy equation of money and speech. After a lengthy review of the Court's cases finding compelled *speech* unconstitutional, the Court insists that "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns."<sup>120</sup> Yet, as others have noted, the Court offers scant support for the claim that compelling someone to *pay* for another's speech raises similar free speech concerns to compelling that person to *utter* the speech.<sup>121</sup> And the proposition is, at any rate, manifestly false, or at least greatly overblown.<sup>122</sup> Plainly, subsidizing speech is *not* the same as being compelled to utter it.

The second notable feature of *Janus* is its implicit reliance on fungibility. *Janus* is a close heir of two prior cases that had already cast doubt on *Abood's* continued vitality.<sup>123</sup> As the Court put it in one of those cases, "a union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes."<sup>124</sup> In other words, nonunion members cannot be made to pay even that portion of dues that would go just to bargaining activities because paying for bargaining activities frees up union money that can then be spent on political speech. As in the material support cases, then, the union dues cases operate with an expansive understanding of money's power and reach. By the logic they embody, employers might have a claim to object to paying their employees' salaries, for fear the employees will use the money to fund speech the employer opposes!

employee "to contribute to the support of an ideological cause he may oppose as a condition of holding a job").

120 *Janus*, 138 S. Ct. at 2464.

121 See, e.g., Marty Lederman, *Exacerbating the Real Error in Abood, Is There Any Justification, "Originalist" or Otherwise, for the Court's Holding in Janus That Deducting Agency Fees Abridges the Freedom of Speech?*, BALKINIZATION (July 23, 2018), <https://balkin.blogspot.com/2018/07/exacerbating-real-error-in-abood-is.html> [<https://perma.cc/2626-WR64>].

122 As Lederman pithily puts it, "[e]very few hours, for example, my tax dollars are used to subsidize statements and tweets by Donald Trump that I find odious and that the government could never require or coerce me to say myself." *Id.*

123 *Knox v. Serv. Emps. Int'l Union*, Loc. 100, 567 U.S. 298, 311 (referring to the ground of *Abood's* holding as "an anomaly"); *Harris v. Quinn*, 573 U.S. 616, 635 (2014) ("The *Abood* Court's analysis is questionable on several grounds.").

124 *Knox*, 567 U.S. at 317 n.6.

### C. Campaign Finance

In a still more extreme line of cases, the Court has concluded that one person subsidizes the speech of another even though the first contributes nothing whatsoever to the second. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* is exemplary.<sup>125</sup> Arizona had established a campaign funding scheme that allowed anyone running for office to avail themselves of public funds.<sup>126</sup> If a candidate chose instead to run on private funds, their publicly funded opponent would receive additional public funds once the privately funded candidate exceeded a certain fundraising threshold.<sup>127</sup> More concretely, for every dollar the privately funded candidate raised over the limit, or for every dollar independent groups spent supporting him, the publicly funded candidate would receive ninety-four cents.<sup>128</sup> Arizona politicians brought suit challenging the scheme.<sup>129</sup>

The Court agreed that the scheme violated the candidates' First Amendment rights. The language of its reasoning is instructive. The Court described the scheme as one where Arizona "gives money to a [publicly funded] candidate . . . when the opposing [privately funded] candidate . . . has engaged in political speech above a level set by the State."<sup>130</sup> The strained language already suggests the problem: speech is not measured in levels, money is. And what triggered the matching funds was not the amount of speech the privately funded candidate uttered at any rate; it was instead the amount of money he had raised—whether he spent it on speech or not.

Here is the Court again misconstruing the scheme: the matching funds provision financed the publicly funded candidate's speech, and thereby "*reduc[ed]* the speech of privately financed candidates and independent expenditure groups."<sup>131</sup> In what sense, though, can funding one person's speech *reduce* the speech of another?<sup>132</sup> Or again, the Court contended that the scheme was an effort to "in-

125 564 U.S. 721 (2011); *see also* *Davis v. FEC*, 554 U.S. 724 (2008).

126 *Bennett*, 564 U.S. at 728.

127 *Id.* at 729–30.

128 *See id.* at 731–32.

129 *Id.* at 732.

130 *Id.* at 754 (emphasis added).

131 *Id.* at 741 (emphasis added).

132 Note too that without the matching funds arrangement, the privately financed candidate can greatly outspend, and so outspoke, his publicly funded opponent, in which case the speech of the latter is "reduced." *See id.* at 730. So someone's speech will be made relatively less effective unless everyone opts for public funding. One could argue that, if one of the parties must sustain a reduction in speech, it should be the party who forced the choice in the first place—namely, the one who opted out of the public financing scheme.

crease the speech of some at the *expense* of others.”<sup>133</sup> But there was no expense exacted at all. Under the scheme, the publicly funded candidate was not gaining an advantage; she was simply being permitted to keep up.

Still, the Court could not seem to lose its grip on the thought that the scheme somehow made the privately funded candidate *pay for* his opponent’s speech.<sup>134</sup> The money he raised, even though directed to him in the first instance, would end up in the coffers of his opponent—just like the money received by the liberation movements in the FTO cases, or the unions in *Janus*, could be diverted to ends the funder opposed.

## V. PECUNIARY COMPLICITY IN LIBERAL AND CHRISTIAN THOUGHT

The foregoing analysis has aimed to show that the law treats pecuniary complicity as more serious, and so more worthy of solicitude, than nonpecuniary forms of implication. But it is already surprising that the law recognizes, and seeks to protect people (and corporations!) from, complicity at all. Keen to insist on the separateness of persons,<sup>135</sup> liberalism has been pervasively chary in assigning one individual responsibility for what another has done.<sup>136</sup> What is it about money that prompts the law to deviate from its liberal individualism? And what is it about Christianity, in which individualism plays no marked role, that nonetheless prompts concerns about money’s power to taint? This Part seeks to answer these questions in turn.

### A. *Secular Concerns About the Self*

There are two ways to think about the cases where individuals or entities raise free speech concerns because they are made to pay for expression they oppose—especially if that expression runs counter to their own pecuniary interests. First, one can see the free speech claims the challengers raise as disingenuous; they are convenient constitutional hooks to escape costly regulations that incidentally in-

133 *Id.* at 741 (emphasis added).

134 In addition to the telling language already presented, consider the Court’s reliance on *Miami Herald Publishing Co. v. Tornillo*, in which the Court invalidated a law that forced newspapers “both to pay for and to convey a message with which [they] disagreed.” *Id.* at 776 n.9 (Kagan, J., dissenting) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974)). But the Arizona scheme does no such thing: the privately financed candidate neither pays for his opponent’s message nor disseminates that message.

135 JOHN RAWLS, *A THEORY OF JUSTICE* 27 (1971); see also *supra* notes 18–19 (describing liberalism’s individualism).

136 See *supra* Section I.A.

volve speech.<sup>137</sup> *Janus*, the case involving union dues, might be exemplary here.<sup>138</sup> The union was going to speak for Janus whether or not he gave it any money. So his complaint that his dues recruited him into speaking the union's message was a non sequitur.<sup>139</sup>

There is much to decry in opportunistically reaching for a constitutional claim to protect an interest different from the one the asserted constitutional provision protects—as where, for example, Janus alleges a free speech injury to protect his pocket, or where Cedar Point alleges a taking to protect its superior bargaining prerogatives. These false invocations dilute the force of constitutional protections and demean those who can genuinely claim them.<sup>140</sup>

Still, opportunistic complaints about compelled support are not quite as bad as the second dynamic that some of these cases might reflect. On this second understanding, the party challenging the compelled subsidization *genuinely* believes that it is being made to speak against its interests. But it holds this belief only because it has mistakenly assimilated itself with its money. For example, the challengers in *Arizona Free Enterprise* might well have been possessed of the thought that *they* were supporting their political opponents, because their money triggered a flow of cash into their opponents' coffers.

This way of construing one's relationship to others is the polar opposite of a concern about purity, which is what motivates the Christian complicity claims, as we will see below.<sup>141</sup> Whereas the latter evince a desire to dissociate oneself from one's money—one's money is the bad thing, the infecting agent—the secular concern sees one's money not as a medium of connection but instead as an extension of oneself. And just as problematically, the Court appears to have adopted the elision between money and self. One can see this, paradoxically, in a rare case where the Court concluded that money did not in fact implicate. Its reasoning is instructive.

*Arizona Christian School Tuition Organization v. Winn* was a 2011 case in which the Supreme Court upheld Arizona's policy of granting taxpayers a credit in exchange for their contributions to school tuition organizations (STOs) that cover tuition costs at private schools, including religious ones.<sup>142</sup> Plaintiffs had sued, arguing that the tax

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137 I elaborate on this phenomenon in *Free Speech and Off-Label Rights*. See Sepinwall, *supra* note 100, at 466.

138 *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

139 See Sepinwall, *supra* note 100, at 467.

140 See *id.* at 505–10.

141 See *infra* Section V.B.

142 563 U.S. 125 (2011).

credits constituted an Establishment Clause violation.<sup>143</sup> But the Supreme Court denied their claim, saying that because it wasn't plaintiffs' *own* money that was going to subsidize religious schooling, they lacked standing to complain.<sup>144</sup> Justice Kagan dissented vigorously (with the three other liberal Justices joining her opinion) on the ground that it made no difference from the perspective of the Establishment Clause whether the government offered a tax credit in exchange for contributions to a religious organization or else funded the organization itself.<sup>145</sup> In the former case, it might not have been plaintiffs' tax dollars that went directly to the religious entity but they were still having to cover a greater share of government expenditures, which made it effectively like the government itself had "funding religion" as a line-item on its budget.<sup>146</sup>

Importantly for our purposes, Justice Kagan recognized that the Court's decision rested on a reification of money. As she noted, "[on the Court's way of thinking,] a taxpayer suffers legally cognizable harm if but only if *her particular tax dollars* wind up in a religious organization's coffers."<sup>147</sup> She then quoted, with incredulity, the Solicitor General's assertion that the "'key point' was: 'If you placed an electronic tag to track and monitor each cent that the [Plaintiffs] pay in tax,' none goes to religious STOs."<sup>148</sup> In contrast to the Solicitor General's crabbed understanding of association, Justice Kagan contended that the relevant precedent allows a taxpayer to challenge legislative action regardless of *whether* that action "disburses *his particular contribution* to the state treasury."<sup>149</sup>

In *Winn*, then, the Court shows its reverence for money as the mirror of the self. *Your* money carries your indelible imprint; it does implicate you. It is a reflection of you and your values. While Christian thought is even more sensitive to pecuniary implication, its reasons are far less profane, as we shall now see.

### B. *Christian Concerns for Purity*

Christianity views complicity expansively. This is in no small part because "the religious person strives for sanctity, or purity . . . . [They seek] to avoid impurity, or corruption, or pollution, that would ne-

143 *Id.* at 129.

144 *Id.* at 130.

145 *Id.* at 148 (Kagan, J., dissenting).

146 *Id.* at 158.

147 *Id.* at 162 (emphasis added).

148 *Id.* (quoting Transcript of Oral Argument at 4, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (No. 09-987)).

149 *Id.* at 163 (emphasis added).

gate or undermine the association with the sacred.”<sup>150</sup> Perhaps for this reason, “Christian ethics puts the bar higher than secular ethics.”<sup>151</sup> But still, few contemporary Christians can claim to be “separatists,” who will preserve their purity by retreating altogether from secular society.<sup>152</sup> And so they find themselves enmeshed in “webs of social relationships” that persistently threaten taint.<sup>153</sup> They seek to remain in the market, reap its rewards, all the while avoiding complicity in discrete wrongs as best one can.

The conscience-based claims that emerge from the enmeshment pit not just Christian and secular values against each other. It is important to see that liberal commitments reside on both sides of the conscience wars. Granting accommodations can threaten third parties’ interests,<sup>154</sup> and sometimes foundational liberal values like equality too.<sup>155</sup> But so too denying accommodations can threaten liberal neutrality, or the minority reinforcement rationale upon which, on at least some visions of it, a liberal pluralist democracy might rely.<sup>156</sup>

Given decent people and decent commitments on both sides, we might not all agree on how conscience-based complicity claims should come out. But we should all respect the good-faith striving for purity that they embody. So far as that goes, the religious complicity claims stand on much more commendable footing than the cases challenging compelled pecuniary support in secular contexts. To spell out further the differing moral dimensions between the liberal and Christian complicity concerns: mistaking one’s money for oneself is worse than mistaking one’s conscience for one’s purse;<sup>157</sup> it is worse to worry about misattribution than moral taint; and it is worse to seek to safeguard one’s money—even if it is (or perhaps precisely because one believes it is) one’s alter-ego—than it is to seek to safeguard one’s soul. In its solicitude for parties like the owners of Hobby Lobby, the Court reveals a compassionate willingness to retreat from the liberal conception of complicity. But in offering this compassion

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150 STEVEN D. SMITH, *PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* 40 (2018).

151 Johan Graafland, Book Review, 81 *J. AM. ACAD. RELIGION* 275, 278 (2013).

152 Stolzenberg, *supra* note 42, at 753–54.

153 *Id.* at 753.

154 See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 745 (2014) (Ginsburg, J., dissenting).

155 It is fair to see wedding vendors’ refusals to serve same-sex couples as denigrations of LGBTQ+ individuals. See Amy J. Sepinwall, *Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations*, 53 *CONN. L. REV.* 1 (2021).

156 See, e.g., C. Edwin Baker, *The Media That Citizens Need*, 147 *U. PA. L. REV.* 317, 329–31 (1998).

157 See *Barnes v. Inhabitants of First Par. in Falmouth*, 6 *Mass.* (5 Tyng) 401, 408 (1810).



primarily where money is at stake, and then in showing the same solicitude for far baser cases of pecuniary implication, the Court reveals something far more rotten.

