EMORY | LAW

Emory Law Journal

Volume 65
Issue 2 *The 2015 Randolph W. Thrower Symposium — The New Age of Communication: Freedom of Speech in the 21st Century*

2015

# Speech or Conduct? The Free Speech Claims of Wedding Vendors

Caroline Mala Corbin

# SPEECH OR CONDUCT? THE FREE SPEECH CLAIMS OF WEDDING VENDORS[†]

*Caroline Mala Corbin*[*]

## INTRODUCTION

Is baking a cake for a same-sex wedding or photographing the bride-and-bride or groom-and-groom "speech" triggering free speech scrutiny? Or is providing wedding services better viewed as conduct that does not implicate the Free Speech Clause?

Marriage equality is now a constitutionally protected right in the United States.[1] The Supreme Court has declared that denying same-sex couples the right to marry violates substantive due process and equal protection.[2] This decision was cause for widespread celebration.[3]

However, not everyone is pleased. Many oppose same-sex marriage on religious grounds.[4] Indeed, some in the wedding industry claim that it violates

---



* Professor of Law, University of Miami School of Law; B.A., Harvard University; J.D., Columbia Law School. I would like to thank the participants at the *Emory Law Journal* Thrower Symposium on "Freedom of Speech in the 21st Century," the Yale Information Society Project Program for the Study of Reproductive Justice, and the Third Annual Freedom of Expression Scholars Conference at Yale Law School. Special thanks are owed to Jack Balkin, Ashutosh Bhagwat, Aaron Caplan, Michael Cheah, Michael Dorf, David Han, Margot Kaminski, Lili Levi, Chip Lupu, Helen Louise Norton, Liz Sepper, Priscilla Smith, Steven Shiffrin, and Alexander Tsesis for invaluable comments. Thanks also to Gabrielle Braga, Claire Howe, Sabrina Niewialkouski, and Magena Rodriguez for superb research assistance, as well as Andrea Clark at *Emory Law Journal* for excellent editing.

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

2 *Id.*

3 *See, e.g.*, Perry Stein, *Celebration of Same-Sex Marriage Ruling Starts Early in D.C.*, WASH. POST (June 26, 2015), http://www.washingtonpost.com/news/local/wp/2015/06/26/celebration-of-same-sex-marriage-ruling-starts-early-in-d-c/.

4 *See, e.g.*, Lauren Markoe, *Righteous or Repugnant? Religious Responses to the Supreme Court's Same-Sex Marriage Decision*, RELIGION NEWS SERV. (June 26, 2015), http://www.religionnews.com/2015/06/26/religious-responses-to-the-supreme-courts-gay-marriage-decision/; Craig Schneider, *Southern Baptist Convention's Statement Opposing Same-Sex Marriage*, ATLANTA J. CONST. (June 17, 2015, 8:45 AM), http://www.ajc.com/news/news/local/southern-baptists-statement-opposing-gay-marriage/nmfLH/; Press Release, U.S. Conference of Catholic Bishops, *Supreme Court Decision on Marriage "A Tragic Error" Says President of Catholic Bishops' Conference* (June 26, 2015), http://www.usccb.org/news/2015/15-103.cfm.

their religious beliefs to participate in any way in these marriages.[5] To do so, they argue, would make them complicit in sin.[6] Wedding photographers do not want to take pictures of same-sex unions;[7] wedding bakers and florists do not want to bake cakes or arrange flowers for same-sex ceremonies;[8] and bridal shop owners do not want to sell dresses to same-sex brides.[9]

In many places, these vendors are free to refuse service to same-sex couples, as neither federal[10] nor most state public accommodations law bars discrimination based on sexual orientation.[11] In jurisdictions with LBGT protections, religious vendors have claimed that these anti-discrimination laws violate their First Amendment rights. They have advanced religious claims and speech claims.

For the speech claims, whether baking a cake or taking a picture counts as speech is pivotal. After all, the Free Speech Clause prohibits the "abridging of freedom of speech."[12] At the same time, the clause has been interpreted to protect conduct found to have an expressive component. For example, burning

---

[5] *See, e.g.*, *Why Some Businesses Say "I Don't" to Gay Couples*, PBS NEWSHOUR (Jan. 21, 2015, 6:20 PM), http://www.pbs.org/newshour/bb/wedding-businesses-say-dont-gay-couples/ ("I actually feel like I'm taking part in the wedding. Part of me goes to the reception. And in this case, that part of me doesn't want to be represented in a ceremony that I believe is unbiblical." (quoting Jack Phillips, Owner, Masterpiece Cakeshop)).

[6] *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at *3 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision) ("Phillips also believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way. . . . Phillips believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be displeasing God and acting contrary to the teachings of the Bible.").

[7] Elane Photography, LLC v. Willock, 309 P.3d 53, 61 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[8] *Craig*, No. CR 2013-0008; *In re* Klein, CR 44-14, 45-14 (Or. Bureau of Labor & Indus. Apr. 21 2015) (synopsis); Ingersoll v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015) (mem.).

[9] Curtis M. Wong, *Pennsylvania's Cake Pros Bakery Rejects Lesbian Couple's Cake as Owner Vows to 'Stand True to God*,' HUFFINGTON POST (Aug. 14, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/08/14/pennsylvania-cake-pros-gay-wedding-_n_5678410.html (quoting a bridal salon owner who stated "that providing the [same-sex couple] dresses 'for a sanctified marriage would break God's law'").

[10] Title II of Civil Rights Act bars discrimination on the basis of "race, color, religion, or national origin" in places of public accommodation. 42 U.S.C. § 2000a (2012). It does not ban discrimination on the basis of sex or sexual orientation. Thus, even though the EEOC has recently ruled that sex discrimination includes sexual orientation discrimination, Title II reaches neither. Sarah Caspari, *'Sexual Orientation Discrimination Is Sex Discrimination,' EEOC Rules*, CHRISTIAN SCI. MONITOR (July 17, 2015), http://www.csmonitor.com/USA/USA-Update/2015/0717/Sexual-orientation-discrimination-is-sex-discrimination-EEOC-rules.

[11] *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 6, 2015) (displaying map which shows that twenty-eight states do not ban discrimination on the basis of sexual orientation in places of public accommodation).

[12] U.S. CONST. amend. I.

a cross on a black family's lawn may communicate hostility and even a threat of violence.[13] Burning an American flag often communicates disapproval or disgust with U.S. policy.[14] The Supreme Court has recognized both as expressive conduct implicating the Free Speech Clause.

Should creating a cake or photograph likewise be deemed expressive conduct that triggers some level of free speech scrutiny? In other words, do religious bakers and photographers have a compelled speech claim if the government forces them to render services pursuant to public accommodations law?[15] According to the vendors, these laws essentially compel them to express approval of same-sex marriages—something contrary to their deeply held beliefs.[16]

To be clear, the question for this Article is not whether public accommodation laws violate the Free Speech Clause but whether they even trigger free speech review. Or to put it another way, the question is not whether the wedding vendors' conduct is ultimately protected by the Free Speech Clause, but whether it is covered by it at all.

The two types of vendors are not entirely analogous. Photography, a branch of art, has long been recognized as a mode of communication in much the same way words are.[17] Baking, in contrast, has not. Thus, the photographers' challenge also raises the question of whether conduct involving words or photographs necessarily amounts to speech that is covered by the Free Speech Clause.

Part I describes the current free speech doctrine surrounding expressive conduct. In particular, it examines the *Spence v. Washington* test for deciding whether conduct is deemed expressive or not.

---

[13] Virginia v. Black, 538 U.S. 343, 360 (2003).

[14] Texas v. Johnson, 491 U.S. 397, 406 (1989).

[15] This Article does not address the vendors' potential compelled expressive association arguments. They are inapposite, anyway. In *Boy Scouts of America v. Dale*, the Supreme Court held that the Boy Scouts were an expressive association and that a public accommodation law that required the Boy Scouts to accept gay scoutmasters violated their freedom of expressive association. 530 U.S. 640, 644 (2000). Even assuming that commercial bakeries and photography studios are expressive associations, they are not membership organizations, and public accommodation laws do not force them to accept unwanted members. Scoutmasters might be members of the Boy Scouts, but customers are not members of bakeries or photographic studios. *Cf.* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 69 (2006) ("Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'").

[16] *See supra* note 4 and accompanying text.

[17] *See infra* note 187 and accompanying text.

Part II considers whether a cake baked by a vendor for a same-sex wedding should be covered speech. It proposes that compelled expressive conduct—a little-analyzed category—does not trigger free speech scrutiny unless the compelled actor is forced to convey a message with which she disagrees. To find otherwise would exacerbate a recent trend, characterized as revival of *Lochner*-era libertarianism, of using the First Amendment to skirt government regulation. Part II then concludes that baking a cake is not covered speech, as the business context essentially neutralizes any potential message of endorsement.

Part III addresses the question of whether photographs by a professional wedding photographer should amount to covered speech. It contemplates—but ultimately rejects—the possibility that any conduct involving words or photographs must implicate free speech. It also suggests that both the regulated photographs and the challenged regulation must be considered in answering this question. It finds that, at most, the photographers' claims trigger intermediate scrutiny. My conclusions here are more tentative. This Article finishes by warning against the tendency to automatically value free speech over equality.

## I. EXPRESSIVE CONDUCT DOCTRINE

Laws that regulate conduct with an expressive component are subject to heightened scrutiny. Whether conduct has an expressive element is (often but not always) determined by the test set forth in *Spence v. Washington*[18]: conduct is deemed expressive if the actor intended to express a particularized message and that message is understood by the audience.[19] Due to open questions and inconsistent application, it is not altogether clear how the *Spence* test would apply to bakers and photographers who decline to provide wedding cakes or wedding photographs.

### *A.* O'Brien *and* Spence *Tests*

#### *1.* United States v. O'Brien

Regulations of conduct with an expressive component must be closely scrutinized. When the regulation targets the expressive conduct because of its

---

[18] 418 U.S. 405 (1974) (per curiam).
[19] *Id.* at 410–11, 415.

message, then, like all content-based regulations,[20] it is subject to strict scrutiny.[21] For content-neutral regulations of expressive conduct, the test from *United States v. O'Brien*[22] controls. After David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse to protest the Vietnam War,[23] he challenged the statutory amendment that made such conduct illegal.[24] Under *O'Brien*, the first question is whether the regulation really is content neutral, or whether its true purpose was to censor speech.[25] If the latter is true, then strict scrutiny applies. If the regulation's goal is unrelated to the suppression of speech, and the effect on speech is incidental rather than intentional, then intermediate scrutiny applies.[26] In addition to applying intermediate scrutiny, courts also ask whether the regulated speaker has alternative means of communicating her message.[27] If the regulation fails intermediate scrutiny, or the speaker lacks alternate means, then the regulation violates the Free Speech Clause.

Because intermediate scrutiny is so malleable, whether a regulation passes it can be difficult to predict.[28] The alternative means of communication requirement is also imprecise, with different lower courts requiring different

---

[20] McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014) (noting that content-based regulations are subject to strict scrutiny). The one exception to this rule—content-based but viewpoint-neutral regulations in a nonpublic forum—does not apply, since the wedding vendor cases do not occur in nonpublic forums. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800, 806 (1985).

[21] City of Erie v. Pap's A. M., 529 U.S. 277, 289 (2000) ("If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard.").

[22] 391 U.S. 367 (1968).

[23] *Id.* at 369.

[24] *Id.* at 375 (noting that 1965 Amendment made it a crime to "knowingly destroy" or "knowingly mutilate" a draft card).

[25] *City of Erie*, 529 U.S. at 289 ("To determine what level of scrutiny applies to the ordinance at issue here, we must decide 'whether the State's regulation is related to the suppression of expression.'" (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989))).

[26] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (describing *O'Brien* as requiring intermediate scrutiny). Note that in *Humanitarian Law Project* itself, the Supreme Court did not apply intermediate scrutiny because it held that the law as applied to plaintiffs was not content-neutral. *Id.* at 2723–24.

[27] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that expressive conduct regulations must "leave open ample alternative channels for communication of the information").

[28] Vikram David Amar & Alan Brownstein, *The Voracious First Amendment:* Alvarez *and* Knox *in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 500 (2013) ("The big knock on intermediate scrutiny generally is that it is too malleable and indeterminate in its application.").

showings.[29] All of this assumes, of course, that the challenged conduct has an expressive component.

*2.* Spence v. Washington

The threshold question—and the principal question for this Article—is: When does conduct qualify as expressive? The question here is not whether the conduct is ultimately protected by the Free Speech Clause, but whether it is covered by it. In other words, the question is not whether the Free Speech Clause is violated, but whether the Free Speech Clause is triggered.[30]

Under *Spence v. Washington*,[31] conduct is considered to have an expressive component sufficient to trigger free speech scrutiny if (1) the speaker intended to send a particularized message and (2) her audience understood that message.[32] In answering these two questions, the Supreme Court has emphasized the importance of context. When analyzing whether a peace sign taped onto an American flag counted as expressive, the *Spence* Court observed, "[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."[33]

Historically, the Supreme Court has adopted a relatively narrow view of expressive conduct. In *O'Brien*, the Court worried that all conduct risked becoming expressive conduct if only the intent of the speaker were considered: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[34] Thus, the Court insisted that the particular message be understood by the audience as well.

---

[29] R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 352 (2006) ("The phrasing of this alternative-speech-channels requirement unpredictably varies from case to case, as does the rigor or laxity of its demands in practice.").

[30] *See, e.g.*, Cynthia L. Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 NOTRE DAME L. REV. 1361, 1368 (1997) ("To say that speech is 'speech'—that it is *covered* by the First Amendment—is not to conclude that it is *protected*.").

[31] 418 U.S. 405, 410–11 (1974) (per curiam).

[32] *Id.*; *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989) (describing test as "whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it" (alteration in original)).

[33] *Spence*, 418 U.S. at 410.

[34] United States v. O'Brien, 391 U.S. 367, 376 (1968). The Supreme Court repeated this concern in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006) ("But we rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive." (citation omitted)).

In *O'Brien* itself, the Court assumed without deciding that burning a draft card was expressive conduct,[35] though one suspects everyone knew exactly why O'Brien burned his draft card.[36] In *Texas v. Johnson*, however, the Court expressly acknowledged that burning an American flag—an inherently symbolic item[37]—at a political protest during the Republican National Convention[38] amounted to expressive conduct.[39]

### 3. *Expressive Conduct in Speech vs. Religious Claims*

While this Article focuses on the free speech claim of religious objectors, most simultaneously bring a religious liberty claim. Consequently, it is worth noting that there is an important difference between triggering the Free Speech Clause and triggering the Free Exercise Clause or a statute like the Religious Freedom Restoration Act (RFRA),[40] or a state counterpart,[41] via expressive conduct.

---

[35] *O'Brien*, 391 U.S. at 376 ("However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

[36] Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1098 (1968) ("The conduct [of burning draft cards] has no other explanation than the desire to communicate.").

[37] 491 U.S. at 405 ("That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country . . . .").

[38] *Id.* at 399.

[39] *Id.* at 406 ("In these circumstances, Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

[40] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012). Because it is more expansive, recent religious liberty cases have relied on RFRA rather than the Free Exercise Clause. *See infra* note 42; *see, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2751 (2014).

[41] RFRA applies only to federal laws. City of Boerne v. Flores, 521 U.S. 507, 534, 536 (1997). Many states, however, have passed their own version of RFRA that governs their laws. States with RFRA counterparts include Arizona, ARIZ. REV. STAT. § 41-1493.01 (2011); Connecticut, CONN. GEN. STAT. ANN. § 52-571b (West 2013); Florida, FLA. STAT. ANN. §§ 761.01–761.05 (West 2010); Idaho, IDAHO CODE ANN. §§ 73-401 to 73-404 (West 2006); Illinois, 775 ILL. COMP. STAT. ANN. 35/15 (West 2011); Indiana, S. Enrolled Act No. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015) (codified at IND. CODE §§ 34-13-9-1 to -9-11); Kansas, KAN. STAT. ANN. §§ 60-5301 TO 60-5305 (West Supp. 2014); Kentucky, KY. REV. STAT. ANN. § 446.350 (West Supp. 2014); Louisiana, LA. STAT. ANN. §§ 13:5231–13:5242 (2012); Mississippi, MISS. CODE ANN. § 11-61-1 (West Supp. 2014); Missouri, MO. ANN. STAT. § 1.302 (West 2013); New Mexico, N.M. STAT. ANN. §§ 28-22-1 to 22-5 (West 2003); Oklahoma, OKLA STAT. ANN. tit. 51, §§ 251–258 (West 2008); Pennsylvania, 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401–2407 (2015); Rhode Island, 42 R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -80.1-4 (West 2014); South Carolina, S.C. CODE ANN. §1-32-10 to -32-60 (2006); Tennessee, TENN. CODE ANN. § 4-1-407 (West 2013); Texas, TEX. CIV. PRAC. & REM. § 110.003 (West 2011); and Virginia, VA. CODE ANN. §§ 57-1 to 57-2.1 (West 2009). One state—Alabama—amended its constitution. Alabama Religious Freedom Amendment of 1998, ALA. CONST. art. I, § 3.01 (amended 1999).

At first glance, the two appear parallel. In religious liberty challenges, especially under RFRA,[42] the question is whether the regulation substantially burdens religion.[43] In free speech challenges, the question is whether the regulation burdens expression. As formulated, religious protection seems more difficult to obtain, as existing tests require that the burden on the ability to practice religion be substantial.[44]

In fact, it can be easier to trigger religious protections because courts—in particular the current Supreme Court—have proven to be highly deferential to subjective claims of substantial religious burden. In its most recent case addressing the question, *Burwell v. Hobby Lobby Stores, Inc.*,[45] the Supreme Court suggested that as long as the religious objectors were sincere, they essentially decide what counts as a substantial religious burden that triggers RFRA.[46]

This deference to religious objectors is partly due to the Establishment Clause, which bars courts from resolving theological disputes.[47] Courts worry that declaring a religious burden insubstantial comes too close to parsing theology, a task outside their institutional competence.[48]

---

[42] Under the Free Exercise Clause, religious exemptions become available if (1) a law is not neutral and generally applicable, (2) the law imposes a substantial religious burden, and (3) the law fails strict scrutiny. *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). The national and state RFRAs eliminate the first requirement and grant religious exemptions whenever a law that imposes a substantial religious burden fails strict scrutiny.

[43] 42 U.S.C. § 2000bb-1 (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.").

[44] Because the constitution does not provide protection against neutral laws of general applicability, this is truer for statutory protections. *See supra* note 42.

[45] 134 S. Ct. 2751.

[46] *Id.* at 2779 ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." (citation omitted)). There is a limit to this deference. So far, every court of appeals (but one) that has considered the question has rejected the claim of non-profits that filing the paperwork to obtain an exemption from the contraception mandate is itself a substantial religious burden. *See, e.g.*, Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 444 (3d Cir. 2015), *cert. granted*, No. 15-191, 2015 WL 4765464 (Nov. 6, 2015).

[47] *See, e.g.*, Andrew Koppleman, *Secular Purpose*, 88 VA. L. REV. 87, 108 (2002) ("The Establishment Clause forbids the state from declaring religious truth.").

[48] *See, e.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic [could] be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

With speech, no such deference to the religious objector's view is warranted. First, no Establishment Clause concerns loom over court decisions regarding whether conduct counts as expressive or not. It is a question about speech, not about religion. Second, free speech doctrine makes clear that the plaintiff's subjective view—the speaker's intent—is not the only consideration. The audience must also understand the message communicated.

### *B.* Spence v. Washington *Applied to Wedding Vendors*

It is uncertain how the wedding vendors' claims come out under *Spence v. Washington*. The difficulty lies not in the first question—whether the speakers have a particular message, but in the second—whether an audience would understand that message. Contributing to the uncertainty is both unresolved doctrinal questions and inconsistent application of the *Spence* test. Recent case law suggests that an act must be "inherently expressive" in order to trigger free speech scrutiny. Although the coherence of an "inherently expressive" inquiry is open to question, controlling precedent suggests that baking a cake, at least, would not be viewed as inherently expressive conduct.[49] Taking a picture might warrant a different conclusion.

#### *1. Speaker's Intent*

The first *Spence* factor requires that the speaker intend to communicate a message. How particularized the message must be is uncertain. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court seems to have rejected the particularized requirement, holding that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[50]

In any event, this requirement is not likely in dispute insofar as wedding vendors are concerned. Every objecting baker, florist, and photographer who refuses to provide services for a same-sex ceremony resists sending a particular message, namely, "I endorse or condone same-sex weddings."[51] For them,

---

[49] I am assuming a cake with no text on it.

[50] 515 U.S. 557, 569 (1995) (citation omitted).

[51] Actually, they object to endorsing same-sex unions as well. The photography studio in *Elane Photography* was not asked to memorialize a same-sex wedding—which at the time was still illegal in New

creating a cake or taking a picture for a same-sex ceremony conveys approval of that union, an approval they do not wish to bestow. This is true even when the cake (or photograph) has no explicit written message of support.[52] As one couple argued, "compelling them to prepare a cake for a same-sex wedding is equivalent to forcing them to 'speak' in favor of same-sex weddings."[53]

In short, while existing doctrine is unclear about how particularized the speaker's intended message must be, the first *Spence* factor is likely satisfied by the wedding vendors who do not wish to communicate approval of same-sex unions.

### *2. Audience Understanding*

The second *Spence* factor for determining which conduct is expressive—how audiences read the provision of a wedding service—is not so readily satisfied. The most analogous precedent suggests that the second factor is not met and therefore public accommodations laws are not compelling expressive conduct. However, because the photographers' claim involves a recognized mode of communication, their claim differs from the bakers.

Moreover, the existing doctrine has not yet resolved questions such as whether conduct deemed expressive must be inherently expressive and what role context plays in that analysis, whether the audience is actual or hypothetical, and at what level of generality the conduct ought to be described. Although this Article makes some normative suggestions on how to fill in those doctrinal holes, these answers alone do not lead to a conclusive result regarding the wedding vendors' claims.

---

Mexico—but a same-sex "commitment ceremony." Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[52] The bakers, for example, believe that a cake need not bear the words "I approve of same-sex weddings" or any other written message in order to communicate a pro-marriage equality message. *See* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at *7 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision).

[53] *See id.*; *see also* Paul Hosford, *Cork Company Offers to Make Invite for Gay Couple Refused by Printer*, THEJOURNAL.IE (Mar. 6, 2015, 8:37 AM), http://www.thejournal.ie/gay-wedding-invite-printer-offers-help-1976272-Mar2015/ (quoting printers that refused to print wedding invitations to a same-sex couple: "We have never hidden our faith from our customers and represent the gospel at every opportunity. . . . [W]e do not support same sex marriage, which printing wedding invitations would do").

*a.* Rumsfeld v. FAIR *and "Inherently Expressive" Conduct*

In its most recent decision to directly address this threshold question of when conduct is expressive, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), the Supreme Court suggested that regardless of speaker intent, conduct must be "inherently expressive" in order to warrant free speech concern.[54] In *FAIR*, the Supreme Court rejected a claim by a consortium of law schools that allowing the military to interview students on campus communicated endorsement of military recruitment policies.[55] At the time, the military still enforced "Don't Ask, Don't Tell,"[56] and the schools did not want to be seen as condoning this discriminatory policy.[57]

The Supreme Court held that providing military recruiters access to campus was not inherently expressive.[58] The Court argued that without an explanation by the schools, no one would realize that military recruitment occurred off-campus because of opposition to this policy rather than, say, lack of space.[59] Furthermore, "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."[60] Because providing access to campus was not inherently expressive, it was deemed conduct, not expressive conduct.[61]

Is providing wedding services inherently expressive such that vendors need not explain their reluctance to provide them? It is unlikely. Because *FAIR* held that without an explanation, simply providing equal access to recruiting services does not in fact convey any message, it suggests the same is true for

---

[54] 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive."); *cf*. *Hurley*, 515 U.S. at 568 ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.").

[55] *FAIR*, 547 U.S. at 52 ("They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military.").

[56] Under the "Don't Ask, Don't Tell" Policy, in effect from 1993 to 2010, gay servicemen and women were allowed in the military as long as they kept their orientation secret. Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES (Dec. 18, 2010), http://www.nytimes.com/2010/12/19/us/politics/19cong.html.

[57] *FAIR*, 547 U.S. at 64–65.

[58] *Id.* at 66.

[59] *Id.*

[60] *Id.*

[61] *Id.* ("Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive.").

providing equal access to commercial services.[62] Although an audience needs no additional information when it witnesses someone burn an American flag, it might if a wedding vendor replied to an email request with a simple "No." After all, perhaps the bakery or studio declined because it was overbooked. It is only when the vendor accompanies its refusal with the statement, "We are sorry, we cannot condone your marriage," that its message is communicated. Thus, if disapproval is conveyed, it is conveyed by what is said or written, rather than by not baking a cake or taking a picture.

Then again, the Supreme Court has not always insisted that conduct be "inherently expressive,"[63] nor is it clear whether this test is even workable without taking context into account. *Spence* itself asks whether an audience understood the message given its context: "An intent to convey a particularized message was present, *and in the surrounding circumstances* the likelihood was great that the message would be understood by those who viewed it."[64] Granted it is easier for an audience to read conduct as expressing a message if the conduct is "inherently expressive," but conduct that is not inherently expressive may present as expressive in the right context. For example, sitting is not inherently expressive, but sitting at a segregated lunch counter may well be expressive.[65] Indeed, one wonders whether any conduct is actually so "inherently expressive" that it doesn't need some context. Even burning a flag does not always communicate political criticism, as one could be incinerating it because it is worn out.[66]

---

[62] *Id.* ("An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.").

[63] *See, e.g.*, City of Erie v. Pap's A. M., 529 U.S. 277, 289 (2000) ("Being 'in a state of nudity' is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct . . . ."); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) ("It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.").

[64] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (emphasis added).

[65] *Clark*, 468 U.S. at 306 (Marshall, J., dissenting) ("[S]itting or standing is not conduct that an observer would normally construe as expressive conduct. However, for Negroes to stand or sit in a 'whites only' library in Louisiana in 1965 was powerfully expressive; in that particular context, those acts became 'monuments of protest' against segregation."); *cf.* Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion) (protesters at segregated library); Garner v. Louisiana, 368 U.S. 157 (1961) (protesters at segregated lunch counters).

[66] Texas v. Johnson, 491 U.S. 397, 405 (1989) ("We have not automatically concluded . . . that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred."). Similarly, one might wonder whether burning a cross is "inherently expressive" when context might be needed to determine exactly what is being expressed. Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion) ("The act of burning a cross may

Moreover, the analysis for bakers vs. photographers differs because even if the provision of services is not inherently expressive, photographs may be. So the fact that the photographer is providing photographic as opposed to baking services may mean there is a free speech component after all. In *Holder v. Humanitarian Law Project*, for example, the Court held that even though the ban on providing material aid to designed terrorist groups generally applied to conduct, when it applied to providing material aid in the form of expert advice,[67] free speech analysis was required.[68] Then again, *FAIR* held that sending emails as part of providing equal access would not require free speech analysis.[69] Whether *FAIR* or *Humanitarian Law Project* controls depends both on whether taking wedding pictures is more like sending emails or providing expert advice, and on whether public accommodation law is more like *FAIR*'s equal access law or *Humanitarian Law Project*'s material support law.[70] Assuming the photographers are analogous to the *Humanitarian Law Project* plaintiffs, and they may not be, then *O'Brien* scrutiny applies if the public accommodation law is content-neutral (as it seems to be) and strict scrutiny if it is content-based (as the regulation was in *Humanitarian Law Project*).[71]

To sum up the discussion on audience reception so far: The Supreme Court has held that conduct must be inherently expressive in order to trigger free speech scrutiny and has further found that providing equal access is not inherently expressive. However, taking pictures may be inherently expressive in a way that baking cakes is not and in any event the "inherently expressive"

---

mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech."). Although perhaps burning a cross is always inherently expressive, and context is necessary only to determine what exactly is being expressed.

[67] 130 S. Ct. 2705, 2724 (2010) (describing what was at issue as "whether the Government may prohibit what plaintiffs want to do—provide material support . . . in the form of speech").

[68] *Humanitarian Law Project*, 130 S. Ct. at 2723–24 ("The Government is wrong that the only thing actually at issue in this litigation is conduct . . . . The law here may be described as directed at conduct. . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.").

[69] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006) (noting that although "recruiting assistance provided by the schools often include elements of speech[]" nonetheless "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse[]" and furthermore the compelled speech "is plainly incidental to the Solomon Amendment's regulation of conduct").

[70] Note that by its own terms, the material support law regulates speech, since the law defines material support as including expert advice and assistance. *Humanitarian Law Project*, 130 S. Ct. at 2714 ("[I]n 2001, Congress amended the definition of 'material support or resources' to add the term 'expert advice or assistance.'").

[71] *Id.* at 2723–24 (finding that the law was content-based because "Plaintiffs want to speak to the PKK and the LTTE [designated terrorist groups], and whether they may do so under § 2339B depends on what they say").

test is flawed. Nonetheless, even if conduct need not be "inherently expressive" and context may be taken into account, the conduct still must express a message that audiences understand. Thus, the question remains: How does an audience read the act of providing wedding services like baking a cake or taking a photograph, and what guidelines should inform the analysis?

*b. Second Factor as Social Meaning*

Asking whether an audience would understand the vendors' message once context is taken into account raises further questions: Should the audience be the actual audience or a hypothetical audience? At what level of generality should the act be described? And what context should matter? Is it the general cultural context, the individualized context of a particular exchange, or both? For example, does the meaning of baking a cake remain ambiguous when a baker who initially agrees to provide a cake to a bride changes her mind after discovering the wedding has two brides? Is this the type of context that ought to be considered? Because the Supreme Court has never definitively answered these questions, this section demarcates some guidelines.

I suggest reframing the second *Spence* inquiry as: "What is the social meaning of the contested act?" Here, what is the social meaning of professional vendors whose shops are open to the public providing wedding cakes or photographs? Social meaning has been described as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context"[72] or "the expressive dimension of conduct . . . in the relevant community."[73] In other words, it is the meaning society attaches to particular conduct in a particular time and place.

Analyzing the second *Spence* factor in terms of social meaning does not answer all the questions the Supreme Court has left unanswered about audience, context, and level of generality. Nevertheless, the issue of whether

---

[72] Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) [hereinafter Lessig, *Social Meaning*]; *see also* Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1451 (1996) ("By 'social meaning' I mean a name and a price given to an action, inaction, or status that (a) in a particular community has a well-defined association (whether positive, or negative, or neutral) and that (b) is internalized by a significant portion of the community with which the meaning is a social meaning . . . .").

[73] Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 925 (1996) ("Social norms help people assign 'social meaning' to human behavior. With this term I refer to the expressive dimension of conduct (not excluding speech) in the relevant community. Social meaning is a product of social norms." (footnotes omitted)).

the audience is actual or hypothetical[74] may not much matter as either audience is presumably aware of the cultural significance of an action. With regard to context, social meaning analysis necessarily looks at the broader social context, as social meaning of an act depends on that context.

As for the level of abstraction, the social meaning analysis begins at a higher level of abstraction. In order to understand the social meaning attached to a wedding vendor's creation of a cake or photograph for a wedding customer, it is essential to know the message that is generally conveyed when vendors sell something to someone at a place of business open to the public. One might think of this inquiry as another way of asking, or related to, whether the conduct is inherently expressive—whether it carries some particular message. The answer to that could (and this Article argues should) create a presumption: if the category of conduct is generally understood as expressive, the challenged conduct is presumed expressive and vice versa.

However, starting with a higher level of abstraction does not mean disregarding the circumstances of the particular refusal, as presumptions are rebuttable. As the Supreme Court has acknowledged, specific circumstances can imbue an otherwise nonexpressive act with meaning, like sitting at a lunch counter in the South during the Civil Rights Movement.[75]

The Supreme Court has never articulated its approach quite like this, even assuming it has a consistent approach. Earlier cases like *Spence* have highlighted the importance of context; more recent cases focus on the inherent expressiveness of the general category of conduct—such as hosting recruiters or marching in a parade.[76] To the extent that these cases can be reconciled, it may be that the Court did not think the particular circumstances in the recent cases overcame the category presumption. After all, if the general category creates a presumption, starting with the category does not preclude continuing with the more immediate circumstances to confirm or rebut that presumption.

An approach along these lines best captures whether conduct is expressive. Conduct enters the realm of free speech when it communicates. Since the

---

[74] As opposed to actual audiences, hypothetical audiences are generally presumed to be reasonable and aware of the history and cultural significance of an action. Because it has never pinpointed which of the two controls, or even discussed the issue, the Supreme Court may already be assuming a "reasonable and informed" audience. In any event, it is not clear how often this different viewpoint would lead to a different outcome.

[75] *See supra* note 65 and accompanying text.

[76] *See supra* note 54.

nature of communication includes both someone who speaks and someone who listens,[77] any test should, as in *Spence*, include both a speaker prong and an audience prong.[78] An audience prong that considers only the general category may miss the cases where the circumstances imbue the conduct with an expressive component, like protestors sitting at a lunch counter. Moreover, the fact that the meaning of specific conduct will invariably be informed by the meaning of its category of conduct advises against an approach that looks only at the particular.[79] Consequently, in thinking about whether conduct communicates, the general category of conduct should establish a presumption of expressiveness, which can be rebutted by the particulars of the individual case.

Although the Supreme Court has not described its approach to expressive conduct in this way, this approach is not necessarily inconsistent with Supreme Court doctrine either. To be clear, framing the second *Spence* factor as an inquiry into social meaning is this Article's recommendation on how to implement the *Spence* test. It works within the confines of precedent (Parts II and III are not as tethered to existing doctrine). Although it fills in gaps, it is consistent with existing law.

To conclude, *FAIR* suggests that providing equal access is not expressive conduct that merits free speech scrutiny. Is *FAIR*'s conclusion correct? What is the social meaning of a place of public accommodation baking a cake for a wedding, or taking photographs of a wedding? Is there something about the individual cases that changes the analysis? Or, as *Humanitarian Law Project* suggests, is there something about photography that does? The next two Parts explore that question as applied to bakers and photographers who open their shops to the public but who do not wish to serve same-sex unions.

---

[77] Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("[A]s an irreducible minimum, [expressive conduct] must constitute a communication. . . . [which] in turn, implies both a communicator and a communicatee . . . .").

[78] Strictly speaking, given the free flow of information strand of free speech jurisprudence, perhaps the speaker's intent is not required. Nevertheless, because these cases are usually brought by speakers making an autonomy-based claim, it makes sense to require that the claimant has an intent to communicate.

[79] An analysis that becomes too individualized also loses some of the benefits of a more rule-based approach.

## II. EXPRESSIVE CONDUCT: BAKERS

This Part examines the social meaning of a bakery providing a cake for a wedding. Assuming that there is no written message iced onto the cake, is it nonetheless expressive? If it is, does it communicate what religious objectors claim—approval of customers or their event? If so, what is it about baking a cake that conveys this message? To help pinpoint exactly why baking a cake might be expressive and what it may express, I will examine variations of the basic act of selling a cake. Ultimately, I conclude that whatever the vendor who is covered by public accommodations laws may communicate by baking and selling a wedding cake, it is not approval or disapproval of the people who buy it or of the event at which it is eaten. In other words, barring some unusual circumstances, the religious bakers do not have a colorable free speech claim.

### *A. Variations on Social Meaning*

As an initial matter, this analysis focuses on the social meaning of providing a cake rather than refusing to provide it. The complaints make clear that the wedding industry objectors believe there is something expressive about baking a cake or taking pictures for a wedding, and that is why they are religiously opposed to doing it. In particular, they argue that it signals approval of a union that their religion condemns. The bakers feel that "compelling them to prepare a cake for a same-sex wedding is equivalent to forcing them to 'speak' in favor of same-sex weddings."[80] Similarly, the owners of Elane Photography said that taking pictures of a same-sex wedding would "require them to create expression conveying messages that conflict with their religious beliefs."[81]

---

[80] Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at *3 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision); *see also* Yvonne Man, *Same-Sex Couple Denied Cake by Bakery, Owners Speak Out*, FOX 59 (Mar. 14, 2014, 10:35 AM), http://fox59.com/2014/03/14/same-sex-couple-denied-cake-by-bakery-owners-speak-out/ ("When asked to do a cake for an occasion or with a theme that's in opposition with our faith? It's just hard for us. We struggle with that."); *Why Some Wedding Businesses Say "I Don't" to Gay Couples*, *supra* note 5 ("I actually feel like I'm taking part in the wedding. Part of me goes to the reception. And in this case, that part of me doesn't want to be represented in a ceremony that I believe is unbiblical.").

[81] Robert Barnes, *Case Weighing Religious Freedom Against Rights of Others is Headed to Supreme Court*, WASH. POST (Mar. 2, 2014), http://www.washingtonpost.com/politics/case-weighing-religious-freedom-against-rights-of-others-is-headed-to-supreme-court/2014/03/02/88de86d4-a198-11e3-b8d8-94577ff66b28_story.html.

### *1. Social Meaning of a Sale*

To understand the social meaning of a cake sale, imagine a slightly different sale. Instead of a religious bake shop owner, imagine a religious linen shop owner who refuses to sell sheets to a same-sex couple. Is selling linen expressive? The sheet seller might argue that facilitating a same-sex relationship by selling wedding bed sheets—on which the same-sex couple will consummate their marriage—is tantamount to endorsing that consummation. This argument parallels the religious bakers: contrary to their religious convictions, they are compelled to express approval of same-sex relationships.

But generally when a store sells goods to a member of the public, that sale does not communicate any message of endorsement. The social meaning of a sale by a shop open to all and sundry is limited. It carries no connotation of endorsing customers or their events. That is, a sale for money in a place of public accommodation is not expressive conduct.[82] If selling sheets conveys no message of endorsement, then why should selling cakes, flowers, wedding gowns, or any other item?

### *2. Social Meaning of Sale of Mass Produced Item*

One difference is that the baker creates what she sells while the sheet store owner does not. Thus, it is necessary to consider a transaction that includes producing as well as selling an item. Perhaps an expressive component lies in the manufacture if not the sale. Yet, assuming that the seller owns the factory that makes the sheets, it is not clear that production adds any expressive component to the overall transaction. Indeed, when an item is mass produced for retail distribution, it is generally done without specific customers in mind.

### *3. Social Meaning of Sale of Artisanal Item*

If not machine production, perhaps artistic creation communicates approval. Imagine now that the seller embroiders fanciful borders on the sheets. Still, even hand-crafted with undeniable artistry, making and selling artisanal sheets does not really endorse same-sex marriage all that more than making and selling ordinary sheets.

---

[82] Does money equal speech? Money is considered speech only if it is spent on speech.

I am not making a high art versus low art distinction, where high art is expressive and low art is not.[83] If the scenario were changed to Picasso refusing to sell one of his paintings to a same-sex couple on their honeymoon from his open-to-the-public gallery, the conclusion that the sale does not express approval of the honeymooners or their nuptials would hold.

Instead, what matters is not the type of creative artistry but whether the creative artistry furthers a message of endorsement.[84] In general, any link between the creativity behind embroidery—or baking for that matter—and endorsement of same-sex marriage is tenuous at best.[85] Assuming there is something being expressed, it is not approval of same-sex marriage.

### *4. Social Meaning of Sale of Commissioned Artistic Creation*

That conclusion does not change if the artistic item is custom-made for someone, rather than made beforehand. Arguably, there is a difference between selling embroidered sheets or wedding cakes that are made before a couple walks into a shop and making them on commission. The latter involves providing services as well as wedding goods. Nonetheless, if there is no link between whatever the creative artistry expresses and endorsement of same-sex marriage, then it is unlikely that commissioning matters. After all, the compelled speech complaint (as opposed to the religious facilitation complaint) is that the business owners are being forced to communicate a message contrary to their beliefs. If no such message of approval exists, then their free speech claim should fail.

What if the bakers claim that their free speech rights are abridged merely because they are forced to create, regardless of message? If this were the complaint, it might matter whether the vendors created their item for sale beforehand or created it on commission. If a cake or dress or floral arrangement existed before a couple walked into their shop, then the wedding

---

[83] I find that problematic for various reasons, among which is that the binary is often gendered. *See, e.g.*, Gill Perry, *Introduction: Gender and Art History*, *in* ART AND ITS HISTORIES: GENDER AND ART 8, 24 (Gill Perry ed., 1999) ("[F]eminist art history has often drawn attention to the separation within patriarchal culture of a predominately masculine sphere of 'high art' from a more feminine sphere of applied or decorative art, of embroidery and 'craft.'").

[84] *Cf.* Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 493 (1984) ("In applying *Spence* to ambiguous conduct, a court should ask whether the conduct is relevant to the actor's message.").

[85] The analysis might differ if the seller were asked to embroider "God smiles on this union," or some other message or decorative motif that itself carried a message of endorsement.

vendors are never forced to create an item, they are only forced to sell it.[86] If the wedding vendors must make an item on commission specifically for the couple, on the other hand, then the state compels creative conduct.

However, forced creation, irrespective of message, is not at issue. The bakers' free speech complaint is that by providing creative services for same-sex weddings they are essentially forced to endorse same-sex marriage.[87] Therefore, whether forced creative conduct regardless of the message communicated implicates free speech is not a question raised by the wedding vendor cases.

Nonetheless, even if the question were raised, it is not clear that forced creative conduct, irrespective of message, triggers the Free Speech Clause. It is true that such conduct has a creative, and therefore arguably expressive, component. Yet that cannot be enough. As the Supreme Court has observed, "It is possible to find some kernel of expression in almost every activity a person undertakes,"[88] including walking down the street.[89] Thus, every action, including a sale, may have an expressive dimension.[90] There is certainly an endless list of occupations with a creative element.[91] In the wedding industry alone, creative professionals include—in addition to bakers and photographers—florists, wedding gown designers, stationers, caterers, party planners, deejays, singers, and musicians. Yet the mere presence of some

---

[86] An already-existing cake might mean two things. One, it might mean the cake (or bouquet or wedding gown) is ready for purchase. Or it might mean the design already exists, and the couple selects from a list of a pre-existing options. If the creative aspect centers around the design, then neither should count as creating something on commission.

[87] *See, e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428, 432 (N.M. Ct. App. 2012) *aff'd*, 309 P.3d 53 (N.M. 2013) ("Elane Photography denied Willock's request to photograph the ceremony based upon its policy of refusing to photograph images that convey the message that marriage can be defined to include combinations of people other than the union of one man and one woman.").

[88] City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

[89] *Id.*; *see also* Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1550 ("The way a person walks tells us something about her mood. In addition, it communicates to us that she is walking. It also communicates that she is able to walk.").

[90] Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1235 (2014) ("[A]ny business's provision of a good or service to someone on an equal basis with others can always be characterized as expressive. The provision of the good or service expresses the message, at the least, that the customer is entitled to be treated like any other customer." (emphasis omitted)).

[91] Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 DENV. U. L. REV. 495, 525 (2014) ("[A] vast array of individuals providing services can plausibly claim that they are also engaged in providing artistic or expressive services.").

expressive or creative component without more cannot suffice to trigger the Free Speech Clause. Otherwise, virtually all conduct would be expressive conduct for free speech purposes.[92]

We need a principled way to distinguish between conduct with an expressive/creative component that is covered by the Free Speech Clause from conduct that is not. This Article proposes that compelled expressive conduct (including compelled creative conduct) is not cognizable as free speech infringement unless the speaker/creator is forced to communicate a viewpoint contrary to her own. To be more precise, the speaker must believe that she is communicating a message that she disagrees with, and the audience must understand the speaker to be communicating that objectionable message. The audience need not know that the speaker disagrees with the message, but must read her conduct as communicating it. The Free Speech Clause protects expressive conduct from government bans to ensure that the actor is able to express a particular message. Similarly, the Free Speech Clause should protect expressive conduct from government compulsion when the actor does not want to express a particular message. In short, compelled expressive conduct should trigger free speech scrutiny only when someone is forced by their actions into conveying a viewpoint they disagree with.[93]

Although courts have not generally stated the rule so bluntly, it mostly aligns with current doctrine. In its compelled speech cases—not even its compelled expressive conduct cases—the Supreme Court has mostly struck down laws that forced speakers to articulate an ideological position contrary to their own.[94] "In short, there is no 'generalized right not to speak.'"[95]

---

[92] It surely would lead to endless challenges to public accommodation laws. *Id.* at 525 ("Recognizing an exemption to public accommodations statutes for individuals who perform artistic or expressive conduct would likely afford such a wide-ranging exemption that the central purpose behind public accommodation laws—the 'elimination of discrimination'—would be severely undermined, if not gutted." (footnote omitted)).

[93] Notably, the paradigmatic compelled speech cases with actual speech involve people forced to articulate messages with which they disagreed. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (holding a compulsory flag salute unconstitutional because it allowed "public authorities to compel [the plaintiff] to utter what is not in his mind"); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding a mandatory state motto on a license plate unconstitutional because it "forces an individual . . . [to] foster[] public adherence to an ideological point of view he finds unacceptable"); *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995) (holding that forcing parade organizers to allow an LBGT group to march in a parade with a banner was unconstitutional because "when dissemination of a view contrary to one's own is forced upon a speaker . . . the speaker's right to autonomy over the message is compromised").

[94] Compelled expressive conduct cases are rare. But even with compelled speech, the times that the Supreme Court has found a compelled speech violation usually involved forcing someone to express an ideological position contrary to their own. *See supra* note 93 (listing compelled speech cases); *see also* Pac.

This proposed rule draws the line between covered and uncovered compelled expressive conduct at the point where free speech concerns become salient. In other words, it is drawn at the point where what we think is problematic about compelled speech comes into play. The three most commonly articulated free speech goals are (1) to encourage a diverse marketplace of ideas to help with our search for knowledge;[96] (2) to facilitate participatory democracy;[97] and (3) to promote individual autonomy, self-expression, and self-realization.[98]

The free speech goal placed most in jeopardy by compelled speech is promoting individual autonomy. Forcing someone to speak might compromise speaker autonomy in various ways: It physically forces someone to speak (or create) when she would rather stay silent.[99] Worse, it may compel her to articulate a view with which she disagrees, provoking a clash between her

---

Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 4, 20 (1986) (striking a law that required a company to carry messages of third parties whose viewpoint clashed with the company's); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (holding that a state cannot compel nonunion members to pay for a union's ideological messages as opposed to union-related activities). In contrast, the Court has upheld compelled speech that lacked this ideological compulsion. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (requiring a mall owner to allow expressive activities on his property did not violate free speech in part because he was not forced to affirm an ideology with which he disagreed).

There are two exceptions. There is a line of cases involving the right to anonymous speech. In *Talley v. California*, the Supreme Court struck down a law requiring disclosure of names and addresses on political pamphlets, arguing that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." 362 U.S. 60, 64 (1960). One might argue that the concern for anonymity might justify triggering free speech scrutiny any time someone is forced to articulate a viewpoint, even one they agree with. Of course, banning anonymous speech and compelling speech are not quite the same. The first presents the risk that a speaker unable to speak anonymously decides to remain silent, and speech is chilled. The second, where a speaker must speak, does not present this same risk. *See infra* note 113. In any event, anonymity is not at issue in the wedding vendor challenges.

The one compelled speech case that involved neither viewpoints nor anonymity is an outlier. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 784 (1988). In *Riley*, the Supreme Court struck a law requiring professional fund-raisers of charities to disclose the percentage of contributions that actually went to charitable activities. *Id.*

[95] Steven H. Shiffrin, *What is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 504 (2014).

[96] *See, e.g.*, JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 20–21 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859); *see also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989) (describing the "truth discovery" justification for free speech).

[97] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26–27 (1965); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2368 (2000).

[98] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

[99] Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1298 (2014).

mind and her words.[100] Worst of all, when someone is forced to speak, listeners may believe the opinion is the speaker's actual views.[101]

Compelled conduct should be a matter of free speech concern only when it involves the latter two.[102] To start, not all infringements on autonomy raise constitutional issues. The state compels us to do things we might rather not do all the time. It is inevitable in a society with laws. You might want to stop at a green light, but traffic laws require you to move.[103] Granted the issue here is not just compelled conduct but compelled expressive conduct. Still, if the main critique to compelled expressive conduct is that the actors would prefer not to act rather than that they disagree with the message communicated by the act, then the actual complaint is not especially different. Therefore, being required to perform a task is simply not a sufficient infringement on free speech autonomy, even if it is an expressive task.[104]

In contrast, being forced to perform a task that communicates a viewpoint contrary to your own should raise free speech red flags.[105] Although having people misattribute that viewpoint to you makes it even worse, misattribution is not necessary.[106] Instead, it is enough if the state forces you to say something you disagree with.[107] That is, the government's compulsion should trigger free speech scrutiny when it creates a clash between what someone believes and what she must communicate. The fact that an audience understands that it is not the compelled actor's personal opinion does not mitigate the affront of

---

100 *Id.* at 1299.

101 *Id.* at 1299–300.

102 In other words, being forced to act, speak or create when one prefers not to is not enough to trigger free speech scrutiny.

103 *Cf.* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 889 (1994) ("Someone may be 'coerced' by the threat of sanctions to stop at a traffic light. But in another, more relevant sense, 'coercion' connotes the deliberate and wrongful subjecting of one human being to the will of another or domination that disrespects the other's equal moral worth.").

104 I am of course assuming that another clause besides the Free Speech Clause of the Constitution does not prohibit the government compulsion.

105 It is the difference between forcing a history student to describe the Pledge of Allegiance and forcing a student to take the Pledge. Thanks to Aaron Caplan for this distinction.

106 Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 434, 457 (Michael C. Dorf ed., 2d ed. 2009) (arguing that compelled recitations of substantive views are constitutionally problematic because they "explicitly manifest indifference to the actual thoughts and judgments of the person required to speak").

107 Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

having to express the offending viewpoint in the first place. Such compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[108] Obeying traffic laws does not trample on this "sphere of intellect and spirit"; articulating an objectionable viewpoint does. Therefore, even if wedding vendors have the opportunity to clarify that they do not in fact support same-sex marriage, any law that compels them to endorse it warrants close scrutiny.[109]

Restricting free speech scrutiny to compelled expressive conduct that conveys a viewpoint contrary to one's own also makes sense because the other two free speech concerns—promoting a marketplace of ideas and facilitating democratic self-government—do not really kick in until then. These two goals both rely on the free flow of speech, which ensures that the full range of ideas and information are available for people's search for knowledge and political decision-making. These aims may be compromised by a discourse that is distorted by either untrue or confusing speech.[110] What the wedding vendors express cannot be described as inaccurate misinformation. It might, nevertheless, cause confusion: compelled expressive conduct that conveys a viewpoint the speaker does not hold can distort the discourse by making people believe a particular opinion is much more popular than it actually is.[111] In turn, this mistaken view of a message's popularity "will cause audiences to credit it more than they would have otherwise, as studies show that the perceived popularity of a message can increase its persuasiveness."[112] This error, however, occurs only when a speaker is forced to articulate a viewpoint not her own.[113]

My proposed approach would mean that claims of compelled creative conduct, like any claim of compelled expressive conduct, would not be

---

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

[109] A closer look does not guarantee that the wedding vendors prevail: the requirement might pass heightened scrutiny if the government's purpose is sufficiently strong and the means sufficiently tailored to justify the free speech infringement.

[110] Corbin, *supra* note 99, at 1293.

[111] Imagine, for example, if all government employees were required to bear specialty license plates supporting one sports team as opposed to another.

[112] Corbin, *supra* note 99, at 1295.

[113] The risk of chill, another free speech worry, is also much reduced. Compelled speech might chill speech if a speaker decides to cease speaking rather than convey the mandated message. But this risk is small when the speaker is merely forced to communicate something that comports with her views, or at least is not at odds with it.

cognizable unless the compelled actors are forced to communicate a message they find objectionable. If an audience understood the wedding vendors' compelled conduct as endorsing same-sex marriage—a message that is anathema to the vendors—then the compulsion would trigger free speech protections. Without that message, however, compelled conduct, even if creative, would not.

In this case, a shop providing a service, even a creative service, even on commission, does not generally convey endorsement of its customers or their events. Consequently, the wedding bakers' compliance with public accommodation laws does not merit free speech scrutiny unless there is something about the context that changes the social meaning of cake-baking by a bakery open to the public. The next section addresses this possibility.

### *B. Does Context Change the Analysis?*

Even if baking a cake for a wedding does not in general carry expressive meaning, perhaps the surrounding circumstances overcome that presumption. After all, social meaning is fluid.[114] Just as destroying a draft card became expressive when draftees began protesting the Vietnam War, perhaps baking a cake has likewise taken on expressive meaning in the wake of marriage equality. Or perhaps there is something about the individual particulars of the objecting vendors that bolsters their claim that baking a cake for a same-sex wedding does in fact communicate approval of same-sex marriage.

#### *1. The Broader Context Argument*

Although heretofore providing a service at a business open to the public did not connote approval, social meaning is not fixed.[115] On the contrary, it is capable of changing over time. Burning a draft card took on a whole new meaning during the Vietnam War, as it came to symbolize opposition to an unpopular war. Perhaps a similar transformation is occurring with regard to bakers and same-sex weddings.

Two significant cultural events might support this claim. First, business actions have taken on expressive meaning. At one point, for example, few

---

[114] Lessig, *Social Meaning*, *supra* note 72, at 954 ("Nor of course are these meanings fixed, or stable, or uncontested, or uniform across any collection of people. They change, they are contested, and they differ across communities and individuals.").

[115] *Id.* Nor is social meaning determinant. A confederate flag, for example, has more than one meaning.

would argue that a for-profit entity with thousands of employees exercised religion. We usually did not read the business practices of corporations as potential religious practices. Yet, after *Burwell v. Hobby Lobby Stores, Inc.* held that for-profit corporations were persons protected by the Religious Freedom Restoration Act,[116] and that providing insurance coverage for employees could infringe on the company's religious conscience, the social meaning of certain business practices has changed. Given the recognition of free exercise implications of corporate actions, perhaps we ought to rethink the free speech implications of for-profit activity generally. In particular, we may be witnessing a shift in the meaning of for-profit wedding services.[117]

Second, these cases are occurring against the backdrop of a major surge in LBGT rights. In the United States, same-sex unions are a relatively new phenomenon,[118] and the widespread availability of same-sex marriage more recent still. No state recognized same-sex marriages until 2003.[119] When the Supreme Court decided *United States v. Windsor* in 2013, same-sex marriage was available in only twelve states and the District of Columbia.[120] Within two years of the ruling, thirty-seven states and Washington, D.C. allowed gay couples to marry.[121] Finally, in its 2015 *Obergefell v. Hodges* ruling, the Supreme Court declared that the U.S. Constitution requires marriage equality.[122] Public opinion has likewise undergone a sea change: support for

---

[116] 134 S. Ct. 2751, 2775 (2014) ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

[117] To the extent that owners of public accommodation businesses make similar complaints outside the context of the wedding industry, one could point to the growing equality of the LBGT community outside the context of marriage equality.

[118] Strictly speaking, *legally recognized* same-sex unions are fairly recent. Same-sex couples have existed throughout our history. *See, e.g.*, RODGER STREITMATTER, OUTLAW MARRIAGES: THE HIDDEN HISTORIES OF FIFTEEN EXTRAORDINARY SAME-SEX COUPLES (2012).

[119] Massachusetts, or rather the Massachusetts Supreme Judicial Court, made same-sex marriage legal in 2003. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 973–74 (Mass. 2003). Although the Supreme Court of Hawaii had held that denying marriage to same-sex couples violated the state's Equal Protection Clause in 1993, the case was remanded and the state soon amended its constitution to ban same-sex marriages. HAW. CONST. art. I, § 23; Baehr v. Lewin, 852 P.2d 44, 59–67 (Haw. 1993), *as clarified on reconsideration* (May 27, 1993).

[120] 133 S. Ct. 2675, 2689 (2013) ("New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.").

[121] Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

[122] 135 S. Ct. 2584, 2604–05 (2015). The Court held that

> the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may

marriage equality, which hovered around 37% in 2005, reached 60% in 2015.[123] Given this context, perhaps we need to reconsider the meaning of providing services to same-sex weddings. If conduct that was not expressive became so when protesting a significant political issue like war, perhaps conduct that was not previously expressive becomes so when protesting a significant cultural change like LBGT rights.

However, just because the social meaning of an act can change does not mean it already has changed. The social meaning of a wedding vendor sale has not yet morphed into approval of the customers or events served, and courts should not abet any such change. Courts, like the law more generally, reflect and influence social meaning.[124] Although social meaning sometimes changes independently of courts, other times a court decision can play a role in that shift.[125] Burning a draft card came to represent political protest without the courts, and arguably, despite the Supreme Court's reluctance to acknowledge it in *O'Brien*. The same undeniable change has not yet taken place with regard to services to same-sex weddings. At most, the social meaning is in flux.

Moreover, courts should reject a change in the social meaning of public accommodation services. One reason to resist any shift in meaning is that it gives businesses a powerful tool to avoid government regulation. Multiple commentators have already noted the way in which companies have used free speech to curtail the government's ability to regulate in the public interest.[126]

---

> not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.

*Id.*

123 *Marriage*, GALLUP, http://www.gallup.com/poll/117328/Marriage.aspx (last visited Nov. 5, 2015) (showing that 60% of respondents in May 2015 believed that same-sex marriage should be "recognized by law as valid," up from 37% just ten years prior); *see also* George Gao, *Most Americans Now Say Learning Their Child Is Gay Wouldn't Upset Them*, PEW RES. CTR. (June 29, 2015), http://www.pewresearch.org/fact-tank/2015/06/29/most-americans-now-say-learning-their-child-is-gay-wouldnt-upset-them/ (reporting that the percentage of Americans who would not be upset if their child came out as gay or lesbian shifted from just 9% in 1985 to 57% in 2015).

124 *Cf.* Lessig, *Social Meaning*, *supra* note 72, at 949–50 ("Some social meanings are constructed; some are constructed by government.").

125 For example, whether the state endorsed the message on specialty license plates was an open question, as some courts had classified such speech as private speech and others as government speech. If the plates were private speech, that militated against a conclusion that the state endorsed the message on the specialty license plate. After the Supreme Court ruled that specialty license plates were government speech in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, it will be difficult to argue that the state is not endorsing the message of those license plates. 135 S. Ct. 2239, 2253 (2015).

126 *See, e.g.*, Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 233 (2014) ("In several leading cases, conservative judges have used the First

Previous commercial litigants, however, have targeted regulations of business advertising,[127] disclosures,[128] and other word-based regulations,[129] not nonverbal conduct that might be expressive. The attempt to transform the commercial practices of for-profit businesses into expressive conduct protected by the Free Speech Clause is new. This push builds upon *Burwell v. Hobby Lobby Stores, Inc*., which imbued for-profit corporate practices with religious meaning.[130] The criticisms of *Hobby Lobby* are legion.[131] Among them is that recognizing corporate religious liberty rights has helped resurrect *Lochner*-era libertarianism under the guise of First Amendment protections.[132]

---

Amendment in a libertarian manner to invalidate regulations that reflected liberal or progressive values."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1794 (2004) ("Similarly, objections to government regulation of business that were originally based on concern for economic liberty have become objections to the regulation of commercial advertising . . . ."); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 25 (2015) ("Objections having little to do with free speech at their heart are channeled into First Amendment challenges in U.S. law both because of the rhetorical force of free speech claims and because, relatedly, the First Amendment is much more likely to invalidate legislation than many other rights . . . .").

[127] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (striking ban on billboard advertisements near schools and playgrounds); Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291 (4th Cir. 2013) (striking ban on alcohol advertisements in college newspapers); Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997) (invalidating federal ban on broadcast advertisement of casino gambling); *cf.* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012) (invalidating a requirement that graphic warning labels be included on tobacco advertising and packaging), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

[128] *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (striking on free speech grounds SEC rule requiring companies to report whether minerals and mineral products are "conflict-free"), *overruled by Am. Meat Inst.*, 760 F.3d 18; Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 950 (D.C. Cir. 2013) (striking on free speech grounds NLRB rule requiring that "[a]ll employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights . . . ." (alteration in original)), *overruled by Am. Meat Inst.*, 760 F.3d 18; United States v. Caronia, 703 F.3d 149 (2d Cir. 2012) (striking on free speech grounds an FDA regulation barring promotion of drug's off-label uses).

[129] *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (striking a law which restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (invalidating FDA rule that exempted compounded drugs from FDA approval requirements if makers did not advertise or promote them).

[130] 134 S. Ct. 2751 (2014). While strictly speaking *Hobby Lobby* was decided under the RFRA rather than the Free Exercise Clause, RFRA protects the same interests.

[131] *See generally* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 279 (2015); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 138 (2015); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 304 (2014).

[132] *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). During the *Lochner* era, the Supreme Court regularly struck down labor laws designed to protect employees on the grounds that they interfered with the employer's (and employee's) right to contract. *Id.* The Court, whose

Similar concerns are at stake here.[133] The latest incarnation of the *Lochner*-esque revival is particularly worrisome because corporations are challenging on First Amendment grounds regulations designed to protect the less powerful. In *Hobby Lobby*, a corporation used religious rights to avoid compliance with employment protection law.[134] Infusing employer–employee relations with religious significance has increased the power of already powerful employers over their employees.[135] With wedding vendors, it is public accommodation law.[136] Granting free speech significance to the provision of wedding services makes customers belonging to historically subordinated groups more vulnerable to discrimination. Nor are wedding vendors the only religious objectors likely to bring free speech claims.[137] If their sales create a cognizable free speech claim, then why not sales by other vendors, or other conduct by other businesses?[138]

---

decisions were informed by social Darwinism and laissez-faire economics, assumed that the status quo was natural and pre-political, and that therefore government should not interfere with it. *Id.* Although long reviled, *Lochner*-style thinking has been making a comeback. Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 569 (2015) ("In the last decade, however, a new wave of libertarian scholars—operating closer to the mainstream of conservative legal thought—has argued anew for a revival of *Lochner*'s aggressive scrutiny for regulations that interfere with economic liberty.")

133 *See, e.g.*, Bagenstos, *supra* note 90, at 1239 ("[I]f the Supreme Court holds that secular, for-profit corporations have religious rights against the application of the ACA under RFRA, it is a very short leap to say that those corporations have speech and associational rights against the application of public accommodations laws under the First Amendment." (emphasis omitted)).

134 *Hobby Lobby*, 134 S. Ct. at 2776.

135 *See, e.g.*, Leslie C. Griffin, Hobby Lobby*: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 641 (2015) ("In the name of religious freedom, the Supreme Court authorized the Green family, the Christian owners of the Hobby Lobby corporation, to impose their religious faith upon their female employees through force of law."); Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 64 (2015) (noting "how much more value the *Hobby Lobby* Court gave to the religious concerns of employers than to the religious freedoms of their employees").

136 Earlier constitutional challenges to the public accommodation laws of the Civil Rights Act of 1964 were grounded in freedom of contract, association, and involuntary servitude. Bagenstos, *supra* note 90, at 1214–17. They were all rejected by the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260–62 (1964).

137 *See infra* notes 150–56 and accompanying text (listing examples of business owners refusing to serve the LBGT community); *cf.* Claire Galofaro & Adam Beam, *Same-Sex Marriage Fight Turns to Clerks Who Refuse Licenses*, ASSOCIATED PRESS (June 30, 2015, 7:09 PM), http://bigstory.ap.org/article/4d7db143743145a0a58530c7b88fad2a/same-sex-marriage-fight-turns-clerk-who-refuse-licenses (reporting that some judges and clerks in Alabama and Texas have in the name of religious liberty and free speech ordered their offices "to issue no marriage licenses at all").

138 In fact, recognition of free speech rights in this type of case might actually serve as a more powerful sword than religious rights, since it can be wielded by any objector with strong viewpoints (which is basically everybody), not just religiously devout objectors. Store owners, for example, might claim their overwhelming patriotism prevents them from selling items to undocumented immigrants lest it endorse illegal immigration.

To hold that the wedding vendors' conduct has an expressive component protected by the Free Speech Clause might also undermine free speech doctrine. It greatly expands what counts as expressive conduct, and an overly broad understanding of expressive conduct risks nullifying the distinction between covered "speech" and uncovered "conduct." Although some critics have insisted on the futility of the speech–conduct distinction especially vis-à-vis expressive conduct,[139] free speech jurisprudence needs it.[140] Otherwise, either all expressive conduct potentially triggers the Free Speech Clause, or none does.

A very expansive category also risks diluting potential protection for that category. Often, "The more broadly rights are drawn, the more difficult it becomes to enforce those rights stringently."[141] Because a broader right is more disruptive, it creates incentives to lessen its impact: "If every act becomes a potentially protected free speech act, then the test to measure its constitutionality may well weaken."[142] In short, although the social meaning of

---

While it is true that the current wedding vendors have all been religious, future ones might not be. Granted, perhaps only religious business owners would feel strongly enough to bring suit, but that seems unlikely. It is also possible that the courts are more open to the claims of religious objectors, though granting religious views more protection than other views is itself a free speech problem, as free speech is supposed to protect all views equally, no matter their popularity.

[139] *See* Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("A constitutional distinction between speech and nonspeech has no content. . . . Speech *is* conduct, and actions speak."); *infra* Part III.B.3.b.iii (describing approach that assumes distinction between speech and conduct is incoherent and therefore focuses on government's motive).

[140] *See, e.g.*, STANLEY FISH, THERE IS NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 105 (1994) ("The distinction [between speech and conduct] is essential because no one would think to frame a First Amendment right that began 'Congress shall make no law abridging freedom of action,' for that would amount to saying 'Congress shall make no law. . . .'"); *cf.* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 973 (2001) ("Although several scholars have contested the usefulness, as well as the accuracy, of this distinction as a tool for explaining the First Amendment, the problem of dividing speech from action consumes a significant part of case law and scholarship." (footnote omitted)).

[141] William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 567 (1985). This is especially true given that free speech claims are increasingly brought by businesses rather than actual people. *Cf.* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015) (noting that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights").

[142] MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 782 (3d ed. 2011) ("There may be . . . a kind of inverse relation between coverage and protections. They are like taffy: The wider we stretch the meaning of 'speech,' the thinner the barrier between us and the government."); *see also* Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 837 (2004) ("Nonetheless, the danger may be inherent in every attempt to expand a right, for at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access."). Professor Hamburger argues that free exercise protection suffered this fate: "[W]hen the right of free exercise of religion came to be defined broadly, it was rendered conditional on government interests." *Id.*

a commercial sale is capable of changing, we should resist this particular shift in understanding.

*2. The Specific Individual Context Argument*

The bakers might respond that the social meaning should be informed not only by the general social context but also their individualized context. Even if wedding services provided by businesses open to the public may not in general carry expressive connotations, if the individual vendor made a point of picking and choosing who they serve, and has only ever served couples who conform to their ideal of Christian marriage, the meaning of a cake or photograph may be different for them in particular, regardless of the wider social meaning of baking a wedding cake or taking a wedding photograph.

Conduct that is not generally considered expressive may become imbued with meaning due to circumstances. Chewing gum is generally not expressive. But after a principal suspends from school a black student but not a white student for the exact same chewing gum infraction, gum-chewing may take on meaning—understood by its audience—when students do it at a protest the next day. Could the creation of a wedding cake undergo the same transformation?

At the very least, for baking a cake to express approval, bakers would have to limit their services to customers and events they screen and support. As a factual matter, however, it is uncertain whether any plaintiff can actually make this showing.[143] None has claimed that they check every client for conformity to their religious beliefs and regularly turn away those who fall short. Indeed, it is unclear whether any wedding vendor has refused any customers besides gay ones,[144] such as couples who are atheists or who have engaged in extra-marital sex or other activities that clash with their religious convictions.[145] The dearth of such evidence weakens their argument that their participation in a wedding

[143] Elane Photography states that it refuses to take any photographs that present abortion, pornography, nudity, or polygamy in a favorable light. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 979 (2011). However, given that they specialize in weddings, with a sideline of engagement and family portraits, they are not likely to encounter (nor have they claimed to have encountered) requests to photograph anything related to these themes. *Id.* at 978–79.

[144] While the Huguenins did decline to document the making of a horror film, they have not claimed that they check every client for compliance with their religious beliefs and regularly turn away those who do not. *Id.* at 979.

[145] It is possible, but probably unlikely, that they do not condemn extra-marital sex. Indeed, it is hard to believe that the only tenet of their religion that matters is the gender of wedding partners.

indicates approval of that marriage, especially since they must overcome the presumption that commercial sales do not convey endorsement.[146]

Nor is it clear whether careful vetting for compliance with religious beliefs is even possible in a place of public accommodation. Such screening is generally incompatible with operating a shop that anyone can enter. By definition, places of public accommodation are open to the general public. (That non-selectivity helps create the presumption that places of public accommodation convey no message of endorsement of their customers when they provide a service, even if that service is expressive.) Moreover, part of the wedding vendors' individualized circumstances is that they have opted to run a business open to the public, as opposed to one that took only referrals.[147]

Of course, the foregoing assumes that courts should look to such individualized particulars as opposed to social meaning. Social meaning, even when informed by local events,[148] is readily available to audiences; specific practices of individual shops are not. The chewing gum incident would likely be well-known to the relevant audience, unlike the sales policy of each store in

---

[146] Howard M. Friedman, *Why Do You Speak That Way?—Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587, 589 (1988) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." (quoting Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984))); *cf.* Magid, *supra* note 84, at 492 ("Because sleeping is an ambiguous activity—that is, it can have an ordinary or a communicative purpose—the indicia of observer understanding must be particularly persuasive to overcome the strong presumption that sleeping, like other common activities, has no communicative purpose.").

[147] Part of the individualized context is also that they live in a location with a public accommodation law that bans discrimination on the basis of sexual orientation. The very fact that the law forbids them from discriminating makes the social meaning of service at least ambiguous. If a decision to serve a same-sex wedding were completely voluntary, it might be easier to attach meaning to it. Once it becomes mandatory, the decision to serve could just as easily be read as expressing the desire to obey the law rather than the desire to approve same-sex marriage. This ambiguity arguably did not exist in the chewing gum example. Thus, for audiences, at most, the meaning of the wedding vendors' conduct is ambiguous. *Cf.* Lessig, *Social Meaning*, *supra* note 72, at 966.

> In a context where there is no legal proscription against discrimination, the act of hiring or serving a black had a relatively unambiguous meaning—either a special favor for blacks or greed for money. But if that context were changed such that discrimination against blacks was illegal, then at the least, the decision to hire a black would have an ambiguous meaning. The businessman could be hiring or serving a black because of his concern for the status of blacks, or he could be hiring or serving blacks because of his concern to obey the law. By creating this important ambiguity, the law would function to reduce the symbolic costs of hiring blacks.

*Id.*

[148] Recall that social meaning may be community-specific. *See supra* notes 71–72 and accompanying text (defining social meaning).

town. Most people at a wedding, for example, could not name the wedding cake's bakery, never mind describe its service history. To assume that the audience's understanding of baking a cake is informed by major local events is one thing; to assume it is informed by the individual decisions of storeowners might go too far.[149]

Even assuming such individualized decisions are taken into account, in the bakers' case they fail to rebut the presumption that a sale is just a sale and not a message of approval. Moreover, as already discussed, there are good reasons to resist reading the baking of a wedding cake for a couple as approval of their marriage. In addition to the concerns expressed earlier about reviving *Lochner* and wreaking havoc in free speech jurisprudence, such a reading would risk nullifying public accommodation law. After all, the arguments advanced by the bakers are not limited to wedding vendors. They could apply to any place of public accommodation. That is, any place open to the public that is somewhat selective in whom they serve would be able to argue that, like the bakers, providing goods or services equals endorsement of the people and event served, and therefore is expressive conduct whose regulation triggers free speech scrutiny. Every single transaction in every store, hotel,[150] restaurant,[151] bowling alley,[152] doctor's office,[153] day care center,[154] auto repair shop,[155]

---

[149] Magid, *supra* note 84, at 481 ("The question in the hard cases of ambiguous conduct is not whether to apply *Spence*, but rather what contextual factors in a given case can and should be relevant in determining if the conduct is designed and perceived as expression." (emphasis omitted)).

[150] *See, e.g.*, Billy Hallowell, *Lesbian Couple Wins Discrimination Lawsuit Against Religious Bed and Breakfast Owner Who Denied Them a Room*, BLAZE (Apr. 16, 2013, 7:07 AM), http://www.theblaze.com/stories/2013/04/16/lesbian-couple-wins-discrimination-lawsuit-against-religious-bed-and-breakfast-owner-who-denied-them-a-room/.

[151] *See, e.g.*, Chris Ramirez, *LGBT Group Claims NM Denny's Denied Service, Used Homophobic Slurs*, KOB4 (Feb. 10, 2015, 4:58 PM), http://www.kob.com/article/stories/s3694403.shtml (reporting that a waitress in New Mexico refused to serve "fags and faggots"); *Arizona Lesbian Couple Told to 'Get a Room' by Restaurant Manager After Kissing During Anniversary Dinner*, HUFFINGTON POST (Feb. 29, 2012, 12:57 PM), http://www.huffingtonpost.com/2012/02/29/arizona-lesbian-couple-kiss-restaurant_n_1310737.html.

[152] *See, e.g.*, *Gay Plano Couple Asked to Leave Family Fun Center, Told They Are 'Not Family*,*'* DALLASVOICE.COM (Jan. 8, 2013, 2:09 PM), http://www.dallasvoice.com/gay-plano-couple-told-not-family-asked-leave-main-event-10136107.html.

[153] *See, e.g.*, N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court, 189 P.3d 959 (Cal. 2008) (rejecting doctors' claim that providing fertility treatment to a lesbian violated their religious rights); *see also* Tresa Baldas, *Pediatrician Wouldn't Care for Baby with 2 Moms*, DETROIT FREE PRESS (Feb. 19, 2015, 6:46 PM), http://www.freep.com/story/news/local/michigan/macomb/2015/02/18/discrimination-birth/23640315/.

[154] Joey Garrison, *Davidson Academy Turns down Children Because Parents Are Gay*, TENNESSEAN (Jan. 23, 2015, 10:52 AM), http://www.tennessean.com/story/news/2015/01/22/gay-nashville-brian-copeland-davidson-academy/22170797/; Hailey Heinz, *Child with Gay Parents Can't Enroll at School*,

taxicab,[156] and more would potentially implicate the Free Speech Clause. Indeed, the reasoning could apply to other conduct as well—such as providing housing, employment, or education—thereby making other anti-discrimination laws subject to free speech challenges. Ultimately, neither the general nor individual context provides sufficient reason to reinterpret the social meaning of providing wedding services, and many reasons caution against it.

* * *

In analyzing the conduct versus speech distinction in the context of services provided by businesses open to the public, it would appear that conducting a commercial transaction is ultimately conduct. That is, barring some explicit message of approval,[157] the sale of a cake, even if created with genuine artistry, even if commissioned, does not equate to compelled endorsement of the customer or her event. Furthermore, even if its social meaning is capable of changing, we should resist reading a shop's sale as endorsement. Otherwise the speech–conduct distinction could be rendered meaningless and every transaction could become subject to a free speech challenge.[158] In short, we should conclude, as one court did, that "[the bakers] have no free speech right to refuse because they were only asked to bake a cake, not make a speech."[159]

## III. CONDUCT PLUS EXPRESSION: PHOTOGRAPHERS

Challenges by wedding photographers present two potential differences. First, as opposed to wedding cakes, perhaps wedding photographs do communicate approval of same-sex marriage. After all, in contrast to cakes,

---

ALBUQUERQUE J. (July 28, 2012, 1:03 AM), http://www.abqjournal.com/main/2012/07/28/news/child-with-gay-parents-cant-enroll-at-school.html.

155 Faith Karimi, *Michigan Auto Repair Shop Says Yes to Gun Owners, No to Homosexuals*, CNN (Apr. 12, 2015), http://www.cnn.com/2015/04/17/us/michigan-business-bans-openly-gay-people/.

156 *Gay Chicago Couple Says a Kiss Got Them Kicked out of a Taxi Cab*, HUFFINGTON POST (June 3, 2013, 3:15 PM), http://www.huffingtonpost.com/2013/06/02/gay-chicago-cab-kiss-_n_3375104.html; *Oregon Cab Driver Who Refused Lesbian Couple Service Loses Permit*, HUFFINGTON POST (Aug. 22, 2013, 2:22 PM), http://www.huffingtonpost.com/2013/08/22/oregon-gay-cab-driver-permit_n_3796604.html; James Michael Nichols, *Houston Gay Couple Allegedly Kicked Out of Cab for Kissing*, HUFFINGTON POST (Oct. 24, 2014, 3:59 PM), http://www.huffingtonpost.com/2014/10/15/gay-couple-kissing-taxi_n_5983188.html.

157 Part II assumed no written messages on the cake.

158 Note that *Hobby Lobby*, which recognized facilitation as a substantial burden on for-profit entities, has already cleared the way for free exercise challenges to anti-discrimination laws.

159 Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at *9 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision).

they depict the actual wedding.[160] Second, unlike the bakers' cakes, the photographers' compelled work product—photographs—have long been recognized as speech. Do either of these differences mean that taking photographs for a same-sex wedding should trigger free speech scrutiny? I will address each potential difference in turn.

### *A. Wedding Photographs as Endorsement of Same-Sex Marriage*

The first question is whether photographs of a same-sex wedding communicate the photographer's endorsement of that wedding. Part II argued that the provision of a service by a place of public accommodation does not equate to approval of customers or their event. This section investigates whether that analysis still holds if the service is a picture of those customers or their event.[161] It argues that notwithstanding the wedding photographers' claim that the personal artistic choices they make translate into endorsing the wedding depicted, creative decisions do not automatically read as approval, especially when the public accommodations context neutralizes any potential endorsement.

The wedding photographers argue that requiring them to photograph a same-sex wedding forces them to endorse the wedding because "the artistic choices [made] regarding their photographs influence not only the power, but also the meaning of the message conveyed."[162] As anyone who has ever had their picture taken with their mouth full can testify, artistic decisions can influence the message conveyed by a photograph. There certainly is no gainsaying the creativity involved in taking a picture. The timing, lighting, perspective, and composition are all creative decisions that may affect the final

---

[160] Another difference is that, unlike bakers, photographers attend the wedding. That is, photographers provide their service at the wedding while bakers fulfill their service obligations at the bakeshop. In fact, this distinction is not a sharp one. Bakers usually bring and set up the cake at the wedding venue, while much of the photographers' work is done at the studio. In any event, although their presence may bear on a religious claim of forced participation, it is less relevant for deciding a forced speech claim. The issue, after all, is whether their photography communicates endorsement of same-sex marriages. The more relevant distinction is that wedding photographs depict the same-sex union while wedding cakes do not.

[161] The argument that artists necessarily endorse any event portrayed in their art is also unavailing. First, as discussed, these are artists running a business open to the public, not artists working independently who decide what they want to depict. Moreover, it is a fallacy that artists only portray scenes they admire and approve. For example, photojournalists would never make that claim.

[162] Brief of Wedding Photographers as Amicus Curiae Supporting Petitioner at 13, Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014) (No. 13-585).

image.[163] There is also cropping, color correction, and other modifications that happen in post-production.[164] For example, Elane Photography explained, "By cropping out a playful look on the face of a young child standing behind a kissing couple, Ms. Huguenin singlehandedly transforms a picture's message from humor to romance."[165]

In attempting to take pictures that will please clients, the professional photographer will no doubt end up depicting a same-sex wedding in a positive light instead of a negative one.[166] For some this is equivalent to endorsing the positively portrayed scene.[167] As one commentator observed, "If Huguenin actively formed the content of the photograph through her artistic manipulation of the medium, then the photograph likely contained her own expressive interpretation of the scene."[168]

But just because the photographer has communicated something, it does not mean it is her approval of same-sex marriage. Perhaps all that is communicated by flattering photographs is the photographer's professionalism. As with most professions, wedding photography has certain standards. These standards transcend any particular client or event, and a professional photographer is expected to meet them regardless of the scene portrayed. Consequently, satisfying those minimal requirements is less about personal expression and more about professional competence. Whatever emotion is conveyed, the photographer need not share it. Thus, a joyful wedding scene depicts the couple's joy, not the photographer's.[169] A photographer may well

---

[163] *See id.* at 15; Shiffrin, *supra* note 95, at 501 ("And, as an excellent amicus brief by wedding photographers detailed in *Willock*, the artistry of wedding photographers is far from trivial.").

[164] Brief of Wedding Photographers, *supra* note 162, at 7.

[165] Petition for Writ of Certiorari at 5 n.2, Elane Photography v. Willock, 134 S. Ct. 1787 (2014) (No. 13-585).

[166] Elane Photography, LLC v. Willock, 309 P.3d 53, 63 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). Elane Photography "creates and edits photographs for its clients so as to tell a positive story about each wedding it photographs, and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage." *Id.*

[167] Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1533 (2012) ("Requiring a photographer, on pain of civil sanction, to portray certain events in a positive light that she believes should not be so portrayed is essentially forcing her to support or adopt an idea not her own.").

[168] *Id.*

[169] Brief of Amici Curiae Steven H. Shiffrin & Michael C. Dorf Supporting Respondent at 31–32, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33,687), *cert. denied*, 134 S. Ct. 1787 (2014) ("[A]lthough the company is required under New Mexico law to photograph the ceremony in a way that meets professional standards, conveying joy, emotion, romance, and love within the ceremony, nothing in the record suggests that the company contests that same sex ceremonies lack these qualities and therefore, the compelled

be a storyteller, as an amicus brief written by wedding photographers argues, but the story told is about the day that two people wed,[170] not about the photographer's endorsement of same-sex marriage.[171] In short, photos capture what the couple is feeling, and "say nothing about the proper way to interpret the Bible and nothing about . . . childrearing."[172]

Even assuming that some creative decisions reflect the photographer's personal view, portraying a same-sex wedding positively still should not automatically read as endorsement of same-sex marriage. First, the message communicated by the wedding photographs is not altogether clear. In other compelled speech cases, the message was not ambiguous. The link between the Pledge of Allegiance and honoring the flag is clear,[173] as is the message in New Hampshire's state motto "Live Free or Die."[174] These examples both involved verbal messages, which are less likely to be ambiguous.[175] For example, in another cake refusal case, a customer requested a Bible-shaped cake with "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22" written on it, accompanied by a picture of two grooms holding hands with a large red X over them.[176] The link between the Bible verses and a message of condemnation of gay people is clear.[177] The link

expression does not clash with the company's expressed beliefs."); Shiffrin, *supra* note 95, at 506 (arguing that at most "she must photograph a commitment ceremony in ways that capture the celebration's emotional, loving, romantic, and joyful aspects, but the record does not suggest it is any part of her views (including her religious or public policy views) that same-sex commitment ceremonies do not contain these aspects").

170 Brief of Wedding Photographers as Amici Curiae Supporting Petitioner at 18, Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014) (No. 13-585) ("The goal of a wedding photojournalist is to 'tell the whole story of the day.'" (quoting GLEN JOHNSON, DIGITAL WEDDING PHOTOGRAPHY: CAPTURING BEAUTIFUL MEMORIES 19 (Wiley 2006))).

171 The wedding photographers attempt to bolster their case by comparing wedding photographers to tattoo artists. Brief of Wedding Photographers, *supra* note 162, at 28–29. Like wedding photography, tattooing is a deeply creative and expressive endeavor. *Id.* At the same time, few would look at a tattoo of a heart with "mom" written in it and think that the tattoo artist loves the inked person's mother.

172 Shiffrin, *supra* note 95, at 507.

173 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626, 632–33 (1943).

174 *See* Wooley v. Maynard, 430 U.S. 705, 707 n.2 (1977).

175 Of course, writing does not guarantee clarity. In *Morse v. Frederick*, the meaning of a student's banner proclaiming "BONG HiTS 4 JESUS" is accurately described as "cryptic." 551 U.S. 393, 397, 401 (2007). The school principal thought it promoted illegal drug use; the student argued it was mere nonsense. *Id.* at 401–02.

176 Alan Gathright & Eric Lupher, *Denver's Azucar Bakery Wins Right to Refuse to Make Anti-Gay Cakes*, 7NEWS DENVER (Apr. 23, 2015, 7:43 PM), http://www.thedenverchannel.com/news/local-news/denvers-azucar-bakery-wins-right-to-refuse-to-make-anti-gay-cake. Although the baker agreed to make the cake, she refused to write the requested words. *Id.* The baker also offered to provide a pastry bag and icing so the customer could write the messages himself. *Id.*

177 Moreover, the Bible verses clarify the meaning of another picture—the two groomsmen with a large red X over them—in case the message conveyed by being X'ed out was not itself sufficiently clear.

between pictures of a same-sex wedding and a message of approval of same-sex marriage is not quite as obvious. Whatever link exists cannot compare to the link between the hate cake's Bible verses and its message, or even the message conveyed by an image of a same-sex wedding couple with a big X over it. Then again, even if the wedding photographs were accompanied by a big check or thumbs up, what exactly would be endorsed? The happiness of two people, or that the institution of marriage should extend to them?[178]

Second, perhaps the artistic choices that express approval (assuming some choices do read as approval) have to predominate in order to trigger protection as expressive conduct, and perhaps they fail to do so with wedding photographs. Well-done lighting and thoughtful composition, while creative and crucial to the final image, do not necessarily communicate endorsement of same-sex marriage. Of course, deciding which creative aspects "predominate"—those that contribute to a message of endorsement versus those that do not—may be a mare's nest.[179]

Third, the context of being a photograph taken by a studio that qualifies as a public accommodation likely neutralizes any message of endorsement, at least when that endorsement is uncertain.[180] The commercial, public accommodation context was certainly decisive for the New Mexico Supreme Court in *Elane Photography*, which rejected a free speech claim by a

---

[178] Presumably one can be happy for a couple without endorsing all their choices. I can be thrilled that two friends have wed while disagreeing with the tenets of the church where they married.

[179] It may even be a cousin to deciding whether the speech or conduct aspect in expressive conduct "predominates." *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17–18 (1970); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 20 (1966). Emerson's approach was severely criticized by many who argued that it was impossible to separate out the speech and conduct aspects. *See, e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (arguing that burning a draft card was "100% action and 100% expression"); *cf*. Henkin, *supra* note 139, at 79 ("A constitutional distinction between speech and nonspeech has no content. . . . Speech *is* conduct, and actions speak."). At the same time, some First Amendment tests do ask which of two aspects predominates. For example, the *Lemon* test in Establishment Clause analysis asks whether there was a predominantly secular or predominantly religious purpose or effect to challenged government action. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[180] Some might go further and argue that the context of a commercial transaction by a place of public accommodation neutralizes any potential message of endorsement by the service provider—even very clear ones. In other words, even if icing spells out "same-sex marriage is an abomination," the only conclusion an audience would draw is that someone asked the baker to write those words. I am making a more limited claim: when the message itself is unclear—what does the photograph convey about same-sex marriage?—the public accommodation context suggests that it does not convey any particular viewpoint, and certainly not the photographer's.

photography studio that refused to photograph a same-sex commitment ceremony.[181]

While context can imbue an ambiguous display or conduct open to interpretation with meaning, so too can context drain or minimize it. Just as the Supreme Court has found that a state-owned Madonna painting should not be read as endorsing religion in contexts such as an art museum,[182] a picture of a same-sex wedding should not be read as endorsing same-sex marriage in the context of a hired photography studio that holds itself out as open to the public.[183] For the same reason, when Sears photographs a married man and his mistress (or a married woman and her paramour) in an embrace, we generally do not view the photograph as endorsing adultery.

If nothing else, we certainly do not view that photograph as Sears's or the photographer's approval of adultery. Or, as the New Mexico Supreme Court noted,

> Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom).[184]

Thus, the photographers' expressive conduct claim parallels the bakers' unsuccessful claim. Both weddings vendors complain that they are forced to endorse marriage equality.[185] But as the trial court concluded, Huguenin's only message as a paid photographer was "fine photography of special moments."[186]

---

[181] Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) ("It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work.").

[182] Van Orden v. Perry, 545 U.S. 677, 742 (2005) (Souter, J., dissenting) ("[T]he Government of the United States does not violate the Establishment Clause by hanging Giotto's Madonna on the wall of the National Gallery."); Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.").

[183] Similarly, a wedding photographer taking a picture of a same-sex couple at a synagogue endorses neither Judaism nor same-sex marriage.

[184] *Elane Photography*, 309 P.3d at 69–70.

[185] *Id.* at 63.

[186] Elane Photography, LLC v. Willock, CV-2008-06632, 2009 WL 8747805, para. 25 (N.M. Dist. Ct. Dec. 11, 2009); *see also* Shiffrin, *supra* note 95, at 509 ("It does not force the photographer to endorse

### *B. Photography as Speech*

The photographers' case differs from the bakers' for another reason; photographs, like words, have long been viewed as speech.[187] Consequently, perhaps the expressive conduct analysis is inappropriate. That is, perhaps the public accommodation law triggers free speech scrutiny not because the wedding vendors' services amount to expressive conduct but because photographs are speech. In deciding what level of scrutiny to apply, perhaps compelling someone to take pictures is akin to compelling someone to write words, whether they be "God condemns same-sex marriage" or "God supports same-sex marriage."

If what is at issue is not conduct—which may or may not trigger free speech protections depending on whether the conduct has a sufficiently expressive component—but straightforward speech, then should it not be covered by the Free Speech Clause? In fact, several commentators have compared *Elane Photography* to the classic compelled speech cases[188] like *Barnette*, where public school students were required to pledge allegiance to the U.S. flag,[189] and *Wooley*, where drivers were required to display "Live Free or Die" license plates.[190] If the comparison is apt, instead of analyzing the social meaning of wedding pictures, a court should plunge straight into a speech analysis. Nonetheless, there are several reasons why wedding photographs are not comparable to these seminal compelled speech cases.

---

same-sex commitment ceremonies, and it does not force her to endorse same-sex marriage because, from an objective perspective, photographers do not endorse the events they photograph.").

[187] Kaplan v. California, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection."); Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (holding that motion pictures fall within the scope of speech protected by the First Amendment); *see also, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 97 (1982) ("It is not always true that 'one picture is worth a thousand words', but the fact that this ancient proverb treats the two as different denominations of the same currency suggests that words and pictures have similarities particularly relevant in the context of the principle of freedom of speech.").

[188] Gottry, *supra* note 143, at 988–89 ("A more appropriate case to analogize to [*Elane Photography*] may be *Wooley v. Maynard* . . . ."); Nabet, *supra* note 167, at 1535–34 (comparing *Elane Photography* to *Barnette* and *Wooley*); Eugene Volokh, *Amicus Curiae Brief:* Elane Photography, LLC v. Willock, 8 N.Y.U. J.L. & LIBERTY 116, 119 (2013) ("This case is largely controlled . . . by *Wooley v. Maynard* . . . .").

[189] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[190] Wooley v. Maynard, 430 U.S. 705, 707 (1977).

### *1. Compelled Service Involves Conduct*

First, the *Elane Photography* challenge to New Mexico's public accommodation law cannot be considered a pure speech case because it involves conduct as well. The claim is not that taking a photograph involves conduct. Arguably, so does writing and several other forms of expression which are nonetheless considered pure speech.[191] Rather, the claim is that providing services is conduct. Therefore, unlike the regulation in *Barnette* which on its face ordered speech (the recitation of the Pledge),[192] the public accommodation law in *Elane Photography* on its face orders conduct (the provision of services).[193] Consequently, *Elane Photography* is not in fact analogous to *Barnette*.

While the students in *Barnette* were required to *say* something, the wedding vendors are required to *do* something. Public accommodations laws require that businesses that are open to the public, including creative ones, make their services available to anyone (in a protected category) who requests them. In short, the law requires that they do not discriminate, which is a regulation of conduct, not speech. Consequently, *Elane Photography* cannot be described as involving pure speech. Thus, even assuming that the law compels expression, it compels expressive conduct, and therefore would be subject to the intermediate scrutiny of *O'Brien* rather than the strict scrutiny of *Barnette* and *Wooley*.

### *2. Compelled Photographs Are Not Problematic Compelled Expressive Conduct*

Perhaps another reason why wedding photographs do not merit the same scrutiny as the words in *Barnette* and *Wooley* is that pictures are different than words in free speech jurisprudence. Despite some Supreme Court language to the contrary, perhaps there exists a free speech hierarchy with verbal

---

191 *See, e.g.*, Steven L. Winter, *Re-Embodying Law*, 58 MERCER L. REV. 869, 890 (2006) ("[A]ll speech involves action of some sort (talking, writing, printing, etc.) . . . .").

192 *Barnette*, 319 U.S. at 626.

193 *Id.* at 628–29. Strictly speaking, the law required students to say the pledge of allegiance (speech) and salute the flag (conduct). *Id.* Saluting might nonetheless be considered akin to "pure speech" in the same way that wearing black armbands to protest the Vietnam War was in *Tinker*. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969). In both cases, the only purpose of the conduct was communicative, and the only effect was due to the communicative impact. *Tinker*, 393 U.S. at 505–06; *Barnette*, 319 U.S. at 628–29.

expression at the top.[194] Or perhaps words are not considered more worthy, but merely more clear. That is, perhaps words are more protected because they are easier to read. If, as suggested earlier,[195] compelled expressive conduct only becomes problematic when the speaker is forced to sponsor a message or point of view with which she disagrees,[196] that is more likely to happen with words than photographs because words are generally less ambiguous. To wit, compelled speech claims might be weaker with images because their messages tend to be much less self-evident. This is not to argue that words are always clear (or that photographs never are), nor that the category of words expressing a viewpoint is well-defined, but merely to suggest that it can be easier to discern a viewpoint in something verbal than in a picture.

If a law requiring a baker to write "Happy Birthday" does not trigger heightened scrutiny—even though it involved words—because it does not force the baker to express a message with which she disagreed, then arguably neither does a law requiring a wedding photographer to take flattering pictures of a same-sex wedding, assuming that such photographs do not communicate support of same-sex marriage.

### *3. Compelled Words and Images Are Not Always "Speech"*

Third, even if photographs were equivalent to words, words—and therefore photographs—do not always equal "speech" that triggers free speech scrutiny. That is, speech in the colloquial sense does not always amount to "speech" in the constitutional sense.[197] As a result, conduct involving words (and photographs) is not necessarily of First Amendment significance. Indeed, the argument from the previous section that not all compelled expressive conduct

---

[194] *Cf.* Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 822–23 (2014) (noting but critiquing that in the Establishment Clause context, "Courts tend to assume a lower intensity of communicative impact when religious symbols are at issue than when spoken or written religious words are at issue, manifesting a hierarchical binary: text is presumed active and privileged over images which are merely passive"); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward A First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2273 (2004) (noting that the Supreme Court's "normative bias in favor of less 'primitive' expression, namely verbal expression, accounts for the current low status of symbolic speech").

[195] *See supra* notes 96–113 and accompanying text.

[196] The free speech argument against compelled photography, after all, assumes that the photographers are forced to express an idea they cannot condone. *See, e.g.*, Volokh, *supra* note 188, at 129 ("Moreover, the photographs at a wedding must implicitly express a particular viewpoint: Wedding photographers are hired to create images that convey the idea that the wedding is a beautiful, praiseworthy, even holy event.").

[197] SCHAUER, *supra* note 187, at 91–92 ("[Speech] must be defined by the purpose of a deep theory of freedom of speech, and not by anything the word 'speech' might mean in ordinary talk.").

triggers free speech scrutiny is an example.[198] The question then becomes, when are words and photographs "speech" and when are they not?[199]

*a. Widespread Confusion*

This confusion regarding when words/images amount to "speech" is not limited to wedding photography. In some cases, words are not treated like speech but are characterized as conduct.[200] Title VII's ban on sexual harassment in the workplace provides an example.[201] Verbal comments alone may create a hostile work environment in violation of Title VII.[202] The Supreme Court has characterized this speech as conduct, namely the conduct of discrimination.[203]

Doctors' conversations with their patients—an area of much recent litigation—is another example. Lower courts have been divided in their

---

198 *See supra* Part III.B.2. and accompanying text.

199 *See* Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 760 (2003) ("A great deal of speech is treated as unprotected conduct for constitutional purposes."); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. FORUM 165, 179 (2015) ("Virtually everything humans do requires the use of language. . . . If speech is understood to mean human communication, it is literally everywhere.").

200 Winter, *supra* note 191, at 890 ("[S]ome forms of speech are subject to regulation because they are tantamount to conduct.").

201 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing the existence of a hostile work environment claim under Title VII).

202 *See, e.g.*, Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1417 (10th Cir. 1997) (holding that verbal conduct without accompanying physical conduct can establish a hostile work environment claim); Black v. Zaring Homes Inc., 104 F.3d 822, 826 (6th Cir. 1997) ("[V]erbal conduct alone can be the basis of a successful hostile work environment claim."); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996) ("Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive as to . . . create an abusive working environment that violates Title VII.").

203 Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) ("In *Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R.A.V. v.* [*City of*] *St. Paul*, we cited Title VII as an example of a permissible content-neutral regulation of conduct." (citation omitted)). Arguably, this dicta is in tension with *Holder v. Humanitarian Law Project*, which subjects to free speech scrutiny a ban on material support to certain terrorist organizations as applied to support in the form of advice. 130 S. Ct. 2705 (2010). *Wisconsin* suggests that discrimination in the form of words is best characterized as the conduct of discrimination. *Wisconsin*, 508 U.S. at 487. *Humanitarian Law Project* suggests that providing aid in the form of words is best characterized as speech: "The law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statutes consists of communicating a message." *Humanitarian Law Project*, 130 S. Ct. at 2724. But the difference may not be due to a change in the Court's treatment of how to characterize what is regulated but due to how it views the regulations: In *Wisconsin*, the regulation was deemed content-neutral, while in *Humanitarian Law Project* the Court found it to be content-based. *Humanitarian Law Project*, 130 S. Ct. at 2723; *see infra* note 282 and accompanying text (discussing current doctrine on conduct/speech mixtures).

treatment of these exchanges. Take mandatory abortion counseling laws,[204] which require doctors to convey certain information to their abortion patients.[205] More than one state, for example, has demanded that doctors show and describe an ultrasound of an unwanted pregnancy to women seeking to terminate.[206] The Fifth Circuit viewed this "informed consent" requirement as essentially regulating conduct, the practice of medicine.[207] In contrast, the Fourth Circuit held that these mandatory ultrasound laws clearly implicate doctors' free speech rights as well as the regulation of professional conduct, and applied intermediate scrutiny.[208]

A similar divide exists with decisions addressing state bans on therapies designed to make gay people straight, a practice repudiated by the medical profession.[209] These bans forbid licensed therapists from subjecting minors to the discredited "gay conversion therapy."[210] The Ninth Circuit held that the practice of therapy, even if talking therapy, is the practice of medicine and

---

[204] The Supreme Court provides minimal guidance on "informed consent" laws directed at abortion patients. In *Planned Parenthood v. Casey*, the Supreme Court decision that purported to uphold *Roe v. Wade*, the Supreme Court made an opaque comment about mandatory abortion counseling, noting that "[t]o be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." 505 U.S. 833, 884 (1992) (citations omitted).

[205] *State Policies in Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited Nov. 5, 2015).

[206] *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (last visited Nov. 5, 2015).

[207] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575 (5th Cir. 2012) ("The only reasonable reading of *Casey*'s passage is that physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]' This applies to information that is 'truthful,' 'nonmisleading,' and 'relevant . . . to the decision' to undergo an abortion." (alteration in original) (citation omitted)).

[208] Stuart v. Camnitz, 774 F.3d 238, 245 (4th Cir. 2014) ("We agree with the district court that the Requirement is a content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny to survive.").

[209] After emphasizing that "[t]he most important fact about these 'therapies' is that they are based on a view of homosexuality that has been rejected by all the major mental health professions," the American Academy of Pediatrics, American Psychological Association, the American Counseling Association and many other groups condemned them, finding that attempts to change sexual orientation "have serious potential to harm young people." JUST THE FACTS COAL., JUST THE FACTS ABOUT SEXUAL ORIENTATION AND YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS, AND SCHOOL PERSONNEL 5–6 (2008), http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

[210] CAL. BUS. & PROF. CODE § 865 (West 2013); N.J. STAT. ANN. § 45:1-54 (West 2013).

therefore conduct that does not trigger any free speech scrutiny.[211] In contrast, the Third Circuit subjected a similar ban to intermediate scrutiny.[212]

What free speech principles explain these diverging decisions? It may be that the courts are using the words "speech" and "conduct" as terms of art that reflect a conclusion about an issue unrelated to the question of speech versus conduct. In the sexual harassment example, the Supreme Court may have decided that the equal protection interests of women trapped in hostile work environments simply outweighed the speech interests of their harassers.[213] In the medical speech examples, the courts may be struggling with issues relating to professional speech.[214] Then again, these determinations may in fact reflect differing views about speech versus conduct, an issue lurking in all these cases. Although it reaches speech, Title VII's goal is to end discriminatory conduct in the workplace. Professional speech is complicated in part because it is speech made during the course of practicing one's profession, which is conduct.

The regulated activities in these examples could be characterized as expressive conduct, though perhaps that is not quite the right term. "Expressive conduct" is most associated with symbolic conduct—that is, nonverbal conduct that might nonetheless be communicating. The classic example is burning a flag. We need a term for when "speech is brigaded with action"[215] or for when speech and conduct are bound up together in a way that creates uncertainty as to whether it should be treated as speech or conduct. A photographer serving a customer by taking a picture or a physician treating a patient by talking to them are both examples.[216] More importantly, we need an approach as to how to

---

211 Pickup v. Brown, 728 F.3d 1042, 1055 (9th Cir. 2013) ("[The ban] regulates conduct. It bans a form of medical treatment for minors; . . . . [T]he fact that speech may be used to carry out those therapies does not turn the prohibitions of conduct into prohibitions of speech.").

212 King v. Governor of N.J., 767 F.3d 216, 224–25 (3d Cir. 2014), *cert. denied sub nom*. King v. Christie, 135 S. Ct. 2048 (2015) (mem.) ("We hold that these communications are 'speech' for purposes of the First Amendment."); *see also id.* at 225 ("Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE [sexual orientation change efforts] counseling are 'conduct.'").

213 The sexual harassment ban also advances the right of the captive audience to avoid unwanted speech. *See, e.g.*, Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943 (2009) ("[F]ree speech jurisprudence does recognize that, in some circumstances, a listener's right to not hear speech trumps a private speaker's right to convey speech.").

214 *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 944.

215 *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (describing shouting fire in a crowded theatre as "a classic case where speech is brigaded with action").

216 A slightly different example of a complicated relationship between speech and conduct is when certain conduct is a necessary precursor to speech, such as when spending money is necessary to propagate a message,

treat these types of cases, which appear with regularity. Current doctrine does not provide a clear road map. The discussion that follows considers possible approaches rather than delimits current law.

### *b. Text vs. Law Approaches*

There are two schools of thought on how to decide what conduct–expression mixture should be recognized as "speech" for free speech purposes. Each approach has a fundamentally different focus. One approach concentrates on the speech that is regulated and the other on the regulation itself, specifically the goal of the regulation. With one exception, theories that focus on the speech try to isolate those instances where speech performs as well as expresses. As to the theories that focus on the regulation's purpose, the claim is that when the government regulation aims to censor or coerce due to communicative impact, the words or conduct should be deemed covered "speech" that triggers free speech scrutiny. Otherwise they should not.[217] Neither likely leads to a cognizable free speech claim for the religious wedding photographers, with the regulation-focused approach essentially precluding it.[218]

#### *i. Focus on Text*

While most theories from the first school try to cabin out those instances when words ought to be treated as conduct rather than speech, one does not. This more absolutist view basically argues that the presence of words or photographs[219] indicates speech covered by the Free Speech Clause.[220]

---

or when standing in a particular place is necessary to reach a certain audience. These types of speech–conduct cases have also been treated inconsistently. Thus, there are at least three categories where the line between speech and conduct is unclear. The first category is symbolic conduct: conduct that is itself expressive, like burning something in protest. Second is conduct with an expressive component: conduct that is accompanied by speech in some way, such as serving customers by taking their picture. Third is conduct that is a necessary precondition for speech.

[217] While this approach was devised with symbolic conduct in mind, it also serves as a way to think about other speech–conduct mixtures.

[218] Recall that in the litigated cases, the religious bakers and photographers were not asked to produce cakes or pictures with written messages on them. Therefore, while the following analysis will consider those permutations, they are hypothetical rather than actual cases.

[219] The argument applies to the presence of any established medium of communication—braille, film, cartoons, etc. I list words and photographs because they are the focus of this Article.

[220] *See, e.g.*, Franklyn S. Haiman, "SPEECH ACTS" AND THE FIRST AMENDMENT 5 (1993) ("[T]he thesis of this book is that a fundamental difference obtains between symbolic and nonsymbolic interactions and that the First Amendment is *always* implicated in the former and only occasionally in the latter."); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 121 (1982) (arguing that "*all*

Proponents include those who support the wedding photographers' free speech claims against public accommodation laws.[221] They argue that this approach best protects not just religious businesses, but liberal ones too, such as a public relations firm that does not want to aid an anti-gay organization,[222] or a baker who does not want to ice a pro-KKK message on a cake.[223]

Of course, most refusals would not trigger public accommodation law prohibitions, which usually bar discrimination based on protected characteristics like race, sex, religion, and, of course, sexual orientation. Thus, no one will be forced to advertise or bake for the KKK or other hate groups because refusing to serve someone due to their hateful ideology is not illegal.[224]

In any event, insisting that words (or photographs) always equal "speech" is too blunt a rule. For example, a restaurant may not decline to serve a black family or a mixed race couple as discrimination on the basis of race is illegal. In the course of serving customers, a waiter must talk to them and write down their orders. Strictly speaking, the law compels speech, both oral and written. But few, I think, would argue that the anti-discrimination law should trigger heightened free speech scrutiny.[225] Indeed, even the most vehement free speech defenders do not argue that every single action that includes words (or

---

speech is protected from abridging laws made by Congress without exception" and disparaging "question-begging verbal artifices (e.g., by calling [an irresistible counterexample] 'conduct,' 'speech-brigaded-with-action,' or 'speech-acts')").

221 *See, e.g.*, Volokh, *supra* note 188, at 116.

222 *Id.* Volokh gives the example of a public relations firm forced to write materials for Scientologists despite thinking the organization was fraudulent. *Id*. at 127. If people refuse to work for them based on fraud concerns, they are not discriminating on the basis of religion. If they believe they are fraudulent in the sense of disagreeing with their own religious beliefs, then it might be better to view the refusal as a religious liberty case and not a free speech case. Indeed, if the main concern is that they are giving aid to a false religion, then the complaint is forced facilitation rather than compelled speech. Forcing someone to facilitate an activity they oppose is different in kind from forcing someone to endorse it.

223 As with most rules, this more formal rule-based view also provides greater clarity.

224 For that same reason, no dry cleaner will be forced to clean Klan robes or a confederate flag. Granted, a few jurisdictions protect discrimination based on political affiliation. *See, e.g.*, D.C. CODE § 2-1411.02 (West 2013); V.I. CODE ANN. tit. 10, § 64(3) (2014); SEATTLE, WASH. MUN. CODE §§ 14.06.020(L), 14.06.030(B). Courts, however, have interpreted this prohibition narrowly. *See, e.g.*, Blodgett v. Univ. Club, 930 A.2d 210, 221 (D.C. 2007) (holding that "'[p]olitical affiliation' means the state of belonging to or endorsing any political party" and expulsion due to affiliation with hate groups did not constitute discrimination based on political affiliation prohibited by public accommodation law).

225 *Cf.* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

other recognized mode of communication) must count as "speech": Because almost everything we do involves words, everything would be subject to challenge.[226] That still leaves open the question of which words do count.

Assuming not everything involving words automatically equates to covered speech,[227] other scholars have tried to create categories based on how the words function. Some categories are "speech" that trigger free speech scrutiny, some are not. At times, the uncovered words are termed "conduct," especially if they can be described as doing something rather than saying something.[228] "Words are the main technique by which we convey our ideas about facts and values. Yet, they can also be the medium for doing certain things or attempting to do certain things."[229]

For example, Cass Sunstein argues that words are not protected if they are performative.[230] In trying to explain when words should be considered conduct, Sunstein lists five categories and argues that only those in the first category equal conduct.[231] This first category includes speech that acts. These

---

[226] *See supra* note 199 and accompanying text.

[227] Schauer, *supra* note 126, at 1773 ("That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word 'speech' is simply implausible.").

[228] This discussion leaves out two varieties of speech whose "uncovered" status is not controversial. To start, some words fall into a recognized "unprotected category" of speech. These include fraud, threats, incitement to imminent lawless action, fighting words, defamation, child porn, and obscenity. Some of these might be examples of speech that is better characterized as conduct. Others are not conduct but essentially speech of such low value that it does not merit protection. Until recently, these unprotected categories were described as those whose harm outweighed any free speech value. The current Supreme Court has applied a more originalist explanation, arguing these categories are unprotected because they have historically been unprotected. United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).

In addition, there are still other types of speech (in the colloquial sense) that have simply not set off free speech alarm bells. *See generally* Schauer, *supra* note 126. Indeed, some argue that there are large swathes of speech that have never raised constitutional concern. As Fred Schauer has observed, "Although the First Amendment refers to freedom of 'speech,' much speech remains totally untouched by it." *Id.* at 1765. For example, Kent Greenawalt points out that many crimes ranging from blackmail to armed robbery involve speech, yet no one would think of challenging them on free speech grounds. Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1084 (1983); *see also* Arnold H. Loewy, *Distinguishing Speech from Conduct*, 45 MERCER L. REV. 621, 622 (1994) ("A significant number of crimes either require or frequently involve communication. . . . I am aware of no serious argument that any of this 'speech' ought to be constitutionally protected.").

[229] Greenawalt, *supra* note 228, at 1091.

[230] Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 836 (1993); *see also* SCHAUER, *supra* note 187, at 102–03 ("Initially, we can easily exclude most performative uses of language. . . . Some words advocate conduct. Others are closer to the conduct itself, or are the conduct itself.").

[231] Sunstein suggests that

> we might distinguish among (a) speech that amounts to the commission of an independently illegal act or that is evidence that the act has been committed; (b) speech that creates or

words do not merely cause action, "they constitute the relevant action or provide evidence of an action."[232]

The statement "I won't serve you because you are black" is an act and evidence of discriminating against someone because of their race. Conversely, forcing someone to talk to and write down the order of a black customer is merely compelling them to do an act—the act of providing restaurant service. According to Sunstein, apart from this category, everything else that involves words, plus expressive conduct, would trigger free speech scrutiny.[233]

Greenawalt's situation-altering utterances provide another example of an attempt to identify which words ought to be categorized as conduct.[234] Uncovered situation-altering utterances include those that alter our obligations or rights.[235] For example, "By speaking marriage vows . . . a person can radically change his or her legal relations with someone else."[236] The same might be said of offers, agreements, and promises.[237] The two theories overlap: Sunstein might describe the recitation of wedding vows ("I do") as the act and evidence of marrying someone. These cursory summaries are obviously incomplete, and other scholars have created their own taxonomies, but they should suffice for the purposes of this Article.

---

> constitutes conditions that can constitutionally be made illegal; (c) speech that leads immediately to illegality; (d) speech that is produced as a result of illegality; and (e) speech that leads proximately, but not immediately, to illegality or otherwise to constitutionally cognizable harm.

Sunstein, *supra* note 230, at 836.

[232] Sunstein writes,

> The written or oral statement, "You're fired," is an act, not merely speech, in the sense that the words are simply a way of committing an unlawful discharge. The statement, "I agree to fix prices with you," is a way of fixing prices, indeed the most efficient way of doing so. These words do not merely cause action; they constitute the relevant action.

*Id.* at 837.

[233] *Id.*

[234] Greenawalt, *supra* note 228, at 1091 ("[T]he utterance of some kinds of words in some kinds of circumstances actually changes the settings in which we live. These utterances are situation-altering.").

[235] *Cf.* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1328 (2005) ("'Situation-altering utterances,' as the book defines them, certainly do not cover all attempts to 'do things with words' or to 'alter' the 'situation' by speaking.").

[236] Greenawalt, *supra* note 228, at 1091.

[237] *Id.*

*ii. Text Approach Applied*

How does the text approach apply to the various wedding vendor scenarios discussed so far? For the most part, cakes with written messages or photographs of a wedding ceremony do not perform any act or alter any situation.[238] At the same time, the refusal to render services does, since it is the act of discrimination. Much of the analysis turns on whether the communicative and conduct strands can be separated out.

Bakers and photographers are not analogous in this respect. Bakers whose customers request a message that clashes with their beliefs have a compromise option available. Like the baker who was asked to make the Bible shaped cake with homophobic Bible verses, they can make the cake but decline to write the message.[239] Because the words cannot be characterized as performative or situation-altering, had state law compelled the writing, that compulsion would trigger some free speech scrutiny. (As it happens, public accommodation law would compel nothing since her refusal to write a homophobic message was not based on a protected characteristic.)[240] Of course, triggering free speech scrutiny does not automatically result in a free speech violation. It merely means that the compulsion implicates free speech concerns.

This compromise solution is not available to the photographer asked to take wedding pictures. With the request for a cake bearing a written message, it was arguably possible to disentangle conduct (providing baking services) and speech (writing the message). It is not an entirely clean separation, since writing on the cake is part of the baking service, but it is at least a workable one. Photography, however, does not lend itself to such disentangling.[241]

In the end, the inability to separate out conduct and speech in photographic services may not matter. A cake with "God supports same-sex marriage" is not analogous to a photograph of a same-sex marriage. Even if no one attributes

---

238 One could argue that every utterance alters the world to some extent. *See, e.g.*, B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 734 (2010) ("Over the course of the series of lectures that came to be published as *How to Do Things with Words*, Austin's analysis therefore shifted from distinguishing performatives from constatives to establishing that performative force . . . is a property of all utterances."). I mean to work within the framework of scholars like Sunstein and Greenawalt.

239 Gathright & Lupher, *supra* note 176.

240 *Id.*

241 Other services such as printing also do not lend themselves to such disentangling. In any event, printing a menu card for a wedding does not read as endorsing the marriage any more than photographing the event does.

the (very clear) message to the baker, she still has to write it out. She is forced to articulate a viewpoint contrary to her own.[242] In contrast, for the reasons discussed earlier, a wedding photographer's picture of same-sex wedding should not be read as endorsing same-sex marriage.[243] In other words, wedding photographs may ultimately not trigger free speech scrutiny not because they are performative or situation-altering, but because they do not force the photographers to convey a message with which they disagree. Even if such a message existed, however, a studio's taking of photographs presents a conduct–speech mixture, where the provision of a service is conduct and the pro-marriage message is speech.

It may help to compare the wedding services to other services where the messages are more clear. Turning to medical speech, "gay reparative therapy" seems like performative speech, and therefore conduct. Therapy is medical treatment. Even if treatment is in the form of speech, providing health care with the goal of making a sick person well appears to be conduct.

Traditional informed consent, where the doctor informs the patient of the medical risks and benefits of a proposed medical treatment and its alternatives, is harder to categorize. The doctor is not actually providing medical care per se, since telling patients about the procedure does not itself alter a patient's health. Rather, it is speech about providing the care. Does its close link to medical treatment nonetheless make it less than pure speech? That is, is being speech ancillary but necessarily linked to the provision of medical care enough to move it from speech to a speech–conduct mix?[244] As for mandatory informed consent about abortion, the further the information strays from traditional informed consent, the less it can be considered providing or even

---

[242] Some might argue that because the message "God loves same-sex marriage" would not be attributed to the baker, the baker should not have a free speech claim. However, as discussed earlier, I assume that free speech concerns are triggered when someone is forced to express a viewpoint contrary to her own, even if the public does not attribute that message to her. The photographer lacks a claim because the photograph does not read as "God loves same-sex marriage," never mind that the photographer does.

[243] No one is likely to read it as the photographer's endorsement of marriage, which was the photographer's primary claim. It might be argued that the photograph in general supports same-sex marriage, and therefore, like the bakers, the photographers are forced to articulate a point of view with which they (vehemently) disagree. Nevertheless, for reasons discussed earlier, professional photographs produced by shops open to the public ought not be read as endorsing the people or events depicted. And if there is no message of support for marriage equality, then there is no free speech claim.

[244] Perhaps informed consent's close connection to medical care matters only at the balancing and not the categorization stage. In that case, even if informed consent is speech, it is ultimately justified by the government's compelling interests in ensuring safe and ethical medical care.

ancillary to providing medical care and therefore the closer it moves to speech that triggers heightened scrutiny.[245]

To the extent these categories are unclear, the difficulty may call into question the utility of attempting to classify words as conduct, speech, or a speech–conduct mixture.[246] On the other hand, perhaps the real difficulty is not so much in isolating those performative or situation-altering words (or photographs) that amount to conduct, but in determining which words constitute pure speech as opposed to a speech–conduct mixture. If so, perhaps this initial inquiry, if it is adopted at all, should be limited to identifying those words (or photographs) that ought to be considered pure conduct that do not trigger any free speech analysis. If so, however helpful this analysis may be for addressing doctor's conversations with their patients, it is of more limited use for wedding vendors whose products include words or photographs, as wedding cakes and pictures are not performative or situation-altering and therefore cannot be considered belonging to this pure conduct category.[247]

### *iii. Regulation-Focused Approach*

An altogether different approach concentrates on the regulation rather than the speech. Moreover, in deciding whether confusing speech–conduct should count as covered speech rather than uncovered conduct, what matters is the regulation's purpose. John Hart Ely, for example, argued that because expressive conduct was "100% action and 100% expression,"[248] the focus should not be on categorizing the expressive conduct but on examining the regulation's purpose.[249] Other scholars agree: "The state's purposes . . . are

---

[245] The more attenuated link with medical care also makes the state's interest weaker as well, at least as with regard to regulating the practice of medicine.

[246] *Cf.* Greenawalt, *supra* note 228, at 1095 ("If the borderline problems are intrinsically too great, however, or afford unacceptable opportunities for officials to perpetrate abuses in individual cases or to systematically draw lines that are at odds with free speech values, then that possible basis for classification must be abandoned.").

[247] As discussed earlier, wedding photographs ultimately may not trigger free speech scrutiny not because they are performative or situation-altering, but because they do not force the photographers to convey a message with which they disagree.

[248] Ely, *supra* note 179, at 1495 ("But burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.").

[249] Ely, *supra* note 179, at 1496 (approving "an inquiry into whether the governmental interest or interests that support the regulation are related to the suppression of expression").

dispositive."[250] Again, while these theories were developed with expressive conduct in mind, they apply equally well to other types of speech–conduct mixtures.[251]

According to the regulation-focused school, if the law targets communicative harms, then the expressive conduct is covered and the law triggers free speech scrutiny.[252] However, "[t]here is no First Amendment 'pass' from a law whose purpose is not to punish speech."[253] Since that formulation addresses government censorship, the rule for government compulsion needs to be slightly modified. For compelled speech claims, then, the rule would be: If the government's purpose is to compel the saying of words (or the taking of pictures) because of their communicative impact, then they are covered and trigger free speech protection. On the other hand, if the state's purpose is to regulate conduct harms, then the Free Speech Clause is not implicated.

### *iv. Regulation-Focused Approach Applied*

The regulation-focused approach simplifies some "speech brigaded with conduct" cases.[254] In particular, the challenges to public accommodations law become much easier because the goal of anti-discrimination protections is to ensure equal access and equal opportunity.[255] Thus, anti-discrimination laws can be characterized as regulating conduct, and under the government purpose approach, anything affected by them will likewise be classified as "conduct," or at least not "speech." Accordingly, free speech challenges to public accommodation laws should be dismissed.

---

250 Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001) ("The actor's purposes are not relevant to free speech analysis. The state's purposes, on the other hand, are dispositive." (emphasis omitted)).

251 *See supra* note 216 and accompanying text (discussing different types of speech–conduct categories).

252 *See* Ely, *supra* note 179, at 1497 ("The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.").

253 Rubenfeld, *supra* note 250, at 768.

254 SCHAUER, *supra* note 187, at 111 ("In the case of censorship of art, as with many other free speech cases, focus on the reasons for the regulation rather than the objects of the regulation solves what at first sight appear to be difficult puzzles.").

255 For example, Title II of the Civil Rights Act states that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2012).

And yet, perhaps it is not quite that simple, as this analysis assumes a single legislative purpose and laws may have more than one. In fact, public accommodation laws aim to prevent two distinct harms, one of which is expressive. The first harm, as already mentioned, is the denial of equal access to goods and services. But the second harm targeted is the denial of equal citizenship[256] and equal dignity.[257] 'The state's goal here is to avoid condoning discrimination, which sends a message of second-class citizenship to members of historically subordinated groups who are denied the ability to eat, shop, and play in the same way as everyone else.[258] "To be told that you are not wanted at the lunch counter . . . is to be told—in the most public way imaginable—that you are not good enough to sit with those who are the real citizens."[259] Or as explained by a mother whose son sued after a bakery refused to serve him and his fiancé, "It was never about the cake. It was about my son being treated like a lesser person."[260] In short, part of the regulation is aimed at the message communicated by the denial of service.[261]

Does this mean that public accommodations laws cannot be fairly characterized as designed to regulate conduct? In a way, this question represents a reappearance of the "all conduct has an expressive component" problem. Recall that part of the difficulty of categorizing what counts as covered expressive conduct was that all conduct potentially had an expressive component.[262] Consequently, it is not surprising that all regulation of conduct potentially has an expressive goal.

---

256 Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1594 (2005) ("[E]qual access to public accommodations [is] a telling indicator of civil freedom and equal citizenship.").

257 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) ("The fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'").

258 *In re* Klein, CR 44-14, 45-14 (Or. Bureau of Labor & Indus. Apr. 21 2015) ("When Respondents denied RBC and LBC a wedding cake, their act was more than the denial of the product. It was, and is, a denial of RBC's and LBC's freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do . . . or be." (ellipsis in original)).

259 Karst, *supra* note 256, at 1594–95.

260 Deborah Munn, *It Was Never About the Cake*, ACLU BLOG (Dec. 9, 2013, 4:00 PM), https://www.aclu.org/blog/religion-belief-lgbt-rights/it-was-never-about-cake.

261 Bagenstos, *supra* note 90, at 1229 ("When a restaurant gives equal service to black and white customers, it necessarily sends the message that blacks and whites deserve equal service.").

262 *See supra* notes 88–93 and accompanying text.

Yet just as all conduct cannot be deemed expressive conduct,[263] all regulation of conduct cannot be considered targeting expression. As before, to hold otherwise would simply collapse the distinction between speech and conduct, and raise the specter of endless free speech challenges to social and economic regulations.[264] How then, should regulations with dual conduct and expressive goals (like anti-discrimination laws) be classified?

One solution might be that in order to count as a conduct regulation that does not trigger free speech protection, the regulation of conduct must be the main or but-for goal. At a minimum, this means that the government would still have passed the law even if it only affected conduct.[265] Anti-discrimination laws would meet easily this requirement. As the Supreme Court once noted, "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."[266]

The ban on "gay conversion therapy" would also meet this requirement. Generally, if the goal of a regulation is the safe practice of medicine (conduct), then it will not trigger free speech scrutiny. Thus, if the government outlaws gay conversion therapy because it is bad medicine and harms patients, then it is a regulation of conduct. What if, similar to anti-discrimination law, a ban has dual goals, and also targets the practice because of the message it conveyed—i.e., that homosexuality is a disease that should be cured? Like anti-discrimination law, the anti-therapy law would still not trigger the Free Speech Clause provided the legislature would have passed the ban even without its expressive goal. As for abortion "informed consent" laws, whether they merit free speech scrutiny turns on whether their true goal is to safeguard women's health or to advance a pro-life message.[267] Again, if the main goal is

---

[263] In deciding whether conduct with an expressive component was covered, this Article had earlier suggested, at least with regard to compelled expressive conduct, that a regulation of expressive conduct would not trigger free speech scrutiny unless it forced speakers to express a message contrary to their viewpoints.

[264] *See supra* notes 139–46, 133–36, 150–56 and accompanying text.

[265] It might also mean that the government would not have passed the law had it only affected the expressive component.

[266] Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (rejecting a First Amendment freedom of association challenge to public accommodation law and concluding that "[a]ccordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection").

[267] What about regulations requiring traditional informed consent? They do not regulate conduct: Informed consent does not itself heal people, although is it bound up with the practice of medicine. That still leaves open the question of whether traditional informed consent is pure speech or a conduct–speech mix. In

unrelated to the safe practice of medicine, then it would not be considered a regulation of conduct.[268]

Would treating some regulations with dual goals as conduct regulations be too easy to exploit? There is a risk that as long as the state articulates an ostensible conduct goal, it can target people's communication with impunity.[269] Indeed, *O'Brien* might provide a cautionary tale.[270] In *O'Brien*, the Supreme Court upheld a law banning the burning of draft cards, and in doing so, outlawed a powerful means of protest.[271] Although the Court ultimately assumed without deciding that the Free Speech Clause applied, it could have and likely would have held otherwise under the proposed inquiry[272]: The *O'Brien* Court accepted the government's claim that the main purpose of the law was to ensure the smooth functioning of the draft at a time of war.[273] The effect on expression was therefore deemed merely incidental.[274] In reality, the law was designed to target a particular form of political protest.[275]

A Court that forthrightly addressed the question would have reached a different conclusion than the one hinted at by the *O'Brien* Court. In all likelihood, Congress would not have passed the challenged amendment if it

---

other words, how tightly linked must it be with the practice of medicine to raise a question at all? Must it be speech that occurs during the course of the conduct? Necessary to the course of conduct? Notably, the tightness of its link may depend on how the practice of medicine is defined. Is the practice of medicine defined as safely healing people, or is it safely and ethically healing people while respecting their autonomy?

268 Similarly, a law forbidding doctors from inquiring about their patients' gun ownership, which has the stated goal of protecting patient privacy rather than ensuring safe medical practice, would not be considered a regulation of conduct. *Cf.* Wollschlaeger v. Governor of Fla., 797 F.3d 859, 869 (11th Cir. 2015).

269 *Cf.* Ely, *supra* note 179, at 1496 ("Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message . . . .").

270 United States v. O'Brien, 391 U.S. 367, 369–72 (1968).

271 Granted, the illegality contributed to the power of the symbolic act of burning one's draft card.

272 *O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

273 *Id.* at 377–80 (describing the "many functions performed by Selective Service certificates").

274 *Id.* at 382 ("For this noncommunicative impact of his conduct, and for nothing else, [O'Brien] was convicted.").

275 *See, e.g.*, Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 2010 WIS. L. REV. 1049, 1089 ("Even in *O'Brien* itself, the court seemed to simply brush aside powerful evidence that the measure reviewed in that case was aimed at suppressing anti-war speech."); *see* 111 CONG. REC. 19871 (daily ed. Aug. 10, 1965) (remarks of Representative Bray) ("The need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers."); 111 CONG. REC. 19746, 20433 (daily ed. Aug. 10, 1965) (remarks of Senator Thurmond) ("It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy.").

had no effect on anti-war expression.[276] After all, existing laws already protected draft cards.[277] Moreover, this was not really a difficult call, despite the Court's protestations.[278] Consequently, the law barring draft cards was actually a regulation of expression masquerading as a regulation of conduct. Still, the question remains whether the regulation-focused test is more susceptible to manipulation than the text-focused one.[279]

Neither school is free of difficult line-drawing. Nor am I sure whether it is possible, or desirable, to adopt only one school to the exclusion of the other. Existing free speech jurisprudence overall relies on both. Often free speech analysis starts by examining the regulated speech and asking whether it is covered "speech."[280] The focus then usually shifts to whether the challenged regulation is content-based or content-neutral—itself a proxy for determining the government's goals.[281] The doctrine with respect to speech–conduct mixes in particular is unsettled, though arguably both schools aid the analysis of it.[282]

---

[276] Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 n.117 (1996) ("Congress clearly understood, and indeed intended, the law to penalize antidraft expression.").

[277] *O'Brien*, 391 U.S. at 387–88 ("[T]he present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." (quoting H.R. REP. NO. 747 (1965)).

[278] Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 990 (2008) ("Considerable naiveté would be needed to doubt that the motivating factor in Congress' action [in enacting the Selective Service Act] was dealing with draft card burners who were dramatizing their objections to the war. In addition to explicit statements made on the floor to this effect, the congressional committee reports '[made] clear a concern with the "defiant" destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards.'").

[279] Trying to figure out whether a law that affects both conduct and expression was primarily targeting speech bears more than a passing relationship to the actual *O'Brien* test. Once it is clear that expressive conduct is at issue, the *O'Brien* test asks whether the challenged law is "unrelated to the suppression of speech" and whether it passes scrutiny. *O'Brien*, 391 U.S. at 377. The major difference is that the *O'Brien* test applies to covered speech, while the proposed inquiry is meant to decide whether the Free Speech Clause is implicated at all.

[280] For example, a court might first decide whether challenged speech fell into an unprotected category of speech. *See, e.g.*, *supra* note 228 (listing categories of unprotected speech). When analyzing a free speech challenge by a public employee, the first question is whether the employee was speaking as a citizen or as the state; the former would be covered by the Free Speech Clause, the latter would not. *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[281] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.").

[282] Arguably, the Supreme Court has not been consistent in its approach towards words that are bound up with conduct. *See supra* note 203 (discussing possible tensions between *Wisconsin* and *Humanitarian Law Project*). In *FAIR*, the Supreme Court seemed more focused on the regulation, rejecting a compelled speech challenge to a law requiring schools to send information emails in the course of providing equal access to

For conduct bound up with words (or photographs or other established mode of communication), a synthesized approach for deciding whether free speech applies might have two steps. The first step would be to identify and designate as uncovered those words and photographs that should be considered conduct because they are performative or situation-altering. If what remains communicates a message with which the speaker disagrees, the next step would be to examine the challenged regulation's goals. If the primary bona fide goal is to regulate conduct, then a free speech analysis may not be warranted.

* * *

To summarize, the photographers' claims are not analogous to the compelled speech claims of *Barnette* and *Wooley*. To begin with, the compelled photographs do not necessarily communicate a clear message at odds with their speakers' beliefs the same way the compelled statements in those classic cases did (or the way "God loves same-sex marriage" iced on a cake does). Moreover, compelling the utterance of words or the taking of photographs is not always "speech" covered by Free Speech Clause.[283] Although wedding photographs would not be considered conduct because they are performative or situation-altering, they might ultimately be classified as "conduct" based on the goal of public accommodations law, which is to end the conduct of discrimination on the basis of a protected characteristic. At the very least, the public accommodations law's anti-discrimination goals, plus the way the speech of photography and the conduct of providing services are

military recruiters on campus: "The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006) (citation omitted). In *Humanitarian Law Project*, on the other hand, the Court seemed more focused on the use of language, noting that the law's overall goal might be regulation of conduct, but "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2710, 2724 (2010). Then again, *FAIR* might have been more willing to focus on the government's purpose because the compelled words were merely factual and not ideological. *FAIR*, 547 U.S. at 62 (noting that the compelled speech was "compelled statements of fact"). And *Humanitarian Law Project* may have focused more on the words bound up with conduct because the goal of the content-based regulation was to censor a particular type of communication.

[283] Again, the question is whether the speech is "speech" that triggers free speech protection rather than whether the speech is ultimately protected by the Free Speech Clause. It could be "speech" yet be unprotected because the law passes heightened scrutiny.

intertwined, suggests it is not a regulation of pure speech as in *Barnette* and *Wooley*.

## CONCLUSION

The question for this Article is not whether the wedding vendors' would win their compelled speech claim, but whether they have a free speech claim to begin with. The bakers do not.[284] The photographers probably do not either.[285] Nonetheless, would it not be easier to acknowledge or at least assume that the cake-baking and photo-taking involve speech, and subject public accommodation laws to heightened scrutiny. In other words, why spend so much effort discounting the free speech element? After all, the wedding vendors' free speech claims could easily fail. The state has not just an important interest but a compelling interest in ending discrimination.[286] As discussed above, every time the state permits a wedding baker, or photographer, or shopkeeper, to effectively hang a "no gays allowed" sign, it creates significant harms.[287] It denies equal access to good and services[288] and it denies equal citizenship.[289] Furthermore, there is no other way to guarantee full access and citizenship other than to bar these refusals.

Perhaps requiring courts to directly address the clash between constitutional values—speech vs. equality—is actually the better solution because it would be more transparent. It is true that courts shy away from such direct balancing of competing interests, but perhaps they should not. If value judgments inform their decision-making, those judgments ought to be made

---

284 *See supra* Part II.

285 *See supra* Part III.

286 Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (describing state public accommodations law as "reflect[ing] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" and concluding "[t]hat goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order").

287 Deborah Munn, mother of Charlie Craig, a gay man who was denied service by Masterpiece Cakeshop, stated that "[w]hat should have been a joyous occasion had turned into a humiliating occasion." Munn, *supra* note 260.

288 Jami Contreras, a woman whose baby was denied medical service because she and her partner are gay, stated "[i]t was embarrassing. It was humiliating . . . It's just wrong." Baldas, *supra* note 153 (ellipses in original).

289 David Mullins, a gay man who was refused service by Masterpiece Cakeshop for his wedding, stated that "[b]eing told and treated unequally, it makes you feel like a second-class citizen. It makes you feel like you matter less than the person standing next to you." *Why Some Wedding Businesses Say "I Don't" to Gay Couples*, *supra* note 5.

plain. So why not just err on the side of speech protection?[290] I want to resist that impulse for two reasons.

First, as discussed earlier, the current jurisprudential climate counsels against automatic sympathy to free speech claims. In particular, concerns about misusing the Free Speech Clause in ways reminiscent of *Lochner*-era courts' misuse of substantive due process suggests some wariness may be in order.[291] In earlier times, courts might have struck down regulations as interfering with contract and property rights; today they are more likely to strike them down as interfering with First Amendment rights.[292] "Across the country, plaintiffs are using the First Amendment to challenge commercial regulations . . . . It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable."[293] Free speech claims that would have been summarily rejected in past years are now being taken seriously.[294] That it is even necessary to address the free speech claims of wedding vendors may reflect the popularity and success of "free speech opportunism"[295] or "free speech expansionism."[296] I want to push back against this trend, especially given the recent challenges to anti-discrimination regulations.

---

290 *See, e.g.*, Gottry, *supra* note 143, at 1000 ("While not all cases [of potential expressive conduct] provide a clear answer to this question, courts should err on the side of protecting expression.").

291 Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1208–09 (2015) ("These [free speech] claims mirror *Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.").

292 *See, e.g.*, Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1629 (2015) ("The opportunistic lawyer or client seeking a way of fighting against some form of regulation or prosecution can now have increased confidence that an argument from the First Amendment will not be received with political scorn or doctrinal incredulity.").

293 Post & Shanor, *supra* note 199, at 166–67.

294 *See, e.g.*, Kendrick, *supra* note 291, at 1205 ("As others have observed, litigants are raising First Amendment claims when earlier they never would have done so."); Schauer, *supra* note 292, at 1616 ("What is most interesting about these various claims and arguments is not merely that some of them have been taken seriously. Rather, it is that they have been advanced at all, in contrast to what would have been expected a generation ago, when the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions." (footnote omitted)).

295 *See generally* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175–76 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

296 *See* Kendrick, *supra* note 291, at 1200, 1209.

Second (and relatedly),[297] I want to resist that impulse to automatic sympathy because I think we tend to overvalue First Amendment rights, and that overvaluing tends to come at the expense of equality.[298] American exceptionalism vis-à-vis hate speech exemplifies this tendency. Unlike most other countries, the United States protects hate speech.[299] John Powell describes how after a racist incident on campus, many recognize the possible free speech repercussions of potential speech restrictions, but fail to understand the equal opportunity consequences for students of color.[300] Furthermore, he continues, "To the extent that they recognize the equal opportunity issues, they see these as trumped by free speech concerns."[301]

That the powerful gain more from speech than equality might explain this state of affairs.[302] Everyone, including the powerful, benefits from free speech. (Some might argue that ever since money has been equated with speech, especially the powerful benefit.) In contrast, members of historically subordinated groups are the ones who benefit most directly from equality. And while our speech jurisprudence is premised on deep distrust of government

---

297 Heyman, *supra* note 126, at 233 ("[T]he conservative-libertarian view affords too much protection to speech that injures, abuses, or degrades other people.").

298 *See, e.g.*, Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 689 (2015) ("The First Amendment is exceptional. In the United States, we privilege speech at the expense of other (constitutional) values, including equality, privacy, and dignity.").

299 Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 976 (2009) ("The U.S. approach, in which racist speech is protected except when it constitutes a threat, contrasts quite strongly with the treatment of racist speech worldwide. For instance, more than thirty European countries place restrictions on racist speech."); *see also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 347–48 (1997) ("[I]n the area of hate speech the Court has chosen to emphasize freedom of speech over racial equality, even though there is nothing in the Constitution to suggest that when speech and equality conflict, speech should win.").

300 John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 11–12 (1997) ("For instance, after a series of racial incidents on a college campus, I often get calls from reporters. They are almost always interested in whether explicit racist incitements might lead to the consideration of policies to limit speech by the college. Very few express concern about the rise of explicit racism and the consequent threat to equal opportunity for minority groups on college campuses. Most of these reporters see the problem through the lens of free speech, because that is the narrative in which they are comfortable or accustomed.").

301 Powell, *supra* note 300, at 21 ("In our legal history, and even today, there is often the assumption that the First Amendment is the essential amendment and the Fourteenth Amendment is the unessential or epiphenomenal amendment.").

302 *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing his "interest convergence" theory as postulating that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

regulation, that distrust seems to be selective.[303] Given the tendency to protect speech at the expense of equality, I see no reason to add another thumb to the scales and automatically assume speech is in fact at issue in potential clashes between speech and equality.

I am not saying that equality automatically trumps speech. Rather, I am saying that speech should not automatically trump equality. There is no denying that we need speech in order to maximize equality.[304] Countless social movements, including the LBGT one, have relied on the freedom of speech to fight for recognition of their dignity and rights. It is also true, however, that we need equality in order to have the fullest flourishing of speech.[305]

---

303 *See* Schauer, *supra* note 126, at 1786.

304 *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 435 ("Blacks know and value the protection the first amendment affords those of us who must rely upon our voices to petition both government and our neighbors for redress of grievances.").

305 *See, e.g.*, *id.* at 452 (arguing that hate speech shuts down debate: "If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.").