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FREE SPEECH AND OFF-LABEL RIGHTS

Amy J. Sepinwall[*]

When a litigant invokes a constitutional right to protect interests different from the ones underpinning the right, he engages in what this Article calls an off-label rights exercise. The Free Speech Clause has recently become an especially prominent, and troubling, site of off-label rights exercises. Two of the most prominent cases in the Supreme Court's last term involved litigants who invoked their constitutional rights to free speech to protect interests unrelated to speech or expression. In Janus v. American Federation of State, County, & Municipal Employees*, a state employee argued that forcing him to pay for the union's bargaining activities violated his rights against compelled speech. But the union would be speaking for him—representing him along with all of his fellow employees in labor negotiations—whether or not he was made to pay union dues. His free speech claim was then a smoke screen used to protect a purely pecuniary interest—or an off-label rights exercise, and an opportunistic one at that.*

Second, in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a baker who opposed same-sex marriage on religious grounds argued that requiring him to provide custom wedding cakes to same-sex couples violated his free speech rights. But, as in* Janus*,*

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speech was incidental to the baker's true interest. Had the Court granted the baker's free speech claim—finding that he could deny a gay couple a wedding cake with unique artistic designs but still requiring him to provide an unadorned cake—the baker would likely have been no better off. For speech or artistry does not implicate a wedding vendor in a same-sex marriage any more than a non-expressive contribution does. Here, too, then the free speech claim was off-label—an effort to leverage the law's greater solicitude for speech relative to religious freedom even while the baker does not have the expressive interests grounding constitutional rights to free speech.

This Article uses cases like the baker's, which the Court will almost surely revisit, to advance a theory of the proper scope of constitutional rights, distinguishing between on- and off-label rights invocations. To that end, the Article's first aim is to establish that artistic wedding vendors' invocations of the Free Speech Clause are in fact off-label.

The Article's second and larger aim is to critique off-label constitutional rights exercises. This Article argues that every off-label rights exercise demeans the asserted right and risks creating intolerable inequality relative to the person who shares the litigant's true interest but who cannot make her claim fit within the contours of the misappropriated right. For that reason, the Article concludes that courts have good reason to deny off-label rights claims—especially in cases like the wedding vendor challenges.

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I. INTRODUCTION

When a physician prescribes a drug for a use other than the one for which it received government approval, the physician's prescription is deemed to be "off-label."[1] This Article is concerned with an analogous phenomenon: when a litigant invokes a constitutional right to protect interests other than the ones underpinning the right, the litigant's invocation of that right is also "off-label." This Article describes and critiques off-label exercises of constitutional rights and argues that these off-label exercises misunderstand the nature of legal rights and allow prevailing litigants to evade regulations to which others who are similarly situated remain bound.

Consider, as a paradigmatic example of an ultimately unsuccessful off-label rights usage, the *Slaughter-House Cases*.[2] There, butchers in New Orleans claimed the protections of the newly passed Reconstruction Amendments in their efforts to challenge a law regulating their trade.[3] The Court balked—the Amendments were meant to prohibit slavery and eliminate its vestiges, not to protect economic liberty.[4] On these grounds, the Court rejected the butchers' claims.[5]

Recently, the First Amendment has been subject to off-label use with disquieting success: plaintiffs invoke the Free Speech Clause to protect interests different from the ones underpinning constitutional rights of free speech.[6] Two U.S. Supreme Court cases from the 2017–2018 Term are representative. In *Janus v. American Federation of State, County, & Municipal Employees*,[7] an Illinois state employee objected to a law requiring that he pay the portion

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[1] *See Understanding Unapproved Use of Approved Drugs "Off Label*,*"* U.S. FOOD & DRUG ADMIN. (Feb. 5, 2018), https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label [hereinafter *Understanding Unapproved Use*] (describing "off-label" use as "using an FDA-approved drug for an unapproved use").

[2] 83 U.S. (16 Wall.) 36 (1872).

[3] *Id.* at 38–43.

[4] *Id.* at 38.

[5] *See id.*; *see also infra* Section II.B.

[6] *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2462 (2018) (arguing that the First Amendment protects against forced payment of union dues); Brief for Petitioners at 20–21, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (invoking the Free Speech Clause to refuse services to a same-sex couple).

[7] 138 S. Ct. 2448 (2018).

of dues supporting the collective bargaining activities of the American Federation of State, County, and Municipal Employees (AFSCME). Specifically, he alleged that the dues amounted to compelled political speech.[8] But on examination, it is clear that he did not oppose the agency fees because of the supposed political messages they subsidized; instead, he opposed the arrangement because it made him *pay* for whatever contract terms the union negotiated on his behalf, without his consent.[9] In this way, Janus took an extraneous feature (the fact that union representatives must speak to bargain) and deployed it to achieve protection for a non-speech interest (the interest in avoiding having to pay one's share for the union's bargaining).[10] Justice Kagan's dissenting remark that, in ruling for Janus, the Court had "weaponiz[ed] the First Amendment" tracks the exact problem this Article identifies.[11]

The second case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[12] forms the backbone of the analysis here. *Masterpiece* is one among several cases brought by wedding vendors who oppose same-sex marriage on religious grounds.[13] The vendors—all of whose work involves some artistry—claim that, *as a*

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[8] Brief for the Petitioner at 9, *Janus*, 138 S. Ct. 2448 (No. 16-1466) ("[B]argaining with the government is political speech indistinguishable from lobbying the government.").

[9] *Id.* at 9–10. Other scholars also conclude that Janus's interest was not a speech interest. Eugene Volokh & William Baude, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018).

[10] Brief for the Petitioner, *supra* note 8, at 9–10.

[11] *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting). While Janus might be accused of using his speech rights disingenuously, the notion of off-label rights exercises does not require bad faith. In this way, off-label constitutional rights exercises constitute a broader class of constitutional misuse than described by David Pozen in *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 920–39 (2016). There, Pozen argues that "bad faith" always involves deception (self-deception or efforts to deceive others) or other kinds of deviousness. *Id.* It is also worth noting that the phenomenon Pozen elucidates is one involving, not individuals who invoke their constitutional rights in bad faith, but instead state actors who fill their institutional roles in bad faith. *Id.*

[12] 138 S. Ct. 1719 (2018).

[13] *See id.* at 1720; *see also, e.g.*, Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 63 (N.M. 2013) ("Elane Photography argues that the NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs."); State v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017) (stating that the defendant "would be unable to do the flowers for [the couple's] wedding because of her religious beliefs"), *vacated sub nom.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018). The floral shop owner in *Arlene's Flowers* filed a petition for certiorari with the U.S. Supreme Court on July 14, 2017. Petition for Writ of Certiorari, *Arlene's Flowers*, 138 S. Ct. 2671 (No. 17-108). On June 25, 2018, the U.S. Supreme Court vacated Washington's judgment and remanded the case for further consideration in light of *Masterpiece*. *Arlene's Flowers*, 138 S. Ct. at 2671.

matter of their rights of freedom of expression, they may deny service to same-sex couples.[14] The Court eventually disposed of *Masterpiece* on narrow grounds unique to the particular treatment the petitioner had received in the courts below.[15] But the Court continues to face similar challenges,[16] and commentators predict that it will almost certainly have to decide one of them on the merits.[17] When it does, there is good reason to think that the free speech issue will be determinative—the Court suggested as much in *Masterpiece* itself.[18] And many commentators on both sides of the issue agree that if a wedding vendor's work conveys a message, or if his work is a form of artistic expression, then he has a constitutional right to refuse service.[19]

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[14] *See, e.g.*, Petition for Writ of Certiorari at 15–17, *Arlene's Flowers*, 138 S. Ct. 2671 (No. 17-108) (arguing that her "original floral designs are artistic expression that communicates a celebratory message"); Brief for Petitioners at 20–21, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) ("Expressing such messages would contradict the core of his beliefs about marriage."). It is worth noting that the wedding vendors in *Masterpiece* and *Arlene's Flowers* raised both free speech and free exercise claims. *See* Petition for Writ of Certiorari, *supra*, at 46; Brief for Petitioners, *supra*, at 20–21. It is their free speech claims, however, that seem more troubling. *See, e.g.*, Transcript of Oral Argument at 15–19, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf (showing the Justices at pains to draw a line between artistic and non-artistic vendors). For a perhaps more persuasive source, see Brief for the United States as Amicus Curiae Supporting Petitioners at 7–9, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) (showing the Department of Justice interceding on Phillips's behalf and advancing only free speech arguments).

[15] *Masterpiece*, 138 S. Ct. at 1719.

[16] The petitioners in *Arlene's Flowers* filed a second petition for writ of certiorari on September 11, 2019. *See* Petition for Writ of Certiorari, *Arlene's Flowers*, 138 S. Ct. 2671 (No. 19-333). The first was filed on July 14, 2017. *See* Petition for Writ of Certiorari, *supra* note 14.

[17] *See, e.g.*, David Badash, *US Supreme Court Punts – Sends Anti-Gay Christian Bakers' Case Back to Lower Court*, NEW C.R. MOVEMENT (June 17, 2019, 9:47 AM), https://www.thenewcivilrightsmovement.com/2019/06/us-supreme-court-sends-anti-gay-christian-bakers-case-back-to-lower-court/ ("It is not unlikely the Court will take up this or another case[].").

[18] I describe below how each of the five *Masterpiece* opinions finds speech to be relevant to the disposition of these cases. *See infra* note 36.

[19] For commentators who think speech or artistry is decisive, see, for example, Brief for Cato Inst., Eugene Volokh & Dale Carpenter as Amici Curiae Supporting Petitioner at 18–19, Elane Photography L.L.C. v. Willock, 572 U.S. 1046 (2014) (No. 13-585) (arguing that "if a person's activity is protected by the First Amendment against a ban, for instance because it involves writing or photography, then it likewise may not be compelled" but denying that commercial photography should receive this protection); Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 242 (2015) ("[W]hether baking a cake . . . counts as speech is pivotal. After all, the Free Speech Clause prohibits the 'abridge[ment] of freedom of speech.'" (quoting U.S. CONST. amend. I)); Sherif Girgis, *The Christian Baker's Unanswered Legal Argument: Why the Strongest Objections*

This Article, by contrast, contends that the wedding vendors' free speech claims are off-label rights exercises. To see this, consider that the artist-baker's interest is no different from the interest of, say, a person who owns and rents out a reception hall,[20] even though the latter's product involves no speech or art at all. Both vendors aim to forbear from advancing the marriage *in any way*.[21] In other words, artistic and non-artistic wedding vendors share the same interest—a conscience-based objection that would fall, but also likely fail, under the Free Exercise Clause.[22] For the wedding vendors whose work is expressive, speech is incidental to the true interest they seek to protect, just as it was in *Janus*. Their bid to avoid complicity by invoking the Free Speech Clause is, then, off-label.[23]

Off-label invocations of constitutional rights exploit the absolute primacy that rights receive in Anglo-American law and jurisprudence.[24] Given this primacy, the "line demarcating those who hold rights and those who do not becomes a momentous one."[25] In other words, because rights function as trumps, judges should be especially careful about delineating their scope. But if anything, jurists and commentators have been in thrall to First Amendment

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Fail, PUB. DISCOURSE (Nov. 29, 2017), http://www.thepublicdiscourse.com/2017/11/20581/ ("[I]nterfer[ing] with freedom of expression would require drilling through decades of cases to shatter what the Supreme Court has said is the 'bedrock principle underlying the First Amendment, [which] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989))); Andrew Koppelman, *The Gay Wedding Cake Case Isn't about Free Speech*, AM. PROSPECT (Nov. 27, 2017), https://prospect.org/article/gay-wedding-cake-case-isn%E2%80%99t-about-free-speech (arguing that requiring the baker to disseminate a distinct message he opposed "would clearly violate the First Amendment" but denying that the cake Craig and Mullins sought from Masterpiece Cakeshop would have had that character). *Cf.* KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 170–71, 179 (2016) (arguing that exemptions should be granted where the wedding vendor would be directly involved in the nuptials and identifying wedding photography and custom cake baking as forms of direct involvement while denying that, for example, driving a couple to their wedding venue connects the driver only remotely).

[20] *See, e.g.*, *In re* Gifford v. McCarthy, 23 N.Y.S.3d 422, 429 (N.Y. App. Div. 2016) (upholding lower court's ruling that religious owners of Liberty Farm violated New York's human rights law when they refused to host a same-sex wedding on their property).

[21] *See infra* Part II.

[22] *See infra* Part IV.

[23] *Cf.* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 32 (2018) (describing one way of viewing the dispute in *Masterpiece*—viz, as "a portrait of rights on one side, bad faith on the other, and powerful disagreement about which is which").

[24] *See, e.g.*, *id.* (stating that "[t]his frame creates many problems for constitutional law").

[25] *Id.*

rights, and this has permitted the off-label usage that this Article aims to uncover and critique.

Other scholars have compellingly described First Amendment expansionism.[26] Their efforts have largely been descriptive.[27] To the extent they decry the expansion, they do so in virtue of its negative policy and practical consequences,[28] or because it is emblematic of what they see as economic liberty's more general ascendancy.[29]

This Article, by contrast, does not aim to trace a historical development or to critique off-label rights exercises on practical or ideological grounds. Instead, this Article's ambitions are jurisprudential and normative. I argue that invoking a constitutional right when one does not have the interests underpinning the right is wrong, independent of whatever consequences ensue—it is wrong in virtue of the correct understanding of what a legal right is and because doing so betrays the normative foundations of the right. In this way, the theory offered here is not specific to the First Amendment. It is instead a theory about the proper scope of any constitutional right.

Further, even within the First Amendment context, there is an analytic difference between this Article's work and the burgeoning critique of First Amendment expansionism. The existing literature concerns itself with whether an activity, *as a class*, involves the kind

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[26] *See, e.g.*, Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 176 (Lee C. Bollinger & Geoffrey Stone eds., 2002); Greene, *supra* note 23, at 33; Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1219 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1468–70 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 198–201 (2016). *But cf.* David Cole, *Trust the First Amendment*, N.Y. TIMES, Aug. 2, 2018, at A25 (arguing that First Amendment expansionism is to the benefit of conservatives and liberals alike).

[27] *See, e.g.*, Kendrick, *supra* note 26, at 1210–19 (diagnosing the expansion as a result of the nature of speech and the nature of rules). Amanda Shanor has offered an account of First Amendment coverage that admirably proceeds along both descriptive and normative grounds. Amanda Shanor, *First Amendment Coverage*, 3 N.Y.U. L. REV. 318 (2018). She advances an account of the doctrine that makes sense of the boundaries between speech and conduct that the Court has somewhat waywardly tread, and she also articulates a theory about when a particular activity should count as speech, and so receive constitutional protection and when, instead, it should count as conduct, and so endure constraints for the sake of other social goals. Unlike Shanor, I aim to determine not what counts as speech but instead how courts should respond when litigants assert free speech rights for the sake of non-speech interests.

[28] *See, e.g.*, Sepper, *supra* note 26, at 1464–95 (discussing and critiquing the negatives associated with First Amendment expansionism, or as this Article calls it, Free Exercise Lochnerism).

[29] *See, e.g.*, Kendrick, *supra* note 26, at 1209 ("[T]he First Amendment is so often the designated vehicle for these antiregulatory impulses.").

of expression that the First Amendment does or should protect. For example, why should insider trading fall outside of the Free Speech Clause while wearing a black armband falls within it?[30]

This Article, on the other hand, acknowledges that *particular instances* of a class of expression that the Free Speech Clause covers—including poetry, portraiture, cake art, and so on—sometimes ought not receive free speech protection. In particular, they should not receive that protection if the only interests the regulation threatens are non-speech interests—for example, as in *Masterpiece*, an interest in not *materially* supporting same-sex marriage.[31] To invoke the Free Speech Clause where only non-speech interests are at stake is to seek to exercise free speech rights off-label.

This Article deploys the wedding vendor cases as an example of off-label rights usage. Part II of this Article articulates a theory of complicity that captures the nature of the relationship of the wedding vendor to his customers' projects. I argue that all wedding vendors are implicated in the same way in the marriages to which they lend their goods or services. To that end, I survey all of the elements one might think implicate any of these expressive vendors in a gay couple's wedding, and I argue that these elements arise as well, and just as forcefully, for wedding vendors (the chauffeur, reception hall owner, or wedding coordinator) whose work straightforwardly does not involve the kind of speech or artistry that the Free Speech Clause protects. Along the way, I have occasion to consider the artist—a paradigmatically compelling bearer of free speech rights.[32] One might have thought that artists, whether fine or commercial, had stronger claims to avoid complicity because their persons are so bound up with their work. But I argue that, relative to others, the artist is even more empowered to protect

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[30] *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1779–80 (2004) [hereinafter Schauer, *Boundaries*] (explaining that insider trading laws do not violate the Free Speech Clause); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1619–20 (2015) [hereinafter Schauer, *Incentives*] (stating that the First Amendment protects non-traditional modes of speech, such as wearing black armbands).

[31] *Cf.* Nomi Maya Stolzenberg, *It's about the Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727, 748 (2015) (articulating a distinction between expressive and material support, where the former involves conveying a pro-attitude and the latter involves advancing some end practically, thereby making it more likely to come about).

[32] *Cf.* Kaplan v. California, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection . . . .").

himself from complicity. Wedding vendor complicity, then—indeed, the complicity of any storeowner in the projects of his customer—is completely speech-insensitive.

This conclusion sets up this Article's second theoretical aim—namely, the articulation of a theory regarding the proper exercise of constitutional rights. When a wedding vendor working in an expressive vein invokes the Free Speech Clause, he or she engages in an off-label exercise of his constitutional rights. Part III develops the theory of off-label rights. It describes when and why invocation of a right is off-label, and it explains why off-label rights usage is problematic. I argue that in most cases, courts should deny off-label rights claims, and I explain that, far from preserving constitutional meaning, limiting off-label rights usage is instead perfectly compatible with constitutional change.

Part IV elaborates the account of off-label rights in the context of the Free Speech Clause. Free speech rights might seem resistant to off-label usage. After all, under one understanding of the Free Speech Clause, one's rights of free speech persist no matter whether one aims, through one's speech, to advance any of the interests underpinning the right.[33] Think here of advertiser's speech, for example, which often seeks only to enhance profits for the person or entity whose product the advertisement promotes.[34] I argue that, even while the Free Speech Clause protects much speech offered without its true aims at heart, it too can be subject to off-label usage.

Part V concludes by applying the account of off-label rights to the wedding vendor cases. Given the conclusion of Part I—namely, that the complicity claims of all wedding vendors stand on the same moral and constitutional footing—I argue that the proper home for all of them lies in protections for religious freedom. I contend that these protections are no match for LGBTQ rights to equal treatment, both as a matter of doctrine and as a matter of political morality. As such, courts should reject the wedding vendors' complicity claims. I end by drawing out the more general lessons for on- and off-label constitutional rights usages.

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[33] *See infra* Part III.

[34] *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that otherwise constitutionally protected expression does not lose its First Amendment protection merely because it was bought and paid for).

II. IS EXPRESSION MEANINGFUL IN THE WEDDING VENDOR CASES?

The standard approach to the wedding vendor cases divides the vendors into two classes: (1) those whose work is expressive (e.g., wedding singers, cake bakers, photographers), and (2) those whose work is not (e.g., reception hall owners, chauffeurs).[35] While the U.S. Supreme Court opinions in *Masterpiece* did not settle the free speech issue, they nonetheless were rife with suggestions that speech matters.[36] I argue here that there are two problems with an approach that distinguishes between expressive and non-expressive contributions. First, as a matter of complicity, expressive and non-expressive contributions are on equal footing. Thus, Section II.A establishes that an expressive contribution does not implicate more than a non-expressive contribution.

But perhaps, one might think, compelled expression should trouble us over and above its ability to implicate. In particular, one might think that expressive contributions involve the kind of artistic or creative choices that the law should protect from government interference. As such, the wedding singer or poet who opposes same-sex marriage risks more than his conscience when he is made to provide service for a same-sex wedding; he risks his integrity too. And integrity or artistic autonomy might provide an independent ground for granting his claim for immunity from public accommodations laws. This second effort to distinguish expressive and non-expressive contributions is equally misguided, as I argue in Section II.B.

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[35] *See supra* note 19 and accompanying text.

[36] All five of the opinions address the relevance of speech. Speaking for the Court, Justice Kennedy stated that "[i]f a baker refused to design a special cake with words or images celebrating the marriage . . . that might be different from a refusal to sell any cake at all." Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018). The other opinions offer even stronger statements of the significance of speech. *See id.* at 1745–46 (Thomas, J., concurring) ("Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny."); *Id.* at 1733 n.* (Kagan, J., concurring) (implying that Phillips' refusal might have been justified if the couple had sought a cake with a unique message, instead of a generic cake of the kind Phillips routinely sells to others); *Id.* at 1739–40 (Gorsuch, J., concurring) (contending that all wedding cakes are expressive and that bakers therefore may refuse any particular commission as a matter of faith); *Id.* at 1748 n.1 (Ginsburg, J., dissenting) (arguing at length that wedding cakes are not expressive, presumably in order to deny that Colorado would have compelled Phillips' speech, even while allowing that bakers who refuse to sell cakes with offensive messages on them act within their rights).

A note on complicity at the outset: one might have thought that the complicity claims of these vendors were non-starters. After all, if a wedding vendor supplies his service or stock in trade merely because a public accommodations law compels him to do so, then surely he cannot be complicit; he is doing what the law requires. Additionally, even assuming that same-sex *marriage* is wrong, there is nothing about providing a cake or flowers for a same-sex *wedding* that advances that (supposed) wrong—a marriage does not require a wedding, let alone one with a cake or flowers.[37] Thus, the standard conception of complicity denies that wedding vendors can be complicit in the unions to which they provide their goods or services.[38]

The standard conception, however, is incorrect.[39] One need only think about our reactions to acquiescence in regimes of oppression (e.g., the Third Reich, Apartheid) to recognize that legal compulsion does not preempt complicity.[40] One need not make a causal difference to a wrong to count as complicit in that wrong. Ratification, legitimation, and even silent submission can morally implicate.[41] So, the wedding vendors' complicity claims cannot be dismissed as conceptual mistakes.

Where the baker, florist, and photographer go wrong, however, is in thinking that the expressive nature of their trades renders their complicity claims more compelling than that of the chauffeur or reception hall owner. This Part aims to rebut the purported distinction.

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[37] Indeed, and as Jack Phillips knew at the time he turned down the commission, the cake sought would have been served at a reception celebrating a wedding that would already have taken place some time earlier in Massachusetts since Colorado had not yet legalized same-sex marriage. *See id.* at 1724 (majority opinion). Thus, there is no way Phillips could have made a causal contribution to the wedding itself.

[38] For theorists who defend the standard conception, see, for example, Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593, 1596, 1611–18 (2017) (arguing that the law should recognize the complicity claims of those, like medical personnel, who would be asked to participate in conduct they believe immoral but not of those, like wedding vendors, who would merely be taken to endorse that conduct).

[39] *See* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897, 1922 (2015) (arguing that complicity in an act may arise not only from direct participation in the act but from facilitation or legitimation of the act as well).

[40] *See id.*

[41] *See* Amy J. Sepinwall, *Burdening "Substantial Burdens,"* 2016 U. ILL. L. REV. 43, 45 (2016) (arguing that ratification of an act may constitute complicity in the act).

A. COMPLICITY AND SPEECH

Jack Phillips, the cake baker at the center of the U.S. Supreme Court's first foray into wedding vendor challenges to anti-discrimination laws,[42] styles himself an "artist" who uses "cake as his canvas with Masterpiece as his studio."[43] His cakes, as he would have it, speak.[44] His wedding cakes in particular "announce a basic message: that this event is a wedding and the couple's union is a marriage."[45] More than that, "Phillips's wedding cakes—endowed with all their grandeur—declare an opinion too: that the couple's wedding 'should be celebrated.'"[46] Accordingly, he maintains that he "is as shielded by the Free Speech Clause as a modern painter or sculptor."[47]

Unfortunately for Phillips, Colorado did not share his assessment.[48] When Phillips refused to bake a cake for a gay couple's wedding celebration, citing his own religious objections, he was sanctioned by the Colorado Civil Rights Commission for violating Colorado's public accommodations law.[49] He challenged the Commission's determination on First Amendment grounds, and the highest appellate court in Colorado to hear his challenge upheld the Commission's decision.[50]

Colorado's anti-discrimination law provides that it is unlawful to deny "any individual or group . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" because of that individual or group's "disability, race, creed, color, sex, sexual

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[42] Several state supreme courts have also ruled on these issues, denying exemption claims. *See, e.g.*, Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 59 (N.M. 2013) (holding that a photography company could not refuse to photograph a same-sex commitment ceremony in violation of the New Mexico Human Rights Act on First Amendment grounds); State v. Arlene's Flowers, Inc., 389 P.3d 543, 560 (Wash. 2017) (reasoning that the sale of wedding floral arrangements was not "expressive conduct" protected by the First Amendment).

[43] Brief for Petitioners, *supra* note 14, at 1.

[44] *Id.* at 19.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 20.

[48] *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015), *rev'd*, 138 S. Ct. 1719 (2018).

[49] *Id.* at 277.

[50] *Id.* at 276.

orientation, marital status, national origin, or ancestry."[51] Colorado defines "place of public accommodation" broadly to include "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."[52]

Phillips rests his claims on religious freedom and free speech principles,[53] but his religious claims are unavailing. Colorado is one among approximately twenty states that do not offer religious freedom protections beyond those conferred by the U.S. Constitution.[54] The U.S. Constitution's Free Exercise Clause, as interpreted by the U.S. Supreme Court in *Employment Division v. Smith*, does not permit exemptions "if prohibiting the exercise of religion . . . is not the object of [the challenged law], but merely the incidental effect of a generally applicable and otherwise valid provision."[55] Since Colorado's public accommodations law is generally applicable, it does not target religion, and it does not offend free exercise rights. Indeed, even the Department of Justice, which interceded on Phillips's behalf, declined to take up religious freedom arguments, focusing only on the free speech issues.[56] A majority of the briefs supporting Colorado and the gay couple whom Phillips turned away respond by arguing that Phillips's work is not of a kind warranting free speech protection.[57]

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[51] COLO. REV. STAT. § 24-34-601(2)(a) (2019). Colorado is among twenty-one states whose public accommodations laws include LGBTQ individuals among the protected classes. *See State Maps of Laws & Policies: Public Accommodations*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state-maps/public-accomodations (last updated June 11, 2018). For an excellent overview of these laws, see generally Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631 (2016).

[52] COLO. REV. STAT. § 24-34-601(1) (2019).

[53] *See* Brief for Petitioners, *supra* note 14, at 14–15.

[54] *See* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010). Twenty-one states explicitly offer enhanced protections for religious freedom beyond those contained in the Free Exercise Clause. For a list of the relevant provisions, see Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 WAKE FOREST L. REV. 585, 588 n.15 (2017).

[55] 494 U.S. 872, 878 (1990).

[56] *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 14, at 1.

[57] *See, e.g.*, Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Brief for Freedom of Speech Scholars]; Brief for the Cato Inst., Reason Found. & Individual Rights Found. as Amici Curiae in Support of Petitioners, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Brief for the Cato Institute].

In this Section, I argue that the focus on speech is misguided. I aim to establish that the extent of a vendor's implication does not depend on whether the good or service he provides does or does not involve speech.[58] To that end, I look to the existing rationales for protecting people from compelled speech and then argue that these rationales also apply in the context of other forms of compelled support.[59]

For rhetorical purposes, it will be useful to imagine two wedding vendors: a wedding baker, like Jack Phillips, and a limousine driver, whom I will call "Linda Lorry." I assume that Lorry's contributions cannot, in any meaningful way, constitute speech or art. By contrast, I assume that Phillips's work does count as art.[60] The skeptical reader may substitute the wedding singer or poet or portraitist for Phillips if they cannot fathom that cake decorating is an artistic enterprise.

1. Misattribution.

Someone who is compelled to speak risks having those words attributed to her as her own.[61] The compelled speech may cause others to attribute beliefs to her that she does not hold, or it may

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[58] Thomas Scanlon argues that it is a mistake to think that we can gain clarity on whether something deserves free speech protection by first developing a theory of what does or does not count as speech. *See* Thomas M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 208 (1972) ("[T]here is no theoretically interesting (and certainly no simple and intuitive) definition of the class of acts which enjoys this privilege."). Scanlon may be right when it comes to the class of speech writ large, but it is not clear to me that we can abandon the aspiration to conceptual clarity when it comes to defining what counts as "art" and also what counts as "fine art" versus "commercial art."

[59] I focus here on three such interests. But there are other concerns that I do not address. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that compelled speech is unconstitutional when applied to news organizations because they need to retain control over the content they disseminate); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 861 (2005) (identifying compelled insincerity—and especially government-mandated insincerity—as a distinct reason to oppose compelled speech). Concerns about a free press are obviously inapt here. Concerns for sincerity are doubtlessly relaxed in the marketplace (though not entirely suspended, by my lights), and that relaxation might suffice to make the sincerity rationale one we need to attend to less in this context.

[60] To be clear, this is an assumption, not an assertion. The argument in this Section is meant to interrogate what follows *if* the work of a wedding vendor counts as art. If it does not so count, then it is clear that his free speech claims fail, and we may treat his work no differently from the work of a chauffeur, for example.

[61] *See, e.g.*, Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 505 (2014) (observing the "specific evils" accompanying compelled speech, including misattribution).

cause others to misunderstand her when she endeavors to convey the beliefs she does hold.[62] In either case, compelled speech exposes her to the risk of misattribution.[63] When the state compels speech, it "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[64]

Assume for the sake of argument that Phillips has a legitimate concern that some message will be attributed to him by virtue of his baking a wedding cake for the wedding celebration of Charlie Craig and David Mullins. And suppose further that the cake in question has a clear message on it—for example, "Charlie and David will be forever in love." Does the writing on the cake constitute the message that Phillips has reason to think will be attributed to him? An affirmative answer would entail that bakers mean whatever their baked goods say. So, for example, if a baker decorated a cake with the words "I love you," we would then be licensed to infer that the baker loved the intended recipient of the cake. That, of course, is absurd. No one would think the actual words on the cake are the baker's; nor should they.[65] The words are intended to convey the message chosen by the *customer*.[66] The baker thus need not fear that the words appearing on the cake will be attributed to him.

Still, the cake does stand for something, and others may legitimately infer that the baker who provided it does not strongly oppose whatever the cake symbolizes. So, for example, if a baker

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[62] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 577 (1995) (holding that forced inclusion of a gay rights advocacy group impermissibly interfered with the message the parade organizers aimed to convey).

[63] *See, e.g.*, Shiffrin, *supra* note 61, at 505 ("[T]here may be circumstances in which a reasonable observer might wrongly attribute compelled speech to reflect attitudes that the speaker does not hold.").

[64] *Hurley*, 515 U.S. at 573; *cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."). Where the Court has found no risk of misattribution, it tends to deny that the state compels speech in contravention of the First Amendment. *See, e.g.*, Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

[65] *See* Brief of American Unity Fund & Professors Dale Carpenter & Eugene Volokh as Amici Curiae Supporting Respondents at 18, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Brief of American Unity Fund & Professors] ("No one looks at a wedding cake and reflects, 'the baker has blessed this union.'").

[66] *See id.* (observing that the refusal to bake a cake decorated with a given message is "a refusal to engage in conduct, not a refusal to create speech," since the specific words are provided by the customer).

agrees to provide a cake with the phrase "Down with the gays!," others may legitimately infer that the baker does not strongly oppose the cake's message. The message in question need not consist of words for this principle to apply. Imagine a baker who knew that he was providing an unadorned wedding cake for a union between a man and his twelve-year-old trafficked bride. We reasonably would infer that the baker does not strongly oppose that union. As Phillips himself says, wedding cakes "communicate" that this is a marriage and, moreover, a marriage worthy of celebration.[67] But note that the declaration in question arises from the wedding cake independent of any distinctive message it conveys (e.g., "Charlie and David forever"). The mere fact that a cake celebrates a *particular* union already contains an expression—namely, that the baker does not oppose the union, or if he does, he is willing to set aside his opposition aside for the sake of turning a buck.[68]

Insofar as the message legitimately attributable to a wedding vendor is one of general support of the union, it is not only expressive artifacts that communicate this message; so too do other contributions. Take Lorry, our limousine driver, who is asked to drive the wedding couple around on their wedding day. If she obliges, we may infer that she does not oppose the union, or does not oppose it so strongly that she would be willing to forsake the job.[69] More generally, any form of practical support for the wedding may be read as an expression of support for, or at least moral neutrality toward, the marriage. Speech is not special when it comes to attribution.

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[67] *See Masterpiece*, 138 S. Ct. at 1743 (Thomas, J., concurring) ("Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'" (citation omitted)).

[68] In their amicus brief, Michael Dorf, Steven Shiffrin, and Seana Shiffrin contend that "the provision of a wedding cake does not constitute an endorsement of the marriage. Bakers, florists, and even ministers have offered their services to couples they may have thought were not right for each other." Brief for Freedom of Speech Scholars, *supra* note 57, at 9. In point of fact, though, these amici have in mind a different object of endorsement than the one I contemplate: they contend that the baker does not endorse *this very union* in providing a cake; I contend that the baker does endorse a union of *this kind* in providing a cake—that is, a same-sex marriage, independent of whichever two individuals of the same sex will wed.

[69] *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1235 (2014) ("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.").

2. Thought Control.

A separate line of thought, developed by Seana Valentine Shiffrin, identifies the wrong of compelled speech, at least in part in its power to interfere with the compelled speaker's thought process.[70] As she writes, the "general concern at issue for protecting freedom of thought is that what one regularly says may have an influence on what and how one thinks."[71] Shiffrin points to a wealth of examples in other contexts that amply demonstrate the ways that our thoughts can be redirected, or even manipulated, through subtle outside influences, of which compelled speech is a prominent example.[72] The Court has noted as much, perhaps most famously striking down compelled recitations of the pledge of allegiance because they "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[73]

Assuming, then, that compelled speech genuinely poses a risk of thought control, the question becomes whether compelled conduct poses that risk as well.[74] Is Lorry, our chauffeur, likely to abandon

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[70] *See* Shiffrin, *supra* note 59, at 855 ("The regular presence of specified statements in one's speech and related action may predictably have an influence on which topics seem salient.").

[71] *Id.*

[72] *Id.* at 855–60 (noting examples from moral methodology, religious practice, and acting); *see also* Tamara R. Piety, *Onslaught: Commercial Speech and Gender Inequality*, 60 CASE W. RES. L. REV. 47, 66–67, 77 (2009) (describing how ads objectify, commodify, and debase women, and the real harms to women that these ads might produce). These harms are particularly significant, especially given the power of advertisements to manipulate and influence thought without directly engaging our rational faculties.

[73] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Wallace v. Jaffree, 472 U.S. 38, 53 (1985) ("[R]eligious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .").

[74] Shiffrin thinks it does. As she writes, "The things one finds oneself regularly doing . . . will have an understandable impact on what subjects one thinks about." Shiffrin, *supra* note 59, at 855. But is compelled speech a more powerful means of thought control than compelled conduct? Here, Shiffrin is mostly silent. It seems to me not implausible to think that if compelled speech has any edge at all, it is only because it is a more common form of thought control, not that it is intrinsically more controlling. Take, for example, two pernicious forms of mind control—propaganda and brainwashing. The first uses words and the second uses conduct, but there is no reason to think propaganda is more effective on that account. As Susan Andersen and Philip Zimbardo write, "Expectations about what behaviors are appropriate and permissible within the structure of a role can come to control us more completely than the most charismatic of persuaders." Susan Andersen & Philip Zimbardo, *On Resisting Social Influence*, 1 CULTIC STUDIES J. 196, 199 (1984). In short, our actions stand to have at least as profound an effect on our thoughts as do our words.

her opposition to same-sex marriage if she is compelled by a public accommodations law to drive gay couples around on their wedding days? It seems to me that routine exposure to same-sex couples reveling in their union in the backseat of her car might have a profound effect on Lorry's perspective. In particular, Lorry might hear and see in the same-sex couples' exuberance the echoes of the happy heterosexual newlyweds whom she regularly drives around. That exuberance may overwhelm her cooler, considered thoughts about the (supposed) wrong of same-sex marriage. As a result, she may come to believe that same-sex romantic love and commitment are quite like their heterosexual counterparts—so much so that her opposition to gay marriage seems less and less compelling. Salutary though Lorry's change of heart may be,[75] Shiffrin's point is that compulsion wreaks illicit interference with the compelled agent's beliefs and violates her autonomy as a result.[76] The compelled agent does not arrive at the belief in question through a process of reasoned deliberation; instead the compulsion bypasses her reason, causing her to adopt beliefs in light of habitual performance.[77] Compelled speech and compelled conduct appear to pose the same risk of thought control. That risk provides us with no more reason to protect Phillips than Lorry.

3. Commandeering.

A final reason to object to compelled speech arises once one recognizes that autonomous agents have "a right not to be *used* or *commandeered* to do the state's ideological bidding by having to mouth, convey, embody, or sponsor a message . . . with one's voice or body or resources."[78] The concern about commandeering does not

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[75] *Cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995) ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.").

[76] *See* Shiffrin, *supra* note 59, at 859; Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 302 (2011) ("Compelled speech of this kind threatens (or at least aims) to interfere with free thinking process of the speaker/listener and to influence mental content in ways and through methods that are illicit.").

[77] *See* Shiffrin, *supra* note 59, at 859.

[78] *See* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001); *see also* Abner Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1476, 1493 (2018) (arguing that the right to "free speech[,] . . . at least presumptively, grants one the liberty to use one's body or property . . . to foster or disseminate one's own chosen messages and not those of others").

depend on whether others will attribute the message expressed to the agent herself.[79] Rather, the wrong is that it recruits one person, against her will, in the dissemination of another person's message.[80] Using a person in this way is itself a violation, even if everyone knows that the person so used disavows the message she is made to help disseminate.

The anti-commandeering rationale best justifies the set of complicity claims one finds in the wedding vendor context. To defend a refusal of service, Phillips need not argue that, in providing a cake for a same-sex wedding, he will be viewed as endorsing same-sex marriage. It is enough for him to argue that he opposes same-sex marriage and that providing a wedding cake furthers same-sex marriage—in particular, by furthering the signature event celebrating same-sex marriage. But once we recognize an interest in not being commandeered that is independent of the misattribution rationale, it is hard to see why that interest should arise only, or especially, when it comes to *speaking* on behalf of the project one opposes. For compelled speech is not the only way—or even the most powerful way—one can be commandeered to support a project one opposes. Forcing someone to contribute money to that project is another form of commandeering.[81] Indeed, this was the rationale that the U.S. Supreme Court adopted in *Burwell v. Hobby Lobby Stores, Inc.*, where the Court recognized, and sought to protect, an interest in not having to subsidize contraception to which the would-be subsidizers had religious objections.[82] As Nomi Stolzenberg astutely notes, the employers' complaint was about

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[79] Tribe, *supra* note 78, at 645–46.

[80] *Id.*

[81] Some scholars conflate a desire to withhold material support with a desire to refrain from endorsing. In other words, the only complicity claims they recognize are those that *express* support in a speech-like way: "A person gets no special immunity from the tax code just because he objects to the federal government and *wants to communicate this view* by not paying." Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 297 (2001) (emphasis added). But the tax resister might have no communicative ambitions at all; he might be concerned exclusively with not advancing the government's ends, whether or not anyone else knows that he has withheld his financial support.

[82] 134 S. Ct. 2751, 2759 (2014) (holding that the U.S. Department of Health and Human Services' mandate that corporations provide contraception violates the sincerely held religious beliefs of the companies' owners and violates the Religious Freedom Restoration Act of 1993 (RFRA), "which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest").

"material support, not expressive support."[83] Even more paradigmatic is the pacifist who seeks a conscientious exemption from the draft: he objects not only, or even principally, because going along with his conscription would otherwise express his agreement with the war; instead, he objects because he does not want to lend his body—or worse still, his life—to a cause he abhors.[84] We can imagine that he would seek the exemption even if he had been drafted in secret, into a covert unit, such that no one would know that he was being made to further the war effort.

In short, commandeering, like misattribution and thought control, is not uniquely produced by compelled speech. Compelled support—whether in the form of speech or conduct—bears a connection to complicity on any of the rationales elucidating why compelled speech is wrong.

B. COMPLICITY AND ART

I have been arguing that none of the rationales for the wrong of compelled speech proffered in the case law or legal scholarship can justify thinking speech-like contributions are more implicating than non-speech contributions. But perhaps there is still something distinctive about cake decorating (or speech writing or wedding portraiture or singing) that the compelled speech analyses do not capture. Consider that we tend to view creative contributions as intimate expressions of the self.[85] Producing art is not a mindless, alienating task. Instead, the artist is keenly attentive and authentic when producing her art.[86] Given this picture of artistic creation, one might conclude that artistic contributions involve a kind of support that we have special reason to care about, even if non-artistic contributions should trouble us too. Accordingly, we should be more

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[83] Stolzenberg, *supra* note 31, at 748.

[84] *See, e.g.*, Sepinwall, *supra* note 41, at 49 (discussing Americans burning their draft cards during the Vietnam War).

[85] *Cf.* Charles R. Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. POL. PHIL. 330, 339 (2005) (describing a view arguing for enhanced artistic authority over the disposition of an artist's work because of "the intimate bond which exists between a literary or artistic work and its author's personality" (quoting Raymond Sarraute, *Current Theory on the Moral Rights of Authors and Artists under French Law*, 16 AM. J. COMP. L. 465, 465 (1968))).

[86] *See, e.g.*, Gary A. Fine, *Crafting Authenticity: The Validation of Identity in Self-Taught Art*, 32 THEORY & SOC'Y 153, 175 (2003) (arguing that identity and authenticity are essential for the self-taught artist).

sympathetic to the baker's claim for an exemption than that of the chauffeur. Some commentators take this position. In the words of one set of amici, because "the government may not compel people to create speech or other protected expression, . . . the government cannot compel photographers, videographers, graphic designers, printers, painters, or singers to record, celebrate, or promote events they disapprove of, including same-sex weddings."[87]

There are three problems with this line of thought. First, weighing artistic contributions against non-artistic contributions to see which is more worthy of accommodation necessarily privileges skilled work relative to unskilled work because all artistic contributions involve skill while many non-artistic contributions (e.g., chauffeuring, setting up tables and chairs, serving food and drink, cleaning up after the festivities) do not. But this approach is morally troubling, not least of all because it reinforces class hierarchy: not only do we deprive many underprivileged individuals of meaningful work, but we then add insult to injury by failing to take their complicity claims as seriously as those of skilled workers, precisely because the unskilled workers' work is not meaningful, both in the sense of carrying a message and in the sense that it calls upon one's self (e.g., one's mind, creative energies, and passions).[88]

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[87] *See* Brief of American Unity Fund & Professors, *supra* note 65, at 4; *see also* Brief for the Cato Institute, *supra* note 57, at 5 (arguing that those who "refuse to distribute expression" with which they disagree are protected by the First Amendment); 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, 1516–17 (2012) (noting where an artist is "compelled by a state public accommodations law to express an idea, or associate himself with an idea, with which he does not agree on pain of civil sanctions[, this] compelled expression or association likely violates the artist's First Amendment rights").

[88] With that said, we should allow that even unskilled work can be ennobled where one pursues it meaningfully. Thus, for example, "[u]plifting the dignity and creativity in all work, Dr. Martin Luther King spoke of the 'street sweeper' who could 'sweep streets like Michelangelo painted pictures; sweep streets like Handel and Beethoven composed music; [and] sweep streets like Shakespeare wrote poetry.'" Mary Bonauto, *Symposium: Commercial Products as Speech – When a Cake Is Just a Cake*, SCOTUSBLOG (Sept. 15, 2017, 10:24 AM), http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake/. But the possibility that unskilled work might be noble is one that the wedding vendor cases implicitly reject, as each side presupposes that it is only if the vendor's contribution is like speech or like art that the vendor will qualify for an exemption from the reigning public accommodations laws. *Cf.* Ben Davis, *Why the Legal Strategy Behind* Masterpiece Cakeshop *Gets Art Backwards — and Why It Should Make People Nervous*, ARTNET (Jun. 7, 2018), https://news.artnet.com/opinion/is-a-cake-really-a-masterpiece-1297892 (noting the irony in the baker's proclaimed artistry in virtue of its resonance with the "lefty call-to-arms" that "everyone is an artist").

Second, wedding vendors who do not work in an artistic vein might contribute just as thoughtfully and meaningfully as a cake artist does. Consider, for example, the wedding coordinator who guides the couple through every phase of the wedding. His causal proximity to the wedding, the intensity of his connection, and the extent to which his contribution bears his personal touch—on all these dimensions, the wedding coordinator does not appear to be meaningfully different from the cake baker. It is hard to see why the wedding coordinator's contributions should count for less than the cake baker's, even though such contributions are not artistic in nature.

The third and remaining problem with elevating art cannot be dispatched so quickly. It involves getting clear on the scope and ground of the artistic vendor's authority to control his work and the moral responsibility attributable to him therefrom.

1. Art, Authority, and Attribution.

Phillips's bid for exceptional treatment turns on the belief that it is more difficult for the artistic vendor, relative to the non-artistic vendor, to distance himself from the same-sex marriage to which he contributes.[89] Art, according to this way of thinking, is an intimate expression of the artist and so identifiably *his*.[90] This distinction, however, is illusory: individuals in non-expressive lines of work might throw themselves just as passionately into their projects. In Section II.B.2, I extend the argument, contending that while an artist might imbue his work with more of his self, that fact makes it easier, if anything, for him to renounce the work as compared with the vendor whose contribution is more generic.

As an initial matter, we should note that when the state compels service, it dictates whom the vendor must serve, not what form his product must take.[91] So, if the poet has forever forsworn free verse

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[89] *See* Davis, *supra* note 88 ("[T]he baker and his lawyers have sought to draw upon the exceptional quality of artistic labor in order to carve out an exception to the anti-discrimination laws that American business owners must otherwise observe.").

[90] *See, e.g.*, K.E. GOVER, ART AND AUTHORITY: MORAL RIGHTS AND MEANING IN CONTEMPORARY VISUAL ART 161 (2018) (discussing the "'presumed intimate bond' between artist and artwork" that allows the artist to control attribution and disposition of the artist's work).

[91] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1733 n.* (2018) (Kagan, J., concurring). In its U.S. Supreme Court brief, Colorado similarly argued that a "business may refuse service for many reasons, including the specific design of a requested product," but "may not refuse service based on a customer's identity." Brief for

or the toastmaster has always abjured acrostics, each may stand firm in his artistic commitments. Similarly, if Phillips's artistic sensibilities preclude making rainbow cakes, then he can deny a gay couple a rainbow cake (though not of course as a pretext to avoid having to provide them with any cake; he must refuse rainbow cakes to any and all customers).[92]

Still, it is not always easy to distinguish product from project or purpose. And it is also sometimes difficult to know who has authority to decide whether it is the product or the person whom the vendor is refusing. When a baker refuses to provide a wedding cake to a same-sex couple, is he discriminating against them because they are gay? Because he opposes same-sex marriage, although he would sell the couple a cake for a different event? Or because he will not sell "gay" wedding cakes to any couple—gay or heterosexual? Suppose that Phillips thinks that the event at which his cake is presented informs the nature of the cake, such that a wedding cake served at a same-sex wedding is a different product than an identical cake served at a heterosexual wedding. This is not an idle supposition. The meaning of a work often depends on where the artist intends to display it.[93] Must we take the artist at his word? That question is connected to others, all relating to the authority of the artist, which roil beneath the surface of much of the debate about the autonomy of artistic vendors.

So, what makes a good or service expressive, and why would one think that expression warrants more solicitude in these cases? One hallmark of creative expression is that it involves robust discretion. Consider the poet who is commissioned to create a romantic sonnet to be recited as one of the readings at the wedding ceremony. The couple commissioning the poem dictates neither the process of its construction nor its precise content. If the couple were able to dictate all of the relevant choices—effectively choosing each and every word—the end product would be the very poem they would

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Respondent Colorado Civil Rights Commission at 48, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4838416, at *48.

[92] *See Masterpiece*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring) ("A vendor can choose the products he sells, but not the customers he serves—no matter the reason.").

[93] Consider Marcel Duchamp's urinal. Duchamp created the first instantiation of *Fountain* in 1917 and submitted it under a pseudonym to the Society of Independent Artists' salon for that year. *See, e.g.*, Jon Mann, *How Duchamp's Urinal Changed Art Forever*, ARTSY (May 9, 2017, 4:08 PM), https://www.artsy.net/article/artsy-editorial-duchamps-urinal-changed-art-forever.

have commissioned. Instead, the poet exercises his craft and his discretion on two dimensions—process and product. It is not merely that he has expertise in *executing* the couple's vision. Skilled laborers working in non-expressive trades might exercise just as much discretion along the process dimension. An individual hires a tiler to put up the tile he has selected for his bathroom because he lacks knowledge about how to cut and lay tile. The tiler then exercises her craft and discretion in the process of tiling. There might be multiple ways to proceed, and she chooses the one she thinks best for the job. But the end state is given by the commissioning customer, who knows in advance exactly what it should look like. By contrast, the poet has great discretion with respect to both how he will go about crafting the poem and also what the end product will be.

At a first cut, then, we might identify the following as a defining feature of artistic work: the commissioning customer cannot say in advance what the end product should look like; instead, the end product results significantly from the choices its creator makes along the way. But note that other lines of work involve at least as much discretion. A person hired to create an optimal seating plan for wedding guests, ensuring that each invitee maximally enjoys her dining companions, must exercise a good deal of discretion over the process (how should she weigh various factors?) and the product (the couple could not have dictated the resulting seating plan in advance). So, we might add to the discretionary element in a work of art something about the product aiming at one or more aesthetic virtues—beauty would be typical in art produced for weddings, but art might aim at other aesthetic virtues too (e.g., mimesis, meaning, critical commentary).[94] Or again we might point to the object's

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[94] I offer this description of the aims of a work of art only tentatively. Here is a proposed legal definition:

> A "work of fine art" is a pictorial, graphic or sculptural work of recognized stature. In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art.

133 CONG. REC. S11,502 (1987). The "recognized stature" language has found its way into the Visual Artists Rights Act, 17 U.S.C. § 106A(3)(b) (2012). Interestingly, the bill defines art not in light of its intrinsic qualities, but instead by appeal to a community of experts, none of whom need be the creator of the work. This is perhaps consonant with a general judicial reticence to decide what is art—embodied, for example, in Justice Holmes's opinion in

intended use, or place of consumption, or critical reception,[95] or its intended relationship with an art-historical tradition.[96]

So imagine we have this romantic poem, for which the couple provided some raw ideas but which largely results from the poet's choices. Assume that the poem aims to capture the beauty of love. Even if everyone attending the wedding knows that the poet was paid to produce the poem, and indeed that his occupation in life is to produce poems on commission, it seems perfectly natural for the guests to conceive of the poem as a product of the poet, and not as a product of the couple. The poet is the *author* of the poem in every sense of that word. The poem is then attributable to him.

Moreover, it is precisely because the product is uniquely his that one might think that his concern to guard against contributing to certain marriages warrants special solicitude, for the very features that make the poem uniquely the product of the poet also look to make it most difficult for the poet to dissociate himself.

Of course, the poet could request that the poem be attributed to an anonymous author. But if he writes in a distinctive style, recognizable only as his own, then anonymity might offer no real cover.[97] Nor could he readily depart from his style, for it is

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Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903). *See also* Christine H. Farley, *Judging Art*, 79 TUL. L. REV. 805, 808 (2005). One might go even further, denying that there is a defined category of work that counts as art in the first place. Arthur Danto offered something like this sentiment: "You can't say something's art or not art anymore. That's all finished." Amei Wallach, *Is It Art? Is It Good? And Who Says So?*, N.Y. TIMES, Oct. 12, 1997, at 36. Of course, Heidegger beat him to the punch, declaring some 40 years earlier: "Art—this is nothing more than a word to which nothing real any longer corresponds." Martin Heidegger, *The Origin of the Work of Art*, *in* POETRY, LANGUAGE, THOUGHT 17 (Albert Hofstadter transl., Harper & Row 1971). The more untenable the distinction between art and other products, the better for my project of arguing that speech or art is not special. The definition provided in the text accompanying this note, then, is offered in the service of playing out what would follow if "art" were a meaningful category. I take it that the definition tracks a common-sensical notion of art, and it is not prejudicial to the case for thinking that art is special.

[95] *See generally* GEORGE DICKIE, THE ART CIRCLE: A THEORY OF ART (1984) (articulating a theory of what counts as art according to which art is any artifact that is singled out for public appreciation through social practices and roles, including that it is on display in a setting where one typically consumes art).

[96] *See, e.g.*, JERROLD LEVINSON, MUSIC, ART, AND METAPHYSICS 4 (1990) (noting the "essential historicity" of works of art).

[97] E.E. Cummings is perhaps the best-known exemplar of a unique, highly recognizable poetic artist, given his repudiation of syntax as well as his interest in the appearance of his poetry on the published page. *See, e.g.*, *E. E. Cummings*, POETRY FOUND., https://www.poetryfoundation.org/poets/e-e-cummings (last visited Jan. 20, 2020)

presumably the reason why the couple selected him, and denying them that style when he willingly offers it to heterosexual customers might run afoul of anti-discrimination laws.[98] So the poem might unavoidably be his. Whether and to what extent he can dissociate affects his complicity and his sense of self. Even if the poem does not materially advance the marriage, and even if the poem does not increase the prevalence of or support for gay marriage, the poet might nonetheless recoil at having produced a monument to a project he deplores in a style that is recognizably his own.

All of this suggests that the artist might have a claim to refuse service not only based on his complicity—a concern he shares with the chauffeur—but also on something else that sets him apart from the chauffeur. What might this additional factor be? The answer emerges from a comparison between shame and guilt.[99] Complicity involves an association in virtue of which one should take oneself to be morally blameworthy; guilt is the appropriate attitude to take in the face of one's complicity.[100] But one might reasonably judge that one's association with another's wrong should prompt, not guilt, but shame (or not only guilt but also shame). Bearing a connection to a wrongdoer can be shameful even if one bears no moral responsibility

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("Cummings experimented with poetic form and language to create a distinct personal style.").

[98] The claim that a vendor who offers a product, like wedding cakes, to some couples cannot, without running afoul of anti-discrimination laws, deny it to other couples can be seen, for example, in John Corvino, *Drawing a Line in the 'Gay Wedding Cake' Case*, N.Y. TIMES (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/opinion/gay-wedding-cake.html. *See also* Brief for Respondents Charlie Craig & David Mullins at 27, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) ("[T]he Bakery . . . refused to sell Mr. Mullins and Mr. Craig a cake that it *would have sold to any heterosexual couple*.").

[99] *See generally* GABRIELE TAYLOR, PRIDE, SHAME AND GUILT: EMOTIONS OF SELF-ASSESSMENT (1985); BERNARD WILLIAMS, SHAME AND NECESSITY (1993).

[100] Typically, complicity may be judged morally reproachable no matter the position from which one judges: one's self-assessment should align with that formed from a second- or third-personal stance. One of the challenging features of the wedding vendor cases, however, is that the vendor operates with a more expansive conception of complicity than the one found in law or standard moral theories. *Cf.* Sepinwall, *supra* note 39, at 1935–38 (describing and defending the more expansive conception of complicity conscientious objectors adopt relative to the standard conception). I have argued that we should honor subjective assessments of complicity where, as in the wedding cases, they are more demanding than the assessments that morality or law would yield. *Id.* In these cases, the vendor would then have reason to experience guilt even while others would not have reason to resent or harbor indignation toward him.

for their wrong.[101] For example, consider the reactions of contemporary citizens to historic transgressions of their nation-state.[102] Shame is the experience one is apt to feel in relation to who one is, rather than what one has done.[103] Importantly, the bases of shame are social—shame requires an audience, real or imagined, that stands in judgment.[104] Since shame is about how others would be licensed in viewing one, the capacity to dissociate from conduct one takes to be shameful or tarnishing is then important as a means of protecting oneself from shame. And, at least arguably, the more identifiable one's contribution to the (assertedly) shameful act, the more difficult dissociation becomes. As such, if the artist were unavoidably bound up with his art then that would constitute a consideration, unrelated to complicity, supporting artists' bids to refuse service. And since chauffeurs and reception hall owners are not unavoidably bound up with the services they provide—driving or renting a hall does not bear the unique stamp of the chauffeur or the hall owner—artists would then look to have a stronger claim to be free to refuse service. Against this argument, however, I contend that artists are *more* empowered to dissociate than are those who work in modes that are less creative.

2. Art and Disavowals.

We can see that artists enjoy greater authority to control the responsibility they bear for their art when we consider the phenomenon of artist disavowals. Take, for example, Richard Prince, who painted a portrait of Ivanka Trump, which she bought.[105] After President Trump was elected, Prince took to

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[101] *See, e.g.*, LARRY MAY, SHARING RESPONSIBILITY 155 (1996) (describing the phenomenon of taint, which is the shame that arises from association with a wrong for which one is not morally responsible).

[102] *Cf.* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 987 (1992) ("[T]here must be a group of objects and events—the space shuttle and the Vietnam War are perhaps good examples—that are so prominently linked to American identity that virtually every American sees herself as the author of at least some of them and feels pride or shame with regard to them.").

[103] *See, e.g.*, Dan Zahavi, *Self, Consciousness, and Shame* (discussing individuals' internalization of others' perspectives when experiencing shame), *in* THE OXFORD HANDBOOK OF CONTEMPORARY PHENOMENOLOGY 304, 310 (2012).

[104] *See, e.g.*, TAYLOR, *supra* note 99, at 64 (discussing the role of the "audience" in shame).

[105] Jonathan Jones, *Richard Prince Has Disowned His Ivanka Trump Work, but He Can't Wash His Hands so Easily*, GUARDIAN (Jan. 16, 2017), https://www.theguardian.com/artanddesign/jonathanjonesblog/2017/jan/16/richard-prince-

Twitter to repudiate the work: "This is not my work (Ivanka's painting). I did not make it. I deny. I denounce. This fake art."[106]

Disavowals are tricky. During the reign of modernism, the artist's or author's intention dictated the meaning of his creations.[107] At the extreme, the artist could successfully disown his work; his say-so made the work what it was—or, more powerfully still, annihilated the work altogether.[108] This was just the self-conception under which Prince operated: "I made the art. And I can unmake the art," he explained.[109] But Prince presented his disavowal to an audience now steeped in postmodernism, wherein the viewer has displaced the artist.[110] On a postmodern understanding, Prince lacks authority over what, if any,

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has-disowned-his-ivanka-trump-work-but-he-cant-wash-his-hands-so-easily (discussing Prince's attempts to dissociate himself from his Ivanka Trump work).

[106] *See* Kenny Schachter, *Kenny Schachter on Richard Prince and the Magic of Art Market Metaphysics,* ARTNET (Jan. 17, 2017), https://news.artnet.com/opinion/kenny-schachter-on-richard-prince-and-the-magic-of-art-market-metaphysics-819017.

[107] Paradigmatic here was "biographical criticism," which viewed fiction as allegorical autobiography and so necessarily appealed to the author's biography for clues to the work's meaning. *See, e.g.*, Noel Carroll, *Art, Intention and Conversation*, *in* INTENTION AND INTERPRETATION 97–98 (Gary Iseminger ed., 1992).

[108] Consider a contemporary example. Cady Noland halted the auction of an outdoor sculpture she created when she showed up to the auction house to inspect the work. Finding small patches of damage on each of its four corners, she declared the work no longer hers, and Sotheby's was forced to withdraw the piece from its upcoming sale. *See* Isaac Kaplan, *How Much Control Do Artists Have over a Work after It's Sold?*, ARTSY (June 21, 2016, 1:22 PM), https://www.artsy.net/article/artsy-editorial-do-artists-have-the-right-to-disown-their-work.

[109] Schachter, *supra* note 106. A further wrinkle in Prince's disavowal: even before the Ivanka gambit, there was controversy over whether any of his art in the series including that portrait was really his, since the portraits were painted imitations of others' Instagram images. *See, e.g.*, Anna Freeman, *Can Richard Prince Really Disown His Own Art?*, DAZED (Jan. 17, 2017), http://www.dazeddigital.com/artsandculture/article/34347/1/can-richard-prince-really-disown-his-own-art. Since that question of attributability is not going to arise for most artists, I set it aside here.

[110] For an early defense of anti-intentionalism, which is a central feature of postmodern art criticism, see W.K. Wimsatt, Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 468 (1946) ("[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work . . . ."). Schachter encapsulates the view when he contends that, with contemporary art, "the thing itself, the *Art,* is divorced from the aim of the artist." Schachter, *supra* note 106. This is surely an overstatement, though. Conceptual art, for example, likely requires reference to the artist's intentions. *See, e.g.*, Sol Lewitt, *Paragraphs on Conceptual Art*, 5 ARTFORUM 79, 79 (1967) ("Logic may be used to camouflage the real intent of the artist . . . ."). The same might be said of minimalism, where one can appreciate the work itself—as spare in its details as it is—only if one sees it as the artist intended, which is to say as an exemplar of the minimalist artistic program. *See, e.g.*, Robert Stecker, *Moderate Actual Intentionalism Defined*, 64 J. AESTHICS & ART CRITICISM 429, 434–35 (2006).

attributions his audience will make between him and his work.[111] He may take to Twitter all he wants (a postmodern gambit if there ever was one, especially as he played with the meme of "fake news" in declaring his work "fake art"). He may resoundingly declare (in 280 characters) what is or is not a creation of his. But no one else need alter their belief about who created the Ivanka portrait as a result.

Should we then conclude that artist disavowals enjoy no special standing—that is, that they are completely indistinguishable from, and just as ineffectual as, the disavowal an unskilled worker like a chauffeur might issue? (Imagine how readily we would dismiss the statement of a chauffeur who, upon delivering his patrons to their destination, turned around and denied that he had ever driven them anywhere.) Two considerations suggest that the artist's disavowal retains some force, even if they are not decisive. First, the artist can control some of the normative upshots of artistic attributions. Consider, for example, Gerhard Richter, the contemporary painter now famous for his large-scale abstract works,[112] who has sought to disown his early figurative paintings.[113] To this end, Richter has excluded from his catalogue raisonné—typically, the comprehensive and authoritative record of an artist's work[114]—the realist paintings he produced from 1962–1968.[115] Richter's disavowal cannot falsify

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111 *Cf.* Beitz, *supra* note 85, at 344 ("[I]t does not seem essential to the enjoyment of creative works that one accurately grasp the communicative intentions of their creators.").

112 *See, e.g.*, Gerhard Richter, *Cage (1)-(6)*, TATE MODERN LONDON (2006); Gerhard Richter, *Ice (1)*, ART INST. CHI. (1989). Richter has set record-breaking prices at auction for his abstract paintings. *See, e.g.*, *Gerhard Richter*, ARTNET, http://www.artnet.com/artists/gerhard-richter/ (last visited Jan. 21, 2020). For example, the musician Eric Clapton sold one of Richter's paintings at a Sotheby's auction for $34 million, the highest price ever for the work of a living artist. *See, e.g.*, *Eric Clapton Fetches $34 Million for Gerhard Richter Painting*, ROLLING STONE (Oct. 13, 2012, 5:45 PM), https://www.rollingstone.com/music/news/eric-clapton-fetches-34-million-for-gehrard-richter-painting-20121013.

113 *See, e.g.*, Henri Neuendorf, *Collectors Alarmed as Gerhard Richter Disowns Early Works from West German Period*, ARTNET (July 21, 2015), https://news.artnet.com/art-world/gerhard-richter-omits-art-from-catalogue-318665.

114 *See, e.g.*, Bernhard Schulz, *I Create My World*, DER TAGESSPIEGEL (July 21, 2015), https://www.tagesspiegel.de/kultur/das-werk-von-gerhard-richter-ich-mal-mir-meine-welt/12080862.html (describing a catalogue raisonné as "a catalog of works that claims to be complete and accurate in terms of science, but which is supposed to present the whole of an artistic life's work").

115 Richard Prince has also sought to disown the work he created prior to 1980 on aesthetic grounds. *See, e.g.*, Daniel Grant, *Artistic Paternity: When and How Artists Can Disavow Their Work*, OBSERVER (July 28, 2017, 10:17 AM), http://observer.com/2016/07/artistic-paternity-when-and-how-artists-can-disavow-their-work/.

the claim that the paintings in question were created by him.[116] But his disavowal can alter the normative landscape, as it were, shifting the propriety of certain forms of second-personal address.[117] For example, Richter's disavowal disables him from taking umbrage with someone who scorns the disavowed work. It also forestalls resentment on the part of someone whom Richter does not thank after she praises the work. And it may constrain the curatorial choices of an institution wanting to honor the artist, prompting the institution to respect his wishes by including in its retrospective exhibits only those works he continues to avow.[118] In short, the artist's repudiation can alter the normative facts around what we owe him or he owes us.

A second consideration suggesting that the disavowal has some force arises where the artist seeks to disavow, not because he believes that his artistic evolution makes his earlier work no longer *his*, but because he thinks the work now implicates him in ends he finds morally troubling. This was Prince's rationale for disavowal: he continues to make works in a style very similar to the Ivanka portrait, but he decided that he did not "want anything to do with [the Trump] family."[119] The problem for Prince is that disavowal itself is not exculpatory. No one gets to escape the consequences of wrongdoing simply by declaring that he did not do the thing that he quite clearly did. Put differently, authority over attributions of moral responsibility resides with the community, not with the agent. To be sure, a person can, through her subsequent acts, obliterate the bases on which we might otherwise blame her. This happens, for example, when a wrongdoer apologizes and makes complete amends. But *we* set the success conditions for the obliteration (e.g., by requiring apology and repair), and *we* determine whether she has met them. And once met, the artist will

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[116] Joshua Holdeman, an art advisor, noted that "if an artist says a work isn't by him, but it's clear that he made it and presented it as his work, well it kind of is what it is." Randy Kennedy, *Richard Prince, Protesting Trump, Returns Art Payment*, N.Y. TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/arts/design/richard-prince-protesting-trump-returns-art-payment.html.

[117] *See generally* DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE (2012).

[118] *See, e.g.*, Grant, *supra* note 115 (describing Prince retrospectives at the Guggenheim and Whitney, both of which chose not to include art that Prince had repudiated in their retrospectives).

[119] Kennedy, *supra* note 116. "It was just an honest way for me to protest," Mr. Prince said. *Id.* "It was a way of deciding what's right and wrong. And what's right is art, and what's wrong is not art. I decided the Trumps are not art." *Id.*

have succeeded, not in that she never created the work in question, but only in that she is no longer blameworthy (or praiseworthy) for it.

What would count, then, as a successful disavowal on the part of a poet compelled to write a poem, or a baker compelled to decorate a cake, celebrating a project he opposes (e.g., a same-sex marriage)? For one thing, the disavowal should be credible. If the poet or baker were to profit from the transaction, we would have reason to doubt the sincerity of his repudiation.[120] Thus, we might require that the poet or baker accept no more money than is necessary to cover his costs, or return any money above that needed to cover his costs.[121] We might also require that the poet or baker express his contrition over having contributed to the project he opposes and disclaim any praise for the contribution.

To be sure, the chauffeur could undertake to disavow her driving in the same ways. She too could return any profit from her driving, express her contrition, or refuse credit or praise for her work. Still, there is reason to take the poet or baker, or any other artistic vendor, to be better positioned than the chauffeur in this regard. While our postmodern leanings in art generally favor our own authority to anoint or dethrone, we have not fully escaped the cult of the artist.[122] It is perhaps for this reason that we deem some artist disavowals to count as art in their own right.[123] And the very impulse that insists on attributions in the first place—for example,

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[120] By analogy, consider the public's outrage when Wall Street executives paid themselves handsome bonuses even as they were professing contrition for the 2009 financial crisis. *See, e.g.*, Maureen Dowd, *Disgorge, Wall Street Fat Cats*, N.Y. TIMES (Jan. 31, 2009), https://www.nytimes.com/2009/02/01/opinion/01dowd.html ("Anyone who gave bonuses after accepting federal aid should be fired, and that money should be disgorged to the Treasury.").

[121] For example, Prince accompanied his disavowal with a return of the $36,000 he was paid for the Ivanka portrait. *See* Kennedy, *supra* note 116.

[122] *See, e.g.*, Naomi Polonsky, *The Cult of Celebrity in the World of Art*, CHERWELL (Oct. 8, 2014), https://cherwell.org/2014/10/08/the-cult-of-celebrity-in-the-world-of-art/ ("It cannot be denied that we live in a time when artists, whether in the visual or performance arts, are some of the most influential people in the world, placed on a towering pedestal.").

[123] *See, e.g.*, Jerry Saltz, *Richard Prince Just Showed Artists a Way to Fight Trump. And May Have Cracked Open a New Contemporary Art Code Too*, VULTURE (Jan. 13, 2017), https://www.vulture.com/2017/01/richard-prince-just-showed-how-art-fights-trump.html (suggesting that, in disowning the work, "Prince had just invented a whole new conceptual category of art"); *cf.* Freeman, *supra* note 109 ("Language, more so than ever, is shaping the concept of art and an artist's ability to contextualise their work can mean the difference between MoMA and a coffee shop residency. In this case, Prince's words, rather than the painting itself, have emphasised its significance and will arguably increase its aesthetic legacy, rather than diminish it.").

for purposes of gleaning whether the artist endorsed his subject matter—reveals that we do not take the work to be a thing in the world, disconnected from its creator. The artist's intentions continue to retain a hold on us, mandating some re-evaluation after a disavowal even if we ultimately refuse to countenance it. More powerfully still, in some instances the law itself empowers the artist to renounce her own work, as the Visual Artists Rights Act provides.[124] Thus, art critic Kenny Schacter astutely notes that in no "other sector [than art] can you conceivably disown something that is what it is."[125] Precisely because the artistic work is an expression of the self, the artist can disavow it. The chauffeur enjoys no such luxury. We do not accord her own understanding of her acts the same pride of place.

C. COMPLICITY AND EXPRESSION

This Part has argued so far that *speech is not the mode of implication in commercial complicity cases.*[126] Speech can, of course, be implicating. Instigation or encouragement—both modes of complicity—paradigmatically involve utterances.[127] This Part has aimed to establish, however, that speech does no special work in making the vendor complicit in the conduct he opposes.[128] Nor does the presence of speech justify heightened concern for the compelled service of wedding poets or bakers relative to chauffeurs or reception hall owners. As such, the conscientious objections of both expressive and non-expressive wedding vendors should receive the same legal treatment.

That conclusion cuts two ways: perhaps both the chauffeur and the baker should receive the protection of the Free Speech Clause, or perhaps neither should. The idea that both would have a free

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[124] *See* 17 U.S.C. § 106 (2012); *see also* Kaplan, *supra* note 108 ("[Artists'] disavowal is empowered by the United States's Visual Artists Rights Act (VARA).").

[125] *See* Schachter, *supra* note 106; *see also* Freeman, *supra* note 109 (suggesting that Prince might have "taken momentous steps to shift the capitalist drive of art culture and return the power to its creators, vis-à-vis himself, by rejecting responsibility for the piece's creation").

[126] *See supra* Sections II.A, II.B.

[127] Consider Iago's attempt to incite Othello to violence by implanting in Othello the false belief that Desdemona has been unfaithful: "[S]uch a handkerchief—I am sure it was your wife's—did I today See Cassio wipe his beard with . . . . It speaks against her with the other proofs." WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3. Or again consider Lady Macbeth's efforts to "screw [Macbeth's] courage to the sticking place" to solidify his resolve to kill Duncan. WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 7.

[128] *See supra* Sections II.A, II.B.

speech claim rests on the idea that selling a good or providing a service already expresses something in its own right—namely, that one does not oppose the project to which the good or service contributes. But what if one does oppose that project? Being made to provide the good or service would then compel her to associate herself, against her will, with that project.[129] Or, to put it in the terms of some of the objecting wedding vendors, the state violates a vendor's rights of expressive association when it compels her to engage in these sales.[130]

The problem with this line of argument is that to have a First Amendment right to expressive association "a group must engage in some form of expression."[131] While it "is possible to find some kernel of expression in almost every activity a person undertakes . . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[132] So, chauffeuring a gay couple would not count as expressive in the right way. And, if I am right that the baker and the chauffeur have the same constitutional claims, then it follows that neither has a right of free expression to avoid providing service for same-sex weddings.

But here is where the law goes wrong. Because poetry or cake decorating involves words or artistry, poets and bakers seek refuge for their conscientious objections in the Free Speech Clause.[133] This makes their compelled speech arguments awkward at best. The relevant wrong that they track—the ability of compelled speech to implicate—in fact has nothing to do with speech and everything to do with compulsion. Arguing that cake decorating is *not* speech is then not helpful because whatever cake decorating is it might well still be implicating. And arguing that cake decorating *is* speech leaves those who support the baker in the difficult position of

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[129] *See, e.g.*, Conor Friedersdorf, *Should Mom-and-Pops that Forgo Gay Weddings Be Destroyed?: The Attack on Memories Pizza and Its Implications*, ATLANTIC (Apr. 3, 2015), https://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be-destroyed/389489/ (allowing that religious vendors have reason to feel that they are associated problematically with same-sex weddings).

[130] *See* Petition for Writ of Certiorari, *supra* note 13, at 15 (arguing that the state would be compelling a florist to celebrate an idea of marriage she did not have "in her mind").

[131] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

[132] *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989); *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("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.").

[133] *See supra* text accompanying notes 14–22.

justifying exemptions for cake decorating that do not swallow up each and every material contribution to the wedding. Put differently, what makes Phillips's cakes art—if they are art—has nothing to do with what makes providing them for a same-sex wedding upsetting to his conscience. It is now time to confront the deeper problems arising when litigants seek to press their interests by claiming constitutional rights that are not rightfully theirs.

III. OFF-LABEL EXERCISES OF CONSTITUTIONAL RIGHTS

As Part II suggested, if Phillips prevails on free speech grounds, he will have won on the basis of the Court's conceptual confusion—not about whether cake decorating is speech but about whether Phillips's objection has anything to do with speech. Wedding cake bakers, photographers, florists, and so on have endeavored to leverage the expressive nature of their pursuits to claim constitutional protection that is not properly theirs. As a moral and policy matter, it is troubling that they should enjoy enhanced protection relative to chauffeurs and reception hall owners simply because they work in a medium cognizable to the Free Speech Clause. But it is also troubling as a matter of the proper understanding of constitutional rights.

In this Part, I describe this bug in our constitutional jurisprudence: the *off-label exercise of constitutional rights*. I argue that individuals should not be allowed to avail themselves of a constitutional protection to serve ends other than those for which that protection was designed, especially if others (e.g., the chauffeur in the wedding vendor cases) with the very same interest at stake cannot, for purely extraneous reasons, do the same. To that end, Section III.A articulates the theory of off-label exercises of constitutional rights, Section III.B argues that these exercises are problematic, Section III.C describes how courts should respond to them, and Section III.D examines the relationship between denying off-label rights assertions on the one hand, and constitutional change on the other.

A. WHAT ARE OFF-LABEL EXERCISES OF CONSTITUTIONAL RIGHTS?

A person exercises her constitutional rights off-label when she invokes a constitutional provision to protect an interest different

from the one that the provision is designed to protect.[134] Off-label exercises of constitutional rights are then analogous to off-label uses of prescription drugs (i.e., the use of medicines for purposes other than the ones for which they were designed or approved).[135] Off-label exercises involve claiming that one has a right simply because one is engaged in the activity that the right typically protects, even while one uses the right to protect an interest different from the interest the right is intended to protect.

To be clear at the outset, while the idea of an off-label rights exercise references the interests the right is *intended* to protect, the

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[134] It may be worth noting that an off-label exercise of a right is analytically distinct from a right to do wrong. The latter arises where an agent performs action *A*: *A* "is morally wrong, but nevertheless [*A*] is an action that the agent in question has a moral right to do." Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21, 22 (1981); *see generally* Ori J. Herstein, *Defending the Right to Do Wrong*, 31 L. & PHIL. 343 (2012) (discussing morality and personal autonomy in relation to the right to do wrong). Examples include rebuffing a stranger who asks for directions, *cf.* Waldron, *supra*, at 21, or staging a protest near a gravesite at which a funeral service is taking place, where the protest involves displaying hateful signs maligning the deceased, *see generally* Snyder v. Phelps, 562 U.S. 443 (2011) (extending First Amendment protections to Westboro Baptist Church protesters). In these cases, an agent acts within her rights even though she does something morally impermissible. By contrast, an agent who exercises her rights off-label in fact does not have the right she asserts.

Off-label rights exercises include well-known, deliberate, and oftentimes devious misuses of the law for personal gain, as in cases involving abuse of rights, *see infra* notes 160–64 and accompanying text, as well as loopholing, which occurs where "an actor carefully contrives to bring her conduct within the confines of an applicable rule or norm, and thus to gain its benefit, with the knowledge or expectation that in doing so she is frustrating the rule's spirit or animating purpose." Mitchell N. Berman, Cheating, Loopholing, and Metanorms 13 (Feb. 24, 2015) (unpublished manuscript) (on file with author). Like off-label rights exercises, then, loopholing involves claiming the benefits of a legal enactment even while that enactment is not meant to confer that benefit upon the claimant. But, importantly, off-label exercises need not involve the contrivance or bald opportunism of loopholing.

Perhaps also worth noting is the obverse phenomenon: creative judicial extension of one constitutional right because an appeal to a different right—on its face more fitting—has been foreclosed by prior decisions narrowing the scope of the latter right. In this vein, consider, for example, U.S. Supreme Court decisions upholding rights to abortion that find their home in the Due Process Clause, rather than the Equal Protection Clause. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (upholding abortion rights under the Due Process Clause of the Fourteenth Amendment). As Kenji Yoshino argues, in deciding *Casey*, the Court was well aware of the equality considerations underpinning abortion rights. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781 (2011). But, in the wake of prior decisions refusing to see pregnancy as a form of sex discrimination and refusing to find any discrimination absent intent, the Court was left to find a new constitutional grounding for these rights. *Id.* at 783. Enter a reconstruction of the Due Process Clause as protector of liberty-based dignity claims. *Id.* at 784–85; *see also id.* (performing a similar analysis in the context of congressional power to enact federal disability accommodation laws binding on the states).

[135] *See generally Understanding Unapproved Use*, *supra* note 1 (explaining the concept of an "off-label" drug use).

theory of off-label rights is not committed to originalism.[136] Of course, originalism can supply *an* answer to the question, "just what interests underpin such-and-such constitutional right?" But originalism is hardly the only theory that can do so, and it is not the one upon which the theory of off-label rights relies. Instead, I assume that there is an ahistorical, moral philosophical truth of the matter.[137] To paint in very broad strokes, each of us has interests necessary to living our lives with dignity and freedom.[138] Some of these interests are important enough to justify placing restrictions on what others may do to us, or must do for us. In other words, these interests impose duties on others. Rights are simply the correlates of those duties.[139] The state has a special role to play in securing some of the interests important for living lives with freedom and dignity,[140] and it risks impinging upon others.[141] Constitutional rights are rights that protect these interests where they stand to be affected by the state.[142]

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[136] For overviews as well as critical analyses of originalism, see generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (proposing a positive law framing of the originalism debate); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (challenging pro-originalism arguments); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (describing the role of original intent in law-making).

[137] Ronald Dworkin is a key proponent of the view of legal rights as foundationally grounded in moral philosophical principles. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (critiquing positivism further); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (arguing about the role of positivism in rights-based discussion). Michael Perry offers an even more forthright account of the role moral philosophy plays in central constitutional law decisions. *See generally* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982) (analyzing the U.S. Supreme Court's developments in due process by reference to morality).

[138] *See generally* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (2012) (arguing that human dignity is tied to legal status); Gavin Morrison, Dignity and Duty: A Dignity Based Account of Human Rights and their Associated Duties 96 (Sept. 2016) (unpublished Ph.D. dissertation, Trinity College Dublin) (on file with Trinity College Dublin) ("The status of human dignity requires the protection of a set of interests that then translates into a set of rights.").

[139] This formulation draws upon Joseph Raz's conception of rights, upon which I elaborate below. *See infra* notes 149–55 and accompanying text.

[140] *See, e.g.*, ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION 266 (2003).

[141] It is for this reason that so many rights secured in the Bill of Rights are rights against the state. Consider, for example, the First Amendment, which is framed not in terms of what an individual may do, but what a state actor may *not* do. U.S. CONST. amend. I.

[142] *See, e.g.*, William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 1 (1991) ("The American Bill of Rights, guaranteeing freedom of speech, religion, assembly, and

Sometimes, a particular right has more than one set of interests underpinning it. Rights of free speech, for example, serve to promote democratic self-government and individual autonomy, among other interests too.[143] I do not venture to identify one true or primary interest. Instead, I mean for the account of off-label rights to be ecumenical. While I have my favored view of the normative foundations for the right of free speech,[144] the reader need not agree with me. The important point is that the right is grounded in a particular conception of individual interests that the state may not infringe—a conception given to us by moral philosophical investigation.[145] So even while the account of off-label rights will sometimes speak of using rights for a purpose other than the one for which the right is "intended" or "designed," I mean only to signify that rights have a function—namely to protect particular interests.[146] I do not mean to lend credence to an originalist interpretation of the U.S. Constitution.

The idea that rights aim to protect interests important enough to impose duties of restraint on others draws upon interest theories of

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the press, along with other important protections against arbitrary or oppressive government action . . . stands as a constant guardian of individual liberty.").

[143] For the view that the Free Speech Clause is primarily about democratic rule, see Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175–76 (2007) (asserting that "democracy is not about individual self-government, but about collective self-determination"); *cf.* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986) (arguing that the free speech doctrine should focus not on protecting autonomy but instead on enriching public debate). For examples of theorists who conceive of the First Amendment as a protection for individual self-authorship first and foremost, see, for example, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (grounding free speech protections in a right to individual self-fulfillment); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'"); Scanlon, *supra* note 58, at 221–22 (grounding free expression in individual autonomy).

[144] *See* Eric W. Orts & Amy J. Sepinwall, *Collective Goods and the Court*, 97 WASH U. L. REV. (forthcoming 2020).

[145] I recognize that moral philosophical investigation might determine that the interests we should care about are those the Framers identified, perhaps even because the Framers identified them. That determination could, in turn, rest on a moral commitment to tradition or a faith in the Framers' greater moral expertise. An off-label exercise of the Free Speech Clause would then be one that sought to protect interests other than those the Framers had identified as the ground for free speech rights. But nothing in the idea of off-label rights privileges the Framers' conception. *See* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 4–5 (1989) (listing a number of different rationales proffered for the First Amendment).

[146] *See generally* Joseph Raz, *The Nature of Rights*, 93 MIND 194 (1984) (discussing the nature and account of rights).

rights.[147] Joseph Raz offers a canonical statement: "'*X* has a right' if and only if *X* can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[148] Rights then involve restrictions on others' liberty.[149] In virtue of the importance

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[147] This is a version of the so-called interest theory of rights. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1986) (advancing interest theories of rights). *Cf.* Joel Feinberg, *The Rights of Animals and Unborn Generations* (positing the possession of interests, but not the capacity for choice or waiver, as a necessary condition for bearing rights), *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 159–84 (1980). I focus on Raz's version of the interest theory since I am concerned with justifying the duties that rights impose, which involves inquiring into the precise nature of the interest(s) that a right protects. Matthew Kramer offers a different version of an interest theory of rights but, as he acknowledges, his theory is concerned more with identifying *whom* the right protects rather than inquiring into whether the interests justify protection through rights. *See* Matthew H. Kramer, *In Defense of the Interest-Theory of Right-Holding: Rejoinders to Leif Wenar on Rights* (Cambridge Legal Stud. Res. Paper Series, Paper No. 22/2016, May 2016) (advancing an alternative interest theory of rights); *see also* Matthew H. Kramer, *Getting Rights Right*, *in* RIGHTS, WRONGS AND RESPONSIBILITIES 28–95 (Matthew H. Kramer ed., 2001); Matthew H. Kramer, *Refining the Interest Theory of Rights,* 55 AMER. J. JURIS. 31 (2010). The main rivals of interest theories are will or choice theories of rights, which identify as the distinctive feature of rights claims against others that the right-holder may choose to exercise or waive. *See, e.g.*, H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 162–93 (1982) (promoting a broader conception of rights than interest-theories of legal rights); CARL WELLMAN, REAL RIGHTS 7 (1995) (referring to rights in terms of an individual's freedom, control, and liberties); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 175 (1955) (advancing the position that the main natural right of people is to be free). For an overview of the debate between these two positions, see Leif Wenar, *The Analysis of Rights*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 254 (Matthew H. Kramer ed., 2008).

I take it that will theories are inapt when it comes to assessing the scope of constitutional rights, which do not have choice as their central element. What would it mean, for example, to waive one's right to due process or equal protection of the laws? It is possible that constitutional rights do not readily lend themselves to will theories because they are not so much rights of individuals as restraints on government. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 881 (1960). Or it is possible that constitutional rights are not particularly amenable to will theories because many of the interests these rights protect are so foundational that rightholders ought not to be permitted to forsake them. Leif Wenar says something along these lines with regard to human rights. *See* Leif Wenar, *The Nature of Claim-Rights*, 123 ETHICS 202, 218 (2013). At any rate, because of the awkward fit between will theories and constitutional rights, I do not consider will theories further.

[148] Raz, *supra* note 146, at 195. Raz offers lots of examples of the kind of interests sufficiently weighty to ground rights (e.g., rights to personal security, *id.* at 210, and rights to education, *id.* at 199). For a general statement of the nature of the interests grounding rights, see Sarah Hannan, *Autonomy, Well-Being, and Children's Rights: A Hybrid Account* 8 (Stanford Univ., Working Paper) (Feb. 10, 2012) (contending that the interests worthy of protection are interests in those "goods whose satisfaction is required for a recognizably human life, whatever a person's particular plans, and distinctive conceptions of the good").

[149] To be under a duty not to do *X* is to no longer be at liberty to do *X*. *Cf.* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE

of protecting a particular interest of *X*, we impose duties upon others—duties to refrain from acting in ways that would set back the protected interest, or duties to affirmatively promote that interest. Accordingly, the nature of the interest determines the shape and scope of the right and its corresponding duties.[150] The U.S. Supreme Court has at least on occasion recognized something of this kind, declaring that the "purpose [of rights] is to protect persons from injuries to particular interests and *their contours are shaped by the interests they protect*."[151]

When does a litigant have a claim that falls under one constitutional right rather than another (or no constitutional right at all)? When, that is, does a litigant claim a constitutional right on- rather than off-label? Two points are important in answering that question. First, merely engaging in the activity that the right normally protects is not sufficient to make the use on-label; instead, one must also have the interest that the right protects. Second, assertion of a right can be on-label even if one's bid to have the right protect her ultimately fails. I elaborate on each of these in turn.

1. On- and Off-Label Rights Assertions.

On one possible view of the proper assertion of a constitutional right, each such right has "elements," or conditions of its application, that determine whether a litigant may avail herself of it (even if a court ends up denying that the right extends to her). For example, one asserts free exercise rights on-label just so long as one is engaged in religious practice; one asserts rights of freedom of the press on-label just so long as one is engaged in something plausibly construed as media activity; one asserts rights against cruel and unusual punishment on-label only if one is subject to criminal sanctions. On this view, the feature that makes the invocation on-label is that one is engaged in the activity the right protects (or one will be subject to treatment that the right protects *against*, as with punishment).

I believe that this way of construing whether a rights assertion is on- or off-label is misguided. Formally put, it mistakes a

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L.J. 16, 36–37 (1913) (disagreeing with the conception of a duty not to interfere with the rights of third parties).

150 "A right is based on the interest which figures essentially in the justification of the statement that the right exists." Raz, *supra* note 146, at 198.

151 Carey v. Piphus, 435 U.S. 247, 254 (1978) (emphasis added).

necessary condition for a sufficient one. To be sure, one may claim rights of free exercise against application of a particular law only if the law constrains one's religious observance, and one may claim freedom of the press against application of a particular law only if one is involved in media activity. But, crucially, if the interest upon which the law threatens to impinge is not the one that the right in question protects, one's assertion of the right will be off-label. Suppose, for example, a litigant happens to be a member of a pacifistic religion at the time of a military draft, and even though he harbors no pacifistic commitments himself, he asserts free exercise rights against his conscription because military service would conflict with his long-time ambition to pursue a project meaningful for him—say, hiking the Appalachian Trail. There is no question that his co-religionists who have internalized the prohibition on military service could properly assert free exercise rights to evade conscription. But insofar as the interest he seeks to protect—an interest in pursuing a personal, non-moral and non-religious ambition—is not the interest free exercise rights protect, his assertion is off-label.

Those who think that this litigant may take advantage of the right even if he does not have the interest the right protects conceive of rights as freestanding entities. But this is a mistake. We have rights only because we have interests that are sufficiently weighty to warrant the imposition of duties on others.[152] Rights are simply the corollary of those duties.[153] It is important that rights remain tied to the interests grounding them in order to justify the burdens (i.e., the duties others incur) that having a right entails. So, the litigant who does not have the interest the right protects proceeds off-label when she asserts that right; she imposes a duty of restraint on others that her interests cannot justify.

But what if the litigant has *some* interest that a right protects, yet she invokes a different right in the service of that interest? In *Masterpiece*, for example, Phillips has interests in freedom of conscience, and these deservedly ground rights in our constitutional regime—in particular, rights of free exercise. Insofar as he has an

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[152] *See supra* note 149 and accompanying text.

[153] *See supra* note 149 and accompanying text; *see also* Raz, *supra* note 146, at 208 ("Rights are intermediate conclusions in arguments from ultimate values to duties . . . . Such intermediate conclusions are used and referred to *as if* they are themselves complete reasons." (emphasis added)).

interest warranting constitutional protection, may he seek to protect it through any constitutional provision that roughly tracks his activity? In particular, may he seek to protect it by invoking rights of free speech?

I believe not. Again, the reason follows from the relationship between protected interests and duties. Recall that interests that are sufficiently weighty receive protection by imposing duties on others.[154] Each set of duties is then justified by the interests it is meant to support. But there is no reason to think that the state would be justified in imposing those duties in the service of a set of interests *different* from the ones underpinning the asserted right.

To make matters more concrete, I offer a preliminary way of thinking about the way Phillips's interests interact with the rights he asserts. Assume that an interest in freedom of conscience is not sufficiently weighty to permit discrimination against protected classes whereas an interest in freedom of speech might be.[155] If Phillips has only an interest in freedom of conscience, then he should not receive an exemption from Colorado's public accommodations law; he would not have an interest weighty enough to impose upon gay couples a duty to refrain from insisting on their statutorily granted right to service. Invoking a free speech claim—*ex hypothesi*, a right he does not have—would then serve as an end-run around this outcome. Phillips would then be imposing upon gay couples duties—to refrain from insisting on service—that were not justified by the interests Phillips really has.

Here is the more general point: one reason to require that litigants press their interests through the rights corresponding to those interests, rather than through any right at all, goes to the unfairness that might befall duty-holders were they made to incur burdens to which the litigant, given her true interest, would not otherwise be entitled.

Another reason, as we shall see in greater detail, is that allowing a litigant to claim a right that does not correspond to her interest results in unfairness to those who have the same interest as she has but whose situation does not include the extraneous feature that the

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[154] *See supra* note 139 and accompanying text.

[155] Because I do not believe that wedding vendors' free speech interests are implicated in these cases, *see supra* Part II, I do not venture to determine whether these interests could justify discrimination. I do go on to argue that interests in freedom of conscience cannot do so. *See infra* Part V.

off-label claimant can exploit to make it look like the off-label right fits. Think again of the chauffeur and the baker, where the baker can exploit the expressive elements of his work to claim free speech rights—off-label, as we can now see. While I shall have much more to say about this in what follows, the important definitional point for now is this: a particular right is asserted on-label only where the interests in question warrant protection through rights and only where the interests in question are the ones the right protects.

2. Unsuccessful On-Label Rights Assertions.

Consider a litigant who asserts a free exercise right against a law that looks to single her out for a special burden because of her religion. The First Amendment forbids this kind of targeting, so she exercises her free exercise rights on-label.[156] But the fact that it is on-label does not entail that she will prevail. For she might be mistaken—the burden the law imposes on her might be one that most everyone subject to the law shares, and to the same extent too. Or the law might indeed have impermissibly singled out the litigant and those who share her faith, and yet she might still lose because the law serves a compelling state interest in the least restrictive way.[157]

The general point is that invocation of a right can be on-label even if a court ultimately concludes that the right does not extend to the party invoking it. What makes the invocation on-label is that the litigant actually has the interest the right protects (again, even if she does not have it to the requisite degree, or even if the right does not extend to her case because its scope is cabined by sufficiently weighty state interests).

B. THE TROUBLE WITH OFF-LABEL RIGHTS ASSERTIONS

I have already suggested that, given the relationship between interests of a sufficiently strong kind and duties, off-label rights exercises are troubling.[158] Rights restrict others' liberties, so we should worry if a litigant invokes a right to protect interests he does

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[156] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (declaring local law targeting a specific religious group violated the Free Exercise Clause).

[157] *See id.* at 546 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978))).

[158] *See supra* text accompanying notes 154–55.

not have.[159] The abuse-of-rights doctrine, found in many civil law jurisdictions,[160] protects against a distinctive kind of off-label exercise for precisely this reason.[161] If a homeowner erects a non-functioning chimney simply to obstruct her neighbor's view, she abuses her property right.[162] A proper exercise of her property right would have her set back others' interests only incidentally, if at all. But here she exercises her right precisely to harm her neighbor.[163]

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[159] *Cf.* Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191, 195 (2011) ("The normative function of rights is to demarcate areas of freedom for the right-holder that can coexist with the freedom of those whom rights place under an obligation."). The worry arises with even greater force if one believes that the interests grounding rights are so weighty that we might well need more than one duty to protect them. *See, e.g.*, Jeremy Waldron, *Rights in Conflict* ("There are many ways in which a given interest can be served or disserved, and we should not expect to find that only *one* of those ways is singled out and made the subject matter of a duty."), *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, 212 (1993).

[160] *See* Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 MCGILL L.J. 389, 392–95 (2002) (surveying the abuse of rights doctrine as implemented in various civil law jurisdictions).

[161] While U.S. law lacks the far-reaching abuse-of-rights doctrine found in continental jurisdictions, one can understand nuisance law as embodying the doctrine's spirit. *See, e.g.*, *id.* at 396 (attributing this understanding of nuisance to William Prosser). Others have argued that a principle of abuse of rights is immanent in other common law doctrines, such as patent and property law. *See* Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 B.Y.U. L. REV. 259, 293 (2007) (describing cases in which courts denied relief when a patent challenge was mounted in bad faith); Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448–50 (2013) (arguing that Anglo-American law contains a principle prohibiting the abuse of property rights, and that this principle follows from the political foundations of private property). *But cf.* Mitchell N. Berman, *Abuse of Property Right without Political Foundations: A Response to Katz*, 124 YALE L.J. F. 42, 43, 49–51 (2014) (arguing that abuse of property rights turns on a moral principle against harming others that is inherent in many legal doctrines and not on considerations internal to the justification). One can also find a cousin of the doctrine in cases that prohibit using speech to instigate imminent violence. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (noting that "[f]reedom of speech and of the press are fundamental rights" but "[t]hese rights may be abused by using speech or press or assembly . . . to incite . . . violence and crime"); *cf.* Scanlon, *supra* note 58, at 210 ("[T]he sound of my voice can break glass, wake the sleeping, trigger an avalanche, or keep you from paying attention to something else you would rather hear. It seems clear that when harms brought about in this way are intended by the person performing an act of expression . . . then no infringement of freedom of expression is involved in considering them as possible grounds for criminal penalty or civil action.").

[162] Katz, *supra* note 161, at 1451 ("[A]n owner necessarily exceeds her jurisdiction when she makes an otherwise permitted decision about a thing just for the reason that it will harm others."); *cf.* Weinrib, *supra* note 159, at 209 (explaining that encroachment upon another's property undertaken for gain or through negligence that has the serendipitous effect of preserving one's property would not be justified because it was not pursued *for the sake of* preservation).

[163] This case is described in H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 32–33 (1933). *Cf.* David A.J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and*

While her neighbor is generally under a duty not to interfere with the homeowner's property right, the abuse-of-rights doctrine holds that the duty ceases when the homeowner exercises her property right maliciously, or with an intent to harm her neighbor.[164]

Still, not all off-label exercises involve the mischief contemplated in the abuse-of-rights doctrine.[165] Nor need they involve bad faith.[166] The person who invokes a right meant to protect an interest other than the one that is in fact at stake for her may just be mistaken about how best to characterize her true interest. In other words, not all off-label rights exercises need be consciously opportunistic.[167] We should assume that wedding vendors who appeal to the protections of the Free Speech Clause do not intend to leverage their rights as weapons against others.[168] Nor does their invocation of free speech rights directly cabin others' liberties. The Free Speech Clause protects individuals from undue interference by the state.[169] To be sure, if bakers and poets were to prevail on free speech grounds, that would limit the range of businesses gay couples could frequent.

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the Politics of Identity, 74 CHI.-KENT L. REV. 779, 804–05 (1999) (describing limits on free speech rights in Germany aimed to prevent the exercise of rights intended to damage others' dignity).

[164] *See* Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 25 (1996) (providing an overview of the abuse of rights doctrine and arguing that European jurisdictions focus on malice while Japan focuses on public welfare).

[165] *See, e.g.*, Byers, *supra* note 160, at 394 (indicating that Louisiana has expressly rejected an intent requirement in its doctrine).

[166] For a different use of the term "bad faith" in constitutional law, see generally Pozen, *supra* note 11 (discussing various concepts of constitutional bad faith).

[167] For the authoritative account of opportunism in constitutional rights, see Schauer, *Incentives, supra* note 30, at 1627–31 (discussing what is meant by "First Amendment opportunism" and some of its implications). *See generally* Schauer, *Boundaries*, *supra* note 30 (developing, in detail, his concept of "First Amendment opportunism" through a series of doctrinal vignettes).

[168] I recognize that a certain form of activism might at times involve something of this kind. There is evidence, for example, of contraceptive mandate challenges designed to both protect conscience and wage a larger assault on women's reproductive rights. *See*, *e.g.*, Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2542–54 (2015) (discussing the role that conscience-based claims play in larger law reform goals). To the extent that is true, we could think about this strategy as an abuse of rights. At any rate, it would count as off-label and thus be subject to the critique offered here. For clarity on the full scope of off-label exercise, however, we should assume the good faith of at least some of the objecting wedding vendors, an assumption also mandated by generosity of spirit.

[169] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234 (1992) ("[T]he First Amendment protects against impositions by government.").

But these couples would not then be under a *duty* not to frequent these stores; instead, we should say that they had no right to service.[170]

What, then, would explain the troubling nature of off-label exercises of constitutional rights where intentional harm is not at play? One answer arises if one thinks of the U.S. Constitution as a quasi-religious document, with misuse of its provisions perpetrating something like sacrilege.[171] For illustration, consider the *Slaughter-House Cases*, which presented the U.S. Supreme Court with its first occasion to construe the Reconstruction Amendments.[172] There, butchers in New Orleans argued that a health and welfare law limiting the places where they could slaughter meat violated their civil rights as newly enacted in the Thirteenth and Fourteenth Amendments.[173] The Court recoiled from the idea that these Amendments might be used not to ensure liberty and equality, but instead to protect businesses' narrow economic interests:

> [T]he one pervading purpose found in [the Reconstruction Amendments], lying at the foundation of each, and without which none of them would have been even suggested . . . [was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[174]

The Court was no less affronted by the butchers' contention that the law they were challenging constituted a form of "servitude" in

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[170] In Hohfeldian terms, the victorious wedding vendors would have a privilege to exclude, which correlates to no-right to complain on the part of those who have been excluded. Hohfeld, *supra* note 149, at 34–37.

[171] *See, e.g.*, Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984) (developing an account analogizing between "what has been said about the Bible and the Constitution as objects of interpretation"); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 130 (1979) (analogizing the approaches taken in constitutional and theological construction).

[172] *See* 83 U.S. (16 Wall.) 36, 66–67 (1872).

[173] *See id.* at 43.

[174] *Id.* at 71.

violation of the Thirteenth Amendment.[175] And the Court rejected the butchers' appeal to the Equal Protection Clause, too, on the ground that the Clause was meant to protect social and political equality, not economic interests.[176] In each of these moves, the Court made clear that constitutional rights may not be invoked for purposes other than those for which they were intended. The animating spirit of the Court's decision is this: we demean the evils the Amendments aim to combat if we allow those who suffer a business injury to claim the Amendments' protections.

One need not proceed with such a reverential attitude toward constitutional text to perceive that off-label rights exercises are pernicious. Consider that, even apart from the dilution or denigration that rights sustain through their off-label exercise, off-label rights exercises also wage an unfairness to those unable to make their claims fit within the right's contours. Here we return to the religious baker and chauffeur: if the injury to each of being made to contribute to a same-sex wedding is the same, then it is unfair that the baker's complicity claim should gain greater recognition only because of the fact that his trade uses words or artistry—a fact extraneous to the nature of the interest that he seeks to protect.[177] The unequal treatment is an affront to the chauffeur. But it is also an affront to society. For recognition of a constitutional right functions as a trump against state laws. In this way, the baker would be released from obeying a law to which all others in his state are subject—a disparity that offends against a commitment that each citizen share equally in our political obligations.[178] Moreover,

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[175] *Id.* at 69 ("To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.").

[176] *See id.* at 81 (stating, with regard to the Equal Protection Clause, that "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision"). *But cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147 (1976) (noting that the Amendment was intended to cover all persons but nonetheless insisting that "blacks were the intended primary beneficiaries . . . [as] it was a concern for their welfare that prompted the Clause").

[177] *See supra* text accompanying notes 128–30.

[178] This form of equality is a specification of the broader principle that each of us is equal before, or in the eyes of, the law. *See, e.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (8th ed. 1982) ("[W]ith us no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and

state laws function as an important means for achieving socially valuable ends—including the equality guarantees in public accommodations statutes[179]—so we have special reason to object when a right is invoked for ill-fitting purposes to evade these ends. Indeed, widespread recognition of off-label exercises of rights might threaten to undermine these ends altogether.[180]

C. JUDICIAL RESPONSES TO OFF-LABEL CONSTITUTIONAL RIGHTS EXERCISES

How should courts respond to off-label exercises of constitutional rights? I propose that, when a different provision of the U.S. Constitution protects the true interest for which the asserted, inapt right is claimed, courts should decide the matter as if it had been brought under the proper provision. In some cases, good lawyering will have made it the case that any and every constitutional provision that might possibly fit will have been briefed by the party claiming the right. This has been the strategy in the wedding vendor cases, for example, where the vendors have asserted both Free Speech Clause and Free Exercise Clause claims.[181] But in cases where only the off-label right has been asserted, courts might invite

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amenable to the jurisdiction of the ordinary tribunals."). For contemporary theorists grounding our political obligations in our equal moral status, see generally THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2008); ANNA STILZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE (2009).

[179] For a catalog of the socially valuable equality-conferring ends that public accommodations laws aim to achieve, see, for example, Sepper, *supra* note 51, at 663–68.

[180] But what if the off-label exercise aims instead to protect against socially undesirable laws, or worse still, laws that are unjust? Should the advocate of, say, mandatory arts education in public schools not wield whatever tools are at her disposal, including constitutional rights that look to provide a colorable entitlement, even if these are ultimately off-label? And what about avenues of judicial relief that are foreclosed by precedents that are genuinely mistaken? One might see the modern-day doctrine of habeas corpus as an off-label effort to rectify severe violations of due process rights within the criminal justice system. (I am grateful to Erin Miller for this suggestion). Responding to these concerns requires distinguishing merely socially undesirable laws from those that are genuinely unjust. The former cannot justify off-label rights usage. Constitutional rights aim to strike a balance between protecting individuals from state interference and securing arrangements that promote social welfare. Recognizing off-label rights upsets this balance. It allows the off-label rights claimant to avoid a law that passes constitutional muster and that the state, in its democratic wisdom, has judged socially advisable. By contrast, courts should perhaps grant more lenience to the person who claims rights off-label because doing so is the only avenue available to them and the foreclosure of other avenues constitutes a grave injustice. I leave for another day the question of just how constraining existing doctrine must be and what interests might justify protection through off-label means.

[181] *See supra* notes 14, 20 and accompanying text.

further briefing on whether the interest at stake could be vindicated under some other, arguably more fitting, constitutional provision.

Having courts decide a case on the basis of one constitutional right when more than one right has been claimed is not a novel mode of judicial disposition. Courts faced with a claim that a law violates multiple rights sometimes choose to vindicate all of them or to vindicate only a subset of them. The marriage equality cases, for example, rely on both the Due Process and Equal Protection Clauses.[182] But *Lawrence v. Texas*, the case overturning prohibitions on sodomy, explicitly adduced only the Due Process Clause in support.[183] The *Lawrence* Court did not deny that anti-sodomy laws wrought inequality. Instead, the Court contended that overturning these laws on equal protection grounds would not get at the fundamental harm they inflicted—namely, the stigmatization of homosexuality that the laws imposed.[184] Still, one can reasonably ask why the Court did not choose to rest its decision on both equality and due process grounds. A plausible answer is that the interest Lawrence sought to protect would have been demeaned had the Court characterized it as an interest in equal treatment. States would then have been free to punish sodomy so long as they targeted both same-sex couples and opposite-sex couples. To get at the underlying wrong of sodomy prohibitions, the Court had to make plain that anti-sodomy laws reflected gay

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[182] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1448 (2004) (discussing cases where the two clauses run together).

[183] 539 U.S. 558, 564 (2003) ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."); *see also* Yoshino, *supra* note 134, at 781 (describing the novelty in Justice Kennedy's opinion as a synthesis of the Due Process and Equal Protection Clauses: "Liberty and equality became—or were revealed to be—horses that ran in tandem rather than in opposite directions."). For a commendable distillation of practical principles from this synthesis, see generally Anthony O'Rourke, Windsor *Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM. & MARY L. REV. 2171 (2014).

[184] *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.").

animus. Construing the harm in these laws as a failure to treat likes alike would have detracted from, rather than added to, the force of recognizing the principal offense.

It is worth noting that the Court did not decline to recognize Lawrence's claim that the law violated his equal protection rights because it viewed that claim as an off-label exercise of his rights. But *Lawrence* does stand as an example of a case where the Court is sensitive to the interests undergirding various rights that might be asserted, and it chooses to decide the case on the basis of the right that best promotes that interest. Thus, *Lawrence* shows that proceeding in this way is within the competence of courts. Further, given the harms of off-label constitutional rights exercises described above, I submit that courts *should* proceed in this way. They should deny the application of constitutional rights where the asserted rights protect interests other than the ones the rights contemplate. That is, courts should reject off-label exercises of constitutional rights.

D. OFF-LABEL RIGHTS AND CONSTITUTIONAL CHANGE

At this point, one might worry that refusing to countenance off-label rights assertions will foreclose constitutional change. Even if one agrees that constitutional rights are grounded in particular interests, one might think that the dynamic nature of these rights demands that we allow litigants to assert novel constitutional claims—that is, claims that a given constitutional right should receive a new interpretation, or should be extended to a new class of activities.[185] If anything, then, we ought to welcome off-label uses as instances of zealous advocacy and, where successful, as important tools in the process of constitutional evolution.[186] On this line of thought, skepticism about off-label rights is misplaced at best, and perhaps also regressive.

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[185] *See* Amy J. Sepinwall, Intension, Extension, and Constitutional Change (unpublished manuscript) (on file with author) (exploring the interpretive models presented by Professors Ackerman and Lessig); *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 289–90 (1991) (providing a model of constitutional change not bound to the formal amendment process); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1216–17 (1993) (offering a model of constitutional change as translation, where the interpreter uses the Framers' understanding of the meaning of a particular concept but the contemporary, rather than original, scope of that concept's application).

[186] *See generally* DAVID STRAUSS, THE LIVING CONSTITUTION (2010).

The worry misunderstands when and why a right's assertion is off-label, and so rightly denied judicial recognition. There are two aspirations a litigant might have in seeking to have a constitutional right apply to him where it has not applied to like cases before. The first is a bid to enlarge the meaning or the scope of application of a right. In these cases, the litigant implies that the right, as currently construed, is not broad enough. He contends that the right, as the doctrine currently stands, fails adequately to track its normative foundations.

The second aspiration does not start from the premise that the law stands in need of correction. Instead, the litigant takes the doctrine as given but seeks to avail himself of its protections by exploiting a surface resemblance between the activities the right normally protects and his own. Again, this exploitation might be self-consciously opportunistic, or it might be pursued in good faith. Either way, he is not after constitutional change—he wants the *existing* interpretations of the right to apply to him. If pressed, he could not establish that the interest at stake for him fits within the normative foundations of the right.

The assertion of a right is off-label when it is of the second variety. The litigant who invokes a right off-label has misunderstood the right—again, perhaps opportunistically or innocently. Constitutional interpretation is just the enterprise aimed at discerning the meaning and scope of constitutional provisions, including constitutional rights.[187] Courts should then address novel constitutional claims with an eye to determining whether these claims are consistent with the normative foundations of the claimed rights. If they are, then the court in question should recognize the claimed right. While novel, it is nonetheless on-label. The right always had the immanent potential to cover that interest even if no prior litigant had sought to protect it, and so no court had an opportunity to assess whether the right extended to it. At the same time, courts should reject rights assertions that do not serve the interests underpinning the asserted right. Their doing so does not stymie constitutional change; it merely prevents the right's misapplication.

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[187] *See supra* note 130 and accompanying text.

IV. OFF-LABEL RIGHTS EXERCISES AND THE FREE SPEECH CLAUSE

One might be convinced that, in general, courts should deny off-label exercises of constitutional rights but also think that free speech rights ought to stand as an exception to this general posture. After all, free speech is famously expansive—protecting speech of low value, irrespective of the speaker's motive, and oftentimes not even for his own sake.[188] One might then think that, whatever the general concerns with off-label rights exercises, courts should tolerate them when the asserted right is a right to speak. In this Part, I consider and reject two reasons for thinking that courts should permit off-label exercises of free speech rights.

A. THE FIRST AMENDMENT IS (SUPPOSEDLY) NOT ABOUT RIGHTS

On one well-established view, the purpose of the First Amendment is not to confer rights but instead to restrain government.[189] The text of the First Amendment would seem to make this plain: "Congress shall make no law . . . abridging the freedom of speech."[190] But of course Congress passes many laws

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[188] *See infra* Section IV.B.

[189] *See, e.g.*, Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 362 (1993) ("The conceptual limit of the constitutional right [of free speech] is not, in other words, another right, but a power of government, supported and identified by reference to underlying interests."); Fried, *supra* note 169, at 234 ("[T]he First Amendment protects against impositions by government."); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 213 n.66 (1983) (noting "the usual view of the function of the [F]irst [A]mendment as but a negative restraint on government's efforts to punish or preclude speech activities"); *cf.* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13 (1965) ("The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants."); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831, 874 (1989) ("[T]he purpose of the [F]irst [A]mendment is to constrain government action, not only to confer personally held 'rights' on certain individuals."); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867 (1979) ("The historic purpose of the [F]irst [A]mendment has been to limit government, not to serve as a source of government rights."). *But see* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260 (1994) (noting "the rejection of the prevailing view that the First Amendment has force merely as a negative restraint on government"). The Court sometimes runs together the negative restraint view and individual rights view. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("The First Amendment, however, protects the right to be free from government abridgment of speech.").

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

abridging the freedom of speech.[191] Whether government exceeds its power in doing so depends on the scope of the interests that the First Amendment protects.[192] Thus, even though the text speaks of a limit on state power, the meaning of the text depends on an analytical and normative prior understanding of First Amendment rights. If off-label exercises of free speech rights are then permissible, it will not be because of the text of the Free Speech Clause but instead because of an immanent understanding of the scope of the right that makes it insensitive to the reasons for invoking it and so unusually expansive.

B. FREE SPEECH MAXIMALISM

Free speech rights are perhaps more expansive than any others protected by the U.S. Constitution. For example, no other amendment has an overbreadth doctrine associated with it.[193] That is, only the Free Speech Clause can be invoked to challenge a state law not because its application to the challenger affronts the U.S. Constitution but because the law threatens to unconstitutionally silence others.[194] And no other constitutional right so forthrightly

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[191] Consider that the law prohibits many forms of speech—threats, blackmail, fighting words, and defamation—and compels many others—warning labels and financial disclosures, for example. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (listing categories of speech historically falling outside of First Amendment protection); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651 (7th Cir. 2006) (citing warning and nutrition labels as the most prominent, though not the only, permissible instances of compelled speech); *cf.* Scanlon, *supra* note 58, at 207 ("[S]ince acts of expression can be both violent and arbitrarily destructive, it seems unlikely that anyone would maintain that as a class they were immune from legal restrictions. Thus the class of protected acts must be some proper subset of this class."). Fred Schauer's body of work on First Amendment "coverage" amply describes the puzzles and paradoxes regarding what counts as "speech" for First Amendment purposes. *See, e.g.*, Schauer, *Boundaries*, *supra* note 30; Schauer, *Incentives*, *supra* note 30. For accounts that aim to provide coherence to the doctrine, see generally Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87 (2017), and Shanor, *supra* note 26.

[192] *Cf.* Scanlon, *supra* note 58, at 205 ("[A]t least some element of balancing [between individuals' rights and societal interests] seems to be involved in almost every landmark first amendment decision.").

[193] *See, e.g.*, Schall v. Martin, 467 U.S. 253, 268 n.18 (1984); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965))). *But see generally* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004).

[194] *See, e.g.*, Note*, Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1749–51 (2010) (contrasting the overbreadth doctrine with traditional standing requirements).

aims to protect not only the claimant of the right (here, the speaker) but also those who would benefit from its exercise (i.e., the speaker's audience).[195] The unique breadth of the Free Speech Clause might then lead one to think that the law should tolerate off-label exercises of speech rights, even if it should limit off-label exercises of other rights.[196]

To respond to these worries, it will be useful to treat speech restrictions and compelled speech separately. In what follows, I say more about compelled speech because that is the kind of free speech abridgement that the wedding vendor cases involve.[197] Nonetheless, I will offer some brief and tentative remarks about speech restrictions first.

1. Off-Label Challenges to Free Speech Restrictions.

The problems with off-label rights exercises persist with notable force in cases where a speaker asserts a right to speak with an eye to advancing a non-speech interest. The person who would challenge a speech restriction because she cares about disseminating her message not for its own sake, but for some other end, is not well placed to advance the ends of the Free Speech Clause.[198] First, hers

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[195] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (stating that the purpose of the First Amendment is "to supply the public need for information"); Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1778 (2017) ("Free speech theorists are virtually united in concluding that listeners are rightsholders . . . . The debate is over whether speakers also enjoy speech rights. Some argue that . . . speech rights are exclusive to listeners." (footnotes omitted) (citations omitted)). Kendrick argues that free speech rights protect both speakers and listeners. *See id. passim*.

[196] The thought here is of a piece with a general scholarly approach to the Free Speech Clause that opts for maximal speech protections not because all speech warrants such protection but because courts and legislators are not to be trusted with making the right kinds of distinctions. *See, e.g.,* David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 68 (2017); *cf.* Shiffrin, *supra* note 59, at 862 ("[F]ree speech protections in any particular case do not and should not turn upon whether the speaker is actually sincere.").

[197] *See supra* text accompanying notes 59–85.

[198] Thomas Emerson usefully denominates the central rationales for protecting the freedom of speech:

> Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

is not an authentic expression of the self, so it is hard to see how it advances her dignity;[199] she is not endeavoring to speak her mind—a classic justification for free speech protections.[200] Second, insofar as she uses speech instrumentally, she is liable to craft his speech carelessly, or worse, misleadingly, if doing so would promote her non-speech end. So, her speech may not have the hallmarks of high-value First Amendment speech—that is, speech that aims to seek truth or add to the store of public discourse for the sake of advancing democratic self-governance.[201]

If anything, then, off-label exercises of free speech rights raise not only the concerns that general off-label rights exercises do—namely, that the person exploits the right for ends it is not intended to serve—but also concerns that show that listeners have little reason to care about that speech.[202] As such, there looks to be a

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[199] For the view that the Free Speech Clause aims to protect and promote individual dignity, see Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1326 (1998) ("The purpose of the First Amendment is not merely to protect speech itself, but also the inner life that it expresses."); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 15 (1989) ("We tolerate a speaker's attempt at self-expression out of respect for human dignity."); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) ("The value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish."). *But cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 52 (1982) ("[T]he concept of self-expression is not helpful to an analysis of free speech . . . . Because virtually any activity may be a form of self-expression, a theory that does not isolate speech from this vast range of other conduct causes freedom of speech to collapse into a principle of general liberty.").

[200] *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992) (describing the right of free speech as "a right defiantly, robustly, and irreverently to speak one's *mind just because it is one's mind*" (footnote omitted)); *cf.* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 503–04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

[201] Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("[E]very schoolchild can understand . . . our duty to defend" free speech when it comes to "political oratory or philosophical discussion . . . . But few of us would march our sons and daughters off to war to preserve the citizen's right to see [an adult film] . . . in the theaters of our choice."); *see generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273–82 (1981) (describing high-value speech and the justifications for its strong protection).

[202] Mitchell Berman offers a fascinating explication of the prohibition against blackmail—a crime that crucially involves speech: "[A] person exceeds or 'abuses' her rights by disclosing information that she foresees will be harmful to another's reputation unless she genuinely believes that the balance of morally relevant considerations renders the disclosure justified all things considered." Berman, *supra* note 161, at 52. While Berman is concerned with the

plausible case for concluding that a court should not permit off-label exercises of free speech rights that challenge speech restrictions.

2. Off-Label Challenges to Compelled Speech.

When it comes to compelled speech, the case against off-label rights exercises looks, at least at first glance, to be on even stronger footing. If the poet or the baker is required to serve, then each will be issuing *more* speech rather than less. As such, compelled speech looks not to raise overbreadth worries, which arise where a regulation threatens to chill protected speech in addition to speech that is properly regulated.[203] This is because chilling involves self-enforced silence, and compelled speech is manifestly not silent.[204]

We can take an initial pass at disposing of the worry about listeners' rights in the same way: we care about listeners' rights when the law would deprive them of speech they might otherwise hear. But if the poet or baker is compelled to serve gay couples, the resulting product will *add* to the store of speech. If anything, then, listeners appear to be better off under a regime where wedding vendors may not turn gay couples away.[205]

With that said, one might worry that the foregoing is too hasty. Compelled speech might have an overbreadth analog—individuals might avoid those roles or contexts where they would be compelled to speak precisely to avoid the compulsion. If those roles or contexts would also have provided a platform for sincere speech, then the compulsion might well reduce the number of speakers or the amount of speech. One could imagine this outcome in the wedding vendor cases: individuals with great concern for artistic integrity may decline to pursue their art commercially lest they be subject to government intervention in decisions they take to be central to their

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scope of one's moral right to expression, I take it that his analysis is congenial to the construction of constitutional rights here, which might be put in just the pithy terms that Berman adduces for his own account: "Reasons matter." *Id.*

[203] New York v. Ferber, 458 U.S. 747, 772 (1982) ("[A] sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals.").

[204] *Cf.* Martin Redish, *Compelled Commercial Speech and the First Amendment*, 94 NOTRE DAME L. REV. 1749, 1750 (2019) ("[C]ompelled speech may actually *further* First Amendment values, by providing potentially valuable information . . . ." (emphasis in original)).

[205] *See id.* at 1764 (describing that listener's rights "could conceivably be *advanced* by compelled speech because such speech could often result in enrichment of the listeners in the performance of their private self-governing function").

art. So compelled speech could chill forms of artistic expression that would otherwise be available. And compelled speech might harm listeners too. Speech that is compelled is insincere, and the presence of these insincere statements can mislead listeners into believing that the views so expressed are more widely endorsed than they actually are.[206] Finally, compelled speech could undermine the spirit of truth-seeking that should animate the bulk of our discourse. As Shiffrin writes, "state measures that flaunt an indifference to sincerity encourage cynicism and ambivalence about the value of truth."[207]

As with the off-label challenges to speech restrictions, we need not contemplate whether compelled speech is problematic in and of itself. Instead, the issue is whether the aforementioned concerns are serious enough to warrant the law's recognition of *off-label* exercises of speech rights. On that score, whether any of these concerns should bear significant weight is not clear. We can expect that the market will match the number of artistic vendors to the demand for their services. If wedding vendors opposed to serving all-comers take themselves out of the open market,[208] they will be replaced by others who allow for universal access. Nor would this produce a less diverse collection of viewpoints. Under either regime—one where some vendors turn some couples away versus one where all vendors accept all-comers—the only cakes that are made are those that celebrate the couple's love. So too for all the wedding poetry, portraiture, and so on. Insofar as each wedding vendor has her own

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[206] *See, e.g.*, Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 333 (2008) ("[T]he government can distort the marketplace of ideas through the use of compelled speech. The government artificially amplifies its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint."). Compelled speech might undermine the speech of those who utter the compelled message sincerely since listeners might mistake the sincere utterance for one that is compelled. Shiffrin, *supra* note 59, at 853 n.56; *cf.* Daniel Putnam, Freedom of Expression and Consideration of Interests (unpublished manuscript) (on file with author).

[207] Shiffrin, *supra* note 59, at 862.

[208] Private religious businesses, which do not hold themselves out to all-comers, are permitted to serve only members of their faith. *See* Jane Haskins, *The Right to Refuse Service: Can a Business Refuse Service to Someone?*, LEGALZOOM, https://www.legalzoom.com/articles/the-right-to-refuse-service-can-a-business-refuse-service-to-someone-because-of-appearance (last updated Apr. 6, 2015) ("Nonprofit organizations such as churches are generally exempt from the [Federal Civil Rights Act of 1964]."); *see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1401–08 (1996) (providing a historical overview and extensive analysis of public accommodations laws).

unique style, replacing some vendors with others will necessarily mean that the market deprives the public of some artistic styles; but again, other vendors will fill the vacancies, thereby offering the public artistic styles they would not otherwise have seen.

Those wedding vendors who oppose same-sex marriage but nonetheless choose to abide by laws prohibiting discrimination on the basis of sexual orientation will, when they produce wedding cakes for gay couples, be expressing support that belies their true sentiments. But we need not worry that this expression will mislead anyone because these vendors can engage in counterspeech. They can find other ways of publicizing their opposition to same-sex marriage—presumably through more common and effective means of communication. A posting on Facebook or a bumper sticker on one's car likely conveys one's attitude toward gay marriage much more clearly than does supplying a cake for a gay wedding.[209]

Lastly, there is the concern about government-mandated insincerity. This concern should carry less weight given that sincerity isn't a sine qua non of commercial transactions. Most businesses supply goods and services while indifferent to the end to which these goods and services will be put. So, no one is licensed in reading from the provision of a wedding cake or wedding poem that the vendor is deeply enthusiastic about the event his creation celebrates. Further, here too the vendor can engage in counterspeech to undercut whatever sentiment his providing the good or service would otherwise insincerely convey. Finally, it is not at all clear that the government acts impermissibly when it forbids business owners from expressing or enacting their opposition to same-sex marriage through their business operations.[210] For it may well be that concerns for ensuring equal access and equal dignity should outweigh the conscientious objections of business owners.[211]

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[209] As we saw in Section II.B, artists might enjoy even more power to dissociate than do non-artistic wedding vendors. When Samuel Beckett, for example, learned that his play *Endgame* was to be staged on a set that deviated significantly from the bare stage for which the play explicitly called, he insisted that the theater include in the program a statement from him denouncing the production. *See* Beitz, *supra* note 85, at 340.

[210] *Cf.* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam) (deeming "patently frivolous" the restaurant owners' contention that the Civil Rights Act of 1964 was invalid because, in prohibiting segregation, it "'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'").

[211] I argue as much in Amy J. Sepinwall, Commercial Complicity 17–21 (Nov. 21, 2019) (unpublished manuscript) (on file with author).

V. OFF-LABEL EXERCISES AND THE WEDDING VENDOR CASES

The Court will almost surely have an opportunity to hear another wedding vendor challenge in the coming years.[212] It should approach that challenge with an eye toward ensuring that it protects only those constitutional rights the wedding vendor can properly claim. Since the interest the expressive wedding vendor would seek to protect is not an interest in speech or artistic expression per se, invocation of the Free Speech Clause represents an off-label exercise of the right to free speech. The proper doctrinal hook for a wedding vendor's complicity claim—whether or not the wedding vendor works in an expressive vein—is instead in protections for the rights of conscience. These rights find their legal home in religious freedom protections.[213]

Unfortunately, locating these claims in rights of conscience sounds their death knell in states without their own religious freedom laws.[214] This is because the U.S. Constitution's Free Exercise Clause does not support bids for religious exemptions from neutral laws of general application,[215] including public accommodations laws.[216] Nor can wedding vendors avail themselves of the federal RFRA since it does not apply against the states.[217] As such, the Court should reject the vendor's free speech claim as an off-label exercise of his free speech rights and then deny his bid for an exemption on post-*Smith* Free Exercise Clause grounds.[218]

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[212] *See supra* notes 16–17 and accompanying text.

[213] There is perhaps something aesthetically pleasing about an exercise in rights theory coming to rest on religious rights since the "historical circumstances that engendered the language of rights" involved concerns for religious toleration and religious freedom. *See* William A. Galston, *On the Alleged Right to Do Wrong: A Response to Waldron*, 93 ETHICS 320, 323 (1983).

[214] For a list of these states, see Dhooge, *supra* note 54, at 588 n.15. Washington state, where Arlene's Flowers is incorporated, does not have a religious freedom law, so Baronelle Stutzman would have no shield to deploy against the state's public accommodations law. Neither would Jack Phillips, were Colorado to decide to provide him with a new hearing, again because Colorado does not have a religious freedom law either.

[215] *See* Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).

[216] *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–03 (1968) (per curiam) (affirming the court of appeals decision that Title II of the Civil Rights Act of 1964 applied to the defendant's drive-thru restaurants and sandwich shop after the defendant argued, among other things, that Title II was invalid because it interfered with the free exercise of his religion).

[217] *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (striking down the portion of the federal RFRA that applied to the states on federalism grounds).

[218] *See supra* text accompanying note 54.

Wedding vendors in states with their own versions of RFRA should have their claims decided as a matter of state law, with each state adjudicating for itself the conflict between religious freedom and anti-discrimination.[219] I argue elsewhere that there is a compelling case for having anti-discrimination norms prevail.[220]

With that said, the aim here has not been to urge any particular substantive outcome. Rather, I have sought to reframe the conflict itself. We can see this conflict for what it truly is—a contest between religious freedom and equality—once we recognize which rights wedding vendors in fact have and which they have claimed off-label.

More broadly still, we can see there are good, progressive reasons to safeguard the Constitution from all off-label exercises of constitutional rights. The wedding vendor cases bring out these reasons. As I argued in Part III, off-label rights exercises are unfaithful to the U.S. Constitution and inconsistent with the normative foundations of the asserted rights.[221] That alone makes them wrong in principle. And perhaps worse still, they allow individuals to evade compliance with regulations that the legislature, in its wisdom, has deemed socially beneficial.[222] Courts should perhaps grant exemptions to individuals who disagree with these regulations on moral or religious grounds.[223] But the exemptions should heed the scope and meaning of constitutional rights protecting freedom of conscience. An exemption should not be granted on the basis of another right whose grounding interests the exemption does not serve.

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[219] *Cf.* Lund, *supra* note 54, at 467 (discussing the limited role state RFRAs have played thus far in suits about religious freedom).

[220] *E.g.*, Sepinwall, *supra* note 211.

[221] *See supra* text accompanying notes 156–80.

[222] *See supra* notes 181–83.

[223] *See* Sepinwall, *supra* note 39, at 1908–09 (advocating a revised balancing test for courts to use when granting requested religious exemptions).