

## Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction

James M. Oleske Jr.

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**DORIC COLUMNS ARE NOT FALLING: WEDDING CAKES,  
THE MINISTERIAL EXCEPTION,  
AND THE PUBLIC-PRIVATE DISTINCTION**

JAMES M. OLESKE, JR.\*

*[S]omehow a feeling persists, and is passionately expressed, that massive Doric columns are falling.* –Charles Black (1967)<sup>1</sup>

*In the space of a few short years, the basic terms of the American church-state settlement have gone . . . from being “taken for granted” to being “up for grabs.” . . . The change has been sudden, remarkable, and unsettling.* –Paul Horwitz (2014)<sup>2</sup>

*It is the evening of religious accommodation. . . . The government’s vindication of third-party dignitary harms has the potential to destroy religious accommodation.*  
–Marc DeGirolami (2015)<sup>3</sup>

*[L]ibertarian skeptics have put themselves in a position to threaten even the core applications of public accommodations laws.*  
–Samuel Bagenstos (2014)<sup>4</sup>

*[T]he “Freedom of the Church” to ignore the dictates of our various Civil Rights Acts . . . is a vivid example of a newly emerging and deeply troubling family of rights . . . .* –Robin West (2015)<sup>5</sup>

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\* Associate Professor of Law, Lewis & Clark Law School. I am very grateful to Mark Graber for inviting me to participate in the 2015 Maryland Constitutional Law Schmooze and to Sam Bagenstos, Marc DeGirolami, Rick Garnett, Chip Lupu, John Parry, and Liz Sepper for providing helpful comments on earlier drafts of this Paper.

1. Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 89 (1967).

2. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014) (quoting Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997)).

3. Marc. O. DeGirolami, *Free Exercise by Moonlight*, SAN DIEGO L. REV. (forthcoming) (manuscript at 3, 32), <http://ssrn.com/abstract=2587216>.

4. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1233 (2014).

5. Robin L. West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoe Robinson et al., eds.) (forthcoming 2015) (manuscript at 5), <http://ssrn.com/abstract=2595663>.

## INTRODUCTION

The center is holding. Our basic understanding of the public-private distinction—an understanding that underlies both the church-state and civil-rights settlements in America—remains intact. It remains intact despite being challenged in recent years by a series of novel arguments nurtured in the academy and deployed by high-profile political figures. Some of those arguments would dramatically curtail religious accommodations, even for churches. Others would dramatically expand religious accommodations, most notably from civil rights laws in the commercial marketplace. And yet others would deliver a libertarian realignment that would render such marketplace accommodations unnecessary. Any one of those results would represent a significant shift in the “Overton Window,”<sup>6</sup> which, in the constitutional context, we might better call the “Balkin Window.”<sup>7</sup>

Not surprisingly, the far-reaching arguments mentioned in the previous paragraph have generated anxiety among religious liberty advocates and within the civil rights community. In addition, commentators coming from both perspectives have raised alarm about other supposed “changes” and “emerging” developments<sup>8</sup> that, in truth, are merely new applications of long-settled principles. Taken together, the truly radical arguments and the perceived-to-be-radical trends have contributed to a growing sense that fundamental protections—for religious liberty, equal citizenship, or both—are in jeopardy. The actual threat, however, has been largely overstated. Only one genuinely novel argument can claim even a partial victory, and that victory was neither constitutionally mandated nor based on circumstances that are likely to be replicated.<sup>9</sup> Indeed, to date, the arguments for sweeping change are most notable for their failure to convince judges, legislators, and the general public to depart from ingrained instincts about the contexts in which the government can and cannot demand adherence to nondiscrimination norms.

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6. See Nathan J. Russell, *An Introduction to the Overton Window of Political Possibilities*, MACKINAC CTR. FOR PUB. POL’Y (Jan. 4, 2006), <https://www.mackinac.org/7504> (describing the Overton Window as the range of options on a given issue that are “within the realm of the politically possible at any time” and explaining how advocates work to “[m]ove the window” so that “policies previously impractical can become the next great popular and legislative rage”).

7. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> (“The history of American constitutional development, in large part, has been the history of formerly crazy arguments moving from off the wall to on the wall, and then being adopted by courts.”).

8. See, e.g., DeGirolami, *supra* note 3, at 34 (warning of “considerable changes afoot” that threaten religious liberty); West, *supra* note 5, at 5 (warning of “newly emerging” church freedoms that threaten civil rights).

9. See *infra* notes 95–101 and accompanying text (discussing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

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Part I of this Paper traces those ingrained instincts to an understanding of the public-private distinction that has prevailed since the end of the *Lochner* era. On the one hand are areas of activity involving the general public, where regulation of conduct is pervasive and presumptively constitutional. On the other hand are areas of activity involving inherently selective, expressive, or intimate associations, where various liberty or privacy interests may preclude regulation of conduct. More specifically, and of greatest relevance to the disputes discussed in this Paper, we have long understood the regulated public sphere to include “commercial relationship[s] offered generally or widely”<sup>10</sup> and the protected private sphere to include relationships within religious institutions.

Part II turns to the most prominent context in which the public-private distinction is being recontested today: the debate over whether business owners have a right to refuse marriage-related goods, services, and benefits to same-sex couples. Cases have already arisen around the country involving wedding cakes, flowers, photos, and venue spaces, and it seems inevitable that disputes will arise over employee benefits for same-sex spouses. Both sides claim that the other is pressing extreme arguments, and in this instance, it is those asserting liberty rights for business owners who are truly pushing the envelope. So far, however, their constitutional contentions have all been rejected in the courts, and their push for legislative relief has borne little fruit.

Part III addresses the ministerial exception, which was the subject of the Supreme Court’s 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>11</sup> Like the wedding cake debate, the debate over the ministerial exception has seen both sides raise alarm about allegedly novel claims on the other side. But in this case, it is those making equality arguments against religious institutions that are outside the constitutional mainstream. They have fared no better, however, than the liberty advocates above: their arguments were rejected 9-0 in *Hosanna-Tabor*, and the basic proposition embraced in the lower courts since 1972—that non-discrimination laws cannot be applied to clergy hiring and firing—remains the law of the land.

Part IV concludes by emphasizing that, to date, the judicial, legislative, and cultural verdicts rendered on these two conflicts have all reaffirmed the longstanding status quo with respect to the public-private distinction and its implications for religious liberty and civil rights.

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10. *Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Powell, J., concurring).

11. 132 S. Ct. 694 (2012).

## I. A KEY PUBLIC-PRIVATE DISTINCTION: OPEN AND COMMERCIAL VERSUS INHERENTLY SELECTIVE, EXPRESSIVE, OR INTIMATE

The core idea behind the public-private distinction is that there are some areas of life, constituting a protected “private sphere,” where individual and associational decisionmaking must remain largely free from governmental control.<sup>12</sup> The classic example of such an area is the home, where an individual’s choice of guests can be subject to no antidiscrimination law.<sup>13</sup> The critical question is how far from the paradigm the private sphere extends.

As Professor Samuel Bagenstos recently detailed, there have long been arguments that a business’s choice of customers should be considered a protected private activity, even if the business is generally open to the public at large.<sup>14</sup> If ever this view was going to prevail, it would have been during the *Lochner* era, when the Court routinely limited state authority to regulate businesses that were deemed insufficiently “affected with a public interest.”<sup>15</sup> But even then, the Court declined to protect businesses against the

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12. See Bagenstos, *supra* note 4, at 1212 (observing that the “public-private distinction [is] understood . . . to preserve a sphere of private, individual choice”); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 280 (2010) (discussing the “crucial distinction between public and private realms” and observing that “[o]n the private side, the political community has only a limited authority to regulate the bonds of intimacy and association”); Carol Nackenoff, *Privacy, Police Power, and the Growth of Public Power in the Early Twentieth Century: A Not So Unlikely Coexistence*, 75 MD. L. REV. 312 (2015) (“The Court celebrates its legacy of protecting the private realm.”).

The term “public-private distinction” is sometimes used in a different sense to distinguish between state actors and non-state actors. See Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 127 (2004) (“Mainstream constitutional theory posits a strict distinction between private actors, who are shielded from constitutional liability . . . , and governmental actors, who are subject to constitutional constraints against interference with private actors’ rights.”); cf. Leslie Friedman Goldstein, *Death and Transfiguration of the State Action Doctrine—Moose Lodge v. Irvis to Runyon v. McCrary*, 4 HASTINGS CONST. L.Q. 1, 16 (1977) (contrasting the use of the term “public building” in the sense of “state owned and state managed” and the use of the terms “public accommodation” and “public restaurant” in the sense of “‘open to the public at large,’ or ‘open to the buying public’”).

13. See *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (“Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home . . . on the basis of personal prejudices including race.”); Black, *supra* note 1, at 102 (“Law does not, in our legal culture, commonly deal with dinner invitations and the choice of children’s back-yard playmates. . . . [T]he concept of authentic privacy . . . so as to shield the private life that is really private, is warranted . . .”).

14. See Bagenstos, *supra* note 4, at 1207–08 (“Since the Reconstruction era, continuing through the civil rights era to today, public accommodations laws have triggered legal controversy over the extent to which antidiscrimination principles should penetrate into spaces that had at one time been understood as ‘private’ or ‘social.’”; *id.* at 1210–17 (reviewing the arguments for protecting choice of customers).

15. *Williams v. Standard Oil Co.*, 278 U.S. 235, 239 (1929) (first quoting *Ribnik v. McBride*, 277 U.S. 350 (1928); then quoting *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927); then quoting *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); and then quoting *Chas. Wolff Packing*

operation of state nondiscrimination laws.<sup>16</sup> And by 1934, the Court had discarded the narrow “public interest” test altogether, explaining in *Nebbia v. New York* that “there is no closed class or category of businesses affected with a public interest.”<sup>17</sup> Instead, the Court wrote, “[t]he phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.”<sup>18</sup> And “there can be no doubt that . . . the state may regulate a business in any of its aspects.”<sup>19</sup>

In the eight decades since *Nebbia*, lawmakers and jurists have consistently rejected arguments that the Constitution precludes application of nondiscrimination norms in the commercial marketplace. Those arguments were pressed vigorously during the Civil Rights Era,<sup>20</sup> but to no avail. In a 1963 address to the nation, President Kennedy articulated what would soon become an article of faith among most Americans: “It ought to be possible for American consumers of any color to receive equal service in places of

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Co. v. Court of Indus. Relations of Kan., 262 U.S. 522, 524 (1923)); see *Ribnik*, 277 U.S. at 357 (“An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner . . . . Under the decisions of this court it is no longer fairly open to question that . . . the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power.”); *Chas. Wolff Packing Co.*, 262 U.S. at 537 (“[O]ne does not devote one’s property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings . . . . An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes . . . .”); *Lochner v. New York*, 198 U.S. 45, 57 (1905) (“[W]e think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.”); Keith Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law*, 75 MD. L. REV. 383 (2015) (“In the late nineteenth and early twentieth century, . . . economic affairs were . . . generally understood to be ‘private’ . . . and thus insulated from governmental interference . . . .”).

16. See *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 361, 364 (1907) (rejecting a challenge to California’s public accommodation law). Of course, the Court did hold in *The Civil Rights Cases* that Congress lacked authority under the Thirteenth and Fourteenth Amendments to prohibit discrimination in places of public accommodation, but that decision left unquestioned the authority of states to do so. 109 U.S. 3, 24–25 (1883).

17. 291 U.S. 502, 536 (1934).

18. *Id.*

19. *Id.* at 537. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (“It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”); Whittington, *supra* note 15, at 383–84 (“[A] key move of modern reform liberalism was to shift economic affairs from the private to the public sphere and thus make them more tractable to government control.”).

20. See Bagenstos, *supra* note 4, at 1214–17 (surveying arguments); Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 B.U. L. REV. 891, 900 n.48 (2015) (noting that “[a]rguments about private property and freedom of association featured prominently in oppositions to the CRA, particularly the public accommodations provisions”).

public accommodation, such as hotels and restaurants and theaters and retail stores.”<sup>21</sup> Accordingly, the President called upon “Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public.”<sup>22</sup> Within thirteen months, Congress had passed the landmark Civil Rights Act of 1964,<sup>23</sup> which prohibited discrimination in hotels, restaurants, gas stations, and theaters, as well as in the employment context.<sup>24</sup> Four years later, Congress continued extending nondiscrimination principles into the marketplace by passing the Fair Housing Act of 1968.<sup>25</sup> And although Congress never went as far as President Kennedy urged by extending the public accommodations provision of the 1964 Act to cover all businesses open to the public, including retail stores, many states did.<sup>26</sup>

In upholding the 1964 Act’s public accommodation provision against a due process challenge, the Court explained that a business “has no ‘right’ to select its guests as it sees fit, free from governmental regulation,” and it made a point of noting that “32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts.”<sup>27</sup> Thirty-one years later, the Court

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21. Transcript of John F. Kennedy, Address to the Nation (June 11, 1963), <http://www.jfklibrary.org/Civil-Rights-Microsite/Shared-Content/Chapters/Address-to-the-American-People/The-Address/Tune-in-Tonight.aspx>.

22. *Id.*

23. Pub. L. No. 88-352, 78 Stat. 241 (1964).

24. Title II of the 1964 Act covers the enumerated public accommodations while Title VII covers employment.

25. Pub. L. No. 90-284, 82 Stat. 73 (1968).

26. *See, e.g.*, Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2012) (enacted in 1959) (requiring “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever”); *Ohio Civil Rights Comm’n v. LYSYJ*, 313 N.E.2d 3, 5–6 (Ohio 1974) (noting that Ohio’s public accommodation law covers “any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, or other place for the sale of merchandise, or any other place of public accommodation or amusement where the accommodation, advantages, facilities, or privileges thereof are available to the public,” and construing the “omnibus clause” broadly (emphasis added) (quoting OHIO REV. CODE ANN § 4112.01(I) (West 1974))); *Public Accommodations: Definition—Oregon*, 6 RACE REL. L. REP. 644, 644 (1961–1962) (reproducing Oregon’s 1961 law, which covered “[a]ny place offering to the public goods or services”). *See generally* Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841, 842–46 (1965) (cataloging state public accommodations laws, which at the time included thirty with broader coverage than the 1964 federal law).

27. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259–60 (1964); *see* *Marshall v. Kan. City*, 355 S.W.2d 877, 880 (Mo. 1962) (“A number of states have adopted statutes designed to secure to all persons equal rights and privileges in places where the public is generally served, accommodated or entertained. . . . ‘Laws containing such guaranties are generally known as ‘civil rights statutes,’ and their validity has been made the subject of frequent attack, based upon the contention that they violate constitutional provisions prohibiting the deprivation of life, liberty, or property without due process of law. Where the question has been raised, however, it has been held that such legislation is a proper exercise of the police power of the state.” (quoting 10

reiterated that “[p]rovisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”<sup>28</sup>

In between those declarations, the Court and individual justices affirmed the broad authority of the state to subject commercial relationships to nondiscrimination laws in a variety of contexts.

In the 1976 case of *Runyon v. McCrary*,<sup>29</sup> the Court considered the application of Section 1 of the Civil Rights Act of 1866<sup>30</sup> to two “commercially operated, nonsectarian schools.”<sup>31</sup> The schools’ educational services “were advertised and offered to members of the general public” through the Yellow Pages and mass mailings, and those advertisements appealed “to the parents of all children in the area who c[ould] meet their academic and other admission requirements.”<sup>32</sup> Having found that the schools’ “actual and potential constituency” was “more public than private,” the Court analogized them to “so-called private clubs” that had previously been subjected to antidiscrimination laws because they “were open to all objectively qualified whites—*i.e.*, those living within a specified geographic area.”<sup>33</sup> Against that background, the Court rejected the schools’ constitutional defenses,<sup>34</sup> noting along the way that the case did not involve “governmental

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Am. Jur., Civil Rights, § 8 (1936)); Caldwell, *supra* note 26, at 870 (“There are no reported cases where such statutes have been held unconstitutional.”).

Although *Heart of Atlanta* involved a quintessential place of public accommodation—an inn—the Court did not limit its holding to such businesses. See *Katzenbach v. McClung*, 379 U.S. 294, 298 & n.1 (1964) (relying on *Heart of Atlanta* to reject a restaurant owner’s constitutional challenge to the 1964 Act). See generally Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292, 1390 (1996) (“[B]efore the Civil War, the law probably required all businesses that held themselves out as open to the public to serve anyone who sought service. . . . The common-law rule, as we currently know it—placing a duty on innkeepers and common carriers but not on other businesses—did not crystallize into that form until the post-Civil War period. The narrowing of the duty to serve the public first occurred in the context of claims of a right of access by African-American plaintiffs. The current rule clearly has its origins in a desire to avoid extending common-law rights of access to African-Americans.”).

28. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995). The *Hurley* Court found a constitutional violation only because the Massachusetts statute had been “applied in a peculiar way,” not to “address any dispute about the participation of openly gay, lesbian, or bisexual individuals” in a public parade, but to instead treat the parade sponsor’s “speech itself to be the public accommodation” so as to require the sponsor to include competing banners undermining its message. *Id.*

29. 427 U.S. 160 (1976).

30. 42 U.S.C. § 1981 (2015).

31. *Runyon*, 427 U.S. at 168.

32. *Id.* at 172, 172 n.10.

33. *Id.* at 172–73, 172 n.10.

34. *Id.* at 175–79.

intrusion into the privacy of the home or a similarly intimate setting”<sup>35</sup> and did “not present any question of the right of a private social organization to limit its membership.”<sup>36</sup>

In his *Runyon* concurrence, Justice Powell took the opportunity to elaborate on the public-private distinction.<sup>37</sup> The three key takeaways from Justice Powell’s opinion are as follows:

(1) Relationships that are *both* open to the public generally *and* commercial in nature are on the “public” side of the line. Justice Powell’s term for this category—“commercial relationship offered generally or widely”<sup>38</sup>—remains one of the most helpful ever offered.

(2) Non-commercial relationships can also fall on the “public” side of the line if they are open to large portions of the public indiscriminately (e.g., recreational associations with “no plan or purpose of exclusiveness” that are “open to every white person in the geographic area”).<sup>39</sup>

(3) Commercial relationships can fall on the “private” side of the line if they are “personal contractual relationships” in which “the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association” (e.g., relationships established with babysitters, housekeepers, and private tutors).<sup>40</sup>

In the third situation, unlike the first two, Justice Powell explained that “there is reason to assume that, although the choice made by the offeror is selective, it reflects ‘a purpose of exclusiveness’ other than the desire to bar members of the Negro race. Such a purpose, certainly in most cases, would invoke associational rights long respected.”<sup>41</sup> But that was not the case of the schools in *Runyon*, which were “operated strictly on a commercial basis”<sup>42</sup> and made an “open offer to the public.”<sup>43</sup> That type of transaction,

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35. *Id.* at 178.

36. *Id.* at 167.

37. *Id.* at 187–89 (Powell, J., concurring).

38. *Id.* at 189.

39. *Id.* at 187 (discussing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1978)). For a very illuminating discussion of a modern example in this category, see Lupu & Tuttle, *supra* note 12, at 279–82 (examining *Bernstein v. Ocean Grove Camp Meeting Ass’n*, No. PN34XB-03008 (N.J. Dep’t of Law and Pub. Safety) (Dec. 29, 2008), <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>).

40. *Runyon*, 427 U.S. at 187 (Powell, J., concurring); *see id.* at 188 (suggesting that the protected private realm might also include a “small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students”). *See generally* Lupu & Tuttle, *supra* note 12, at 281 (“The distinction between public and private focuses on the scope of invitation and the character of the use.”).

41. *Id.* at 187–88.

42. *Id.* at 188.

43. *Id.* at 189.

Powell reiterated, “is simply not a ‘private’ contract” in the sense of “an individual entering into a personal relationship.”<sup>44</sup>

In the years following *Runyon*, the Court continued to validate state authority to apply nondiscrimination norms to commercial relationships that were not essentially private and personal in nature. In *Hishon v. King & Spalding*,<sup>45</sup> the Court held that Title VII’s prohibition of sex discrimination could be applied to a large law firm’s denial of a candidate for partnership.<sup>46</sup> In *Roberts v. U.S. Jaycees*,<sup>47</sup> the Court held that a state public accommodations law could be applied to a membership organization that was “neither small nor selective”<sup>48</sup> and that offered “various commercial programs and benefits” to its members.<sup>49</sup> Concurring separately in *Jaycees*, Justice O’Connor placed even greater emphasis on the fact that the Jaycees were a commercial organization. “The Constitution,” she wrote, “does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.”<sup>50</sup> In *New York State Club Ass’n, Inc. v. City of New York*,<sup>51</sup> the Court upheld against a facial challenge a public accommoda-

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44. *Id.* In an early and important assessment of *Runyon*, Professor Leslie Goldstein wrote that the justices “faced more directly than ever before the crucial question of where to draw the line between the public and the private spheres.” Goldstein, *supra* note 12, at 33. Consistent with the analysis offered here, Goldstein read the majority and concurring opinions in *Runyon* as teaching that nondiscrimination norms could “reach as far as the civic life itself, certainly including the whole world of essentially commercial transactions,” but could “not extend into the protected sphere of truly private life, even though there may be some contracting or some buying and selling in that private sphere.” *Id.* at 31.

45. 467 U.S. 69 (1984).

46. *Id.* at 71–78. See also *Hopkins v. Price Waterhouse*, 920 F.2d 967, 979–80 (D.C. Cir. 1990) (reaching the same result with respect to an accounting firm’s partnership decision).

47. 468 U.S. 609 (1984).

48. *Id.* at 621 (“Apart from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds.”).

49. *Id.* at 625–26 (“Like many States and municipalities, Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct. This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.” (first citing *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 768 (1981); then citing *California v. Webster*, 430 U.S. 313, 317 (1977) (per curiam); then citing *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973) (plurality opinion); then citing Brief for Nat’l League of Cities, et al. at 15–16, *Roberts v. U.S. Jaycees*, 428 U.S. 609 (1984) (No. 83-724)).

50. *Id.* at 634 (O’Connor, J., concurring). But see Richard W. Garnett, *Jaycees Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587, 589–90 (2005) (discussing how Judge Arnold viewed the *Jaycees* case as one concerning the rights of “a private, non-commercial association”) (emphasis added).

51. 487 U.S. 1 (1988).

tions ordinance that utilized objective criteria “in pinpointing organizations which are ‘commercial’ in nature, ‘where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.’”<sup>52</sup> Concurring again, and this time joined by Justice Kennedy, Justice O’Connor emphasized that “[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by [a public accommodations] law.”<sup>53</sup> And the Court subsequently confirmed in *Boy Scouts of America v. Dale*<sup>54</sup> that the commercial-noncommercial distinction plays a critical role in free association cases: “As the definition of ‘public accommodation’ has *expanded from clearly commercial entities*, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.”<sup>55</sup>

The same basic themes running through the Court’s privacy and free association cases, involving an overarching public-private distinction informed by a subsidiary commercial-noncommercial distinction, have long played out in discourse about religious liberty rights. Writing in 1944, Justice Jackson offered the following “principle of separating immune religious activities from secular ones” that can be limited by government regulation:

I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar’s affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not

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52. *Id.* at 12 (citing New York Local Law No. 63 of 1984, § 1, App. 15).

53. *Id.* at 20 (O’Connor, J., concurring).

54. 530 U.S. 640 (2000).

55. *Id.* at 657 (emphasis added).

arbitrary and capricious, in violation of other provisions of the Constitution.<sup>56</sup>

Consistent with Jackson's view, the Court held in 1982 that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>57</sup> Accordingly, the Court refused to grant an exemption to an employer who had sincere religious objections to the Social Security system, explaining that to do so would "operate[] to impose the employer's religious faith on the employees."<sup>58</sup> The Court reached a similar conclusion, more emphatically and summarily, in an earlier case involving a restaurant owner who raised a free exercise challenge to application of the 1964 Civil Rights Act.<sup>59</sup> Professor Douglas Laycock aptly described the state of the law in 1998 testimony to Congress, when he explained that "courts have never disagreed that in the outside-world, religiously motivated people have to comply with the civil rights law."<sup>60</sup>

But while a "religiously motivated citizen" who "participates in government or the secular economy . . . must obey the secular rules that apply to all," the "internal affairs of churches are an enclave where the free exercise clause must control."<sup>61</sup> Accordingly, the federal circuit courts have long recognized a "ministerial exception" that shields religious institutions from liability under civil rights laws for decisions regarding their ministerial employees.<sup>62</sup> And the Supreme Court unanimously endorsed the ministe-

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56. *Prince v. Massachusetts*, 321 U.S. 158, 177–78 (1944) (Jackson, J., dissenting).

57. *United States v. Lee*, 455 U.S. 252, 261 (1982).

58. *Id.*; *cf. Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) ("[T]he government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'").

59. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402–03 n.5 (1968) (per curiam) (rejecting as "patently frivolous" a restaurant owner's argument that, by prohibiting racial discrimination, the 1964 Civil Rights Act "constitute[d] an interference with the 'free exercise of the Defendant's religion'" (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 437–38 (4th Cir. 1967))).

60. *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Const. of the Comm. on the Judiciary H.R. on H.R. 4019*, 105th Cong. 238 (1998) [hereinafter 1998 House Hearing].

61. Douglas Laycock, *Tax Exemptions for Racially Discriminatory Schools*, 60 TEX. L. REV. 259, 263 (1982).

62. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). *See generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705, 705–06 n.2 (2012) ("Since the passage of Title VII of the Civil Rights Act of 1964 . . . and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.") (collecting cases).

rial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>63</sup> explaining that the Constitution “gives special solicitude to the rights of religious organizations.”<sup>64</sup>

To summarize, and to borrow phrasing from Professor Paul Horwitz, American law has long treated the commercial marketplace as an “egalitarian space,” and there has been widespread acceptance of a distinction “between commercial and noncommercial institutions . . . for freedom of association as well as religious exercise purposes.”<sup>65</sup> Horwitz maintains that this distinction has been “undertheorized,”<sup>66</sup> but surely that cannot be said of the public-private distinction writ large.<sup>67</sup> And the placement of “commercial relationships offered generally or widely” on one side of the line and “ministerial relations” on the other fits comfortably with the well-established, post-*Lochner* understanding of the distinction.<sup>68</sup>

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63. 132 S. Ct. 694 (2012).

64. *Id.* at 706.

65. Horwitz, *supra* note 2, at 179 (“Even those who take a robust view of free exercise or associational rights are inclined to respect this distinction, if only for pragmatic reasons. To fail to respect it falls, for most people in polite legal circles, into the realm of ‘unutterability.’” (footnote omitted) (citing John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 828–29 (2014); Lawrence Lessig, *Understanding Federalism’s Text*, 66 GEO. WASH. L. REV. 1218, 1220–21 (1998))).

66. *Id.* But cf. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 324 (1998) (describing “the principle that government must have broad authority to regulate business affairs” as one of “the most well-thought-out and deeply theorized principles in constitutional law”).

67. See Howard Schweber, *Legal Epistemologies*, 75 MD. L. REV. 210 (2015) (“The idea that conduct that is self-directed is outside the reach of legitimate public control is the central premise of liberalism. . . . The Millian liberal conception of the public/private has been the subject of endless and often fruitful critique. . . . But the basic idea that ‘public’ means ‘affecting others’ has been and remains a central element of constitutional law by way of tort doctrine and police powers jurisprudence.”); see also Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 18 (2000) (observing that the “general idea of separation between public and private . . . is central to liberalism”); Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982) (“The distinction between public and private connects with a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-a-vis the individual.”).

68. See text accompanying *supra* notes 20–55; see also Mnookin, *supra* note 67, at 1432 (writing in 1982 that “the trends of the last fifty years—both legislative and judicial—certainly suggest that the economic realm has generally come to be seen as more public, while the sphere of activities centering around intimate association is viewed as more private”); Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and The Mark of Sodom*, 95 B.U. L. REV. 929, 939 (2015) (“Our constitutional structure distinguishes between areas of social and political life where groups are presumptively entitled to be exclusionary (such as religion or political associations) and areas of life where access without regard to race or other caste designations is presumptively prohibited—and the main area of life to which the equal access norm applies is the parts of the economy that are open to the general public.”).

## II. WEDDING CAKES AND THE PUBLIC SPHERE

Against the settled background discussed in Part I, the question of whether the state can require businesses to provide equal goods and services to same-sex couples would not appear difficult. Bakers, florists, commercial photographers, and for-profit banquet halls typically open their doors to the public at large, and to date, courts and civil rights commissions have not hesitated to treat such businesses as public accommodations that can be subjected to nondiscrimination laws.<sup>69</sup> And although considerable efforts have been made to convince states to enact legislative exemptions that would allow business owners to refuse marriage-related goods, services, and benefits on religious grounds, no state has yet done so.<sup>70</sup>

Notwithstanding the consistency of these results with past practice in analogous areas,<sup>71</sup> the failure to secure exemptions for objecting business owners has helped fuel dire rhetoric about the state of religious freedom in the United States.<sup>72</sup> Perhaps the most prominent academic example is Professor Paul Horwitz's *Harvard Law Review* Comment on *Burwell v. Hobby*

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69. See *Elane Photography, LLC v. Wilcock*, 309 P.3d 53 (N.M. 2013); *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb 18, 2015); *Melissa Klein*, Nos. 44-14 & 45-14 (Ore. Bureau of Lab. & Indus. July 2, 2015) (order) (ALJ); *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952 & 10157963 (N.Y. Div. Hum. Rts. Aug. 8, 2014) (final order); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Office of Admin. Courts Dec. 6, 2013) (initial decision) (ALJ), *aff'd*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n June 2, 2014) (final order); see also Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 93 (2015) (describing cases "that involve employer objections to paying family benefits to employees with same-sex spouses" as "the next wave of RFRA possibilities").

70. See James M. Oleske, Jr., "State Inaction," *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 4 n.4, 9–11(2015) (manuscript at 104 n.4, 109–110), <http://ssrn.com/abstract=2589743> (discussing the academic lobbying effort for such exemptions that began in 2009 and the numerous legislative proposals that have followed). The Supreme Court's recent ruling that all states must recognize same-sex marriage, see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), has prompted a renewed focus on the exemption debate. See Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), [http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html?\\_r=0](http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html?_r=0); Rachel Zoll & Steve Peoples, *Religious Liberty Is Rallying Cry After Gay Marriage Ruling*, ASSOCIATED PRESS, (June 29, 2015), <http://bigstory.ap.org/article/a050a5a384564f858bb7ba8ec2674149/religious-liberty-rallying-cry-after-gay-marriage-ruling>.

71. See James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 145–46 (2015) (noting that "no state has ever exempted commercial business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals—even though major religious traditions in America have opposed each type of marriage").

72. See Nelson Tebbe, *The End of Religious Freedom: What Is at Stake*, 41 PEPP. L. REV. 963, 963 (2014) ("Warnings can be heard today that the American tradition of religious freedom is newly imperiled and may even be nearing exhaustion."); *id.* at 964 (observing that the fears are influenced by "a sense that the culture wars are over and that they have been won by the forces of secular liberalism," particularly "in the area of LGBT rights").

*Stores Inc.*<sup>73</sup> Although the fiercely debated *Hobby Lobby* decision involved a commercial exemption claim outside the gay rights context,<sup>74</sup> Horwitz accurately notes that the issue of “[h]ow to reconcile religious objections and LGBT equality . . . remains very much in the foreground of current contestation.”<sup>75</sup> Specifically, Horwitz takes note of the “legal issues concerning the religiously motivated conscientious refusal to provide services to gays and lesbians in relation to same-sex marriages” and the “acrimonious state by state debate over proposed religious accommodations” that “would have allowed business owners with religious objections” to assert a defense “if sued by private parties invoking state or local antidiscrimination laws.”<sup>76</sup>

Extrapolating from the *specific* controversy about extending religious exemptions into the commercial realm—a key contested issue in both *Hobby Lobby* and the ongoing refusal-to-serve debate—Horwitz argues that the *general* “consensus in favor of accommodation of religion . . . seems to have weakened, if not collapsed.”<sup>77</sup> As I have explained elsewhere, this dramatic leap is difficult to square with the ongoing, cross-ideological support for religious accommodations outside the commercial realm.<sup>78</sup> Yet, Horwitz is far from alone in warning of the possible demise of religious accommodation.<sup>79</sup> In a striking new essay entitled *Free Exercise by Moonlight*, Professor Marc DeGirolami claims that we have reached “the evening of religious accommodation.”<sup>80</sup> DeGirolami’s central concern is what he describes as “the recent emergence of theories” that would vindicate “new dignitary and other third party” interests under a “relentlessly expanding

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73. 134 S. Ct. 2751 (2014); see Horwitz, *supra* note 2.

74. *Hobby Lobby*, 134 S. Ct. at 2751 (granting a religious accommodation pursuant to the Religious Freedom Restoration Act of 1993 (RFRA) to a for-profit business that objected to including coverage for emergency contraception in its health plan for employees).

75. Horwitz, *supra* note 2, at 176.

76. *Id.* at 174–75; see *id.* at 160 (“Same-sex marriage and its consequences have become a central, foregrounded, socially contested issue.”).

77. *Id.* at 170; see *id.* at 155 (asserting that “the very notion of religious liberty . . . has become an increasingly contested subject”); *id.* at 159 (“Until recently, there was widespread approval for religious accommodation. . . . The past few years have witnessed a significant weakening of this consensus.”); *id.* at 160 (“The church-state consensus . . . has been put up for grabs . . .”); *id.* at 170 (“A substantial body of opinion on this issue has moved from the view that [the Court] erred grievously by rejecting the prior regime of free exercise exemptions from generally applicable law, to the view that legislative exemptions are permitted but subject to careful cabining, to a broader questioning of religious accommodations altogether.” (footnote omitted) (citing Douglas Laycock, *The Religious Exemption Debate*, 2 RUTGERS J.L. & RELIGION 139, 157–63 (2009))).

78. James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 87–90 (2015). See generally Elizabeth Sepper, *Reports of Accommodation’s Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24 (2014).

79. See Tebbe, *supra* note 72, at 963 (noting similar concerns raised by Professors Steven Smith and Douglas Laycock).

80. DeGirolami, *supra* note 3, at 3.

body of antidiscrimination norms,” resulting in “surprising understandings of the limits of religious accommodation.”<sup>81</sup>

But there is nothing “new” or “surprising” about the government using civil rights laws to prevent dignitary harms in the commercial marketplace. As the Court explained in *Heart of Atlanta*, the “fundamental object of Title II [of the 1964 Civil Rights Act] was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>82</sup> Likewise, in upholding the application of Minnesota’s public accommodations law in *Jaycees*, the Court emphasized the “stigmatizing injury” of being denied “equal access to public establishments,” which it concluded was “surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”<sup>83</sup> And the use of third-party harm theory to limit accommodations in the commercial marketplace is not novel, as that is precisely what the Court did in *Lee*,<sup>84</sup> acting in accord with Justice Jackson’s suggestion forty years earlier.<sup>85</sup>

Although he does not address this past precedent for vindicating dignitary interests and preventing third-party harms in the commercial marketplace, Professor DeGirolami does indicate that the situation is different today due to the “modern expansion of the reach of the state” in creating entitlements and broadening antidiscrimination norms.<sup>86</sup> DeGirolami posits that this expansion has resulted in more ways for people to be negatively impacted by government accommodation of religious objections, which has resulted in “the growing unpopularity of religious accommodation.”<sup>87</sup> This theory, however, does not fit comfortably with the historical record. By all accounts, the high-water mark of bipartisan political support for religious

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81. *Id.* at 7, 34; see *id.* at 22 (identifying “the growing unpopularity of religious accommodation” with the “modern expansion of the reach of the state,” particularly in protecting against dignitary harms); *id.* at 32 (“The government’s vindication of third-party dignitary harms has the potential to destroy religious accommodation.”).

82. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). See generally Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2574–78 (2015) (discussing the dignitary harms caused by refusals of service).

83. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (quoting *Heart of Atlanta Motel*, 379 U.S. at 250).

84. See *supra* note 57 and accompanying text.

85. See *supra* note 56 and accompanying text.

86. DeGirolami, *supra* note 3, at 22–23, 34; see also Ryan T. Anderson, *Why Is Religious Freedom at Risk?*, *FIRST THINGS* (July 28, 2015), <http://www.firstthings.com/web-exclusives/2015/07/why-is-religious-freedom-at-risk-3-historical-developments-explain-it> (contending that “a change in the scope of our government” is partially to blame for “religious liberty now losing so much ground”).

87. DeGirolami, *supra* note 3, at 22.

accommodation came in 1993,<sup>88</sup> long after the New Deal and Great Society expansions of the modern state.<sup>89</sup> Moreover, the high-water mark for constitutional accommodation rights came in the 1960s and 1970s alongside the adoption and expansion of antidiscrimination laws, but never in derogation of those laws in the commercial marketplace. Given this history, it seems that today's controversies over religious accommodations have less to do with the changing nature of the modern state and more to do with societal trends that are being fiercely resisted on religious grounds. That is not a new phenomenon, as the nation went through something very similar in the 1960s with respect to interracial marriage.<sup>90</sup>

What *is* novel today is the argument that, during this period of change, business owners should be granted religious exemptions to continue engaging in discrimination that is otherwise being prohibited in the marketplace.<sup>91</sup> As noted above, that argument has not yet borne any fruit.<sup>92</sup> Also bearing no fruit so far is the more radical libertarian argument that, in competitive markets where customers have other options, businesses have a right to discriminate “whether the lines of difference are race, religion, or sexual orientation.”<sup>93</sup> Although the notion that America will re-embrace a form of separate-but-equal in the commercial marketplace seems far-fetched,<sup>94</sup> Professor Bagenstos has suggested that the prospect is not as implausible as it may appear. Writing prior to the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>95</sup> Bagenstos expressed concern that if the Court ruled for the company in its challenge to the Affordable Care Act's “contraception mandate” (which the Court did), it would “collapse the expressive-commercial distinction” that limits the impact of the Court's freedom of association holding in *Boy Scout of America v. Dale*, and it would be “a very short leap

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88. See Horwitz, *supra* note 2, at 169 (discussing the “widely held view” when RFRA passed that “religious accommodations and exemptions are a good thing”).

89. Notably, the 1982 *Lee* case involved Social Security, a massive entitlement program.

90. See Oleske, *supra* note 71, at 107–09, 118 (discussing the depth of religious opposition to interracial marriage on both religious and natural law grounds).

91. See *id.*, at 104–07 (outlining the discrepancy in detail); see also Lupu & Tuttle, *supra* note 12, at 288 (“[T]he proposed exemption invites skepticism and careful scrutiny because it is legally anomalous. In no other respects are individuals and for-profit entities excused, on religious grounds, from compliance with non-discrimination laws.”).

92. See *supra* note 70 and accompanying text.

93. See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1282 (2014).

94. A simple hypothetical is useful in testing the appetite for the full-blown libertarian argument (as well as the free speech argument that is often made by business owners who oppose same-sex marriage): If an interracial couple walks into a bakery and asks for a wedding cake with the words “Congratulations, Richard and Mildred” on top, does the proprietor have a right to turn them away so long as there is another bakery in town that will sell them such a cake?

95. 134 S. Ct. 2751 (2014).

to say that those [for-profit] corporations have speech and associational rights against the application of public accommodations laws.”<sup>96</sup>

Yet, the leap is not short at all because the exemption claim in *Hobby Lobby* was brought under a statute—the Religious Freedom Restoration Act—not the Constitution.<sup>97</sup> Bagenstos acknowledges the statutory nature of the claim in *Hobby Lobby*,<sup>98</sup> but understates its importance.<sup>99</sup> *Hobby Lobby* was not a case about whether Congress *could* constitutionally regulate certain decisions in the commercial realm, but rather, whether it *had chosen* not to regulate those decisions by virtue of its enactment of RFRA.<sup>100</sup> And the decision provides little basis for concluding that “libertarian skeptics have put themselves in a position to threaten even the core applications of public accommodations laws.”<sup>101</sup>

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96. See Bagenstos, *supra* note 4, at 1220, 1237–39. Bagenstos also saw a threat to the expressive-commercial distinction in free speech claims being made in cases like *Elane Photography*. See *id.* at 1233–37. Given that all ten judges who heard that case, from the trial court to the New Mexico Supreme Court, rejected the business owner’s free-speech argument, and given the similar results that have obtained in every other wedding vendor case to date, see *supra* note 69, the threat does not appear dire.

97. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

98. Bagenstos, *supra* note 4, at 1237–38.

99. After initially noting that “the courts *could* say that ruling for the contraceptive mandate’s challengers would not undermine the expressive-commercial distinction in free speech or free association cases,” Bagenstos proceeds to argue that constitutional speech and associational rights against the application of public accommodations laws may follow “*a fortiori*” from the recognition of statutory religious exemption rights in *Hobby Lobby*. *Id.* at 1239. “The implications of the contraceptive mandate cases for the public accommodations context,” Bagenstos concludes, “are therefore likely to be significant.” *Id.* at 1239–40.

100. See *Hobby Lobby*, 134 S. Ct. at 2767 (“By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”). As I have noted elsewhere, I am skeptical of the *Hobby Lobby* Court’s conclusion that RFRA represented a choice by Congress to extend religious exemption rights into the commercial realm. See Oleske, *supra* note 71, at 131 n.165. But that is a disagreement over what Congress has chosen, which is a fundamentally different issue than what the Constitution prevents legislators from choosing.

This is an important distinction to keep in mind as states continue to debate the consequences of same-sex marriage. Although ordinary commercial businesses do not have a constitutional right of immunity from civil rights laws (whether on free association, free exercise, or privacy grounds), policymakers could conceivably choose to place certain businesses outside the reach of such laws on prudential grounds. In other words, the fact that most commercial retailers and service providers fall comfortably within the public realm and *can* be subject to government regulation of their customer relations does not necessarily mean government *will* regulate all those relations. *But cf.* Oleske, *supra* note 70, at 39–62 (contending that, if a state broadly protects against other types of invidious discrimination in the marketplace, the Equal Protection Clause obligates it to protect against sexual-orientation discrimination in the marketplace).

101. Bagenstos, *supra* note 4, at 1233. This is especially so given that the Court cabined its decision by emphasizing that accommodating *Hobby Lobby*’s objection would have “precisely zero” effect on its female employees. *Hobby Lobby*, 134 S. Ct. at 2760. That rationale would not be a comfortable fit in cases where businesses are seeking exemptions that would allow them to refuse services to customers. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (highlighting the “stigmatizing injury” of being denied “equal access to public establishments” (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))). *But cf.* *Hands on Originals*,

In sum, states remain free to pass civil rights laws that require businesses to provide equal services to same-sex couples, and when they do so, they act in accord with a long-settled understanding of the commercial marketplace as an egalitarian public sphere.

### III. THE MINISTERIAL EXCEPTION AND THE PRIVATE SPHERE

Equally settled is the idea that the First Amendment “precludes application of [civil rights] legislation to claims concerning the employment relationship between a religious institution and its ministers.”<sup>102</sup> This represents the unanimous view of the current Supreme Court, and it is supported by broad scholarly consensus.<sup>103</sup> Nonetheless, the Court’s 2012 affirmation of the “ministerial exception” in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is not without its critics.

One of those critics is Professor Robin West, who offers dire warnings about the consequences of the ministerial exception for civil rights. The warnings begin in the title of her essay on *Hosanna-Tabor*, which includes the ominous phrase, “Freedom of the Church and our Endangered Civil Rights.”<sup>104</sup> In the body of her essay, West refers critically to “the ‘Freedom of the Church’ to ignore the dictates of our various Civil Rights Acts,”<sup>105</sup> and she treats this freedom as something newly “created” by the Court in

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Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm’n, Civ. No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015), <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf> (relying on *Hobby Lobby* in the course of holding that a print shop with a stated policy and established practice of refusing to print messages contrary to the owners’ beliefs had a right under a state religious accommodation statute to refuse to print t-shirts with a gay-rights message). See generally Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (arguing that *Hobby Lobby* exemplifies a new phenomenon in which religious liberty claims are reinforced by economic libertarianism).

102. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012).

103. See, e.g., IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 73 (2014); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U.L. REV. COLLOQUY 175, 175–76 (2011); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 821–823 (2012).

It is important to note that supporters of the ministerial exception do not all agree as to the proper rationale for the doctrine. See LUPU & TUTTLE, *supra*, at 43–44 & n.2 (rejecting arguments that ground the exception in broad notions of “church autonomy” and “freedom of the church,” and instead justifying the exception based on “the limited competence of civil authority in religious matters”).

104. West, *supra* note 5.

105. *Id.* at 5. See *id.* at 4 (“[I]t is not at all clear why our nation’s ministers, rabbis, and imams, whether they are ministering or teaching, should not be drawn from the full and diverse American public . . . . It is even less clear why the churches, synagogues, and mosques that hire and fire them should be explicitly permitted to do so partly on the basis of their race, sex, age, ethnicity, or able-bodied-ness.”).

*Hosanna-Tabor*.<sup>106</sup> West concludes with a series of specific admonitions about the profound impacts of this new right:

- The “rending of a unified social fabric is the hidden but substantial cost of all exit rights, including, perhaps quintessentially, the institutional ‘Freedom of the Church’ articulated in *Hosanna-Tabor*.”<sup>107</sup>
- “What is jettisoned . . . is the aspiration of a civil rights society in a much larger sense.”<sup>108</sup>
- “When we set aside our civil rights to enter in order to make room for a Church’s freedom to exit, we are setting aside . . . a particular conception of our rights tradition.”<sup>109</sup>
- “The shutting down of the civil rights aspiration . . . is a profound, misguided, and I believe, a tragic compromise of the promise of our civil society.”<sup>110</sup>

The idea that *Hosanna-Tabor* created a new right to church autonomy that threatens to shut down our civil rights aspirations in tragic fashion is not easy to reconcile with developments over the past four decades. As the *Hosanna-Tabor* Court noted, the federal courts of appeals had already “uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment,” and they began doing so forty years prior to the Court’s decision in *Hosanna-Tabor*.<sup>111</sup> In other words, the exception has been with us for almost as long as the landmark 1960s civil rights acts themselves, and if the exception posed an existential threat to the civil rights project, one would have expected to have heard about it previously. Moreover, although there was no opportunity for the courts to recognize a ministerial exception prior to efforts to enforce the civil rights acts against religious institutions, it follows from the basic principle Justice Jackson laid

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106. *Id.* at 11 (referring to the “right to the ministerial exception created in *Hosanna-Tabor*”); *id.* at 12 (“In both *Hobby Lobby* and *Hosanna-Tabor*, the Court created rights of religious believers to exit our civic society . . .”); *see id.* at 10 (“*Hosanna-Tabor* is one clear, even paradigmatic, example of the creation and then the enforcement of an exit right.”). Elsewhere, West uses less definitive phrases: “created or at least newly discovered,” “recognized or created,” and “recognized and broadened.” *Id.* at 5, 9, 28.

107. *Id.* at 29–30.

108. *Id.* at 30. As noted above, not all supporters of the ministerial exception view it as part of a broad “freedom of the church.” *See supra* note 103. Thus, West’s framing of the ministerial exception as a quintessential “exit right” rests on a contested predicate. *See* Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoe Robinson et al. eds.) (forthcoming 2015) (manuscript at 39), <http://ssrn.com/abstract=2535991> (“Religious exemptions are not a function of private freedoms, of the church or otherwise. Instead, they arise primarily from an understanding of what government may not appraise, decide, or support.”).

109. West, *supra* note 5, at 30.

110. *Id.* at 31.

111. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 705, 710 (2012); *see also* Berg et al., *supra* note 103, at 176 (“[O]ver the last forty years every federal circuit has adopted some version of the ministerial exception.”).

out in 1944: “Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.”<sup>112</sup>

Of course, one can certainly disagree with that principle,<sup>113</sup> but it is simply not accurate to characterize it as new. By insisting otherwise and framing the ministerial exception as a novel and daunting threat to our civil rights aspirations, Professor West detracts from the more fundamental and interesting point in her essay noting that “‘civil rights’ and ‘exit rights’ are very often in tension.”<sup>114</sup> Claiming that the tension has suddenly reached perilous new heights because of the decision in *Hosanna-Tabor* is no more convincing than the claims that the application of nondiscrimination norms to religious objectors in the commercial marketplace poses a novel threat to religious freedom.<sup>115</sup>

There was, however, one genuinely significant development surrounding the *Hosanna-Tabor* case, and that was the government decision to urge the Court to reject the idea of a categorical ministerial exception based in the Religion Clauses and instead require religious institutions to rely on free association claims that would be subject to interest-balancing.<sup>116</sup> The Court’s response was apparent shock:

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s . . . view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.<sup>117</sup>

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112. *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting).

113. For a thorough pre-*Hosanna-Tabor* critique of the ministerial exception, see Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965 (2007).

114. West, *supra* note 5, at 8.

115. See *supra* notes 82–90 and accompanying text.

116. See Brief for the Federal Respondents at 11–12, 19–32, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012) (No. 10-553), [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other\\_Brief\\_Updates/10-553\\_federalrespondents.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_federalrespondents.authcheckdam.pdf).

117. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (citing Brief of Perich at 31, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553); Tr. of Oral Arg. at 28, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553)).

## IV. CONCLUSION

Recent years have seen a number of arguments arising out of religious liberty disputes that, if successful, would have meaningfully altered our settled understanding of the public-private distinction. One of those arguments would have reduced the size of the protected private sphere by discarding the ministerial exemption. Two other arguments would have expanded the size of the protected private sphere by limiting the reach of antidiscrimination laws into the commercial realm, either by exempting business owners based on religious objections or excusing all businesses other than monopolies from compliance. The Supreme Court has already rejected the first argument, and the second two are likely to face similar fates if pressed on constitutional grounds. Meanwhile, legislatures have not been receptive to the argument that they should grant new religious exemptions in the commercial realm as a prudential matter, and cultural forces do not appear poised to alter that state of affairs. While there is still an active constituency working on behalf of such exemptions, opponents are working just as hard, and continued maintenance of the status quo appears highly likely.<sup>118</sup>

Of course, the *actual* maintenance of the status quo with respect to the public-private distinction is no guarantee that everyone will *perceive* the line to be stable, especially in a time of great social contestation over issues affected by where the line is drawn. False alarms are already ringing about threats to religious liberty and civil rights, and more will surely ring in the years ahead, but there is no reason to panic.

Doric columns are not falling.

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118. See Sandhya Somashekhar, *Christian Activists: Indiana Law Tried To Shield Companies Against Gay Marriage*, WASH. POST. (Apr. 3, 2015), [http://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89\\_story.html](http://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html) (discussing the backlash that greeted the passage of Indiana's RFRA and describing how Indiana lawmakers quickly passed an amendment to clarify that the law "cannot be used by businesses, landlords and others to turn away gay customers").