

WHEN BUSINESSES REFUSE TO SERVE FOR RELIGIOUS REASONS: DRAWING LINES BETWEEN “PARTICIPATION” AND “ENDORSEMENT” IN CLAIMS OF MORAL COMPLICITY

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ABSTRACT

The owners of small businesses and others involved in for-profit work occasionally refuse to provide a service to a patient, client, or customer on the grounds that to provide the service would render them complicit in immoral conduct in violation of their religious beliefs. Some of these conscientious refusals might be protected by legislation, regulation, or court decision, as in the case of a doctor refusing to perform an abortion, or an employer refusing to provide employees with contraception coverage. The new question raised—and soon to be answered by the U.S. Supreme Court—is whether wedding vendors (bakers, florists, and the like) who refuse to provide goods and services to same-sex couples will be similarly protected or whether they will be required to abide by the non-discrimination norms of public accommodations law. For those weary of religious claims in the culture wars, the very notion that the Court might extend legal protections to wedding vendors in such situations tends to cast doubt more generally on religion-based refusals in the for-profit context.

The purpose of this article is to draw a bright line between the traditional category of complicity claims and this newer category of wedding vendor claims. Traditional claims typically involve health care personnel and others refusing to participate in activities they consider to be immoral—most often those that entail ethical issues surrounding the beginnings and endings of life, such as assisted reproduction and assisted suicide. In

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contrast, this newer set of claims involve wedding vendors refusing to endorse activities they consider to be immoral, like the marriage of a same-sex couple. Herein lies the critical distinction: participation in immoral activity is not the same thing as endorsement or approbation of someone else's immoral activity. The wedding vendors concede the distinction, as they expressly claim the right not to endorse a message with which they disagree, but they seek to extend the protections of traditional complicity jurisprudence to their claims. The article contends that the traditional complicity jurisprudence, which allows businesses to refuse to participate in activity they consider immoral, has little, if anything, to say about refusals to approve the conduct of others. The Court should not extend this jurisprudence to the wedding vendor context.

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I. INTRODUCTION

In 2014, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* held that businesses could exercise religion—or, more precisely, that individuals could exercise their religion through their closely-held corporations, by managing their businesses in accordance with their faith.¹ At issue was the federal Affordable Care Act's (ACA) contraception mandate, which required businesses to provide contraceptive coverage to employees as part of their health insurance package.² Numerous closely-held corporations that viewed

1. See 134 S. Ct. 2751, 2759 (2014).

2. *Id.* at 2762.

contraception as immoral challenged this requirement as a burden on their religious exercise under the Religious Freedom Restoration Act (RFRA), arguing that they had the right to refuse in conscience to provide the coverage.³ The Court agreed.⁴ Although the mandate advanced a compelling governmental interest, the Court found that less restrictive alternatives were available.⁵ These included the accommodation given to objecting nonprofit entities, which shifted the responsibility for providing the offending coverage to the insurer.⁶ The Court envisioned the extension of the nonprofit accommodation to the for-profit context, thereby ensuring that coverage would still be available (albeit from a different source) so that the “effect . . . on the women employed . . . would be precisely zero.”⁷ And in fact, within a year of the *Hobby Lobby* decision, the Obama administration promulgated a new rule that extended the accommodation to closely-held businesses.⁸ In this way, the businesses were not complicit in the provision of coverage they considered immoral.

Beginning a few years before (and continuing after) *Hobby Lobby*, a spate of wedding vendors refused on religious grounds to provide goods and services to same-sex couples.⁹ In addition to growing cultural acceptance of same-sex relationships, states began to legalize same-sex marriage in 2003 and in 2015 the Supreme Court held it to be a federal constitutional right in *Obergefell v. Hodges*.¹⁰ In this same period, many states and cities extended their public accommodations laws to prohibit discrimination on the basis of sexual orientation.¹¹ Thus, gay and lesbian couples who had been turned away from wedding florists, photographers, bakers, and others have sued these businesses; in every case of this type brought thus far, the vendors’ claims have failed.¹²

The religious claimants’ argument in *Hobby Lobby* and the wedding vendor cases is similar: at bottom, business owners argue that a law makes them complicit in immoral conduct.¹³ The Court in *Hobby Lobby*

3. *Id.* at 2759.

4. *Id.* at 2759.

5. *Id.*

6. *Id.*

7. *Id.* at 2760.

8. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,317, 41,323 (July 14, 2015) (to be codified at 45 C.F.R. pt. 147).

9. *See* Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 926–28 (2016).

10. 135 S. Ct. 2584, 2608 (2015). For the history of this growing acceptance, see Day & Weatherby, *supra* note 9, at 913–19.

11. *See* Day & Weatherby, *supra* note 9, at 918, 926–29.

12. *See id.* at 926–29; *infra* notes 84–92 and accompanying text.

13. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–79 (2014).

accepted this “complicity” concern as *bona fide* religious exercise, deferring to an owner’s sincere belief no matter how attenuated the involvement might appear.¹⁴ Yet state courts have not embraced this deference in the vendor cases.¹⁵ Indeed, they have refused to characterize the vendors’ conduct as conscientious refusals to avoid complicity in immoral activities and have framed the vendors’ conduct instead as discrimination on the basis of sexual orientation.¹⁶ Why was Hobby Lobby’s claim one of conscience regarding complicity and not discrimination against women? What explains the difference? Is it a product of non-uniform religious rights throughout the country, in which federal law varies from state law and states vary among each other? Is it because *Hobby Lobby*’s all-male conservative majority does not “get” the importance of contraceptives?¹⁷ Or might some other rationale distinguish them?

This article posits that the primary jurisprudential reason for the difference is that the *Hobby Lobby* Court was operating under the longstanding conscience paradigm, which permits refusals to *participate* in activity that one considers to be immoral, while the wedding vendor courts are operating under the longstanding public accommodations paradigm, which does not permit refusals to *endorse* activities one considers to be immoral. This article further supports a bright line between these two concepts. The conscience paradigm has been developed over time on abortion and other ethical matters, typically those involving the beginnings and endings of life. Under the ACA contraception mandate, for instance, four out of the twenty drugs and devices approved by the Food and Drug Administration are considered abortifacients by some Christians.¹⁸ (Indeed, the government conceded as much, even though considerable scientific evidence disputes that characterization).¹⁹ And although many of the Catholic business

14. *See id.* at 2755–77.

15. Day & Weatherby, *supra* note 9, at 926–29.

16. *See id.*

17. Nicole Flatow, *Ruth Bader Ginsburg: Male Justices Don’t Understand What Hobby Lobby Meant for Women*, THINKPROGRESS (July 31, 2014, 3:41 PM), <https://thinkprogress.org/ruth-bader-ginsburg-male-justices-dont-understand-what-hobby-lobby-meant-for-women-564348c406c4/>.

18. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2766, 2777; *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013).

19. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2775 (“As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n.4, may result in the destruction of an embryo.”); *see also Hobby Lobby Stores, Inc.*, 723 F.3d at 1123 n.3 (government and medical amici supporting government concede that some of the

plaintiffs challenging the mandate opposed all contraception, the evangelical Protestant (Hobby Lobby Stores) and Mennonite (Conestoga Wood) plaintiffs before the Court in *Hobby Lobby* opposed only the four abortifacients.²⁰ Refusals to participate in abortion, even indirectly, have a long history in the conscience jurisprudence,²¹ and may help explain the *Hobby Lobby* Court's solicitude toward the businesses. But that decision need not—indeed should not—extend to situations in which no one is compelled to participate in conduct they consider to be immoral. As the Supreme Court takes up the baker's challenge to public accommodations in *Craig v. Masterpiece Cakeshop*, it should segregate the jurisprudence involving participation and address the claim of endorsement on its own terms.²²

This article will use these two paradigmatic ends of the spectrum of religious claims—those involving conscientious refusals to participate in immoral activity and those involving refusals to endorse someone else's immoral activity—to explore the wedding vendor claims now before the Court, as well as other topics now before courts and legislatures. This line-drawing will help courts and legislatures distinguish protected religious conscience from unlawful discrimination.

II. COMPLICITY IN IMMORAL CONDUCT BY "PARTICIPATION": THE ABORTION REFUSAL PARADIGM

Long before the right to refuse to perform an abortion came the right to refuse to bear arms in times of war. Significant Supreme Court decisions in the Vietnam era expanded the scope of the conscientious objection exemption to include those morally (as well as religiously) opposed to killing, but accommodations for religious pacifists have existed since the founding period.²³ Analogizing between the government requiring participation in war and requiring performance of abortions may seem a stretch to some, but Professor Amy Sepinwall, in identifying the centrality of human agency, explains the law's solicitude:

contraceptives have the potential to frustrate implantation). As to the scientific evidence, see generally Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1930–31 (2015).

20. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2765.

21. Angela C. Carmella, *For-Profit v. Nonprofit: Does Corporate Form Matter? The Question of For-Profit Eligibility for Religious Exemptions Under Conscience Statutes and the First Amendment*, 1 SETON HALL L. PROC. 75, 77–80 (2013).

22. 370 P.3d 272, 276 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017).

23. See *Welsh v. United States*, 398 U.S. 333, 335 (1970); *United States v. Seeger*, 380 U.S. 163, 179–80 (1965).

[W]hy permit the physician to refuse? Why not just think the objecting physician's concern precious and, worse still, violative of the commitment to his patient's welfare that forms the backbone of his profession? The answer, it turns out, depends on the special value that each of us attaches to our own agency. In general, it is a moral commonplace that no one should be made to participate in an act that he deems immoral. We safeguard people from such participation because we recognize that, from the perspective of the actor, it makes a difference that the wrong occurs through *his* hands, even if he knows that the wrong will occur whether or not it is he who brings it about.²⁴

Conscience protection for abortion refusal came in reaction to *Roe v. Wade*.²⁵ Shortly after that decision, Congress in 1974 passed the Church Amendment,²⁶ which protects hospitals and medical personnel who refuse to participate in abortion and sterilization.²⁷ Federal protections were initially limited to the direct provision of abortion and sterilization, but widened over time to include physician training programs, among others.²⁸ The vast majority of states followed with some kind of statutory conscience protection of their own, many of

24. Sepinwall, *supra* note 19, at 1949. For a critique of the entire refusal regime, see Julian Savulescu & Udo Schuklenk, *Doctors Have No Right to Refuse Medical Assistance in Dying, Abortion, or Contraception*, 31 *BIOETHICS* 162, 162–70 (2017), <http://onlinelibrary.wiley.com/doi/10.1111/bioe.12288/pdf>.

25. 410 U.S. 113 (1973).

26. Church Amendment, Pub. L. No. 348, 88 Stat. 342 (1974).

27. The Church Amendment threatens the loss of federal funding, but does not provide a private right of action. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 696–97 (2d Cir. 2010) (finding that a nurse alleging that she was forced to assist with abortions and then retaliated against for reporting it has no cause of action under Church Amendment; however, action under Title VII religious accommodation provision is available).

New rules have been proposed that grant authority to the HHS Office of Civil Rights to enforce conscience protections under existing federal statutes. See *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880, 3880 (proposed Jan. 26, 2018) (stating that the purpose is “to ensure that persons or entities are not subjected to certain practices or policies that violate conscience, coerce, or discriminate, in violation of” those statutes).

28. See, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2535–39 (2015); Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 *YALE L. J.* 2470, 2477–83 (2015). For an example of the argument that conscience protection is not fully enforced, see Letter from the U.S. Conference of Catholic Bishops to Senator (Feb. 8, 2017), <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Conscience-Protection-Act-Dolan-Lori-Ltr-to-Senate-02-08-17.pdf>.

which allow refusals for indirect participation.²⁹ By the 2000s, some pharmacists were beginning to refuse to fill prescriptions for emergency contraception because of a remote potential for these drugs to behave as abortifacients.³⁰ Some states extended conscience protection to this scenario.³¹ Professional associations devised a middle way, allowing refusal by the pharmacist as long as another pharmacist was available to “step in” to dispense the drug, urging the transfer of prescriptions to another pharmacy if the drug was not stocked, and the like.³²

Some have criticized these expansions of abortion conscience protection, which go well beyond the original scenario of refusals to perform abortions.³³ It is certainly true that, after *Hobby Lobby*, conscience claims now encompasses quite remote complicity in participating in abortion—employer provision of health insurance covering an offending act—well beyond any direct acts that proximately cause the abortion.³⁴ But it bears noting that the conceptual framework for expansive protections is not new, nor has it only been the product of a slippery slope: indeed, the most attenuated conscience claim possible—refusing to pay taxes to fund abortions³⁵—has been

29. Carmella, *supra* note 21, at 77–80. Individuals can refuse to participate in abortion (44 states), sterilization (16 states), contraception (9 states); pharmacists can refuse contraception (6 states); and “[a]lmost all state conscience clauses allow nurses or doctors to refuse to treat a patient even in an emergency or other time-sensitive situation.” Deutsch, *supra* note 28, at 2481–82.

30. See, e.g., *Ensuring that Individuals are Able to Obtain Contraceptives at Pharmacies*, AM. PUB. HEALTH ASS’N (Nov. 8, 2006), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/18/13/39/ensuring-that-individuals-are-able-to-obtain-contraceptives-at-pharmacies>.

31. Carmella, *supra* note 21, at 82–83.

32. See, e.g., *Ensuring that Individuals are Able to Obtain Contraceptives at Pharmacies*, *supra* note 30.

33. See generally NeJaime & Siegel, *supra* note 28, at 2538–42. Note the law in Mississippi, which allows refusal to participate in “any phase of patient medical care, treatment or procedure, including, but not limited to . . . patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.” Deutsch, *supra* note 28, at 2482 (citing MISS. CODE ANN. § 41-107-3(a) (2014)). And the term “participate” is broadly defined to include acts “to counsel, advise, provide, perform, assist in, refer for, admit for purposes of providing, or participate in providing, any healthcare service or any form of such service.” *Id.* at 2483 (citing MISS. CODE ANN. § 41-107-3(f) (2014)).

34. See generally NeJaime & Siegel, *supra* note 28, at 2541.

35. See 42 U.S.C. § 300a-6 (2012); Casey Quinlan, *On Tax Day, Remember that Taxpayer Money Still Can't Fund Abortions*, THINKPROGRESS (Apr. 13, 2017, 7:43 PM), <https://thinkprogress.org/on-tax-day-remember-that-taxpayer-money-still-cant-fund-abortions-f40187c86492>.

acknowledged and protected almost as long as doctor refusal has been.³⁶ Obviously individual taxpayers cannot obtain conscience exemptions, but the Hyde Amendment³⁷ has prohibited federally funded abortions through Medicaid, with some narrow exceptions, for four decades on the grounds that taxpayers should not be complicit in abortions,³⁸ and the recent action to de-fund Planned Parenthood continues the effort to protect taxpayers from funding abortions.³⁹ So whether the issue is directly performing an abortion or indirectly paying for one, there is clear statutory recognition of conscientious objection.

The expansion of complicity notions in abortion is not unique to that topic. Even the law's deference to conscience in the military context has expanded in unexpected ways. In *Thomas v. Review Board*, a Jehovah's Witness working at a munitions factory was moved to a position that had him manufacturing tank turrets.⁴⁰ He refused this position because the tank turret line involved him directly in manufacturing weapons; his prior job involved him only indirectly with making materials that could ultimately be used in weapons production.⁴¹ In the appeal of his denial of unemployment compensation, the Supreme Court found that his understanding of complicity and the line that he drew—while not required or recommended by his church—was a sincerely held religious belief and deserved deference under precedent.⁴² It is not surprising that the *Hobby Lobby* Court relied heavily on *Thomas* in its understanding of the business owners' complicity claims.⁴³

It is quite common for courts and legislatures to provide great latitude for conscience on the topic of abortion and other matters regarding the beginning and ending of life, which I will refer to as the "edges of life."⁴⁴ Among our culture's core (and contested) ethical issues are such matters as war, abortion and abortion-related processes, sterilization, embryonic stem cell research, assisted reproduction,

36. Perhaps the only other place this is done is with taxpayer funding that violates the Establishment Clause.

37. Hyde Amendment, Pub. L. No. 94-439, 90 Stat. 1434 (1976).

38. Quinlan, *supra* note 35.

39. See *Harris v. McRae*, 448 U.S. 297, 322 (1980) (upholding the constitutionality of the Hyde Amendment); Jennifer Steinhauer, *Senate Lets States Defund Clinics That Perform Abortions*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/pence-congress-family-planning-money.html>.

40. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 711 (1981).

41. *Id.* at 707–10.

42. *Id.* at 720. That precedent was *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963).

43. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

44. See, e.g., PAUL RAMSEY, *ETHICS AT THE EDGES OF LIFE* XV (1978) ("The integrated theme of this volume is to direct attention to medical, ethical, and legal intersections at the edges of life, in the first and at the last of it.").

euthanasia, assisted suicide, assisting with death penalty executions, life support termination, and even autopsies and certain burial requirements.⁴⁵ Legislative and judicial willingness to accept broad complicity claims on these topics reflects the role of law in “safeguarding” people from participating in acts they consider immoral.⁴⁶ Given legislative and judicial sensitivity to personal conscience on edge-of-life issues, it is not surprising to find a whole host of religious and moral exemptions within federal and state laws.⁴⁷ Legislatures and courts have made a substantive societal choice to prioritize conscience claims regarding life and death, and have recognized, to varying degrees, the potential for profound moral conflict engendered by participation in edge-of-life matters. Thus, for example, states that permit physician-assisted suicide provide conscience exemptions.⁴⁸ For states that do not accommodate the ethical sensitivities of its citizens, outright resistance occurs—as has been the case of physicians refusing to assist with prisoner executions.⁴⁹ Recently, Pfizer and twenty other drug companies publicly refused to supply drugs to governments for lethal injections.⁵⁰

Although the *Thomas* Court found that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,”⁵¹ I would posit that conscientious objection to participation in war, abortion, suicide, and the death

45. See, e.g., Jake Grovum, *Religious Freedom, States' Interests Clash Over Autopsies*, PEW CHARITABLE TRUSTS (June 29, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/6/29/religious-freedom-states-interests-clash-over-autopsies> (“Seven states have adopted strong religious protections against autopsies: California, Maryland, New Jersey, New York, Ohio, Rhode Island and, as of July 1, Minnesota. Members of the medical community, lawmakers and religious rights advocates say the conflict between religious beliefs and a state’s interest in determining a cause of death will likely arise in an increasing number of states because of the diversifying religious makeup of America and a growing sensitivity to religious liberties. A number of groups, including Orthodox Jews, some Muslims and Native Americans, object to autopsies on religious grounds.”).

46. Sepinwall, *supra* note 19, at 1949.

47. See, e.g., Nancy Berlinger, *Conscience Clauses, Health Care Providers, And Parents*, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 35, 37–38 (Mary Crowley ed., 2008) (detailing religious exemptions in the context of healthcare).

48. *Id.* at 36.

49. Participation is prohibited by the American Medical Association code of ethics. See Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs. Medical Ethics*, 298 J. AM. MED. ASS’N 2779, 2779 (2007).

50. Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0.

51. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

penalty—even when attenuated—is quite consistent and intelligible, given that issues of life and death, albeit controversial and contested ones, are at stake. The introduction of refusals regarding contraception, especially contraception that has no possible abortifacient quality,⁵² has had the unfortunate effect of conflating two distinct moral issues, abortion and contraception. The inclusion of contraception among the edge-of-life topics is due in part to the fact that different reproductive strategies are clustered together under the “family planning” rubric, and that both the women’s movement and the Catholic Church support this categorization.⁵³

The inclusion of contraception as a concern within the conscience jurisprudence is due in large part to the conflict over women’s equity legislation passed in the late 1990s and early 2000s in more than half the states, which required contraception coverage in employer health insurance.⁵⁴ Most of these statutes had exemptions for religious employers, but the exemptions in New York and California covered only churches and not church-affiliated non-profits (in social services, education, and health care).⁵⁵ Since Catholic moral teaching forbids any method of artificial birth control, Catholic nonprofits challenged these narrow exemptions, seeking inclusion within the exemption, on the grounds of free exercise, church autonomy, and establishment doctrines, among others.⁵⁶ The litigation failed,⁵⁷ and the culture war battle lines were drawn between Catholic doctrine and women’s health concerns. An issue that had been viewed as a matter of individual conscience by many Catholics for decades was suddenly thrust onto the public stage, presaging the fight at the federal level in 2011 under the ACA. Through all of it, contraception has been categorized alongside other edge-of-life refusals.

The *Hobby Lobby* majority focused on the abortifacient quality of the four drugs opposed by Hobby Lobby Stores and Conestoga Wood, the two parties before the Court.⁵⁸ Of course, the justices were aware

52. See, e.g., NeJaime & Siegel, *supra* note 28, at 2582 n.273 (explaining that in *Hobby Lobby* plaintiffs claimed that contraceptives at issue were abortifacients because they believe pregnancy begins at fertilization rather than implantation of an egg).

53. See *id.* at 2546 n.118, 2557 n.122.

54. *Id.* at 2538.

55. See, e.g., N.Y. INS. LAW § 3221 (McKinney 2017); CAL. HEALTH & SAFETY CODE § 1367.25(c)(1)(A) (West 2017).

56. See, e.g., *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006) (unsuccessfully challenging narrow religious exemption); *Catholic Charities of Sacramento v. Superior Ct.*, 85 P.3d 67, 73–74 (Cal. 2004) (same).

57. See, e.g., *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 461; *Catholic Charities of Sacramento*, 85 P.3d at 74.

58. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

that the larger category of contraceptives was being challenged in other suits, and they made no attempt to carve out protection for abortifacients alone. But by focusing on the conscience claims before them, they could easily tie their analysis to the familiar paradigm of refusal to provide abortions—even citing to federal conscience statutes relating to abortion, including the Church Amendment, that apply to for-profit medical practices.⁵⁹ Indeed, the Court called up the specter of other edge-of-life issues, noting that insurance requirements for late-term abortion and physician-assisted suicide would surely raise legitimate conscience claims for businesses⁶⁰ and further describing the Court's prior deference to the religious claimant in *Thomas* who drew his own lines on what constituted immoral participation in war.⁶¹

The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is *connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage*. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Id. at 2778 (emphasis added).

59. *See id.* at 2773. The Court cites the Church Amendment and the Coates Amendment (prohibiting discrimination against facilities that refuse training and other activities relating to abortion) as federal statutes that “do exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience.” *Id.* (citing 42 U.S.C. §§ 300a-7(b)(2), 238n(a)).

60. *Id.* at 2783 (“It is HHS’s apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS’s view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.”). The Court’s focus on edge-of-life issues suggests that it would not view other refusal claims with quite the same deference. For instance, the Court simply notes that other claims must be taken on a case-by-case basis in response to Justice Ginsburg’s concern about the slippery slope. Further noting that, “employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others).” *Id.* at 2805 (Ginsburg, J., dissenting).

61. *Id.* at 2778 (majority opinion) (“[I]n *Thomas v. Review Bd. of Indiana Employment Security Div.*, we considered and rejected an argument that is nearly identical to the one

If the *Hobby Lobby* Court placed the business owners squarely within the conscience paradigm to allow them to refuse to participate in activity they deemed immoral, Justice Ginsburg's dissenting opinion placed them squarely within the sex discrimination paradigm.⁶² She thought the exemption was grossly outsized, and that third-party impacts on women were not properly taken into account.⁶³ The majority disputed the notion that its decision was discriminatory toward women by focusing on the government's ability to extend the nonprofit accommodation to the objecting for-profits so that no female employee would be without the mandated coverage.⁶⁴ But Justice Ginsburg was not buying it: she rejected the distinction between businesses refusing to provide contraception in its health insurance and those businesses discriminating against blacks, women, and gays on religious grounds.⁶⁵

now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that "it is not for us to say that the line he drew was an unreasonable one." (citations omitted).

62. The contraceptive coverage requirements at the state level came as part of Women's Equity Acts, so it is important to see the non-discrimination rubric applied in that context (and co-existed with religious conscience exemptions). Restrictions on abortions are typically not understood in terms of sex discrimination, but for arguments that they should be, see, e.g., Jennifer Keighley, *Health Care Reform and Reproductive Rights: Sex Equality Arguments for Abortion Coverage in a National Plan*, 33 HARV. J. L. & GENDER 357 (2010) (regarding funding).

63. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

64. See *id.* at 2780–82 (majority opinion). In fact, Justice Kennedy's concurrence placed the discrimination concern on the side of the businesses, noting that in the for-profit context RFRA protects religious people from being shut out of the market. See *id.* at 2785–86 (Kennedy, J., concurring). Free exercise "means . . . the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Id.* at 2785.

65. *Id.* at 2804–05 (Ginsburg, J., dissenting). The dissent summarized the history as:

Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941, 945 (D.S.C.1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff'd* in relevant part and *rev'd* in part on other grounds, 377 F.2d 433 (C.A.4 1967), *aff'd* and modified on other grounds, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the

Yet the discrimination paradigm has been invoked only in a narrow band of religious refusal cases, to which we now turn.

III. COMPLICITY IN IMMORAL CONDUCT BY “APPROBATION”: THE NON-DISCRIMINATION PARADIGM

Public accommodation laws at the federal and state levels have created a general expectation of non-discrimination in the provision of goods and services in the commercial context.⁶⁶ It is not surprising, then, that for-profit claims to a right to discriminate against a customer on religious grounds have been quite rare. This class of claims was shut down unequivocally in 1968 in connection with race discrimination.⁶⁷ As anti-discrimination laws expanded in some places to include categories like marital status, a handful of cases were brought in the early 1990s by landlords who refused to rent to unmarried cohabiting couples over concerns of complicity with immoral behavior. Results were mixed, but litigation soon died down.⁶⁸ More recently, hundreds of Somali Muslim

opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonistic *2805 to the Bible,” including “fornicators and homosexuals” (internal quotation marks omitted), appeal dismissed, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, — N.M. —, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the company’s owners), cert. denied, 572 U.S. —, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn’t the Court disarmed from making such a judgment given its recognition that “courts must not presume to determine . . . the plausibility of a religious claim”? *Ante*, at 2778.

Id. at 2804–05 (Ginsburg, J., dissenting).

66. See, e.g., Ronald J. Krotoszynski, Jr., *Agora, Dignity, and Discrimination: On the Constitutional Shortcomings of ‘Conscience’ Laws That Promote Inequality in the Public Marketplace*, 20 LEWIS & CLARK L. REV. 1221, 1244–45 (2017).

67. See *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 434–36 (4th Cir. 1967), *aff’d* 390 U.S. 400 (1968); *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (finding no religious exemption from nondiscrimination law to permit for-profit health club employer to engage in sex and sexual orientation discrimination in employment).

68. See, for example, the following cases holding against landlords: *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283, 285 (Alaska 1994) (concluding prohibition against discriminating on the basis of marital status does not infringe landlord’s religious freedom; “[v]oluntary commercial activity does not receive the same status accorded to directly religious activity.”); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 912 (Cal. 1996) (concluding prohibition against discrimination on basis of marital status is generally applicable and neutral towards religion and, thus, does not violate federal free exercise of religion clause; would not “substantially burden” landlord’s

taxi drivers at airports refused to transport passengers who were carrying alcohol; the court upheld airport penalties against them, asserting clearly that non-discrimination norms govern common carriers.⁶⁹

The issue of religious refusals has become heated more recently because of the inclusion of “sexual orientation” as a protected category in many state public accommodations laws and the legalizing of same-sex marriage.⁷⁰ Of the forty-five states with public accommodations laws, twenty-one of them and the District of Columbia include protections from discrimination on the basis of sexual orientation.⁷¹ An additional 255 cities have ordinances to that effect as well.⁷² Some wedding vendors have refused on religious grounds to provide goods or services to same-sex couples, without success;⁷³ their cause has fueled proposals for mini-RFRAs in some states that would allow businesses to discriminate on the basis of sexual orientation.⁷⁴ These debates have been tremendously controversial and have led to wider criticism of religious liberty⁷⁵—even the charge that it is nothing more than

religious exercise within meaning of RFRA); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239–40 (Mass. 1994) (concluding landlord discriminating on the basis of marital status is not protected). Compare with the following cases holding in favor of landlords: *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 726 (9th Cir. 1999), *rev’d en banc on other grounds*, 220 F.3d 1134, 1142 (9th Cir. 2000) (not ripe for review); *State by Cooper v. French*, 460 N.W.2d 2, 3 (Minn. 1990) (landlord’s conscience rights under state constitution allowed him to refuse to rent to cohabiting couple); *Donahue v. Fair Emp’t and Hous. Comm’n*, 2 Cal. Rptr. 2d 32, 46 (Cal. Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993) (state’s interest in protecting unmarried cohabiting couples from discrimination did not outweigh landlords’ right to free exercise under state constitution).

69. See *Muslim Cab Drivers Lose Round in Court*, MPR NEWS (Sept. 9, 2008), https://www.mprnews.org/story/2008/09/09/muslim_cabs_court; Jamal Abdulahi, *Minneapolis-St. Paul Airport’s Somali Workforce*, STAR TRIB. (Mar. 9, 2015, 8:50 AM), <http://www.startribune.com/minneapolis-st-paul-airport-s-somali-workforce/295525991>.

70. See Lucien J. Dhooze, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 U. FLA. J.L. & PUB. POL’Y 1, 6, 30–31 (2016) (describing tremendous variety of public accommodations statutes and state RFRAs, and their interaction). Note that thirty-one states include sexual orientation as a non-discrimination category in employment laws. *Id.* at 47 n.233. There is almost no protection in federal anti-discrimination statutes for sexual orientation. See, e.g., Day & Weatherby, *supra* note 9, at 917.

71. See Dhooze, *supra* note 70, at 30–31.

72. Day & Weatherby, *supra* note 9, at 918.

73. See *infra* notes 84–92 and accompanying text.

74. See Day & Weatherby, *supra* note 9, at 919–20.

75. Although they retreated from this approach in the end, proposed RFRAs in Arkansas and Indiana in 2015 were part of this movement. See *id.* at 919–20 n.83. Twenty-one states have RFRAs. For a full categorization of the public accommodations laws and the RFRAs state-by-state, see Dhooze, *supra* note 70, at 30–31.

bigotry.⁷⁶ Within the last few years, mini-RFRAs in Arizona, Mississippi, and Indiana were supported by many who wanted businesses to be able to refuse service to gays.⁷⁷ Even if the right to such refusals was not explicit in the text, the *perception* was widespread: these laws were intended to allow blanket discrimination against the LGBT community.⁷⁸ In reality, most businesses wanted nothing to do with these laws. Under immense pressure from them and others opposed to such law, Gov. Jan Brewer of Arizona vetoed the Arizona statute and then-Gov. Mike Pence signed a clarification to the Indiana law to ensure that it could not be interpreted to allow discrimination.⁷⁹ Some have suggested that it would be better to have state statutes that provide for narrow and specific exemptions for refusals to engage in wedding-related transactions as a way of preventing judicial interpretations that would invite refusals of service outside this context.⁸⁰

The concern for religious business owners as victims of imposed public norms has been expressed repeatedly in the wedding vendor cases. They argue that to require them to provide wedding goods and services to same-sex couples forces them to endorse, even celebrate, same-sex marriage in violation of their right not to be coerced to speak the government's message and their right to religious conscience.⁸¹ They contend that this coercion is unnecessary because someone else in the market will be more than happy to serve these couples and no harm will result.⁸² Indeed, Professor Douglas Laycock has argued that

76. The Chairman of the U.S. Commission on Civil Rights, Martin R. Castro, concluded "[t]he phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance." U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016).

77. See Alex Riley, *Religious Liberty vs. Discrimination: Striking a Balance When Business Owners Refuse Service to Same-Sex Couples Due to Religious Beliefs*, 40 S. ILL. U. L.J. 301, 316–17 (2016).

78. See *id.* at 317.

79. *Id.* at 310–12.

80. See, e.g., *id.* at 318–20 (providing a model statute to allow refusals by those in the wedding industry to provide goods and services to same-sex weddings).

81. See generally *id.* at 301–02.

82. See Adam Liptak, *Justices to Hear Case on Religious Objections to Same-Sex Marriage*, N.Y. TIMES (June 26, 2017), http://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html?_v=0 (noting that in the context of *Masterpiece*, the shop's brief argued "[the same sex couple] could have bought a cake from another baker"). This echoes the ACA nonprofit accommodation that the *Hobby Lobby* majority anticipated would be (and was) extended to for-profits: religious objectors should not have to provide the contraceptive coverage; someone else (the insurers) will, and no harm will result to female employees. Coverage of Certain

framing the wedding vendor claims in “discrimination” terms rather than as religious exercise takes us down a dangerous road:

Discrimination is a powerful charge. It still retains some of the moral imperative associated with the civil rights movement of the 1960s, when the discrimination at issue was utterly indefensible by any measure. The issues involved in these religious liberty disputes are very different from Jim Crow, but the broad label “discrimination” makes no distinctions.⁸³

Wedding vendor challenges, involving a photographer in New Mexico,⁸⁴ a florist in Washington,⁸⁵ and a baker in Colorado,⁸⁶ among others,⁸⁷ have produced a small body of case law, with all of the vendors losing on their claims of compelled speech and restriction of free exercise rights. The courts adjudicating these claims unequivocally embrace a non-discrimination model, refusing to create religious exemptions from public accommodation statutes for businesses.⁸⁸ The courts in the three main decisions viewed the refusals not as refusals to participate in the wedding, but rather as refusal to provide goods and services on the basis of sexual orientation, and all three drew an analogy to racial discrimination.⁸⁹ In addition, the courts viewed the public accommodation statutes in each case as serving not only the goal of promoting access to goods and services, but also the goal of promoting a healthy society and equal citizenship.⁹⁰ Indeed, in all three cases, the

Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41325, 41328 (July 14, 2015).

83. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869.

84. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63–68 (N.M. 2013); see also *Odgaard v. Iowa Civil Rights Comm’n*, No. CVCV046451, at *2, *14–15 (Iowa Dist. Ct. Apr. 3, 2014) (owners of art gallery would not allow it to be used for same-sex wedding).

85. *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 568 (Wash. 2017).

86. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 292–94 (Colo. App. 2015), cert. granted, 137 S. Ct. 2290 (2017); see also Melissa Elaine Klein, 34 Boli 102, at *23 (OR BOLI 2015) (awarding \$135,000 damages against baker who refused to provide cake for lesbian wedding).

87. See, e.g., *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426 (N.Y. App. Div. 2016) (wedding venue); *Brush & Nib Studio v. City of Phoenix*, No. CV2016-052251 at *2 (Ariz. Super. Ct. Sept. 16, 2016) (stationer).

88. See *Elane Photography*, 309 P.3d at 71; *Arlene’s Flowers*, 389 P.3d at 554; *Masterpiece Cakeshop*, 370 P.3d at 292.

89. *Elane Photography*, 309 P.3d at 59 (no different from racial discrimination); *Masterpiece Cakeshop, Inc.*, 370 P.3d at 291 (referencing civil rights era refusals to serve blacks on religious grounds).

90. *Masterpiece Cakeshop, Inc.*, 370 P.3d. at 293–94 (finding the public accommodations law “creates a hospitable environment for all consumers by preventing

notion of a retail market “commons”⁹¹ is invoked to avoid the proverbial slippery slope, on which “there could be no end to religious claimants’ objections to providing goods and services to the LGBT community”⁹² Such swift and decisive judgment against these businesses contrasts sharply with the deference shown to the owners of Hobby Lobby and Conestoga Wood.⁹³ Will the U.S. Supreme Court extend *Hobby Lobby’s* deference to the vendor case now before it, *Craig v. Masterpiece Cakeshop, Inc.*, or will the Court segregate the conscience paradigm, with its clear notion of “participation” in immoral activity, and reaffirm the non-discrimination paradigm? The facts and arguments in that case thus warrant discussion here.

In *Masterpiece Cakeshop*, the bakery was found to have violated the state’s public accommodation law when it refused on religious grounds to create a wedding cake for a same-sex couple.⁹⁴ Jack Phillips, the owner of Masterpiece Cakeshop, contended that he did not want to be complicit in the celebratory message that would be conveyed by baking the cake.⁹⁵ He argued that the creation of a cake is artistic expression and that the public would understand his creation to be an endorsement of the wedding; therefore, to mandate the cake-baking was to unconstitutionally compel speech.⁹⁶ Additionally, he argued on a variety of grounds that the public accommodations law was subject to, and would not survive, strict scrutiny under the Free Exercise Clause as applied to the creation of the cake.⁹⁷ Phillips lost on both arguments, the state appellate court holding that the baking of a cake was conduct that lacked sufficient expressive quality and that no message celebrating same-sex marriage is conveyed; and further, that, in any

discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own ‘kind,’ and ensures that the goods and services provided by public accommodations are available to all of the state’s citizens.”); *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring) (“In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [objectors] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the [objectors], with the utmost respect: it is the price of citizenship.”).

91. Dhooge, *supra* note 70, at 46–48.

92. Day & Weatherby, *supra* note 9, at 941.

93. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

94. *Masterpiece Cakeshop, Inc.*, 370 P.3d at 283.

95. *Id.* at 280.

96. *Id.* at 283.

97. *Id.* at 289–90.

event, the conduct would not be interpreted by a reasonable observer as an endorsement of same-sex marriage.⁹⁸ Invoking the failed argument for religious exemptions for race discrimination, the court noted that “Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business in the state of Colorado, the law prohibits it from picking and choosing customers based on their sexual orientation.”⁹⁹ In his petition for certiorari, Phillips again raises both compelled speech and free exercise doctrines.¹⁰⁰

The decision in *Masterpiece Cakeshop* is echoed in the recent decision of the Washington Supreme Court in *State v. Arlene’s Flowers*,¹⁰¹ in which a florist shop owner was found to have discriminated on the basis of sexual orientation. Barronelle Stutzman, the owner of Arlene’s Flowers, refused to provide floral arrangements for a gay couple’s wedding on the ground that it would be “tantamount to endorsing marriage equality for same-sex couples.”¹⁰² Like Jack Phillips, Stutzman argued that her floral arranging involved creative artistry and that insofar as it was expressive, the state could not compel her to voice a particular message.¹⁰³ And as in *Masterpiece Cakeshop*, the court rejected that argument as well, finding that her floral arranging was not speech but rather conduct unprotected by the Free Speech Clause.¹⁰⁴ Stutzman has recently filed a petition for certiorari with the Supreme Court, asking that her case be consolidated with *Masterpiece Cakeshop*.¹⁰⁵

Stutzman also argued that conscientious refusals should be protected as free exercise and exempt under public accommodation laws since other florists are available to serve the gay couple.¹⁰⁶ The court rejected this argument under both federal law (which employs a rational basis standard of review) and under Washington state law (which employs strict scrutiny).¹⁰⁷ Under federal law, a neutral law of

98. *Id.* at 285–86.

99. *Id.* at 291–92.

100. Petition for a Writ of Certiorari, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. July 22, 2016), 2016 WL 3971309, at *8–12 (argued Dec. 5, 2017).

101. *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 549–50 (Wash. 2017).

102. *Id.* at 550.

103. *Id.* at 548.

104. *Id.* at 557.

105. Petition for Writ of Certiorari, *Arlene’s Flowers, Inc. v. Washington*, *petition for cert. filed*, No. 17-108 (U.S. July 14, 2017).

106. *Arlene’s Flowers, Inc.*, 389 P.3d at 566.

107. *See id.* at 561–62.

general applicability (like the state law against discrimination) is constitutional; since it does not apply selectively to religious businesses, strict scrutiny is not triggered.¹⁰⁸ And under state law, neutral health and safety laws—including anti-discrimination public accommodation laws—survive strict scrutiny.¹⁰⁹

The court clearly locates Stutzman’s refusal within the discrimination framework, and indeed finds no distinction between her conduct and the racial discrimination of the civil rights era.¹¹⁰ Describing the open nature of the commercial market, the court “emphatically reject[s]” the argument that the couple could easily find another florist to serve them:

As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.¹¹¹

Indeed, the court specifically rejected Stutzman’s argument that discrimination cannot be invidious if based on religious beliefs.¹¹² The court agreed with the statement of the gay couple for whom service had been denied, which likened the situation to the lunch counter refusals of the civil rights era: “This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.”¹¹³

IV. DISTINGUISHING PARTICIPATION FROM ENDORSEMENT/APPROBATION

The doctor who refuses to perform an abortion and the baker who refuses to bake a cake for a same-sex wedding share some superficial similarities: both are in a secular business and both make a conscience claim that they do not want to be “complicit” in conduct they deem immoral.¹¹⁴ Yet their claims are profoundly different, and the doctor’s refusal, but not the baker’s, is protected by law.

108. *Id.* at 561–62.

109. *Id.* at 565.

110. *See id.* at 552–53.

111. *Id.* at 566.

112. *Id.* at 553 n.4.

113. *Id.* at 566 (internal citations omitted).

114. *See* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 720–21, 743–44 (2014).

One main difference is that while the doctor is directly participating in the offending act, the baker is not. As Professor Sepinwall has said of the doctor, “we recognize that, from the perspective of the actor, it makes a difference that the wrong occurs through *his* hands”¹¹⁵ But the “wrong” that troubles the baker—the same-sex marriage—does not occur through his hands. Indeed, I would maintain that the baker, by baking the cake, does not participate *at all* in the immoral act. Obviously, there is no causation or proximate responsibility;¹¹⁶ but neither is there participation—not even indirect participation—in the immoral act. The wedding event occurs quite apart from a cake, or flowers, or photographs, or a hall;¹¹⁷ and the marriage itself continues until a divorce or the death of one of the spouses. The baker’s refusal to provide goods and services for the event is a *refusal to endorse or affirm* the immoral marriage.¹¹⁸ The act of marrying and being married are acts done by the couple, not the vendors. The wedding vendor cases are about approbation and not about direct or even indirect participation in an immoral act. This is why the complaints of dignitary harm by customers turned away are so common: the refusal is not about committing a wrong through “my own hands;” it is about sending a message that I disagree with your independent choices and will not lend my approval to them.¹¹⁹

Of course, the vendors concede as much: their religious claim is to refuse to endorse same-sex marriage; they do not claim to be forced “to participate” in the marriage.¹²⁰ They focus on the right to be free from endorsing behavior they do not condone under either the Free Speech or Free Exercise Clauses.¹²¹ Yet they treat their claim to be exempt from compelled *approbation* as if it were equivalent to *participating* in the

115. Sepinwall, *supra* note 19, at 1949 (emphasis in original).

116. See Sepper, *supra* note 114, at 743.

117. See *id.*

118. See *id.* at 744. This is similar to the claim that one is offended by another’s lifestyle choice. See Day & Weatherby, *supra* note 9, at 947. In contrast, legal counsel to refusers argue that wedding vendors are forced to participate in same-sex ceremonies. See generally Casey Mattox, *You Will Be Made to Worship Their God*, ALLIANCE DEFENDING FREEDOM (Apr. 12, 2016), <https://www.adflegal.org/detailspages/blog-details/allianceedge/2016/04/12/you-will-be-made-to-worship-their-god>.

119. See Day & Weatherby, *supra* note 9, at 944 (“[W]hen scrutinizing exactly what religious belief or practice is burdened by adherence to nondiscrimination practices in public accommodations, it is difficult to characterize the burden as anything beyond offense.”) (citation omitted).

120. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017).

121. *Id.* at 276, 203, 289–92.

offending act. Pay particular attention to the language used in the petition for certiorari in *Masterpiece*:

Colorado requires [the baker] not only to interview the same-sex couple and develop a custom design celebrating their union, but to physically create their wedding cake *with his own two hands*. Colorado thus mandates that Phillips do far more than recite an offensive message. It requires him to first research and draft that message and then bring it to life in three-dimensional form using a variety of artistic techniques that range from painting to sculpture.¹²²

Even with the baker's direct involvement, the moral quality of endorsement should not be confused with the moral category of participation. As we saw in *Thomas*, participation in what is considered an immoral act is generally viewed from the perspective of the actor; deference is given to the person's conscientious refusal, even on attenuated participation claims.¹²³ This has been at the heart of the analysis of military conscientious objectors during the founding period, all the way up to the owners of Hobby Lobby and Conestoga Wood.¹²⁴ In contrast, whether the actor is endorsing an immoral act done by another is not simply about the actor's perspective; it involves, in constitutional doctrine, an analysis of whether the actor's conduct is expressive, and if so, whether the public would understand it to convey a particular message.¹²⁵ The law employs a reasonable observer standard, which is not about deferring to the actor's belief but about deciding in an external forum what message is being conveyed.¹²⁶ The Colorado Court of Appeals found that the public would only infer that the bakery's provision of cakes to all weddings meant it was following state law on public accommodations.¹²⁷ Regardless of the court's holding, the endorsement remains morally distinct from participation.

This distinction between participating in an immoral act and endorsing someone else's act is borne out by other cases in which courts have rejected religious conscience claims.¹²⁸ We could say that the

122. Petition for a Writ of Certiorari, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. July 22, 2016), 2016 WL 3971309, at *16-17 (argued Dec. 5, 2017).

123. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716-17 (1981).

124. See *United States v. Seegar*, 380 U.S. 163, 169-73 (1965).

125. *Masterpiece Cakeshop, Inc.*, 370 P.3d at 284.

126. *Id.* at 286.

127. *Id.* at 286-87.

128. See *supra* notes 68-69 and accompanying text.

Muslim cab drivers who would not drive passengers carrying French wine were not participating in the provision or use of alcohol, but were instead refusing to endorse or affirm the independent immoral choice of another. The same goes for the landlords who did not want to rent their apartments to cohabiting couples engaging in pre-marital sex.¹²⁹ These situations involved refusing approbation of *another's* immoral act.

Even indirect participation in edge-of-life matters is marked by a connection that is absent from the wedding vendor situation. When a business refuses to provide employee health insurance that covers abortions, it is not simply refusing to endorse someone else's immoral act. Of course, the connection is attenuated, as the decision whether or not insurance will be used to pay for the abortion rests solely and ultimately with the employee. But there is a connection nonetheless: the owner refuses to provide the means—through their contracted insurer—to arrange, pay for, and facilitate the procedure. The Supreme Court has plainly accepted this understanding of indirect participation.¹³⁰ It is not simply refusing approbation of another's immoral act, like refusing to bake the cake for a wedding.

This first distinction between participation and approbation is connected to a second distinction, between the categorical and the selective provision of goods and services. The edge-of-life claimants typically refuse to engage in certain immoral acts across the board: a military conscientious objector is opposed to all war;¹³¹ a doctor does not

129. *Court Lets Landlord Refuse Unmarried Couple*, N.Y. TIMES (May 29, 1994), <http://www.nytimes.com/1994/05/29/us/court-lets-landlord-refuse-unmarried-couple.html>. The few cases in which courts allowed landlords to refuse rentals to unmarried couples can be explained by the chaotic free exercise jurisprudence that occurred in the immediate aftermath of the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which states sought out opportunities to interpret their own constitutions with a broad definition of burden and stricter standard of review.

130. In *Hobby Lobby*, the Court's examples show that participation in war is not only about shooting a gun, but also about manufacturing tank turrets; participation in abortion is not only about performing the surgery, but also about paying for employee health insurance that would cover a late term abortion or cover a drug that might cause one; participation in another's suicide is not only about prescribing drugs to a patient, but also about paying for employee health insurance that would cover those drugs. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778, 2783 (2014).

131. This is tracked in the military conscientious objection cases, in which the objector must oppose all war and not some. *Gillette v. United States*, 401 U.S. 437, 447 (1971) (holding that a selective objector who refused to participate only in "unjust wars" did not satisfy statutory criteria for conscientious objector, and noting that petitioner's reliance on *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), was misplaced).

perform any abortions;¹³² a pharmacist does not stock any emergency contraception;¹³³ a business does not provide any abortion coverage in the employee health insurance package.¹³⁴ But the baker provides cakes to the public—yet refuses a cake to people engaged in an immoral act.¹³⁵ The taxi driver provides transportation to the public—yet refuses transport to people engaged in an immoral act.¹³⁶ This second distinction reinforces the first, between those who refuse to participate in the immoral act, and those who have refused to endorse or affirm the immoral act of another. Wedding vendors and cabbies and landlords who make complicity arguments have no scruples against baking a cake, taking photographs, arranging flowers, renting an apartment, or driving a cab. They are simply refusing to engage in that very same work when it endorses or affirms the immoral act of another. But conscientious refusals to participate in immoral acts, usually relating to edge-of-life matters—war, abortion and abortion-related processes, sterilization, embryonic stem cell research, assisted reproduction, assisted suicide, assisted death penalty, and autopsies and certain burial requirements—are rooted in the concern about direct or indirect participation in the act itself, and not simply a desire to separate oneself from *someone else's* immoral act.

Other commentators analyze the problem differently. Many express alarm over the extent to which the *Hobby Lobby* Court protected an attenuated complicity claim, and are concerned that it is but a short step from there to the complicity arguments regarding refusals of service on the basis of sexual orientation.¹³⁷ Professors Douglas NeJaime and Reva Siegel note how broadly healthcare refusals have been extended beyond the original Church Amendment, and see “[i]n the sexual orientation context, complicity-based conscience claims,

132. See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1502 (2012) (“Forty-three percent of doctors have worked in a religiously affiliated institution, many of which restrict treatment, not for medical but for religious reasons.”) (footnote omitted). Emergencies, especially in the context of religious medical monopoly, present a vastly different case. See Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. F. 369, 380–81 (2016).

133. See generally NeJaime & Siegel, *supra* note 28, at 2258 n.173.

134. See generally *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759 (employer objected to all methods of abortion and believed that the objectionable birth control methods included in health insurance package were, in fact, abortifacients).

135. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276, 279 (Colo. App. 2015).

136. See *supra* text accompanying note 69.

137. See NeJaime & Siegel, *supra* note 28, at 2518–19 (discussing claimants’ concerns of complicity arguments extending to claims raised in response to contested sexual norms).

which are beginning to proliferate . . . modeled on healthcare refusals.”¹³⁸ Indeed, there are already documented refusals that go well beyond the wedding vendor cases, like the doctor who refuses to treat a sick infant of a same-sex couple, the EMTs who refuse to treat a dying transgender individual, and the pharmacist who refuses to dispense HIV drugs to a gay man.¹³⁹ Yet I would consider these to be easy cases of unlawful discrimination, dealing entirely with approbation. Courts can distinguish between what it means to participate in an act deemed immoral and what it means to approve or endorse someone else’s act. In these examples, those who refuse are not in any way participating directly or indirectly in immoral acts; these claimants are simply refusing to endorse or affirm someone else’s acts.¹⁴⁰ The pharmacist who refuses to hand over emergency contraception is, in his view, providing the means (possibly) to destroy an embryo; in contrast, the pharmacist who refuses to hand over HIV drugs is voicing disapproval over the customer’s (assumed) sexual activity.

While I would draw the line between participation and endorsement in order to cabin the complicity claim, commentators like Professor Sepinwall¹⁴¹ and Professors NeJaime and Siegel draw the line between religious claims that have minimal impacts on third parties and those that cause harmful impacts to third parties.¹⁴² A free exercise exemption for a prisoner to wear a short beard has no impact on

138. *Id.* at 2558 (footnote omitted).

139. See Day & Weatherby, *supra* note 9, at 926; Jessica J. Nelson, *Freedom of Choice for Everyone: The Need for Conscience Clause Legislation for Pharmacists*, 3 U. ST. THOMAS L.J. 139, 162–63 (2005).

140. Accord Nelson, *supra* note 139, at 163. See also NeJaime & Siegel, *supra* note 28, at 2539 (concern over broad refusals to provide health care). The distinction is blurred when protective legislation is very broad. For example, see Mississippi’s Health Care Rights of Conscience Act, creating “the right not to participate . . . in a health care service that violates [one’s] conscience.” MISS. CODE ANN. §§ 41-107-5(1) (West 2004). Health care service is defined to include

any phase of patient medical care, treatment or procedure, including, but not limited to . . . patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.

Id. § 41-107-3(a).

141. Sepinwall, *supra* note 19, at 1908–09 (“[T]he smaller the burden of a religious exemption on third parties, the more readily courts should grant the requested exemption. By the same token, the greater the burden that a conscience-based exemption would impose on third parties, the less willing courts should be to accede to the religious objector’s request.”).

142. NeJaime & Siegel, *supra* note 28, at 2519 (“Because [complicity-based conscience] claims are explicitly oriented toward third parties, they present special concerns about third-party harm.”).

others.¹⁴³ A compromise like that of the ACA accommodation satisfies the concern over third-party harms, as the employee receives the insurance.¹⁴⁴ But other exemptions for complicity-based claims tend to have “the potential to inflict material and dignitary harms on other citizens.”¹⁴⁵ Thus, these scholars propose that any legislature or court considering accommodations attend to third-party harms as a general limiting principle.¹⁴⁶

In my view, however, drawing lines between protected and unprotected religious conduct based explicitly and primarily on impacts is a disproportionate response. Surely impacts of exemptions must be taken into account,¹⁴⁷ and deference to complicity claims should not be easily extended when third-party harms cannot be eliminated or mitigated—indeed, this was the centerpiece of the *Hobby Lobby* analysis.¹⁴⁸ But an approach that overvalues impacts could sweep in *many* complicity claims without acknowledging that some have their own history and cohere around a particular principle—the principle of participation. Edge-of-life matters are already a unique set of substantive issues for which broad deference to conscience has been recognized.¹⁴⁹ Even if limits to attenuation are warranted, as some scholars suggest,¹⁵⁰ the traditional complicity jurisprudence preserves the requirement of participation, which in turn helps to serve as a

143. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

144. Indeed, this is why Professor Sepinwall conceded that *Hobby Lobby* had been rightly decided; the third-party harms were eliminated. Sepinwall, *supra* note 19, at 1977–78.

145. NeJaime & Siegel, *supra* note 28, at 2516.

146. *See id.* at 2579.

147. I have written elsewhere about ways to limit impacts on third parties in general. *See generally* Angela C. Carmella, *After Hobby Lobby: The “Religious For-Profit” and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381, 382 (2015) (in the for-profit context); Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007).

148. *See supra* notes 1–8 and accompanying text.

149. *See, e.g.*, Grovum, *supra* note 45.

150. Professor Sepinwall accepts the expansion of the conscience claims because of the human tendency for some to have an “unusually expansive sense of their own complicity.” Sepinwall, *supra* note 19, at 1935 (noting although there should be “no deference [if] the claim’s empirical elements are manifestly false”). While recognizing the need to respect the objector’s concerns, “[w]ho are we to say that he is being overly sensitive or stringent when it comes to his own moral purity?” *Id.* at 1958. Professor Sepinwall notes that this must be limited by balancing against third party impacts, especially in situations that differ from the HHS accommodation, which provided an easy regulatory scheme. *Id.* at 1974–78. Indeed, Sepinwall criticizes the too-narrow understanding of conscience proposed by the *Hobby Lobby* dissent, which would limit a complicity claim to the situation in which a party has: “(1) taken part in the decision to pursue some act and (2) participated directly in that act” *Id.* at 1915.

natural limiting principle to complicity claims. The better line to draw is one between participation and approbation; complicity claims involving the latter will be subject to greater scrutiny within the non-discrimination framework of public accommodation laws.

V. HEALTH CARE REFUSALS TO PARTICIPATE IN ACTIVITIES RELATING TO SEXUAL ORIENTATION AND GENDER REASSIGNMENT

It will be instructive to explore some situations located in between participation and endorsement—the abortion refusal paradigm and the vendor discrimination paradigm—in order to think through the proper distinctions between a refusal that is a protectable act of conscience and one that is illegal discrimination. Two examples follow: one involves a doctor who routinely provides assisted reproductive services but refuses to provide in vitro fertilization to a lesbian and the second involves a surgeon who has done numerous mastectomies and hysterectomies in response to disease or disease-prevention, but who refuses to do such surgeries for a transgender individual undergoing sex reassignment, also called gender transition.¹⁵¹ These two examples come from actual situations in which the government attempted to cast refusals in the context of a market that should be governed by non-discrimination principles. Do these examples involve “edge-of-life” matters (or the equivalent in moral weight) that deserve the extension of abortion-type conscience protection? Or are they more like the selective discrimination we see in the wedding vendor marketplace?

A. *Non-Discrimination in the Commercial Marketplace*

As a threshold matter, the commercial marketplace is an important concept to consider. Public accommodation laws vary from state to state; a majority of states do not even list sexual orientation as a protected category.¹⁵² Nonetheless, commentators argue for the broadest non-discrimination norms. Professor Lucien Dhooge proposes a uniform public accommodation law applicable to all secular businesses

151. See *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cty.* Superior Court, 189 P. 3d 959 (Cal. 2008); *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

152. For a complete listing of public accommodation laws as they apply to sexual orientation and gender identity, see Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1415–57 (2017); *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 26, 2018).

providing goods and services that would be broadly non-discriminatory, “guaranteeing public access to the widest range of establishments.”¹⁵³ He argues against religious exemptions because of the impacts, both material and dignitary, but also because various types of exemptions would be unworkable.¹⁵⁴ Similarly, Professor Ronald Krotoszynski would have the “agora,” the public market, governed by broad public accommodation norms that prohibit discrimination in ordinary trade and commerce.¹⁵⁵

Much like the state courts in the wedding vendor cases, these commentators and others focus on the notion that full participation in the market is a warrant of equal citizenship.¹⁵⁶ Professor Dhooge argues that “government has compelling interests in the protection of human dignity and equal exercise of the rights of citizenship through prohibitions upon discrimination, including guaranteeing access to public establishments.”¹⁵⁷ Others have described the market as a “commons” that includes “potentially most commercial enterprises, where non-discrimination should be expected given the norms of the institution or affiliation involved.”¹⁵⁸ The commons includes “places or encounters where people who may be different from one another in all kinds of respects, including gender, sexual orientation, beliefs and values, *can expect not to be excluded.*”¹⁵⁹

Thus, the market is both a place where people come together not only for economic transactions, but also where the equal availability of goods and services has profound political meaning. Surely one can understand this for sandwiches and for floral arrangements: norms of nondiscrimination are reasonably expected in ordinary trade and commerce. It would seem these values should also govern health care. In contrast to a retail market, however, the health care “market” is not ordinary trade and commerce. Indeed, the notion that it is a “market” made up of transactions for goods and services akin to other markets

153. Dhooge, *supra* note 70, at 33 (proposing a broadly non-discriminatory uniform public accommodation law, in contrast to public accommodation laws that list the establishments that are covered).

154. *See id.* at 46–48.

155. Krotoszynski, *supra* note 66, at 1244–45 (collecting and discussing numerous state laws attempting to protect religious conscientious objection to same-sex marriage and arguing for a nondiscriminatory “agora,” or public marketplace). He notes that churches are private, and outside the market. *See id.* at 1222.

156. *See, e.g., id.* at 1245.

157. Dhooge, *supra* note 70, at 48.

158. Joel Harrison & Patrick Parkinson, *Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society*, 40 *MONASH U. L. REV.* 413, 443 (2014).

159. *Id.* at 442 (emphasis added).

has been criticized, given that it involves public (as opposed to private) goods, market distortions, and the pervasive and powerful role of insurers.¹⁶⁰ So it may be that a direct analogy cannot be drawn between the market for wedding cakes and that for hysterectomies. Yet the non-market and extra-market factors—which involve the basic human need for health care and the societal interest in a healthy population—suggest that non-discrimination in this context is just as important (if not more) to human dignity and equality than in ordinary commercial transactions.

In the two examples more fully described below, a state public accommodations law and a federal non-discrimination regulation both attempt to shoe-horn the provision of medical services into a non-discriminatory market model. But in both decisions, the courts continue to give deference to doctors' conscience claims. The courts simply find it too difficult to tell doctors that they must participate—*by their own hands*—in a procedure or surgery or service that they believe is immoral.

B. Protecting Conscience in the Health Care Market

In *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, a medical practice was sued by a lesbian patient who had been denied intrauterine insemination (IUI) by two of the doctors in the practice with religious objections.¹⁶¹ Although the objecting doctors had intended to involve non-objecting doctors in the patient's care at the appropriate time, no one at the practice was able to

160. See Chris Ladd, *There is Never a "Free Market" in Health Care*, FORBES (Mar. 7, 2017, 10:00 AM), <https://www.forbes.com/sites/chrisladd/2017/03/07/there-is-never-a-free-market-in-health-care> (criticizing Republicans' trust in the market and arguing for the need for regulation of insurers: "Under an insurance system without effective, powerful regulation, the market forces that would exist in a face to face transaction between consumer (patient) and supplier (doctor) disappear, replaced with a grim gamble in which the insurance company has every incentive to cheat."); Diane Lim, *Knees v. Nikes: How Buying Health Care Isn't Like Buying Shoes*, COMMITTEE FOR ECON. DEV. (Mar. 19, 2015), <https://www.ced.org/blog/entry/knees-vs.-nikes-how-buying-health-care-isnt-like-buying-shoes> (noting problems with the "market," especially in that health care is a public, as opposed to private, good); David A. Wells, Joseph S. Ross & Allan S. Detsky, *What is Different About the Market for Health Care?*, 298 J. AM. MED. ASS'N, 2785, 2785–87 (2007), http://vbidcenter.org/wp-content/uploads/2014/11/What-Is-Different-About-the-Market-for-Health-Care_AMA_2007.pdf.

161. 189 P.3d 959, 962–63 (Cal. 2008) (finding that medical practice has no religious exemption from anti-discrimination statute to allow refusal to provide assisted reproductive services to lesbians).

perform the IUI because of poor internal communication and inconsistent treatment competencies among the doctors.¹⁶²

The California Supreme Court held that the medical practice and its two objecting physicians had violated the state's civil rights law prohibiting discrimination on the basis of sexual orientation.¹⁶³ The medical practice was indeed a public accommodation.¹⁶⁴ The court rejected the affirmative defenses of free speech and free exercise of religion, finding that no religious exemption was warranted, "even under a strict scrutiny standard" of review.¹⁶⁵

Despite imposing liability on the doctors, the court explicitly stated that compliance with the law did not mean that, going forward, all doctors would be compelled to participate in the IUI procedure:

To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physicians' employer. Or, because they incur liability under the Act if they infringe upon the right to the "full and equal" services of North Coast's medical practice . . . *defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives "full and equal" access to that medical procedure though [sic] a North Coast physician lacking defendants' religious objections.*¹⁶⁶

This is a fascinating concession by the court, which regards the defendants more like doctors who refuse to perform an abortion than wedding vendors who refuse to provide a service. In fact, it has regard for the doctors' consciences even when the refusal is selective rather than across-the-board, and even when it seems to involve refusal to endorse nontraditional families.¹⁶⁷ But the court errs on the side of

162. See *id.* at 963–64. One of the objecting physicians had provided drug therapy and diagnostic testing to the patient; she refused only to perform the actual IUI procedure and provided notice of her refusal at the beginning of the doctor-patient relationship. See *id.* at 963.

163. See *id.* at 962, 968.

164. See *id.* at 965.

165. *Id.* at 968.

166. *Id.* at 968–69 (emphasis added) (citations omitted).

167. Obviously, selectivity is part of the exercise of medical judgment. But the decision did not seem to be based on medical judgment, as we saw in the revocation of the license of the doctor who performed in vitro fertilization on Nadya Suleman (the "Octomom"), implanting twelve embryos rather than the age-appropriate two. *Octomom's Fertility*

conscience, in Professor Sepinwall's words, "safeguard[ing] people from such participation because we recognize that, from the perspective of the actor, it makes a difference that the wrong occurs through *his* hands"168 The court takes a compromise position to honor the doctor's conscience refusal and to provide the services to the patient, sending a strong message to the medical practice to get its act together—for scheduling, communications, licensure, and the like—so that patients bear no effects from any individual doctor refusals.¹⁶⁹

The concurrence raises a hypothetical—but harder—question:

I am not so certain this balance of competing interests would produce the same result in the case of a sole practitioner, who arguably is a "business establishment[]" for purposes of the Unruh Civil Rights Act . . . , but who lacks the opportunity to ensure the patient's treatment by another member of the same establishment. At least where the patient could be referred with relative ease and convenience to another practice, *I question whether the state's interest in full and equal medical treatment would compel a physician in solo practice to provide a treatment to which he or she has sincere religious objections*. One might well conclude that, in that situation, application of the Unruh Civil Rights Act against the doctor would not be the means "least restrictive" on religion of furthering the state's legitimate interest. These issues are not before us here, however, and the majority does not express any views on them. On that basis, and with that understanding, I concur in the majority's reasoning, and in its result.¹⁷⁰

Would the individual doctor who refuses to perform an IUI on a lesbian patient, but who refers her to another doctor, be considered to have discriminated on the basis of sexual orientation in violation of public accommodations law? Is the doctor no different from the florist or baker or photographer who tells the gay couple that another vendor in

Doctor Has License Revoked, CBS NEWS (June 2, 2011, 12:35 AM), <http://www.cbsnews.com/news/octomoms-fertility-doctor-has-license-revoked/>.

168. Sepinwall, *supra* note 19, at 1949.

169. This is quite similar to proposals made by Sepinwall, *supra* note 19, at 1960–61, and NeJaime & Siegel, *supra* note 28, at 2566, 2579, focusing on eliminating dignitary and material harms to the patient, and also in the pharmacy context, to ensure that customers are served by a non-objecting professional. See Catherine Grealis, *Religion in the Pharmacy: A Balanced Approach to Pharmacists' Right to Refuse to Provide Plan B*, 97 GEO. L.J. 1715, 1735–37 (2009).

170. *N. Coast Women's Care Med. Grp., Inc.*, 189 P.3d at 971 (Baxter, J., concurring) (emphasis added) (citations omitted).

town will be happy to assist them? I contend that in situations that involve participation in these types of edge-of-life matters, a court or legislature would be reluctant to compel a person to commit an act she believes to be immoral—directly, by her own hands. Had the doctor claimed a sincere religious objection to treating a lesbian with meningitis because the patient was in a same-sex marriage, non-discrimination norms under a public accommodation law would prevail. The doctor’s claim in this hypothetical unequivocally entails approbation of, not participation in, what she considers to be immoral conduct.

A similar deference to medical conscience claims can be seen in the transgender non-discrimination context. In 2016, the federal government promulgated rules under the ACA to prohibit sex discrimination in medical services and insurance coverage on the basis of “gender identity” and “termination of pregnancy.”¹⁷¹

The rules were intended to invoke the discrimination paradigm, so that a hospital’s or doctor’s categorical refusal to assist with gender transition (which includes sterilization) or abortion could now be viewed as selective sex discrimination.¹⁷² Religiously-affiliated hospitals and doctors were concerned that if surgeries like mastectomies or hysterectomies were done for medical reasons, they also had to be done for gender transition, and that if miscarriages were treated with procedures like dilation and curettage, then abortions had to be performed as well.¹⁷³ Existing religious exemptions were not incorporated into these expanded sex discrimination rules, so hospitals faced the loss of federal funds and doctors faced liability.¹⁷⁴ They argued under RFRA that the rules thus “require[d] them to perform and provide insurance coverage for gender transitions and abortions,” in violation of their “religious beliefs and medical judgment.”¹⁷⁵

In *Franciscan Alliance, Inc. v. Burwell*, a Catholic hospital system and a faith-based organization representing 18,000 physicians (as well as a number of states) challenged the rules, and a nationwide injunction was issued.¹⁷⁶ Among numerous bases for injunction, the court found “a

171. See *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016); *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,387–88 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

172. See *Franciscan Alliance, Inc.*, 227 F. Supp. 3d at 672–73.

173. See *id.* at 673.

174. See *id.* at 671.

175. *Id.* at 670.

176. See *id.* at 670–71, 674. The Court determined that the rules violated the Administrative Procedures Act and, as applied to the private plaintiffs, were substantially likely to violate the Religious Freedom Restoration Act. See *id.* at 691, 693 (based, in part,

substantial likelihood of success on” a violation of RFRA.¹⁷⁷ The court found that the rules created a substantial burden on religious exercise because they placed “substantial pressure” on the hospital and the doctors to violate their beliefs.¹⁷⁸ By prohibiting across-the-board refusal to engage in gender transitions and abortions, hospitals and doctors would have to decide each time a request was made, thus putting substantial pressure on them to perform these procedures.¹⁷⁹ The court found that the government failed to show that a compelling interest was at stake; even assuming such an interest, less restrictive alternatives existed to meet the rules’ objectives short of forcing hospitals and doctors to act against conscience.¹⁸⁰ It seems a straightforward protection of medical personnel from direct participation in activity they deem immoral, refusing to “use one’s hands” to provide the surgeries and other procedures for gender transition.¹⁸¹

If we consider third-party harms, as commentators have proposed, we see that the court in *Franciscan Alliance* sought not simply to protect conscience, but also to put the responsibility for reducing externalities on the government, much as the *Hobby Lobby* Court did, noting that there were other ways for the federal agency to eliminate transgender and abortion discrimination in health care that were less restrictive alternatives.¹⁸² One option is for the government to “assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services.”¹⁸³

on plaintiffs demonstrating substantial likelihood of success on a RFRA claim). *But see* Sandhya Somashekhar, *Transgender Man Sues Catholic Hospital for Refusing Surgery*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/06/transgender-man-sues-catholic-hospital-for-refusing-surgery/?utm_term=.97f06a8a18dd.

177. *Franciscan Alliance, Inc.*, 227 F. Supp. 3d at 693.

178. *See id.* at 692.

179. *See id.*

180. *See id.* at 693. The analysis and holding included the provision of insurance for abortions and gender transition as well as insurance coverage. *See id.* at 695–96.

181. *See* Sepinwell, *supra* note 19, at 1949; *see generally* David Cloutier & Luke Timothy Johnson, *The Church & Transgendered Identity: Some Cautions, Some Possibilities*, COMMONWEAL, Mar. 10, 2017, at 15 (discussing the externalities of gender self-identity).

182. *See Franciscan Alliance, Inc.*, 227 F. Supp. 3d at 693.

183. *Id.*

VI. CONCLUDING THOUGHTS

The purpose of this analysis has been to urge the Supreme Court to avoid extending the complicity jurisprudence—as illustrated in *Hobby Lobby*—to cases of endorsement.¹⁸⁴ Even if the wedding vendors sincerely believe they are being forced to be complicit in a message that celebrates same-sex marriage, that claim should be addressed on its own terms and not through the application of complicity jurisprudence. This is so because that jurisprudence protects conscientious objectors who refuse to *participate* in activity they consider immoral.

Complicity through participation always comes down to the notion that “the wrong occurs through [one’s] hands.”¹⁸⁵ Obviously, “participation” in this sense is not limited to edge-of-life matters (although comparably profound matters, such as gender identity, fit well within the rubric). Yet edge-of-life matters stand as a pre-existing field of ethics, are rooted deeply in historical precedent, and can be intelligibly extended to other types of refusals to participate, even those that are attenuated. No such participation is at stake in the endorsement claims of the wedding vendors.

Third-party harms that flow from refusals to participate in activities deemed immoral can be minimized or eliminated; not so in the endorsement arena. In the provision of medical and drug services, conscientious objections can be accommodated without curtailment of services.¹⁸⁶ And with requirements to provide insurance, conscientious refusals can be addressed through an accommodation framework like that described in *Hobby Lobby*.¹⁸⁷

In contrast, it would be difficult, if not impossible, to minimize or eliminate third party harms flowing from a right to refuse services based on approbation. If endorsement is understood from the objector’s perspective, the claims are potentially limitless. One might believe that a whole range of activities “sends a message” with which she disagrees. On the other hand, if endorsement is understood from the perspective of a reasonable observer, then numerous claims will need to be

184. The distinction will be particularly important to maintain if the HHS Proposed Rules become final. See *supra* note 27.

185. *Sepinwall*, *supra* note 19, at 1949.

186. See *supra* notes 161–166 and accompanying text. This would not apply to the death penalty context.

Note that Title VII accommodations of employees may be implicated in these refusals. See Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073, 1104 (2006).

187. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783–84 (2014).

adjudicated to determine whether (and in what contexts) the provision of goods and services sends a message.

In order to avoid casting doubt more generally on religion-based refusals in the for-profit context, the Court should draw a bright line in *Masterpiece Cakeshop* between the traditional category of complicity claims and this newer category of wedding vendor claims. If the concept of complicity proves too elastic, some courts and legislatures might rethink even long-standing rights to refuse participation. But if the Court ensures that *Hobby Lobby* is not relevant to approbation claims, it preserves participation claims—which remain subject to critique and limitation, as always, on grounds of attenuation and third-party harms.