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INTRODUCTION

For over a hundred years, the U.S. Supreme Court—and an array of state supreme courts—consistently rejected arguments that businesses open to the public have a constitutional right to provide less than the full and equal services required by antidiscrimination laws.[1] The Supreme Court made clear that public accommodations law "does not, on its face, target speech or discriminate on the basis of its content."[2] First Amendment claims involving unusual applications of public accommodations law have sometimes met success.[3] But the Court drew a sharp contrast between expressive associations—safeguarded from application of the law—and "commercial relationship[s] offered generally or widely"—entitled to no First Amendment protection.[4] First

† Professor of Law, University of Texas at Austin School of Law. I'm grateful to Kathryn Garza for excellent research assistance and to the participants in the University of Chicago Law School's *Legal Forum* Symposium, *What's the Harm? The Future of the First Amendment*, for their comments and suggestions. I thank Nika Arzoumanian, Rebecca Boorstein, Austin Kissinger, Daniel Simon, Anna Porter, James Gao, Rebecca Roman, Claire Lee, Qi Xie, and the rest of the journal staff for their superb organizing and editorial assistance.

[1] *E.g.*, W. Turf Ass'n v. Greenberg, 204 U.S. 359, 364 (1907); Messenger v. State, 41 N.W. 638, 639 (Neb. 1889); People v. King, 18 N.E. 245, 248–49 (N.Y. 1888).

[2] Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) (observing that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments").

[3] *Hurley*, 515 U.S. at 572 ("In the case before us, however, the Massachusetts law has been applied in a peculiar way."); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) (distinguishing entities like "taverns, restaurants, [and] retail shops" from non-commercial membership organizations like the Boy Scouts that "may not carry with them open invitations to the public").

[4] Runyon v. McCrary, 427 U.S. 160, 189 (1976) (Powell, J., concurring); *Hurley*, 515 U.S. at 571; *Dale*, 530 U.S. at 657 (distinguishing entities like "taverns, restaurants, [and] retail shops" from organizations that "may not carry with them open invitations to the public" or are not "clearly commercial entities"); Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (observing constitutional "dichotomy" between the rights of expressive and commercial organizations).

Amendment claims from businesses failed, regardless of whether they were framed as rights of free speech, free association, or free exercise.[5]

But over the last decade, a movement for exemptions from antidiscrimination laws has taken hold.[6] For-profit businesses refuse to take photos or videos, bake cakes, print invitations, rent accommodations, or arrange flowers for same-sex couples out of religion-based objections to same-sex relationships. While religion motivates business owners, public accommodations laws easily meet the Free Exercise Clause's requirements of neutrality and general applicability.[7] These laws were adopted to eradicate discrimination, not target religion, and are generally applicable, usually applying to every place open to the public.[8] As a result, the question at the heart of these cases is whether cake baking, flower arranging, wedding hosting, or invitation lettering is speech. Objectors argue that requiring businesses to sell goods and services on equal terms to a same-sex couple compels them to speak in favor of the marriage.

Court after court rejected these arguments.[9] But then, in 2019, the Court of Appeals for the Eighth Circuit and the Arizona Supreme Court became the first courts to hold that wedding businesses have a free speech (and free exercise) right to refuse service.[10] Two justices of the U.S. Supreme Court, Thomas and Gorsuch, have indicated their agreement.[11] In the near future, the Court will likely take up the issue. So—as this symposium asks—what's the harm?

Thirty-five years ago, the Supreme Court instructed that "unique evils" inhered in discrimination in public commerce.[12] In this essay, I

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[5] *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973) (noting that no court has ever granted "affirmative constitutional protections" to private discrimination).

[6] Sarah Posner, *The Christian Legal Army Behind Masterpiece Cakeshop*, NATION (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/ [perma.cc/R7FH-RA5L].

[7] Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that neutral laws of general applicability do not offend the Free Exercise Clause).

[8] *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638–62 (2016) (describing the scope and limited exceptions from these laws).

[9] Elane Photography, LLC v. Willock, 309 P.3d 53, 68 (N.M. 2013); Gifford v. McCarthy, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438–39 (Ariz. Ct. App. 2018) ("The items [calligraphers] would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public."), *rev'd*, 448 P.3d 890, 895 (Ariz. 2019); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019), *petition for cert. filed*, No. 19-333 (Sept. 12, 2019); Klein v. Or. Bureau of Labor & Indus., 289 410 P.3d 1051 (Or. Ct. App. 2017).

[10] Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio*, 448 P.3d at 895.

[11] *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgement).

[12] Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

evaluate what might be unique about public accommodations within the civil rights framework. As Part I describes, by inviting the general public, public accommodations generate expectations of service, expectations always realized by the in-group—often defined by race, religion, and gender—and sometimes denied to minorities. Unlike employment, housing, and other spheres of antidiscrimination, public accommodations operate according to accepted conventions of nonselectivity. The public expects businesses to deliver goods and services on a first-come, first-served basis, to charge the same prices, and to treat people with respect for their status as consumers.

As Part II argues, the status of consumer entitles would-be patrons to a modicum of respect for their dignity. By contrast to discrimination in employment and housing, discrimination in consumer goods imposes trivial monetary damages on any particular individual, even as it has large aggregate effects in the market. But, as the law governing public accommodations has understood, public-facing businesses have particular power to inflict damage to one's status as a consumer and citizen. Under the common law, courts recognized dignitary damages in order to enforce businesses' obligations to the public. Given the absence of significant money damages for failing to honor a movie ticket or sell a hamburger, dignitary damages provided an otherwise missing deterrent effect. They ensured marginalized groups would no longer have to participate in the performance of their own inferiority before the audience inherent to businesses that welcome the public.

The final two Parts sketch the import of the unique evils of public accommodation discrimination for free speech. Part III argues that this arena manifests unified conventions of the consumer marketplace. The law of public accommodations shapes a consumer capitalist market that operates with an ideal of neutrality toward identity traits and aspires to frictionless transactions and movement. The result is a consumer marketplace where people and money flow freely in low-information, low-stakes transactions.

Part IV indicates an overlooked asymmetry in the communicative potential of service and denial. Because of social expectations of service, a business communicates little, if anything, when it provides a good or service to any particular customer. The wedding vendor signals no approval of the person or the use of the goods by its service. By contrast, denial of service powerfully expresses that a person (or group) does not merit status as a consumer. The message conveyed by breaking uniform conventions of service does not depend on the artistic or bespoke nature of the product sold or the celebration of any particular event. Free speech claims built around denial of service cannot be so cabined.

I. CONSUMER STATUS AND THE EXPECTATION OF SERVICE

Most spheres of life governed by civil rights laws—whether employment, housing, or credit—manifest selectivity. Consider employment, the focus of most antidiscrimination scholarship. Employers use discretion and often subjective criteria in choosing among applicants. They gather ample information, ranging from resumes and references to personality tests and credit checks. People find themselves denied jobs for an array of legitimate reasons—a lack of experience, bad interview, improper fit, or preference for alumni of the boss's alma mater.

Our expectations of employment are rejection and disappointment or, at best, uncertainty about the direction of decision making. Applicants neither anticipate nor receive any response from many jobs to which they apply. Employers routinely reject applicants, deny promotions, and turn down requests for raises.

By contrast, public-facing businesses—from restaurants to grocery stores, from ballparks to theaters, from flower shops to bakeries—welcome all comers. People rarely offer their names, let alone personal details, in these places. The business tends to inquire only as to the method of payment. Customers rarely anticipate or receive rejection without good reason that the tables are booked or the tickets sold out. Even rejection often serves as invitation to reserve for a future date or to return for a later game.

Unlike employers, public accommodations do not have an interest in, or practice of, choosiness.[13] The business is organized around abstract customers—any member of the public is welcomed to deal.[14] This invitation generates expectations of service, expectations consistently realized by the in-group—whether white, male, or heterosexual—and sometimes denied to minorities. Over the twentieth century, the enactment and enforcement of public accommodations law secured consumer status for increasing numbers of people. Today, proprietors and consumers alike assume a convention of equal access.

These expectations derive from a long history of business duties to consumers. Even before the first public accommodations statute was

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[13] *See* Charles L. Black, Jr., The Supreme Court, 1966 Term *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 102 (1967) ("It is not a warranted assumption of our civilization that a lunch-counter proprietor will practice a general choosiness about his customers, or that the law is expected to leave him alone in this regard."); James M. Oleske, *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 50 (2016) ("[T]he law did not assume bakers, florists, and caterers had such an interest in being selective about their customers before same-sex couples requested equal service.").

[14] Amnon Reichman, *Professional Status and the Freedom to Contract: Towards a Common Law Duty of Non-Discrimination*, 14 CANADIAN J.L. & JURIS. 79, 108 (2001) ("The profession is organized around an interaction with an abstract customer, any member of the public, and hence is organized around serving the public. Consequently, equal access to the services provided by the business as such is intrinsic to the profession.").

passed, the common law required equal access to businesses open to the public. As Joseph Singer has demonstrated, prior to the Civil War the common law rule dictated that "[t]hose who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve."[15] The rule appears to have applied broadly, to barber shops, victuallers, bakers, tailors, and traders.[16] Having invited consumers in, a business could not exclude any one of them without good cause.

Under the common law, the status as a consumer was closely linked to citizenship. Thus, after the Civil War, it briefly seemed that newly freed slaves would gain full and equal access to public businesses under the common law.[17] The Mississippi Supreme Court, for example, observed that the common law had "always" demanded that inns, common carriers, and "public shows and amusements" be open to all "unless sufficient reason were shown."[18] During Reconstruction, state supreme courts often concluded that that even in the absence of a statute, black people were due equal treatment.[19] And when the U.S. Supreme Court struck down the federal Civil Rights Act in 1883, it too assumed that state common law—and the duty of equal access it encompassed—would still govern.[20] But as Reconstruction ended, legislatures in the South rejected the duty-to-serve rule in favor of a right, and eventually duty, of businesses to exclude black people.[21] And in many states, courts came to interpret common law to permit segregation even by core common carriers like trains and inns.[22]

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[15] *See generally* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1321 (1996) (reviewing American and English treatises, case law, and custom).

[16] *Id.* at 1327–31.

[17] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 515 (1985) ("At the time the fourteenth amendment was ratified, it still was believed that the common law provided protection against private interference with individual rights.").

[18] Donnell v. State, 48 Miss. 661, 680–81 (1873).

[19] Decuir v. Benson, 27 La. Ann. 1, 5 (1875) ("In truth the right of the plaintiff to sue the defendant for damages would be the same, whether [the act] existed or not . . . ."), *rev'd on other grounds sub nom*. Hall v. DeCuir, 95 U.S. 485 (1877); Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) ("The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places.").

[20] The Civil Rights Cases, 109 U.S. 3, 17 (1883); *id.* at 25 ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them.").

[21] Singer, *supra* note 15, at 1388 (noting that by 1900, every state in the former Confederacy and in Kentucky had statutes requiring segregation).

[22] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 89 (2004) ("Common-law challenges to racially unequal railroad accommodations had frequently succeeded through the mid-1880s, but such cases virtually disappeared thereafter.").

Slowly, however, the class of persons entitled to consumer status expanded. White men had enjoyed access so long as they could pay. White women were marginal actors, whose status in the consuming public grew beginning in the mid-nineteenth century and fluctuated through much of the twentieth.[23] Racial minorities had a much more tenuous grasp on consumer status. Although many Northern states enacted public accommodations statutes prohibiting race and color discrimination after the Civil War, these laws often were honored in the breach into the early twentieth century.[24]

To be sure, minority groups were purchasers of goods and services. In some places, they had ample choices.[25] Retail stores solicited the trade of black customers even in the Deep South.[26] But service came with mistreatment and norms that gave priority to white customers. At other times, disfavored minorities were restricted to a market niche. For example, before the Civil Rights Era, Mexican, Asian, and Sikh farm laborers in California might frequent the one market willing to serve them, while otherwise encountering signs reading "White Trade Only."[27] Parallel markets sometimes developed as groups launched their own businesses. In South Texas, Mexicans could shop in "their own dry goods stores, grocery stores, meat markets, tailor shops and a number of other shops."[28] Minority groups had access to goods and services, but their status as consumer-citizens entitled to move and spend freely was denied.[29]

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[23] LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 136, 147 (2003) (noting that after WWII, "female consumers withdrew from the civic arena as wartime citizen consumers and even to some extent as post war purchasers as citizens" as female homemaking became the contrast to male worker-citizen-consumer).

[24] Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–40 (1978); *see also* THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 134 (2008) (noting that antidiscrimination laws were frequently ignored in Northern cities and states).

[25] Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 708 (1965) (observing that black people "have patronized theaters, restaurants, amusement parks, and public conveyances, in some locales [in Ohio], to such an extent that their presence is unnoted"); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 109–10 (1959) (examination found virtually no discrimination in restaurants in D.C. and New York City in 1954); Charles Abrams, "*. . . Only the Very Best Christian Clientele*," COMMENTARY, Jan. 1, 1955, at 15 (reporting that half of resorts in Maine, Vermont, and New Hampshire allowed Jews as guests).

[26] GREENBERG, *supra* note 25, at 113.

[27] NAT'L PARK SERV., CIVIL RIGHTS IN AMERICA: RACIAL DESEGREGATION OF PUBLIC ACCOMMODATIONS 92–93 (2009).

[28] DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986 167 (1987).

[29] *E.g.*, NAT'L PARK SERV., *supra* note 27, at 116 (noting that throughout the twentieth century, "there was uneven consistency in how and when denials of services" confronted Asian American residents); GRACE E. HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE

The importance of one's status as a consumer grew over the twentieth century. As historian Lizabeth Cohen explains, engagement in commerce served as an increasingly important mark of citizenship as the United States became a "consumers' republic."[30] After World War II in particular, ideals of economic abundance and democratic freedom aligned to create a civic responsibility of mass consumption.[31] As histrion Thomas Sugure observes, "[a]ccess to consumer goods—the right to buy—was a defining characteristic of what it meant to be an American citizen."[32]

The black civil rights movement against segregation in stores and restaurants claimed black people's status as consumers. While it would eventually become viewed as a struggle for integration, "what first drove blacks who challenged discrimination in public accommodations after World War II was a demand for equality of access."[33] Some civil rights leaders explicitly sought to reclaim the antebellum view of the common law.[34] Protestors targeted the theaters, restaurants, and pools that represented "the promise of American consumer culture."[35] They asserted "the right to eat and drink, to spend their money, where they pleased."[36]

In this period, black activists and their allies secured the passage, amendment, and enforcement of city and state laws against public accommodations discrimination.[37] And after sustained protests and bloody attacks, they won the passage of federal public accommodations law—Title II of the Civil Rights Act of 1964[38]—that would end consumer segregation in the South. As historian Louis Hyman explains, this movement proved so successful in part due to its inherently conservative claim of a right to spend money.[39]

SOUTH, 1890–1940 Loc. 3791–3800 (2010) (noting black access in practice to most commercial establishments in 1930s Southern towns with a "constant uncertainty").

[30] *See generally* COHEN, *supra* note 23 (analyzing the crucial significance of consumption to ideals of citizenship, from the Great Depression through the late twentieth century).

[31] COHEN, *supra* note 23, at 127.

[32] SUGRUE, *supra* note 24, at 135.

[33] COHEN, *supra* note 23, at 174.

[34] GREENBERG, *supra* note 25, at 81–87, 96–101.

[35] SUGRUE, *supra* note 24, at 135, 143.

[36] *Id.* at 143.

[37] David F. Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1101–02 (2011) (discussing numerous successful race discrimination suits in Northern and Western states in the 1930s and 1940s); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–60 (1964) (noting that by the year of the Civil Rights Act's passage, thirty-two states had public accommodations laws).

[38] 42 U.S.C. § 2000a (2018).

[39] Gaby Del Valle, *How the Sears Catalog Transformed Shopping Under Jim Crow*, VOX (Oct. 19, 2018), https://www.vox.com/the-goods/2018/10/19/18001734/sears-catalog-bankruptcy-jim-

Over the twentieth century, an increasing number of people—women, people with disabilities, and LGBTQ people—demanded this right and their status as consumers.[40] They too secured legal reform. Today, nearly all states guarantee "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" without regard to race, color, national origin, religion, sex, or disability.[41] Many jurisdictions also reach gender identity and sexual orientation discrimination.[42] Reinforced by these laws, shared norms today dictate that public businesses will serve the customer at the front of the line first. People anticipate being able to purchase goods in all shops, not just some shops.

II. DIGNITY AND THE POWER OF THE PUBLIC

Many antidiscrimination laws primarily safeguard access to economically important opportunities. Each individual transaction has economic weight—the job, apartment, loan, or insurance policy denied. Individual economic damages can be significant.

The individual injury of public accommodations discrimination, however, is not primarily economic. As defendants have often argued, not even "five cents damages" can be said to be inflicted by a restaurant that serves a black man the same food as his white friends, alone and in the kitchen.[43] Or the movie theater that seats Mexican-Americans on one side.[44] Even where service is denied altogether, the monetary loss seems trivial. The denial of a cake for a wedding, a lunch at the counter, or a drink at the bar imposes minimal cost. But as civil rights activist

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crow-racism-mail-order [perma.cc/3HX9-F24H]; *see also* COHEN, *supra* note 23, at 127 (observing that one appeal of the Consumer's Republic was that "it promised the socially progressive end of economic equality without requiring politically progressive means of redistributing existing wealth").

[40] Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 107–08 (2019) (describing the feminist movement's use of this language in the late 1960s and 1970s).

[41] *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601 (West 2014); *State Public Accommodations Laws*, NAT'L CONF. ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/SHN6-JMZF].

[42] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 41. In many states without such protections, city ordinances typically bar sexual orientation and/or gender identity discrimination in the major cities. *See Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/C8RK-5MLV].

[43] Crosswaith v. Bergin, 35 P.2d 848, 848–49 (Colo. 1934) (rejecting the argument).

[44] Movie theaters in the West and Southwest into the 1940s kept Mexican Americans from the center seats—an experience Cesar Chavez recalls as launching his fight against discrimination. ALLISON VARZALLY, MAKING A NON-WHITE AMERICA: CALIFORNIANS COLORING OUTSIDE ETHNIC LINES, 1925–1955 164 (2008); *see also* Guy v. Tri-State Amuse. Co., 40 Ohio C.C. 77, 80 (Ohio Ct. App. 1917) (rejecting defendant's argument that black plaintiffs "had just as good an opportunity to see the pictures or vaudeville performance . . . seated on the right hand side, as if they were seated in the center section").

Ella Baker declared, this sort of discrimination is about "something much bigger than a hamburger or even a giant-sized Coke."[45]

Denial of equal treatment in public accommodations expresses an ideology of a group's inferiority, not merely an ordinary civil injury.[46] The indignity—or humiliation—is different in kind from mere insult or hurt feelings. Following Martha Nussbaum, this conception of dignity is deeply tied to respect.[47] When a business denies service or provides unequal treatment, it expresses disrespect for the would-be patron's status as a consumer. As Deborah Hellman convincingly argues, wrongful discrimination, unlike differentiation, demeans its targets. It requires both expression—that the person is less worthy of equal respect—and power or status—that the person expressing disrespect is in a position to subordinate the other.[48] In this regard, the publicness of the refusal further distinguishes public accommodations. Although some discrimination takes place one-on-one, the presence of an audience of strangers sets public accommodations apart from employment or housing. Before an audience of fellow citizens, the proprietor has the power to impugn the standing of a person to participate in public commerce.

Courts have long conceptualized the denial of equal access as a dignitary harm. In the late nineteenth century, courts recognized that granting a remedy for indignity inflicted by public accommodations was essential, because otherwise the plaintiff would receive mere contract damages—the cost of the ticket, for example—which would not adequately reflect the harm.[49] One court summarized its state's common law, "[e]very person . . . has a right to go to any public place, or visit a resort where the public generally are invited" with "freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace . . . ."[50] In carrying on business with the public generally, a

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[45] Ella Baker, *Bigger Than a Hamburger*, SOUTHERN PATRIOT (May 1960), http://www.crmvet.org/docs/sncc2.htm [perma.cc/B8E3-6N3R].

[46] Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1620 (2001).

[47] MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 31 (2011).

[48] DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG 35 (2008).

[49] Chi. & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (1870) (holding that where a common carrier inflicts delay, vexation, and indignity by excluding a passenger, the actual pecuniary damages sustained "would, most often, be no compensation at all"); *see also* Mo., K. & T. Ry. Co. v. Ball, 61 S.W. 327, 329 (Tex. Civ. App. 1901) ("That damages for mental pain, anxiety, distress, or humiliation suffered . . . may be recovered, though unaccompanied with physical injury, pain, or suffering, is now too well settled in this state to admit of question.").

[50] Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 207 (1904) (where amusement park employee insulted a white plaintiff's character by mistaking her for another woman).

proprietor assumed a duty to treat them with respect for their status as a paying customer.

Public accommodations statutes imported this commitment to consumer dignity. Leading the National Organization for Women's campaign to prohibit sex discrimination by the many male-only public places of the late 1960s, Karen DeCrow wrote, "the most basic right of all may be the right to equal treatment in places of public accommodation. It means the right to human dignity, the right to be free from humiliation and insult, and the right to refuse to wear a badge of inferiority at any time or place."[51] In upholding Title II in *Heart of Atlanta Motel*, the Supreme Court emphasized that its "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access.'"[52] Other courts describe "the injury to an individual's sense of self-worth and personal integrity."[53]

While incivility and disappointment are common in our society, public accommodations have particular power to inflict humiliation for three reasons. First, as common law often recognizes, commercial sellers have the upper hand in their relationships with customers.[54] Their social role dictates that businesses take greater precautions than average individuals must.[55] Free speech doctrine also approaches consumer-business relations with some awareness of power dynamics.[56]

Second, the practice of holding open an invitation to the public increases the likelihood of people encountering indignity unaware. As the Supreme Court has noted, public accommodations laws structure "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[57] The pervasive nature of public accommodations means consumers are vulnerable to discrimination in a way that is unrelenting. Whereas individuals apply to and interact with relatively few potential employers or even landlords, they routinely—even daily—enter businesses open the public. In the absence of

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[51] Sepper & Dinner, *supra* note 40, at 111.

[52] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

[53] King v. Greyhound Lines, 656 P.2d 349, 352 (Or. Ct. App. 1982).

[54] Some courts have ascribed the duty to avoid indignity and insult to the special relationship between a public accommodation and its customers. *See* Meyer v. Hot Bagels Factory, 721 N.E.2d 1068, 1076–77 (Ohio Ct. App. 2000) (noting that in Ohio, this reasoning was recognized as early as 1911).

[55] Stephen D. Sugarman, *Land-Possessor Liability in the Restatement (Third) of Torts: Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079, 1088 (2009) (explaining why, based on social roles, commercial actors must take greater precautions to protect others than "ordinary folks").

[56] *See, e.g.*, Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 468 (2019) (discussing how free speech doctrine acknowledges disparities in knowledge and sophistication between sellers and consumers—what she calls "expressive inequality"—to permit greater regulation of the offers and exchanges in which they are engaged).

[57] Romer v. Evans, 517 U.S. 620, 631 (1996).

equal access, members of marginalized groups face constant uncertainty about where, when, and how they will access goods and services. People can avoid associating with their enemies, but often will find themselves "invited to an establishment, only to find its doors barred to them."[58]

Third, in public accommodations, the presence of an audience enhances the impact of the business's denial of service. Surveying cases involving offenses to dignity, in 1938, Fowler Harper and Mary McNeely concluded that these denials involved almost uniformly incidents that occurred in public, including accusations of theft and ordering of patrons out of amusement parks, theaters, and trains—in front of an audience of other patrons.[59] Adjudicating claims brought under both the common law and public accommodations statutes, courts often highlighted the size of the crowd of witnesses.[60] The New York Court of Appeals, for example, said, "it is the publicity of the thing that causes the humiliation."[61]

African American legal scholar Patricia Williams recounted her own experience in a law review article.[62] While Christmas shopping in New York City, Williams rang a store buzzer, eager to enter the store and purchase a sweater in the window for her mother. The salesclerk glared and then mouthed "we're closed." Williams was not fooled, "It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for their mothers." Moved nearly to violence, she recalls, "I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do . . . that would humiliate him the way he humiliated me."[63] She recognized the clerk's power to disrespect her status as a consumer. He would not acknowledge her, Williams says, "even at the estranged level of arm's length transactor."[64]

Public accommodations discrimination requires its victims not merely to listen but to perform. Most obviously, the Jim Crow system of

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[58] Evans v. Ross, 154 A.2d 441, 445 (N.J. Super. Ct. App. Div. 1959).

[59] Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1983 WIS. L. REV. 426 (1983).

[60] *See, e.g.*, Weber-Stair Co. v. Fisher, 119 S.W. 195, 197 (Ky. 1909) (noting that theater employees showed "a disposition to oppress and disgrace" a customer made worse by the "presence of a number of persons"); Odom v. E. Ave. Corp., 34 N.Y.S.2d 312, 314 (1942) (observing "the presence of a number of people"), *aff'd*, 264 A.D. 985 (N.Y. App. Div. 1942); Kelly v. Dent Theaters, Inc., 21 S.W.2d 592, 592–93 (Tex. Civ. App. 1929) (noting that when an orderly theatergoer was ejected a crowd "filled the whole sidewalk in front of the building" to watch).

[61] Aaron v. Ward, 96 N.E. 736, 738 (N.Y. 1911).

[62] Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987).

[63] *Id.* at 128.

[64] *Id.*

the South required compliance with a complex set of manners and customs in commercial space.[65] Historian Grace Elizabeth Hale vividly describes one such performance: "[c]limbing above the 'for white men' only restroom between the segregation sign and the Dr. Pepper advertisement, the black man can watch the same movie and drink the same soda as a white patron as long as he declares his race and, by implication as well as the shabby surroundings, his inferiority as he enjoys his purchases."[66] The audience understood what Bruce Ackerman calls the "systematic degradation ritual"[67] by virtue of the two speakers involved—the proprietor and the would-be patron. Public commercial spaces functioned as a "theater" for the contradictions of segregation.[68]

While the minority group invariably is called upon to perform, the conduct or speech compelled varies by time, space, and trait. As a black woman, prominent educator Mary Church Terrell describes being unable to eat in Washington, D.C., "from the Capitol to the White House" unless she "were willing to sit behind a screen."[69] At professional meetings in the 1960s, women of any race would need to peel off from their colleagues or subordinates to go to ladies' entrances and elevators. Gays and lesbians performed the role of heterosexual and took care to wear a minimum number of articles of "gender appropriate" clothing so as to avoid scrutiny.

Unequal treatment by a business sends a message that the patron or would-be patron is not worthy of respect. At mid-century, Jewish groups worked to bar discriminatory signs, recognizing that "such words as 'selected clientele' connote in the public mind that colored persons, Jews and others who are not lily-white need not apply."[70] Two decades later, encounters with the many bars that banned unescorted women and the restaurants that excluded all women during businessmen's lunch hours prompted "the realization that society thought—as one woman said—that 'women don't belong in the outside world.'"[71] In

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[65] This civility demand on the racial minority persisted even as the laws of Jim Crow were taken down. *See generally* Joseph Crespino, *Civilities and Civil Rights in Mississippi*, *in* MANNERS AND SOUTHERN HISTORY 114 (Ted Ownby, ed. 2007) (demonstrating the way white elite weaponized civility against black civil rights movement).

[66] HALE, *supra* note 29, at Loc. 3861.

[67] BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 138 (2014).

[68] ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 55–75 (1994).

[69] PAULA C. AUSTIN, COMING OF AGE IN JIM CROW DC Loc. 830 (2019).

[70] Camp-Of-The-Pines, Inc. v. N.Y. Times Co., 53 N.Y.S.2d 475, 484 (Sup. Ct. 1945). For more detailed history across the United States, see John Higham, *Social Discrimination Against Jews in America, 1830–1930*, 47 PUBS. AM. JEWISH HIST. SOC'Y 1 (1957).

[71] Georgina Hickey, *Barred from the Barroom: Second Wave Feminists and Public Accommodations in U.S. Cities*, 34 FEMINIST STUD. 382, 389 (2008). For a full exploration of feminist advocacy during the late 1960s and 1970s, see Sepper & Dinner, *supra* note 40, at 80–81.

Masterpiece Cakeshop v. Colorado Civil Rights Commission, the Supreme Court likewise recognized that public accommodations discrimination treated gay couples "as social outcasts or as inferior in dignity and worth."[72] Disfavored groups not only saw their standing fall in a single business but also experienced "community-wide stigma."[73]

Mistreatment by public accommodations—unlike an average social interaction—is able to systematically change a person's standing among their fellows.[74] Charlie Parker, an African American man born in the 1890s in Mississippi, remembered that at banks and post offices when a white person came in, black people "would always get back and let him go first, you come last."[75] These practices let black people know their place in society and the market.[76] It was not only black people in the Jim Crow South who received this message. In the 1960s, public accommodations discrimination affirmed the marginal nature of LGBT people's access to the public. Proprietors forced gay men to sit alone with their back to other customers to eat a meal or to face the bar rather than socialize with one another.[77] That same decade, women too were sometimes literally put in their place. At the National Press Club awards dinner, for example, female journalists were seated with the wives in a separate room.[78] While the type of unequal treatment of each of these groups differed in meaningful ways from each other, public accommodations discrimination designated their proper (and limited) place both literally and figuratively.

Public accommodations thus have an inescapable power to demean would-be customers. The public marketplace contains retail, service, and amusement; it meets needs and wants for commerce and leisure. Where norms of equal access and first-come, first-served are not universally observed, marginalized people live with constant potential for discrimination. They risk conscription into a performance that signals their inferior standing and limited claim to consumption before an audience of their fellow citizens.

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[72] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

[73] *Id.*

[74] Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2204–05 (1990) (noting the ways in which discrimination in the private sphere can create a caste system, precluding full political citizenship).

[75] STEPHEN A. BERREY, THE JIM CROW ROUTINE: EVERYDAY PERFORMANCES OF RACE, CIVIL RIGHTS, AND SEGREGATION IN MISSISSIPPI 38 (2015).

[76] *Id.*

[77] David K. Johnson, *LGBTQ Business and Commerce in* LGBTQ AMERICA: A THEME STUDY OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HISTORY 16-1, 16-10 (Megan E. Springate ed. 2016) (describing Julius' in New York City forcing patrons to face the bar lest it be accused of allowing homosexual assembly and closed as a "disorderly house").

[78] Sepper & Dinner, *supra* note 40, at 106.

As the next two Parts explain, the market and dignitary functions of public accommodations laws help explain why doctrine has largely carved out these commercial spaces from the reach of free speech. Conventions of equal-access structure expectations such that service does not communicate a message to consumers and the broader public.

III. FREE SPEECH AND THE CONVENTIONS OF THE CONSUMER MARKET

First Amendment theorists have often puzzled over the boundaries of First Amendment coverage. Speech in schools and public employment, for example, often lies outside the scope of free speech. In commercial settings, laws may target what otherwise might be thought to be covered speech, such as laws requiring disclosure and setting parameters for dealing. Dignitary torts allow plaintiffs to seek damages against speakers.[79]

Courts also have understood public businesses to play a distinct social role, requiring regulation that is largely shielded from First Amendment scrutiny. In *Masterpiece Cakeshop*, for example, Justice Kennedy distinguished public accommodations from realms of freedom of free exercise and expression. He observed that a clergy member would clearly be protected from performing a marriage for a couple, and religious organizations and individuals should be free to hold and "teach the principles that are so fulfilling and so central to their lives and faiths."[80] But the "general rule" was clear: "objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[81] As the Supreme Court held long ago, in this marketplace "open to the public to come and go as they please," the state enjoys broad authority to create rights of public access on behalf of its citizens.[82]

While this article makes no pretense to theorize the First Amendment's scope, it helps clarify why it is that public accommodations laws in particular have long enjoyed a peaceful coexistence with the First Amendment. Consistent with sociological accounts of First Amendment coverage, it argues that public accommodations operate according to

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[79] Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 349 (Catherine MacKinnon & Reva Siegel eds., 2000) (noting the absence of "moderately workable and well-known doctrinal or theoretical standards to determine the scope of the First Amendment's coverage").

[80] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (quoting Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015)) (noting that this exercise of religion "gay persons could recognize and accept without serious diminishment to their own dignity and worth").

[81] *Id.*

[82] Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

fixed social conventions that require service and a modicum of respect from the business toward the consumer. As Amanda Shanor argues, the First Amendment tends not to reach where social norms are cohesive, rather than pluralist, and speech acts are "straightforward in their effect" on the audience.[83] These criteria are particularly likely to exist within commerce. As Daniel Halberstam explains, whereas public debate allows for the construction and challenging of background norms and suffers no bounds, a commercial transaction "does not leave much room for cultural differences or diverging beliefs about the nature of the transacted deal."[84] Engaged in bargaining, the "speakers" seek an agreement, "ultimately objectified in a material transaction[;]" they do not explore each other's beliefs.[85] Constitutional and common law take buyer and seller to share a commitment to the rules governing commercial transactions.[86]

When consumers and proprietors meet in public accommodations—a subset of the commercial world—they too assume a single set of background norms and values. In this "predefined communicative project,"[87] the public accommodation invites all the world to transact business. Because its purpose is to serve the public, equal access is intrinsic to the business. The baseline is that a business will serve "any member of the public who is willing to pay."[88] And, as Parts I and II explained, an expectation of service and respectful treatment attaches.

This taken-for-grantedness of the governing norms is central to the consumer market. Establishing discrimination is relatively straightforward as a result. Unlike in employment, proof that, for example, a black patron was turned away and a white patron was seated would suffice.[89] In *Romer v. Evans*, the U.S. Supreme Court echoed this understanding of rights of equal access, describing them as "taken for granted by most people either because they already have them or do not need them."[90] Indeed, these norms are so uniform among the in-group that when a restaurant or store refuses to sell, consumers demand answers.

Public accommodations may be a space where the First Amendment's hands-off approaches to commercial transactions and to common law torts, respectively, align. As Shanor explains, "the exclusion of

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[83] Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 344–45, 356 (2018).

[84] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 833 (1999).

[85] *Id.* at 833–34.

[86] *Id.* at 834.

[87] *Id.* at 832.

[88] Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 933 (Haw. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

[89] *See* SUGRUE, *supra* note 24, at 135.

[90] Romer v. Evans, 517 U.S. 620, 631 (1996).

common-law torts safeguards a space of cohesive social norms around what it means to treat others with dignity and respect."[91] For example, Robert Post argues that the tort of invasion of privacy, which has remained largely immune from the First Amendment's reach, does not have purely individualist goals. The tort instead "safeguards rules of civility that in some significant measure constitute both individuals and community."[92] In other words, it redresses individual injury to personality and upholds the norms that generate the community. Common law torts built around equal access and dignified treatment share these functions, constructing a public space of consumption. Originating in these dignitary torts, public accommodations laws promote both individual remedy and market-wide structures.[93]

Unlike plural political debates, public accommodations manifest an orthodoxy of identity-neutral capitalism. Antidiscrimination laws in this area foster low-information exchanges: as a general rule, consumers do not have to provide qualifications to gain access to products. Nor do businesses need to know much about a consumer. Proprietor and patron interact as strangers. The consumer market functions in a race-, sex-, sexual orientation-, and other identity-trait neutral way.[94] Ability to pay becomes the sole concern of the transaction.[95] Dollars are exchanged seamlessly, anonymously, and without need for introducing search or information costs.

The dictates of service and dignity construct a uniform market of full—not just equal—enjoyment. As Hubert Humphrey described Title II, equality in public accommodations meant any customer could go to "the nearest soda fountain," "the nearest restaurant" and take "his pick of the available motels and hotels."[96] More recently, dissenting from the Eighth Circuit's opinion in *Telescope Media v. Lucero*, Judge Kelly explained: these laws do not aim to ensure "access to *some* places of public accommodation. They were passed to guarantee equal access to *all* goods and services otherwise available to the public."[97] Consumers anticipate freely moving and purchasing in all businesses open to the public. There is no room for pluralism as to these ground rules.

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[91] Shanor, *supra* note 83, at 349.

[92] Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959 (1989).

[93] Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70 (2019).

[94] SUGRUE, *supra* note 24, at 135 ("To Cold War-era civil rights activists, the creation of a race-neutral economy was an essential step toward full citizenship.").

[95] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (noting that requirements of nondiscrimination "assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man").

[96] ACKERMAN, *supra* note 67, at 136.

[97] Telescope Media Grp. v. Lucero, 936 F.3d 740, 777 (8th Cir. 2019) (Kelly, J., dissenting).

IV. THE SILENCE OF SERVICE AND THE EXPRESSION OF DENIAL

The unique nature of public accommodations law also adds to our understanding of the "major contest" in the wedding vendor cases—namely, whether the conduct of preparing a wedding service actually communicates anything to the public at large.[98] Until 2019, court after court concluded that public accommodations law regulated wedding vendors' conduct—the baking and sale of a cake, for example. That conduct was not "inherently expressive" so as to be entitled to full First Amendment protections.[99] Regardless of whether the wedding vendors intended to convey a message through their conduct, viewers were unlikely to understand providing a good or service in commerce to express the vendor's message about marriage.[100] Courts worried that any other decision would license "a public accommodation that serves only opposite-sex couples" or other in-groups, and would generate intractable line-drawing problems. [101]

But in 2019, in *Telescope Media*, the Eighth Circuit determined that commercial videography of opposite-sex weddings constitutes expressive conduct conveying the business's own views that marriage is "a divinely ordained covenant" between a man and a woman.[102] Requiring service for a same-sex couple—the court said—would instead compel the owners to speak favorably about same-sex marriage.[103] The First Amendment thus barred the application of public accommodation law. The Arizona Supreme Court soon followed, granting a stationary company protection under the Arizona Constitution.[104] Justices Thomas

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[98] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019).

[99] Elane Photography, LLC v. Willock, 309 P.3d 53, 68 (N.M. 2013); Gifford v. McCarthy, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438–39 (Ariz. Ct. App. 2018) ("The items [calligraphers] would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public."), *rev'd*, 448 P.3d 890, 895 (Ariz. 2019); *Arlene's Flowers*, 441 P.3d at 121; Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017).

[100] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings.").

[101] *Telescope*, 936 F.3d at 763 (Kelly, J., dissenting); *see also Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 720213, at *27 (Wash. Super. Feb. 18, 2015) ("[T]here is no slope, much less a slippery one, where 'race' and 'sexual orientation' are in the same sentence of the statute, separated by only three terms: 'creed, color, national origin . . . .'"). Scholars supporting objectors sometimes argue that "weddings" constitute the limiting factor for free speech claims. But objections frequently have involved instances where the couple had already wed (*Masterpiece Cakeshop*) or where the couple was not marrying but holding a commitment ceremony (*Elane Photography*). This argument further ignores that the bakery in *Masterpiece Cakeshop* denied a range of pre-made baked goods to a same-sex couple. *See Masterpiece Cakeshop*, 138 S. Ct. at 1726.

[102] *Telescope*, 936 F.3d at 751.

[103] *Id.* at 752.

[104] *Brush & Nib Studio*, 247 Ariz. at 303.

and Gorsuch have already expressed their opinion that the sale of custom wedding cakes is expressive conduct that antidiscrimination law cannot reach.[105] The Supreme Court is likely to take up the issue in the near future.[106]

In this kind of litigation, courts have typically presumed a symmetry between the ability of service and denial to communicate. The Supreme Court of Washington, for example, noted that even the objecting florist admitted that service often did not communicate her endorsement of a wedding.[107] She did not understand herself to endorse atheism or Islam by arranging flowers for an atheist or Muslim wedding. Likewise, the court said, refusal could occur for various reasons—ranging from religious objection to insufficient stock.[108] To the court, service and denial were equally non-communicative.

The long-standing conventions governing public commerce, however, indicate an asymmetry in the expressiveness of service and denial. A public business fails to express any message, let alone a particularized one, through mere service, because we expect paying customers to be served. The audience of other patrons discerns no communication from a business pouring a coffee, selling a cake, or cutting a person's hair. We take for granted that the first person in line will be served, and the wedding vendor will provide its usual goods if available.

The provision of service requires no reason giving. When a server brings a meal to a table, they don't explain that it's because "you seem like a nice Christian family." When a photographer agrees to document a wedding ceremony, they don't tell you that they support your wedding or opposite-sex weddings more generally. You understand that the price is right and the date is available.

The fact that a business sells an item to someone does not imply its endorsement. To be sure, serving a particular person might feel expressive of endorsement to the vendor—the baker, florist, etc. But to the majority in-group, service doesn't communicate approval of the customer, of their use of the product, or much of anything else. With fleeting interactions, customers and businesses typically experience little intimacy and acquire little knowledge about one another.[109] Even with

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[105] *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgement).

[106] A cert petition in *Arlene's Flowers* is currently pending. *See* Petition for Writ of Certiorari, State v. Arlene's Flowers, Inc., 441 P.3d 1203 (2019) (No. 19-333).

[107] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1226 (Wash. 2019).

[108] *Id.* at 1226.

[109] Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 933 (Haw. Ct. App. 2018) ("With respect to selectivity, duration, and congeniality, Aloha B&B generally is not selective about whom it will accept as customers, provides short-term, transient lodging, and does not form lasting relationships with customers."), *cert. denied*, 139 S. Ct. 1319 (2019).

wedding vendors hired for a special day in the lives of the celebrants, the duration of the relationship is quite limited in time, space, and depth. The offer to perform is made without exclusiveness, to one and all. Under these circumstances, the proprietor and customers are not associated with one another or united by any particular views.[110] Whether or not the goods are artistic—a tattoo or handwritten invites—the public's expectations and perceptions remain the same.[111]

To the extent service expresses anything, it might send the message that the customer is entitled to be treated like any other customer—as Sam Bagenstos has pointed out.[112] As he notes, if this is right, then whenever a retail business provides a good, regardless of what is sold, it engages in expression. While Bagenstos sees this message as forceful, it seems muted in contemporary consumer marketplaces. When the social norm was to subjugate a minority group, a business that seated people side by side would indeed powerfully communicate a message of social equality both to the marginalized group and to the audience of consumers. After the enactment of civil rights protections, however, this same act might have expressed mere legal compliance. And with the passage of time and the shift in consumer expectations, service has come to reflect the background norm of treating consumers with dignity and respect. It signifies, as I have suggested, the intrinsic nature of a business organized around serving the public—namely, that all paying customers are served. With decades of experience of the Civil Rights Era settlement, to the extent that service communicates a message of equality, it does so in a whisper.

Denial, by contrast, communicates loudly to both the would-be consumer and a larger audience. Denied flowers for his wedding to Robert Ingersoll, Curt Freed understood the message that "our business is no longer good business."[113] Rejected by a bed and breakfast on their vacation, unmarried same-sex couple Diane Cervelli and Taeko Bufford heard that they were "inferior and unworthy of equal treatment in even a routine business transaction."[114] When a business open to the public

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[110] *See also* Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (rejecting argument that "patrons of the same business establishment" are engaged in constitutionally protected association).

[111] Arguably, where expressive goods and services are involved, any audience is more—not less—likely to treat any message as that of the patron, not the seller. We tend to think that the bearer communicates their own message through their tattoos and that the host conveys the message of the invitation ("come celebrate with us").

[112] Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1235–36 (2014).

[113] *Arlene's Flowers*, 441 P.3d at 1211.

[114] Complaint for Injunctive Relief, Declaratory Relief, and Damages, Cervelli v. Aloha Bed &

turns a person away, it powerfully expresses—as these couples understood—that the person does not merit status as a consumer.

Nor does denial invite multiple interpretations as service does. While service requires no justification, denial calls for explanation. Because a refusal to serve or seat a patron is unexpected in light of social norms governing public businesses, it often prompts the would-be patron to demand a reason. The vendor must explain that stock is depleted, a table reserved, or the shop closed.[115] In the absence of a reason that applies to all consumers, the message and meaning of denial is one's inferiority in the consumer marketplace.[116]

Of course, the free speech claims in current litigation could be equally framed as either a denial or a provision of service. A wedding vendor could be said to engage in expressive conduct (or speech) through withholding a cake or invitations—sending a message that the would-be patron's wedding is lesser. But objectors to same-sex marriage have explicitly framed their expression in terms of service to customers who they prefer not to serve. They argue that nondiscrimination requires them to speak in favor of same-sex marriage. On this construction, it is service to the couple—whether preparing a cake or arranging flowers—that communicates approval or endorsement.

The asymmetry between the messages of service and denial help explain this choice. While service might communicate quietly or not at all, denial as expression sends a clear message of gay inferiority. The desire to express that message would make these business owners less-than-sympathetic standard-bearers for the movement for exemptions from public accommodations laws.

Courts moreover might be more concerned about where exemptions framed to authorize denials of service would lead. Objectors paint their requested free speech exemption as "narrow," applying only to the production of expressive or artistic services.[117] But denial of goods and services—not just expressive goods—powerfully communicates in a way

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Breakfast, 415 P.3d 919, 935 (Haw. Ct. App. 2018) (No. 11-1-3103-12), 2011 WL 10604318.

[115] Public accommodations sometimes—probably often—dissimulate. Historically, they also have used neutral "reasons" that all understood applied only to the disfavored group. Johnson, *supra* note 77, at 16-9 (describing a gay bar turning away African American patrons by using "reserved" signs on tables); Sepper & Dinner, *supra* note 40, at 80 (documenting the use of "reserved" signs to prevent women from sitting).

[116] Indeed, asking for reasons itself can be humiliating for patrons who suspect, but are not sure that they were refused service for discriminatory reasons. My thanks to James Gao for this point.

[117] *Arlene's Flowers*, 441 P.3d at 1228 (quoting objector's argument that the exception will be "narrow," applying to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]"); Elane Photography, LLC v. Willock, 309 P.3d 53, 71 (N.M. 2013) ("Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.").

that the provision of even expressive goods does not. Under the conventions that govern the consumer market today, denial speaks louder than service.

CONCLUSION

The line between speech and conduct may not always be clear. But states have long required nondiscriminatory service by public accommodations. Such obligations have co-existed peacefully with *West Virginia Board of Education v. Barnette's* invocation that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[118] The application of public accommodations laws to commercial sales of even expressive goods and services has not, *pace* the Arizona Supreme Court, "compel[led] uniformity of beliefs and ideas."[119] Indeed, public accommodations laws expressly leave the social, private, and political free of restraint. Business owners retain their "individual freedom of mind" and the component rights to speak and refrain from speaking.[120] Only in the licensed, regulated, and surveilled commercial marketplace will duties of equal access apply.

Nor is public accommodation law aimed—as Justice Thomas opined—"to produce a society free of . . . biases" against the protected groups.[121] Its overarching goal is to secure a consumer market of freely moving people and currency. Given power imbalances between business and individual consumers, it requires public-facing businesses to show a modicum of civility and respect for dignity of would-be patrons.

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[118] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Leslie Kendrick, *A Fixed Star in Shifting Skies:* Barnette *and Civil Rights Law*, 13 FIU L. REV. 729 (2019) (arguing that that *Barnette* applies to commercial cake baking "is to reconfigure what has been considered a purely commercial realm subject to civil rights laws into a hodge-podge where some commercial actors can claim immunity to the extent that they can characterize their activities as speech" and describing this as "an extraordinary step").

[119] Brush & Nib Studio, LC v. City of Phoenix, 247 Ariz. 269, 303 (2019) (describing public accommodation law as "effectively cut[ting] off Plaintiffs' right to express their beliefs about same-sex marriage by telling them what they can and cannot say").

[120] Wooley v. Maynard, 430 U.S. 705, 717 (1977) (quoting *Barnette*, 319 U.S. at 637); *see also* Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 750 (2003) ("[T]ransactional speech and discriminatory conduct are closely linked, while preserving other avenues for decisionmaker expression outside the transactional context.").

[121] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1747 (2018) (alteration in original).

The expansionist project of free speech doctrine has public accommodations laws within its sights. If businesses prevail in their constitutional claims, a number of serious questions arise: What kind of a consumer market will we be left with? In the absence of a shared expectation of service, will we see contestation over norms of the consumer market as we did decades ago? Or will the market become balkanized with stores organized around specific religious or other values rather than abstract customers and their dollars? Will gay identity and relationships be sent back into the closet to be able to access consumer goods? And will other civil rights protections in employment, housing, and education remain unscathed? Is public accommodations discrimination sufficiently distinct in its focus on dignity and its impact on realms of shallow, transient, arms-length relations? Are its "evils" so "unique" that we might distinguish the rest of civil rights law?

What seems clear is that a constitutional privilege against public accommodations law would destabilize longstanding conventions of service and civility in the consumer marketplace. Exceptions—however the lines are drawn—would undermine an identity-neutral marketplace where dollars and people flow freely without the friction of information and search costs. They quite literally would reduce the space for individual dignity.