

Spring 2017

Doux Commerce, Religion, and the Limits of Antidiscrimination Law

Nathan B. Oman

William & Mary Law School, nboman@wm.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Banking and Finance Law Commons](#), [Gender and Sexuality Commons](#), [Inequality and Stratification Commons](#), [Practical Theology Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Oman, Nathan B. (2017) "Doux Commerce, Religion, and the Limits of Antidiscrimination Law," *Indiana Law Journal*: Vol. 92 : Iss. 2 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol92/iss2/7>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Doux Commerce, Religion, and the Limits of Antidiscrimination Law^{*}

NATHAN B. OMAN[†]

INTRODUCTION.....	693
I. RELIGION, SAME-SEX MARRIAGE, AND THE SCOPE OF ANTIDISCRIMINATION LAW.....	697
II. THE PUBLIC THEORY OF THE MARKET AND THE PRIVATE THEORY OF THE MARKET.....	703
A. THE PUBLIC THEORY OF THE MARKET.....	703
B. THE PRIVATE THEORY OF THE MARKET.....	706
III. DOUX COMMERCE AND THE REACH OF ANTIDISCRIMINATION LAWS.....	709
A. THE DOUX COMMERCE THEORY OF THE MARKET.....	710
B. DOUX COMMERCE AND THE SCOPE OF ANTIDISCRIMINATION LAW.....	714
C. OBJECTIONS AND RESPONSES.....	725
CONCLUSION.....	732

INTRODUCTION

We are used to thinking about law and religion as presenting questions of church and state. On one side, we have the law and the politics that produces law. On the other side, we have religious believers and the institutions and communities that they create. We then ask ourselves the proper structure of the relationship between church and state. When may the law legitimately regulate the religious behavior of the believer? When may the believer infuse the law with religious content through the democratic process? Do we believe in strict separation of church and state? The accommodation of religion? Some more dramatic vision such as theocracy or *laïcité*? The structures of these debates are well established, and the minuet of argument and counterargument has largely been choreographed. Framing law and religion as a question of church and state, however, obscures the fact that increasingly questions involving law and religion play out in a particular context, namely the market.¹

Adam Smith declared that mankind has a natural tendency to “truck [and] barter.”² Markets, however, are not natural. Rather, they are social achievements, achievements that rest on an intricate web of norms and institutions. Much of our law is thus

* Copyright © 2017 Nathan B. Oman.

[†] Rita Anne Rollins Professor of Law, William & Mary Law School. I would like to thank Angela Banks, Sam Brunson, Tara Grove, Michael Helfand, Alli Larsen, James Stern, and Tim Zick for detailed comments on an earlier draft of this paper. I also benefited from comments at faculty workshops at Washington University in St. Louis and William & Mary Law School. All errors remain, of course, my sole responsibility. Bria Cunningham and Evan Feely provided excellent research assistance. As always, I thank Heather.

1. See generally Nathan B. Oman, *The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141 (2015).

2. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 17 (Edwin Cannan ed., Univ. Chi. Press 1976) (1776).

devoted to constructing the market. Likewise, the central legal debates of the last century have been dominated by the question of the extent to which market activity should be controlled by state actors.³ In short, the law is not neutral or irrelevant to the shape of the market. What is the proper relationship between religion and the market? Current cases testify that this is hotly contested ground.⁴ Because the law cannot but shape the form of the market, it also cannot but structure the relationship between religion and commerce. What should be the structure and content of that relationship?

Answering the question of how the law ought to structure the relationship between religion and the market requires that we address the issue directly. On the whole, however, legal intellectuals have asked this question only obliquely.⁵ Hence, we have debates about whether corporations can exercise religion,⁶ or else conflicts over the proper place of religion in the market are crammed awkwardly into narratives about constitutional law and the rise of the modern regulatory state. The problem with such approaches is that they clutter the question of how the law should structure the relationship between religion and the market with extraneous concerns to the point where the issue is seen only in a glass darkly, if at all. This Article seeks to move this discussion forward in two ways: First, it explicitly articulates three competing normative visions of how the law could structure the relationship between religion and the marketplace. Second, it applies these theories to a concrete and current conflict over the relationship between commerce and religious faith.

Perhaps the most hotly contested question of law, commerce, and religion today centers on the conflicts between religious believers and antidiscrimination laws created by the advent of same-sex marriage. The last two decades have seen a sea change in American attitudes toward same-sex marriage. Most dramatically, the Supreme Court declared in *Obergefell v. Hodges* that gays and lesbians have a constitutional right to marry their partners.⁷ Despite this shift, however, many Americans continue to have strong religious objections to same-sex marriage. Conflicts arise when these

3. See generally LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* (2002) (discussing the many legal and policy disputes revolving around economic issues); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937* (1991) (same).

4. See, e.g., *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015) (presenting the question of whether Title VII of the 1964 Civil Rights Act requires a retailer to accommodate a Muslim employee who wishes to wear a hijab in violation of the company's dress code); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring) (holding that religious employers could claim an exemption from the mandate to provide certain forms of contraception to employees).

5. There are, of course, some notable exceptions. See, e.g., Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 770 (2015); Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 891 (2009); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 62 (2013).

6. See Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. FORUM 273, 274 (2014); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1568 (2013); Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 70 (2013).

7. See 135 S. Ct. 2584, 2604–05 (2015).

religious objectors operate businesses that same-sex couples call upon to assist in celebrating their weddings. For some religious believers such involvement constitutes unacceptable complicity in a ceremony to which they have deep religious objections. When the businesses in question, however, are subject to antidiscrimination laws covering sexual orientation, the refusal to provide services to a gay or lesbian couple is a legal wrong that can give rise to substantial fines and money damages. This debate has been fought using the familiar language of church and state. However, it represents more than a fight over the limits of religious liberty. Because the religious objectors are also commercial actors operating within a market, the debate raises the broader question of the proper role of religion in the market. It thus provides a useful case study on this broader question.

This Article addresses the question of law, religion, and the market directly. It does so by developing three theories of how one might conceptualize the proper relationship between commerce and religion. The first two theories I offer are not meant to be summaries of any position explicitly articulated by any particular thinker. There is a paucity of explicit reflection on the question of markets and religion and virtually no effort to generate broad legal theories of that relationship.⁸ Rather, these theories are an attempt to explicitly articulate clusters of intuitions that seem to travel together. My hope is to show that these largely inchoate intuitions have a coherent structure and that it is easier to work out their implications and judge their merits when they are explicitly articulated. Any such attempt, of course, runs the risk of creating a straw man. My hope is that the gains in clarity and simplicity justify running that risk. Furthermore, I believe that something like one of these two theories forms the basic assumptions of most of those involved in debates at the intersections of law, religion, and commerce. The third approach, which I label the *doux-commerce* theory, builds on arguments that I have advanced elsewhere.⁹ *Doux commerce* means “sweet commerce.” The theory harks back to eighteenth-century theorists of the market such as Montesquieu and Adam Smith who lauded the social

8. There is, of course, a religious literature offering theological reflections on commercial life. See, e.g., MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* (Madison Books 1991) (1982); MAXIME RODINSON, *ISLAM AND CAPITALISM* (Brian Pearce trans., Saqi Books 2007) (1966). Likewise, since Max Weber offered his theory of economic development in *Protestantism and the Spirit of Capitalism*, economic historians have also generated a literature on the role of religion in commercial life. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Routledge 1992) (1930); see also Ephraim Fischhoff, *The Protestant Ethic and the Spirit of Capitalism: The History of a Controversy*, 11 SOC. RES. 53, 53–54 (1944). What is lacking is a literature by legal scholars explicitly asking the normative question of how the law ought to structure the relationship between religion and markets.

9. See NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183 (2012); cf. DEIRDRE N. MCCLOSKEY, *BOURGEOIS DIGNITY: WHY ECONOMICS CAN'T EXPLAIN THE MODERN WORLD* 40–47 (2010) (“Markets and innovation . . . are consistent with an ethical life.”); DEIRDRE N. MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* 1–8 (2006) (“The claim here is that modern capitalism does not need to be offset to be good. Capitalism can on the contrary be virtuous.”); Donald McCloskey, *Bourgeois Virtue*, 63 AM. SCHOLAR 177, 182 (1994).

and political effects of markets.¹⁰ I offer it as an attractive alternative to the other two approaches.

To those familiar with the debates on law and religion, my discussion in this Article will seem oddly truncated. I will not discuss questions of constitutional doctrine. I will not address myself to the institutional issue of whether this question should be resolved by courts or legislatures. This is a deliberate choice. These are all important questions, but they are not the question that I am answering in this Article. Rather, my goal is to keep the basic normative issue of the market's proper structure and religion's relationship to commerce in the foreground. Based on a theory of religion's role in a well-functioning market, how should this conflict be resolved? The other questions can be left for another day.

The first approach is what I label the public theory of the market. It posits that norms of equal respect associated with liberal democratic institutions should be extended to market actors. On the question of religious objectors to same-sex marriage and antidiscrimination laws, its implications are incoherent or at least indeterminate. Partisans of both antidiscrimination laws and religious exemptions can invoke equally plausible arguments based on equality and dignity in favor of their positions. I label the second approach the private theory of the market. It posits that any market outcome is legitimate so long as it results from voluntary contracts. This counsels against antidiscrimination laws in general, but provides no particular justification for religious exemptions.

The *doux-commerce* theory I advance sees markets as serving an important public function in managing religious, ethnic, and ideological pluralism and fostering an ethic of peaceful cooperation. Markets are unable to perform these functions, however, if they are dominated by the norms we rightly impose on democratic institutions, if they are segregated on tribal lines, or if some groups are systematically excluded from meaningfully participating in commerce. Accordingly, the case for both antidiscrimination laws and religious exemptions is empirically contingent. Aggressive antidiscrimination laws may be necessary to ensure meaningful access to the market, but where instances of religious discrimination are uncommon, there is no compelling justification for punishing idiosyncratic religious behavior. Indeed, doing so will tend to degrade the value of markets. The great advantage of this approach is that it avoids the need to adjudicate between dueling claims to injured dignity. Gay or lesbian couples insist that any religious exemption from antidiscrimination laws fails to treat them with the respect to which they are entitled. Religious believers, in turn, claim that punishing them for refusing to violate their consciences fails to treat them with respect. Requiring that they abandon their religious convictions or abandon their profession is an affront to their dignity. The *doux-commerce* theory does not require that we resolve this intractable dispute.

This Article proceeds as follows. Part I provides background on the rise of same-sex marriage and the conflict between antidiscrimination laws and religious objectors. Part II articulates and analyzes the public theory of the market and the private

10. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989); SMITH, *supra* note 2. For the canonical scholarly treatment of the history of the *doux-commerce* argument, see generally ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977).

theory of the market. Part III offers the *doux-commerce* theory as an alternative, applies it to the debate over same-sex weddings and antidiscrimination laws, and considers objections and possible responses. The Article then concludes.

I. RELIGION, SAME-SEX MARRIAGE, AND THE SCOPE OF ANTIDISCRIMINATION LAW

The last two decades have seen a dramatic shift in American attitudes towards same-sex marriage and homosexuality. When he ran for president in 2008, Barack Obama was on the record as opposing the legal recognition of same-sex marriage, a position that he said was based in part on his Christian religious beliefs.¹¹ In 2012, he publically shifted his position, announcing that he now supported same-sex marriage.¹² His shifting opinions mirror those of many in the United States. Gallup began tracking American attitudes towards same-sex marriage in 1996.¹³ In that year, 27% of Americans supported legal recognition for same-sex marriage while 68% opposed it.¹⁴ By 2014, 55% supported legal recognition while 42% opposed it.¹⁵ In 2015, twelve states (and the District of Columbia) had adopted same-sex marriage either by ballot initiative or legislation.¹⁶ In five states, the state supreme court had held that same-sex marriage is mandated as a matter of state constitutional law.¹⁷ Finally, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment requires all states to recognize and solemnize same-sex marriages.¹⁸ Despite this shift in laws and attitudes, however, a very sizeable minority of the population remains opposed to same-sex marriage or is deeply ambivalent about it. Like President Obama's pre-2012 ambivalence, the ground for their opposition tends to be religious.¹⁹

11. See BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 222–24 (2006).

12. Phil Gast, *Obama Announces He Supports Same-Sex Marriage*, CNN (May 9, 2012, 9:57 PM), <http://www.cnn.com/2012/05/09/politics/obama-same-sex-marriage/index.html> [<https://perma.cc/JR6F-UV8G>].

13. See Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx> [<https://perma.cc/8UCY-2RHT>].

14. *Id.*

15. *Id.*

16. See *Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> [<https://perma.cc/6R4B-CYE9>].

17. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Garden State Equal. v. Dow*, 82 A.3d 336, 367 (N.J. Super. Ct. Law Div. 2013); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013).

18. See 135 S. Ct. 2584, 2604, 2607–08 (2015).

19. For example, among the religiously unaffiliated support for same-sex marriage is (as of 2016) 80%, among white mainline Protestants and Catholics it is 64% and 58% respectively, among black Protestants it is 39%, and among white Evangelical Protestants it is 27%. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. RELIGION & PUB. LIFE (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/> [<https://perma.cc/ZK49-Y3M5>]; see also Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public*

Sexual orientation is not a protected category under federal antidiscrimination legislation,²⁰ although the EEOC recently claimed it has jurisdiction to decide employment discrimination claims based on sexual orientation under Title VII.²¹ The EEOC's position, however, has been rejected by all of the circuit courts of appeal that have addressed the issue.²² There has also been executive action extending anti-discrimination protections in federal employment to gays and lesbians.²³ In addition, numerous states and municipalities have passed laws protecting gays and lesbians from discrimination in employment, housing, and/or public accommodations.²⁴ In

Accommodations: An Empirical Approach to Religious Exemptions for Holdout States, 100 GEO. L.J. 1783, 1795–1803 (2012) (discussing the role of religion and the passage of public accommodations laws covering sexual orientation).

20. See 1 SEXUAL ORIENTATION AND THE LAW § 6:1 (Karen Moulding ed. 2015) (“Unless there is specific state or local legislation laws [sic] specifically that proscribes [sic] discrimination in employment against lesbians, and gays, bisexual or transgender . . . people in employment (and very little such legislation exists), such discrimination is not unlawful.”). *But see infra* note 24 (listing numerous state antidiscrimination laws covering sexual orientation).

21. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *4–6 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/LPW6-GSCX>] (reasoning that because sexual orientation is inherently a “sex-based consideration[,]” Title VII covers sexual orientation discrimination claims as sex discrimination).

22. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (recognizing that sexual orientation is not a protected classification under Title VII); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (same); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (same); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (same); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (same); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (same); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (same); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (same); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (same).

23. See Exec. Order No. 13,087, 3 C.F.R., 1999 Comp., p. 191 (1998). Similar protections have been created by executive order under antidiscrimination laws governing federal procurement. See Exec. Order No. 13,672, 3 C.F.R., 2014 Comp., p. 282–83 (2014).

24. In 1977 the District of Columbia was the first major American jurisdiction to pass a nondiscrimination law covering sexual orientation. See Human Rights Act of 1977, 24 D.C. Reg. 2830 (Sept. 28, 1977). Sixteen states have followed the District since then, banning discrimination in one or more of the following areas: employment, housing, public accommodations, and other areas. See COLO. REV. STAT. ANN. § 24-34-502, -601 (2015); Act of April 23, 2009, Pub. Act No. 09-13, § 3, 2009 Conn. Acts 78, 79 (Reg. Sess.) (codified at CONN. GEN. STAT. § 46b-20); DEL. CODE ANN. tit. 6, §§ 4603–4604 (2013); DEL. CODE ANN. tit. 19, § 711 (Supp. 2014); HAW. REV. STAT. ANN. § 378-2 (West Supp. 2015); HAW. REV. STAT. ANN. § 489-3 (West 2008); HAW. REV. STAT. ANN. § 515-3 (West Supp. 2015); 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West Supp. 2016); MD. CODE ANN., EDUC. § 7-424.1 (LexisNexis 2014); MD. CODE ANN., STATE GOV'T § 20-304, -606, -705 (LexisNexis 2014 & Supp. 2015); MINN. STAT. ANN. § 363A.08, .09, .11(1), .16(1) (West 2012 & Supp. 2016); NEV. REV. STAT. ANN. § 118.020 (LexisNexis Supp. 2013); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2012); NEV. REV. STAT. ANN. § 651.070 (LexisNexis 2014); N.H. REV. STAT. ANN. § 354-A:6, :7, :8, :10, :16, :17 (2009); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2015); N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2009); N.Y. EDUC. LAW § 313 (McKinney 2009); OR. REV. STAT. § 659.850(1) (2015); OR. REV. STAT. § 659A.030, .403 (2015); 11 R.I. GEN. LAWS

some jurisdictions, this latter category is extended beyond its traditional meaning. Under federal antidiscrimination laws, public accommodations include only hotels, restaurants, and places of public entertainment.²⁵ It does not include retailers or other businesses generally open to the public.²⁶ However, many state and local antidiscrimination laws cover all businesses open to the public.²⁷ These laws have created conflicts with business owners that object on religious grounds to participation in same-sex nuptials. In *Elane Photography, LLC v. Willock*, a New Mexico wedding photographer ran afoul of state antidiscrimination laws when she refused to photograph a same-sex wedding, citing religious objections.²⁸ In Oregon, a baker with similar religious objections was fined \$135,000 for refusing to bake a wedding cake for a same-sex couple.²⁹

These and other cases have led to calls to amend antidiscrimination laws to allow for religious exemptions or to include such exemptions in any new antidiscrimination laws. In the wake of the U.S. Supreme Court's opinion in *Employment Division v. Smith*,³⁰ Congress passed the Religious Freedom Restoration Act (RFRA), which instructs courts to apply a strict scrutiny balancing test to laws that burden religious

§ 11-24-2 (2002); 28 R.I. GEN. LAWS § 28-5.1-8 (2003 & Supp. 2015); 34 R.I. GEN. LAWS § 34-37-4 (2011); Antidiscrimination and Religious Freedom Amendments, 2015 Utah Laws 68; VT. STAT. ANN. tit. 9, §§ 4502(a), 4503 (2014 & Supp. 2015); VT. STAT. ANN. tit. 21, § 495(a) (2009 & Supp. 2015); WASH. REV. CODE ANN. § 49.60.180 (West 2008); WASH. REV. CODE ANN. § 49.60.222 (West Supp. 2016); Act of Mar. 2, 1982, ch. 112, 1981 Wis. Sess. Laws 901; WIS. STAT. ANN. § 111.31(2) (West Supp. 2015).

25. See 42 U.S.C. § 2000a(b) (2012) (“Each of the following establishments which serves the public is a place of public accommodation . . . any inn, hotel, motel . . . ; any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ; any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and any establishment which is physically located within the premises of any establishment otherwise covered . . . and which holds itself out as serving patrons of such covered establishment.”).

26. The Supreme Court, however, has held that the Civil Rights Act of 1866 does generally prohibit discrimination on the basis of race in private contracting. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). However, this prohibition does not extend to religion, national origin, or other categories protected under the 1964 Civil Rights Act and other federal antidiscrimination laws. See 42 U.S.C. § 1981(a) (2012) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .”).

27. For example, California's Unruh Civil Rights Act covers “all business establishments of every kind whatsoever.” CAL. CIV. CODE § 51(b) (West 2016). Indeed, it bans not only discrimination against customers seeking services from businesses open to the public, but also states, “No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any [protected] characteristics.” CAL. CIV. CODE § 51.5(a) (West 2007).

28. 309 P.3d 53, 59 (N.M. 2013) (holding that there was no constitutional objection to the application of the antidiscrimination ordinance and that New Mexico's religious freedom act did not apply to the case).

29. See Shelby Sebens, *Judge: Oregon Bakery Should Pay Gay Couple \$135,000 over Wedding Cake*, REUTERS (Apr. 28, 2015, 4:45 PM), <http://www.reuters.com/article/us-usa-oregon-gaymarriage-idUSKBN0NJ2JE20150428> [<https://perma.cc/9LXP-KFS2>].

30. 494 U.S. 872 (1990).

exercise.³¹ RFRA alone has never been used successfully to challenge federal anti-discrimination laws, and after the Court's decision in *City of Boerne v. Flores*, it does not apply to state laws.³² Numerous state legislatures, however, have passed their own versions of RFRA, which do apply to state laws.³³ To date, no state RFRA has been interpreted to grant an exemption from a state antidiscrimination law covering sexual orientation.³⁴ In the *Elane Photography* case, the New Mexico Supreme Court held that New Mexico's RFRA did not apply to private causes of action.³⁵ In response, Arizona sought to amend its state RFRA to explicitly include private suits.³⁶ While Arizona has no statewide law prohibiting discrimination on the basis of sexual orientation, the proposed amendment was widely seen as taking aim at anti-discrimination laws—although it did not mention them. The resulting public outcry against efforts to “license discrimination” included calls to boycott the state, and Arizona's governor vetoed the law.³⁷ Indiana, which also does not have a statewide antidiscrimination law covering sexual orientation, passed a state RFRA that covered private causes of action.³⁸ Again there was a national outcry resulting in calls to boycott the state, and the state legislature and governor quickly adopted an

31. See 42 U.S.C. §§ 2000bb–2000bb-4 (2012). See generally Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994) (discussing the background and effect of RFRA); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (same); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994) (same).

32. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that RFRA as applied to the states exceeds congressional authority under the Fourteenth Amendment). RFRA was used successfully in a challenge to the application of Title VII to a religious university's canon law department. See *Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). The court in that case, however, also rested its opinion on the First Amendment. Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 707 (2012) (holding that the Religion Clauses created a ministerial exception from antidiscrimination laws). The Court has held that RFRA continues to apply to federal laws. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

33. See W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63, Westlaw (database updated Dec. 2014) (collecting statutory references).

34. In his study of state court decisions under state RFRAs, Christopher Lund concluded that the statutes had generally been interpreted very narrowly and on the whole were ineffective at granting religious believers exemptions from otherwise applicable laws. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

35. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 76–77 (N.M. 2013).

36. See S. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (providing that a person could assert the defense “regardless of whether the government is a party to the proceeding”); see also Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 631–33 (2015) (providing additional information on the Arizona proposal).

37. See Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014, 11:13 PM), <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/index.html> [<https://perma.cc/U2YX-PVWU>].

38. See Act of Mar. 26, 2015, Pub. L. No. 3-2015, § 1, 2015 Ind. Acts 6, 8.

amendment exempting antidiscrimination laws from the coverage of the state's RFRA.³⁹ Similar state-RFRA controversies have played out in other states.⁴⁰

Not surprisingly, these policy debates have spawned a law review literature on both sides of the issue.⁴¹ Andrew Koppelman argues that antidiscrimination law is primarily an exercise in social engineering, ensuring access to the market and changing social norms.⁴² He rejects the notion that discrimination is an individualized harm, such as a classic tort, and favors religious accommodations because such accommodations do not threaten the structure of antidiscrimination laws.⁴³ Other scholars, in contrast, have argued that respect for the dignity of LGBT citizens requires that there be no religious exemptions from antidiscrimination laws.⁴⁴ Such exemptions, they argue, threaten the psychological well-being of gays and lesbians.⁴⁵ On the other side of the debate, Thomas Berg has noted the similarities between the claims of religious conscience and the gay-rights critique of the closet.⁴⁶ Both impulses arise from a desire to live authentically in the public sphere. Both reject the notion that others may demand that core aspects of one's identity—sexuality and religion—be kept out of view in a private space.⁴⁷ Berg accordingly argues in favor of generous exemptions for religious objectors.⁴⁸

39. See Act of Apr. 2, 2015, Pub. L. No. 4-2015, 2015 Ind. Acts 9; see also Koppelman, *supra* note 36, at 635–36 (discussing the background to the law as amended).

40. See Koppelman, *supra* note 36, at 631–38.

41. See, e.g., Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra*, at 103; Koppelman, *supra* note 36; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015); Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069 (2011).

42. See Koppelman, *supra* note 36, at 620, 627.

43. See *id.* at 620.

44. See Melling, *supra* note 41, at 190 (“Anti-discrimination laws are fundamentally a way of according recognition, of embracing and opening the doors to those traditionally excluded.”); Underkuffler, *supra* note 41, at 2088 (“Laws that prohibit discrimination against gay men and lesbian women, in all aspects of their lives, attempt to ‘foster[] . . . individual dignity, . . . creat[e] . . . a climate and environment in which each individual can utilize his or her potential . . . , and [ensure] equal protection’ of the laws.”) (alteration in original) (quoting Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 37 (D.C. 1987)).

45. See Melling, *supra* note 41, at 190–91 (“It takes only one such experience, sanctioned by the law, to make an LGBT person think that the promise of equality is not real.”).

46. See Berg, *supra* note 41, at 218.

47. See *id.* at 207–08.

48. See *id.* at 208. Chai Feldblum also notes the affinity between the claims of religious objectors—what she calls “belief liberty”—and arguments offered by gay-rights advocates but concludes that in all but a few very limited cases, religious objectors should not be accommo-

This debate extends beyond questions of church and market. Some of the actors that might claim religious exemptions are nonprofit entities that are involved only indirectly in commerce.⁴⁹ Most of these cases, however, involve for-profit businesses. The argument has invoked the classical debates over church and state. In making their arguments, however, scholars and others often reference the commercial status of the participants and the fact that they have chosen to operate in the market. Consider Chai Feldblum, who writes:

Once an individual chooses to enter the stream of economic commerce by opening a commercial establishment, I believe it is legitimate to require that they play by certain rules. If the government tolerated the private exclusionary policies of such individuals in the commercial sector, such toleration would necessarily come at the cost of gay people's sense of belonging and safety in society. Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect the ability of LGBT people to live in the world.⁵⁰

Notice that for Feldblum's position the commercial status of the religious objectors is key to weakening their right to act in accordance with their religious beliefs. Likewise, she conceptualizes the market as a place where gay people are entitled to be shielded from certain kinds of religious beliefs. Presumably, for example, she does not believe that a similar legal entitlement should govern the noncommercial activities of churches. In short, her argument assumes an ideal relationship between religion and the market, a relationship that the law must define and police.⁵¹ This only partially articulated ideal does much of the normative work in her argument. Unfortunately, she does not fully articulate the theory of church and market that supports her conclusions. Similar assumptions about the proper relationship of religion and

dated. *See* Feldblum, *supra* note 41, at 149–55. In contrast, Laura S. Underkuffler acknowledges the connection between identity and behavior with regard to sexual identity but not religion. *See* Underkuffler, *supra* note 41, at 2082 (“Conduct may be a part of gay or lesbian sexual orientation, but that conduct is simply an expression of who that person is.”).

49. *See* Bernstein v. Ocean Grove Camp Meeting Ass'n, OAL Dkt. No. CRT 6145-09 (N.J. Office of Admin. Law, Jan. 12, 2012), http://www.aclu-nj.org/files/8713/2639/9826/CRT_6145-09_Bernstein_ID.pdf [<https://perma.cc/A52H-S5AY>] (involving an ocean-side pavilion operated by a self-described ministry associated with the Methodist Church).

50. Feldblum, *supra* note 41, at 153 (footnote omitted).

51. Feldblum is certainly not alone in tying the legitimacy of denying religious exemptions to antidiscrimination laws to the market context of religious actors. *See, e.g.*, Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (but Wrongly) Decided*, 35 CONN. L. REV. 129, 159–61 (2002) (arguing that commercial entities should not be able to assert expressive association exemptions from antidiscrimination laws); Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 543 (1998) (“Landlord/tenant-free exercise conflicts are different from the usual free exercise claim for a number of reasons. These conflicts always involve a landlord who voluntarily engages in a regulated commercial activity, not for religious, but for profit-making purposes.”) (emphasis in original).

market are at work in the arguments of others. How this relationship might be explicitly conceptualized is the issue to which I turn in the next sections.

II. THE PUBLIC THEORY OF THE MARKET AND THE PRIVATE THEORY OF THE MARKET

This Part presents two theories of the market and how commerce and religion ought to be related to one another. It then applies each of these theories to the question of whether those with religious objections to same-sex marriage should be granted exemptions from antidiscrimination laws when those laws require that they assist with same-sex weddings. The first is what I label the public theory. It posits that ideally markets ought to embody the values associated with liberal democracy so that powerful market institutions should be treated as closely analogous to government institutions. This implies that religion is both entitled to special protection within the market, and that its power should be limited. I label the second approach the private theory of the market. This theory is substantively indifferent to the role of religion in the market, so long as market outcomes result from contractual arrangements free of force and fraud.

A. *The Public Theory of the Market*

The public theory of the market takes the relationship between the state and citizens in a well-functioning liberal democracy as the model for structuring the market. In the liberal tradition, the legitimacy of the state's power rests on two conditions. First, the state is accountable to citizens collectively for its actions. It is a government "of the people, by the people, for the people."⁵² Its actions are their actions, the expression of their collective will exercised after due deliberation. Second, the state is to lavish equal respect and concern on its citizens. There is no privileged class nor is there any caste of underlings.⁵³ All are equal before the law, and all laws are to be framed so as to benefit the public good. In practice, of course, the benefits and burdens of laws will fall unequally, but when those burdens are systematically allocated to groups based on immutable characteristics or basic aspects of individual identity—race, gender, sexual orientation, or religion—then the law is presumptively illegitimate.⁵⁴ Beyond the formal equality of the law, a well-functioning liberal democracy is supposed to provide social equality, or at the very least, a society in which opportunity is open to all and none can claim special advantages based upon accidents of birth.

52. ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania, November 19, 1863*, in SPEECHES AND WRITINGS: 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989) (the text of the Gettysburg Address).

53. See JOHN RAWLS, A THEORY OF JUSTICE 87–88 (rev. ed. 1999) ("Aristocratic and caste societies are unjust because they make these contingencies [of birth] the ascriptive basis for belonging to more or less enclosed and privileged social classes.")

54. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (arguing that courts should impose heightened scrutiny when laws unduly burden "discrete and insular minorities"). See generally Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163 (2004).

When the norms of democratic liberalism are taken as the benchmark of legitimacy, the unregulated market appears problematic. The shape of such a market is emergent rather than deliberative. It is not the result of debate and democratic decisions. Furthermore, the ebb and flow of business within the market can leave some actors with more power than other actors. On this view, employers are more powerful than employees, businesses are more powerful than consumers, and corporations are more powerful than individuals. These asymmetries of power are like the asymmetry in liberal-political theory between the power of the state and the power of individuals. Just as the asymmetry between government and citizen requires that the state be subject to limitations on its power and norms of equality, powerful economic actors should be subject to regulations that impose similar public values on their activities.⁵⁵ Thus beginning in the Progressive Era and continuing through the New Deal to the present, one of the central ambitions behind the construction of the modern regulatory state has been to make the market more liberal and more democratic in its operation, constraining the power of private and democratically unaccountable market actors.

Religion occupies an ambivalent position in liberal-democratic theory and likewise has an ambivalent position in the public vision of the market.⁵⁶ On one hand, liberal democracy is premised on the brute fact of moral and religious pluralism. Public institutions should not embody any particular theological view nor should they seek to impose on citizens a comprehensive moral or religious system.⁵⁷ Furthermore, religion can be seen as an irrational and potentially violent force, one that must be constrained and kept away from the levers of state power.⁵⁸ Accordingly,

55. For example, critics of the law's willingness to enforce boilerplate agreements have long suggested that doing so undermines democracy, because large commercial actors are in effect authoring laws without democratic accountability. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33–51 (2013); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971).

56. For a good discussion of the problems of religion and modern philosophical discussions of liberalism, see generally ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000).

57. Of course, this does not mean that the state must be entirely neutral with regard to notions of the good. The prior demands of justice place constraints on visions of the good life that citizens may pursue. As two political philosophers put it:

If some ways of life cannot survive in a society in which everybody has what justice demands, and without perfectionist political action on their behalf, then that is unfortunate for those who favour such ways of life but no reason for the state to help them. Rather, they will have to revise their conception of the good to fit the constraints imposed by the priority of the right.

STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* 31 (1992).

58. See AUDI, *supra* note 56, at 3–4 (“Religion can, however, be a divisive force in democratic politics. The impulse to pursue the Ultimate Good, particularly in an authoritative institutional context and with the support of others sharing the same religious outlook, can lead to a tendency, conscious or unconscious, to dominate others. A holy cause can sanctify extreme measures.”); Koppelman, *supra* note 36, at 629 (“Resistance to religious accommodation has its source in the political left, much of which, largely as a consequence of disputes

norms against the establishment of religion and theocracy place limits on the ability of the state to enact laws with explicitly religious content.⁵⁹ At the same time, religion can be part of an individual's core identity, an identity that the state should respect. The state may not single out believers on the basis of their religion and in some cases may need to limit the law's reach in order to ensure that believers have the necessary freedom to live their religion.⁶⁰

For the public theory, the proper reach of antidiscrimination laws is open to a vigorous debate. Arguing from broadly similar principles about how the market should be structured, proponents of aggressive antidiscrimination laws and generous religious exemptions reach very different conclusions. For proponents of anti-discrimination laws, the market is a public space in which all are entitled to equal respect regardless of their race, religion, or sexual orientation. The evil of discrimination lies in the act of discrimination itself, independent of the question of how pervasive the discrimination might be. Hence, the fact that there is no shortage of bakers in Portland, Oregon, eager to provide wedding cakes for lesbian nuptials is irrelevant. Analogously, the vast majority of government officials do not discriminate on the basis of race, but this fact would not immunize a single official that did discriminate from the censure of the Equal Protection Clause. It is enough that the government has failed its obligation to treat its citizens equally regardless of race.⁶¹ Likewise, businesses occupy a position of greater power than their customers. As powerful, public institutions, they must exercise that power consistent with fundamental liberal-democratic norms. The fact that the business is religiously motivated is irrelevant. If anything, the religious motivation makes the conduct of Elane Photography LLC or the Portland baker even more suspect. Just as the institutions of the state may not be structured on explicitly religious grounds, so also businesses cannot be left unfettered to pursue religious goals.⁶² Religion is perhaps especially prone to irrational or illiberal action. Hence, religiously motivated discrimination is particularly dangerous because it threatens not only norms of equality but also a public space in which powerful institutions cannot exploit their power to advance sectarian interests or threaten a secular public order.

Religious objectors, however, can also deploy a public vision of the market in favor of exemptions from antidiscrimination laws. In a public space, citizens are entitled to be treated with dignity by powerful actors. Religious believers cannot be

over sexual ethics, regards religion as a malign force in the world.”).

59. *See, e.g.*, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (holding that government power may not be delegated to religious bodies).

60. *See, e.g.*, *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (holding that laws which single out conduct merely because it is religious must satisfy strict scrutiny); *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963) (holding that laws incidentally burdening religious conduct were subject to constitutional scrutiny).

61. *Cf.* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

62. Justice Ginsburg, for example, has articulated a vision of the market in which businesses exist for purely secular purposes. “Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting).

excluded from public life on the basis of religion.⁶³ A key aspect of dignity is the ability to live and act authentically.⁶⁴ Crucially, this includes the ability to act consistently with one's basic identity in public. We do not respect citizens when we insist that their identity is acceptable only so long as it is kept private. Just as society does not adequately respect the dignity of gay citizens if it requires that their sexuality remain firmly locked in the closet, society is similarly disrespectful of religious believers when it requires that religious conduct be confined to the closet of private spaces. Hence, antidiscrimination laws properly limit the ability of employers to punish employees who are "too religious" in public, as for example when a Muslim woman is prohibited by her employer from wearing a hijab to work.⁶⁵ Likewise, antidiscrimination laws threaten the dignity of religious believers who must abandon the right to live authentically in accordance with their beliefs as a condition of pursuing their chosen employment.⁶⁶

The public theory of the market may thus be deployed in favor of both enforcement of and exemption from antidiscrimination laws. When the issue is joined in these terms, both sides share the assumption that the market should be structured by the law so as to instantiate the values of equal respect and concern that should apply to public spaces. At best, the public theory is thus indeterminate. At worst, it is incoherent. It is possible, however, to conceptualize the market in ways that reject the public theory's basic assumptions.

B. The Private Theory of the Market

The private theory of the market rejects the idea that the norms of a liberal democracy should form a baseline for legitimate commercial behavior.⁶⁷ Rather, it places primary emphasis on voluntary, private agreement. Indeed, voluntary agreement is seen as more normatively primal than the norms of liberal democracy. Thus, the social contract tradition tries to legitimate liberal democracy by recourse to

63. See *McDaniel v. Paty*, 435 U.S. 618, 627–29 (1978) (holding that states may not prohibit ministers from holding public office); *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (holding that government office may not be conditioned on beliefs about God).

64. See Berg, *supra* note 41, at 215 ("[R]eligious freedom finds significant justification . . . in the importance of religious belief to personal identity.").

65. See *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015) (presenting the question of whether Title VII of the 1964 Civil Rights Act requires a retailer to accommodate a Muslim employee who wishes to wear a hijab in violation of the company's dress code).

66. See Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 41, at 189, 201 ("The result would be to exclude from a range of occupations and professions many believers who are unwilling to violate their faith commitments. Such occupational exclusions have an odious history. The English Test Acts and penal laws long excluded Catholics from a range of occupations . . .").

67. Richard Epstein has provided the clearest and most forceful critique of anti-discrimination laws on these grounds. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 *STAN. L. REV.* 1241 (2014).

stories about (admittedly imaginary) private contracts rather than vice versa.⁶⁸ This does not mean that the market should be thought of as an anarchic space, red in tooth and claw. Law is necessary to provide an institutional structure in which economic life can be ordered by voluntary agreements.⁶⁹ Tort and criminal law should prohibit the use of force and fraud. Property law should provide clear rules about entitlements to resources and how those entitlements may be transferred. Contract law should foster trust and cooperation by enforcing executory obligations. Other forms of regulation may be necessary to overcome difficulties created by externalities, holdout situations, natural monopolies, and a host of other problems that inhibit the ideal of orderly, voluntary cooperation. Depending on one's views regarding the scope of these problems, the private theory of the market can push in a markedly libertarian direction, but it need not.⁷⁰ If one concludes that the natural impediments to a well-functioning, voluntary market are substantial, then one can justify a great deal of regulation in the name of constituting the market as a space ordered by private agreements.

The key difference between the private theory of the market and the public theory of the market is not necessarily the overall level of regulation. Rather, it is that the private view of the market rejects the assumption that in order to be legitimate, market institutions should replicate the norms applicable to the liberal-democratic state. Importantly, the private theory of the market feels no sense of unease with the fact that market processes are emergent rather than deliberative. Collective outcomes needn't be the result of democratic choice to be legitimate. Likewise, even significant market actors needn't be subject to norms of equal concern to be legitimate. Rather, the legitimacy of market outcomes rests on the procedural question of whether they are the result of choices uninfected by force, fraud, or diminished capacity.⁷¹

Because this theory sees a well-functioning market as emerging from private choices, it is likely to be skeptical of claims that the market necessarily leads to vast asymmetries of power. For example, one needn't assume that employers will always have more power than employees. Rather, the distribution of power between employers and employees will depend on the background supply and demand in the labor market, which is constantly shifting. Likewise, corporations are not more powerful

68. See Jean Hampton, *Contract and Consent*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 379, 379 (Robert E. Goodin & Philip Pettit eds., 1993) ("The contractarian form of argument became popular in the seventeenth century, and its popularity continues to this day. Advocates of this approach tell us to resolve answers to moral and political issues by asking what a group of rational persons could all agree to, or alternatively, what such people would be unreasonable to reject.").

69. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 220 (1960) ("The classical argument for freedom in economic affairs rests on the tacit postulate that the rule of law should govern policy in this as in all other spheres.").

70. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *STAN. L. REV.* 1205 (2014) (identifying this critique of anti-discrimination laws with libertarianism).

71. Cf. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 147–82 (rev. ed. 2013) (offering a historical theory of justice, under which society is judged not by the ultimate distribution of resources but whether that distribution results from just acquisitions and transfers of resources).

than their individual customers so long as those relationships are purely contractual. The customer may always take his or her trade elsewhere, and corporations spend millions seeking to cater to the desires of consumers, not vice versa. Once-mighty firms can be rapidly brought low by competition, and dominant market positions are frequently upset by new tastes and technologies.⁷² To be sure, in any actual market the competitive conditions that give employees and consumers the whip hand are present to a greater or lesser extent. By and large, however, the private theory of the market suggests that the solution to any asymmetries is to foster competition by lowering barriers to entry and refusing to protect incumbent firms.

The private theory of the market suggests that religion in the market is unobjectionable so long as it is contractual. Religious commercial actors—like other market participants—are entitled to have the state enforce their voluntary, private arrangements.⁷³ Crucially, however, norms of equality and public deliberation do not apply to contractual activity. Hence, a firm should be free to discriminate against customers or employees on the basis of religion so long as there is no force or fraud involved in its decisions. No market actor has an obligation to contract with any other market actor. This would apply both to those that might wish to disfavor an employee or employer because of her religious identity, and to a religious employer or business that wishes to pursue an illiberal course of action dictated by his religious conscience. Likewise, there is no objection to major market actors, such as large corporations, pursuing explicitly religious agendas so long as they do so through voluntary contracts.⁷⁴ Crucially, however, other market actors should be free to refuse to contract with religiously motivated or discriminatory businesses.⁷⁵ Religion, like any other

72. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1950) (“The opening up of new markets, foreign or domestic, and the organizational development from the craft shop and factory to such concerns as U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.”) (emphasis in original) (footnote omitted).

73. Cf. Helfand & Richman, *supra* note 5, at 773–75 (discussing legal challenges that religious actors in the market face in getting their contracts enforced).

74. For example, the Islamic finance industry involves an excess of \$1 trillion globally, but has attracted very little controversy in large part because it overwhelmingly involves purely contractual relationships among equally sophisticated parties such as banks, investors, and bond-issuing entities. See Mohammed Aly Sergie, *The Rise of Islamic Finance*, COUNCIL ON FOREIGN RELATIONS (Jan. 30, 2014), <http://www.cfr.org/economics/rise-islamic-finance/p32305> [<https://perma.cc/ZE3H-A3GP>] (“Global Islamic financial assets have soared from less than \$600 billion in 2007 to more than \$1.3 trillion in 2012, an expansion rooted in the growing pool of financial assets in Muslim-majority countries driven by consumer demand for products that comply with religious codes.”). See generally MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE (2006).

75. See Ed Payne, *Indiana Pizzeria Finds Itself at the Center of ‘Religious Freedom’ Debate*, CNN (Apr. 3, 2015, 9:54 PM), <http://www.cnn.com/2015/04/02/living/indiana-religious-freedom-pizza-feat> [<https://perma.cc/Z9ZM-U2VS>] (recounting boycotts organized against a pizzeria owner who stated that he would not cater a same-sex wedding). But see Robby Soave, *Boycotts Are Hypocritical, Discriminatory, and Bad for Social Change*, REASON.COM: HIT & RUN BLOG (Mar. 27, 2015, 4:01 PM), <http://social.reason.com/blog/2015>

activity pursued in the market, must succeed or fail based on its ability to attract customers and has no grounds for complaint if it is shunned or boycotted by others.

While the private theory of the market is hostile to antidiscrimination law in principle, it provides no particular reason for granting an exemption for religiously motivated conduct. Indeed, the private theory views the law's concern with the substance of otherwise voluntary transactions as illegitimate. The content of agreements should be left to the parties, and there is no reason for the law to inquire into the content of transactions once it has determined that there is no force or fraud. To grant a religious exemption from antidiscrimination laws would favor religiously motivated commerce precisely because it is religiously motivated.⁷⁶ Hence, a regime of religious exemptions from antidiscrimination laws suffers in part from the same problem as the antidiscrimination laws themselves. It judges market choices based on their substance rather than their voluntariness. Exemptions can only be justified by the private theory of the market, if at all, because they represent a rollback of antidiscrimination laws, but it is necessarily an ad hoc and arbitrary rollback of those laws. There is nothing in the private theory of the market that suggests that religiously motivated commerce is particularly deserving of protection. It is thus equally hostile to a religion-protective version of the public theory under which the law should override private ordering to ensure that the market is a respectful space for religious believers.⁷⁷

III. DOUX COMMERCE AND THE REACH OF ANTIDISCRIMINATION LAWS

Against the two theories articulated in the previous section, I offer what I label the *doux-commerce* theory. Unlike the private theory, this approach rejects the idea that market outcomes are legitimated purely by virtue of being voluntary and contractual. It shares with the public theory a concern for the role of markets in fostering a peaceful and pluralistic society. However, in contrast to the public theory, the *doux-commerce* theory sees much of the value of markets as lying precisely in the fact that they are not formally governed by the norms of liberal democracy. It thus responds to weaknesses in both of the alternative approaches. The problem with the public

/03/27/boycotts-are-hypocritical-discriminatory [https://perma.cc/3KMT-2UTU] (offering a libertarian critique of boycotts).

76. The broadest proposal for such an exemption was passed by the lower house of the Kansas legislature, but the Kansas Senate declined to take it up. The law would have provided a blanket exemption from antidiscrimination laws based on religious motivations:

[N]o individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender: (a) Provide any services . . . related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement

Koppelman, *supra* note 36, at 631 (alteration in original) (quoting H.R. 2453, 2014 Leg., Reg. Sess. (Kan. 2014) (as amended by the House Committee)).

77. *Cf.* Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015) (presenting the question of whether Title VII of the 1964 Civil Rights Act requires a retailer to accommodate a Muslim employee who wishes to wear a hijab in violation of the company's dress code).

theory is that by insisting on constructing the market around thick norms of dignity, equality, and respect, it misses the important work that markets perform in society precisely when they are governed by far thinner norms of mutual cooperation. The weakness of the private theory is that it ignores the important social and political work that markets perform. When commerce is reduced to nothing more than the pursuit of private interests, we lack the moral language to identify and articulate this work. We are also blinded to the way that the market's ability to perform this work is contingent on the shape of market outcomes as opposed to the purely procedural question of whether transactions are voluntary.

A. The Doux Commerce Theory of the Market

The *doux commerce* theory rejects the notion that markets should be structured to reflect as much as possible the norms of liberal-democratic institutions. It also rejects the private theory's evaluation of markets purely in terms of the voluntary satisfaction of preferences. Rather, it sees commerce as a distinctive form of social activity, one that is separate from politics but that serves important political functions. In Montesquieu's language, commerce tends to "gentle" manners.⁷⁸

Commerce is valuable because it is prosocial. Markets foster cooperation between strangers, train us to see the world from another's point of view, and generate wealth, which has an ameliorative effect on tribal strife and a host of other social evils.⁷⁹ Markets can perform these functions precisely because they are not democratic or deliberative institutions. Unlike collective democratic action, collective market activity requires unanimity.⁸⁰ A citizen cannot easily defect from the decision of his country to go to war or change the law. It is far easier for an employee, however, to find a new employer or for a consumer to select a different provider.⁸¹ Market participants must, therefore, be far more attuned to the desires of others than political

78. See MONTESQUIEU, *supra* note 10, at 338 ("[I]t is almost general rule that everywhere there are gentle mores, there is commerce and that everywhere there is commerce, there are gentle mores." (footnotes omitted)).

79. I have developed these themes at much greater length elsewhere. See *supra* note 9 and accompanying text.

80. Of course, markets don't require literal unanimity in society. Rather, they require unanimity among those directly involved in a collective project. This is not true of democratic political decisions. The argument in the text relies only on the point that markets require relatively high levels of consensus.

81. Of course, an employee's practical ability to defect will depend on his economic situation and the availability of alternatives. My claim is not that employees enjoy some kind of unfettered freedom. Rather, I'm making the more modest, comparative point that defection from the state is far, far more difficult. As David Hume put it:

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.

DAVID HUME, *Of the Original Contract*, in POLITICAL ESSAYS 186, 193 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1772).

activists. Such activists always contemplate dragooning objecting citizens into some collective project. This is, by definition, what political victory entails in a democratic society. My observation here is not meant as a libertarian criticism of democratic government. Rather, I wish to emphasize the different set of skills required of successful commercial and political actors.

Markets impose a requirement of persuasion on commercial actors.⁸² Businesses must entice customers, and those seeking goods and services must understand potential suppliers. Potential employees must persuade employers that they should be hired. And so on. To be sure, in modern markets many transactions are impersonal and mass-produced. Even such transactions require knowledge of counterparties (a fact attested to by the ubiquity of market-research firms), and even impersonal markets provide frequent opportunities for more personal interactions. In order to entice counterparties into a bargain, commercial actors must enter imaginatively into the position of the other party. This process fosters skills of mutual comprehension. At the same time, market cooperation does not require intense levels of commitment and moral agreement. While associating products with a certain diffuse moral outlook has become a popular marketing ploy, the vast majority of market transactions do not rest on moral, political, or religious agreement.⁸³ This is good. Indeed, part of the virtue of markets is that they are generally not ideologically fraught spaces, and it is precisely this blasé attitude toward ethnic, religious, political, and moral differences that makes them such powerful engines of peaceful cooperation in a pluralistic society.⁸⁴

In order for markets to act as incubators of prosocial attitudes and behaviors, they must be structured in particular ways. Crucially, they must facilitate trade between strangers and trade across boundaries of tribal identity, whether the tribes are constituted by ethnicity, religion, sexual identity, or political conviction.⁸⁵ They must be largely voluntary and reasonably competitive. A market actor whose counterparties have little choice but to deal has far less incentive to enter imaginatively into the world of his customers, and, to that extent, commerce will do less to “gentle” his manners.⁸⁶ Likewise, *doux commerce* requires that markets be widely accessible.

82. The demandingness of the persuasion requirements imposed on market actors is, of course, one of the reasons that democratic government is necessary. Certain kinds of very valuable collective projects are simply impossible under the unanimity requirements of commerce.

83. I might want to buy the world a Coke because I like the message of world peace, but Coke and I needn't have bonds of shared political convictions. Likewise, shopping at Whole Foods may be a way of signaling my love of the earth, but customers and employees needn't share the same religion.

84. Voltaire provides the classic statement of this position, noting the way that those of differing religious persuasions peacefully traded with one another on the Royal Exchange in London. VOLTAIRE, *Sixth Letter: On the Presbyterians*, in *PHILOSOPHICAL LETTERS* 19, 20 (John Leigh ed., Prudence L. Steiner trans., Hackett Publ'g Co. 2007) (1733).

85. See OMAN, *supra* note 9, at 23–39 (arguing in part that “well-functioning markets cross boundaries created by the communities that define one's basic identity.”).

86. A classic Saturday Night Live skit captures this point nicely. Aired in the 1970s before the breakup of the telephone monopoly, it takes the form of a mock television ad and shows a telephone company employee engaging in various acts of gratuitous mismanagement and laziness, much to the apparent consternation of phone users. The ad then ends with the tagline:

Just as trade that is tightly concentrated within a single tribe is less prosocial than trade across tribal boundaries, a market from which certain tribes are excluded is significantly less valuable than a market to which all have access. At the same time, they cannot be made to instantiate the norms of deep, moral recognition or equality that characterize the public theory of market without eroding their value as a sphere in which contestation over such deep political and moral concerns is muted.

The *doux-commerce* theory thus shares with the public theory a concern for the role of markets in constituting public life and, in particular, a concern with the problem of managing conflict and cooperation in a pluralistic society. It rejects the private theory's assumption that once the market has been arranged so as to eliminate force and fraud, whatever outcome is produced by the voluntary interactions of the market participants is right. The value of markets is not purely procedural. Rather, markets are valuable because in the aggregate they can deliver a set of goods that support a pluralistic society. Imagine, for example, a world sharply divided into mutually hostile and suspicious tribal groups that refuse to trade with one another. So long as the refusal to trade was voluntary and tribal solidarity was not the result of force and fraud, the private theory of the market would offer no basis for criticizing such a market. From the *doux-commerce* perspective, however, such a market would be a failure, even if it was entirely the result of voluntary transactions. Markets are valuable in large part because they facilitate cooperation across such tribal boundaries, cooperation that requires a certain blasé attitude toward trading with ideological opponents.

The *doux-commerce* theory's attitude toward religion in the market is largely contingent and empirical. Consider a business that is infused with a sense of religious purpose or identity, such as a kosher butcher or a religious publishing house directed towards a particular sectarian audience.⁸⁷ Such firms will cater largely to a particular tribe, and to that extent their commerce will provide less social lubricant in the face of pluralism. However, they will also deal with large numbers of non-coreligionists.⁸⁸ Even if the butcher sells his meat only to Jews, he may purchase animals for the slaughter from a gentile farmer.⁸⁹ Likewise, the religious publisher will deal with a secular printer to produce its volumes. Pursuing religious goals through the market is thus more prosocial than pursuing those religious goals through alternative methods that involve less cooperation across tribal lines. The church that hires a printer not of its faith to produce volumes of scripture fosters ties across tribal frontiers in a way that it does not when it produces the volumes itself.⁹⁰

"We don't care. We don't have to. We're the Phone Company." *Saturday Night Live: Season 2, Episode 1* (NBC television broadcast Sept. 18, 1976), https://www.youtube.com/watch?v=CHgUN_95UAW [<https://perma.cc/KXA2-KEZM>].

87. See Meese & Oman, *supra* note 6, at 278–80 (collecting examples of such firms).

88. For an overview of coreligionist commerce and its legal challenges, see generally Helfand & Richman, *supra* note 5.

89. In reality, a small kosher butcher likely buys meat from a slaughterhouse that complies with the *kashruth* rules. A major purveyor of kosher products, such as Hebrew National, however, would have extensive commercial ties, including with wholesale suppliers of animals for slaughter.

90. See, e.g., Wm. James Mortimer, *The Coming Forth of the LDS Editions of Scripture*, LDS.ORG (Aug. 1983), <https://www.lds.org/ensign/1983/08/the-coming-forth-of-the-lds-editions>

Problems may arise, however, in markets where religion dominates commerce. Consider Voltaire's classic statement of the *doux-commerce* thesis:

Go into the Royal Exchange in London, a building more respectable than most courts; there you will find deputies from every nation assembled simply to serve mankind. There, the Jew, the Mohammedan, and the Christian negotiate with one another as if they were all of the same religion, and the only heretics are those who declare bankruptcy; there the Presbyterian trusts the Anabaptist, the Anglican accepts the word of the Quaker. Leaving this peaceful and liberal assembly, some go to the synagogue, others go to drink⁹¹

In this vision, religion is not absent. Voltaire defines the market participants in terms of their religion. The commerce in which they engage, however, is not defined in terms of religion. Indeed, it is precisely because religion does not dominate commerce that the market provides an arena of peaceful cooperation despite religious and moral pluralism.

Now consider a market in which religion dominates commerce. American history provides an example of such a society in nineteenth-century Utah. In 1847, responding to years of persecution, the Mormons migrated en masse to the Great Basin. Motivated in part by a vision of a godly society and responding in part to the exigencies of settlement in the arid West, the Mormon Church organized much of economic life along religious lines, distributing land and water rights as well as sponsoring various industrial projects.⁹² With the completion of the transcontinental railroad, church leaders redoubled their efforts to maintain Mormon economic independence, organizing boycotts of non-Mormon merchants, cartelizing Mormon-owned businesses, and actively discouraging the consumption of imported goods.⁹³ Not surprisingly, the Mormon quest for autarky exacerbated conflict between Mormons and non-Mormons, leading at times to violence and contributing to the fervor of the anti-polygamy crusades of the 1880s, which ultimately resulted in the mass incarceration of Latter-day Saints⁹⁴ and the near destruction of the Mormon Church.⁹⁵ Tellingly, in the end the Mormons relied on commercial relationships with non-Mormons—

-of-scripture?lang=eng [https://perma.cc/BB2D-XN8V] (recounting how the Mormon church hired Cambridge University Press to prepare an edition of its scriptures and the friendships and understanding that developed as a result).

91. VOLTAIRE, *supra* note 84, at 20 (footnote omitted).

92. The story of this religious economy is told in LEONARD J. ARRINGTON, FERAMORZ Y. FOX & DEAN L. MAY, *BUILDING THE CITY OF GOD: COMMUNITY AND COOPERATION AMONG THE MORMONS* 41–62 (Univ. of Ill. Press 2d ed. 1992) (1976). *See also* LEONARD J. ARRINGTON, *GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830–1900*, at 39–63 (1958).

93. *See* ARRINGTON, *supra* note 92, at 311–35.

94. “Latter-day Saint” is another name for Mormons, taken from the official name of the Mormon Church, The Church of Jesus Christ of Latter-day Saints.

95. *See* Nathan B. Oman, *Doux Commerce in the City of God: Trade and the Mormon Ideal of Zion* 7 (William & Mary Law Sch., Research Paper No. 09-289, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520499 [https://perma.cc/96KH-AT5Y] (discussing conflict generated by the Mormon policy of religious autarky).

bankers and investors who had purchased bonds issued by the church—to mediate an end to the conflict between themselves and the federal government.⁹⁶

The Mormon Zion did not exhibit the characteristics that Voltaire lauded in the Royal Exchange. The *doux-commerce* theory requires a market in which religious identity does not dominate commerce. This doesn't mean that religious identity must be abandoned, but trade must flow relatively freely across tribal frontiers. Religiously themed businesses and religiously motivated conduct—even conduct that restricts trade on the basis of religion—is unobjectionable but only so long as it does not threaten to undermine commerce as a process mediating social pluralism. Ultimately, the market envisioned by the *doux-commerce* argument cannot be transformed into a godly space. This doesn't mean that it needs to be a secular space, affirmatively hostile to religion. Indeed, constructing the market in such terms is likely to breed resentment and hostility of precisely the kind that commerce is supposed to ameliorate.⁹⁷ The market, however, must be a pluralistic space, one to which all have relatively open access and in which all can readily find willing trading partners beyond the tribes—religious, ethnic, political, moral, or sexual—that define their deepest identities.

B. Doux Commerce and the Scope of Antidiscrimination Law

The *doux-commerce* argument suggests that the scope of both antidiscrimination laws and religious exemptions from those laws should be empirically contingent. While it is sensitive to the role of markets in constituting public life, it does not insist that, to the extent possible, markets should conform to liberal-democratic norms. Indeed, an effort to comprehensively impose such norms on market actors would be destructive, undermining much of the good that markets do. The *doux-commerce* argument does, however, require that markets be open to all and that, to the extent possible, a blasé attitude toward commerce be cultivated. It thus shares with the private theory of the market at least a strong presumption that freedom of contract should order market activity.⁹⁸ However, where the private theory of the market sees the value of freedom of contract precisely in the fact that it is voluntary, a realm in which private individuals may pursue their private agendas through private

96. See EDWARD LEO LYMAN, *POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD* 232–48 (1986) (recounting the role of friendly bondholders as intermediaries between church leaders and federal officials).

97. Louise Melling has argued that providing religious exemptions from anti-discrimination laws will not serve to lessen social conflict around same-sex marriage. See Melling, *supra* note 41, at 185–87. In support of her claim, she points out that conscience exemptions guaranteeing that objecting medical professionals need not perform abortions have not lessened the social conflict around abortion. *Id.* at 186. The obvious problem with this argument is that it rests on an unobservable counterfactual. The social conflict around abortion might have been even more intense but for such exemptions. Certainly, it isn't difficult to imagine that the abortion wars would be considerably more intense if objecting doctors were required by law to perform abortions or give up the practice of medicine.

98. See OMAN, *supra* note 9, at 23–39 (arguing that freedom of contract supports a *doux-commerce* approach to markets); see also Oman, *supra* note 9, at 204–18 (arguing that contract law ought to be organized so as to support markets).

agreements, the *doux-commerce* theory values freedom of contract for three public and social, rather than private and individualistic, reasons.

First, freedom of contract forces market participants to think very carefully about the desires of potential counterparties. As Adam Smith observed, “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”⁹⁹ In pursuing their interests, however, the butcher, brewer, and baker must imaginatively enter into our world and understand our needs. This ability to see the world from another’s point of view is a key skill for operating in a pluralistic society. Thus, research suggests, for example, that in pre-modern societies trust and cooperation increases as trade replaces subsistence agriculture as the basis of economic life.¹⁰⁰

Second, freedom of contract makes intertribal cooperation easier by lowering the stakes of collective action. Political institutions are designed to allow collective action in the face of disagreement. Democratic deliberation creates a fictitious consent to political decisions. Frequently, however, political decision making is an incubator for suspicion and ideological extremism.¹⁰¹ By raising the spectre of a hostile and coercive order from which one cannot easily defect, politics tend to foster distrust and conflict. In contrast, commercial interactions tend to be less fraught precisely because market actors have less power over one another. It is thus easier for those with opposing political, religious, or ethnic allegiances to cooperate as trading partners than as political partners because defection from such schemes is far easier than defection from political decisions. Freedom of contract makes the market regime of relative unanimity and easy defection possible, thereby fostering cooperation across tribal lines that would not be possible in a world of purely democratic decision making. To the extent that we abandon freedom of contract as an ordering principle of the market, we raise the ideological stakes of commerce, increasing conflict. This is, in part, why the public theory of the market, with its allegiance to strong norms of dignity and recognition at the expense of freedom of contract, is potentially so destructive.

Finally, freedom of contract allows for a flexibility in economic arrangements that historically has produced material prosperity on a scale unrivaled by any alternative means of organizing economic life.¹⁰² Material prosperity, in turn, tends to have an

99. SMITH, *supra* note 2, at 18.

100. *See generally* Joseph Henrich, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, Herbert Gintis, Richard McElreath, Michael Alvard, Abigail Barr, Jean Ensminger, Natalie Smith Henrich, Kim Hill, Francisco Gil-White, Michael Gurven, Frank W. Marlowe, John Q. Patton & David Tracer, “*Economic Man*” in *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. BRAIN SCI. 795 (2005) (summarizing experimental findings showing that when playing the so-called “Ultimatum Game” those engaged in subsistence agriculture offered more one-sided distributions than those engaged in trade, hunting, or other cooperative enterprises); Joseph Henrich, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, Herbert Gintis & Richard McElreath, *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. PAPERS & PROC. 73 (2001) (same).

101. *See generally* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009).

102. This is also why even a “public theory” of the market will continue to allow the bulk

ameliorative effect on a host of social evils from environmental degradation to the mistreatment of ethnic and other minorities.¹⁰³ Economic prosperity even reduces the number of people executed for witchcraft.¹⁰⁴

Freedom of contract, however, is not the only concern that the *doux-commerce* theory has in structuring the market. Freedom of contract is important because of the kinds of social spaces and practices that it creates in the market, not because it reflects some primal, libertarian right or represents the satisfaction of revealed preferences.¹⁰⁵ The focus of the *doux-commerce* theory is social rather than individualistic. We are interested in markets as a set of social institutions and commerce as a social practice. A market, no matter how staunchly it upholds freedom of contract, from which groups are systematically excluded is for that reason a weaker and less valuable aspect of communal life. Markets are valuable because they foster cooperation in the face of disagreement, inculcate habits of toleration, and generate prosperity and opportunity. They cannot do this if they are the preserve of a favored tribe or group. Crucially, however, the *doux-commerce* argument's concern with exclusion stems not from a strong vision of what human dignity demands but rather from the more modest ambition that commerce be maintained as a mechanism for managing pluralism and fostering peaceful cooperation.

Consider the position of African Americans prior to the passage of the 1964 Civil Rights Act. In the wake of Emancipation, numerous southern state legislatures passed "Black Codes," which dramatically curtailed the power of freed slaves to contract, excluding them from large segments of the market and subjecting their participation to pervasive white control.¹⁰⁶ Reconstruction Congresses moved against the

of economic activity to be organized by freedom of contract. History has taught that the alternative is mass impoverishment. There will, obviously, be massive disagreements about the scope of freedom of contract that one must preserve to deliver acceptable levels of prosperity, but today no one seriously questions that material abundance is impossible without leaving the majority of economic activity to contract.

103. See generally BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2005) (documenting the tight correlation between economic growth and diminished social conflict, discrimination, and other social ills); Susmita Dasgupta, Benoit Laplante, Hua Wang & David Wheeler, *Confronting the Environmental Kuznets Curve*, J. ECON. PERSP., Winter 2002, at 147 (discussing evidence that pollution and many forms of environmental degradation decrease as societies become wealthier).

104. See generally Edward Miguel, *Poverty and Witch Killing*, 72 REV. ECON. STUD. 1153 (2005) (showing a strong correlation between poverty and witch killing in Tanzania); Emily Oster, *Witchcraft, Weather and Economic Growth in Renaissance Italy*, J. ECON. PERSP., Winter 2004, at 215 (finding the same result for Renaissance Italy).

105. Compare CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7 (2d ed. 2015) (arguing that contract law is required by the "liberal ideal" which states that "morality requires we respect the person and property of others, leaving them free to make their lives as we are left free to make ours"), with Oman, *supra* note 9, at 229–30 ("Given the benefits that flow from markets, we have good reason for creating bodies of law that serve to sustain and strengthen markets. This is what contract law does.").

106. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 199–200, 208–09 (1988). While the Reconstruction Congresses did move aggressively to improve the plight of freed slaves, one shouldn't overstate their commitment to racial equality. They believed that African Americans were entitled to "political rights" and "civil rights," but

Black Codes, but after Reconstruction southern legislatures—aided and abetted by the Supreme Court, which struck down much of the work of the Reconstruction Congresses as unconstitutional¹⁰⁷—created a Jim Crow regime of de jure segregation in a host of areas such as public accommodations and transportation. Semi-government-sanctioned violence further limited African American participation in economic life. Finally, racist norms and beliefs supported and strengthened the regime. Libertarians and progressives argue over the extent to which Jim Crow resulted from government action or the failure of private markets.¹⁰⁸ From the perspective of the *doux-commerce* thesis, however, the resolution of this debate is of limited interest. Rather, what is important is that the exclusion of the African Americans from full participation in the market was undeniable and that the 1964 Civil Rights Act, despite the fact that it did not ban discrimination in the market generally, massively expanded the ability of African Americans to engage in peaceful and productive commerce.

In the eyes of the *doux-commerce* theory, the evil of racial discrimination is systemic rather than individual. The refusal of any particular individual to contract with another individual is a natural result of freedom of contract and should not be made a legal wrong. The problem arises when discrimination is so systemic that its victims are unable to fully participate in commerce. Antidiscrimination laws are justified as a way of combating this systemic evil. The *doux-commerce* theory, however, does not provide arguments that justify banning discrimination as a way of vindicating an individual right to be free of public insults to one's dignity. The goal of the *doux-commerce* approach is peaceful cooperation in a pluralistic society, not universal bonds of fraternity or a deep mutual recognition. Consider a sign in a business declaring, "No blacks allowed." If such signs are widespread and the sentiment that they express widely acted upon, then they undermine the ability of the market to deliver the benefits posited by the *doux-commerce* argument. On the other hand, if such signs are extremely rare and mark the business owner that posts them as a crank and a social pariah, then they do not threaten the beneficent possibilities of commerce and the *doux-commerce* theory provides no justification for banning them.

One justification that the *doux-commerce* theory might offer for a more expansive, individualistic, rather than systemic, approach to antidiscrimination laws is that such laws force market actors to trade across tribal and ideological boundaries. The ability of markets to foster cooperation and social interaction across such boundaries is one of their chief virtues. Aggressive antidiscrimination laws even in the absence of systematic exclusion, one might argue, seem to enhance this activity. Despite its initial plausibility, however, there are two reasons for rejecting this argument. The first is that it does a poor job of justifying any of the antidiscrimination laws that we

not "social rights," an elastic category that justified de jure segregation of various kinds. See Bagenstos, *supra* note 70, at 1209–13 (briefly recounting this intellectual history and collecting sources).

107. See *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (striking down the Civil Rights Act of 1875).

108. Compare EPSTEIN, *supra* note 67, at 126–27 (arguing that African American exclusion from the market resulted from government action), with Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, SOC. PHIL. POL'Y, April 1991, at 22 (arguing that unregulated markets inevitably result in widespread discrimination).

currently have. Those laws all have an asymmetrical structure.¹⁰⁹ Employers may not refuse to hire an employee because of the employee's religion, but employees are free to refuse to work for an employer because of the employer's religion.¹¹⁰ Businesses, likewise, are prohibited from discriminating on the basis of race, religion, gender, or sexual orientation, but customers are free to discriminate on that basis.¹¹¹ If the goal of antidiscrimination laws was simply to force individuals to trade across tribal boundaries, this asymmetry makes little sense.

The second problem with this argument is that other aspects of the *doux-commerce* approach are undermined when the refusal to contract is made into a legal wrong. The mutual understanding promoted by markets comes from more than the brute proximity promoted by commerce. Rather, trade requires market actors to consider the desires and goals of their counterparties. This imaginative ability to see the world from another's point of view is one of the reasons that commerce tends to have a corrosive effect on established social hierarchies. In a nation of shopkeepers no one can afford the haughtiness of an aristocrat who need not consider the goals of another. Likewise, seeing the world from another's point of view lubricates interactions in a pluralistic society. Indeed it is an intellectual prerequisite for complying with most liberal conceptions of justice.¹¹² Allowing a party, however, to demand as a legal right that another contract with him undermines this process.¹¹³ The holder of such a legal entitlement need not see the world from his counterparty's point of view. It is

109. *But see* CAL. CIV. CODE § 51.5(a) (West 2007) (stating that “[n]o business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any [protected] characteristics”).

110. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

111. *See, e.g.*, 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”); *but see* CAL. CIV. CODE § 51.5(a) (prohibiting discrimination in purchasing by “business establishments”). Note, federal law does not prohibit discrimination in public accommodations on the grounds of gender, although California does.

112. *See* PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* 74–83 (1999) (arguing that, for example, John Locke’s theory of justice requires certain dispositions of understanding others); OMAN, *supra* note 9, at 40–66 (discussing how markets foster mutual understanding).

113. The system of Spanish trade in colonial Latin America provides an extreme example. Under the *repartimiento de mercancías*, conquered Incas were forced to purchase goods from Spanish merchants at prices set by the conquerors. *See* DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 16–19 (2012) (discussing Spanish economic practices in the conquered Inca Empire). Such an arrangement provided little incentive for the Spanish merchants to understand their Inca “customer,” nor did it make much sense for Incas to invest in learning about alternative suppliers to the Spanish “traders.” *See id.*

enough to invoke the fear of the courts. This is not a reason per se for rejecting anti-discrimination laws, but it does suggest that such laws should not be justified on the basis of forcing individual market interactions. Such forced interactions lack the capacity to “gentle manners” in Montesquieu’s phrase.

Applying this framework to antidiscrimination laws covering sexual orientation suggests that the value of such laws is empirically contingent. Gays and lesbians have undoubtedly been subject to violence and discrimination.¹¹⁴ In some places, being out may significantly limit one’s access to the market. In such places commerce cannot function successfully in the way posited by the *doux-commerce* theory without legal intervention to ensure widespread access to goods and services in the market. However, in other places being a gay or lesbian does not represent a barrier to full participation in the market. This does not mean that the market in such places is free of all acts of discrimination. Rather, it means that in such places discrimination is rare and does not represent a threat to meaningful participation in commercial life. In such places, the case for antidiscrimination laws is quite weak. At best they serve a prophylactic function, ensuring that shifts in social norms don’t result in threats to market access. Their ability to fulfill this role, however, is undermined by the fact that the passage of antidiscrimination laws covering sexual orientation is generally a result of shifting social attitudes rather than a cause of those shifts.

There are countervailing reasons that counsel in favor of granting religious exemptions, where antidiscrimination laws are adopted. Aggressively enforcing anti-discrimination norms in the absence of threats to meaningful access can undermine the pluralism-managing force of markets. In such cases, antidiscrimination norms insist on a kind of normative recognition in the teeth of religious objections and then deploy the power of the state against objectors to extract that recognition. Such a course of action is more likely to exacerbate conflict rather than ameliorate it. Stated simply, society is not well served when markets become sites of religious martyrdom. Ideally, the market should resemble the idealized Royal Exchange of Voltaire not the Circus Maximus of Nero. To LGBT-rights activists, any suggestion that religious business owners are being persecuted for complying with antidiscrimination laws is ridiculous. Such laws, they insist, are not designed to punish believers but to vindicate the rights of gay citizens. This response, however, misses the point. Within religious communities, those who face legal sanctions rather than engaging in conduct that they regard as sinful will be lionized as heroes and martyrs regardless of what gay-rights advocates say. History suggests that religious conduct that is legally sanctioned becomes more, rather than less, religiously salient.¹¹⁵ When the market becomes the site where religiously motivated conduct is punished, commerce is

114. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 58–83 (1999) (documenting violence and discrimination against gays and lesbians).

115. Examples could be endlessly multiplied. Think of the Old Believers and Orthodox believers in Russia who stubbornly clung to their beards. See ROBERT K. MASSIE, *PETER THE GREAT: HIS LIFE AND WORLD* 234–36 (1980) (recounting Peter the Great’s attempt to force Russians to shave their beards). Contemporary French efforts to ban students from publically wearing the hijab provide another example. See, e.g., Angélique Chrisafis, *French PM Calls for Ban on Islamic Headscarves at Universities*, *GUARDIAN* (Apr. 13, 2016, 7:23 PM), <https://www.theguardian.com/world/2016/apr/13/french-pm-ban-islamic-headscarves-universities-manuel-valls> [<https://perma.cc/Y2SD-DZHQ>].

transformed into another front in the culture wars rather than a mechanism for managing pluralism. This doesn't mean that the claims of religious believers should always triumph. As noted above, widespread access to the market must trump other concerns. Nevertheless, the *doux-commerce* theory provides reasons why religious exemptions are valuable if they do not threaten others' ability to participate meaningfully in commerce.

As an empirical matter, how common is discrimination by businesses against gay and lesbian customers? Sizeable majorities of Americans believe that gays and lesbians face significant levels of discrimination.¹¹⁶ The research on discrimination based on sexual orientation, however, has overwhelmingly focused on employment and workplace discrimination.¹¹⁷ There has been surprisingly little research on the scope of discrimination by businesses against gay or lesbian customers. In her book-length treatment of the economic lives of gays and lesbians, for example, M.V. Lee Badgett discusses discrimination against gay customers only briefly in passing, and in outlining legislative proposals to increase the economic well-being of gays and lesbians, she does not mention antidiscrimination laws targeting businesses' interactions with customers.¹¹⁸ To be sure, there is some evidence of such discrimination. In the past, governments have targeted businesses that catered to gays and lesbians.¹¹⁹ Such legal impediments, however, have largely disappeared.¹²⁰ Two "tester" studies attempted to show the extent of discrimination against gay customers. One study found no cases in which a business refused services to gay customers, although store attendants were slightly slower in approaching same-sex couples.¹²¹ The other study, this time of hotels, found that overtly gay customers were refused accommodations at somewhat higher rates than heterosexual couples, although the size of the

116. See PEW RESEARCH CTR., PUBLIC SEES RELIGION'S INFLUENCE WANING 16 (2014), <http://www.pewforum.org/files/2014/09/Religion-Politics-09-24-PDF-for-web.pdf> [<https://perma.cc/R4KB-9DGT>] ("About two-thirds of Americans think gays and lesbians face a lot of discrimination in the U.S. today (65%) . . .").

117. See S. REP. NO. 113-105 (2013), <https://www.congress.gov/113/crpt/srpt105/CRPT-113srpt105.pdf> [<https://perma.cc/LY4M-Q53Z>] (summarizing research on employment discrimination on the basis of sexual orientation in response to the Employment Non-Discrimination Act of 2013); M. V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 20-51 (2001) (discussing the effects of employment discrimination on LGBT incomes).

118. See BADGETT, *supra* note 117, at 125 (discussing discrimination against gay customers).

119. See *id.* at 106 ("Until the 1960s, the expansion of these public sites of gay consumption and identity formation was limited by police harassment, practices of extortion, laws against homosexual sodomy, and pressure from liquor control boards.").

120. See, e.g., *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 13 (N.J. 1967) (holding that the state liquor licensing authorities could not discipline gay bars because they permitted "apparent homosexuals to congregate"); see also *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (striking down as unconstitutional a law that the Court deemed to be motivated by *antigay animus*).

121. See Andrew S. Walters & Maria-Cristina Curran, 'Excuse Me, Sir? May I Help You and Your Boyfriend?': Salespersons' Differential Treatment of Homosexual and Straight Customers, 31 J. HOMOSEXUALITY, nos. 1/2, 1996, at 135.

differential was unclear.¹²² The Pew Forum's 2013 survey of LGBT Americans reported that twenty-three percent of respondents had "[r]eceived poor service in a restaurant, hotel, place of business" because of their sexual identity.¹²³ The study, however, did not ask respondents whether they had ever been refused service.

It is difficult to know what to make of the empirical evidence. The lack of research on discrimination by businesses is likely the result of a kind of intellectual triage by scholars interested in LGBT rights, focusing on employment because that is the area with the greatest impact on the economic well-being of gays and lesbians.¹²⁴ Likewise, gays and lesbians may be able to avoid situations where they are refused service by cloaking their sexual identity or consciously avoiding businesses that discriminate.¹²⁵ The fact remains, however, that there is no evidence of widespread denials of service to gay customers. Unlike African Americans in 1963, gays and lesbians do not seem to operate in a market where they face ubiquitous refusals by a large segment of businesses to serve them. There is evidence that discrimination in fields such as housing and employment have serious, negative consequences on the material well-being of gays and lesbians.¹²⁶ Likewise, there is evidence of subtle forms of discrimination against gay customers, but not of the sort that antidiscrimination laws can effectively remedy.¹²⁷ Making rude service into a legal wrong is a fruitless enterprise. On the other hand slurs, verbal attacks, or threats can be more effectively addressed through the tort of intentional infliction of emotional distress or the criminal law, if the threats rise to the level of assault.¹²⁸

Of course, it is unreasonable to demand that all laws be justified by comprehensive, empirical studies with statistically significant results. Often, lawmakers, of necessity, act based on anecdotes and less rigorous social observation.

122. See David A. Jones, *Discrimination Against Same-Sex Couples in Hotel Reservation Policies*, 31 J. HOMOSEXUALITY, nos. 1/2, 1996, at 153, 155–57 (1996). The study involved contacting hotels via letter and soliciting a response via a self-addressed stamped envelope. The difficulty comes in how to interpret the many hotels that never responded to the query. The authors coded all of these responses as rejections, although some of them may have simply been hotels uninterested in the hassle of corresponding with potential customers. *Id.* at 158.

123. PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 41 (2013), http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf [https://perma.cc/EY4B-DAMF].

124. The popular stereotype of gays and lesbians as affluent is complicated by fuller economic data. See BADGETT, *supra* note 117, at 117–21. Lee Badgett attributes this difference to employment discrimination. See *id.* at 46–47. More recent data shows that while gay or lesbian individuals earn less on average than the population as a whole, gay couples earn more than heterosexual couples. See PEW RESEARCH CTR., *supra* note 123, at 27 (“Same-sex couples bring in an average of \$107,000 a year, compared with \$96,000 for opposite-sex married couples and \$65,000 for opposite-sex unmarried couples [in 2011].”).

125. I am grateful to Lee Badgett for pointing out this possibility to me in an email exchange.

126. See BADGETT, *supra* note 117, at 20–50.

127. See generally Walters & Curran, *supra* note 121 (finding that store employees delayed approaching apparently gay or lesbian customers).

128. Cf. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing in favor of a tort cause of action for extreme and insulting racist speech directed at individuals).

Given the historical animus against gays and lesbians, it is not unreasonable to suppose that laws outlawing discrimination by businesses against gay and lesbian customers would enhance their participation in commerce. My point, however, is that we should be careful about overstating the necessity for such laws. Indeed, while there are very few studies finding discrimination by businesses against gay or lesbian customers, there is an extensive marketing literature on how businesses can reach out to such customers.¹²⁹ Much of this work is based on inaccurate hype generated by marketing firms about the purchasing power of gay or lesbian consumers, but it does suggest that, by and large, businesses are mainly interested in getting gay dollars rather than refusing gay customers.¹³⁰ Even if one believes that it is implausible that market competition will eliminate discrimination against gay employees, the available evidence suggests that markets have done a fairly good job of eliminating denials of service to gay and lesbian customers.¹³¹

The second empirical question is the likelihood that large numbers of religious believers would avail themselves of a religious exemption from antidiscrimination laws to avoid participating in same-sex weddings. Currently, there is no evidence of frequent denials of services by wedding-industry professionals to same-sex couples. One hundred and thirty-two thousand same-sex couples identified themselves as married in the 2010 Census.¹³² Of the tens of thousands of same-sex weddings that have occurred in the United States as of 2016, only a handful seem to have run into business owners with a religious objection to participating commercially in the nuptial festivities and sued them.¹³³ The current evidence suggests that even among those with religious objections to same-sex marriage, very few people would deny services associated with same-sex weddings. Thirty-nine percent of Americans opposed same-sex marriage before *Obergefell*,¹³⁴ and “[o]ne of the strongest factors underlying views of same-sex marriage is religion, and the sense that homosexuality is in conflict with one’s religious beliefs.”¹³⁵ Given the widespread religious opposition

129. See generally Lisa Peñaloza, *We’re Here, We’re Queer, and We’re Going Shopping! A Critical Perspective on the Accommodation of Gays and Lesbians in the U.S. Marketplace*, 31 J. HOMOSEXUALITY, nos. 1/2, 1996, at 9 (providing a critical summary of this literature).

130. See BADGETT, *supra* note 117, at 102–32 (providing a comprehensive critique of the myth of the affluent gay consumer).

131. Compare Sunstein, *supra* note 108 (arguing that markets will not eliminate employment discrimination), with BADGETT, *supra* note 117, at 38–45 (arguing that market competition will eliminate employment discrimination only slowly).

132. PEW RESEARCH CTR., *supra* note 123, at 25. In 2010, there were fewer than 50,000 legally recognized same-sex marriages performed in the United States. See *id.* at 25 n.6. The self-reported number, however, is a better indicator of the social—as opposed to the legal—salience of same-sex marriage. Also, because the wedding industry is involved with weddings regardless of whether they are legally recognized, the self-reported number is a better indicator of the potential scope of conflicts. The commitment ceremony at issue in the *Elane Photography* case, for example, arose before New Mexico recognized same-sex marriage.

133. See Koppelman, *supra* note 36, at 643.

134. PEW RESEARCH CTR., SUPPORT FOR SAME-SEX MARRIAGE AT RECORD HIGH, BUT KEY SEGMENTS REMAIN OPPOSED 1 (2015), <http://www.people-press.org/files/2015/06/6-8-15-Same-sex-marriage-release1.pdf> [<https://perma.cc/YY3C-ZKNL>].

135. *Id.* at 3.

to same-sex marriage, we would expect there to be ubiquitous denials of service to gay couples if such beliefs were regularly translated into discriminatory commercial conduct. Such is not the case.

Same-sex marriage is in its infancy, however. In all likelihood, the norms among the minority of religious believers that object to same-sex marriage are in the process of coalescing. Hence, it is possible that a strong norm of refusing to provide services to gay couples could develop among conservative religious wedding professionals. No such norm currently seems to exist, but one might object to granting religious exemptions from antidiscrimination laws on the ground that the law must nip such a norm in the bud before it can take root among conservative religious believers.¹³⁶ This is a valid concern to the extent that such a norm might result in significant problems of access to wedding-related services in regions dominated by conservative religious believers.

Nevertheless, there are three reasons to be skeptical of this argument. First, legally punishing religiously motivated conduct is likely to make it more, rather than less, salient for religious believers, as it plays into well-established narratives of religious persecution by the state.¹³⁷ This suggests that punishing religious behavior is likely to be counterproductive from the point of view of weakening religious norms around that behavior. Second, even were such a norm to become entrenched, religious exemptions would still not threaten meaningful access to services in areas with relatively few conservative religious believers. Third, there is reason to believe that such a norm is not currently taking root in conservative religious communities. One

136. Professor Frederick Mark Gedicks has made this argument. *See Koppelman, supra* note 36, at 644 (recounting Gedicks's argument).

137. *But see* Melling, *supra* note 41, at 191–92 (arguing that granting exemptions will slow the pace of social change). One might counter the claim that legally sanctioning religiously motivated conduct will tend to entrench that conduct's religious salience by pointing to the example of Bob Jones University, which has formally renounced its prohibition against interracial dating despite fighting the loss of its tax-exempt status over this prohibition to the Supreme Court. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983). However, it is by no means clear that the loss of tax-exempt status hastened the change in Bob Jones University's policy, which did not happen until 2000, three decades after the IRS initially moved against it. Having ideologically invested so much in the issue during the battles with the IRS, it is equally likely that government action slowed change at Bob Jones University.

One might also believe that conservative religious groups will abandon their moral objections to homosexuality and same-sex marriage if they are not coddled with religious exemptions. Several religious traditions have, in fact, altered their teachings on sexual morality to accommodate shifting attitudes toward homosexuality and other sexual behavior. These groups, however, were not responding to antidiscrimination laws. Furthermore, religious norms around sexuality may prove particularly hardy. We are now two generations removed from the Sexual Revolution's initial attacks on notions of chastity, which links licit sexual activity to heterosexual marriage, yet chastity remains an important moral ideal for many conservative religious believers. Sexual orientation presents a different set of challenges to this ethic, but it would be a mistake to suppose that conservative religious sexual moralities are epiphenomenal teachings that will be rapidly discarded. Continued opposition by some religious believers to the sundering of the link between marriage and licit sexual activity suggests that these teachings are considerably more durable than the flimsy racist theologies that have been almost universally abandoned over the same period.

researcher, for example, was unable to locate any hotels or bed-and-breakfasts that refused to provide services for a same-sex wedding in the very religiously conservative region of southern Utah.¹³⁸ Slightly less than half of Americans support allowing those with religious objections to refuse to provide services to a same-sex wedding, but it appears that only a tiny fraction of Americans actually have any interest in denying services themselves.¹³⁹

Finally, we have reason to believe that there is regional variation both in the need for antidiscrimination laws and the way that religious exemptions might interact with those laws in practice. Given the paucity of data on discrimination by businesses against gay or lesbian customers, it is impossible to accurately quantify the regional likelihood of discrimination. The Pew Research Center's study of the experience of LGBT Americans found that respondents in the South were roughly 50% more likely to report discrimination of any kind than respondents in the Northeast or Midwest.¹⁴⁰ Likewise, we know that religious opposition to same-sex marriage is not distributed evenly across the country.¹⁴¹ The irony is that religious exemptions from anti-discrimination laws are least likely to be adopted in those jurisdictions where they pose the least threat, and antidiscrimination laws are least likely to be adopted in those regions where they would be needed most. As a practical matter, however, crafting limited religious exemptions from antidiscrimination statutes is probably the

138. See Chapman, *supra* note 19, at 1821–22. It must be emphasized, however, that Chapman's study made no attempt at systematic rigor and at best is a striking anecdote.

139. See Michael Lipka, *Americans Split over whether Businesses Must Serve Same-Sex Couples*, PEW RES. CTR. (Mar. 30, 2015), <http://www.pewresearch.org/fact-tank/2015/03/30/businesses-serving-same-sex-couples/> [<https://perma.cc/B87D-NP9X>] (noting that 47% of Americans would allow the business to refuse services and 49% would require the business to provide services). Rasmussen Reports ran a poll based on the *Elane Photography* facts in 2013, 2014, and 2015 asking if the photographer has the right to turn down the job and reports 85%, 73%, and 70% respectively of respondents in the three years favored the photographer. See *Do You Want a Religious Freedom Law in Your State*, RASMUSSEN REP. (Apr. 1, 2015), http://www.rasmussenreports.com/public_content/politics/general_politics/march_2015/do_you_want_a_religious_freedom_law_in_your_state [<https://perma.cc/K7UQ-CZT8>]. It is possible that the respondents thought they were being asked the current state of the law rather than for their own opinion, although Rasmussen also reports that 19% of respondents in 2015 “believe the Christian photographer should not have the right to turn down a same-sex wedding job, while 12% are not sure.” *Id.*

140. The Pew report stated:

LGBT adults living in the South are more likely than those living in the Northeast and Midwest to have experienced four or more of these incidents—29% vs. 18% for the Northeast and 19% for the Midwest. LGBT adults living in the West are not statistically different from any of the three regional groups in this regard (22% say they've experienced four or more of these incidents).

PEW RESEARCH CTR., *supra* note 123, at 43. The “incidents” referred to consist of having ever “[b]een subject to slurs or jokes”; “[b]een rejected by a friend or family member”; “[b]een threatened or physically attacked”; “[b]een made to feel unwelcome at a place of worship”; “[r]eceived poor service in a restaurants, hotel, place of business”; and “[b]een treated unfairly by an employer” because of sexual orientation. See *id.* at 41. The survey did not ask about refusals of service.

141. See Chapman, *supra* note 19, at 1795–1801 (providing a detailed breakdown of religious and political attitudes towards same-sex marriage and homosexuality by state).

most likely route toward getting them adopted in regions where they may be needed.¹⁴²

This analysis suggests that the proper balance between antidiscrimination laws and religious exemptions will vary from community to community and from market to market.¹⁴³ In places where there is widespread hostility to gays and lesbians, pervasive discrimination against gay customers may pose significant limits on the ability of gay citizens to participate in commercial life, although it is difficult to find evidence of such markets. Such a market will have less ability to “gentle” manners, and its ability to facilitate peaceful cooperation will be significantly limited. In such places, there is a more compelling case for antidiscrimination laws. Furthermore, religious exemptions from those laws must be narrowly cabined if we are to maintain meaningful access to the market in areas where such exemptions would be routinely invoked. These are also communities where market forces are least likely to guarantee meaningful access. If a significant portion of the population consists of religious believers that will invoke such exemptions, then they may need to be eliminated in their entirety. If, on the other hand, hostility to gay and lesbian customers by businesses is rare in the markets, then the case for antidiscrimination laws weakens considerably. Likewise, in those markets, the case for religious exemptions is stronger. Such exemptions will be invoked infrequently, and their existence will not meaningfully threaten access to the market. Furthermore, these are also the situations in which market pressure is most likely to be effective in limiting religiously motivated discrimination.

C. Objections and Responses

Such a framework will necessarily result in laws whose coverage varies and will require lawmakers—whether legislative, administrative, or judicial—to make ad hoc decisions based on local circumstances. One might object that such an approach faces three difficulties: First, we lack clear criteria as to what constitutes “meaningful access” and when that access is threatened. Second, antidiscrimination laws cannot create meaningful changes in the market if their coverage isn’t complete. Third, such an approach fails to properly respect the dignity of either the victims of discrimination or conscientious objectors to antidiscrimination laws, whose sincerely held religious beliefs are violated.

While I cannot claim to have an algorithm that specifies when discrimination

142. The Utah experience is instructive here. Despite having an extremely conservative and religious population, the state legislature adopted an antidiscrimination law creating employment and housing protections for gays, lesbians, bisexuals, and transsexuals. The law passed with the very active support of the Mormon Church. Exempting religious organizations from the law’s reach was key to creating the coalition in favor of its passage. See Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. TIMES (Mar. 12, 2015), http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?_r=2 [https://perma.cc/D3CJ-CBYS]. Of course, the law does not deal with discrimination against customers, so it does not directly implicate the questions addressed in this article, but it does suggest a political dynamic that could result in greater legal protections for LGBT citizens.

143. See Laycock, *supra* note 66, at 197–201.

poses a threat to meaningful participation in the market, analogies to antitrust law can at least guide our judgments in this situation. Of course, because the goals of antitrust law center mainly on market efficiency, the analogy to the *doux-commerce* argument is imperfect, but it does provide a useful starting place. Federal antitrust law prohibits firms with market power from abusing that power. It thus requires both a definition of the market and a test for determining when a firm has market power. To massively oversimplify, antitrust law defines the given market for a firm as consisting of those firms that can readily supply substitutes for the firm's goods and services.¹⁴⁴ Market power, in turn, is defined as "the ability to raise prices by restricting output."¹⁴⁵ These concepts can be applied in a very rough way to debates over the proper scope of antidiscrimination laws.

When asking if discrimination poses a threat to meaningful access, we define the market as the sphere in which those similarly situated to the targets of discrimination normally shop. Of course, by assuming ever greater investment in searching for alternative providers, the definition of the market can be expanded, and as the Supreme Court has acknowledged in the antitrust context, the precise contours of any given market are fuzzy.¹⁴⁶ Using the behavior of similarly situated consumers not subject to discrimination, however, provides a baseline. In defining the market, it would be a mistake to impose on targets of discrimination heroic search requirements that we do not assume other market participants are shouldering. Evidence that discrimination has an effect on prices faced by gays and lesbians would provide powerful evidence in support of the claim that discrimination threatens meaningful access.¹⁴⁷ Discrimination could also be said to threaten meaningful access when it imposes on gays and lesbians materially higher search costs than similarly situated participants in the market. Minor or *de minimis* additional costs do not threaten meaningful access. Concluding otherwise implies that every instance of discrimination, no matter how isolated or rare, threatens meaningful participation. On the other hand, demanding that additional search costs be substantial would create an unnecessarily heavy presumption against antidiscrimination laws.¹⁴⁸ Hence, while the *doux-commerce*

144. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 5.02a (2002) ("Thus, a market is the arena within which significant substitution in consumption or production occurs.").

145. *Id.* at § 5.01.

146. See *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 667 (1974) (expressing some doubt as to the precise scope of the market in relationship to a proposed merger); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 n.36 (1963) (same); *Brown Shoe Co. v. United States*, 370 U.S. 294, 340–41 (1962) (same); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 330–32 (1961) (expressing some doubt as to the precise scope of the market in the case of a contract challenged under the Clayton Act).

147. This is the approach taken in demonstrating the existence of substantial discrimination against gays and lesbians in the employment context. There, the guiding assumption is that wage differentials faced by gays and lesbians after controlling for other factors are evidence of discrimination. See BADGETT, *supra* note 117, at 45–47 (discussing the research on employment discrimination on the basis of sexual orientation).

148. It is important to note that search costs and prices are in some sense substitutes for one another in this argument. Price differentials could be evidence of discrimination in the absence of increased search costs and vice versa.

argument has a strong presumption in favor of freedom of contract, it does not place unduly high hurdles in the way of justifying antidiscrimination laws.

Proponents of a public theory might argue that just as any discrimination by the government among its citizens based on race, religion, gender, ethnicity, or sexual orientation is impermissible, any discrimination by market actors is also unacceptable. While there is an appealing conceptual purity to such a position, it would represent a radical departure from how antidiscrimination laws have typically been applied. First, those laws have always left huge classes of market actors unaffected. Most dramatically, employees and customers have never been subject to such laws. The racist who refuses to work for a black employer commits no legal wrong. The same is true if he refuses to patronize an African American-owned business. Likewise, Title II of the 1964 Civil Rights Act does not apply generally to all businesses.¹⁴⁹ More subtly, determining the proper level of sanctions for violations of antidiscrimination laws always involves judgments about the acceptable level of discrimination. The central insight of Gary Becker's pioneering work on the economics of punishment is that, in setting sanctions, we are always making a judgment as to the acceptable level of some evil.¹⁵⁰ Insisting on "meaningful access" to the market is not an algorithm but a rule of thumb, one that focuses our attention on the proper concern. Calls to eradicate all discrimination have an algorithmic character, but in light of experience and the limitations of the law as a system of social control, they cannot be taken seriously.

Experience under the 1964 Civil Rights Act and antidiscrimination laws belies the claim that gaps in the coverage of such laws renders them ineffective. Without denying or belittling the barriers to opportunity faced by African Americans, the 1964 Civil Rights Act has been incredibly successful in dismantling the system of segregated businesses and wholesale exclusion from much of economic life that characterized Jim Crow.¹⁵¹ Yet the scope of the 1964 Act was limited. Most tellingly,

149. See 42 U.S.C. § 2000a(b) (2012) ("Each of the following establishments . . . is a place of public accommodation . . . any inn, hotel, motel . . . ; any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ; any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and any establishment which is physically located within the premises of any establishment otherwise covered . . . and which holds itself out as serving patrons of such covered establishment.").

150. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1* (Gary S. Becker & William M. Landes eds., 1974).

151. See James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 *YALE L. & POL'Y REV.* 276, 281 (1990) (documenting the large jump in average wages for African Americans associated with the passage of the 1964 Civil Rights Act). In historical terms, the system of formally segregated businesses in the South and elsewhere in the country collapsed so rapidly that Title II of the 1964 Civil Rights Act garners very little scholarly or political attention today. See Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has To Teach Environmentalists Today*, 31 *ENVTL. L.* 229, 305 (2001) ("Partially because the 1964 Civil Rights Act's ban on segregation in public accommodations achieved success so quickly, the Act's most powerful provision today is Title VII . . .").

it did not ban discrimination against customers on the basis of race in all businesses but only in hotels, restaurants, and places of public entertainment. The Supreme Court did hold in 1975 that the 1866 Civil Rights Act, which states that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens,”¹⁵² prohibits racial discrimination in private contracting,¹⁵³ but that law does not reach discrimination based on religion, gender, or national origin.¹⁵⁴ The single greatest testament to the success of these laws, despite gaps in their coverage, is that there is no organized effort to expand Title II to cover all businesses. The issue has essentially no political salience today. Indeed, most people would be surprised to learn that federal law does not generally ban discrimination by retailers. Likewise, even legally sophisticated parties are surprised to learn that Title II of the Civil Rights Act of 1964, which deals with public accommodations, does not ban discrimination on the basis of sex.¹⁵⁵ The combination of commercial pressure and antidiscrimination laws covering key sectors of the market is sufficient to ensure access. Indeed, antidiscrimination laws have always included exemptions of various kinds. Federal antidiscrimination laws exempt religious institutions from aspects of their coverage.¹⁵⁶ Laws prohibiting housing discrimination routinely exempt owner-occupied dwellings or small commercial units.¹⁵⁷

152. See 42 U.S.C. § 1981(a) (2012); see also § 1981(c) (“The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”).

153. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (finding that 42 U.S.C. § 1981 provided a private cause of action against a private, for-profit school that discriminated on the basis of race and upholding such authority); *Johnson v. Ry. Express Agency*, 421 U.S. 454, 459–60 (1975) (holding that 42 U.S.C. § 1981 provided a cause of action for private employment discrimination based on race independent of the cause of action provided under Title VII).

154. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (“If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.”).

155. See, e.g., Mike Dorf, *Arizona SB 1062 Post-Mortem: Statewide, It Would Chiefly Have Licensed Sex Discrimination. That’s Right, Sex Discrimination*, DORF ON LAW (Feb. 26, 2014), <http://www.dorfonlaw.org/2014/02/arizona-sb-1062-post-mortem-it-would.html> [https://perma.cc/4Z7A-LFWZ] (“My first thought on making this discovery was ‘Really?’ It doesn’t violate federal law for a restaurant to keep out female customers? Holy crap! Why didn’t I know that?”); see also 42 U.S.C. § 2000a(a) (2012) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

156. See 42 U.S.C. § 2000e-1(a) (2012) (“This subchapter [i.e., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (holding that the religious exemption to Title VII does not violate the Establishment Clause).

157. See, e.g., CONN. GEN. STAT. § 46a-64c(b)(1) (West Supp. 2016) (“The provisions of this section shall not apply to (A) the rental of a room or rooms in a single-family dwelling

Ardent supporters of the public theory of the market are likely to object that the *doux commerce* approach, by making the extent of both antidiscrimination laws and religious exemptions empirically contingent, fails to properly recognize the dignity of the individual. Chai Feldblum writes:

If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table, or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.¹⁵⁸

These objections are not without substance. The targets of religiously motivated discrimination can insist that for market actors to refuse to contract with them is humiliating. If the law tolerates such behavior, it refuses to protect gays and lesbians against these psychic harms.¹⁵⁹ This refusal is an affront to their dignity.

Notice, however, that the claims of individual dignity can be arrayed on both sides of the question. The conscientious objector can insist that an appreciation for individual dignity demands that we accommodate religious conscience. To coerce or punish someone whose behavior is dictated by conscience fails to treat their choices and their religious identity with respect. Indeed, gay-rights advocates themselves reject the idea that one can sanction or discriminate on the basis of homosexual conduct without discriminating on the basis of sexual orientation.¹⁶⁰ As Thomas Berg points out, “Religious liberty claims face similar attempts to dismiss them as conduct, subject to any and all state regulation.”¹⁶¹ The dignity of a religious believer told that

unit if the owner actually maintains and occupies part of such living quarters as his residence or (B) a unit in a dwelling containing living quarters occupied or intended to be occupied by no more than two families living independently of each other, if the owner actually maintains and occupies the other such living quarters as his residence.”).

158. Feldblum, *supra* note 41, at 153.

159. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 210 (1995) (“Discrimination has both instrumental and symbolic consequences. . . . [D]iscrimination is about insult and psychic injury as well as access to goods, and the state’s interest in avoiding those harms may be very strong indeed.”).

160. As Feldblum puts the point:

Particularly as a means of dealing with the holding in *Bowers v. Hardwick*, some legal advocates had argued that their clients should not be discriminated against for the *status* of being gay, although they deliberately failed to claim equal non-discrimination rights for their clients’ rights to engage in gay *conduct*. From the moment I became aware of this legal approach, I have detested it and argued against it. It seemed to me the height of disingenuousness, absurdity, and indeed, disrespect to tell someone that it is permissible to “be” gay, but not permissible to engage in gay sex. What do they think being gay *means*?

Feldblum, *supra* note 41, at 142–43 (emphasis in original) (footnotes omitted).

161. Berg, *supra* note 41, at 214. To her credit, Feldblum acknowledges this symmetry, nevertheless insisting that antidiscrimination laws should triumph over conflicting claims of religious believers’ dignity. See Feldblum, *supra* note 41, at 142–55. Other opponents of

she may have her beliefs in private but will be punished or driven out of business if she acts out those beliefs in her commercial life is not respected. Taken in purely individualistic terms, it is difficult to determine whose dignity suffers the greatest affront or even if the dignity of one actor can be traded off against another actor.¹⁶² At worst, such disputes degenerate into mere tribalism, with “dignity” acting as little more than a label signifying the tribe with which the speaker most closely identifies. The indifference of the *doux-commerce* argument to the claims of personal affronts to dignity is thus a conceptual advantage, not a weakness.¹⁶³ Peaceful and productive cooperation in a pluralistic society is a sufficiently ambitious goal.

In fairness, I should note that there is nothing in the *doux-commerce* theory that limits this analysis to discrimination based on sexual orientation.¹⁶⁴ Consider Title II of 1964 Civil Rights Act, which bans racial discrimination in public accommodations. In his concurrence in *Heart of Atlanta Motel, Inc. v. United States*, which upheld the constitutionality of the 1964 Act, Justice Goldberg quoted the Senate Commerce Committee:

The primary purpose . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment

religious exemptions, however, have acknowledged the problem of limiting gay rights to a purely private sphere while failing to recognize the symmetrical structure of religious believers concerns with a purely privatized or internal religious faith. Compare Underkuffler, *supra* note 41, at 2077 (“If the discrimination [against a religious person] is truly rooted in the individual’s conduct, and not in religious affiliation or identity, then it is not odious discrimination in the way that term is understood here.”) (emphasis in original), *with id.* at 2082 (arguing that “[c]onduct may be part of gay or lesbian sexual orientation, but that conduct is simply an expression of who that person is” and that “[h]atred’s targeting of status is primitive, and its condemnation of behavior an ideologically inspired afterthought” (quoting RICHARD MOHR, *A MORE PERFECT UNION: WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS* 65–66 (1994))).

162. As should be clear from the proceeding section, I don’t believe that it is impossible to make defensible choices in favor of the claims of one group or another. I am skeptical, however, that we can do so based on competing individual claims to affronted dignity. Cf. Koppelman, *supra* note 36, at 620 (arguing that antidiscrimination laws should be thought of as a tool for systemic social engineering rather than providing individual recourse for a tort-like wrong).

163. I admire the intellectual honesty of both Thomas Berg and Chai Feldblum in forthrightly acknowledging the symmetrical structure of claims by gays and lesbians and religious believers. I find it striking that while their analysis is very similar, they come to diametrically opposed conclusions, and I do not believe that either of them offers a compelling reason grounded in concern for personal dignity for preferring the claims of one group over those of the other.

164. See Melling, *supra* note 41, at 180–83 (accusing those favoring religious accommodations of refusing to apply their analysis to antidiscrimination law outside of the context of sexual orientation); Underkuffler, *supra* note 41, at 2083 (same). But see EPSTEIN, *supra* note 67, at 1–12 (criticizing antidiscrimination law generally); Epstein, *supra* note 67, at 1246–49 (same).

that a person must surely feel when he is told that he is unacceptable as a member of the public¹⁶⁵

The system of racial segregation attacked by Title II was deeply unjust. In this, I agree with Justice Goldberg. The injustice, however, did not arise from the fact that occasionally African Americans encountered racist business owners that denied them service.¹⁶⁶ To that extent, I believe Justice Goldberg was mistaken.

Rather, the injustice of segregation in the market arose from the fact that African Americans had to operate in a society in which there were pervasive denials of their access to goods and services. The problem was not individual acts of discrimination, but a market so infested with institutions and practices based on white supremacy that it denied African Americans meaningful economic opportunity.¹⁶⁷ Furthermore, given the pervasiveness of discrimination against African Americans, Congress was correct to grant only very limited religious exemptions from the 1964 Civil Rights Act. It is difficult to know for certain, but given the common religious justifications for segregation, coupled with the reality of pervasive discrimination by employers and businesses, it would have been reasonable to suppose that more generous exemptions would have been widely invoked.

Such conclusions, however, are empirically contingent. If I may be forgiven a personal example, as a college student I was explicitly told by a landlord that he did not wish to rent to me because of my religion. Notwithstanding the landlord's action, however, I continued to operate in a world where the market provided me with ample opportunities. This was literally a once-in-a-life-time experience that did not meaningfully restrict my ability to lead a productive and prosperous life. In short, my position was emphatically different than the position of an African American turned away from a lunch counter in 1963. This does not mean that vicious verbal attacks on individual dignity should be left without a legal remedy. The proper remedy for such attacks, however, lies with torts such as the intentional infliction of emotional distress.¹⁶⁸ Indeed, elsewhere, I have been critical of the Supreme Court's limiting of such torts on free-speech grounds.¹⁶⁹

165. 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

166. Indeed, encountering those with objectionable opinions is part of living in a pluralistic society, and generally free speech values keep us from providing legal relief from “the humiliation, frustration, and embarrassment” that a person feels “when he is told” something by another. Even speech torts like intentional infliction of emotional distress require greater individualized harm than Justice Goldberg suggests here.

167. This point should be clear when one considers the concerns that remain for African American equality in a world in which businesses willingly provide them with services, but where deficiencies of educational and economic opportunity continue to condemn millions of black citizens to poverty.

168. Richard Delgado, for example, has argued that when individuals are subject to extreme and targeted racial insults, they should be given a tort cause of action. *See* Delgado, *supra* note 128, at 134–35.

169. *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1125–57 (2013) (attacking the Supreme Court's decision in *Snyder v. Phelps*, which denied individual recourse by the targets of vicious homophobic attacks by the Westboro Baptist Church).

The humdrum, ideologically blasé world of commerce has its own dignity, not because it instantiates some thick account of what it means to respect someone's deepest identity but because it allows for peaceful cooperation in the face of pervasive disagreement on deeper questions. Hence, while the *doux-commerce* argument provides no way of prioritizing the claims of affronts to individual dignity, it can balance the claims of antidiscrimination and religious conscience. It does so, however, socially and in terms of the market as a whole rather than any particular individual.¹⁷⁰ The targets of religiously motivated discrimination are entitled to protection when their ability to participate fully in the market is threatened. In such cases, the dignity of religious objectors must be subordinated to the requirements of peaceful commerce. Doing so, however, is not a judgment on the value of their personal dignity but on the effects of their behavior on the shape of the market. Likewise, where gays and lesbians enjoy broad access to goods and services and religious objectors to providing wedding cakes or nuptial photographs are rare, the *doux-commerce* argument provides no reason for punishing those who refuse to contract on the basis of religious belief. This is not a judgment as to the worth or dignity of gays and lesbians. Rather, it is a judgment that the market is functioning as it should and that in the end ordinary commercial intercourse will do more to soften the edges of religious conviction than will fines and lawsuits.¹⁷¹

CONCLUSION

Discussions of law and religion should encompass more than debates about the relationship between church and state. In the modern world, much of the regulatory energy of the state is devoted toward shaping the character of the market. Not surprisingly, many of the flash points in current debates over law and religion arise in a commercial context. We face questions not merely of whether and how the state may regulate religious conduct or whether and how the state's conduct may be infused

170. The *doux-commerce* argument for antidiscrimination laws is analogous to representation-reinforcing theory of judicial review, which argues that courts should overturn ordinary political outcomes only to keep open the channels of the democratic process. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Analogous to constitutional arguments made by John Ely and others, I am arguing that the purpose of antidiscrimination laws is not to eradicate individual encounters with prejudice in the marketplace, but to clear the channels of commerce to ensure that all have meaningful access to the market. Notice that in both arguments, the redress of individual rights violations is subordinated to systemic concerns. *Cf.* Laycock, *supra* note 66, at 200 (arguing that religious believers cannot be allowed to close off "choke points" in the market based on their religious beliefs). I'm grateful to my colleagues Tara Grove and Allison Larsen for pointing out this connection.

171. Such a view isn't, of course, neutral in any absolute sense. It assumes that neither same-sex couples nor religious objectors to same-sex marriage are so depraved that they must be driven from the public view or from the polity entirely. Such a judgment will offend zealots convinced that their cultural opponents must be suppressed or confined to the private sphere. *Cf.* Feldblum, *supra* note 41, at 130–34 (arguing that antidiscrimination laws covering sexual orientation cannot be understood as being entirely neutral on the morality of homosexual acts precisely because they allow at least for the toleration of such acts). *Doux commerce* is a way of handling deep pluralism rather than suppressing or minimizing it.

with religious content. We must also confront the question of how religion ought to relate to commercial life. What is the proper relationship between church and market?

Because markets are social creations, the laws that shape the market will determine the relationship between religion and commerce. To be sure, other factors—not the least of which is the content of the religious beliefs that command a significant following in society—will also determine this relationship.¹⁷² Nevertheless, every time the law regulates religious conduct in the market, it is consciously or unconsciously instantiating a view of how religion *ought* to relate to commerce. My central goal in this Article is to explicitly articulate what I take to be the implicit assumptions that frequently determine conclusions about how religious conduct in the market ought to be regulated, and defend my favored approach. The public and private theories that I have articulated are interpretive reconstructions rather than summaries of the positions explicitly espoused by others. Something like these assumptions, however, seems to lie behind many people's intuitions about these questions. On one side is the effort to extend liberal-democratic norms of institutional legitimacy into the market. On the other side are those who argue that markets ought to be creatures entirely of contract. As an alternative to these two approaches, I have articulated a *doux-commerce* theory that sees markets primarily in terms of their social functions but does not tie those functions to the instantiation of liberal-democratic norms.

Applying these three approaches to current debates about same-sex marriage, antidiscrimination laws, and religious accommodations yields three quite different results. The public theory is ambiguous. For some it counsels in favor of the aggressive application of antidiscrimination laws regardless of the background market conditions. Others argue that the liberal norms that ought to constrain market actors imply that religious conduct in the commercial sphere must be protected. The private theory by and large rejects the legitimacy of antidiscrimination laws as interfering with freedom of contract. The *doux-commerce* theory offers empirically contingent answers, depending on both the level of discrimination within society and the extent to which members of society hold particular religious beliefs. At the heart of this empirical balancing is the conviction that markets must be open to all but that eroding freedom of contract tends to undermine the ability of commerce to perform important work in a pluralistic society. Likewise, a pervasively religious market or one sharply divided along lines of identity poses its own threats to the ability of commerce to “gentle” our manners and promote peaceful cooperation. The goal is commerce where religious people are free to contract as they see fit, including on the basis of their religious convictions, but where religion does not dominate the market. Ideally, the law should facilitate a world where the majority of market actors take a distinctly blasé attitude toward religious, moral, ideological, and other differences.

172. For example, of necessity, the relationship between religion and commerce will look different if Amish rather than Muslims are the dominant religious group. The former as a matter of faith eschew much of commercial life while the faith of the latter is arguably particularly hospitable to commerce.