A ZOMBIE IN THE SUPREME COURT: THE *ELANE PHOTOGRAPHY* CERT DENIAL

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INTRODUCTION

One of the least interesting legal phenomena is a denial of certiorari by the Supreme Court. The Court has absolute control of its docket; it can decline to hear a case without explanation, and its denial of review is legally meaningless and has no precedential effect.[1] However, the recent cert. denial in *Elane Photography v. Willock*,[2] a case that presented a three-way collision between gay rights, religious liberty, and free speech, is a revealing window on the limits of constitutional lawmaking. The real issue in the case, the question of how gay people and religious conservatives can live out their ideals, was obscured by weak free speech claims. The Court was right to turn the case away.

In 2006, an Albuquerque wedding photographer declined to photograph a same-sex wedding, citing religious objections. The couple sued her for discrimination and won. The New Mexico Supreme Court rejected her religious accommodation claim. She asked the U.S. Supreme Court to intervene, claiming that the law was compelling her to convey a message with

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1. *See* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n.1 (1973) (referring to the "well-settled view that denial of certiorari imports no implication or inference concerning the Court's view of the merits"). *See generally* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 335-39 (10th ed. 2013).

2. Elane Photography v. Willock, 134 S. Ct. 1787 (2014) (mem.).

which she disagreed, in violation of the First Amendment. The Court denied certiorari in April, 2014.[3]

This produced consternation among religious conservatives. "Today's actions by the Supreme Court may unfortunately embolden some to expand their efforts to punish and humiliate publicly those who believe marriage is defined only as one man and one woman," declared Jordan Lorence, senior counsel for the Alliance Defending Freedom, which represented the photographer.[4] "Gay rights trump religious rights," Fox News columnist Todd Starnes wrote after the ruling.[5] "I believe militant gay rights groups . . . will start targeting pastors who preach against homosexuality. And I believe they will go after individuals who attend those kinds of churches."[6] "This ruling is more in the spirit of Nero Caesar than in the spirit of Thomas Jefferson," said Russell D. Moore, President of the Southern Baptist Ethics & Religious Liberty Commission.[7] "The Supreme Court did the wrong thing, and our cherished American principle of soul freedom is the victim of their neglect."[8]

The reconciliation of gay rights and religious liberty is an important and pressing question. But the cert. petition left it out of consideration. Instead, that question was displaced by weak free speech claims. This paradoxically meant that the Court could not hope to do justice to any of the real issues. The case as presented in the petition for cert. was a zombie: still moving, but without its soul.

I. GAY RIGHTS VERSUS RELIGIOUS LIBERTY?

In September, 2006, Vanessa Willock sent an email to a business called Elane Photography, asking it to photograph her wedding.[9] She indicated that

3. *Id.*

4. Jordan Lorence, *Supreme Court Turns Down Elane Photography Case*, NATIONAL REVIEW (Apr. 7, 2014), http://www.nationalreview.com/bench-memos/375210/supreme-court-turns-down-elane-photography-case-jordan-lorence.

5. Todd Starnes, *Do Gay Rights Trump Religious Rights? Supreme Court Won't Hear Wedding Photographers' Case*, FOX NEWS (Apr. 7, 2014), http://www.foxnews.com/opinion/2014/04/07/do-gay-rights-trump-religious-rights-supreme-court-wont-hear-wedding/.

6. *Id.*

7. Tom Strode, *Supreme Court Declines Photographers' Appeal*, BAPTIST PRESS (Apr. 7, 2014), http://www.bpnews.net/bpnews.asp?id=42326&ref=BPNews-RSSFeed0407.

8. *Id.*

9. Elane Photography v. Willcock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied,* 134 S. Ct. 1787 (2014).

she and her partner were a same-sex couple.[10] (Same-sex marriages were not then legally recognized in New Mexico, but that didn't stop same-sex couples from celebrating their unions.)[11] She received an emailed refusal, which explained that company policy forbids photographing same-sex weddings.[12] The company's owner, Elaine Huguenin, later testified that facilitating such a ceremony is contrary to her religious beliefs.[13]

Willock then brought a complaint with the state Human Rights Commission.[14] New Mexico law prohibits discrimination, on the basis of sexual orientation, by businesses that offer their services to the general public.[15] The Commission concluded that the discrimination violated the Act, and required Elane Photography to pay more than $6000 in attorney's fees and costs.[16] The district court granted summary judgment for Willock, and the state supreme court affirmed.[17] If Huguenin does not change her policy, she will either have to stop offering her services to the public or shut down her business altogether.[18]

This is only one of a number of episodes in which public accommodations laws have put pressure on traditionalist religious views. Other prominent recent stories include a florist who declined to provide flowers for a same-sex wedding, bakeries that refused to make wedding cakes, and a clothing store that refused to sell a bridal dress.[19]

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10. *Id.*

11. *See* Greigo v. Oliver, 316 P.3d 865 (N.M. 2013) (holding that the Equal Protection Clause of New Mexico requires recognition of same-sex marriage).

12. *Elane Photography,* 309 P.3d at 60.

13. *Id.* at 61.

14. *Id.* at 60.

15. *Id.* at 60-61.

16. *Id.* at 60.

17. *Id.*

18. A bakery in Oregon that was sanctioned for refusing to bake a wedding cake did in fact shut down. *See Sweet Cakes By Melissa, Oregon Bakery That Denied Gay Couple A Wedding Cake, Closes Shop*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/09/02/sweet-cakes-by-melissa-closed-_n_3856184.html (last updated Sept. 3, 2013, 8:37 AM).

19. Dominic Holden, *Bigotry in Bloom: A Flower Shop Is Refusing to Do Business with a Gay Couple Getting Married—Is That Blatantly Illegal?*, THE STRANGER (Mar. 13, 2013), http://www.thestranger.com/seattle/bigotry-in-bloom/Content?oid=16232163; Todd Starnes, *Oregon Ruling Really Takes the Cake –Christian Bakery Guilty of Violating Civil Rights of Lesbian Couple*, FOX NEWS (Jan. 21, 2014), http://www.foxnews.com/opinion/2014/01/21/christian-bakery-guilty-violating-civil-rights-lesbian-couple/; *Colorado Cake Maker Appeals Order to Serve Gays*,

This tension between religious liberty and antidiscrimination protection for gay people has become the topic of a large academic and popular literature.[20] It is not about the consequences of legal recognition of same-sex

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ASSOCIATED PRESS (Jan. 6, 2014), http://bigstory.ap.org/article/colo-cake-maker-appeals-order-serve-gays; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner says: "That's Illegal,"* ABC News (Aug. 19, 2011), http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333.

20. *See* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008); JANET L. FOLGER, THE CRIMINALIZATION OF CHRISTIANITY: READ THIS BOOK BEFORE IT BECOMES ILLEGAL! (2005); ALAN SEARS & CRAIG OSTEN, THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY (2003); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L. J. 703 (2014); Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISC. 248 (2013); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1 (2013), *available at* http://www.virginialawreview.org/volumes/content/protecting-same-sex-marriage-and-religious-liberty; Megan Pearson, *Religious Claims vs. Non-discrimination Rights: Another Plea for Difficulty*, 15 RUTGERS J. L. & RELIGION 47 (2013); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012); Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J. C.R. & C.L. 123 (2012); Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012); Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205 (2010); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206 (2010); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236 (2010); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260 (2010); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV.J.L. & PUB. POL'Y 939 (2007); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010);

marriage, though it's often been presented that way: as already noted, New Mexico did not recognize such marriages.[21] Religious conservatives are alarmed. "The message a same-sex commitment ceremony communicates is not one I believe," Huguenin said.[22] "If it becomes something where Christians are made to do these things by law in one state, or two, it's going to sweep across the whole United States . . . and religious freedom could become extinct."[23] Maggie Gallagher worries that those who oppose same-sex marriage will be regarded "as hateful bigots whose beliefs must be suppressed by operation of law."[24]

The battle over same-sex marriage is over – not only in American constitutional law, as declared by the Supreme Court,[25] but also in the court of public opinion. Only a few years ago, Congress seriously considered a constitutional amendment to ban same-sex marriage throughout the country.[26]

Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179 (2009); Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD (May 15, 2006), http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

21. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012). New Mexico later recognized same-sex marriage by judicial decision. Fernanda Santos, *New Mexico Becomes 17th State to Allow Gay Marriage*, N.Y. TIMES (Dec. 19, 2013), http://www.nytimes.com/2013/12/20/us/new-mexico-becomes-17th-state-to-legalize-gay-marriage.html?_r=0.

22. *Quoted in* Ryan T. Anderson, *Clashing Claims: Should Public Accommodation Law Trump All Religious Liberty?*, NATIONAL REVIEW (Aug. 23, 2013, 12:00 AM), http://www.nationalreview.com/article/356539/clashing-claims-ryan-t-anderson.

23. *Id.* A recent, widely publicized focus group study likewise finds that American evangelicals regard homosexuality as the harbinger of a culture that marginalizes and despises them. Memorandum from Stan Greenberg et. al. to friends of Democracy Corps, *Inside the GOP: Report on Focus Groups with Evangelical, Tea Party, and Moderate Republicans*, DEMOCRACY CORPS (Oct. 3, 2013), *available at* http://www.democracycorps.com/Republican-Party-Project/inside-the-gop-report-on-focus-groups-with-evangelical-tea-party-and-moderate-republicans/.

24. Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, *supra* note 20, at 269.

25. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

26. In 2004, both houses of Congress considered a constitutional amendment to ban same-sex marriage in every state. H.R.J. Res. 56, 108th Cong. (2003). In the Senate, the motion to proceed on the amendment failed by a 48-50 vote. *See* Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES (July 16, 2004), http://www.nytimes.com/2004/07/15/politics/15gay.html. In the House, the

Now resistance to such marriages is disappearing. According to Gallup, 55 percent of Americans now support same-sex marriage; 42 percent oppose it.[27] The percentage in support has doubled in only 15 years. There is a sharp generational divide: among those 18 to 29 years old, 78 percent support same-sex marriages. That number drops steadily with age, to 42 percent of those 65 and older.[28] Nate Silver estimated in 2013 that in 2020, there would be majority support for same-sex marriage in 44 states.[29]

The conservative columnist Rod Dreher describes an emerging consensus on the right "that the most important goal at this stage is not to stop gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time."[30]

II. FREE SPEECH I: COMPELLED SPEECH

Elane Photography seemed to be the pivotal case where the conflict between gay rights and religious liberty would be fought out. After the loss in New Mexico, however, there was no hope of bringing the religious liberty claim to the Supreme Court. Huguenin lost her case under a law that did not target religion, and the Court has held that the Free Exercise Clause does not create an exemption from neutral laws of general applicability.[31] New Mexico

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amendment failed by 227 to 186 in favor of the amendment, far short of the 290 votes, or two-thirds of the House, required to adopt it. Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. TIMES (Oct. 1, 2004), http://www.nytimes.com/2004/10/01/politics/samesex-marriage-amendment-fails-in-house. html. Another bill to deny federal courts the right to hear same-sex marriage cases passed the House but got no further. *See* Carl Hulse, *House Backs Bill to Limit Power of Judges*, N.Y. TIMES (July 23, 2004), http://www.nytimes.com/2004/07/23/us/house-backs-bill-to-limit-power-of-judges.html.

27. 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.

28. *Id.*

29. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0.

30. Rod Dreher, *Does Faith = Hate?: Gay Marriage and Religious Liberty are Uneasy Bedfellows*, AM. CONSERVATIVE (Oct. 9, 2013), http://www.theamericanconservative.com/articles/does-faith-hate/.

31. Emp. Div. v. Smith, 494 U.S. 872 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

has a religious freedom statute that provides such exemptions, but the state supreme court held that the statute did not apply to private disputes.[32]

There was, however, a colorable free speech claim: "applying a state public-accommodations statute to require a photographer to create expressive images and picture-books conveying messages that conflict with her religious beliefs violates the First Amendment's ban on compelled speech."[33] It was prominently endorsed, in an amicus brief, by two distinguished legal scholars, Professors Eugene Volokh and Dale Carpenter: "if the government may not suppress photographs, it may not compel their distribution or display, either."[34] The application of public accommodations law to Huguenin, they argued, unconstitutionally compels her to speak. "A writer must have the First Amendment right to choose which speech he creates, notwithstanding any state law to the contrary. The same principle applies to photographers."[35]

As a matter of doctrine, the claim is doubtful. Free speech claims against laws that make no reference to expression are not treated much better than religious liberty claims: they are deemed by the Court to be presumptively constitutional, even if they incidentally affect speech.[36] The Court however is free to change the doctrine if it chooses to do so. That is essentially what Huguenin was asking for.

The New Mexico Supreme Court considered and rejected the compelled speech claim. The antidiscrimination statute "does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[37] A contrary result would have generated a whole new body of legal doctrine:

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32. *Elane Photography,* 309 P.3d at 59.

33. Petition for Writ of Certiorari at i, *Elane Photography*, 309 P.3d 53 No. 13-585), 2013 WL 6002201, at *3.

34. Brief for Cato Institute et al. as Amici Curiae Supporting Petitioners, at 7, *Elane Photography*, 309 P.3d 53 (No. 33, 687), 2012 WL 5990629, at *9, *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/elane-photog-cert-filed-brief.pdf.

35. *Id.* at 3. Or, at least, to photographers who make aesthetic choices. Huguenin's attorneys wrote: "She is not a passive surveillance camera, but a professional artist and storyteller speaking through the images that she captures, edits, and arranges in a book." Reply Brief for Petitioner at 8, *Elane Photography*, 309 P.3d 53 (No. 13-585), 2013 WL 6002201, at *14.

36. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

37. *Elane Photography,* 309 P.3d at 59.

> We decline to draw the line between ''creative'' or ''expressive'' professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively ''expressive,'' but florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.[38]

Both sides agreed that the free speech question, of "which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws," had generated no case law whatsoever.[39]

Volokh and Carpenter are however correct that there is a colorable claim in free speech theory. A major reason for the prohibition of compelled speech is the public humiliation and demoralization of being forced to say what one does not believe.[40] That demoralization will happen whether or not it is intended. If compelled speech doctrine is animated by concern for the impact on the speaker, then perhaps courts should construct the kind of complex new limitation on antidiscrimination law that the New Mexico court worries about.

The trouble with this logic is that it is not confined to speech. It equally applies to any law that requires conduct that can reasonably be understood as having symbolic meaning that the person rejects. The Court came dangerously close to holding this when it declared that forbidding the Boy Scouts to expel a gay scoutmaster "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[41] This

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38. *Id.* at 71.
39. *Id.*
40. Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114-17 (1999).
41. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (citations omitted).

extension of the compelled speech doctrine has absurd implications:

> Federal regulations now require cars to have airbags. These regulations were adopted despite the resistance of automobile manufacturers. When new cars conspicuously have airbags, this is reasonably understood as sending a message that (1) airbags are necessary to make cars safe and that (2) their inclusion is cost-justified – both propositions from which the manufacturer may dissent. Under *Dale*, does the manufacturer not have a powerful argument that its First Amendment rights are being violated by compelled speech?[42]

The demoralization costs of compelled speech are appropriately dispositive in the narrow set of cases where the state is intentionally bringing about that result.[43] It would also be relevant in cases where a neutral law was construed to require someone to express words with which they disagree.[44] In other cases, although what happens is arguably compelled speech, the First Amendment is not even relevant.

There are many types of speech to which free speech law is not salient, such as perjury, price-fixing, conspiracy, and many other things that can be done with words.[45] Free speech is not a deduction from a few premises. It is a complex cultural construct. That construct has purposes that are not relevant in these cases.

Free speech is a tradition that dates back to John Milton's arguments in the 1640s. It is frankly result-oriented. It aims at a vibrant sphere of public

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42. ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION 39 (2009).

43. In the paradigmatic case of West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), that clearly was the state's intention. *See* VINCENT BLASI & SEANA V. SHIFFRIN, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, *in* FIRST AMENDMENT STORIES 99 (Richard Garnett et al. eds., 2011).

44. A Colorado bakery was thus held not to engage in religious discrimination when it refused to decorate a cake with the words, "Homosexuality is a detestable sin. Leviticus 18:22." *See* Alan Gathright & Eric Lupher, *Denver's Azucar Bakery Wins Right to Refuse to Make Anti-Gay Cakes*, ABC7 NEWS DENVER (Apr. 3, 2015), http://www.thedenverchannel.com/news/local-news/denvers-azucar-bakery-wins-right-to-refuse-to-make-anti-gay-cake.

45. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

discourse, in which antagonistic views compete for public acceptance, and in which dissenting ideas proliferate.

> It rests on mutually reinforcing ideals of individual character and collective identity. Rules are tools, created to protect the functioning of this sphere. Judges are given discretion to devise such rules for the mundane reason that they are more likely than legislatures to protect speech in an appropriate way. The test of any rule is precisely its consequences: does it help to produce thriving public discussion and culture in a society of free, self-governing people?[46]

That condition can be achieved even if the state regulates some speech that, in some contexts, has high free speech value. Consider speech about the economy, for instance, about whether prices are at an appropriate level. If a columnist in the *Wall Street Journal* suggests that airline prices are too low, this clearly is fully protected speech. But if the same proposition is uttered in a telephone conversation between the CEO of American Airlines and his counterpart at United, a federal crime may have been committed, and free speech is no defense.[47] That has been the law for over a century, yet American public discourse has not been harmed.

That was enough reason to justify the cert. denial: the New Mexico court got this issue right. This application of public accommodations law is not a serious burden on free speech. The deeper reason is that, even if Elane should have been accommodated, this appeal did not get to the heart of the issue. The free speech claim here is an example of what Frederick Schauer calls "First Amendment opportunism," in which free speech rhetoric is "developed opportunistically in the service of goals external to the First Amendment rather than as a consequence of the purposes the First Amendment was designed to serve."[48]

The real question in this case and others like it is not speech, but religious liberty. Some religious people object to facilitating same-sex marriages. They are unwilling to participate in activity that they regard as sinful. That is the

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46. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 650 (2013). The argument of this paragraph is developed in detail in that article.

47. The example is adapted from Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 699 (1997).

48. *Frederick Schauer*, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 176 (Lee Bollinger & Geoffrey Stone eds. 2002).

only reason why the free speech question arose. A resolution of the case on the basis of free speech would have pointlessly complicated public accommodations law while arbitrarily leaving behind some religious objectors. Volokh and Carpenter admitted as much: "This Court can rule in favor of Elane Photography on First Amendment grounds without blocking the enforcement of antidiscrimination law against denials of service by caterers, hotels, limousine service operators, and the like."[49]

III. FREE SPEECH II: HARASSMENT LAW

There is a second free speech issue in the case. It, however, would not have been before the Court.

The New Mexico Supreme Court declared that "businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."[50] That's probably enough to persuade gay customers – at least, those who are not spoiling for a fight - to look elsewhere, with no formal change in the antidiscrimination law.

The New Mexico court does not notice that this accommodation might require legislative amendment of the law of harassment. The antidiscrimination laws of some states might treat this kind of disclaimer as creating an actionable hostile environment.[51] There are also laws that specifically bar certain public communications. For example, a Delaware statute provides:

> No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly publish, issue, circulate, post or display any written, typewritten, mimeographed, printed or radio communications notice or advertisement to the effect that . . . the patronage or custom

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49. Cato Institute et al., *supra* note 34, at 3 n.2 (stating that "*Amici* take no position for purposes of this case regarding potential defenses that non-expressive businesses may have against the operations of antidiscrimination laws").

50. *Elane Photography,* 309 P.3d at 59.

51. *See* Daniel Koontz, *Hostile Public Accommodations and the First Amendment*, 3 N.Y.U. J. L. & LIBERTY 197 (2008); Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, 318-26 (2000). There is no clear authority on whether New Mexico is one of those states.

> thereat of any person belonging to or purporting to be appearing to be of any particular race, age, marital status, creed, color, sex, disability, sexual orientation, gender identity or national origin is unlawful, objectionable, or not acceptable, desired, accommodated or solicited.[52]

Similar laws are on the books in eight other states and the District of Columbia.[53] Their constitutional validity is not in doubt, because discrimination is illegal, and threats to commit illegal conduct are not protected speech.[54] They could however be construed to bar business people, not only from posting signs like the ones described by the New Mexico court,[55] but also from giving interviews and otherwise publicizing their reservations about

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52. DEL. STAT. ANN. tit. 6, § 4504(b) (2013).

53. COLO. STAT. § 24-34-601 (2015); D.C. CODE ANN. § 2-1401.01 (2007); 775 ILL. COMP. STAT. 5/5-102 (2015); ME. REV. STAT. ANN. tit. 5 §§ 4551 et seq. (2014); MASS. ANN. LAWS ch. 272 §98 (LexisNexis 2015); N.H. REV. STAT. ANN. § 167-D:8 (2015); N.Y. EXEC. LAW § 296 (consol. 2015); R.I. GEN. LAWS § 11-24-1 (2015); WIS. STAT. ANN. § 106.52 (2011). The statutes of five more states have similar language barring communications indicating that protected groups are unwelcome, but do not include sexual orientation as a forbidden basis of discrimination. AK. STAT. §§ 18.80.010 et seq (2015); KY. REV. STAT. ANN. § 344.120 (LexisNexis 2015); MONT. CODE ANN. § 49-2-304 (2015); 43 PA. STAT. ANN. § 955 (West 2015); W. VA. CODE § 5-11-9 (2015).

54. *See* Eugene Volokh, *Why May the Government* Ban *Businesses From Saying "We Won't Bake Cakes for Same-Sex Weddings"?*, VOLOKH CONSPIRACY (July 6, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/why-may-the-government-ban-businesses-from-saying-we-wont-bake-cakes-for-same-sex-weddings/.

55. The Alaska Attorney General opined that that state's law was not violated by bed-and-breakfast advertisements referring to "Christian home" or "Christian environment," holding that these did not imply that non-Christian guests were unwelcome. Memorandum from Vincent L. Usera, Assistant Attorney General, Commercial Section-Juneau, to Tina Lindgren, Exec. Dir. Alaska Tourism Marketing Council (Apr. 20, 1994) (1994 WL 178695). Less defensible was a New York court's determination that a resort's advertisement, "Serving Christian Clientele since 1911," did not indicate that non-Christians were unwelcome. Trowbridge v. Katzen, 203 N.Y.S.2d 736 (N.Y. Sup. Ct. 1960). A sign on an Oregon tavern saying "Viva Apartheid" was recognized to be "pure political speech," which "is afforded maximum protection," but it was held to violate the statute because in context it "communicate[d] that services within would be refused, withheld, denied, or that discrimination would be made on the basis of race." *In re* Masepohl, No. 33-86, 1987 WL 1424455, at *12 (Or. BOLI, June 24, 1987).

facilitating same-sex marriages.[56]

Even absent such statutory language, it is arguable that any indication of a business owner's opposition to same-sex marriage constitutes forbidden discrimination. In the workplace, federal law prohibits "hostile work environment" harassment, in which the employee is subjected to "'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[57] In a place of public accommodation, a hostile environment for protected groups has been held to be similarly actionable, and the threshold is lower: "a proprietor of a public accommodation may be found liable for discrimination based on a single insult."[58] Speech is often a component of a hostile environment suit: slurs and epithets are frequently cited in such cases. The Supreme Court has evaded the free speech issues this raises.[59]

The law of hostile environment harassment is nonetheless justifiable. Women are far more likely to be sexually harassed in male-dominated occupations, and women in nontraditional jobs quit because of sexual

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56. In the Oregon bakery case, the final order banned notices of intent to discriminate, pursuant to a state statute that specifically banned such notices. This would clearly have been correct with respect to clear notices that some customers are unwelcome, such as a posting that read "No shoes shirts service niggers," and even could reasonably apply to a sign saying "Viva Apartheid." *Masepohl*, 1987 WL 1424455, at *12. The Oregon order, however, declared that such an announcement had been made by more general statements such as "This fight is not over. We will continue to stand strong," made in the context of ongoing litigation. That is a strained interpretation of what the baker said, and leaves doubt as to whether a disclaimers such as the one described by the New Mexico court would have violated the statute or the order. *See* Ken White, *So Are Those Christian Cake-Bakers In Oregon Unconstitutionally Gagged, Or Not?*, POPEHAT (July 8, 2015), http://popehat.com/2015/07/08/lawsplainer-so-are-those-christian-cake-bakers-in-oregon-unconstitutionally-gagged-or-not/.

57. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)).

58. *See* Koontz, *supra* note 51, at 208.

59. *See* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND FREEDOM OF SPEECH 82 (1995); Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1 (1994).

harassment at least twice as often as women in traditional jobs.[60] If verbal workplace harassment was fully protected speech, then some workplaces would remain segregated, and the purposes of antidiscrimination law would be thwarted.[61]

There are clear attractions to a free speech solution to the gay rights/religious liberty conflict. The New Mexico court's dictum offers a way of avoiding an important kind of dignitary harm. Willock sought services and was directly told that she was not eligible for them. She was induced, by a business that held itself out to the public and so invited her to contact it, to participate in the activity of her own rejection. The objection is somewhat analogous to religious conservatives' objections to participating in the celebration of same-sex unions. That direct personal insult is more wounding than the mere knowledge that there are people out there who do not want to deal with you.

There are two possible ways to avoid this. One is to allow religious accommodations, but make them conditional on the business announcing its religious objections to the world.[62] The costs of no notice are not merely unfair surprise. An exemption that can be invoked on an ad hoc basis would eviscerate the law, because it would be available as a defense in any case at all.[63] Any responsible lawyer would at least ask the client about religious scruples, and some will try to elicit positive answers.

Another solution would be to allow no religious exemptions, but to clarify that harassment law does not bar the kind of simple notice contemplated by the New Mexico court: "We oppose same-sex marriage but we comply with applicable antidiscrimination laws." As already noted, that would probably suffice to keep most gay people away. Who wants their wedding photographed, or their cake baked, by someone who despises the whole undertaking? A business that posts such a disclaimer might never need to violate its conscience by facilitating same-sex marriages.[64]

Those who feel they must do what their religion demands, even at great

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60. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1834 (1990).

61. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 248-54 (1996).

62. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 SO. CAL. L. REV. 619, 646-49 (2015).

63. KOPPELMAN WITH WOLFF, *supra* note 42, at 27-31.

64. I argue in favor of this approach in Andrew Koppelman, *A Free Speech Solution to the Gay Rights/Religious Liberty Conflict*, Northwestern U. L. Rev. (forthcoming 2016).

personal cost, have the strongest religious liberty claims. A prior-notice requirement is a good way to pick those people out.[65] Open avowal would have protected Willock from the unpleasant surprise she got in response to her email: she would never have contacted Elane Photography in the first place. The specific, personal insult to which she was subjected would not have happened.

If Huguenin were to make the announcement contemplated by the court, it is unlikely that any same-sex couple would want her to photograph their wedding. It is, however, possible that some will find her views so outrageous that they will solicit her business solely for the purpose of bringing a complaint against her. Such claims don't deserve much respect, but the attempt to refuse them may face insuperable practical or political obstacles.

Even if those notices are rare, they will impose a different kind of dignitary harm – here not concentrated on any particular individual, but diffused across the community. Some gay rights advocates have objected that accommodation will produce a proliferation of such harms. Just as a "Whites Only" sign does not make the discrimination nicer, so, Taylor Flynn objects, a notice of unwillingness to facilitate same-sex marriages would be "iconic of second-class citizenship."[66] She fears "a cascading effect that encourages additional claims for exemption as well as other acts of discrimination. Seeing the equivalent of 'no gays served here' affixed throughout town (all with the permission of the state) may spur further acts of discrimination or violence."[67]

Here, however, we encounter the First Amendment yet again. The dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you. The right of free speech is, among other things, the right to say hurtful things.[68]

The objection also fails to account for ongoing cultural change. Hardly any of these cases have occurred: a handful in a country of 300 million people.[69] In all of them, the people who objected to the law were asked directly

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65. An analysis parallel to the one I offer here, which I discovered after this paper was substantially complete, is Toni M. Massaro, *Nuts and Seeds: Disclosure of Religious Exemptions*, 92 DENVER U. L. REV. 325 (2015).

66. Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J. L. & SOC. POL'Y 236, 254 (2010).

67. *Id.* at 257; see also Melling, *supra* note 20.

68. For a recent extreme example, *see* Snyder v. Phelps, 562 U.S. 443, 461 (2011).

69. *See* the catalogues in Marc Stern, *Same-Sex Marriage and the Churches*, *in* LAYCOCK, ET AL., *supra* note 20, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, at

to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people. Even in the large number of states with no antidiscrimination protection for gay people, I am unaware of any case where a couple was unable to conduct a wedding.

The likelihood of Flynn's scenario is quickly evaporating. At the time she wrote, just a few years ago, she could accurately report that "majority opposition to equal marriage is the nationwide norm."[70] Since that time, that opposition has collapsed, and a growing majority supports same-sex marriage.[71] Reflect on the fact that this is the conversation we are having. The conservative claim has shifted from "stop same-sex marriage" to "let us retreat into our enclaves and be left alone." That does not mean that discrimination will not happen. But it will look increasingly like racial discrimination does today: it is practiced, alarmingly often, but almost nobody admits, even to himself or herself, that they are doing it.[72]

IV. THE STRENGTH OF THE RELIGIOUS LIBERTY CLAIM

Huguenin's real claim sounds in religious liberty. That claim has nothing to do with free speech. It is fundamentally about the old problem of addressing religious disagreement.

About four in ten Americans think, most of them for religious reasons,[73] that homosexual sex is never morally acceptable.[74] These people are not homophobic bigots who want to hurt gay people. On the contrary, gay people are marginal to their view of the world. Justice Alito nicely summarizes the

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1 and George W. Dent, Jr., *Civil Rights for Whom? Gay Rights Versus Religious Freedom*, 95 KY. L. J. 553 (2006-07).

70. Flynn, *supra* note 66, at 242.

71. *See supra* text accompanying notes 25-29.

72. On the persistence of unconscious racism, *see* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-28 (2005).

73. *See* Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx (showing that Americans who oppose same-sex marriage are most likely to explain their position on the basis of religious beliefs and/or interpretation of biblical passages).

74. In 2013, 41 percent thought that homosexual sex was not morally acceptable, compared with 60 percent in 2001. Frank Newport and Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx.

position, as it applies to same-sex marriage: "marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so."[75] Whatever the merits of this notion,[76] it is not about gay people. It is focused on the value of a certain kind of heterosexual union.[77] The existence of gay people is a side issue.[78] The function of marriage law, on this view, is to protect a human good that gay people happen to be unable to realize: marriage laws do not discriminate against them any more than art museums discriminate against blind people.

I think that these people's religious ideas are obviously wrong. But that is what I think about an enormous range of religious beliefs. Most Americans surely agree that some religious beliefs are worthless, harmful, weird delusions. They do not agree about which ones. This is nothing new. It is the chronic condition of the United States, probably the most religiously diverse nation in the history of the world. The way in which the American regime has coped with this diversity is to treat religion – understood at such an abstract level as to ignore all doctrinal differences – as a good, and to accommodate it where this is possible.[79]

Some religious beliefs are not only false but destructive. Pertinently here, some give transcendent sanction to discrimination and inequality. When this is the case, they must be deprived of their cultural power. With respect to the religious condemnation of homosexuality, this marginalization is already taking place. That does not mean, however, that the conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions entails.[80]

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75. United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

76. For critique of the claim as it has been presented in secular terms, *see* Andrew Koppelman, *More Intuition than Argument*, COMMONWEAL (May 3, 2013), https://www.commonwealmagazine.org/more-intuition-argument (reviewing SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012)); Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 (2014).

77. *See, e.g.*, Rod Dreher, *Sex After Christianity*, AMERICAN CONSERVATIVE (Apr. 11, 2013), http://theamericanconservative.com.

78. *See* GIRGIS ET AL., *supra* note 76, at 10-12, 86-93.

79. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 1-119 (2013).

80. Such tolerance is familiar in the United States. Today about 34 percent of Americans think that Christianity is the one true religion; 17 percent reject the view that all major religions contain some truth about God. ROBERT WUTHNOW, AMERICA AND THE CHALLENGES OF RELIGIOUS DIVERSITY 190-91 (2005).

Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities.[81] As with the old religious differences that begot the Establishment Clause of the First Amendment, each side's most basic commitments entail that the other is in error about moral fundamentals, that the other's entire way of life is predicated on that error and ought not to exist. Coexistence has nonetheless been achieved in the religious sphere. The United States is a longstanding counterexample to Rousseau's dictum that "[i]t is impossible to live in peace with people whom one believes are damned."[82] Religious accommodation is a part of the reason for the regime's success.[83]

Religious liberty in the United States encompasses action as well as thought. The First Amendment protects "the free exercise of religion." Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Sacramental wine was permitted during Prohibition. Today the Catholic Church is exempted from antidiscrimination laws when it denies ordination to women. The question of religious accommodation arises in cases where a law can allow some exceptions. Many laws, such as military conscription, taxes, environmental regulations, and drug laws will accomplish their ends even if there is some deviation from the norm they set forth, so long as that deviation does not become too great. In the context of such laws, special treatment is sometimes appropriate.

Our question, then, is whether accommodation is appropriate in this context, or whether its costs are too high. In order to determine that, and what kind of accommodation is appropriate, we would need to examine the purposes of antidiscrimination laws, such as the one Huguenin violated, and decide whether and when these would be frustrated by religious exemptions. That

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81. The parallel has also been explored in Berg, *supra* note 20, at 3, and Brownstein, *supra* note 20, at 4.

82. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 131 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762).

83. Similar tolerance evidently is hard to achieve with respect to the gay rights/religion divide. Brandon Eich, the CEO of Mozilla, was forced to resign by a coordinated boycott of his company because years earlier he had contributed to the campaign to prohibit same-sex marriage in California. People should not lose their jobs for having the wrong opinions. *See Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POLITICS (Apr. 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html.

would require a more extensive treatment than I have offered here.[84]

CONCLUSION

I said at the beginning that certiorari was appropriately denied in *Elane Photography* because the real issue, of religious liberty, was not properly before the Court. Instead, the case was presented on a distracting free speech basis, which the court appropriately declined to consider. But the deeper concern with the way the case was presented is that the question of accommodating everyone is not a legal question at all. Tocqueville famously wrote:

> There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. . . . So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.[85]

Discussions of the tension between gay rights and religion reflect the judicialization Tocqueville describes. Everyone talks about rights, enforced by law. When discussions use the idiom of free speech or of torts, we lose sight of the real problem, which is how to justly govern a diverse society. That's why the case was a zombie. This soul cannot be fitted into this body.

There can be a role for the judiciary in this kind of negotiation. The common-law regimes of property, contract, and tort have always involved this kind of interest-balancing. It can also be found in some areas of constitutional law. In dormant commerce clause cases, for example, a state law that creates an incidental burden on interstate commerce will be invalidated if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[86] Courts sometimes invalidate state laws on this basis.[87]

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84. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 SO. CAL. L. REV. 619 (2015).

85. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (George Lawrence trans., J.P. Mayer ed., Knopf Publishing Group 1969)(1835).

86. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

Common law rules are, however, revisable by the legislature. With the dormant commerce clause, Congress may "confer [] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[88]

The same kind of check exists with respect to religious liberty statutes like the one at issue in the New Mexico case, or the law that Arizona sought to amend. Such statutes instruct courts to balance on a case-by-case basis. The results that courts reach can however be revisited and overridden by legislatures. Eugene Volokh has observed that this result plays to the strengths of both courts and legislatures.[89] Courts get to decide, in the first instance, what to do in concrete instances of hardship. But, the political process governs the ultimate tough calls. The result is not all that different from the common-law regimes that already govern issues of property, contract, and tort, where courts craft rules in response to specific disputes, but legislatures have the last word.[90]

Free speech isn't like that. Rights talk is categorical and tends to be insensitive to contextual and systemic effects.[91] That insensitivity is a positive virtue when what is wanted is a doctrinal bulwark against legislative abuses. But it sometimes is the wrong tool for the job at hand.

The precise shape of a legislative accommodation is a matter of negotiation. Political horse-trading is often disdained, but it can realize the noble aspiration – an aspiration to which courts are institutionally unsuited – of reaching a solution that everyone can live with.

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87. BRANDON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, §6.05, at 6-34-37 (2d ed. 2013).

88. Lewis v. BT Inv. Managers, 447 U.S. 27, 44 (1980).

89. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1471-72 (1999).

90. *Id.* at 1471.

91. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).