Dear Free Exercise Participants:

This is a work-in-progress that I am sharing for the first time. Many of the arguments are, shall we say, experimental?! The paper's major target is free speech jurisprudence, which I appreciate may be of less interest to many of you, but it also aims to say quite a bit the wedding vendor cases.

For your purposes (and because the paper is already overly long!), I encourage you to skim the Introduction, and then focus on Parts II and IV.C. Any and all thoughts and reactions will be most welcome!

- Amy

Confusions in Compelled Speech

Amy J. Sepinwall[*]

There is a fundamental tension in free speech jurisprudence. The ascendant theory for why the state may not restrict speech points to values central to democratic self-government. At the same time, the best defense for why the state may not compel speech crucially relates to individual self-realization. It is at least odd that one and the same constitutional provision should yield two prohibitions on state action, both equal in importance,[1] *and yet have two such different values grounding them. But the problem doesn't end there. The political justification for limiting restrictions on speech has the advantage of providing a ready distinction between speech and conduct: speech is straightforwardly essential to self-government. But the individual justification for limiting compelled speech has no such natural stopping point. Self-realization can be burdened by compelled conduct as much as by compelled speech. So the ascendant theory of compelled speech fails to justify the heightened protections it receives.*

The Court's recent foray into the conflict between wedding vendors and civil rights illustrates the problem. In 303 Creative v. Elenis, *the Supreme Court, for the first time, permitted a retail business to evade civil rights laws aimed at ensuring equal access in the marketplace. Because the business provided "pure speech," the Court held that requiring it to offer its services would involve compelled speech, in violation of the First Amendment. While the Court made much of the fact that the business in question offered unique, expressive, and customized websites, the logic of its decision—protecting individuals from supporting projects they believe wrong—extends to compelled conduct. But taking the equivalence between compelled speech and conduct would eviscerate public accommodation laws: vendors of all kinds could refuse service anytime they opposed the end to which their good or service might be put. The more general theoretical upshot is no less alarming: the rationale for prohibiting compelled speech, in all walks of life, cannot be cabined to speech alone. Speech may be special, but compelled speech is not.*

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[*] This article has benefited from excellent research assistance by Blake Land.

[1] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97 (1988)

This Article seeks to make vivid, and then suggest measures to address, this speech-conduct collapse. I argue that the only plausible justification for protecting people from compelled speech is one that identifies the injury to the individual, and not the polity, of being made to speak. So only an individual rationale can make sense of compelled speech doctrine. I show how that rationale justifies prohibitions on compelled conduct no less than speech—in general, and through a full analysis of 303 Creative. *I then explore strategies others have raised to stave off a speech-conduct collapse, and argue that none of them succeeds. I conclude by arguing that we should find a home outside of the First Amendment for all compelled speech cases—one that will offer some (but not robust) protection from compelled speech and conduct alike.*

Confusions in Compelled Speech

Amy J. Sepinwall

The insight that what we say stands for who we are and what we affirm underpins most compelled speech doctrine and theorizing.[2] It is not however emblematic of free speech law or theory more generally. Instead, the overall body of free speech law and theory reveals two rifts—one widely noted and the other barely noticed. The prominent cleavage is between political and individual conceptions of free speech rights: some theorists hold that the Free Speech clause primarily protects democracy,[3] while others tie it essentially to self-expression.[4] The mostly overlooked divergence[5] arises because each of these two conceptions does not equally explain each half of the Free Speech clause's dual mandate—to permit people robust freedom to say what they will, and to prohibit the government from compelling them to say what they would rather not. While the political and individual conceptions each plausibly explains giving people the freedom to speak, only the individual conception succeeds in explaining why we prohibit compelled speech. One might therefore conclude that the individual conception ought to prevail—it better explains more of the Free Speech doctrine we have. And yet the individual conception threatens to stretch free speech protections well beyond their proper bounds.

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[2] *See infra* Part I.B.

[3] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO DEMOCRACY 88-89 (1948) ("The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.").

[4] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 69 (1989); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) ("[F]reedom of expression is essential as a means of assuring individual self-fulfillment."); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 20-21 (1984) (arguing that speech facilitates the individual's ability to control her own destiny and to develop human faculties); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992).

[5] A valuable exception is Vikram David Amar & Alan Brownstein's excellent article, *Toward A More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 7 (2020). Amar and Brownstein note the two different conceptions, and they recognize that the relative primacy of the two in speech restriction cases is the opposite of that in the speech compulsion cases. But Amar and Brownstein's project is different: having argued that unique considerations—dignity and autonomy, in particular—should inform compelled speech adjudication, they seek to articulate a doctrinal framework that would determine the level of scrutiny, under the First Amendment, that speech compulsions should receive. By contrast, I seek to argue that speech compulsions should receive no First Amendment protection at all.

A worry about an unbounded First Amendment characterizes much recent Free Speech theorizing.[6] Scholars have condemned the Supreme Court for countenancing claims that appeal to the First Amendment opportunistically,[7] often to protect economic rather than speech interests.[8] But the worry about an overly elastic Free Speech clause is even more longstanding, and more endemic, than they may realize.

More than fifty years ago, Robert Bork warned of a problematically expanding Free Speech clause.[9] Bork attributed the doctrine's troubling diffusion to a mistaken understanding of its grounding: any justification for the doctrine that appealed to "the development of the faculties of the individual"[10]—or what more recent commentators have called the "self-realization,"[11] "self-authorship,"[12] or "autonomy"[13] rationale—would be unable to distinguish speech

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[6] *See, e.g.*, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 STAN. L. REV. 1205, 1233 (2014); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. U. L. REV. 1053 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199 (2015); Genevieve Lakier, *Not Such A Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 742 (2019); Robert Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Jedediah Purdy, *NeoLiberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014); Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175, 194-96 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Nelson Tebbe, Richard Schragger & Micah Schwartzman, *When Do Religion Accommodations Burden Others?*, *in* WHEN DO RELIGIOUS ACCOMMODATIONS BURDEN OTHERS? THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Susanna Mancini & Michel Rosenfeld eds., Cambridge Univ. Press, 2017). *See generally* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 n. 5 (2016) (collecting citations of "a growing number of scholars, commentators, and judges [who] have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*'s anticanonical liberty of contract" (footnote omitted)). *Cf.* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1392 (2017) (offering a related critique, which addresses not the expanding scope of the first amendment (its extension, to use the philosophical term) but instead the accompanying changes in its meaning (its intension)).

[7] *See, e.g.*, Amy J. Sepinwall, *Free Speech and Off-Label Rights*, 54 GEORGIA LAW REVIEW 463 (2020); Schauer, *supra* note ____.

[8] Cite – Shanor, Garden.

[9] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-21 (1971). *See also* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1292–93 (1983) (restating Bork's challenge).

[10] Bork, *supra* note ____at 25.

[11] Redish, cite

[12] *See, e.g.*, Alan Brudner, *Self-Authorship and Substantive Justice*, *in* CONSTITUTIONAL GOODS (Oxford, 2007; online edn, Oxford Academic, 1 Jan. 2010).

[13] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

from conduct: “Other human activities and 'experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like.”[14]

Scholars who could hardly be accused of sharing Bork’s ideology have nonetheless joined him in seeking a justification for free speech protections that would not extend to conduct. Many of them have also more or less converged on his solution: conceive of the Free Speech clause as centrally concerned with the realm of politics, or the project of self-government, and the specialness of speech seems seamlessly to follow.[15]

The political conception has its roots, then, in an effort to cabin the Free Speech clause to speech.[16] But here is the problem: Whatever the wisdom of consecrating a political conception of the value of *unfettered speech*,[17] that

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[14] Bork, *supra* note ____at 27. *See also* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970) (insisting on a distinction between expression and action); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1010 (1977-1978) (agreeing that “self-fulfillment … can be, and frequently [is], furthered by many types of conduct-including violent, coercive action or other conduct generally thought properly subject to collective control” but then concluding that this should entail extending First Amendment protection to some conduct, rather than seeking an illusory distinction between conduct and expression); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479–80 (2011); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 57 (1982) (“It seems as likely that intellectual self-realization can be fostered by world travel, keen observation, or by changing employment every year, to give just a few examples.”). *Cf.* David Han, 97 Ind. L.J. 841, 860-61 (expressing the worry with respect to autonomy-based accounts in particular).

[15] *See, e.g.*, Meiklejohn, cite; Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 311–12 (1978); Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1089 (2022); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011)
See generally Laurence Shore, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 38 EMORY L.J. 871, 876 (1989) (summarizing the view in this way: “The first amendment…evinces no concern with the private individual's private self-seeking, only with discussion concerning the general good.”); OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996) (defending free speech “not because it is a form of self-expression or self-actualization but rather because it is essential for collective self-determination.”).

[16] In point of fact, the political conception can be traced back further than Bork, to Alexander Meiklejohn, whose theory I discuss in Part I.A.

[17] For cases enshrining this conception, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964), widely agreed to inaugurate the Court’s adoption of Meiklejohn’s position, *see infra* Part I.A; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). For theorists who advance that conception, see, for example, Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 439 (1983) (collecting sources).

conception largely fails to explain compelled speech caselaw.[18] For that reason, virtually none of the proffered theoretical justifications for prohibiting compelled speech appeals to political considerations.[20] Instead, the wrong of compelled speech is cashed out in terms of its impact on the individual person—to be compelled to speak a message one opposes is to forsake one's integrity, violate one's right to self-authorship, interfere with "individual freedom of mind,"[21] subject one to the taint of an unwanted connection,[22] and so on. But concerns about interference with the self arise just as forcefully where one is compelled to support conduct one opposes. In other words, the justification for prohibiting compelled speech is the very one that Bork and others worried could not be cabined to speech alone.

The Supreme Court's recent compelled speech cases enshrine the individual, rather than the political, conception of the wrong of compelled speech. Requiring the website designer in *303 Creative v. Elenis* to create websites for same-sex couples "denied" her the "promise" of the First Amendment—to secure for "all persons" the "freedom to think and speak as they wish."[23] One can find similar language in the Court's other recent compelled speech cases.[24]

The Court's rationale for vindicating the rights of these challengers to be free from "speaking" in support of conduct they oppose (same-sex marriage, union labor, abortion, and so on) is the very same one that underpins its decisions in *Burwell v. Hobby Lobby*,[25] and *Fulton v. City of Philadelphia*.[26] In both of those cases, the Court was concerned about protecting people from having to *act* in support of an end they oppose—to provide contraception or place foster

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[18] *Cf.* Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 308 (2019) ("an instrumental, democracy-enhancing explanation for *pure* compelled-speech claims simply makes no sense."). *But cf.* Seana Shiffrin (sincerity)

[20] See Part I.B.

[21] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); see also Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[22] See Abner S. Greene, *'Not in My Name' Claims of Constitutional Right*, 98 B.U. L. REV. 1475 (2018).

[23] 303 Creative LLC v. Elenis, No. 21-476, 600 U.S. 20, *26 (2023)

[24] *See, e.g.*, Janus v. AFSCME ("When speech is compelled,… individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning…."); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) ("Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.").

[25] 573 U.S. 682, 720 (2014) ("By requiring the [family owners] and their companies to arrange for [contraceptive] coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.").

[26] *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021) ("[T]he City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.")

children with same-sex parents.[27] Nor do concerns about compelled conduct arise only where the law abuts religious freedom, or only for conservative causes. Forced medical treatment,[28] compelled gestation,[29] requirements to use the bathroom corresponding to the sex one was assigned at birth—all of these deeply implicate the self.

At the same time, speech is the Constitution's most hallowed good; no other kind of government impingement or compulsion will be met with as strong a judicial response.[30] The disparity in treatment between compelled speech and compelled conduct—both of which can implicate the self, to the same degree—is unprincipled and intolerable.

The Court could level up, such that government compulsion that interfered with the self received First Amendment protection whether the compulsion arose through speech or conduct. Respectable theorists have advocated as much.[31] But were it to do so there would be, as Bork warned, no "principled stopping point."[32] On what basis could we deny someone's claim that a given legal requirement

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[27] For a more general discussion of the way objections to compelled speech and complicity claims rest on similar harms, see B. Jessie Hill, Look Who's Talking: Conscience, Complicity, and Compelled Speech, 97 Ind. L.J. 913, 923-29 (2022).

[28] *See, e.g.*, *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 270 and 278 (1990) (finding that a person has right to refuse treatment grounded in "common-law rights of self-determination" and "a constitutionally protected liberty interest in refusing unwanted medical treatment").

[29] *See, e.g.*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 927 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

[30] *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982) ("When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct."); Saia v. New York, 334 U.S. 558, 562 (1948) ("Courts…should be mindful to keep the freedoms of the First Amendment in a preferred position"); Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position"); *see also id.* at n. 7 (collecting cases establishing the priority of the First Amendment). *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (refusing to identify a hierarchy between First and Sixth Amendment rights but nonetheless suggesting that the former should prevail); Lawrence Douglas, *The Force of Words: Fish, Matsuda, Mackinnon, and the Theory of Discursive Violence*, 29 LAW & SOC'Y REV. 169, 170 (1995) ("As a general matter, liberalism insists that speech be protected more robustly against state interference than conduct."); Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311, 320 (2020) (citing survey results showing Americans prize free speech rights more than any other rights in the Constitution).

[31] *See, e.g.*, Baker; Bhagwat. *See also* infra Parts IV.A and B.

[32] Bork, *supra* note ____ at 27.

profoundly interfered with their self-realization? Every citizen would become "a law unto himself."[33]

Call the idea that compelled conduct should receive the same level of protection as compelled speech the *speech-conduct collapse*. There are two ways to avoid the threat of lawlessness that the collapse portends. The first is to establish that there are reasons for the *law* to protect us more from compelled speech than compelled conduct, even if the two are equally injurious. The second is to urge a retrenchment in compelled speech doctrine. Because I believe that none of the efforts pursuing the first strategy succeed, I advocate for the second.

The Article has then a critical and a positive aim. The critical aim is directed at compelled speech doctrine and theory. I seek to show that the rationales for protecting people from compelled speech, as they arise in both doctrine and theory, apply with equal force to compelled conduct. To that end, I first aim to establish that only the individual conception of the wrong of compelled speech can make sense of the doctrine. I then argue that the individual conception applies as well to compelled conduct. I advance that argument in general, and then through an extended analysis of *303 Creative*, which reveals the equivalence: contrary to the Court's reasoning, there really isn't anything special about the wedding vendor who works in words relative to one who plies non-expressive goods or services. And yet following through on the equivalence between the wrong of compelled speech and the wrong of compelled conduct would effectively obliterate the rule of law. The Article's positive aim seeks to forestall that result. I offer a revised take on compelled speech—one that moves it outside of the scope of the First Amendment and to the Fifth Amendment.

The Article proceeds as follows: In Part I, I trace the emergence of the two divergent strands in free speech jurisprudence, to explain why and how the political conception came to dominate theorizing about *speech restrictions*, whereas the individual conception had to be pressed into service to explicate the wrong of *speech compulsions*. I end this Part by arguing that the individual conception cannot be confined only to compulsions having to do with speech; instead it applies with equal force to compelled conduct.

In Part II, I aim to make the threat of a speech-conduct collapse even more vivid through a critical reading of *303 Creative v. Elenis*. I argue that the concerns that a compelled speaker has in refusing to provide an expressive service for a same-sex wedding are no different from the concerns someone should have when the state compels them not to speak but instead to *act* in support of projects they oppose. Further, a proper understanding of all of the wedding vendor cases reveals that, even if there is compulsion, it is not at the hands of the state—*there*

[33] *Reynolds*, cite.

is no state action. For both these reasons—that speech is not more implicating than conduct, and that the state is not compelling anything in the wedding vendor cases anyway—we should conclude that the Court's recent compelled speech jurisprudence rests on a serious error. A speech-conduct collapse would be bad; a speech-conduct collapse founded on a mistake would be all the more grievous.

In Part III, I address existing scholarly efforts to erect a distinction between speech and conduct, and argue that none of them proves convincing.

Part IV turns to the Article's positive account. There, I propose that we treat all challenges to state compulsion—whether speech or conduct—under the Fifth (and Fourteenth) Amendments. This is a suggestion Alexander Meiklejohn identified, but never developed. I seek to take some preliminary steps toward developing it here. To be sure, the proposal departs radically from existing caselaw. But radical departure may be necessary. Many theorists who aim to remedy compelled speech doctrine explicitly acknowledge that any fix will require as much.[34] This is hardly surprising for a doctrine many have called confused or incoherent.[35] And the result would be salutary: Equalizing protections for both compelled speech and compelled conduct through the Fifth Amendment would preserve the First Amendment, with its extra strong protections, for the speech that the Constitution should care most about—viz., political speech. Correspondingly, insofar as the Fifth Amendment would likely offer less protection from compulsion, it would yield outcomes far more congenial to the *collective* dimension of collective self-government—sometimes, we must speak or act against interest or even conscience for the sake of our polity's shared aims.[36] With equality key among these aims, it should not be surprising that the wedding vendor challenges to public accommodation law find no succor under the Fifth Amendment.

II. THE RIFT IN FREE SPEECH THEORIZING

The Court has repeatedly contended that "the right to speak and the right to refrain from speaking are complementary components of the [same] broader concept…."[37] The problem is that caselaw and theory adduce multiple concepts,

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[34] *See, e.g.*, Bork, Amar and Brownstein, Post – see infra Part IV.D.

[35] *See infra* Part I.B.

[36] *Cf. Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905) ("in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations").

[37] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). *See also Wallace v. Jaffree*, 472 U.S. 38, 51 (1985); *Riley v. Nat'l*

with multiple underpinnings, for prohibitions on speech restrictions and compelled speech. The central cleavage arises between political and individual conceptions of the First Amendment. This Part aims to trace the development of each of these conceptions, and to show that the political conception dominates concerns about speech restrictions while the individual conception dominates opposition to speech compulsion. I then spell out the implications of the individual conception for the speech-conduct collapse.

A. Speech and Democracy

Alexander Meiklejohn is recognized as the first leading light of the view that the Free Speech clause is designed to serve the project of collective self-government. He held that the "primary purpose of the First Amendment" was to ensure "that all the citizens shall, so far as possible, understand the issues which bear upon our common life."[38] Access to truth was therefore necessary not, as Justice Holmes had announced in his famous *Abrams* dissent, as an end in itself but instead because the Constitution intends "that men shall not be governed by others, that they shall govern themselves."[39] They could do so only if "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information" was kept from them.[40] Summing up his view, he posited that "[t]he unabridged freedom of public discussion is the rock on which our government stands."[41]

Meiklejohn's view made its first appearance in doctrine in *NYTimes v. Sullivan*,[42] as Justice Brennan, who penned the decision, later all but acknowledged.[43] *Sullivan* announced that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social

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Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 797 (1988); Genevieve Lakier, *Not Such A Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 747 (2019). *Cf. Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance."). *But cf.* Robert Post, *Nifla and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1072 (2022) (referring to this "too easy equation" as "far too glib.").

[38] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1949). Many others have since taken up this mantle, including Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 308 (2019); cite others.

[39] Meiklejohn, *supra* note ___ at 89.

[40] *Id.* at 89.

[41] *Id.* at 91.

[42] *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment*, 1964 SUPREME COURT REVIEW 191 (1964).

[43] William J. Brennan, Jr., 79 HARV L REV 1, 18 (1965). *See also* Kalven, *supra* note ____ at 209.

changes desired by the people."[44] No wonder then that Meiklejohn called *Sullivan* "'an occasion for dancing in the streets.'"[45]

The political conception of the First Amendment became the leitmotif in cases protecting speech over the next sixty years, appearing not only in defamation cases,[46] but also in press cases,[47] election law cases,[48] employee speech cases,[49] freedom of expressive association cases,[50] and cases alleging intentional infliction of emotional distress,[51] misleading commercial speech,[52] and stalking and harassment.[53] The Supreme Court has cited *Sullivan* more than just about any other case at the core of the Court's canon.[54] By contrast, it is hard to find a speech restriction case adducing the individual conception.[55] The political understanding of the First Amendment came to pervade much scholarship too.[56] In short, the "*Sullivan* conception of free speech spread through the…literature like a grass fire in mid-August."[57]

Underpinning Meiklejohn's insistence that the First Amendment's constitutional safeguard was meant to promote collective self-government is his little-noticed presupposition that a person has no moral worth outside of the social

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[44] 376 U.S. at 269. (quoting Roth v. United States, 354 U. S. 476, 484 (1957)).
[45] Kalven, *supra* note____ at 22I n. 25.
[46] *See, e.g.*, Hustler v. Falwell, 485 U.S. 46 (1988).
[47] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).
[48] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).
[49] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987).
[50] *See, e.g.*, Hurley v. GLIB, 515 U.S. 557 (1995).
[51] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).
[52] *See, e.g.*, Nike, Inc. v. Kasky, 562 U.S. 443 (2003). *Cf.* BMW of North America v. Gore, 517 U.S. 559 (1996).
[53] *See, e.g.*, *Counterman v. Colorado*, 600 U.S. 66 (2023).
[54] 198 times versus 189 Supreme Court citations to Brown v. Board (1954), and 97 to Carolene Prodcuts (1938). Marbury v. Madison receives more citations, at 301, but it has had much more time on the books. Central anti-canon fare no better – e.g., 91 citations to Lochner v. New York. For work identifying the cases that constitute the canon and anti-canon, see, for example, Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L. J. 243 (1998).
[55] *See, e.g.*, Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 442 (1983) (noting that there are only a "few" speech restriction cases that sound in the register of the self). In identifying the few such cases, Bollinger cites only *Cohen v. California*, a case challenging a conviction for wearing a jacket in a courthouse with the words "Fuck the draft." But even that case hardly stands as a bulwark for the individual conception, as the Court described the "constitutional right of free expression" as "designed and intended to … put[] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity…." *Cohen v. California*, 403 U.S. 15, 24 (1971).
[56] *See, e.g.*, *supra* notes ____ and accompanying text [Intro] and infra Part III.
[57] Bollinger, *supra* note ____ at 439. *See also* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 397 & n. 60 (2008) (collecting sources for scholars influenced by Meiklejohn).

contract:[58] "So far as we can see, the non-human universe …neither knows nor cares about human dignity, nor about anything else. And further, we may agree that respect for human dignity is not a human ultimate. That attitude of mutual regard is created and justified only insofar as groups of men have succeeded in binding themselves together into a fellowship which, by explicit or implicit compact…" commits them to treating one another with dignity.[59] They forge this commitment by "creat[ing] a society in which men shall have the status of governors of themselves."[60] So the Constitution, for Meiklejohn, confers dignity upon us against the backdrop of a natural world that "has no moral principles" before we invent them.[61]

Robert Bork seems to have shared Meiklejohn's metaphysics, so it is perhaps unsurprising that the two arrive at the same interpretation of the First Amendment. In Bork's "Neutral Principles," even before he advances his political conception of the First Amendment, he takes the Warren Court to task for "creating" or "inventing" "fundamental values." "[N]o argument that is both coherent and respectable can be made supporting a Supreme Court that chooses fundamental values because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society." Note though that Bork would have reason to worry about unprincipled value choices only if he thought—as Meiklejohn apparently did—that the values in question did not already exist, independent of us, awaiting our apprehension. In other words, both Bork and Meiklejohn implicitly deny moral realism. They differ with respect to where or how the law should come to invent values—for Bork, judges should defer to the values emerging from the democratic process; for Meiklejohn, judges should find them immanent in Constitutional provisions. Still, each presupposes that the values are "no part of the natural world," as Meiklejohn puts it. More to the point, the value of each of *us* is not *a priori*; it is instead an artifact of our legal order.

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[58] I have found no references to this passage although a few scholars pick up on a later work, in which Meiklejohn argues that education will "so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen." ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM 250 (Cynthia Stokes Brown ed., 1981). *See, e.g.*, Eileen Carroll Prager, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 189 (1977); Elena W. Slipp, *Loper v. New York City Police Department Begs the Question: Is Panhandling Protected by the First Amendment?*, 60 BROOK. L. REV. 587, 632 n. 167 (1994). I take Meiklejohn to be saying that education *confers* dignity (rather than developing or amplifying a dignity that is already there); as such, his comments on education are of a piece with the passage I quote.

[59] *Id.* at 81.

[60] *Id.* at 82.

[61] *Id.* at 81.

The denial of our *a priori* value is not the explicit driving force of either theorist's account. But it is a telling precondition. If each had believed that individuals have intrinsic, pre-legal value, each might have been more sympathetic to an interpretation of the Constitution that saw it, in the first instance, as protecting our dignity. Instead, each interprets the rights the Constitution confers in light of the structure of government that the Constitution envisions. Meiklejohn's view was loftier to the extent that he thought the Constitution's project would dignify us, whereas Bork seems to have thought the central aspiration of the Constitution was to check abuse by undignified legislators.[62] Still the shape and content of First Amendment rights emerging from each theory was similar.

Thus Meiklejohn's view that "[t]he First Amendment does not protect a 'freedom to speak'" but instead "the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility." Meiklejohn therefore restricted the protections of the Free Speech clause to speech that will conduce to enlightened self-government. While initially that entailed very narrow First Amendment coverage—only straightforwardly political speech would count—Meiklejohn later expanded the category to include "all speech that informs people's political decisions…including literature (even obscenity), the arts, philosophy, and science, but not commercial speech."[63] Still, the impetus for protecting that speech was always and only because of its relationship to democracy, and not because it was expressive of the individual.

Bork went further, seeing all of the Constitution's rights as mere instruments for the project of self-government. Thus not only First Amendment rights but also "voting rights, [rights] to criminal procedure and [ ] much else" were "secondary or derivative rights."[64] He argued that these rights

> are not possessed by the individual because the Constitution has made a value choice about individuals…. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.[65]

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[62] See infra text accompanying notes ____ [around 62-63].

[63] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. CT. REV. 245, 256-57; see also Stephen Bates, *Meiklejohn, Hocking, and Self-Government Theory*, 26 COMM. L. & POL'Y 265, 286 (2021).

[64] Bork, Neutral Principles, at 17.

[65] *Id.* [Bork at 17]

In short, Bork held that the Constitution confers rights as a matter of circumscribing government power. For Bork, as for Meiklejohn, the implication was a First Amendment whose sole purpose was to foster self-government: "The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, … It does not cover scientific, educational, commercial or literary expressions as such."[66]

Other theorists offered variations of the political conception of the Free Speech clause.[67] Still others anointed it as the "only" viable conception.[68] Yet even as this theorizing progressed, the Court was developing an ever-expansive doctrine prohibiting compelled speech[69]—one that bore little trace of concerns about democracy.[70]

B. Compelled Speech and the Self

If Meiklejohn's, and then Bork's, political conception of the Constitution could be found in many of the seminal speech restriction cases decided after *Sullivan*,[71] it was veritably absent in the Court's compelled speech cases.[72] If not concerns

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[66] Bork, *supra* note ____ at 27-28.

[67] *See, e.g.*, Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 140-41 (1992) ("the Freedom of Speech Clause was designed, at a minimum, to safeguard the necessary preconditions of collective, democratic self-government.")

[68] Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 305-307 (2019). *But cf.* Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 354 (2022) (arguing that, as a matter of doctrine, political speech is not special relative to other categories of speech, however much the Court or theorists might claim otherwise).

[69] "The idea that the First Amendment protects us from being compelled to speak, while not new, is being invoked more frequently, more widely, and more aggressively than ever before." Vikram David Amar & Alan Brownstein, *Toward A More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 3 (2020)

[70] "In recent decades, the Court has tended to justify the First Amendment presumption against laws that compel speech on autonomy grounds." Genevieve Lakier, *Not Such A Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 751 (2019).

[71] *See supra* [text accompanying survey of cases in Part I.A]

[72] *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978); Roth v. United States, 354 U.S. 476, 484; *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-863, 94 S.Ct. 2811, 2821 (POWELL, J., dissenting).
Cf. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (recognizing that the First Amendment protects both the right of the individual to engage in political expression and the "interests of society as a whole" that there be unfettered, robust discussion of political matters); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (recognizing both rationales as well); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 474 (2015) (same).

about collective self-government, though, just what was the organizing value in these cases? Many theorists attempting to recover a single value, or even a plurality of values systematically applied, have come up empty-handed. Thus, they have decried compelled speech doctrine, referring to it as haphazard and inconsistent,[73] or again "incoherent, imprecise, and unstable."[74] Robert Post has counted ten different rationales in compelled speech doctrine.[75] Eugene Volokh, in his admirable effort to systematize the cases, arrived at twelve,[76] after which he conceded that there might be "no such thing as first principles, …just one damned case after another."[77] A doctrine that is hard to pin down is, as we will see in the next Part, liable to untoward expansion.[78]

At the same time, other theorists have recovered in the cases persistent references to the self, from which they have theorized that compelled speech law is really about autonomy,[79] dignity,[80] self-definition,[81] self-presentation,[82] self-

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The cases involving compelled subsidization of political speech appeal to the political conception of the First Amendment. *See, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, includ[ing] discussions of candidates.") (internal quotations omitted). These should be seen as speech restriction cases rather than compelled speech cases because the worry is, at bottom, that the compulsion will have a chilling effect—people will be silent since speaking triggers the compelled subsidy. For more on the thought that these are really speech restrictions in disguise, see Bhagwat, cite.

[73] Vikram David Amar & Alan Brownstein, *Toward A More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 6 (2020) Vikram David Amar & Alan Brownstein, *Toward A More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 6 (2020)

[74] David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 843 (2022). *See also* Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2360 (2020).

[75] Robert Post, *Nifla and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1082 (2022).

[76] Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 357 (2018).

[77] *Id.*

[78] *See also* Amar and Brownstein, supra note ____ at 6 ("This lack of rigorous doctrinal structure has led to more compelled-speech litigation and, perhaps more problematically, an increased willingness of courts to expand the scope of the case law in this area.").

[79] See Scanlon, *supra* note ____; [Lakier on autonomy]; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (""Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others.").

[80] Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPPERDINE LAW REVIEW 731, 741 (2020); Vikram David Amar & Alan Brownstein, *Toward A More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 7 (2020).

respect,[83] self-realization,[84] individual resolve,[85] independence of thought,[86] preservation of speaker authority,[87] and control over the bounds of one's associations.[88] All of these concerns are, at bottom, about the individual.[89]

The caselaw certainly supports their reading.[90] In challenges to laws that would compel media outlets to include unchosen voices or views, the Court has

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[81] Laurence H. Tribe, American Constitutional Law 888 (1978) (the individual seeks to "to be master of the identity one creates in the world"); David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 97–98 (2012); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 31 (1989). See also Steven Shiffrin, *The First Amendment and Economic Regulation: Away from A General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1237–38 (1983) ("Professor Baker's position …is at the opposite pole [from Bork's], believing that self-expression is the only value protected by freedom of speech."). *Cf.* Tobias Barrington Wolff, "Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy" 63 Brooklyn L Rev 1141, 1144 (1997) (condemning DADT because "it compels gay servicemembers to make involuntary and false affirmations of a heterosexual identity that is not their own.").

[82] Gaebler at 1004.

[83] Gaebler at 1005.

[84] Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963); Redish.

[85] See Martin H. Redish ; and Kirk J. Kaludis (FNaa1), *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114 (1999)

[86] Cantor at 15-16

[87] Redish & Kaludis, *supra* note ____ at 1114

[88] Greene, supra note ____.

[89] See generally Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 245 (2002) (collecting sources). To be sure, some theorists advance accounts related to the self to explain all free speech law, and not just compelled speech doctrine. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 69 (1989); Emerson, *supra* note ____, at 6 ("[F]reedom of expression is essential as a means of assuring individual self-fulfillment."); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 20-21 (1984) (arguing that speech facilitates the individual's ability to control her own destiny and to develop human faculties); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992) ("[F]reedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment."). As we saw above, though, the individual rationale makes only a minor appearance in the caselaw addressing speech restrictions. See *supra* Part I.A; Amar and Brownstein. At any rate, my concern is not to show that the individual rationale cannot explain the wrong of speech restrictions; it is instead to show that the political conception cannot explain the wrong of speech compulsion.

[90] It is standard to identify as the key compelled speech cases "*West Virginia State Board of Education v. Barnette*, *Wooley v. Maynard*, *Miami Herald Publishing Co. v. Tornillo*, *Pacific Gas & Electric Co. v. Public Utilities Commission*, *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston, Inc.*, and *National Institute of Family & Life Advocates v. Becerra*," Greene, supra note ____ at 1486, and now *303 Creative*. *See also* Amar and Brownstein, supra note ____ at 33-45.

recognized "the journalistic integrity of [ ] editors and publishers,"[91] and it has therefore found unconstitutional "any [ ] compulsion to publish that which *reason tells them should not be published.*"[92] Even *Turner Broadcasting System, Inc. v. FCC*, which upheld a requirement that cable television providers reserve some stations for local broadcasters, recognized that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."

Outside of the context of the press, the Court has recognized that compelled speech can interfere impermissibly with the self. In *Wooley v. Maynard*, where the Court held that New Hampshire could not require its citizens to carry its slogan on their license plates, the person challenging the requirement had covered up the slogan with black tape. The Court could have addressed the issue before it as an instance of symbolic speech, as the court below had;[93] that would have made the case one dealing with a speech restriction. But it expressly eschewed this possibility, deciding to "turn instead" to what it viewed as the "essence" of Mr. Maynard's objection, which it quoted in his own words: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."[94] In *Janus v. AFSCME*, where the Court struck down a requirement that workers pay agency fees to public unions, it noted that "Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[95] In *303 Creative v. Elenis*, as we have already seen, the Court saw the injury the website designer would sustain were she compelled to provide websites for same-sex weddings as denying her the "promise" of the First Amendment to secure for "all persons" the "freedom to think and speak as they wish."[96] Finally, in *Hurley v. GLIB*, where the Court ruled that Massachusetts could not compel parade organizers to include an unwanted float, it announced "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[97]

Given that the primary identified harm in speech restriction is our very system of government, one might have thought that the Court would be more

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[91] *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U. S. 94, 412 U. S. 117 (1973) (quoted in *Tornillo*, 418 U.S. at 255).
[92] Tornillo, 418 U.S. at 256.
[93] See 430 U.S. at 713.
[94] *Id.* (internal quotation marks omitted).
[95] Janus at *8.
[96] 303 Creative LLC v. Elenis, No. 21-476, 600 U.S. 20, *26 (2023)
[97] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

hostile to speech restrictions than speech compulsion. In fact, though, the Court appears to think that compelled speech may be "even worse" than compelled silence.[98] Thus the Court sometimes approaches compelled speech as if it is a *per se* injury, rather than undertaking any kind of balancing test. This was true in the Court's very first compelled speech case, *West Virginia v. Barnette*,[99] challenging a mandated pledge of allegiance, even though balancing in the free speech context had been introduced ten years earlier.[100] It was also true in *303 Creative v. Elenis*, the case finding that enforcing a public accommodations law against a wedding vendor whose work is customized and expressive would violate her First Amendment right not to be compelled to speak.[101]

In sum, compelled speech, in theory and doctrine, is wrong because of its affront to the self: it recruits an individual into speaking, or supporting, a message in contravention of their own judgment about what to say.

C. The Speech-Conduct Collapse

We have just seen that compelled speech theorizing, like the cases theorized, overwhelmingly sounds in concerns about the self, and not about the polity or democracy. But once one identifies the wrong as concerned with the self, one must confront the worry that speech is not special. Compelled conduct in support of an end one opposes implicates dignity, self-realization, integrity, and all the rest too. Thus the Court in *Masterpiece Cakeshop v. Elenis* recognized that providing a cake celebrating a marriage one opposed implicated the baker's conscience.[102] Justices Gorsuch and Thomas, in concurring opinions, went further. Each recognized the affront to the baker's convictions in providing *any*

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[98] William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 172 (2018) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) for the proposition that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."). *See also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Whenever the Federal Government or a State prevents individuals from saying what they think on important matters…, it undermines [democratic] ends. When speech is compelled, however, additional damage is done.").

[99] Cite.

[100] In 1939, Justice Roberts wrote the first explicit balancing opinion in a free speech case, Schneider v. State, cite.

[101] *See* Michael Dorf, https://www.dorfonlaw.org/2023/06/unanswered-questions-in-web-designer.html (castigating the Court for saying "[n]ada. Zip. Zilch" about whether Colorado's law was narrowly tailored).

[102] Masterpiece Cakeshop v. Elenis, 584 U.S. 617 (2018).

cake—even one with no words or symbols[103]—and each appears to have been willing to exempt the baker from Colorado's public accommodations ground on that basis.[104]

In the next Part, I aim to draw out how the second installment in the Court's wedding vendor cases, *303 Creative*, makes the threat of a speech-conduct collapse vivid even as the parties there stipulated that the website designer's services involved "pure speech." Before doing so, it will be worth addressing a more general worry about the reality and urgency of the threat.

The central critical claim of this Article is that the reasons for protecting people from compelled speech apply with equal force to compelled conduct; as such, there is no principled basis upon which to accord people greater protection from compelled speech than compelled conduct. But, one might think, the threat of a speech-conduct collapse should arise not just for compelled speech but also for speech restrictions.[105] Just as freedom *to* speak is necessary for self-fulfillment so too is much freedom to act—e.g., freedom to engage in public nudity, polygamous marriage, psilobycin use, and so on. Why hasn't there been, or why shouldn't there be, a speech-conduct collapse when it comes to *restrictions* too?

In point of fact, I am largely agnostic about the stability of a distinction between speaking and acting when it comes to *speech restrictions*, though I express doubt about theorists' efforts to erect that distinction in Part III. But notwithstanding those doubts, the political conception of the free speech clause does offer a promising bulwark against the speech-conduct collapse when it comes to speech restrictions, as many other theorists have shown.[106] If the Free Speech clause is understood to protect democratic government, then there is little reason to worry that it will be invoked to challenge wide-ranging conduct restrictions (prohibitions on nudity and the like).

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[103] 584 U.S. at 650 (Gorusch, J., concurring) ("Nor can anyone reasonably doubt that a wedding cake without words conveys a message.") and *id.* at 655 (Thomas, J., concurring) ("the Commission's order required Phillips to sell '*any* product [he] would sell to heterosexual couples'") and 659 ("a wedding cake *inherently* communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated.") (internal quotation omitted, italics added).

[104] *See, e.g.*, Masterpiece Cakeshop, 584 U.S. at 654 (Gorsuch, J., concurring).

[105] Theorists are not unaware of this threat; it is in part what motivated the political conception, as I noted above. See *supra* note ___ and accompanying text [Intro, around notes 15 and 16]. And a similar threat has been noted in the Free Press context, for a rationale that focuses on producing an informed populace. *See, e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) ("There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.").

[106] See *supra* [Post, BeVier, etc.]

The problem is that the political conception is not available as a plausible explanation for compelled speech doctrine.[107] I argued in Part I.B that the *best* understanding of the seminal compelled speech cases sounds in concerns about the self. But we can go farther still, to see that the individual conception is the *only* plausible explanation: It would make little sense to interpret the cases as protecting self-government or democratic participation instead.

Start with the cases that seem most connected to political speech—*Barnette* (pledge of allegiance), *Wooley* (slogan on license plate), and *NIFLA* (notice of availability of abortion services). In those cases, the state is compelling someone to speak its own message. One can adduce a concern about democracy arising from having the government use private individuals as its mouthpiece.[108] The worry is especially acute when the government compels a private citizen not merely to post its message but instead to partake of it in a way that affirms the speech or speaker, as with the pledge of allegiance.[109]

But now consider the cases where the government is compelling someone to host another private party's speech. For example, in *PG&E*, California required a utility company to include a third party's newsletter in its billing envelope. In *Hurley*, Massachusetts required the organizers of a Saint Patrick's Day parade to include a gay pride float they would have preferred to exclude.[110] The injury in these cases arises because the speech one is made to host interferes with one's own private aims—in *PG&E*, one's financial interests;[111] in *Hurley*, one's vision for the parade. There is no discernible threat to democracy here.

Given the difference between the two sets of cases, one could propose treating them differently, such that only cases where the government, rather than a private

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[107] *See* Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 310 (2019) (arguing that the "idea that pure compelled-speech claims implicate concerns about undermining democratic debate" is "far-fetched." *Cf.* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 905 (1994) ("Although autonomy deserves the status of a First Amendment value, autonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many contexts.").

[108] *Cf.* Baude and Volokh, *supra* note ____ at 192 (offering extended discussion of cases involving compelled government support of its own actors or preferred political parties); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that "First Amendment law ... has as its primary, though unstated, object the discovery of improper governmental motives"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 529 (1977) (same).

[109] *See, e.g.*, Genevieve Lakier, *Not Such A Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 744 (2019).

[110] *See, e.g.*, Tornillo, PG&E, Hurley, 303 Creative.

[111] *See* Sepinwall, NDLR.

party, speaks through a compelled speaker fall under the Free Speech clause. The other cases might then receive the weaker protection that the Fifth Amendment affords.[112] The reason to grant more rigorous review to the cases where the compelled message is the government's would derive from the greater threat to democracy that being made to mouth the government's speech entails. The move would be akin to developing a political conception of compelled speech. Adopting that conception would make the First Amendment the exclusive preserve for political speech when it came to both speech restriction and compulsion.

The problem with this suggestion is that there is no greater threat to democracy in the cases where one is compelled to speak the government's message rather than a third party's; indeed, there is no credible threat at all. Take *Wooley* and *NIFLA* first. The message contained on one's license plate or on the walls of a medical clinic is clearly attributable to the government. As such, there is little to no risk of truth distortion. And there is no other interest connected to collective self-government at stake in *Wooley* or *NIFLA*.

But what about *Barnette*? Cases involving compelled pledges or oaths seem to do more than use someone as a mouthpiece for the state.[113] At least some compelled state speech seems also to affect the status of certain government actors, or even whole governments. This is because sometimes an oath or a pledge is not merely a bland recitation; it is a speech act. In much the same way that the "I do" that a betrothed couple announces at their wedding ceremony effectuates the marriage, thereby committing each to the other, so too a person's pledging allegiance can institute a commitment—in the Pledge, a promise of fealty. Speech can do many other things: inaugurate a president, anoint a king,[114] impose a sentence. Being made to say something that one not only takes to be false or abhorrent but that also brings into being some reviled state of affairs surely involves a different and far more significant injury than merely having given, say, envelope space to a cause that is not one's own, as in *PG&E*.[115] But at least as bad would be to bring about that state of affairs through acts involving no words. No one wants, against their will, to sentence someone to death; but so too no one wants, against their will, to have to administer the lethal injection. This should be unsurprising; speech acts are, well, acts. Nor does it seem like the compulsion is

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[112] This would mirror the cleavage between political and non-political speech that Meiklejohn offers, see infra Part IV.D.

[113] *Cf.* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 208 (2013) (decrying the requirement that agencies receiving federal aid denounce prostitution on the ground that "[t]his is more than merely posting a sign; this is compelled affirmance of a position.").

[114] See Alexander, *supra* note ____.

[115] *Cf. American Communications Association v. Douds*, 339 U.S. 382, 422 (Frankfurter, J., concurring) ("To require oaths as to matters that open up such possibilities invades the inner life of men.")

worse when it is the state that decides what one must say or do, rather than its being the state that permits someone else to decide what one must say or do (as in *PG&E* and *Hurley*).

So *Barnette* does in a way stand alone—of the seminal cases, it is the only one that involves more than mere speech. But as such it is distinct not only from *PG&E* and *Hurley* but also from *Wooley* and *NIFLA*. So the injury it uniquely imposes would not support the cleavage now under consideration. Should it alone receive First Amendment protection, with all the others receiving only Fifth Amendment protection? I will have lots to say about the use of the Fifth Amendment for general government compulsion in Part IV. But I won't answer this question specifically. There is a large literature addressing the limits on what and when the *state* may compel its citizens to effectuate through their speech;[116] much of it seems unsure about where to locate constitutional protections against government abuse.[117] Intervening in that debate will have to await another day.

Returning to the main thread: Whereas a political conception of the First Amendment can forestall the speech-conduct collapse when it comes to speech restrictions, that conception is inapt and so unavailable when it comes to speech compulsion. The threat of collapse remains.

II. SPEECH AND CONDUCT IN *303 CREATIVE*

303 Creative involved an as-applied challenge to Colorado's Anti-Discrimination Act (CADA), which prohibits discrimination in the retail sphere, including discrimination on the basis of sexual orientation.[118] Lorie Smith, a website designer who opposes same-sex marriage, wanted to get into the business of creating wedding websites only for opposite-sex couples. She brought a pre-enforcement challenge, arguing that if the state forced her, under CADA, to create websites for same-sex weddings, it would be compelling speech in violation of the First Amendment. The Court agreed, and it held that public accommodation law must give way when the business in question offers a good or service involving "pure speech," which is what the parties understood a customized and original website to consist in, as per their stipulation.

There are two ways that *303 Creative* exemplifies the worry about a speech-conduct collapse, which this Part addresses in turn. The first and more

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[116] *See, e.g.*, *Burt v. Blumenauer*, 299 Or. 55, 66-67 (1985) (collecting sources and offering an erudite discussion); Baude and Volokh, *supra* note ____ at 192 (other sources and more erudite discussion); Han, 97 Ind. L.J. 841, 858.

[117] *See* 299 Or. at 67.

[118] Colo. Rev. Stat. §§24–34–306, 24–34– 602(1).

straightforward of the two reveals that the interests the website designer has in not providing a speech-based service to gay couples are the very same that any wedding vendor who shares Smith's opposition to same-sex marriage would have—even if that vendor provided a service that did not involve speech. In other words, the reason why compelled speech would harm Smith is the same as the reason why compelled conduct would harm the non-expressive vendor.

Second, and less obviously, Smith's case isn't one where there is state-compelled speech at all; the only compelled speech is the customers'. Since the First Amendment does not prohibit one private party from making another speak the first's message,[119] there is reason to conclude that the Court was wrong to think that the First Amendment was even implicated here. That both the majority and dissent nonetheless took it for granted that there was state-compelled speech bespeaks the grip of the individualist conception,[120] and shows the threat it poses to be especially grave.

A. Two Identical Sets of Interests

I argue here that the website designer's interest in not designing a website for a same-sex wedding is the same as the interest that, say, a reception hall owner would have in not hosting that wedding. Elsewhere, I have identified the traditional rationales for protecting people from compelled speech—misattribution, thought control, and cooptation—and argued that they apply with equal force to the reception hall owner.[121] To rehearse those arguments briefly here: Misattribution arises from the mere fostering of the project to which one contributes one goods or services; the reception hall owner who hosts a same-sex wedding is thus just as likely to be viewed as endorsing that wedding as is the website designer. Our thoughts are as likely to be affected by the words we say as the actions we perform; thus, the reception hall owner might experience thought interference just as readily by witnessing the same-sex wedding as the website owner does in creating the website. And, finally, cooptation results whenever one

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[119] "The right of free speech is constitutionally guaranteed against abridgment by only the federal or state governments." 424 U.S. at 520; *see generally* *Flagg Brothers*, 436 U.S., at 156, 98 S.Ct., at 1733 ("most rights secured by the Constitution are protected only against infringement by governments").

[120] Part II.B explicates the ways in which the majority found there to be compelled speech. In Part II.E, I discuss the dissent's take, which also acknowledged that there was in effect compelled speech, but only incidentally; the government was not aiming to make Smith speak a message she opposed.

[121] Amy Sepinwall, Free Speech and Off-Label Rights, cite.

is pressed into service against one's will; the fact that one is made to speak, rather than, say, spend time setting up and decorating the hall makes no difference.

Here are two other ways to show the equivalence. Notice that the website design service, as a commercial enterprise, is at the end of the day beholden to the client's wishes. Typically, a website designer like Smith will provide a mock-up of the site to her clients, but they can request changes, and she will be permitted to publish the website only if it receives the clients' final approval.[122] The relevance of Smith's running a business is not, as Justice Gorsuch maintained, that one loses one's prerogative to act on conscience once one seeks to earn a profit.[123] I have elsewhere argued that one does not.[124] It is instead that one loses creative control once one discards the mantle of the fine artist to become a commercial purveyor. In this respect, Smith's case is different from *Hurley*, where the parade organizers had a pre-existing message that *only* the state's forced inclusion of a parade float would disrupt.[125] Here, whatever pre-existing message Smith might wish to convey is already subject to disruption by any clients she serves; this is the price she willingly paid by going into business. Had Smith retained the prerogative to speak her own message, that might have distinguished her from the reception hall owner, who has no message. But the commercial reality makes it the case that Smith enjoys no such prerogative. There is no message she is entitled to preserve, and so she is in the same boat as the reception hall owner.

Second, imagine an opposite-sex couple that approaches Smith seeking her website design services. In addition to having a website that conveys the typical details—logistics for the wedding, registry, and so on—they would like the website to tell the story of their meeting, their hopes and dreams as a married couple, and so on. Nowhere on the site do they contemplate endorsing marriage in general, or opposite-sex marriage in particular. Indeed, they might be surprised to learn that the site they envision can be read as an endorsement of marriage, let alone opposite-sex marriage. They might even be opposed to any such implication. They might affirmatively believe that marriage is for everyone, and not just opposite-sex couples; or again, they might believe that it is *not* for everyone, and that other forms of intimate relationships are at least as valuable as

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[122] At oral argument, Kristen Waggoner, Smith's lawyer, cleverly quipped that "the Pulitzer goes to the photographer, not the subject." What she neglected to note was that the Oscar for Best Film goes to the producer—the person whose project it is—not to the cameraman, screenwriter, director or actor. And just as the film is the producer's, so too the website is the couple's.

[123] Cite.

[124] Amy Sepinwall, Conscience and Complicity, cite.

[125] *But cf.* William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 Yale L.J. 2411, 2458-59 (1997) (doubting that there was any message at all in *Hurley*, given the wide variety of floats with no coherent theme).

marriage. Smith might nonetheless see the website as endorsing marriage, or opposite-sex marriage, but she would just be wrong.

Insofar as that message is not one the couple intended and certainly not one that the website explicitly offers, one is left to ask: what grounds the endorsement? The answer seems to be that the website provides evidence of an opposite-sex couple's getting married, and we generally believe that people do what they believe it is good to do.[126] So the couple's choice affirms the good of their marriage. But now notice that the same evidence emerges from seeing the wedding in action — at, say, a reception hall. Both the website designer and reception hall owner provide occasion for the couple to put on display their choice to marry, with the attendant expression that the marriage is worth doing — their marriage, opposite-sex marriage, all marriage, or however one chooses to understand what exactly the couple is choosing. The point is that the expression does not come from anything that the provider provides uniquely to this couple. It comes from the brute fact of their marrying, and it can emerge from expressive and non-expressive contributions alike.[127]

Because the endorsement of marriage comes from the fact of the marriage rather than any explicit message (as per the hypothetical), Smith's case is different from *Lee v. Asher's Baking Company*,[128] a United Kingdom case that the majority cites approvingly in *303 Creative*.[129] In the U.K. case, a customer sought a cake with the phrase "support gay marriage" as part of a campaign to have gay marriage legalized in Northern Ireland. The U.K. Supreme Court upheld the bakery's refusal to provide that cake, explaining that "[t]he less favourable treatment was afforded to the message not to the man." But Smith was not seeking an exemption from having to create websites that explicitly contained political messages promoting same-sex marriage. She was seeking an exemption from having to create customized websites for *any* same-sex marriage[130] —

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[126] *See, e.g.*, J.P. Sartre, Existentialism As a Humanism ("To choose between this or that is at the same time to affirm the value of that which is chosen; for we are unable ever to choose the worse."). *See generally* Sergio Tenenbaum, *The Guise of the Good*, ROUTLEDGE HANDBOOK OF PRACTICAL REASONS (ed. Ruth Chang and Kurt Sylvan) (describing the philosophical thesis corresponding to the idea that people do what they believe it is good to do).

[127] The baker in Masterpiece Cakeshop seems to have conceded as much in arguing that his wedding cakes, even those without words, "declare an opinion too: that the couple's wedding 'should be celebrated.'" Brief for Petitioners at 1, Masterpiece, 138 S. Ct. 1719 (No. 16- 111).

[128] *Lee* v. *Ashers Baking Co. Ltd.*, [2018] UKSC 49, p. 14

[129] *18 n. 3.

[130] Here is Smith in her own words: "'I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman.'" *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).

websites just like the one the hypothetical here describes, which might not have been trying to make any kind of political statement about anything at all.

The overall point is this: Providing a good or service for someone's event can reasonably be seen as promoting or endorsing that event. But the promotion or endorsement arises from the provision of the good or service, not from words or expression that the good or service might contain. Accordingly, the reception hall owner is no less implicated in a same-sex wedding than is the website designer.

B. No State Action

State action is notoriously hard to discern.[131] Perhaps this is why the Court in *303 Creative* slips between two different ways in which the state is (supposedly) compelling the website designer to speak. In some moments, the Court accuses Colorado of using Smith as a mouthpiece for the state's commitment to marriage equality.[132] What is that message? Presumably, it is something like, "we do not turn people away on the basis of their protected characteristics."[133] But if that is right, then it is conveyed whenever one provides a member of a protected class with any good or service at all. The message consists in the provision of service, not in serving them with customized expression. So if the state were to have enforced CADA against Smith, it would have made her speak in just the same way it would make the reception hall owner speak.

In other moments, the Court understands the state to be compelling speech not by foisting its own message on Smith but instead by requiring her to speak the *customers'* message. Thus the Court analogizes Smith's case to *Hurley*, where Massachusetts mandated the inclusion of an unwanted float in the organizers' parade, and it states that "[n]o government… may affect a speaker's message by forcing her to accommodate other views."[134] We have already seen that compelled speech doctrine contemplates cases not only where the government requires that someone speak its own message but also where it requires that someone speak a

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[131] *See, e.g.*, Charles L. Black, Jr., *The Supreme Court, 1966 Term--Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (referring to the state action doctrine as a "conceptual disaster area"). *See generally* Leading Cases, 115 HARV. L. REV. 437 (2001) (collecting sources speaking to the difficulty).

[132] *See, e.g.*, 303 Creative at *19 ("the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?") (italics in original).

[133] *See id.* at *11 ("The coercive elimination of dissenting ideas about marriage constitutes Colorado's very purpose in seeking to apply its law to Ms. Smith.") (alterations omitted).

[134] Hurley, cite.

third party's message.[135] That was the nature of the compelled speech not only in *Hurley* but also in two other seminal cases in which the government sought to compel one private party to disseminate another private party's speech—*Tornillo* and *Pacific Gas & Electric*. I have already argued that *Hurley* is distinguishable because any message Smith has is subject to alteration, or even silencing, by the couple commissioning her work.[136] But so too are *Tornillo* and *Pacific Gas & Electric*.

In each of those two cases, the regulation at issue *explicitly commanded inclusion of another party's speech*.[137] By contrast, the law at issue in *303 Creative*—as with all public accommodation laws—is not an affirmative command, and it says nothing about speech in particular. It is instead a general prohibition; it imposes a limit on a business owner's otherwise unfettered discretion to decide whom to serve. Because of this, public accommodation law should not be seen as compelling anything—speech or conduct—as I will now argue.

It may be easiest to discern the structure of public accommodation laws by likening them to other instances when the law limits someone's freedom. Title VII, for example, prohibits an employer from undertaking an adverse employment action on the basis of an employee's possessing one or more enumerated protected characteristics.[138] For instance, a racist employer may not refuse to hire a Black person because of that person's race. But suppose, contrary to Title VII, an employer does reject a Black job applicant, the applicant learns of the racist reason for his not being hired, and he sues. Does the state's enforcement of Title VII against the employer entail that the state *compelled* the employer to hire that person? If it did, the employer would have a colorable claim that Title VII interfered with the employer's constitutionally protected rights of freedom of association.[139] But that claim has never been made successfully,[140] nor could it have been.[141] Title VII removes a permission the employer otherwise had—

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[135] *See also* Wolff, amicus brief.
[136] See *supra* Part III.A.
[137] Cite.
[138] Cite.
[139] Cite *Slattery v. Hochul* – same problem.
[140] *See* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (finding a violation of Title VII when law firm declined to promote an associate because of sex over a challenge that application of Title VII would violate the firm's rights to expression or association).
[141] *Cf. Heart of Atlanta Motel*, 379 U.S. at 260 ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.").

namely, to enact his biased hiring preferences. But it doesn't compel the employer to hire anyone in particular.[142]

By the same token, in protecting customers' rights to equal access under Colorado's Anti-Discrimination Act (CADA), Colorado is not compelling Lorie Smith to do anything in particular. Like Title VII, CADA removes a permission Smith otherwise had—namely, to enact her biased preferences. But CADA does not compel Smith to do anything—not to speak, not to design custom and unique websites, not to design generic websites, nothing at all. All CADA says is that, if you are in business, you may not turn customers away because of who they are.[143]

With that said, one might think that enforcement of a public accommodation law necessarily involves state action because it is public law.[144] This feature of public accommodation law was especially salient in *303 Creative*, which was a pre-enforcement challenge; as such, there was no private party whom Smith had turned away who could then press their own rights. But CADA, like most public accommodation laws, allows either state officials or private citizens to bring suit to enforce the law.[145] (Thus, in *Masterpiece Cakeshop*, which also involved a challenge to CADA's scope of application, it was the gay couple whom the baker turned away that proceeded against him.) CADA mandates a public duty and confers a private right. My claim is that, when a *private individual* successfully enforces her right to service under a public accommodation law, there is no state compulsion that amounts to state action, just as there is no state compulsion amounting to state action when the law enforces any other private right. If anyone compels service, it is the patron; after all, he could relinquish his right and go elsewhere.[146]

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[142] *Cf. Hishon*, 467 U.S. at 75 ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.").

[143] *See supra* note ____ [Hishon, with quote that employer retains discretion about which benefits it will offer, but not discretion about to whom it will offer them];

[144] *See, e.g.*, Ripstein at 84.

[145] Colo. Rev. Stat. §§24–34–306, 24–34– 602(1). *See generally* https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf at 6 (reporting on number of states that allow for both private and public enforcement).

[146] The claim here is that the compulsion that arises is at the hands of the customer, not the state, and that makes all the difference. In the context of thinking about compelled subsidies, rather than compelled speech, William Baude and Eugene Volokh argue that the public/private distinction should make *no* difference. "Why would the First Amendment distinguish compelling people to subsidize private speech from compelling people to subsidize government speech?," they ask. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 182 (2018). Even while they see each as equally bad, they conclude that neither is worse than being made to pay taxes. Tax revenue sometimes funds political speech yet one may not raise a First Amendment challenge to paying one's taxes. They conclude that there is no First

To the point here: a state that protects a same-sex couple's right to use their entitlement to be served at the business of their choosing is not compelling that business to serve; it is simply telling the business that it may not refuse in this instance to do what the business does in its normal course.

Perhaps, though, *303 Creative* is distinguishable just at this point: why think that providing wedding websites for same-sex couples is part of the "normal course" of Smith's business? Why not instead think that Smith gets to control her inventory, and she has decided that there are some websites she will design—e.g., those for ballet studios and opposite-sex weddings—and some she will not—e.g., those for MMA studios and same-sex weddings.[147] I address this worry below. But before moving on, I want to distill the general point. At least if we assume that what the same-sex couple seeks from the business is uncontroversially among the goods or services that the business already offers, then the state does not violate a store owner's right when it vindicates a customer's right to service.

C. Products Versus Patrons

I have just argued that a state does not compel a business to do anything, other than obey its legal duties, when it permits a customer to exercise their right to service. But what if the customer seeks a good or service that is not straightforwardly one the business was already providing? We typically permit store owners full discretion to determine the scope of their inventory. As Justice Kagan said in her concurrence in *Masterpiece Cakeshop*, "[a] vendor can choose the products he sells" (even if he may not choose the customers he serves).[148] For example, a butcher who operates a conventional meat shop may decide not to

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Amendment right against being made to subsidize a private party's speech. *See generally id.* at Part II. I see their argument as offering support for mine, at least to the extent that they are arguing that the government does not compel speech when it compels subsidization for speech—its own or a private party's. In a similar vein, and as I argue, the government does not compel speech when it compels a private party to foster another's speech not through subsidization but instead through the provision of a good or service—paper on which to print one's pamphlets; photocopying services to reproduce them.

[147] Smith had said that she would not design websites that "encourage[e] violence." *303 Creative* at *17.

[148] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35, 584 U.S. at ____, *3 note * (2018) (Kagan, J., concurring). The full quote is instructive: "A vendor can choose the products he sells, but not the customers he serves—no matter the reason." *Cf.* 303 Creative, 10th Circuit (Tymkovitch, J., dissenting) ("the Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer.").

carry kosher meat; in so deciding, he is not discriminating against Jewish patrons. No one would think that his turning a Jewish patron away implicated a public accommodation law. Why not then understand Smith's refusal to provide same-sex wedding websites in just the same way? "Same-sex wedding website" is not among the product lines she offers.

At some moments, this is precisely the way the majority understands what is at issue for Smith.[149] And if the majority's understanding is right, then CADA would be just as inapplicable here as it is for our non-kosher butcher—neither of them discriminates on the basis of who the customer is in deciding what products to provide. Understanding the Court's analysis in this way would have the salutary effect of explaining an otherwise curious feature of its decision. Scholars have criticized the decision for bypassing strict scrutiny, or any other balancing test.[150] But if CADA is inapplicable, then the Court did not need to hold it to any kind of balancing test. This understanding would also vindicate the outcome of the case: in making Smith provide a same-sex wedding website, the state really would be compelling her to do something—it would be compelling her to include within her inventory products she prefers not to sell, a straightforward violation of her rights.[151]

It is not unreasonable to see Smith's case in this way—as an effort to defend her authority to determine the scope of her inventory, and not as an effort to defend her right to decide whom to serve. But if that is what is going on in *303 Creative*, then the distinction between speech and conduct really does fall away. If "same-sex wedding website" is a distinct product then so too is "same-sex wedding plan." A wedding planner who wanted to plan only opposite-sex weddings would have the very same complaint as Smith were the state to challenge the wedding planner's choice. She too should have the right to decide the scope of her inventory, free from state intervention.

One might think that the equivalence I have posited between website designer and wedding planner is meant to expose the arbitrariness of marking out "same-sex wedding" as a distinct event, whether one is dealing with websites or wedding

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[149] "Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait." 303 Creative at *11-12.

[150] See *supra* note ____ [Dorf]

[151] See *supra* note ____ [Kagan]. *Cf. 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1192 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023) ("the Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer."). *Compare* Irish–American Gay, Lesbian and Bisexual Group of Boston v. Boston, 418 Mass. 238, 260 (Nolan, J., dissenting) (arguing that the parade organizers in *Hurley* had not even violated the Massachussetts public accommodations law because they objected to GLIB on the basis of its message and not the sexual orientation of its members).

plans. What next, one might think? "Opposite-sex right-handed couple weddings"? But in truth I am agnostic about where to draw the boundaries between different kinds of events or products. My point is only that if the affront to Smith lies in having the state determine the scope of her inventory, then it is not an affront that has to do with speech. It is the same affront the butcher suffers if the state makes him carry kosher beef, or non-kosher poultry, or spice rubs, or anything at all other than what he has set out to sell. Smith would have a complaint if the state made her design highly customized websites with unique art and prose for, say, dwarf fighting;[152] but she would have the same complaint if the state instead made her add on to her website business by, say, selling pre-made equipment for dwarf fighting.

To sum up, we should view the wedding vendor cases in one of two mutually exclusive ways: Either CADA is applicable, in which case patrons have a right to service that, when exercised, is not an instance of the state compelling anything, including speech; or the cases are about deciding on the scope of one's inventory, in which case CADA is not applicable, and the vendors' rights are the same whether or not the vendors work in an expressive vein. The important point for the purposes here is that, however one chooses to understand what is at stake for the website designer, the fact that her work is "pure speech" makes no difference at all.

D. Not Incidental

In the last Section, I allowed that one might understand *303 Creative* as a case about controlling inventory. Even while one could reasonably understand the case in that way, doing so renders discussion of speech, which constitutes large swaths of the majority's analysis, irrelevant. My considered view is that the case is not really about inventory, but instead about whether, as the majority writes at the very outset of its opinion, the state may "use its [public accommodations] law to compel an individual to create speech she does not believe." I argued above, though, that in enforcing the customer's right to be served, the state was not compelling speech.

That argument may sound a lot like the one the dissent and some *amici* advance, according to which CADA is a "content-neutral regulation of conduct,"

[152] In addition to not wanting to encourage violence, Smith also says that she will not design websites that "demean" anyone. 303 Creative at *17. I take it that dwarf fighting violates both of these constraints.

and "any effect on the company's speech is therefore incidental."[153] I think that construction of CADA is both unwise and wrongheaded.

Characterizing a regulation's effect on speech as "incidental" carries a distinct legal ramification: it subjects the challenged regulation to an *O'Brien* analysis. In *O'Brien*, David Paul O'Brien, a Vietnam war protester, took to the steps of the South Boston Courthouse to burn his draft card before a crowd, in violation of a law prohibiting destruction of the cards.[154] O'Brien was tried and convicted, and he challenged his conviction, arguing that the card burning was protected speech. Because the law under which he was convicted regulated conduct, and so burdened speech only incidentally, the Court could not treat it as a pure speech regulation. It developed a test of intermediate scrutiny to address the challenge.[155] Thus *O'Brien* held that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the *incidental* restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[156]

The protesters in *O'Brien* lost, but it is not clear that the test wouldn't have a more salutary outcome for Smith. I will not undertake an application of each of the test's factors. It suffices to note that Colorado arguably would not meet its burden with respect to the last one. Insofar as gay couples in urban areas of Colorado would have no difficulty finding willing website designers, Colorado could have protected the couples' interest in receiving a website even while exempting unwilling providers.[157] So *O'Brien* might well be of no help to the dissent's position.[158]

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[153] 303 Creative at *27 (Sotomayor, dissenting). *See also id.* at *24; David Cole, *"We Do No Such Thing": 303 Creative v. Elenis and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J. FORUM 499, 510-516 (2024). [cite amici]

[154] *United States v. O'Brien*, 391 U.S. 367, 369 (1968).

[155] *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 186 (1997) (recognizing *O'Brien* as the source of intermediate scrutiny).

[156] *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (italics added).

[157] *Cf.* Richard Epstein.

[158] The dissent discusses *O'Brien*, but never undertakes to apply its test, and so never states whether *O'Brien* would in fact support Colorado. 303 Creative LLC v. Elenis, 600 U.S. 570, 626 (2023) (Sotomayor, J., dissenting). In Part IV, I construe the government's end as ensuring not merely equal access to goods and services, but fully equal standing jn the marketplace. On that construal, it is possible that the Colorado could prevail under intermediate scrutiny. Still, I think *O'Brien* is inapt for the reasons I go on to present.

More significantly, *O'Brien* is inapt. In *O'Brien*, the protesters' message *consisted in* the violation of the law.[159] In a similar vein, the law schools in *FAIR* argued that their speech *consisted in* refusing the military access—that refusal expressed their opposition to the anti-gay policy the military then enforced. By contrast, in the abortion trespass cases, the trespassing is not the message; it is just the means for getting one's message to one's intended audience. Smith's case is like the trespassers', not like O'Brien's. She is not seeking to violate CADA for the sake of protesting same-sex marriage.[160] She seeks only to be free from having CADA apply to her. I see no reason not to take her at her word.[161] But in that case *O'Brien* is just beside the point.

Here is a final reason against construing CADA as compelling conduct in the first instance, and speech only incidentally. The analysis above was meant precisely to argue that CADA compels *neither* conduct nor speech. CADA gives customers an entitlement; it creates a legal right that has the same structure as one person's natural right not to have another punch the first in the nose. Just as the state does not compel the would-be assailant to do anything with her fist in prohibiting her from punching another person in the nose, so too the state does not compel Smith to do anything (or to say anything) when it prohibits her from not providing her services to same-sex couples. But if that is right, then it is incorrect to say that CADA compels speech only incidentally. To say that is to say that CADA compels *something*, which just happens to be speech in this case. On the picture I have presented, though, public accommodation laws in fact compel nothing.[162]

E. Putting the Pieces Together: 303 Creative and the Speech-Conduct Collapse

This Part contained two theories about how *303 Creative*, and other challenges to public accommodation laws, relate to the threat of a speech-conduct collapse. I first surveyed the reasons a vendor like Smith, who creates customized expression, has to avoid providing her services for a project she opposes. I argued that a vendor who shares Smith's opposition, but whose goods or services are neither customized nor expressive, has the exact same reasons not to want to

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[159] O'Brien said that he burned his draft card in "'demonstration against the war and against the draft.'" *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (quoting O'Brien).

[160] But see Satta, respond.

[161] See 303 Creative (Sotomayor, J., dissenting) (explaining that, as Smith sees it, "God is calling her 'to explain His true story about marriage.'") (quoting Brief for Petitioners 7 (quoting App. to Pet. for Cert. 188a)).

provide service. The fact that each vendor could feel like compelled service would be an affront to their sense of self is hardly surprising; it is, instead, precisely what the speech-conduct collapse predicts. Once one locates the injury in the effect compulsion has on one's autonomy or integrity, there is no reason to think the effect arises from speech alone, or even speech especially. We are what we do. Speaking is just one way we put our values into the world; our actions bespeak our commitments at least as loudly as our words.

It follows that the logic of *303 Creative*, far from isolating why Smith's case is exceptional, instead would justify a conscientious exemption for any vendor—no matter how non-expressive his goods. As the Court put it, Smith faced an impermissible coercive choice: "If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs." But our reception hall owner who shares Smith's opposition to same-sex marriage faces the same coercive choice: If he wishes to offer his hall for weddings, he must either offer it for all weddings or face sanctions for expressing his own beliefs. The expression that produces sanctions is the refusal, so if either vendor refuses, either expresses their own beliefs. In short, wedding vendors who speak are not more special than those who don't.

I then offered a theory of the case aiming to show that public accommodation law's regulation of speech was not merely incidental, as the dissent and some *amici* argue; instead, we should understand these laws such that they involve no state compulsion at all. These laws confer private entitlements, and so the customers who hold these entitlements may call upon the state to enforce them. But in enforcing customers' rights, the state is not doing anything different from when it enforces bodily rights against an assailant, or property rights against a trespasser. The state is placing a limit on what someone may do; it is not compelling that person to do anything.

We are now in a position to put these two strategies together. Suppose the argument of Part II.A is right: wedding vendors who work in "pure speech" have no more entitlement to an exemption from having to provide for a same-sex wedding than do wedding vendors who do not work in an expressive vein. One result might be to have all wedding vendors, no matter how speech-intensive their work, press their claims through religious freedom protections—whether the First Amendment's or the quasi-constitutional rights that RFRAs afford. But now suppose that the argument of Part II.B is also right: there is no state action in these cases. If that's so, then religious freedom laws will be no more availing. In sum,

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[162] For the sake of complete accuracy, the claim should be formulated to say that these laws "compel nothing except adherence to the law." But that formulation seems pedantic. And it would offer no insight that distinguished these laws from any other.

there is *no* constitutional (or quasi-constitutional) home for the wedding vendor claims.[163]

In *303 Creative*, the majority framed the issue as a contest between a constitutional right on the vendor's side, and only a statutory right on the customer's. In such a contest, the Court confidently intoned, "there can be no question which must prevail."[164] Undoubtedly so. The problem is that that was not the contest before the Court. How gravely unfortunate that public accommodation laws have been undermined on the basis of what I have argued is a mistake.

With all that said, let me end this Part by recognizing the revisionary nature of the claim that there is no state compulsion in public accommodations cases. In point of fact, though, one need not accept that claim for purposes of the larger project of establishing the threat of the status-conduct collapse.

III. SPEECH AND ACTION

As I've argued, the primary wrong in all of the compelled speech cases is best rendered on an individual, rather than political, conception.[165] But that conception extends to conduct no less than speech. The analysis of *303 Creative* sought to make that plain. Thus, being compelled to provide a generic good or service central to a project one opposes would seem to interfere with the self no less than being compelled to speak the project's message. It looks to follow that there can be no principled basis for offering compelled speech, but not compelled conduct, the Cadillac of protections that the Free Speech clause affords.[166] But before signing on to that conclusion, we should consider other theorists' efforts to respond to the challenge. I do so here, with an eye to arguing that each is wanting.

The strategies for averting the threat of the speech-conduct collapse seek to find a way to justify making the First Amendment the exclusive preserve of speech. They proceed along four dimensions—textual, structural, logical, and prudential. I address each in turn.

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[163] I build on this claim in Part IV, when I assess whether the Fifth Amendment would provide an avenue to contest public accommodation laws on conscientious grounds.

[164] 303 Creative at *14 (citing the Supremacy Clause, U. S. Const., Art. VI, cl. 2.).

[165] See *supra* Parts I.B and I.C

[166] See supra note ____ [Schauer; "privileged position"]

A. Text

Quite plainly, the text of the First Amendment identifies speech, and not conduct or authority or self-development, as the thing Congress may not abridge. Martin Redish seized on this fact. He contended that "we need not find a logical distinction between the value served by speech and the value served by conduct in order to justify protecting only speech, for the framers have already drawn the distinction."[167] Frederick Schauer summarizes the point: "what makes speech special is the very fact that the constitutional text says it is."[168]

Yet as Schauer goes on to argue, this "argument from coincidence" (the First Amendment happens to mention speech and not conduct) is "circular."[169] And he is right.[170] The Constitution is not the word of God; "because I said so" cannot be the source of its authority. Instead, there must be reasons underlying its text. And if those reasons really are the individual ones compelled speech theorists have offered, then we are left with no justification for the specialness of speech. We must look beyond the text.

B. Structure

Bork's own justification for restricting the First Amendment to political speech is rooted not in the meaning of the free speech clause so much as it is in the capacity of judges to arrive at principled interpretations.[171] Bork was concerned to reconcile judicial supremacy with democracy, a prospect he thought possible only if judges eschewed "fundamental value choices" and instead hewed to "neutral principles"[172]—principles that are "neutrally derived, defined and applied."[173] He restricted the free speech clause to "explicitly and predominantly political speech" because this seemed to him "the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech

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[167] *The Value of Free Speech*, 130 U. PA. L. REV. 591, 600 (1982). *See also* Jorge R. Roig, Decoding First Amendment Coverage of Computer Source Code in the Age of Youtube, Facebook, and the Arab Spring, 68 N.Y.U. Ann. Surv. Am. L. 319, 355 (2012).
[168] Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1298 (1983).
[169] *Id*.
[170] Even as Schauer chafes against relying on the text as the justification for the specialness of speech, by the end of his analysis he ends up conceding that the text is determinative: "Under [my] approach we accept the presupposition that speech is special, because the text imposes that presupposition on us." 78 Nw. U. L. Rev. at 1306.
[171] Bork, *supra* note ____ at 2-6 and 18-23.
[172] *Id*. at 5.
[173] *Id*. at 23.

raise only issues of human gratification" and there is, for Bork, no neutral way of choosing among them.[174]

Others have noted several problems with this approach. On the merits, it overlooks the value of artistic expression or other non-political speech that one might think worthy of the strong protection that the First Amendment affords.[175] Further, and as an analytic matter, Bork's restriction fails to make the very distinctions that one proceeding on a principled basis should, in two ways. First, Bork "conflates speech that is constitutive of the self with other activities that are merely satisfying."[176] Second and more damningly, Bork never explains why the appropriate category is "explicitly political speech" even when, as Paul Brest notes, "there are alternative standards no less *neutral*…—for example, just plain 'speech.'"[177]

My own concern about Bork's approach goes to Bork's skepticism about judges' interpretive capacities. For one thing, even if that skepticism were warranted, it would entail a theory not of First Amendment *coverage*, but only of what we could reasonably expect judges to discern. The meaning of the First Amendment need not be identical to what a judge would read into it; nor need it be identical to what every judge, no matter their own fundamental values, could read into it, as if constitutional interpretation should faithfully proceed according to the lowest common denominator. The free speech clause has a meaning that logically precedes its judicial interpretation.

At any rate, it is not clear that Bork's skepticism about judicial insight is in fact warranted. That skepticism derives from metaphysical commitments that Bork never acknowledges, let alone defends.[178] In particular, if one believes in moral realism—which Bork apparently denies—then relying on judges to discern fundamental values looks far less like a license to caprice and far more like an exercise in, well, good judgment. The result would be less stilted than what would emerge were judges restrained by Bork's limits on the judicial role.

C. Logic

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[174] *Id.* at 26.
[175] See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 262 (1987).
[176] Erik Ugland, *Bork, Robert H. Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971)*, 25 COMM. L. & POL'Y 370, 373 (2020).
[177] Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 n. 171 (1981) (italics in original).
[178] See *supra* Part I.A.

There is a different kind of appeal one can make to the structure of government—one that looks not to the separation of powers, as Bork does, but instead to the "fundamental" purpose that the Constitution as a whole seeks to serve.[179] That purpose is democratic self-governance. A Constitution that permitted speech restrictions on matters essential to self-government would then be self-defeating; it would defy its own logic because it would deprive the governors of the very resources they needed to be self-governing.

Alexander Meiklejohn is the modern originator of this idea (though he stirringly traces it to Plato's serial dialogues, *The Apology* and *Crito*).[180] He grounds his conception of the First Amendment, which would restrict coverage to political speech, on "the necessities of the program of self-government."[181] In order to be a wise participant in democracy, one must have access to the full set of considerations relevant to the issues at hand. "And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American." What the First Amendment "condemns" then "with its absolute disapproval"[182] is the abridging of the "*freedom of* speech"[183]—i.e., limits on the speech that makes us free.[184]

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[179] Meiklejohn, *supra* note ____ at 15 ("the people of the United States shall be self-governed. To that fundamental enactment all other provisions of the Constitution, all statutes, all administrative decrees, are subsidiary and dependent."). *See also* Bork, *supra* note _____ at 23 (recognizing that a representative democracy "would be meaningless without freedom to discuss government and its policies). *Cf.* Genevieve Lakier, *Not Such A Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 753 (2019) (understanding *Barnette* to strike down the mandated flag salute "not because it took from schoolchildren the absolute right to decide what they would or would not say but, because it violated a fundamental principle of democratic government: namely, that in a democratic society, it is the people and not the government that get to decide contested normative questions….").

[180] *Id.* at 19-22.

[181] Supra note ____ at 26.

[182] *Id.* at 27

[183] *Id.* at 19.

[184] Tim Scanlon's account might be seen as the individualist counterpart to Meiklejohn's. *See* Scanlon, *supra* note ____. Whereas Meiklejohn aims to draw a logical connection between the nature of *collective* self-government and the scope of the Free Speech clause, Scanlon aims to draw that connection between the nature of *individual* self-government (or "autonomy," to use Scanlon's term, passim) and the proper scope of freedom of expression. Scanlon argues that to view oneself as sovereign would be incompatible with conceding to the state the power to decide what is true, or what is unsafe to hear. *Id.* at 215-220. Scanlon recognizes that political speech squarely qualifies for protection, *id.* at 222, but he does not restrict his defense to that speech. To the contrary, he views it as a virtue of his account that it is ecumenical with respect to subject matter. *See id.* at 215.

Does Scanlon's account provide a stable distinction between speech and action? I do not think it does. His argument could be used to defend limits on the state from impinging upon a

Lilian BeVier also appeals to the logical connection between the First Amendment and self-government to defend a Free Speech clause whose scope is, in principle, limited to non-violent political speech.[185] Defending speech restrictions, rather than speech protections, she argues that the government may outlaw subversive advocacy because it is "fundamentally inconsistent with the amendment's underlying constitutional principle," which provides for peaceful change.[186] Protecting "such advocacy *in principle* would represent a failure of doctrine to respect the essential integrity of the structure it has a duty to maintain."[187]

Finally, Robert Post extends the strategy of appealing to our constitutional project to explain restrictions on compelled speech: "The government cannot compel public discourse because government would then be manufacturing the very public opinion to which it is supposed to be responsive."[188]

All of these defenses of the limits of the Free Speech clause flow from the logic of our constitutional project—they are "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[189] They are undoubtedly convincing as to the coverage that the First Amendment *must* include: political speech is surely crucially necessary for self-government and it would be non-sensical for the Free Speech clause to exclude it.[190] But these defenses cannot rule out more capacious coverage.

For one thing, even if the logic of the Constitution does not yield protection for non-political speech[191]—that is, we cannot appeal to our project of collective self-government to protect poetry about an old shovel[192] or a sculpture

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range of non-speech freedoms on the ground that relinquishing these freedoms would significantly impair one's ability to be self-governing—most obviously, freedom from enslavement but also freedom from other life-altering conditions that would greatly impair self-determination (forced sterilization, pregnancy, and parenthood come to mind as viable extensions of the theory).

[185] Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

[186] *Id.* at 311; *see also id.* at 310.

[187] *Id.* at 310.

[188] Robert Post, *Nifla and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1089 (2022).

[189] Meiklejohn, *supra* note ____ at 27.

[190] Similarly, it would be non-sensical for the government to compel us to advocate for the policies that government officials required while forbidding advocacy for any others.

[191] But see Emerson and Kalven, each arguing that all speech edifies the citizen and so makes the citizen more fit for democratic participation. Cite. Meiklejohn himself, in later work, broadened his view of the speech worthy of First Amendment protection, finding philosophy, science, literature, and the arts important for instilling in the voter "an values; the capacity for sane an judgment which, so far as possible, a ballot should express." . Alexander Meiklejohn, The First Amendment Is an Absolute 256.

[192] https://www.poetrysoup.com/poem/an_old_shovel_1570544

consisting of a pile of wrapped hard candy[193]—there is nothing in the defenses that establishes that the Constitution's provisions should extend as far, but only as far, as the logic of the project requires.[194] The Constitution could offer some protections because they are necessitated by our chosen form of government and other protections because they are independently desirable, or even morally required. (Arguably, the Sixth Amendment's guarantee of a speedy trial might be seen as justified on these alternative grounds.[195])

Further, and more to the point, even if the argument from the logic of the Constitution were to entail protection only for political speech and not other forms of speech, it still would not provide the distinction between speech and *conduct*, which is what we seek. For there are forms of conduct that it would be no less antithetical to the project of self-government for the state to prohibit. Most straightforwardly, suppose the government passed a law prohibiting driving on election day, thereby impairing the ability of a significant number of citizens to get to the polls. Nor should our worry be restricted to just those conduct restrictions that would have the immediate effect of limiting our democratic participation. Imagine a legal system that entrenched vast educational disparities, so that some citizens end up decidedly less informed about the issues affecting the polity, thereby impairing their democratic participation too. Should the mechanisms sustaining these disparities be declared unconstitutional under the Free Speech clause too?

The worry arises not only for government restrictions but also for government compulsion. For example, should the state be permitted to compel subsidization for its or another party's speech?[196] Some theorists view this as a violation of the free speech clause; others do not.[197] Or again, one might reasonably see as incompatible with the project of collective self-government efforts by the state to manipulate us into violating our laws—through, e.g., duress or entrapment. When

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[193] "Untitled" (Portrait of Ross in L.A.), https://www.artic.edu/artworks/152961/untitled-portrait-of-ross-in-l-a

[194] Even BeVier recognizes that her defense establishes only an "irreducible minimum"—a floor, and not a ceiling, for constitutional protection. *See supra* note____ at 309.

[195] *See, e.g.*, United States v. Danylo, 73 M.J. 183 (2013).

[196] *See, e.g.*, Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1126-34 (2005) (arguing that the wrong of compelled subsidization of others' speech rests primarily in its potential harm to political discourse). *Cf.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 565 n.8 (2005) ("being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy.").

[197] *Compare* Klass, *supra* note ____ *with* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 180 (2018) ("Requiring someone to pay money is not requiring them to believe, to speak, or to associate, even if the money is spent for political purposes. By itself, it does not implicate the First Amendment….").

the state induces us to into law-breaking, it has us betray our collective achievement. Should we understand, say, the wrong of state-inflicted duress as a free speech violation? Only an implausibly strained conception of speech would admit as much. The general point is that proceeding on the basis of the logic of the Constitution seems to yield restrictions on conduct regulation as much as speech regulation. So the threat of a speech-conduct collapse remains.

D. Prudence

A final effort to establish a speech-conduct distinction appeals to pragmatic or prudential considerations—speech is just more salient to us, worse evils emerge from its restriction or compulsion, or we have reason to be more fearful of the state's interfering with speech than with conduct. Thus, for example, Kent Greenawalt allows that, even if speech is not unique in developing the self, it "may well be thought to [do so] in different ways (or more consistently) than nonspeech activities."[200] Harmful speech is, he continues to suppose, less dangerous than harmful conduct.[201] And finally, "legislatures may be thought particularly likely to forbid speech with insufficient reason."[202] Steve Shiffrin explicitly takes up the first of these considerations,[203] and Frederick Schauer's efforts to distinguish speech from conduct echo the second and third.[204]

The problem with each of these considerations is that they rely on unproven empirical assumptions that wouldn't necessarily be convincing even if they turned out to be true. For example, even if we could establish that speech developed the self "differently" from conduct, the result wouldn't prove that speech developed the self in a more significant way, which is what would be required to show that speech was special. A similar problem would arise if we were to establish that speech develops the self more "consistently" than does conduct. We would still

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[200] Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645, 734 n.344.
[201] *Id.* ("[S]peech may be thought generally not to possess the offsetting disadvantages of many other activities.").
[202] *Id*.
[203] Steven Shiffrin, *The First Amendment and Economic Regulation: Away from A General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1238–39 (1983) (suggesting that "speech is different from conduct in that speech more or less combines many values in a particular way we do not generally find in conduct.").
[204] Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303 (1983) ("we are unwilling to disable ourselves from dealing with harmful, offensive, obnoxious, dangerous behavior in general in the way that we are with reference to speech."); *id*. at 1301 (identifying "the dangers of excess governmental regulation" as "a self-sufficient justification" for protecting speech more than other liberties).

need to know what kind of consistency mattered, and why a consistent kind of effect made speech warrant more solicitude. At any rate, the thought that speech develops the self more consistently seems to envision speech as a monolith. Yet it seems plausible that great art develops the self in a radically different way than does reading, say, Gerry Cohen on socialism. In short, we do not yet have reason to think that speech does more to develop the self than does conduct.

On to concerns about the relative dangers of speech or its regulation: Anyone who takes hate speech seriously will bristle at the thought that harmful speech is less dangerous than harmful conduct, and so speech should enjoy fewer restrictions than conduct.[205] And, finally, are legislatures more likely, without good reason, to restrict speech than conduct? Even if this were true, the remedy would not be to accord speech regulation more *stringent* review; it would be to make it easier to get into court for challenges to speech regulations than conduct regulations.

At the end of the day, none of the efforts to argue that the First Amendment is and ought to be restricted to speech succeeds. There may be no way to forestall a general speech-conduct collapse; this seems especially true in the context of compelled speech, where a political understanding is unavailable,[206] and the individual rationale for protecting us from being made to speak applies equally to being made to act.[207] I propose an alternative constitutional response in the next Part.

III. RESITUATING THE RIGHT NOT TO SPEAK…OR ACT

I have argued that the logic of compelled speech doctrine applies with equal force to compelled conduct. The wedding website designer who opposes gay marriage has no better reason to object to serving a same-sex couple than does the wedding reception hall owner who shares the website designer's opposition. Nor is the equivalence confined to the wedding vendor cases. To take an extreme example, it would be no less bad for the government to compel someone to serve as an executioner than it would be for the government to compel him to speak in favor of the death penalty. The equivalence arises because what makes compelled speech problematic is its interference with the self, but being made to speak is not the only, or even the singularly most problematic, way the state can interfere with the self.

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[205] *See, e.g.*, CATHARINE MACKINNON, ONLY WORDS (1993).
[206] See supra Part I.C.
[207] *See supra* Parts I.B and II.A.

If none of the theoretical efforts to erect a speech-conduct distinction succeeds, as I argued above, then how should the law contend with the equivalence? In this final Part, I consider three strategies.[212]

A. Protecting Speech and Conduct Under the Free Speech Clause

In the face of the equivalence between speech and conduct, perhaps we should abandon the insistence upon the specialness of speech and offer all self-realizing activity (speech and conduct) protection under the Free Speech clause. Edwin Baker proposed just this: "*when a general prohibition applies to substantively valued behavior, it is an unconstitutional abridgement of freedom of speech or expression.*"[213] By "substantively valued behavior," Baker had in mind such things as choices around sex between consenting adults, or decisions about family structure.[214]

Baker recognized that his principle would be "difficult to apply."[215] But that is not its only problem. Even if we could cabin the set of conduct so that it encompassed only genuinely important life choices, it seems odd to think these all should count as "speech or expression." Indeed, it might well be anathema to many people to think of some of their most important life choices as expressive, or as intended for an outside audience at all. Much intimacy derives its value, at least in part, precisely from the fact that it is only for the intimates. And yet it seems no less worthy of protection from state interference for all that. So Baker's overlaying all of one's important life choices with an expressive dimension seems to do violence to what makes many of them special. They may well deserve protection, but not because they are instances of speech.

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[212] One strategy I do not consider, decisively rejected in *Heart of Atlanta Motel*, is appeal to the Thirteenth Amendment. For a compelling exploration of the way the Thirteenth Amendment figured on both sides of the debate over the passage of Title II of the Civil Rights Act (the portion pertaining to public accommodations), see Linda C. McClain, *Involuntary Servitude, Public accommodation laws, and the Legacy of* Heart of Atlanta Motel v. United States, 71 UNIVERSITY OF MARYLAND LAW REVIEW 83 (2011).

[213] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1019 (1977-1978) (italics in original).

[214] *Id.* at 1017-18.

[215] *Id.* at 1017.

B. Protecting Speech and Conduct As a Matter of Religious Freedom

Prior to *Employment Division v. Smith*,[216] one might have proposed funneling all of the cases of compulsion to the Free Exercise clause. To the extent that objections to compulsion sound in complicity, there is reason to assimilate them to the kinds of conscientious convictions that the Free Exercise clause had vindicated[217]—most notably, conscientious objection to military service for religious and secular pacifists alike.[218] But *Smith* greatly restricted the scope of constitutionally-protected freedom of religion, holding that the First Amendment could not be used to challenge neutral laws of general applicability. In its wake, it is not clear that it covers military exemptions,[219] to say nothing of conscience-based claims not previously protected under the First Amendment.

Still federal and state religious freedom laws have filled the void *Smith* created,[220] and one might propose invoking them to protect individuals from unwanted compelled speech and conduct.[221] But I am doubtful that religious freedom protections could cover the full range of objections individuals have to state compulsion. Many of these are not properly characterized as conscientious. For example, the utility company in *PG&E* objected to carrying someone else's message in its envelope *whatever the content*. Similarly, the Court in *Wooley* recognized that it was wrong in itself to make individuals have their cars function as billboards for the state, and that would have been true no matter the slogan.[222] In short, in many of the cases, one does not object to the content of what one is

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[216] 494 U.S. 872 (1990).

[217] *Cf.* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481-82 (1990) (noting that the Framers thought of the terms "free exercise of religion" and "rights of conscience" as interchangeable).

[218] *See generally* Ronald B. Flowers, *Government Accommodation of Religious-Based Conscientious Objection*, 24 SETON HALL L. REV. 695, 702-708 (1993) (reviewing the relevant caselaw).

[219] *See* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel*, 125 YALE L.J. FORUM 369, 372 (2016).

[220] *See id.* [Laycock] at 372-73.

[221] I have advocated for this solution elsewhere as a way of addressing the claims of both expressive and non-expressive wedding vendors. Sepinwall, Free Speech and Off-Label Rights, *supra* note ____. *See also* Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 310 (2019). For the reasons I outlined in Parts II.B and II.C, though, I am now skeptical about the merits of issuing any exemptions to wedding vendors.

[222] *Cf.* Post, supra note ____ [NIFLA] at 1092 n. 112 (suggesting that a requirement that one host a state slogan on one's car might be better understood as compelled conduct rather than speech. "*Wooley* is itself rather problematic as a compelled speech case….The mere fact that one has been forced to carry official notices on one's property does not seem to me equivalent to being forced to speak in one's own name.").

being coopted to do; one objects simply to being coopted. Religious freedom is not meant to protect us from this kind of injury.

C. Protecting Speech and Conduct Under the Fifth Amendment

Alexander Meiklejohn, who worried about an unbounded Free Speech clause well before Bork,[223] advanced the intriguing proposal that the Constitution affords speech protections under both the First and Fifth Amendments.[224] But what speech to allocate to which Amendment? Meiklejohn drew his answer from the text of the Fifth Amendment. Insofar as it aims to protect "life, liberty, and property" from "undue interference," and insofar as life and property are "private possessions," we should think of the "liberty" to speak that the Fifth Amendment protects as "private" too.[225] Thus "the right to speak one's mind as one chooses" is among an individual's "most cherished possessions," and so it may not be limited "unnecessarily or unequally."[226] But that is "radically different…from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment."[227]

Meiklejohn is regularly cited for his effort to distinguish between political and non-political speech.[228] But there is a second, perhaps even more fundamental, distinction that the quoted text reveals—that between speech that is for the benefit of the public and speech that is for the benefit of the individual.[229] The former enjoys protection under the First Amendment, the latter under the Fifth. Or, in the language of this article, the First Amendment protects the political and the Fifth Amendment protects the self.[230]

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[223] MEIKLEJOHN, FREE SPEECH AND SELF-GOVERNMENT (1949).
[224] *Id.* at 38. Taking up the challenge of determining what to do with non-political speech, Cass Sunstein offered a different solution—viz., a two-tiered First Amendment. See Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 301-315 (1992). Because my concern is not the distinction between political and non-political speech, I do not consider his proposal. For an effective critique of it, see Gregory P. Magarian, *Substantive Due Process As A Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 278-81 (2005).
[225] *Id.* at 38-39.
[226] *Id.* at 39.
[227] *Id.*
[228] See *supra* Part I.A.
[229] *See also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 225 (1960) ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.")
[230] In taking up Meiklejohn's suggestion to turn to the Fifth Amendment, I am mindful of the criticisms of his account. *See, e.g.*, Bollinger, Stern, Chafee, Schlag – cite. Insofar as these

It bears stating the obvious: "speech" is nowhere mentioned in the Fifth Amendment. But that fact is salutary for present purposes. The Fifth Amendment protects not just speech, but all of a person's "most cherished possessions"; it protects the freedom to maintain one's sense of self.[231] And since, as I have endeavored to show, the self can be implicated in conduct as much as action, the Fifth Amendment affords a ground for challenging state compulsion that would interfere with the self.

How would this work? I pursue two possibilities here. The first is appeal to the Takings Clause. While that clause applies only to property, I seek to show how it might nonetheless cover many of the paradigmatic cases, as well as troubling cases of compelled conduct. A second possibility, more expansive still, would appeal to substantive due process.[232]

A couple of preliminary comments: First, insofar as the Takings Clause has been incorporated against the states,[233] and the due process clause finds an echo in the Fourteenth Amendment,[234] the proposals I advance can, I believe, apply against action by both the federal and state governments. Second, and more importantly, all that I say here is conjectural. If the Fifth Amendment were reimagined to accommodate cases like those canonical in compelled speech doctrine, the Amendment's meaning would likely undergo suitable alteration. So there is something artificial, or at least under-predictive, in seeking to apply the Fifth Amendment jurisprudence we have to a Fifth Amendment that is pressed into service in ways heretofore unseen. The reader should approach the discussion that follows recognizing its conjectural nature. I end this Part by considering some concerns that the proposal engenders.

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criticisms target his efforts to isolate a category of "political speech," and my account is nowhere dedicated to a distinction between kinds or categories of speech, I do not believe these criticisms apply to the proposal I advance.

[231] This is certainly the way the Court and some theorists understand substantive due process. *See, e.g.*, Lawrence v. Texas; Magarian—cite.

[232] *Cf.* Gregory P. Magarian, *Substantive Due Process As A Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 297 (2005) (appealing to substantive due process to protect not compulsion but restrictions on non-political speech).

[233] Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 233, 236–37 (1897). *See also* Sweet v. Rechel, 159 U.S. 380, 398 (1895).

[234] There is of course debate about whether the two due process clauses have the same meaning and scope of application. *Compare* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.") *with* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 402 (2010) (arguing that only the original meaning of the due process clause of the Fourteenth Amendment, and not that of the Fifth, included substantive due process). If Williams is right, I would hope that a clever lawyer might succeed in making a reverse incorporation claim.

1. Takings

The government may not take "private property…for public use, without just compensation."[235] In what follows, I seek to determine which of the existing compelled speech challenges might instead have met with success under the takings clause. I do not consider the question of compensation.

Some of the seminal compelled speech cases already recognize that the injury alleged could just as well have been characterized as a taking. For example, in *PG&E*, Chief Justice Burger likened compelling "Pacific to mail messages for others" to "compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business."[236] Justice Marshall was even more explicit: "California has *taken* from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes."[237] Similarly, in *Miami Herald v. Tornillo*, the Court recognized among the injuries inflicted by the right-of-access statute "the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print."[238] I allow that there may be additional wrongs involved when the government compels newspapers to publish content they would prefer to exclude—wrongs that could be addressed under Freedom of the Press. The material imposition though could be addressed as a takings matter.

Wooley v. Maynard sounds in property too as the Court found that New Hampshire could not require its citizens to "use their private property as a 'mobile billboard' for the State's ideological message."[239] And just as a person's car is their property, so too are a clinic's walls. As such, NIFLA might have contested California's mandated disclosure notice as a takings claim too.[240] On the other hand, in each of *Wooley* and *NIFLA*, the imposition was not unique to the

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[235] U.S. CONSTIT. AMEND. V. *SEE ALSO* Louis Michael Seidman, The Dale Problem: Property and Speech Under the Regulatory State, 75 U. Chi. L. Rev. 1541, 1552 (2008) ("unless the government engages in a permanent physical taking or trespass, or unless its regulatory measures destroy most, if not all, of the value of property, the government retains broad discretion to regulate the use of property without paying compensation.") (footnotes omitted).

[236] *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 21 (1986) (Burger, C.J., concurring).

[237] 475 U.S. at 22 (Marshall, J., concurring) (italics added). *See also* J. Kenneth Moritz, Note, Pacific Gas and Electric Co. v. California Public Utilities Commission: Property in an Envelope, 49 U. Pitt. L. Rev. 229, 259 (1987).

[238] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[239] 430 U.S. at 715.

[240] NIFLA v. Becerra, 585 U.S. ____ (2018).

challengers. Insofar as the takings clause is meant to address cases where the government forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," a takings challenge for these two cases might falter.[241]

I have focused so far on cases involving compelled speech. But the takings clause might also be pressed into service fruitfully to challenge some varieties of compelled conduct. No one would doubt that the government would violate the clause were it to set up a polling place, abortion clinic, or factory farm on someone's front lawn and fail to pay just compensation for the property taken. To be sure, some people will experience the abortion clinic, relative to the factory farm, as a much graver assault on the self (and vice versa). Should the clinic be set up on the lawn of one of these people, it would be tempting to think that compensation should be much greater than it would need to be for the clinic set up on the lawn of a person who supports abortion rights. But in standard takings cases, compensation is insensitive to the interests of the person whose property is taken—it matters not at all that, say, someone whose home is taken in a redevelopment project has lived there her entire life, for almost 90 years, sharing it over the last 60 with her husband.[242] She will receive the market value of her home, as will her neighbors if their homes are taken too, no matter the sentimental attachment of any of them.[243] In our hypothetical, then, if it is a problem that the abortion clinic injures the abortion opponent more than it would someone else, that is a problem with takings law generally.

In all of the preceding cases, the state sought to compel someone to use their tangible assets to advance its goals. But takings cases are not restricted to tangible assets.[244] The fees Janus was made to pay to support the public union's bargaining activities could be construed as a taking.[245]

Other compelled speech cases might not obviously look like takings cases but creative license might allow extension of the takings clause even to them.

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[241] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[242] This was the case for Wilhelmina Dery, one of the petitioners in Kelo v. New London, 545 U.S. ____ (2005), in which the Court held that there was no takings clause violation when New London condemned a neighborhood's worth of houses for the sake of building a Pfizer plant.

[243] See United States v. Miller, 317 U.S. 369, 373-74 (1943). For an effort to offer a more equitable alternative to this market-based measure, see Brian Angelo Lee, *"Equitable Compensation" As "Just Compensation" for Takings*, 10 PROPERTY RIGHTS J. 315 (2021).

[244] *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (citing cases involving intangible assets). *Cf.* *Monongahela Nav. Co. v. U S*, 148 U.S. 312, 337 (1893) ("if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken.").

[245] *Cf.* Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (the taking of money to fund legal services for the poor is for a "public use" under the Takings Clause of the Fifth Amendment.).

Consider *Hurley*, the case holding that the South Boston Allied War Veterans Council did not have to include within its parade the Irish-American Gay, Lesbian and Bisexual group's float.[246] The courts below (ill-advisedly, to my mind[247]) construed the parade as a "public accommodation." It is not undue then to see the parade organizers as possessing a property interest, one that stood in tension with compelled inclusion of GLIB's float. Could the Veterans have successfully challenged Massachusetts's order that it include GLIB as a taking? That question brings us to the special focus of this article—compulsions in the context of public accommodations—and so I seek to offer an extended analysis in answering it.

Heart of Atlanta was the first case to challenge the 1964 Civil Rights Act, which inaugurated federal public accommodations law under the Commerce Clause.[248] There, the Court dismissed the idea that the Act contravened the Takings Clause in a single sentence: "Neither do we find any merit in the claim that the Act is a taking of property without just compensation."[249] In support of that proposition, it cited just three cases,[250] none directly on point.[251] It is well established, though, that the right to exclude is *"*one of the most essential sticks in the bundle of rights that are commonly characterized as property."[252] So why did the Court so summarily dispatch with the takings claim in *Heart of Atlanta*?

While none of the three cases the Court adduced involved rights of access,[253] they nonetheless capture important and relevant insights about the

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[246] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

[247] In point of fact, I think GLIB would have been better served to argue that there was state action. For one thing, for much of the parade's history—from 1737-1947—it was organized by the city itself. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 560 (1995). And then even after the city delegated parade organization to the Veterans Council, "the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding." 515 U.S. at 561. This level of entanglement should have been sufficient for a state action claim under *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). At trial, GLIB had challenged its exclusion as a matter of state action, but it did not pursue this line of argument before the Court, and the Court was content to let it lie. 515 U.S. at 566.

[248] *But cf.* Civil Rights Cases (1883) (challenging federal public accommodation law promulgated under the Thirteenth and Fourteenth Amendments, and finding that those Amendments could not apply to the conduct of private parties).

[249] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

[250] 379 U.S. at 261 (citing *Legal Tender Cases*, 12 Wall. 457, 79 U. S. 551 (1870); *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923); *United States v. Central Eureka Mining Co.*, 357 U. S. 155 (1958)).

[251] *See, e.g.*, Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. FORUM 1010, 1047 (2023) and John A. Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L. REV. 547, 583 (1987).

[252] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). *See also* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

[253] *See, e.g.*, Brady, *supra* note ____ at 1047.

taking clause's limits. All of them involved government action, taken during wartime, that diminished the value of the challengers' holdings, as the Court readily acknowledged in each. But the context of war mattered. Thus, in a case contesting the government's shutting down gold mines to increase the supply of labor available for the war effort, the Court noted that war "makes demands which otherwise would be insufferable."[254] Moreover, the losses the mine owners stood to incur were "temporary in character" and—most importantly—"insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands."[255] One can read that rhetoric as rebuffing the notion that there was an unfairness here of the kind that a taking would wage. If a taking is unfair because it imposes a burden on a distinct few that the public as a whole should bear,[256] then wartime wages that unfairness on a massively larger and more significant scale. Young men were being conscripted to lose their lives; temporary loss of livelihood was, by comparison, inconsequential. No wonder, then, that in concluding that the 1964 Civil Rights Act's public accommodation provisions did "not even come close to being a 'taking' in the constitutional sense," Justice Black likened the complaint of Heart of Atlanta Motel to the imposition suffered by the gold mine owners.[257] The Civil Rights Act was a weapon in a kind of war too, this one combatting the domestic enemy of racism.[258] If successful, whole swaths of social arrangements would be reconfigured. Heart of Atlanta could hardly claim a unique injury.

It wasn't only the gravity of the government's interest in all three of the cited cases that made them relevant. They all shared with *Heart of Atlanta* the same structure, one that made the takings claim in each baseless. In all of them, the government intervened to change the duties or rights of one party and, in so doing, caused another party to lose money.[259] The facts of another one of the

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[254] United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).
[255] Id.
[256] *Armstrong*, 364 U.S. 40.
[257] 379 U.S. at 277 (Black, J. concurring).
[258] *See, e.g.*, https://www.nps.gov/features/malu/feat0002/wof/Lyndon_Johnson.htm#:~:text=He%20immediately%20carried%20out%20the,of%20federal%20funds%20from%20programs (referring to President Johnson's civil rights efforts as part of his "war on racism").
[259] In *Knox v. Lee*, one of the two cases forming the basis of the Legal Tender cases, the Confederate Government permitted Knox, a southerner, to take ownership of a flock of sheep owned by Lee, a northerner, who was deemed an "alien-enemy." When Lee later sued for trespass and conversion, she sought the value the sheep would have commanded at the time Knox acquired them. But because of depreciation caused by the issuance of paper money, paying her an identical amount of money would not yield the value of the flock at the time of the conversion. The Court was unmoved. The effect of the depreciation was that all creditors were subjected to a

wartime cases are illustrative: Omnia Commercial had a contractual right to acquire a large quantity of steel. Before it could receive any of its steel, the U.S. government requisitioned all steel then being produced for the war effort. The steel manufacturer was unable to honor its contract with Omnia, and Omnia sued the U.S. government, alleging a taking. The Court acknowledged that the Takings Clause could extend to contracts, but denied that a taking had occurred here.[260] It explained that "the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government,"[261] and the takings clause "has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals."[262]

Another way to put the matter is to point out that the loss experienced by the parties in the cited cases was no necessary part of the end the government was pursuing in making the change: the government could have received just as much steel from the manufacturer if Omnia had not had a contractual right to the steel; it could have had as many laborers at its disposal if there were no gold mines to shut down. In neither case was the government's gain made possible only *by* a setback to the third party's interests. Instead, any setback was a mere byproduct.

Understanding *Heart of Atlanta*'s controlling precedents in this way dovetails with the analysis I offered in Part II.B, according to which public accommodation laws bestow an entitlement on customers, but involve no state action with respect to the store owner. In the public accommodations context, the customer is the counterpart to the steel manufacturer. The government changes the normative position of the customer, as it did with the manufacturer. But any setback to the store owner is incidental, not a part of the government's plan. One can see that these laws imposed no necessary setback on store owners when one considers that at least some store owners welcomed them; the laws provided legal cover for doing what these owners wanted to do anyway, but didn't for fear of backlash from their bigoted clientele.[263]

The takings clause is then inapt for all public accommodations because, in point of fact, public accommodation laws do not take anything from store owners. Of course, what is at issue for a website designer, or baker, florist, photographer,

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corresponding loss. "But was it ever imagined this was taking private property without compensation or without due process of law?" *Legal Tender Cases*, 79 U.S. 457, 551–52 (1870).

[260] *Omnia Com. Co. v. United States*, 261 U.S. 502, 508 (1923).

[261] 261 U.S. at 513.

[262] 261 U.S. at 511. *See also id.* ("If one makes a contract for the personal services of another, or for the sale and delivery of property, the government, by drafting one of the parties into the army, or by requisitioning the subject matter, does not thereby take the contract.").

[263] *See, e.g.*, LINDA C. MCCLAIN, WHO'S THE BIGOT? *Cf. Heart of Atlanta*, 379 U.S. at 260 ("It is doubtful if, in the long run, appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations.").

wedding planner, bridal gown or tuxedo purveyor, is not at any rate the customer's use of the store's physical space. (In this way, our reception hall owner is unlike most other wedding vendors.) It is instead the provision of service. These vendors must look elsewhere for protection.

2. Due Process Violations

I seek to consider here the possibility that one might understand compelled speech or conduct as a substantive due process violation.[264] Due process aims to secure "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"[265] and decision-making around the same.[266] Accordingly, it protects individuals from "governmental intrusion into matters [ ] fundamentally affecting a person."[267] Still, its protections do not amount to "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[268] Instead, the government may interfere even with a fundamental interest so long as the interference can survive strict scrutiny;[269] and if the interest is not fundamental, only rational basis review applies.[270]

Substantive due process offers two advantages relative to the takings clause. First, it applies more broadly. Recall that takings claims are meant for property owners who are singled out, or at least disproportionately burdened, by some government act.[271] PG&E and Miami Herald were subject to regulatory

[264] For helpful overviews of substantive due process, see Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501 (1999; Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841-49 (2003)]

[265] Cite—Lawrence. *See also* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring) ("The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."). The Court has, on occasion, allowed that "personal appearance" might be a fundamental liberty protected under substantive due process. See *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

[266] Whalen v. Roe, 429 U.S. 589, 599-600 (1977)

[267] Cite—Eisenstadt.

[268] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

[269] *Carey v. Population Servs., Int'l*, 431 U.S. 678, 686 (1977) ("burden…may be justified only by compelling state interests, and must be narrowly drawn to express only those interests").

[270] Romer v. Evans, 517 U.S. 620, 631 (1996) (noting "[i]f a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears rational relation to some legitimate end.'"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 24 (2020).

[271] See *Armstrong*, supra note ____ (underscoring that the takings clause is meant to address cases where the property owner is singled out).

action affecting only a small class. By contrast, every New Hampshire citizen had to bear the state's motto on their license plate. So even while the compelled speech there implicated property interests, it did not have the singling out feature that a takings claim requires.

Second, substantive due process could, in principle, offer a more individualized response. I noted above that, even where one could muster a takings claim, one might think that claim failed to track the nature of the injury sustained. This would be so where the imposition interfered with one's deepest convictions. For example, NIFLA might experience the requirement that it post on its clinic walls information about the availability of abortions not merely as an infringement on its physical space but, far more so, as a violation of its foundational commitments. But the takings clause is, as we saw, insensitive to the non-economic interests that the government's use sets back. By contrast, given that substantive due process centers the self, it might yield a more satisfying result.[272] The remedy—e.g., an exemption, if appropriate—could then be more responsive to the way the imposition was experienced.

These advantages are available in theory. We should proceed through the cases, though, to see which parties should prevail on a substantive due process challenge.

Consider first the cases that would level facial challenges.[273] For example, insofar as PG&E and Miami Herald faced government action unique to them, or unique to actors like them, all of whom would have had the same ground to complain, their concerns would be best addressed facially. The question then becomes whether the impaired right is "fundamental." The parties claimed that the government act impermissibly implicated speech. I confess that the alleged speech interest seems to me far more plausible in *Tornillo* than in *PG&E*. A right-of-reply statute has a potential chilling effect—newspapers might decline to publish material critical of a politician to avoid having to publish the politician's response. As such, and as others have noted, the right-of-reply statute could be addressed as an instance of speech restriction,[274] and its challengers could find relief in the First Amendment.

I find it harder to sympathize with PG&E's assertion that the requirement that it include a third party's newsletter in its billing envelope impermissibly interferes with its speech interests. For one thing, it seems hard to reconcile the

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[272] *But cf.* Seana Shiffrin, supra note ____ [Pepperdine] at 742 (arguing that because NIFLA is an organization, and not an individual, it has no self, or "dignity" that can be violated).

[273] For discussion of the relevance and implications of the difference between facial and as-applied substantive due process challenges, see *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-28 (2019) and id. at 1146 (Sotomayor, J., dissenting).

[274] Cite-Bhagwat, Amar and Brownstein, Volokh.

case with FAIR, where law schools unsuccessfully challenged a requirement under the Solomon Amendment that they admit military recruiters onto campus.[275] In both cases, one could say that the space devoted to the third party is space the host could otherwise have used for their own speech. And in both cases, there is the real risk that the hosted speech will conflict with the host's speech. The Court denied that the hosting requirement interfered with the law school's speech.[276] If that's right then, for the reasons just adduced, I would conclude that PG&E's hosting requirement didn't interfere with its speech either. Of course, a virtue of proceeding under substantive due process is that we do not need to insist on a speech/non-speech distinction. There might be an interest that FAIR and PG&E share—an interest in not hosting another party's speech or projects. I leave open the possibility that that interest is fundamental, even if it has not before been identified as such. (I take it the interest in not hosting just is the interest the Court protected in PG&E under (what I would take to be) the wrong moniker.) And if it is a fundamental interest, then PG&E (or FAIR) would prevail if the imposition could not survive strict scrutiny.

The remaining canonical cases would probably involve as-applied challenges. Start with the cases that do not involve public accommodations—*Wooley*, *Janus*, and *NIFLA*. Assume that what is at stake for each of the challengers is a right of conscience.[277] Substantive due process has sometimes been marshalled to protect such rights,[278] and, where it has, the interference with conscience has been sustained only where it serves a compelling interest in the least restrictive way.[279] So, unless the challenged impositions in the three cases

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[275] 547 U.S. 47 (2006). How should we understand the diverging results? One might understand FAIR as a constitutional conditions case: the law schools faced a threat of invasion only because of, and in exchange for, the benefit of federal funding; had they been willing to forego that funding, they would have been free to deny access. But FAIR was not in fact an unconstitutional conditions case, as the Court concluded that Congress could have mandated access to military recruiters absolutely, and not merely conditionally. See Sepinwall, Tender and Taint, at 1638. In FAIR, the law schools were subject to the requirement because they received federal funding; they could have exercised a right to exclude had they forsworn that funding. But that fact ended up being immaterial, as the Court found that the military could have required access to the law schools outright, even if no funding

[276] 547 U.S. at 60.

[277] As I noted above, *Wooley* need not have involved a conscience-based objection to New Hampshire's slogan, even though the challenger there did have such an objection. See supra text accompanying note ____ ["mobile billboard"] and note ____ [objection in Maynard's words]. I take it that one objects to X as a matter of conscience when one thinks that the content of X is morally wrong. This is different from objecting to compulsion itself.

[278] *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[279] *See, e.g.*, Miranda Perry, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727, 736 & n. 47 (1996). But see [cite – authors contesting that the Court applied strict scrutiny in Meyer.]

being considered could survive strict scrutiny, the challengers would prevail on their substantive due process claims.

The wedding vendors who oppose same-sex marriage could also advance conscience-based objections. Of course, if I am right that there is no state action when a customer exercises his public accommodation right,[280] then substantive due process will be off the table. Constitutional rights apply only against the state, not private individuals.[281]

Note though that even if there is state action, it is doubtful that the wedding vendors would prevail under a due process challenge. Heart of Atlanta Motel raised that challenge along with its takings and Thirteenth Amendment claims in its attack on the 1964 Civil Rights Act. The Court was hardly more fulsome in rejecting the motel's due process claim than its other claims.[282] It cited to "thirty-two states" that had long had public accommodation laws, not one of which had ever been challenged successfully, and concluded that "appellant has no 'right' to select its guests as it sees fit, free from governmental regulation."[283] With that said, Heart of Atlanta contested the requirement to serve because it stood to suffer economic losses were it to comply (or so it contended at any rate).[284] Conscience claims, like those of the wedding vendors, would saddle the government with a greater justificatory burden.

Could the government meet that burden? The Court in *303 Creative* acknowledged that the interest underpinning public accommodation laws is compelling.[285] And the Tenth Circuit ruled that the law was narrowly tailored: A law that did not extend to Smith "would necessarily relegate LGBT consumers to an inferior market because [Smith's] *unique* services are, by definition, unavailable elsewhere."[286] The argument is clever, but flawed. It plays into the libertarian take on public accommodation laws, according to which so long as the good or service in question *is* readily available elsewhere then there is no need for the state to require that an objecting vendor provide it;[287] the state can secure its end of ensuring that LGBT people enjoy equally good products without

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[280] *See supra* Parts I.B and I.C.

[281] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 945 (1982) ("Fourteenth Amendment… does not create rights enforceable against private citizens…but only against the States"); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1348 (1983)

[282] See supra text accompanying note ____ [dispatched in a single sentence]

[283] 379 U.S. at 260.

[284] Id.

[285] 303 Creative at *12.

[286] 10th Circuit opinion at *29.

[287] *See, e.g.*, Richard Epstein, cite.

"conscript[ing]" unique artists like Smith.[288] But public accommodation laws are not meant to ensure that everybody has access to equally good products. They are meant to ensure that everybody is on *equal footing* when they enter the marketplace; no one customer belongs more than any other.[289] That looks to be an end that can be secured only if the government permits no exemptions at all.[290]

To summarize: many cases of compulsion have one's property put to use for another's ends—the government's or a third party's. Where the compelled use subjects one to a disproportionate burden, one could mount a takings clause challenge. With that said, even if one could fit one's claim into the contours of the takings clause, one might still find the recourse it affords unsatisfying, because its remedies do not track one's subjective experience of the imposition. Substantive due process would offer an alternative that allowed for a more individualized assessment; it would also be available even if the imposition were widely shared. Challengers would be most likely to succeed if the government compulsion implicated a fundamental right. In that instance, the compulsion would have to survive strict scrutiny. Insofar as many of the compelled speech cases involve affronts to conscience, and insofar as conscience rights are fundamental, we could expect that many of those cases would have yielded the same outcome if brought as substantive due process challenges. But the wedding vendor challengers, like all public accommodation cases, would likely not succeed. Most of them are about providing a service, not an imposition on one's property. I have argued that there are good reasons to doubt that the imposition involves state action anyway. And even if it does, the imposition burdens all retail establishments; it does not single out particular vendors. So a takings claim is unavailing. So too is a substantive due process claim. Eradicating discrimination is a well-established compelling interest. And it can be served only by ensuring that protected classes enjoy the same freedom—the same sense of belonging—that every other customer does. That will be true only if every store is open to each of them.

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[288] 303 Creative at *15 ("the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted….")

[289] See supra text accompanying note [after dinner guest]

[290] One might contend, as David Velleman does, that equality should obtain on both the customer's and the vendor's side: For the vendor to have his dignity fully realized, he should not have to provide goods or services when his conscience forbids it. One could motivate the argument by pointing to instances of ethical consumerism: buyers get to make choices based on conscience, so why not vendors? I address this argument at greater length elsewhere, see Sepinwall, Conscience in Commerce. For now, I will simply point to a different asymmetry that makes sense of the challenged one. Individuals must turn to the market for virtually all of their provisions, we have not set up alternatives. But no seller need enter his line of trade.

3. A Dented Hat?

Zachariah Chafee describes an early encounter with Meiklejohn.[291] Chafee was a student at Brown, and Meiklejohn a philosophy professor. Philosophers are not ordinarily known for their pugilistic prowess, so it was no surprise when, intervening to break up a fight, Meiklejohn emerged with nothing to show for it but a dented hat. Chafee went on to liken that effort to Meiklejohn's interventions into First Amendment exegesis. This last section considers whether the proposal advanced here, which draws inspiration from Meiklejohn, is any more successful.

Let me begin by acknowledging the warrant for at least some of the criticism Meiklejohn faced. Commentators disputed the idea that the Constitution was meant to protect speech under two different Amendments—a theory he allegedly wove from whole cloth.[292] They also chafed at the idea that speech maximalists would be content with having entire swaths of expression covered only by the relatively weaker protections of the Fifth Amendment.[293] And then there was the question of just which speech to relegate to which Amendment. As Ronald Cass put it,

> Meiklejohn's exegesis leaves a critical decision to be made without textual guidance: definition of the speech that is raised out of the blue-collar expression crowd (struggling to earn protection with its modest liberty-due process privileges) and instead is anointed with First Amendment protection, which in Meiklejohn's analysis confers access to the Constitution's executive suite.[294]

So the theory was potentially *elitist*, *unprincipled*, *groundless*, and *unsatisfying*. Add to that the general concerns about substantive due process and its susceptibility to judicial abuse.[295]

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[291] Zechariah Chafee, Jr., *Book Review*, 62 HARV. L. REV. 891, 891-92 (1949); *see also* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth- Century America*, 95 MICH. L. REV. 299, 392 (1996).

[292] Paul G. Kauper, *Meiklejohn: Political Freedom*, 58 MICH. L. REV. 619, 622 (1960).

[293] Gregory P. Magarian, *Substantive Due Process As A Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 278 (2005) ("Meiklejohn's treatment of nonpolitical speech amounts to dooming with faint protection. No one who disdains the public rights theory for its failure to protect a substantial amount of nonpolitical speech will warm to the theory upon assurance that the censor's iron fist comes sheathed in a procedural velvet glove.").

[294] Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1491 (1987).

[295] *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). *Cf.* debate around the warrant for finding a substantive due process right in the Constitution—*compare* Gedicks (2002) *with* Solum (2022); others.

Meiklejohn's appeal to the Fifth Amendment was different from mine. He aimed to separate speech regulations on the basis of content—political or non-political—and reserve only the former for the First Amendment. He also had to "find" a speech right in the Fifth Amendment, notwithstanding the fact that the Amendment does not mention speech. I appeal to the Fifth Amendment only for compulsions, and not especially for speech compulsions but instead for all forms of compulsion. There is still room on my proposal for speech to receive heightened protection under the Fifth Amendment, as a fundamental right. But it is not the only fundamental right, and it does not receive greater protection as a matter of substantive due process than other fundamental rights receive. So compelled speech is not special.

Is the proposal I offer less vulnerable to the critiques of Meiklejohn's? I think it escapes the charge of elitism. We can see this in the context of wedding vendors. The Court's heightened solicitude for vendors whose work is creative or unique necessarily privileges skilled workers. But as I have aimed to argue, skilled and unskilled workers can have equally strong reasons for objecting to having their labor support ends they oppose. Insofar as the proposal here puts both sets of workers on the same footing, it avoids at least one kind of elitism.

Working out the proposal has admittedly involved an appeal to my own vision of equality. To that extent, the proposal is liable to being viewed as unprincipled. But it is motivated by a state of affairs that was unprincipled in its own right—an understanding of the wrong of compelled speech that treated it as a more serious offense than compelled conduct even when the injury each inflicts is the same. The proposal here owns up to the equivalence. It treats compelled conduct with the same seriousness as compelled speech. At the same time, insofar as it preserves the First Amendment exclusively for speech restrictions, it avoids a wholesale speech-conduct collapse. Some speech remains special, even if compelled speech does not.

Is the proposal I offer groundless? It is certainly a radical break from existing doctrine. As we saw, the Court believes that "the right to speak and the right to refrain from speaking [are] complementary components of the [same] broader concept…."[296] To insist on separating these two components is then to depart from over eighty years of compelled speech doctrine.[297] Still, if free speech doctrine is "incoherent" and potentially boundless, then any effort to discipline it will necessarily deviate from, or even conflict with, the doctrine we have. Bork himself made no bones about the unorthodox nature of the "principled" limits he

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[296] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). *See also* note ____ [first time this is quoted] and accompanying text.
[297] See Barnette (1943).

proposed,[298] and other critics have similarly called for radical revisions.[299] I find myself in eclectic company, but at least I am not alone.

The final critique leveled at Meiklejohn was that his proposal offered cold comfort. Does mine fare better? That will be the last question this piece leaves unanswered.

[298] Bork, Neutral Principles, supra note ____ at 20 ("I am, of course, aware that this theory departs drastically from existing Court-made law [and] from the views of most academic specialists in the field….").

[299] *See, e.g.*, Amar and Brownstein, 2020 U Ill. L. Rev. at 39-44. Or consider Robert Post's argument that the nature of the injury compelled speech inflicts depends on how courts conceive of the social role of the compelled speaker. I take that argument to be a radically revisionist intervention. See Robert Post, *Nifla and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1091 (2022).