BEYOND DISCRIMINATION: MARKET HUMILIATION AND PRIVATE LAW

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Market humiliation is a corrosive relational process to which the law repeatedly fails to respond due to the law's heavy reliance on the discrimination paradigm. In this process, providers of market resources, from housing and work to goods and services, use their powers to reject or mistreat other market users due to their identities. They thus cause users severe harm and deprive them of dignified participation in the marketplace.

The problem has recently reached a peak. The discussion in 303 Creative v. Elenis *indicates that the Supreme Court might legitimize market humiliation by granting private providers broad free speech exemptions from nondiscrimination laws. This Article is the first to offer a rigorous analysis of the oral arguments of this pending case. Its troubling findings show why deciding such a critical issue based on abstract preemptive litigation—designed to eliminate those who would be humiliated from the discussion—would be utterly wrong and should be avoided.*

But the Article not only sounds an alarm in a moment of crisis; it also develops a novel solution. It is time to go beyond discrimination, turning to private law and utilizing its tools to fight market humiliation. The proposed shift requires

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making more room within private law for a duty not to humiliate. This Article recommends how to do so and what legal reforms of doctrines and remedies are needed. Following these recommendations can empower people humiliated in the marketplace to take action and seek remedies from those who mistreated them. Private law has unique expressive, normative, and remedial powers that can fill the normative void created under nondiscrimination laws. When the market's inclusiveness is under attack, one salient response is to develop additional ways to secure market citizenship for all.

INTRODUCTION 89
I. THE PROBLEM OF MARKET HUMILIATION 96
  A. The Behavior 97
  B. The Consequences 102
II. AN EXPANDING NORMATIVE VOID 105
  A. The Limited Efficacy of Nondiscrimination Laws.. 106
  B. Recent Free Speech Attacks 110
    1. The Oral Arguments in *303 Creative* 112
      a. No Facts 113
      b. Skewed Sympathies 115
      c. Focus on a Vilified State 118
    2. The Court's Decision in *303 Creative* 120
      a. Ideological Zeal 123
      b. Deliberate Limitlessness 128
      c. Anti-State Focus 134
III. DEVELOPING A PRIVATE LAW RESPONSE 140
  A. Justifying a Private Law Response 141
    1. Law & Political Economy 143
    2. The Vulnerability Theory 144
    3. Relational Justice Theory 147
  B. Recognizing an Anti-Humiliation Principle 149
    1. The Private Claim of Market Humiliation 150
    2. Contract Law 153
    3. Tort Law 158
      a. Intentional Infliction of Emotional Distress ("IIED") 161
      b. A New Special Tort 163
    4. Private Law Remedies 165
      a. Credibility 166
      b. Foreseeability 167
CONCLUSION 172

INTRODUCTION

When Nikki High decided to fulfill her dream and open an independent bookstore specializing in diverse books, she never expected this to happen. Looking for the right site, she emailed a property manager who expressed excitement about her idea. But, when the manager saw her, "his face just dropped and he said 'I don't think this is the right space for you.'"[1] Later, Ms. High, who is Black, shared: "I just said, 'OK, thank you,' and I got back in my car and sobbed, '*I was so humiliated*.'"[2]

This incident happened not in the 1960s but very recently—a poignant reminder that participating in the marketplace without fear of humiliation is still a privilege hardly available to everyone.[3] Ms. High's experience illustrates the relational process called market humiliation.[4] The process starts when people seeking housing, work, health treatments, educational programs, and a host of goods and services are severely mistreated—due to who they are—by the private providers of these resources. Moreover, the process of market humiliation ends with severe harm. Because providers' humiliating behavior targets identities, it inevitably causes victims a uniquely intense and long-lasting feeling of humiliation that typically also generates stress, anxiety, and significant medical problems.[5]

The law, however, falls short in responding to market humiliation. For the most part, humiliating market incidents are treated under the limiting framework of discrimination. This framing unjustly leaves numerous injured parties without legal recourse. I call this troubling failure a "normative void." One leading reason for this problem is that nondiscrimination laws pertaining to the market have long suffered from narrow and

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1. Melissa Gomez, *How Octavia Butler Inspired a Pathbreaking Black-Owned Pasadena Bookstore*, L.A. TIMES (Feb. 13, 2023), https://www.latimes.com/entertainment-arts/books/story/2023-02-13/how-octavia-butler-inspired-a-pathbreaking-black-owned-pasadena-bookstore [https://perma.cc/CJ9N-Z7DS].
2. *Id.* (emphasis added).
3. *See, e.g.*, MICHELLE R. DUNLAP, RETAIL RACISM: SHOPPING WHILE BLACK AND BROWN IN AMERICA 97 (2021) (collecting and discussing humiliating incidents in the retail context and documenting their harm).
4. *See* Hila Keren, *Market Humiliation*, 56 LOY. L.A. L. REV. 565 (2023) [hereinafter Keren, *Market Humiliation*].
5. *See id.*

sporadic coverage combined with limited efficacy.[6] As such, those laws have frequently failed to protect market users from being humiliated when providers mistreat them due to their identity.

Even worse than the lack of adequate response to humiliation is the phenomenon highlighted in this Article of attacking the normative idea that the market *should* be kept open for all.[7] This attack takes place in two arenas: in the marketplace and in courts. First, as a practical matter, we witness the reappearance of excluding signs across the market. Such new signs—reminiscent of dark ones from our past[8]—are used by businesses ostensibly open to the public to declare whom they are not going to serve. For example, a commercial photographer's website currently states: "I don't photograph same-sex weddings."[9]

Second, at the legal level, a new genre of litigation has challenged states' ability to enforce nondiscrimination laws on market providers. This litigation eventually arrived at the Supreme Court, and in the summer of 2023, yielded the decision in *303 Creative LLC v. Elenis*.[10] For the first time in decades, the Court prohibited states from enforcing their nondiscrimination laws against some businesses *and* from banning the use of excluding signs. This Article offers a novel

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6. *See, e.g.*, Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141 (2021) (discussing the shortcomings of nondiscrimination laws in protecting racial minorities from severe market mistreatment).

7. In general, the idea has strong roots in the Thirteenth Amendment and the legislation it inspired, expressing understanding that market participation is a necessary component of freedom. *See, e.g.*, ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 185 (2019) ("[P]articipation in the commercial sphere [is] a vehicle for inclusion in civil life in market economies."); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002) (maintaining that in the absence of a state action requirement, the Thirteenth Amendment has a significant bearing on private social and economic relationships).

8. *See, e.g.*, ELIZABETH ABEL, SIGNS OF THE TIMES: THE VISUAL POLITICS OF JIM CROW 9 (2010) ("White Only" signs); Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441 (1998) ("No dogs or Jews allowed" signs); WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 142 (2019) (making the comparison between the rejection of LGBTQ+ people and a "whites only" placard).

9. *Weddings*, CHELSEY NELSON PHOTOGRAPHY, https://www.chelseynelson.com/weddings [https://perma.cc/YR4A-3LZL].

10. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

analysis of the unprecedented decision in *303 Creative*.[11] It explains how the decision severely exacerbates the problem of market humiliation, enlarging the normative void to which injured parties are exposed. Unfortunately, in *303 Creative,* a Court controlled by six conservative justices released many businesses, which are ostensibly open to the public, from the duties that applied to public accommodations under various nondiscrimination laws. In so doing, the Court opened the door wide to more practices of discrimination to be carried out through market activities and to an expanded risk of market humiliation. The harshness of this latest development commands immediate attention.

As this Article clarifies, the stakes are high, despite efforts to present the battle as confined to the rights of religious business owners who object to same-sex marriage. In reality, although *303 Creative* originally focused on excluding LGBTQ+ people from the marketplace, it ended up also exposing various other groups to such exclusion. Indeed, the principle of an open market itself was severely compromised, significantly enlarging the normative void left by nondiscrimination laws prior to the decision. Thus, numerous people who were previously protected by a legal right to participate in market activities are now facing an increased risk of rejection and humiliation.

The risk presented by *303 Creative* is broad and limitless because the decision was based on freedom of speech and not on religious rights. The Court accepted a business provider's argument that the state cannot force her to serve LGBTQ+ couples, not because she is a devoted Christian, but since she engages in commercial activity that involves speaking.[12] The Court's conservative majority accepted this free speech argument based on *a single fact* stipulated by the litigating parties: that 303 Creative sells "expressive" services.[13] It then attached to this factual stipulation a newfound and deeply troubling legal exemption, which from now on will be available to countless commercial providers. As this Article explains, this

11. The Article was written in anticipation of the outcome in *303 Creative* and was updated after the decision was released. As such, it is one of the first to offer an analysis of the decision and the first to respond to the decision's consequences with a solution.

12. Transcript of Oral Argument at 3–4, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) [hereinafter Transcript *303 Creative*] (Petitioners' opening argument by Ms. Waggoner).

13. *Id.* at 85.

leap from a stipulated fact to a legal reform that severely limits nondiscrimination laws is indefensible.[14]

Making things worse, the majority irresponsibly did not define who would qualify as an "expressive" provider. Therefore, while the decision may appear narrow, it is far from it. At a minimum, the decision summons various wedding vendors holding anti-LGBTQ+ views, including florists, bakers, hairdressers, and dressmakers, to allege "expressiveness" to revive their offensive practices. But, more significantly, the decision also invites new attempts to discriminate outside of the wedding industry and for a never-ending list of reasons. As Justice Sonia Sotomayor's dissent highlights, the majority's logic removes protection from "any person, because of race, sex, national origin, or other protected characteristic."[15] In this way, the decision raises the specter of a resegregated marketplace and a rise in cases of market humiliation.

This Article thus identifies a new peak level of a crisis that is both socioeconomic and legal. On the one hand, we face the persistence of market humiliation, as demonstrated by Ms. High's experience and the new signs of "no same-sex couples." Yet, on the other hand, nondiscrimination laws fail to provide an effective solution. And, instead of enhancing the impact of these laws, *303 Creative* has exacerbated the problem by significantly limiting their reach. Therefore, this Article argues that the normative void in cases of market humiliation has never been greater. In response, the Article intervenes in this critical moment to account for the new magnitude of the problem and to propose how it could be handled despite the dramatic limits imposed by the Court.

As its first intervention, this Article explains that the majority in *303 Creative* gave numerous businesses a blank check to discriminate and argues that such a result was based on a flawed process that led to a biased analysis. By and large, this new permission to harm others resulted from a legal strategy devised and used by the Alliance Defending Freedom ("ADF"). This leading conservative advocacy group not only represented the business in *303 Creative* since the case started its way in Colorado but also devised the legal strategy that advanced it all the way to the highest court in the country. The

14. *See infra* Section II.B.2 (analyzing the flaws of the decision in *303 Creative*).
15. *303 Creative*, 143 S. Ct. at 2337 (Sotomayor, J., dissenting).

ADF submitted in courts around the country, in both red and blue jurisdictions, *preemptive* free speech demands of exemptions from nondiscrimination laws.[16] This method has been used to sue states and localities *before* anything happened: when no one was rejected or humiliated, and the authorities took no enforcement action. By this design, courts only heard a one-sided story—alleged harm to entrepreneurs chased by their government. In this way, the preemptive strategy obfuscated the grave harm that the litigation aimed to authorize. What started as an unusual procedure that raised questions about standing led to a skewed discussion of the issue that would eventually damage states' ability to protect their residents from businesses' humiliating affronts.

To show how preemptive litigation led to biased adjudication, the Article introduces an innovative analysis of the rhetorical choices (and startling omissions) made during the *303 Creative* oral arguments. Such an investigation allows access to authentic and spontaneous communications that can reveal more than a carefully edited text would. The findings are alarming. For example, the analysis demonstrates how deciding people's right to participate in the market without including them in the litigation instigated a distorted allocation of sympathies in the courtroom. This prejudiced outlook included, for example, multiple disrespectful references to same-sex marriage as "false."[17]

The Article then proceeds to an original analysis of the written decision that eventually emerged from such a problematic hearing. Although the bluntest expressions used in oral arguments were eliminated from the final decision, the majority's opinion is still replete with biased reasoning. For example, the Court astonishingly ignored the severe injuries its decision legitimizes. Justice Neil Gorsuch, who wrote for the majority, stressed only the hardship of Lorie Smith, the business owner who initiated the litigation. He repeatedly portrayed her as a victim of state coercion and continued what started at oral arguments: a total disregard for the pain she plans to cause to others.

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16. *See* Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. IRVINE L. REV. 911 (2022) [hereinafter Keren, *Separating Church and Market*] (identifying the new preemptive legal strategy and describing its many manifestations).

17. *See infra* Section II.B.1.

Because the case was litigated without hearing those it targets, and due to the majority's ideological preferences, the final decision lacks any consideration of the immense human suffering—individual and collective—it will certainly bring about.[18] Therefore, this Article contends that the Supreme Court's permission to discriminate and humiliate, as recently awarded in *303 Creative,* is indefensible and necessitates an immediate search for alternative legal ways to ensure that everyone has full and dignified access to the entire marketplace.

The Article's main contribution, as its title suggests, is in proposing that in this critical moment, we should search for solutions that go "beyond discrimination." Given the previously recognized inability of the discrimination paradigm to adequately secure dignified participation in the marketplace, the new and considerable aggravation of the problem under *303 Creative*, and additional efforts by businesses to escape nondiscrimination laws,[19] the Article proposes a jurisprudential shift. It outlines how to move beyond discrimination by turning to private law. As used in this Article, the term private law refers to the body of law that controls not the "vertical" relationship between states and citizens but the "horizontal" relationships between individuals.

Even if states are no longer allowed to make "expressive" businesses serve everyone under public law, major private fields of law like contract law and tort law are not paralyzed.[20] These laws most directly apply to the relationships between market actors: business providers and the buyers that need the goods and services they supply. As such, these fields of law could and should offer protection when providers act in a manner that intentionally humiliates their counterparties. It is thus essential to move beyond discrimination and develop a principle of anti-humiliation *within* private law.

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18. Keren, *Separating Church and Market*, *supra* note 16.

19. *See* Marcia L. McCormick et al., *The Braidwood Exploit: On the RFRA Declaratory-Judgment Class-Action and Title VII Employer Liability*, U. RICHMOND L. REV. (forthcoming 2023) (exposing a new litigation strategy aimed at releasing for-profit businesses from Title VII liability by using the Religious Freedom Restoration Act).

20. *See* Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South,* 69 UCLA L. REV. 674, 731 (2022) (a historical study illustrating that "private law could serve as a surprising source of redress for sharecroppers and tenants who were left unprotected by criminal law and public law." It also shows that unless correctly applied private law could enhance injustice.).

Within private law, the right of dignified participation in the marketplace should be derived from the broader principle of market citizenship. This principle demands careful attention to how the law allocates rights and duties to support market activities.[21] In the context of market humiliation, both providers and those who need their goods and services are market citizens, but it is essential to recognize that they are not similarly situated. On the providers' side, businesses enjoy and profit from their market citizenship. Significantly, they heavily depend on private law mechanisms that allow them, for instance, to utilize their property, make and enforce their contracts with suppliers and employees, and enjoy limited liability via incorporation.[22] By offering providers such privileges, the state awards them—via private law—a structural advantage and systemic superiority of power.

By contrast, everyone living in a market society must interact with those private providers and be subject to their dominance. Accordingly, private users of everything the market offers must also have market citizenship. Yet, the quality of such citizenship depends on how providers treat other market users. Consequently, for private law to ensure full market citizenship for everyone, it must impose on private providers a duty that is inseparable from their extensive rights: to avoid humiliating their counterparties on the basis of their identities.

Pragmatically, this Article's proposal is to respond to market humiliation by utilizing and revising key principles of contract law and leading tort law doctrines. It anticipates some of the conventional objections to offering remedies to injuries perceived as merely emotional reactions that are individual and subjective. In response, the Article offers tools and replies based on the scientifically supported understanding of market humiliation as a recognized social process with verified consequences.

At the end of the day, turning to our common-law-based norms has promising potential. With their inherent particularity and flexibility, these norms can fill the normative void left by nondiscrimination laws. Together, both legal regimes can much better protect people from market humiliation. Even more importantly, authorizing humiliated individuals to sue

21. *See* Keren, *Separating Church and Market*, *supra* note 16, at 953–66 (defining the principle of market citizenship).

22. *Id.*

under private law is crucial to restoring and affirming their dignity. Indeed, where victims are excluded from the discussion of their rights by the calculated use of preemptive litigation, utilizing private law as proposed here would empower them to pursue justice. It would also enable the legal system to consider their plea based on a rich factual record, replacing partial analysis with nuanced and balanced decision-making.

This Article makes its contributions in three steps. Part I defines and explains what market humiliation is. Based on transdisciplinary studies, it creates a six-factor model for jurists to identify market humiliation and distinguish it from other, less wrongful, market incidents. Part II explains why nondiscrimination laws are increasingly insufficient to protect against market humiliation. This part includes a novel and timely analysis of the oral arguments and the decision in *303 Creative* to substantiate the claim that nondiscrimination laws are under severe attack that risks dignified market participation. Part III calls for a turn to private law in this critical moment. It justifies a normative move beyond discrimination, proposing how contract law and tort law can be utilized and developed to offer adequate redress in cases of market humiliation.

I. THE PROBLEM OF MARKET HUMILIATION

Market humiliation is a troubling and intense social process or relational dynamic.[23] It occurs while people engage—or try to engage—in ordinary market-based activities but get rejected or otherwise severely mistreated by their counterparties. What happens while pursuing those market activities is of the utmost importance because these activities cover almost every aspect of our lives. They include purchasing goods and services, obtaining and holding a job, securing housing for ourselves and our families, borrowing money, improving our skills and credentials via education, and much more. While most people regularly engage in such market-dependent undertakings without worrying about their ability to do so (beyond the limits of their means), others are at constant risk of being rejected or attacked for who they are.

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23. *See* Keren, *Market Humiliation*, *supra* note 4 (defining and explaining based on multidisciplinary literature the phenomenon of market humiliation).

For example, many people frequent McDonald's fast-food restaurants to get burgers and fries. However, when Shasta Lester did so with her mother and her mother's friend, an incident of market humiliation ensued.[24] Upon receiving her take-out lunch order, Ms. Lester noticed that the fries arrived cold, so she requested to substitute them for fresh ones.[25] As the employee who served her turned to fulfill the request, a manager stopped him and asked what he was doing.[26] Having learned about the employee's intention to replace Ms. Lester's fries, the manager told her she would have to pay for a new order.[27] Ms. Lester refused, explaining she had already paid for the fries she returned.[28] The manager, described by the court as "a Caucasian man," responded by calling her, not once but twice, "a black bitch."[29] He also exclaimed, "I'm tired of these damn n——s [using the N word] bringing their food back and don't want to pay for it."[30] Ms. Lester never returned to dine at McDonald's.[31]

In what follows, this Part explains the unique structure of events such as the assault on Ms. Lester. It dispels the myth that humiliation is merely a momentary emotion that everyone experiences for various ordinary reasons. Instead, the humiliation dynamic is a studied social process that starts with a specific wrongful behavior, which then causes severe consequences.[32]

A. *The Behavior*

The highly offensive racial slurs directed repeatedly at Ms. Lester typify the *behavioral* phase of market humiliation. In general, humiliating acts share a common profile that can help legal practitioners and judges recognize when market humiliation—and not just any unfortunate interaction—takes place. This profile includes six factors, explained below: exclusion, power advantage, hostility, targeting marginalized

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24. *See* Lester v. "B"ING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835 (S.D. Fla. Nov. 30, 2010).

25. *Id.* at *1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at *1–2.

30. *Id.* at *1.

31. *Id.* at *2.

32. The fuller model of market humiliation was developed in Keren, *Market Humiliation, supra* note 4.

identities, surprise, and audience. In the market setting, when the conduct of one actor towards another includes most, if not all, of these factors, the incident should be identified as distinguishable from other tense exchanges. The six-factor profile marks and explains why, while some disagreements may occur and pass, humiliating behavior rises to the level of wrongful conduct.

First, at its core, market humiliation is based on *exclusion*. Many businesses are open to all in theory but not in practice. Some engage in direct, explicit, and publicized exclusions of others. This is the dark history of signs limiting services to "Whites Only" or announcing "No dogs or Jews allowed."[33] This is also the current request made in *303 Creative*—to allow the business to state on its website that its owner will not serve same-sex couples.[34] Indeed, following some recent decisions of lower courts,[35] businesses around the country already make such offensive public statements.[36]

Another common pattern of exclusion is indirect. Without declaring their policies, some businesses treat those they find undesirable so negatively that, like Ms. Lester, they never return. Often such rejections follow two opposite modes: ignoring undervalued patrons or excessively following or addressing them.[37] Either way, the message is as painful as the one expressed in blunt signs: some people do not belong in a commercial space in which most others are welcome.[38] They are

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33. *See, e.g.*, ABEL, *supra* note 8; Halberstam, *supra* note 8.

34. *See* 303 Creative LLC v. Elenis, No. 16-cv-02372-MSK-CBS, 2017 U.S. Dist. LEXIS 203423, at *8 (D. Colo. Sept. 1, 2017) ("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.").

35. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't, 479 F. Supp. 3d 543, 561 (W. D. Ky. 2020).

36. *See, e.g.*, *Weddings*, *supra* note 9; AMY LYNN CREATIVE, https://amylynncreative.com/about [https://perma.cc/LH3V-RFDR] ("I will not photograph and post about events (like same-sex wedding ceremonies) that beatify any marriage besides marriage between one man and one woman.").

37. *See, e.g.*, GERALDINE ROSA HENDERSON ET AL., CONSUMER EQUALITY: RACE AND THE AMERICAN MARKETPLACE 15–17 (2016).

38. *See, e.g.*, Cassi Pittman, *"Shopping While Black": Black Consumers' Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 J. CONSUMER CULTURE 3 (2020).

put down and marked as "lesser" than other humans, precisely as the etymology of the word "humiliation" suggests.[39]

Second, market actors who humiliate exploit their *power advantage*. To exclude and reject, they use their superior status over the other party or their control of the space in which exchanges take place. Examples include employers and landlords using their positions to humiliate, respectively, employees[40] and tenants.[41] In other instances, the control might be more situational, such as when Uber drivers utilize their ability to turn away after noticing riders in wheelchairs[42] or when bakeries refuse to sell cakes to Muslim customers.[43] This is not to say that fellow shoppers or work colleagues cannot humiliate their peers. As Ms. Lester's experience demonstrates, many times, "power is inherent in the ability to assign names and derogatory labels to others."[44] In all these cases, because social status is at stake, the behavior is more impactful and less justifiable because power dynamics are at play, marking victims inferior.

Third, market humiliation events project *hostility*. Indeed, explicit and intentional expressions of antagonism often separate market humiliation from unpleasant commercial incidents, such as cases of rude service. Much like the obscene words yelled at Ms. Lester, the facts of *303 Creative* demonstrate

39. The word humiliation originates in the Latin word *humus*, which means ground. *See Humus,* LATIN DICTIONARY (Feb. 15, 2023), http://latindictionary.wikidot.com/noun:humus [https://perma.cc/RF8D-4L8B].

40. *See, e.g.*, Khalaf v. Ford Motor Co., 973 F.3d 469 (6th Cir. 2020) (humiliating immigrant employee with English as second language); Reynolds v. Robert Hasbany MD PLLC, 917 N.W.2d 715 (Mich. Ct. App. 2018) (humiliating a fat employee).

41. Granger v. Auto-Owners Ins., 40 N.E.3d 1110, 1112 (Ohio 2015) (refusing to lease apartment to people with children).

42. *See, e.g.*, Michael Finney & Renee Koury, *Uber Driver Sees Passenger in Wheelchair, Takes Off*, ABC 7 NEWS (May 1, 2019), https://abc7news.com/technology/uber-driver-refuses-to-pick-up-passenger-in-wheelchair/5278327 [https://perma.cc/G8X2-9PL9]; Scottie Hunter, *The Investigators: Woman Alleges Uber Driver Discriminated Against Her Over Wheelchair*, WAFB9 (Mar. 8, 2022, 3:15 PM), https://www.wafb.com/2022/03/08/investigators-woman-alleges-uber-driver-discriminated-against-her-over-wheelchair [https://perma.cc/4P7E-VU7T] (for a similar incident that happened to Elizabeth Morgan).

43. *See, e.g.*, DUNLAP, *supra* note 3, at 98–104 (refusal to sell a cake to a Muslim-looking client after 9/11); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (refusal to sell a cake to a same-sex couple); Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023) (refusal to sell a cake to a transgender woman).

44. Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93, 105 (1991).

this point. In this case, and as part of a carefully planned national legal strategy, the ADF sued on behalf of a business that did not even offer wedding services prior to the litigation.[45] Therefore, unlike the White manager at McDonald's, the owner never encountered real clients that presented requests she found objectionable. Instead, the plan to enter the wedding industry was introduced to create a market platform through which the owner can express her religious beliefs regarding marriage, which include anti-LGBTQ+ views.[46] This turns the act of withholding services into a political weapon to attack same-sex couples. Furthermore, hostility was on display during the case's oral arguments when advocates and justices repeatedly used offensive terms to describe same-sex marriage.[47]

Fourth, and related to evident hostility, when market actors humiliate, they *target marginalized identities*. Humiliating aggressions do not relate to features of the exchange itself but irrelevantly focus on at least one core identity of the victims, with examples covering race, weight, gender, disability, and more. For instance, the White manager at McDonald's did not exclaim that Ms. Lester was stingy or greedy, which would have had some connection to her refusal to pay twice for the same fries. Instead, he chose to use profanities aimed at the intersection of her gender and race.[48]

Targeting marginalized identities is indeed a central part of humiliation's DNA—unlike shaming, it degrades people for who they are rather than what they do.[49] The fact that humiliation features a negation of core identities also explains its ties to discrimination—a concept that focuses on the disparaging of (certain) identities. However, humiliation is not limited to any closed list of identities. What matters most is that the targeted identities constitute the victim's selfhood, which is much of what makes the attack so uniquely painful. Notably, the more marginalized the attacked identities are, the more they intersect

45. Petition for a Writ of Certiorari at 2, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) [hereinafter 303 Creative, Petition for Certiorari] ("[Petitioner] plans to expand her business to design wedding websites.").

46. *Id.* at 5 ("[Petitioner] cannot create websites that promote . . . same-sex marriage.").

47. *See infra* Section II.B.1.

48. Lester v. "B"ING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *3 (S.D. Fla. Nov. 30, 2010) (citing the manager as using the term "black bitch," which relates to both race and gender).

49. Klein, *supra* note 44, at 117.

with each other,[50] and the more they reinforce recognized past traumas, the greater the suffering.

Fifth, incidents of market humiliation often come by *surprise*. While some settings naturally expose participants to profanities (e.g., sports events or political protests) or famously include risk of exclusion (e.g., fancy dance clubs), civil and inclusive behavior is the presumed norm in marketplace interactions. So, part of the intense effect of market humiliation is that it defeats reasonable expectations of courtesy to all. Note that this feature exists even though market mistreatments are a recognized phenomenon—such as in the racialized experience dubbed "Shopping While Black," a phrase that like "Driving While Black" is in common use to capture the various negative experiences of Black shoppers who are repeatedly profiled and mistreated by sellers.[51] Common assaults of this kind remain unpredictable not due to the inability to envision them but because of their arbitrariness, which impedes targeted people's ability to avoid the situation or prepare to protect themselves. Worse, those who cannot rely on being accepted and treated with dignity carry an additional burden when "the possibility of refusal lurks behind every store counter."[52]

Sixth, many acts of humiliation occur in the presence of an *audience*. In general, spectators are part of the typical humiliation "triangle," which includes humiliators, victims, and witnesses.[53] Witnesses are particularly prevalent in the marketplace due to the public nature of most commercial settings, such as retail stores, restaurants, and workplaces. In any case, while one may be humiliated by another without the presence of viewers, "most researchers agree that public

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50. *See generally* Sumi Cho, Kimberlé W. Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS 785 (2013).

51. *See generally* SHAUN L. GABBIDON & GEORGE E. HIGGINS, SHOPPING WHILE BLACK: CONSUMER RACIAL PROFILING IN AMERICA (2020). The term has even its own Wikipedia page. *See Shopping While Black*, WIKIPEDIA (Oct. 6, 2022), https://en.wikipedia.org/wiki/Shopping_while_black#cite_note-journals.sagepub.com-16 [https://perma.cc/C7FP-TBV6].

52. Jennifer C. Pizer, *It's Not About the Cake: Against "Altaring" the Public Marketplace*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 385, 390 (William N. Eskridge Jr. & Robin Fretwell Wilson eds., 2018).

53. Klein, *supra* note 44, at 101.

exposure intensifies feelings of humiliation."[54] Because humiliation challenges one's self-worth, not in isolation but in comparison to others and as a member of society, an audience worsens its impact. Businesses that fight in courts for a right not only to deny services but also to publicly declare that they would not serve same-sex couples or transgender persons seem to understand this special effect.

All in all, as a behavior, market humiliation intentionally assaults people's sense of full belonging to human society via one of the most valued settings of our modern life: the market. If some people cannot even buy fries without being put down and marked as lesser than others, there is very little hope for dignified social membership. It is thus a feature and not a bug of the market system that some people use economic powers to establish superiority over others they find objectionable. They exercise this market humiliation by excluding others, leveraging a power advantage, acting with hostility, targeting marginalized identities, surprising others with their behavior, and often doing so in front of an audience. The problem is, of course, that this is how the process of humiliation starts but not how it ends. This wrongful behavior inevitably comes with a heavy price to individuals, communities, and society.

B. The Consequences

The second part of the market humiliation process includes severe and multilayered harm that legal actors tend to misunderstand and disregard. The damage is an integral part of the process, flowing directly and inevitably from the intensity and meaning of the behavior preceding it. Because humans are social beings, they must sense that they fully belong to society like any other human member to exist. Indeed, leading works in psychology and other disciplines have defined this basic need as a matter of survival,[55] sometimes comparing social exclusions

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54. Yashpal Jogdand et al., *The Context, Content, and Claims of Humiliation in Response to Collective Victimhood*, *in* THE SOC. PSYCH. OF COLLECTIVE VICTIMHOOD 77, 81 (Johanna Ray Vollhardt ed., 2020) (citing studies).

55. *See* Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCH. BULL. 497 (1995); *see also* M.J.W. Van der Molen et al., *Why Don't You Like Me? Midfrontal Theta Power in Response to Unexpected Peer Rejection Feedback,* 146 NEUROIMAGE 474 (2017).

that threaten belongingness to hunger.[56] For that reason, our brains and bodies are programmed to sound a loud alarm whenever our value as humans and our belonging to society are under attack.[57] Thus, mental and physical responses to humiliating acts are essential and rational rather than subjective and erratic. Indeed, they are "recognized as fundamental mechanisms in the formation of modern society."[58]

The first and fastest mechanism is the emergence of an extremely painful feeling. People immediately experience the negative emotion called humiliation, which is uniquely agonizing. Although the source of the pain is emotional, studies show that it is comparable to physical pain.[59] Therefore, jurists who find it hard to believe that emotional injuries deserve compensation should realize that when people suffer social rejection, the activated brain regions are the same as when they experience physical pain.[60] In both cases, the suffering plays an evolutionary role, signaling threats to survival.[61]

In light of much legal suspicion, it is crucial to emphasize the scientific consensus that humiliation is "a particularly intense and painful emotion."[62] Moreover, compelling empirical evidence supports this consensus. Concretely, neurocognitive studies measured brain activity in response to emotion-inducing scenarios and found humiliation to be "a more intense emotional experience" than any of the other induced emotions.[63] Furthermore, this excruciating emotion does not quickly dissipate, as some jurists seem to assume. Rather, the scientific

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56. Judith Gere & Geoff MacDonald, *An Update of the Empirical Case for the Need to Belong,* 66.1 J. INDIVIDUAL PSYCH. 93, 94 (2010).

57. Linda M. Hartling & Tracy Luchetta, *Humiliation: Assessing the Impact of Derision, Degradation, and Debasement*, 19 J. PRIMARY PREVENTION 259, 263–70 (1999).

58. Evelin G. Lindner, *Humiliation and Human Condition: Mapping a Minefield*, 2 HUMAN RIGHTS REV. 46, 46 (2001).

59. *See* Naomi I. Eiesenberger, *The Pain of Social Disconnection: Examining the Shared Neural Underpinnings of Physical and Social Pain,* 13.6 NATURE REVIEWS NEUROSCIENCE 421 (2012).

60. *See id.*

61. Laura. J. Ferris, *Hurt Feelings: Physical Pain, Social Exclusion, and the Psychology of Pain Overlap*, *in* CURRENT DIRECTIONS IN OSTRACISM, SOC. EXCLUSION AND REJECTION RSCH. 100 (Selma C. Rudert, Rainer Greifeneder & Kipling D. Williams eds., 2019).

62. Jogdand et al., *supra* note 54, at 82.

63. Marte Otten & Kai J. Jonas, *Humiliation as an Intense Emotional Experience: Evidence from the Electro-Encephalogram,* 9 SOC. NEUROSCIENCE 23 (2014) (detailing experiments that assessed the intense brain responses to the experience of humiliation).

literature shows that the social and psychological agonies that come from exposure to humiliating behavior have an exceptionally long-lasting impact as they tend to be recalled and refelt by victims.[64]

But the process that started with hostile acts and inevitably created intense and lingering painful feelings does not end there. Some additional outcomes typically follow, spreading the injuries beyond the emotional sphere. These outcomes are severe as they present prolonged risks to individuals' well-being, mental and physical health, and sometimes even their life. Studies report a range of health complications following the undermining of people's self-value.[65] For example, researchers recorded increased traumatic stress and high levels of blood pressure among racial minorities trailed in stores,[66] presented evidence linking discrimination to depression, and reported the development of social anxiety disorder by a hijab-wearing student.[67] Notably, although such injuries go beyond emotional suffering and often necessitate expensive medical treatments, they are sorely missing from the legal discussions of the harm inherent in humiliating behaviors.

In conclusion, recognizing and defining market humiliation is the first step taken in this Article to justify its title and move beyond discrimination. The term is wide enough to encompass any attack on features central to one's identity that perpetuates subordination via the market and severely hurts others. This transdisciplinary understanding of the phenomenon highlights the relational and interpersonal dimensions of the problem: market humiliation is wrong not only because the law sometimes defines it as discrimination. It is wrong because it involves people intentionally and severely harming other people in one of the most significant domains of modern life—the market.

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64. Zhansheng Chen & Kipling D. Williams, *Imagined Future Social Pain Hurts More Now than Imagined Future Physical Pain*, 42 EUR. J. SOC. PSYCH. 314 (2012); Zhansheng Chen & Kipling D. Williams, *Social Pain is Easily Relived and Prelived, but Physical Pain is Not, in* SOCIAL PAIN: NEUROPSYCHOLOGICAL AND HEALTH IMPLICATIONS OF LOSS AND EXCLUSION 161 (G. MacDonald, ed., 2011).

65. Walter J. Torres & Raymond M. Bergner, *Severe Public Humiliation: Its Nature, Consequences, and Clinical Treatment*, 49 PSYCHOTHERAPY 492 (2012).

66. GERALDINE ROSA HENDERSON ET AL., CONSUMER EQUALITY: RACE AND THE AMERICAN MARKETPLACE 20–21 (2016) (describing findings and citing resources).

67. Sender Dovchin, *The psychological damages of linguistic racism and international students in Australia,* INT'L J. OF BILINGUAL EDUC. AND BILINGUALISM 804, 814 (2020).

To be sure, legal discussions of market discrimination sometimes touch on the issue of humiliation, but when they do so, they only refer briefly to one of the emotional outcomes of discrimination.[68] Significantly, even if humiliation is mentioned, the conventional analysis of discrimination does not account for how it emerges, how it is different than other emotional responses, or what other health risks follow. As a result, those rejected in the marketplace or exposed to other market mistreatments due to their identities too often remain without proper redress that fits the magnitude of the experience. In this way, the law ends up perpetuating the problem. Instead, legal actors who operate under nondiscrimination laws need to go beyond the concept of discrimination and recognize the central role of humiliation in discriminatory incidents. The coming Part further explains why it might be necessary to also move beyond nondiscrimination laws (and not only beyond the notion of discrimination), due to rising attacks on their operation.

II. AN EXPANDING NORMATIVE VOID

Legal attempts to handle incidents of market humiliation as cases of discrimination reveal a significant and fast-expanding normative void, where the legal system leaves injured people in a sphere of lawlessness and without a path to redress. This normative void results from a combination of two features, one well-acknowledged and another that is still developing and is yet to be fully recognized. This Part describes them both, starting with a summarized description of the better-documented problem: the limited coverage of nondiscrimination laws and their inherent inability to offer redress in numerous episodes of market humiliation. It then continues to introduce, identify, and explain a more recent development of immense importance: a severe attack on existing nondiscrimination norms that govern the market in the name of freedom of speech. This latest assault is still in the making. Its current peak is marked by the Supreme

68. See, for example, the often cited case of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 2370 (1964), stating that in cases of racial discrimination the issue is less access to "hamburgers or movies," and much more "the *humiliation*, frustration, and embarrassment that a person must surely feel when he is unacceptable as a member of the public . . . .") (emphasis added).

Court's decision in the "blockbuster" case of *303 Creative*.[69] Although only time will tell how much of a resegregated marketplace this most recent shackling of nondiscrimination laws will generate, it is urgent to account for its full devastating potential.

A. The Limited Efficacy of Nondiscrimination Laws

People seeking redress for humiliating mistreatments in the market face numerous hurdles under a complex and confusing patchwork of nondiscrimination norms. Generally speaking, the legal response to humiliating behavior occurring at the market's heart is hopelessly fragmented and unsympathetic, depriving many of the ability to fully and freely participate in market activities. Without mapping out all the omissions, loopholes, and anti-claimant tendencies that impede the effectiveness of our nondiscrimination system, several leading obstacles are worth highlighting.

First, most nondiscrimination norms that pertain to the market cover only the members of certain enumerated groups, leaving countless others exposed or questionably and inconsistently covered. For example, the Supreme Court only recently made protections against workplace discrimination available to the LGBTQ+ community by interpreting the protected category of "sex" as inclusive of sexual orientation and gender identity.[70] However, broader community protections still hinge on context and geography. Legal action is not available, for example, when the relevant nondiscrimination law does not mention the word "sex," such as in the case of refusals to serve same-sex couples in states that had never included sex in their public accommodations laws.[71]

Likewise, fat people who suffer body shaming while working or shopping cannot get legal protection unless they are willing and able to show that their weight creates a recognized

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69. *See The Blockbuster Case That You Probably Haven't Heard About*, AMICUS WITH DAHLIA LITHWICK PODCAST (Dec. 3, 2022), https://slate.com/podcasts/amicus/2022/12/why-free-speech-claims-from-a-colorado-web-designer-threaten-to-topple-discrimination-protections [https://perma.cc/BG6Z-TTE3].

70. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

71. Keren, *Separating Church and Market*, *supra* note 16, at 922 (listing five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—that do not have public accommodations laws for "sex").

disability.[72] Similarly, Americans with foreign accents are only sometimes covered, depending on how well they can link their injury to their national origins.[73] In the same vein, "more than 30,000 federal judiciary employees are currently unprotected by antidiscrimination laws."[74] Therefore, while the injuries of those insulted or rejected due to their identity tend to be similar and happen in identical settings (e.g., while shopping or working), legal protection is patchy and inconsistent.

Second, even claimants covered by most nondiscrimination laws too often suffer early dismissal of their cases for failure to establish a legal claim. Consider, for instance, the federal prohibition on discrimination and segregation in public accommodations. Courts have applied this explicit ban so narrowly and erratically that they have rendered many humiliating market behaviors permissible. A recent study on racial discrimination that analyzed numerous nondiscrimination decisions in market situations revealed that federal judges have repeatedly shrunk protections offered by Section 1981 of the 1866 Civil Rights Act and Title II of the 1964 Civil Rights Act to the bare minimum.[75] With few exceptions,[76] they have insisted that only direct refusals to make or enforce contracts are actionable. As a result, egregious market behaviors that happened before a concrete contract was pursued (e.g., while browsing or standing in line) or after a transaction was completed (e.g., when attempting an exchange) are not covered by this body of laws.

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72. Katie Warden, *A Disability Studies Perspective on the Legal Boundaries of Fat and Disability*, 39 MINN. J. OF L. & INEQ. 155 (2021). I use the term fat and not overweight following its increasing use by fat activists, scholars, and popular writers. *See, e.g.*, Lauren Freeman, *A Matter of Justice: "Fat" is Not Necessarily a Bad Word*, THE HASTINGS CTR. REP. (2020) (arguing that "fat" is not "a word that health care providers should avoid"); Esther Rothblum, *Why a Journal on Fat Studies*, FAT STUD. 3 (2012) (describing the history of using the word "fat" instead of "obese" or "overweight).

73. Khalaf v. Ford Motor Co., 973 F.3d 469, 486 (6th Cir. 2020).

74. Aliza Shatzman, *Untouchable Judges? What I've Learned About Harassment in the Judiciary, and What We Can Do to Stop It*, 29 UCLA J. GENDER & L. 161, 172 (2022).

75. Thomas, *supra* note 6, at 147–48.

76. Most are in the context of full-service restaurants but not in the retail context, including fast-food restaurants and food deliveries. *See, e.g.*, Pena v. Fred's Stores of Tenn., Inc., No. 3:09-cv-209-RV/EMT, 2009 U.S. Dist. LEXIS 121360, at *10 (N.D. Fla. Dec. 31, 2009) (quoting Rogers v. Elliott, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001)).

To illustrate, under this meager interpretation, most aspects of the troubling experience widely known as Shopping While Black remain unregulated.[77] Accordingly, the obscenities directed at Ms. Lester over an order of fries were classified by the court as "highly offensive," but the court still granted McDonald's motion for summary judgment.[78] It reasoned that "egregious as the comments alleged here may have been, they did not prevent the formation of a contract."[79]

It is important to recognize that courts' classification of hostile and insulting treatments as falling outside of otherwise applicable nondiscrimination laws is indefensible and does not align with either the language, history, or rationale of these norms.[80] Indeed, the prevention of humiliation was at the core of the effort to legislate the Civil Rights Acts covering the market.[81] Similarly, humiliation prevention was also the reason why Section 1981 was expanded by the Civil Rights Act of 1991, which explicitly extended protections beyond the ability to contract to the "*enjoyment* of all the benefits . . . of the contractual relationship."[82] Needless to say, people seeking or handling contractual relationships cannot experience such enjoyment when providers humiliate them.

Third, significant market segments are left unregulated, particularly in states and localities that have not supplemented the federal prohibitions on discrimination. For example, retail stores as large as Walmart,[83] as well as airplanes, banks, and most barbershops, were sometimes released by courts from federal bans on discrimination.[84] A similar problem has recently emerged regarding fast-growing market spheres that developed after nondiscrimination statutes were put in place. Much

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77. *See* Thomas, *supra* note 6, at 165–73 (discussing numerous cases of early dismissal due to narrow interpretation that leaves out many events surrounding the making and enforcement of contracts).

78. Lester v. "B"ING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *3, *6 (S.D. Fla. Nov. 30, 2010) (quoting Kinnon v. Arcoub, Gopman & Assoc., Inc., 490 F.3d 886, 891 (11th Cir. 2007)).

79. *Id.* at *5.

80. Elizabeth Sepper, *The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations*, 11 CALIF. L. REV. ONLINE 572, 577–85 (2021).

81. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 325 (2014).

82. *See* Hila Keren, *We Insist! Freedom Now! Does Contract Doctrine have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 147–48 (2005).

83. Jones v. Wal-Mart Stores, No. 4:19-CV-74-JCH, 2020 U.S. Dist. LEXIS 20252 (E.D. Mo. Feb. 6, 2020).

84. Thomas, *supra* note 6, at 155–56.

ambiguity exists, for instance, in the rising platform economy.[85] In the context of ride-share transportation,[86] this ambiguity led one court to note that "[t]he Third, Fifth, Sixth, and Ninth Circuits agree with Uber that a place of public accommodation must be a physical space."[87] Short-term rental platforms such as Airbnb raise a parallel problem.[88]

Last, some nondiscrimination laws that pertain to the market allow limited remedies and thus cannot adequately respond to most incidents of market humiliation. And, without recourse, the existence of a right for dignified market participation becomes questionable. For example, according to Title II of the 1964 Civil Rights Act, the available remedies for prohibited discrimination by public accommodations are only injunctions and declarations; they do not include compensation.[89] So, whenever the humiliating episode reflects episodic animus that cannot be addressed by forward-looking policy, the law leaves no path to recovery, irrespective of the severity of the harm. To illustrate, under this statute, people like Ms. Lester cannot hope to recover, even if they were successful in the previous stages of their litigation.

Overall, the discrimination-based response to humiliating market events is acutely deficient. How can shouting racial slurs at customers be acceptable? More generally, are we willing to approve commerce that is free and enjoyable for most but extremely painful for others?

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85. *See, e.g.*, Kyungwon Lee et al., *Creating a World Where Anyone Can Belong Anywhere: Consumer Equality in the Sharing Economy*, 130 J. BUS. RSCH. 221 (2021); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

86. *See, e.g.*, Elizabeth A. Mapelli, *Inadequate Accessibility: Why Uber Should Be a Public Accommodation Under the Americans with Disability Act*, 67 AM. U. L. REV. 1947 (2018).

87. Access Living of Metro. Chi. v. Uber Tech., Inc., 351 F. Supp. 3d 1141, 1154–55 (N.D. Ill. 2018).

88. *See, e.g.*, Allyson E. Gold, *Redliking: When Redlining Goes Online,* 62 WM. & MARY L. REV. 1841 (2021); Bastian Jaeger & Willem W. A. Sleegers, *Racial Disparities in the Sharing Economy: Evidence from More Than 100,000 Airbnb Hosts Across 14 Countries*, 8 J. ASSOC. FOR CONSUMER RSCH. 33 (2023).

89. U.S. DEP'T OF JUST., C.R. DIV., CONFRONTING DISCRIMINATION IN HOTELS, RESTAURANTS, BARS, AND OTHER PLACES OF PUBLIC ACCOMMODATION (2022), https://www.justice.gov/crt/page/file/1466211/download [https://perma.cc/86LJ-7G9C].

B. Recent Free Speech Attacks

When the Supreme Court decided to hear *303 Creative*, some were surprised, and many were alarmed.[90] Why would the Court invite an issue it seemingly already settled in the now-famous case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*?[91] Both cases introduce business owners in Colorado who, for religious reasons, find same-sex marriage objectionable. Both the bakery owner in *Masterpiece Cakeshop* and the website designer in *303 Creative* asked the Court to allow them to deny services to same-sex couples despite Colorado's nondiscrimination law that explicitly requires businesses that are open to the general public to serve everyone without discriminating on the basis of sexual orientation.[92] In *Masterpiece Cakeshop*, the Court refused to create an exemption from generally applicable nondiscrimination laws for the baking business, although it did find Colorado's concrete handling of the matter to be insufficiently respectful to the baker's religious beliefs.[93] The Court said, "[I]t is a general rule that [religious or philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[94]

Despite this statement, the ADF, which represented the bakery in *Masterpiece Cakeshop*, sued the state of Colorado again and similarly demanded exemptions, this time on behalf of a business designing websites. It probably came with little surprise to the ADF's lawyers when the Tenth Circuit rejected the claim, in part by relying on *Masterpiece Cakeshop*.[95] Nevertheless, this loss fit into a strategic plan to bring the issue back to the Supreme Court by litigating it in the same fashion

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90. Hila Keren, *The Alarming Legal Strategy Behind a SCOTUS Case that Could Undo Decades of Civil Rights Protections*, SLATE (Mar. 9, 2022), https://slate.com/news-and-politics/2022/03/supreme-court-303-creative-coordinated-anti-lgbt-legal-strategy.html [https://perma.cc/2DLF-GQU5].

91. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

92. Colorado Anti-Discrimination Act (CADA), C.R.S. § 24-34-601 (2021), *invalidated by* 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

94. *Id.*

95. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *vacated*, 143 S. Ct. 2298 (2023).

nationwide until sufficient Circuit disagreement was created.[96] And, as planned, immediately after the loss at the Tenth Circuit, the ADF requested that the Supreme Court reconsider the matter.[97]

Surprisingly, the Court agreed to revisit the question, even though it previously denied an ADF request in another case similar to *Masterpiece Cakeshop* concerning flowers.[98] It is worth noting that when the Court agreed to hear *303 Creative,* it did so in a manner that was narrower than what the ADF requested. Although the ADF requested a hearing of the business owner's claims based both on her religious liberty *and* freedom of speech, the Court decided to focus only on freedom of speech.[99] However, in reality (as discussed below), this focus on freedom of speech eventually yielded a decision much broader and more consequential than a ruling attached to religious liberty.

Even before oral arguments ensued, the willingness of the Court to hear *303 Creative* was alarming. To many, it signaled the intention of a new conservative supermajority of the Court to abandon the days of *Masterpiece Cakeshop* in which Justice Anthony Kennedy, despite being appointed by President Reagan, insisted that the marketplace must be fully open to same-sex couples.[100] This signal was particularly strong because the Court could have easily avoided hearing *303 Creative* due to its unusual procedural posture.

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96. So far, the ADF has litigated cases similar to *303 Creative* in eight states: Arizona, Colorado, Kentucky, Minnesota, New York, Ohio, and Virginia. Appeals in Colorado, Kentucky, Minnesota, and New York led respectively to decisions by the Tenth, Sixth, Eighth, and Second Circuits and to a Circuit disagreement that increased the chances of a hearing by the Supreme Court. *See* Keren, *Separating Church and Market*, *supra* note 16, at 923–34.

97. Indeed, the ADF announced its intention to appeal the Tenth Circuit decision on the same day it was released. *See* Press Release, *Web Designer Will Appeal After 10th Circuit Says Colorado Can Force Her to Create Objectionable Websites,* ALL. DEFENDING FREEDOM (July 26, 2021), https://adflegal.org/press-release/web-designer-will-appeal-after-10th-circuit-says-colorado-can-force-her-create [https://perma.cc/QM5Q-7Q8J].

98. Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) (mem.).

99. *See* 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (granting certiorari in part) ("The petition for a writ of certiorari is granted limited to the following question: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.").

100. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

What made the procedural posture unusual was that the legal action was taken preemptively. *303 Creative* was not the only case litigated in this way, but it was the first that arrived at the Supreme Court out of a line of similar cases litigated by the ADF in this way and at the same time as part of a novel legal strategy devised to overcome the decision in *Masterpiece Cakeshop*.[101] Unlike the litigation in *Masterpiece Cakeshop* that raised an actual dispute, in *303 Creative* (and the other cases litigated preemptively), there was no interpersonal clash between the business refusing to adhere to nondiscrimination laws and the potential clients to which it objects.[102] For that reason, and again in contrast to *Masterpiece Cakeshop*, the Colorado authorities have not done anything to enforce the state's nondiscrimination laws on the website designing business. In fact, and contra *Masterpiece Cakeshop* for the third time, prior to initiating litigation to seek a pre-enforcement exemption from nondiscrimination laws, the 303 Creative company did not market wedding products at all.[103]

For those reasons combined, the Court could have easily avoided discussing the matter. It could have reasoned that there is no justification for premature consideration. It could have insisted that a real dispute is needed for the Court to consider exempting businesses from public accommodations laws, despite *Masterpiece Cakeshop*. But it did not. Instead, it invited a hearing of a hollow case, lacking almost any facts. The following sections analyze the *303 Creative* oral arguments and court opinion in an effort to demonstrate how this case enhances the risk of market humiliation.

1. The Oral Arguments in *303 Creative*

And then came the day of oral arguments. Hours of discussion and 154 pages of transcript offer an abundance of evidence that the choice to hear *303 Creative* reflected a motivation to change the law and permit some level of resegregation of the American marketplace.[104] At the end of the hearing, the question seemed to be not whether a license to discriminate will be granted, but only how limited this license is

101. Keren, *Separating Church and Market*, *supra* note 16, at 923–31.
102. *303 Creative*, 143 S. Ct. at 2308.
103. *Id.*
104. *See* Transcript *303 Creative*, *supra* note 12.

going to be and what attempts to expand it will follow. The oral arguments in *303 Creative* are a salient source of information. Most importantly, they reveal what the final decision would somewhat conceal: how the intentional design of the case as a preemptive litigation shaped the discussion and eventually led to a blunt disregard of the individual and social consequences of discrimination.

The coming Sections highlight three essential points. First, the oral arguments show the lack of an adequate factual record in *303 Creative*, which led the Court to consider the claim of compelled speech in the abstract and invited a limitless final decision. Second, they also demonstrate the skewed sympathy of the Court, created by a hypothetical hearing that eliminated the true victims from the courtroom. Third, the oral arguments expose that the matter was misguidedly framed, portraying the state of Colorado—instead of the business that plans to discriminate—as the villain in the story. All those themes would appear later in the final decision, but by then, they would be covered by a thick veil of citations and legalese. Analyzing the oral arguments thus enables a deeper understanding of the outcome of *303 Creative*.

a. No Facts

Once the Court decided to grant certiorari in *303 Creative*, the case's preemptive nature, combined with the business' lack of experience in designing wedding websites or handling couples' requests, imposed on the Court a hearing restrained by an unusually lean factual record. With almost no specifics, many questions raised during the hearing remained unanswered, and much time was consumed by exchanges regarding imagined hypotheticals. A fundamental question that had to be left open due to missing facts was the nature of the wedding-related services the designer wished to start providing.

Neither the record nor the discussion at oral arguments indicated how much speaking might actually be involved in the process of selling wedding websites to interested couples. No one knew or could have known whether the business owner planned to design such websites based on a few premade templates that require minimal "speaking," or rather intended to painstakingly craft each website from scratch to tailor it to the uniqueness of each marriage. Although the parties generally stipulated that

designing websites involves speech, the particular levels of customization and personal engagement with clients were necessary to determine whether a duty to serve all couples, regardless of sexual orientation and gender identity, might amount to more than an incidental burden on speech. Little wonder then, that when Colorado's solicitor general was asked by Chief Justice John Roberts whether former decisions that allowed refusals based on "subjective individualized determinations" were applicable to *303 Creative*,[105] the former had to insist that in this case the relevant facts—how the service provider engages with potential customers—were missing.[106]

The record in *303 Creative* was similarly devoid of examples of previously published websites and thus did not allow examination of the salient question of who would appear to be speaking when a website becomes accessible to larger audiences. As a result, there was simply no way to know whether future viewers of wedding websites designed by the company would reasonably attribute the content to the couples getting married or to the website's designer.[107]

Indeed, the lack of concrete facts made the Justices create hypothetical interactions between the business and same-sex couples. Justice Elena Kagan, for example, asked Mr. Fletcher, the lawyer representing the Department of Justice, whether some specific requests may justify refusal if they are based less on the sexual orientation of the couple and more on the content they seek to add to their wedding website.[108] Mr. Fletcher responded that particular requests that go beyond the ordinary wedding website might make a difference.[109] However, he emphasized that the lack of details about possible special requests and their handling had made this case "frustrating."[110] Similar frustration was expressed by Justice Kagan, who struggled to fit her hypotheticals to the case at hand. She explained that any analysis "really depends on facts and on what exactly [the business] is being asked or compelled to do,"[111] but, she protested, "we have a case without any of that in it."[112]

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105. *Id.* at 63.
106. *Id.* at 64.
107. *Id.* at 107–08.
108. *Id.* at 133–34.
109. *Id.* at 134.
110. *Id.*
111. *Id.* at 135.
112. *Id.*

b. Skewed Sympathies

The Supreme Court's willingness to hear preemptive cases like *303 Creative* turned out to be more than a procedural concession.[113] Instead, the legal strategy used by the ADF nationwide had severe substantive implications. The preemptive strategy artificially removed from the litigation the people who would be most harmed by granting businesses new exemptions from nondiscrimination laws. Due to this partial configuration, business owners' needs, beliefs, and feelings received close attention while the pain they planned to inflict on others by denying services was effectively hidden. Indeed, in *303 Creative*, the fact that the business owner was the only human identified by name in the courtroom while her battle was presented as directed only at the state, rather than at the actual people she seeks to deny, caused a remarkably one-sided legal discussion.

Compelling evidence that the preemptive procedure of *303 Creative* created a bias favoring the litigating business arises from comparing the oral arguments in this case to those in *Masterpiece Cakeshop*. Legally, the hearings were remarkably similar. For one, the same lawyer, Ms. Waggoner, argued on behalf of the ADF in both cases, making similar free speech claims. In addition, the Justices raised identical hypotheticals,[114] and the discussion focused on the same leading precedents and questions.[115] There was, however, one critical difference. In *Masterpiece Cakeshop*, the bakery rejected real people who were involved in the litigation and were mentioned by their names—Mr. Craig and Mr. Mullins—several times

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113. Preemptive litigations similar to *303 Creative* sometimes directly discuss the procedural question of standing. *See, e.g.*, Updegrove v. Herring, No. 1:20-cv-1141, 2021 U.S. Dist. LEXIS 62307, at *14 (E.D. Va. Mar. 30, 2021) ("No case or controversy exists when a person expresses a desire to change his previously compliant conduct to violate a new statute that no person, government or otherwise, has ever sought to enforce."). For an opposite view on the question of standing, see Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 366, 380, 384 (W.D.N.Y. 2021) (recognizing standing but rejecting the business's main claim).

114. *See* Transcript of Oral Argument at 75–76, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Transcript *Masterpiece Cakeshop*] (Justice Ginsburg raising the hypothetical to add the words, "God bless the union."); *see also* Transcript *303 Creative*, *supra* note 12, at 76–77 (Justice Kagan raising the hypothetical to add the words "God bless this union.").

115. *See id.* at 32–33, 97–104; *see also* Transcript *303 Creative*, *supra* note 12, at 8–11, 30–33 (discussion of Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995)).

during the hearing.[116] By contrast, no real personal interactions or human victims existed in *303 Creative*.[117] This significant dissimilarity dramatically changed the tone of the discussion in several ways.

First, the absence of real couples in *303 Creative* yielded harsh rhetoric against same-sex marriage. When the ADF's lawyer described how some religious business owners view same-sex marriage, the adjective "false" was used not once, but four times.[118] Ms. Waggoner emphasized, for example, that her client "believes same-sex marriage to be false,"[119] and claimed that "when you're requiring a speaker to create a message to celebrate something that they believe to be false, you're compelling their speech."[120] A similarly disrespectful description was used by Justice Samuel Alito, who inquired about a hypothetical community in which "99 percent of the public" believed that "same-sex marriages are bad."[121] Justice Alito likewise discussed businesses' objections to "things they *loathe*."[122] Significantly, no one used such derogatory language in *Masterpiece Cakeshop*, where the hearing focused on an undeniable long-term relationship between two real men.

To add depth to this comparison, it is worth recalling that Mr. Craig and Mr. Mullins got married in Massachusetts before the decision in *Obergefell v. Hodges* added nationwide legitimacy to their wedding.[123] And yet, even without years of national recognition, the marriage was never negatively described in the *Masterpiece Cakeshop* dialogue. Instead, the oral arguments referred to the views of those who refuse to serve same-sex couples as "religious objection[s]"[124] based on "religious convictions,"[125] thereby avoiding adversely labeling the marriage itself. It is also worth noting that during the oral arguments in *303 Creative,* no one on the bench or among the litigants' advocates saw fit to challenge the offensive references to same-sex marriage.

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116. Transcript *Masterpiece Cakeshop*, *supra* note 114, at 28, 66, 76.
117. *See* Transcript *303 Creative*, *supra* note 12, at 9, 10, 36, 40.
118. *Id.* at 9, 10, 36, 40.
119. *Id.* at 36.
120. *Id.* at 10–11.
121. *Id.* at 128.
122. *Id.* at 82 (emphasis added).
123. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018); *see also* Obergefell v. Hodges, 576 U.S. 644 (2015).
124. Transcript *Masterpiece Cakeshop*, *supra* note 114, at 48 (Roberts, C.J.).
125. *E.g.*, *id.* at 4 (statement of Ms. Waggoner).

Second, and remarkably, while the oral arguments in *Masterpiece Cakeshop* explicitly raised the issue of years of humiliation of LGBTQ+ people[126] and expressed direct concern for "the affront to the gay community,"[127] the hearing in *303 Creative* was completely devoid of similar sentiments.[128] Even the liberal Justices, who sounded deeply troubled by the idea of opening the floodgates to discrimination, did not challenge the petitioners' lawyers on this issue and generally kept silent regarding the personal injuries that would follow from the exemption demanded in this litigation. Even Justice Sotomayor, who raised the humiliation problem during the hearing of *Masterpiece Cakeshop,*[129] did not spontaneously bring it up during the *303 Creative* oral arguments, although she later wrote about it (and forcefully so) in her dissenting opinion.

Third, in stark contrast to the lack of respect and sympathy for LGBTQ+ couples, the oral arguments in *303 Creative* reflected heightened sensitivity to the dignity of religious business owners. For example, the ADF argued that to require businesses to serve everyone would be "demeaning to them."[130] In addition, the ADF and Justice Alito repeatedly insisted that demanding those who object to same-sex marriage to obey nondiscrimination laws somehow contradicts treating them and their views as "honorable."[131] This dignity-sensitive approach heavily relied on a sentence written by Justice Kennedy in *Obergefell* but took it out of context. Justice Kennedy referred to honorable views to clarify that the decision in *Obergefell* recognized same-sex marriage but should not be read as disrespecting those who personally object to such marriage. To make this narrow point he wrote: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[132] However, Justice Kennedy never said or even implied that those who continue to

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126. *Id.* at 29–30 (Sotomayor, J.).
127. *Id.* at 27 (Kennedy, J.).
128. *See* Transcript *303 Creative*, *supra* note 12.
129. Transcript *Masterpiece Cakeshop*, *supra* note 114, at 29.
130. Transcript *303 Creative*, *supra* note 12, at 25.
131. *Id.* at 29, 80, 153.
132. Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

hold those views post-*Obergefell* should be allowed to act on them in defiance of the decision and nondiscrimination laws.

In fact, Justice Kennedy clearly made the opposite point in *Masterpiece Cakeshop*. There, he emphasized that legitimizing commercial boycotts of same-sex couples by providers of wedding-related goods and services would result "in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[133] Yet, these words did not prevent Justice Alito from suggesting during the hearing of *303 Creative* that the "honorable" comment in *Obergefell* could legitimize discrimination. As he was trying to distinguish between commercial boycotts of same-sex and interracial couples, Justice Alito asked Colorado's solicitor general: "Well, do you think Justice Kennedy would have said that . . . it's honorable . . . to discriminate on the basis of race?"[134] This question was highly misleading. It created the wrong impression that Justice Kennedy ever suggested that discrimination on the basis of sexual orientation might be "honorable." He did not.

Part of the value of examining the oral arguments and not only the final decision is that it is the only way to account for arguments that were eventually set aside by the Court. Particularly, comparing the oral arguments and the final decision shows how the special sympathy for "honorable" anti-LGBTQ+ views and the project of distinguishing them from racist beliefs were eliminated from the majority's final opinion. As we shall soon see, when Justice Gorsuch wrote the decision, he removed all references to *Obergefell* and abandoned the effort to limit the exemptions to views that the conservative Justices deem legitimate. By that time, the majority seemed far less worried than it was during oral arguments about giving racists a license to discriminate.

c. Focus on a Vilified State

Suing preemptively, the ADF has been able to gain sympathy for its clients not only by concealing the harm they seek to cause to LGBTQ+ people but also by portraying its clients as victims of the state. Such artificial representation of

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133. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

134. Transcript *303 Creative*, *supra* note 12, at 82.

the conflict as happening only vertically—between the government and its citizens—considerably impacted the discussion. For one, it invited expressions of hostility toward the state that went beyond the wish to protect religious views, reflecting a broader anti-government ideology. During the oral arguments in *303 Creative*, the ADF repeatedly painted the state's insistence on an open market as intrusive and coercive. Enforcement of nondiscrimination laws was presented as motivated not by the state's care for citizens but by its malicious wish "to drive views . . . from the public square,"[135] including by measures that amount to "cruelty."[136] Ironically, while initiating preemptive legal proceedings around the country, including against Colorado, the ADF argued that Colorado imposed "endless litigation" on artists[137] and that it is "difficult to imagine . . . a more aggressive enforcement history by Colorado."[138]

Furthermore, the ADF's framing of the issue as innocent entrepreneurs chased by their government resonated with and was amplified by some of the conservative Justices who regularly oppose state interventions in other contexts. For instance, Justice Gorsuch, who would later pen the final decision, contributed to the portrayal of religious business owners as victims of the state by insisting that the baker from *Masterpiece Cakeshop* was forced to go through a "re-education program."[139] This rhetorical choice demonstrates outstanding animosity towards the state as it echoes the dark history of re-education camps.[140] It was also used more than once, as Justice Gorsuch tried to have Colorado's solicitor general accept his odd characterization of the training requirement under the state's nondiscrimination law.[141]

Furthermore, the use of "re-education" in this context was more than idiosyncratic wording: the same terminology had been used by conservative leaders as part of their talking points

135. *Id.* at 153.
136. *Id.* at 154.
137. *Id.*
138. *Id.* at 5.
139. *Id.* at 93–94.
140. *Up to One Million Detained in China's Mass "Re-Education" Drive*, AMNESTY INT'L (Sept. 24, 2019), https://www.amnesty.org/en/latest/news/2018/09/china-up-to-one-million-detained [https://perma.cc/29V3-MZQ2].
141. Transcript *303 Creative*, *supra* note 12, at 93–94.

against same-sex marriage.[142] The derogatory reference to "re-education" also appeared in writing in the ADF's petition for certiorari[143] and was repeated in the ADF's opening arguments.[144] From the bench, Justice Gorsuch adopted and further disseminated this conservative talking point, giving it judicial legitimacy. Here, again, the oral arguments illuminate the final decision. In the written version, Justice Gorsuch was slightly more subtle in choosing his words while keeping their original meaning.[145]

All told, the analysis of the oral arguments explains how the legal strategy devised by the ADF after its failure to get general exemptions for its client in *Masterpiece Cakeshop*[146] heavily influenced the Court's new conservative supermajority in *303 Creative*. The troubling nature of the hearing—including references to "false" weddings and a hypothetical "Black Santa" refusing to serve a KKK child[147]—demonstrates how an inadequate process swiftly leads to improper substance. As we shall now see, the ideological inclinations exhibited during the hearing, including the one-sided sympathy for the business owner and the hostility to governmental efforts to ensure equal access to the marketplace, foretold and shaped the case's outcome.

2. The Court's Decision in *303 Creative*

In a 6-3 decision written on behalf of the conservative supermajority by Justice Gorsuch, the Court ruled against the state of Colorado. It prohibited Colorado from enforcing its nondiscrimination laws on the web designing business if it were to start selling wedding websites and refuse to serve same-sex

142. Shadee Ashtari, *Rick Santorum Claims Anti-Gay Business Owners Are Being Sent to 'Re-Education Camps'*, HUFFINGTON POST (June 26, 2014), https://www.huffpost.com/entry/rick-santorum-reeducation-camps_n_5531354 [https://perma.cc/D49F-QKNN].

143. *303 Creative*, Petition for Certiorari, *supra* note 45, at 6.

144. Transcript *303 Creative*, *supra* note 12, at 5.

145. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2309 (2023).

146. *Masterpiece Cakeshop* sided with the discriminating bakery based on a narrow factual finding of hostility against the religious views of its owner. However, the Court refused to grant businesses of any type a general exemption from nondiscrimination laws and emphasized that all businesses open to the public must serve everyone. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

147. Transcript *303 Creative*, *supra* note 12, at 9–10, 75.

couples. Significant to its impact on nondiscrimination protections against market humiliation, the majority's decision was based on the business owner's freedom of speech and not her religious liberty. According to Justice Gorsuch, the business owner, Lorie Smith, won because Colorado "seeks to use its law to compel an individual to create speech she does not believe," which "violates the Free Speech Clause of the First Amendment."[148]

Justice Gorsuch presented this conclusion as merely an application of former precedents that had already established the state's inability to enforce nondiscrimination laws whenever such enforcement influences speech. In Justice Gorsuch's words, the Court has already "recognized that no public accommodations law is immune from the demands of the Constitution," and, therefore, "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."[149] However, the majority's denial notwithstanding, *303 Creative* is the first to forbid such enforcement *against a business selling goods and services to the public*. As the forceful dissent written by Justice Sotomayor emphasizes: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[150]

Justice Gorsuch's response to this claim is telling. He starts by dismissively classifying Justice Sotomayor's entire statement as "reimagination,"[151] and then selectively replies only to its second prong. Since he could not point to a decision allowing "a business open to the public" to discriminate, he attempts to divert readers' attention to the "right to refuse . . . a protected class." He denies that the decision grants such a general right because it was stipulated that the business *sometimes* serves LGBTQ+ clients and the decision only narrowly exempts it from liability for refusals to design wedding websites for this protected class.[152] Convincing or not, this answer relates only to the last part of the sentence. It does not counter the first prong,

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148. *303 Creative,* 143 S. Ct. at 2303.
149. *Id.* at 2315.
150. *Id.* at 2322 (Sotomayor, J., dissenting).
151. *Id.* at 2318.
152. *Id.*

effectively affirming that awarding free speech exemptions to "a business open to the public" is an unprecedented move.[153]

This debate is essential to the understanding of *303 Creative*. Businesses open to the public that can claim engagement in speech constitute a vast category that includes countless new entities that were never exempted from nondiscrimination laws. Adding such category to the limited list of exemptions previously granted by the Court is unprecedented, just as Justice Sotomayor explained, and it opens the floodgates in a way that stands to change the marketplace. Critically, the two leading precedents presented by the majority as supporting the addition of this new category cannot justify this move. Those precedents involved the free speech of parade organizers[154] and a youth organization.[155] Both precedents exempted distinctive entities and therefore had a limited, if disappointing, impact on equality. Neither of them was ever applied to the ordinary market for goods and services—an essential institution in modern capitalist societies. Therefore, the majority's denial that its decision is unprecedented in scope and meaning is misleading. Worse, it also marks the first, but not the last, disregard for the uniqueness of the market and the practical and symbolic importance of keeping it open to all.

Determined to promote conservative ideology, the majority used free speech in a manner that now threatens to drastically reform the marketplace. By severely limiting nondiscrimination laws' reach, effectiveness, and protection, *303 Creative* significantly expands the normative void that already existed under those laws. Dreadfully, albeit not surprisingly given the oral arguments, the decision is deliberately and irresponsibly ambiguous and thus sweeping. As such, instead of settling a dispute (which in this case did not yet exist), the decision invites endless stream of legal actions by additional businesses seeking exemptions. And, to make things worse, the decision is blatantly indifferent to the colossal injuries it legitimizes by preventing states and localities from protecting marginalized groups.

The coming subsections first take up the ideological zeal exhibited in *303 Creative*, then turn to the decision's deliberate limitlessness, and conclude with the majority's anti-state

153. *Id.* at 2322 (Sotomayor, J., dissenting).

154. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., Inc., 515 U.S. 557 (1995).

155. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

approach that operates to hide the decision's true threat on the people who must use the market daily.

a. Ideological Zeal

As detailed earlier, *303 Creative* was a hypothetical case that the Court should have declined to hear because, in 2018, it already decided the matter in an actual dispute in *Masterpiece Cakeshop*. The choice of a conservative supermajority to invite the issue for consideration by the Court again was hard to justify without admitting that it reflects an ideological motivation to change Justice Kennedy's decision in *Masterpiece Cakeshop* in light of the opportunity opened by his retirement and the passing of Justice Ruth Bader Ginsburg. To blur this point, Justice Gorsuch used distraction again, just as he did in the debate regarding whether the decision was unprecedented. Instead of justifying granting relief to a business that was never injured, he highlighted—and immediately rejected—the strawman argument of standing. "To secure relief," Justice Gorsuch wrote, the web designer "first had to establish her standing to sue," which requires a showing of "a credible threat."[156]

The standing argument, however, is not at all where the problem lies. Even assuming the business had standing for the purpose of litigating in lower courts due to a theoretical risk of enforcement,[157] that does not mean the *Supreme Court* had to hear the case or award relief once it decided to grant certiorari.[158] In fact, before taking *303 Creative*, the Court refused to hear a case of a florist (also represented by the ADF) that was remarkably similar to *Masterpiece Cakeshop*. Like the plaintiff in *Masterpiece Cakeshop*, the florist was involved in an actual dispute, and thus her case presented no standing problem like *303 Creative* did.[159] Yet, as the decision denying the florist's case mentioned, although Justice Gorsuch (together with

156. *303 Creative*, 143 S. Ct. at 2308.

157. But note that unlike businesses that already engage in what may yield enforcement, the standing problem is at its peak in cases like *303 Creative*, where the plaintiff has not engaged in the activity it claims might put it under credible threat. *See Id.*

158. And vice versa: granting a writ of certiorari does not prevent denial of relief on the grounds of standing after the hearing. *See, e.g.*, Dep't of Educ. v. Brown, 600 U.S. 551 (2023).

159. Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) (mem.).

Justices Alito and Clarence Thomas) were ready to grant the florist's petition for writ of certiorari, the other three conservative Justices apparently preferred to wait for a better case with a closer association with speech.

The point made here is less about legal procedure and more about the use of judicial power. Since, unlike lower courts, the Supreme Court has wide discretion over the cases it hears, it should use this discretion fairly and carefully. At the very minimum, before taking away people's civil rights, even an overtly ambitious Court should have waited until an actual case or controversy came along. That at least would have allowed those who stand to lose basic protection to be in the courtroom and present their injuries. Instead, the conservative Justices embraced *303 Creative* despite the lack of real dispute. Why? Because, as Justice Gorsuch repeated three times, the business owner "worries"[160] and wants to "clarify her rights."[161] In doing so, the conservative Justices exhibited their zeal to reform the law as some of them expressly wished to do in *Masterpiece Cakeshop* but could not.[162]

Similar eagerness to change *Masterpiece Cakeshop* was demonstrated by the Court's exclusive and exaggerated reliance on the parties' stipulations. As the analysis of the oral arguments has shown, *303 Creative* featured a minimal factual record. This should have worked *against* the petitioning business that is supposed to prove its case, but it did not, giving away the Court's intention to further limit protections long guaranteed under nondiscrimination laws.

First, the business could not show it would indeed start marketing wedding websites even if awarded an exemption. The doubt comes from a similar case litigated and won by the ADF using the same preemptive strategy it used in *303 Creative*. In that case, *Telescope Media Group v. Lucero*,[163] a company that declared the intention to enter the wedding industry if allowed to exclude same-sex couples gave up its plan shortly after its preliminary victory at the Eighth Circuit. When the company soon after requested to dismiss the case, the trial judge that was supposed to hear it pursuant to the order of the Eighth Circuit

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160. *303 Creative*, 143 S. Ct. at 2308.
161. *Id.*
162. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).
163. *See* Telescope Media Grp. v. Lucero, 936 F. 3d 740 (8th Cir. 2019).

expressed frustration.[164] He commented that perhaps the litigation was nothing but a "smoke and mirrors case . . . likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two."[165]

This ending shows that, in *303 Creative*, it was similarly impossible to evaluate the likelihood that the business would indeed engage in weddings after the Court's decision, and, if so, what would be the volume of such engagement. And, without such essential information, it was equally impossible to make the primary legal determination needed in this case: whether the impact of Colorado's generally applicable nondiscrimination laws on the owner's freedom of speech would be significant, merely incidental, or nonexistent. Instead, a Court keen on transforming the law regardless of facts was willing to assume that the burden would be intolerable based merely on the business's statement that it "plans" and "intends" to enter the wedding industry.[166]

Second, instead of facts, the Court exclusively relied on the parties' stipulations while attributing to them legal meaning that goes far beyond what they reflect. Consider Justice Gorsuch's emphasis that "[t]he parties have *stipulated* that Ms. Smith seeks to engage in expressive activity."[167] This seems to be an obvious stipulation, which would easily fit the cases of commercial photographers, caricaturists, videographers, graphic designers, and others. Yet, and critically, this does not necessarily mean that regulating such activity by demanding that providers serve everyone transforms the activity itself and by that impacts speech. Rather, the expressive activity does not change merely because the identity of the service recipient matters to the provider. And, even if the regulation has a side effect of impacting the provider's message, that does not automatically create a burden heavy enough to invalidate it. Instead, the outcome should depend on balancing the alleged impact and the regulation's beneficial goals.

To illustrate, imagine a tourist attraction next to which a caricaturist puts a sign with a set price for creating a souvenir

164. Telescope Media Grp. v. Lucero, No. 16-4094, 2021 U.S. Dist. LEXIS 116592, at *5–6 (D. Minn. Apr. 21, 2021).

165. *Id.*

166. *See, e.g.*, *303 Creative*, 143 S. Ct. at 2307, 2313.

167. *Id.* at 2319 (emphasis in original).

illustration of visitors against the backdrop of the popular site. Although drawing such caricatures is doubtless expressive and must be customized, a duty to equally serve White and Black, or Christian and Muslim, tourists does not coerce speech: the caricaturist engages in *the same* expressive activity even as the human subjects change. That is, of course, unless one is willing to claim that sketching a Black person (or a Christian subject) is, without more, substantively different than illustrating a White person (or a Muslim subject). The case would have been different only if a visitor, of any color or religion, made a special request that goes to content, asking—for example—to add a hateful symbol or quote to the usual caricature offered to all.

Similarly, designing wedding websites for different couples and customizing dates, names, fonts, colors, and more is an expressive activity, as Colorado was willing to stipulate. However, that by itself has little to do with coerced speech unless and until a couple requests unique content that is never offered to others. Saying otherwise, as the majority in *303 Creative* did, equals admitting that what matters in those transactions is the clients' *identity*—exactly what nondiscrimination laws forbid.

Put concisely, there is no necessary link between expressive activity and coerced speech. Repeating the word "expressive" dozens of times—as Justice Gorsuch did[168]—should not distract us from noticing this fallacy. There is no compelled speech each time the law requires sellers of expressive goods and services to treat protected groups equally. Instead, special facts must be established to show that some unusual requests for unusual content were made, requiring the expressive provider to say or do something it would be unwilling to say or do on behalf of anyone, *regardless of identity*. No such facts were available or even suggested in *303 Creative*.

Worse, the opposite factual record was established during oral arguments. There, the ADF's lawyer explicitly admitted that her client will not serve same-sex couples even if they made no special requests and even if they merely asked her to make them a website identical to one she already made for the wedding of their heterosexual friends.[169] This admission established a new fact highly relevant to this litigation: that the business owner will always refuse same-sex couples *regardless*

168. The term "expressive" and its derivatives appear at least thirty-three times in Justice Gorsuch's opinion. *See id.*

169. Transcript *303 Creative*, *supra* note 12, at 37–38.

of content. As her lawyer stated, the specific expressive activity of the designer—standard or not—does not matter because "the announcement of the wedding itself is what she believes to be false."[170]

Furthermore, when Justice Sotomayor called attention to these facts,[171] which severed the link to the designer's expressive activity and proved that status rather than any particular message was at issue, Justice Gorsuch clung to yet another stipulation. According to this stipulation, the business owner "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients . . . ."[172] However, this stipulation proves no more than if the caricaturist mentioned earlier were to show that he or she sometimes serves Black children when hired to entertain groups at birthday parties.[173]

The question was never about non-wedding services but rather emerged from the admitted aversion to same-sex marriage and the alleged intention to start offering wedding websites. When there is no scenario under which the designing business is willing to offer such websites to LGBTQ+ people, selling them other things is yet another distraction. As the dissent rereminded all, the Court rejected such "limited menu" defenses decades ago.[174]

Much like the standing issue, the emphasis here is less on procedural and evidentiary rules and more on the majority's unusual willingness to presume, on behalf of the business, that a general nondiscrimination law that says nothing about speech necessarily imposes a heavy burden that cannot be justified by a compelling state interest. In *303 Creative*, the Court went out of its way to reach such a conclusion despite the premature nature of the case, notwithstanding the striking lack of justifying facts, and in the face of some conflicting statements made during oral arguments. In basing its decision on such wobbly grounds, the majority was more than uncareful or irresponsible. Rather, it revealed its ideological determination to

170. *Id.* at 40–41.

171. *See 303 Creative*, 143 S. Ct. at 2334–37 (Sotomayor, J., dissenting).

172. *Id.* at 2303 (quoting plaintiff).

173. *Compare* John Eligon, *The 'Some of My Best Friends Are Black' Defense*, N.Y. TIMES (Feb. 16, 2016), *with 303 Creative*, 143 S. Ct. 2298.

174. *Compare 303 Creative*, 143 S. Ct. at 2331 (Sotomayor, J., dissenting) (discussing Katzenbach v. McClung, 379 U.S. 294 (1964) and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)) *with* John Eligon, *The 'Some of My Best Friends Are Black' Defense*, N.Y. TIMES (Feb. 16, 2016).

curtail the state and validate extreme religious viewpoints at the expense of groups long protected under nondiscrimination laws. That the Court did all that while claiming its decision promotes tolerance is quite ironic.[175]

b. Deliberate Limitlessness

Liberated from the constraints of facts and energized by the unique forcefulness of the freedom of speech, a determined conservative majority also made little to no effort to limit the unprecedented exemption from nondiscrimination laws it created. The resulting breadth has four central dimensions: the first regards the businesses that might be exempted, the second involves the reasons for which exemptions might be warranted, the third relates to the market activities that might become immune, and the fourth concerns the groups that stand to lose legal protections.

Who is Eligible for Exemption? Nowhere did the Court suggest any criteria to define which businesses might deserve the new exemption. The only articulated condition was that the business engages in "expressive activity"[176] as opposed to being what the Court called a "non-expressive business."[177] Astonishingly, the majority expressed intentional unwillingness to define what would count as an expressive activity. Again, the stipulations served as proverbial fig leaves. In Justice Gorsuch's words: "Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind."[178] Continuing to ignore the hypothetical nature of the

175. *See 303 Creative*, 143 S. Ct. at 2322 ("But tolerance, not coercion, is our Nation's answer.").

176. The majority uses the term "expressive activity" five times. *Id*. at 2315, 2317, 2319, 2320 n.6.

177. *Id.* at 2319 n.5, 2320 n.6. At times, the majority also referred to the stipulation that the web designing business plans to offer "customized" products, but its legal reasoning did not mention this aspect. *Id*. at 2308. Instead, when Justice Gorsuch turned away from the stipulations, he cited a case regarding a parade as setting a broad rule that "public accommodations law . . . could not be 'applied to expressive activity' to compel speech." *Id.* at 2315 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 571, 578 (1995)). The majority likewise left unknown what would count as customization. For example, would merely changing the names and photos in a wedding website's template make the product "customized"? If so, even if customization is required for an exemption, it adds nothing to the amorphous condition of expressive activity.

178. *303 Creative*, 143 S. Ct. at 2319.

case in front of him, Justice Gorsuch dismissed the dissent's questions regarding "photographers, stationers, and others" as "a sea of hypotheticals,"[179] and insisted that no definition is needed. Why? Because "[t]he parties have *stipulated* that Ms. Smith seeks to engage in expressive activity."[180]

This tenacious refusal to offer a definition or at least some limiting principles cannot be accidental. The majority in general, and Justice Gorsuch in particular, understood that leaving the question of expressiveness wide open would invite, and indeed incentivize and empower, many other businesses to follow the web designer and claim that they too engage in expressive activity. Yet, to a Court controlled by conservative Justices, that outcome may not have been a flaw but rather a power-enhancing advantage.

Consider, for example, the case of bakeries. First, back in 2018, Justice Gorsuch joined Justice Thomas's concurring opinion, asserting that the "creation of custom wedding cakes is expressive"[181] and the petitioning bakery deserves free speech protections. Second, at oral arguments, the ADF's lawyer representing the web designer stated that her argument applies to bakeries. She said: "when you're engaging in symbolic speech, whether that be through the creation of a custom wedding cake or a custom wedding website, you are creating speech."[182] And third and most telling, on the day it released its decision in *303 Creative*, the Court also ordered the Oregon Court of Appeals to reconsider its decision in *Klein v. Oregon* regarding a bakery that, like Masterpiece Cakeshop, refused to sell a wedding cake to a same-sex couple.[183]

So, when the majority seemingly left the question of other businesses open in *303 Creative*, it was fully aware of, and indeed welcomed, the fact that additional businesses would follow suit. It was more than "[Justice] Gorsuch's casual way with inconvenient facts[] and vague statements of the law."[184]

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179. *Id.*

180. *Id.* (emphasis in original).

181. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J. concurring).

182. Transcript *303 Creative*, *supra* note 12, at 40.

183. Klein v. Or. Bureau of Labor & Indus., No. 22-204, 2023 U.S. LEXIS 2821 (June 30, 2023).

184. Andrew Koppelman, *The New, Mysterious Constitutional Right to Discriminate*,
THE HILL (July 3, 2023), https://thehill.com/opinion/judiciary/4077760-the-new-mysterious-constitutional-right-to-discriminate [https://perma.cc/94ZJ-L7QH].

He and the entire majority probably knew that defining what "expressive activity" meant might constrain the ongoing project of minimizing the impact of nondiscrimination law and would reduce litigation around this point—both undesirable effects from their conservative perspective.

What Reasons for Refusal are Acceptable? Because the decision in *303 Creative* relied on freedom of speech and not religious liberty, it expressly embraced any reason for refusing service as eligible for exemptions. Rather than conditioning the privilege of exemption on unique circumstances that might make refusal a tolerable concession, Justice Gorsuch embraced what scholars have critically called an "absolute" approach to free speech.[185] He emphasized that our First Amendment jurisprudence protects even the most despicable views, including, for example, those of Nazi supporters and stalkers.[186] Applying this approach to the marketplace, however, exposes non-suspecting clients seeking ordinary goods and services like cakes or printed invitations to traumatizing offenses. Moreover, the majority's decision does not include even a minimal requirement of sincerity on the part of the refusing business. In fact, as long as the business is "expressive," the decision's reasoning seems to be willing to even exempt refusals to serve that have no belief whatsoever behind them.

What Market Activities might be Exempted? Exclusions are not limited, of course, to the wedding industry; business owners' "views" can allow them to refuse to provide goods and services branded "expressive" in countless other settings. Just as businesses resist weddings of certain people, there is nothing in the majority's reasoning that would stop them from objecting to anniversaries, family reunions, funerals, birthday celebrations, or any other occasion. To prove the point: the same bakery that refused to sell a wedding cake to Mr. Craig and Mr. Mullins in *Masterpiece Cakeshop* later refused to sell a pink and blue birthday cake to a transgender woman, and the bakery is still litigating to legitimize its refusal.[187]

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185. Rebecca Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 986–1008 (2015) (discussing and criticizing "The 'Absolute' Protection Against Content Restriction").

186. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321 (2023).

187. *See* Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023). The Colorado Supreme Court granted certiorari on October 3, 2023 to hear this case.

Additionally, the Court's rationale—that the state cannot impact speech—seems readily applicable to market activities beyond the provision of goods and services to the public. For example, in the labor market, private employers may claim that their views allow them to terminate or refuse to hire people to whom they object because their employment selections are integral to their speech. Similarly, in the market of private education, we stand to see claims—already made in the past[188]—that admitting certain students (e.g., racial minorities, transgender youth, and more), or having to treat them with dignity, conflicts with the owners' free speech rights.

What Groups might be Refused? Related to the unlimited variety of reasons for which an expressive business might be exempted is the exposure to harm of not only LGBTQ+ people but many other marginalized groups that were previously protected from discrimination by businesses open to the public. For example, the decision can bring back to the market businesses akin to those that decades ago fought in courts for a right to deny service due to objections to the integration of the races.[189] This horrific possibility was forcefully raised by Justice Sotomayor, who cautioned in her dissent: "Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services."[190]

Alas, this warning induced no denial, let alone any active effort to draw lines between various protected groups. This

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188. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race.").

189. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968) (per curiam) (a business owning several restaurants that refused to serve Black Americans at their restaurants for on-the-premises dining due to religious objection to integration). The business made its arguments based on its owner's freedom of religion under the First Amendment. *See* Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941, 944 (D.S.C. 1966). Rejecting the claim, the district court stated: "Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens." *Id.* at 945.

190. *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting).

silence is particularly significant considering the earlier analysis of the oral arguments. Recall that during the hearing, Justice Alito and the ADF repeatedly insisted that those who object to same-sex marriage are "honorable" people whom *Obergefell* "promised" to respect, and thus their objections cannot be compared to racist refusals.[191] By the time of the final decision, this disturbing line of argument was completely abandoned. Instead, Justice Gorsuch did not even mention *Obergefell*. He also did not limit his analysis in any other way to anti-LGBTQ+ views.

Notably, when Justice Sotomayor forewarned that "[a] website designer could equally refuse to create a wedding website for an interracial couple," and that the decision threatened all the other protected groups, including women and immigrants,[192] Justice Gorsuch labeled some of her examples "pure fiction."[193] He did not, however, suggest any principle that might limit the decision to exclusions of LGBTQ+ people and thus created a new path to market-based disparagement of an ever-growing list of stigmatized groups.

At the end of the day, *303 Creative* poked a wide hole at the bottom of the nondiscrimination ship, consciously inviting countless businesses to further enlarge it and sink the ship. Unsurprisingly, it took conservative advocacy groups no time to begin their efforts to expand the reach of the new legitimization of discrimination. They immediately started to pursue applications of the new ruling beyond web designing, outside of the wedding industry, to more than same-sex couples, and against private parties, not only against the state.[194]

Just a week after the release of *303 Creative*, the Becket Fund for Religious Liberty submitted to the Seventh Circuit a Notice of Supplemental Authority in *Fitzgerald v. Roncalli High*

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191. Transcript *303 Creative*, *supra* note 12, at 80–81 (Justice Alito asking Colorado's solicitor general: "In light of what Justice Kennedy wrote in Obergefell about honorable people who object to same-sex marriage, do you think it's fair to equate opposition to same-sex marriage with opposition to interracial marriage?"); *Id.* at 29–30 (Ms. Waggoner's *negative* reply to Justice Alito's question whether "same-sex marriage are the same thing as religious or other objections to people of color").

192. *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting).

193. *Id.* at 2319.

194. Hila Keren, *Homophobic Business Owners are Having a Field Day Since Last Month's Supreme Court Decision,* SLATE (July 25, 2023), https://slate.com/news-and-politics/2023/07/homophobic-business-owners-supreme-court-decision.html [https://perma.cc/7XNK-9ZFU].

School, weaponizing the web designer's victory against an LGBTQ+ employee of a private religious high school.[195] The Fund argued that *303 Creative* legitimizes the termination of a female counselor married to another woman due to the high school's freedom of speech. Soon after, the court ruled for the school regardless of the new authority, yet *303 Creative* was clearly added to the anti-LGBTQ+ arsenal to be used in future private employment disputes.[196]

Next, the ADF returned to lower courts in a pair of cases that were part of the same preemptive strategy used in *303 Creative*, seeking to extend its accomplishment to commercial photographers. In a case pending at the Sixth Circuit, the ADF submitted a supplementary brief on behalf of a business called Chelsey Nelson Photography that is litigating against Louisville, Kentucky.[197] Appallingly, as mentioned earlier, this photographer's website already carries an offensive (virtual) sign declaring: "I don't photograph same-sex weddings."[198] To expand the impact of *303 Creative,* the ADF asked the court to apply the case in a way that would approve the offensive sign and allow the business to start refusing to serve same-sex couples. Similarly, this time at the Second Circuit, the ADF submitted a supplemental letter brief arguing that *303 Creative* "resolves" the appeal of Emilee Carpenter, a young New York photographer who also seeks to discriminate due to her religious beliefs.[199] It claimed that "[u]nder *303 Creative*," New York's nondiscrimination laws pertaining to the businesses "are per se unconstitutional."[200]

But the ADF also made another move, even riskier to civil rights than extending its victory to photographers. It went back to the pending litigation between Masterpiece Cakeshop and

195. Notice of Suppl. Authority, Fitzgerald v. Roncalli High School, Inc., 73 F.4th 529 (7th Cir. 2023) (No.22-2954), https://storage.courtlistener.com/recap /gov.uscourts. ca7.47625/gov.uscourts.ca7.47625.51.0.pdf [https://perma.cc/CQZ3-THRJ].

196. Fitzgerald v. Roncalli High Sch., Inc., 73 F.4th 529 (7th Cir. 2023) (ruling for the discriminating employer based on the ministerial exception).

197. Chelsey Nelson Photography, LLC's and Chelsey Nelson's Suppl. Brief, Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty Metro Gov't, 479 F.Supp. 3d 543 (W.D. Ky. 2020) (Nos. 22-584, 22-5912).

198. *Weddings*, *supra* note 9.

199. Suppl. Letter Brief on 303 Creative LLC v. Elenis in Response to Court's October 3, 2022 Order, Emilee Carpenter, LLC v. James, 575 F.Supp.3d 353 (W.D.N.Y. Dec. 13, 2021) (No. 22-75).

200. *Id.* at 2.

transgender woman Autumn Scardina (discussed above) and filed a claim that *303 Creative* should also apply far beyond the resistance to same-sex marriage, impacting the market for ordinary birthday cakes, and allowing discrimination against transgender people.[201] Most radically, the ADF asserted—like the Becket Fund—that the ruling against the state of Colorado in *303 Creative* could be utilized not only against the government but also in *private* litigation. In this way, the ADF seeks more than exemption. It attempts to release discriminating business from liability for injuries they caused to other people who are actual or potential parties to a contractual relationship.

All told, *303 Creative* now invites the revival of a segregated market in which more people than ever before are at risk of rejection and humiliation. As part of the regression, many more offensive signs, announcing selective and discriminatory service, are doomed to appear—all rebranded by the highest court in the country as acts of free speech while disseminating indignities and hate.[202]

c. *Anti-State Focus*

Among all the efforts to sway attention from the devastating nature of *303 Creative*, the artificial focus on the state as the malevolent party in the dispute is probably both the worst and the most effective. As we have seen, it started with the oral arguments under the leadership of Justice Gorsuch, who is more generally known for resenting state power.[203] Then, having been assigned the task of writing on behalf of the majority, Justice Gorsuch unleashed a plethora of additional hostility toward governmental legislative efforts to ensure equality and protect marginalized groups. And, in doing so, he offhandedly disregarded the fact that these laws were democratically created, approved time and again by the highest court in the country, and enforced for years. As a neoliberal anti-statist, not even the dissent's powerful insistence on the critical and noble purpose of public accommodations laws mattered to Justice

201. Petitioners' Response to Notice of Suppl. Authority, Masterpiece Cakeshop v. Scardina, 528 P.3d 926 (Colo. App. 2023) (No.000116).

202. Keren, *Separating Church and Market*, *supra* note 16, at 908–09 (citing one sign and explaining how it was permitted by the court).

203. *See, e.g.*, JOAN BISKUPIC, NINE BLACK ROBES: INSIDE THE SUPREME COURT'S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES 1 (discussing Justice Gorsuch's objection to government regulations and agencies).

Gorsuch. He bluntly continued to ignore history, precedent, and the state's compelling interest to keep the market open for *all* its members.

According to the thesis advanced by the majority, the only conflict of interest presented in this dispute was between the state of Colorado and the "worried" business owner it allegedly chased, Ms. Smith. Like a mantra, the opinion repeated variations of an unsubstantiated theory of brutal censorship, which the dissent called "Orwellian thought policing,"[204] alluding to the majority's reference to George Orwell.[205] According to one phrasing of this theory, "the very purpose" of Colorado's efforts "to apply its law to Ms. Smith" was "the coercive elimination of dissenting ideas."[206] Another wording echoing the same theory is that "Colorado [sought] to compel . . . speech in order to excise certain ideas or viewpoints from the public dialogue."[207]

To drive the Orwellian theory, Justice Gorsuch relentlessly used rhetorical techniques. For example, his twenty-six-page decision mentioned the compulsion of speech twenty-five times[208] and the state's coerciveness seven more times.[209] At other times, because there was no external support for the theory, he used creative editing to give it a jurisprudential appearance. No less than four times did he cite, for example, page 1178 of the Tenth Circuit decision in *303 Creative* as supporting the theory.[210] But, to anyone reading the original text, the Tenth Circuit only established that Colorado's law burdens speech at a level that merits strict scrutiny. The Tenth Circuit never meant to suggest, as Justice Gorsuch cited it, that "the very purpose" of the law was Orwellian.[211]

Quite the opposite. On the same page, the Tenth Circuit explained that Colorado's nondiscrimination law "is intended to remedy a long and invidious history of discrimination based on sexual orientation."[212] And, shortly after, still on the same page,

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204. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2340 n.14 (2023) (Sotomayor, J., dissenting).
205. *Id.* at 2321.
206. *Id.* at 2303, 2313 (internal quotation marks omitted).
207. *Id.* at 2313 (internal quotation marks omitted).
208. *See id*. at 2307–22.
209. *See id.*
210. *See id.* at 2303, 2310, 2313, 2318, 2319, 2321.
211. *See id.* at 2313 (internal quotation marks omitted).
212. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).

it stressed that despite its finding of a burden on speech, "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace."[213] Therefore, in contrast to what Justice Gorsuch implied by repeatedly citing pieces of one sentence out of an entire page, this source describes a benevolent rather than a malicious state.

As part of the rhetorical effort to vilify the state, Justice Gorsuch even used the discussion of the standing problem to bring back a slightly more subtle version of his insistence during oral arguments on the punitive state that runs the "re-education program."[214] His written opinion converted the loaded term "re-education" into "mandatory educational programs"[215] and "compulsory participation in remedial training,"[216] but he kept insinuating that it was a form of excessive "punishment."[217]

Significantly, by directing the fire to the Orwellian state, the majority positioned the business owner as its victim. The majority misleadingly described her as someone merely holding to "unpopular" views[218] who is forced "to utter what is not in her mind about a question of political and religious significance."[219] This depiction was designed to hide the fact that the business owner, backed by a conservative organized campaign, is the one that attacked, initiating—without provocation—a bitter fight against both Colorado and LGBTQ+ people. The tortured narrative likewise aimed to conceal that the business sued not to protect itself from harm but to actively engage in harmful explicit rejection of others without consequences.

On this point, rhetoric is significant again. The majority uses the term "pure speech" six times,[220] after the Tenth Circuit only used it twice.[221] But "pure" suggestively colors the entire activity positively, implying no other element but speech exists in this dispute. In this way it cunningly minimizes other elements, most importantly the business owner's profiting from

213. *Id.*
214. Transcript *303 Creative*, *supra* note 12, at 93–94.
215. *303 Creative*, 143 S. Ct.at 2309.
216. *Id*. at 2312 (internal quotation marks omitted).
217. *Id*.
218. *Id*. at 2307.
219. *Id*. at 2318 (internal quotation marks omitted).
220. *Id.* at 2310, 2311, 2312, 2316, 2318, 2319.
221. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (2022), *and rev'd*, 143 S. Ct. 2298 (2023).

being open to the public while screening only some undesirable clients due to their identity. Again, when a same-sex couple orders from the same website that previously designed for their opposite-sex couple friends, refusing the same-sex couple is very far from deserving the faltering title "pure speech."

While this repetitive rhetoric is disingenuous, there is one more aspect that is even more harmful. While Justice Gorsuch attributed to Colorado an intent to eliminate and excise ideas, it is his *own* framing of the dispute—as a clash between an Orwellian state and an oppressed creative entrepreneur—that operates to *eliminate* and *excise* from the analysis the severe damage to real human beings. This fictitious framing seemed effective during oral arguments. There, even the liberal Justices did not raise the injuries the business owner was planning to cause to LGBTQ+ people. Thankfully, by the time of the final decision, the dissenting Justices compellingly presented the unbearable harm that the majority's Orwellian state fiction left out.

Justice Sotomayor did not only set the record straight about the benevolent and vital purposes of democratically created governmental public accommodations laws.[222] And she did not merely correct the portrayal of the business as oppressed by the state.[223] She also importantly and powerfully conveyed the pains of those that were intentionally left out in this hypothetical litigation and under the majority's analysis. In that sense, her opinion gave some voice to the suffering and humiliation of the actual people who were not in court but routinely find themselves on the receiving end of refusals to serve in the open market.

Justice Sotomayor wrote about Jackie Robinson's inability to stay with his baseball team in the same hotel and the late Justice Ginsburg as a young Jewish girl who faced a storefront sign that read: "No Dogs or Jews allowed."[224] She also depicted the isolation and humiliation of a grieving family that made the arrangements for the burial and memorial of their loved one but

222. *See* 303 Creative, 143 S. Ct. at 2322–25 (Sotomayor, J., dissenting).

223. *Id.* at 2325 (Sotomayor, J., dissenting).

224. *Id.* at 2324 (Sotomayor, J., dissenting) (citing Hearings on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 103d Cong., 1st Sess., 139 (1993); James M. Oleske Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-CIV. LIB. L. REV. 99, 138 (2015)).

suffered last-minute refusal after the funeral home realized the deceased was married to another man.[225]

As substantiated by the humiliation studies described in Part I, these devastating experiences demonstrate the "ostracism" and the "otherness" that are "among the most distressing feelings that can be felt by our social species."[226] Such harsh consequences are a far cry from the reality of a "worried" business owner seeking exemption from the laws of her state, making the majority's focus on *her* concerns even more underhanded.

This is all to say that by presenting the dispute as exclusively a debate regarding the state's power to burden "expressive" businesses' speech, the majority prevented many people from realizing how the issue is also—and more so—*interpersonal* and *relational*. Indeed, post-*303 Creative* the state is barely relevant. Having been granted exemptions from nondiscrimination laws, private "expressive" providers would no longer interact with the state. Instead, they would speak louder than ever against fellow members of society. They would use their new exemptions to deny other people the same freedom they employ and profit from, namely the freedom to participate in market activities. And all this has already started to happen immediately after the release of *303 Creative*. As we have seen, businesses represented by conservative advocacy groups have hurried to courts to use the unprecedented decision—not against the allegedly Orwellian state but to defeat the individuals they refused to serve or terminated from work.

It is one thing for the Court to limit government interventions in people's constitutional right to free speech. It is an entirely different act to grant business owners a blank check to harm other members of society. The idea of businesses rejecting potential counterparties due to their identity goes far beyond the constitutional boundaries imposed on state actions. No artificial focus on the state as the sole rival should distract us from noticing the interpersonal problem arising from exempting some market actors from state laws. Therefore, despite the procedure of the litigation in *303 Creative* and the

225. *303 Creative*, 143 S. Ct. at 2324 (Sotomayor, J., dissenting) (citing First Amended Complaint at 4–7, *Zawadski* v. *Brewer Funeral Services, Inc.*, No. 55CI1–17–cv–00019 (C. C. Pearl River Cty., Miss., Mar. 7, 2017)).

226. *Id.* at 2324–25 (citing Kipling D. Williams, *Ostracism*, 58 ANN. REV. PSYCH. 425, 432–35 (2007).

framing of the decision that followed it, we must recognize that private providers are already using the new exemption, not to protect their speech from the state, but to target, attack, and harm other citizens.

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All in all, *303 Creative* is a devastating decision. The only thing worse than its abysmal outcome is the damage to individuals and society it has already started to cause and will certainly continue to bring about. But, as Justice Sotomayor reminded us at the end of her dissent, "that does not mean that we are powerless in the face of the decision."[227] At the very minimum, those who care about civil rights and equal access to the marketplace must fight any attempt to use the decision and expand its application. This resistance should take place not only in the courts of law but also in the courts of public opinion, with solidarity between disfavored groups and allies.[228] Legally, however, this will surely be an uphill battle since even victories in lower courts might end up in the Supreme Court, which will be controlled for many years to come by a conservative supermajority and as such will continue to be hostile to efforts to protect civil rights. Moreover, beyond coping with *303 Creative* and its consequences, efforts to pass legislation that would otherwise improve nondiscrimination law's coverage ought to continue.[229] However, the legislative branch's structure may prevent such needed reform for quite some time.

Yet, much of what makes *303 Creative* so devastating is exactly what might guide us toward new legal means to combat market humiliation. Because the majority's opinion is fueled by unwarranted hostility toward the state and mistrust of its use of regulatory powers, new means that go beyond discrimination and government protections can and should be developed. As the next Part proposes, to fill the normative void left by our nondiscrimination laws, a void dramatically expanded under

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227. *Id.* at 2343 (Sotomayor, J., dissenting).

228. I thank Kathryn Abrams and her inspiring work on social movements for this important point. *See, e.g.*, Kathryn Abrams, *Dividing, Conquering – And Resisting,* 72 FLA. L. REV. F. 57 (2021).

229. *See* Keren, *Market Humiliation*, *supra* note 4 (discussing necessary changes in nondiscrimination laws as they relate to market humiliation).

303 Creative, we should develop a private law response to market humiliations.

III. DEVELOPING A PRIVATE LAW RESPONSE

As explained in Part I, market humiliation is harmful not only when the behavior fits the legal definition of discrimination. Rather, injustice occurs whenever people intentionally inflict severe harm on others in one of the most significant domains of modern life—the market. Therefore, defining and understanding market humiliation as expanding beyond discrimination is an analytic step of pragmatic value. It inspires us to look for legal solutions not only under nondiscrimination laws (themselves insufficient and under increasing attack) but also within legal norms concerned with interpersonal conflicts. The new focus on market humiliation thus directs us toward the domain of private law.

Unlike public law's concentration on the relationship between the state and its citizens, private law applies to the relationship between people, governing their interactions and disputes.[230] Moreover, the leading fields of law comprising what we collectively call private law—property, contract, and tort[231]—directly apply to market-related interactions. Those two leading features of private law—its interpersonal focus and market orientation—make it inherently and straightforwardly relevant to the problem of market humiliation.

Consider, as a leading example, the arena of contracts. People who contract with each other establish contractual relationships that are, in turn, subject to contract law. Thus, when McDonald's sold Ms. Lester burgers and fries, it established a contractual relationship with her, making contract law highly relevant to its aggressive refusal to provide her with fresh fries. More generally, and beyond contracts, private law awards powers and rights, such as by recognizing the ability to own property. It does so while importantly condemning certain peer-to-peer behaviors that threaten to undermine those powers and rights, such as when it forbids trespass. Put differently,

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230. *See, e.g.*, Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUB. POL'Y 267, 270–71 (1986).

231. Hanoch Dagan & Benjamin C. Zipursky, *Introduction: The Distinction between Private Law and Public Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 1 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (treating these subjects as "exemplars of private law").

defining individuals' rights and duties as they interact with each other, especially in the market context, is a core task of private law.

This Part argues that private law's task of defining the rights and duties of market actors must include developing a response to the incidents of market humiliation profiled in Part I. It also argues that constructing such a response *within* private law is necessary and urgent in light of the expanding normative void described in Part II. And, as this Part further explains, to fill this void, and supplement our nondiscrimination regime, a reform of some of private law's leading principles and remedies is needed.

A. *Justifying a Private Law Response*

The key to devising a private law response to market humiliation is a commitment to ensuring full market citizenship for all. By coining the term "market citizenship" in previous works and continuing to use it here, my goal is to highlight a unique combination of rights and duties specifically tailored to the market and its broader civil importance.[232] On the rights side, the term emphasizes that general citizenship depends on market activity, and no one has real (general) citizenship without being a full citizen of the market. This means that people excluded from sections of the marketplace, or mistreated while participating in the market, are deprived of the rights of membership and belonging inherent in full citizenship. On the duties side, the term underscores that, much like general citizenship, market citizenship comes with many state-conferred privileges but must also include some expectations and restraints.

As we have seen, the phenomenon of market humiliation involves a recurring conflict between private providers and the users of the socioeconomic resources they provide: housing, work, education, healthcare, goods, and a wide range of services. Notably, while people on both sides of any deal are market citizens, providers of resources are differently situated than

232. *See* Keren, *Separating Church and Market, supra* note 16, 958–71; Hila Keren & Ronit Donyets-Kedar, *Market Citizenship and Resilience Allocation*, *in* RE-CONCEIVING EQUALITY AND FREEDOM: VULNERABILITY, DEPENDENCY, AND THE RESPONSIVE STATE 111 (Martha Albertson Fineman & Laura Spitz eds., forthcoming Oct. 2023).

those who need them. Private providers enjoy and profit from their market citizenship. Their rights flow not only from their owners' talents and entrepreneurial skills. Rather, they heavily depend on private law mechanisms that allow them, for instance, to utilize their property, make and enforce contracts, and limit their personal liability by incorporation. Those and other privileges that the state offers via private law are highly significant, albeit often invisible. They grant providers—as part of their market citizenship—a structural advantage and systemic superiority of power.[233]

Conversely, everyone in a market society must interact with private providers and be subject to their legally supported dominance. Accordingly, private users of all types of socioeconomic resources also have market citizenship, but the quality of their citizenship is significantly contingent on how providers treat them, and not only on the means with which they enter the market. As the opening of this Article demonstrates, a great business idea and funds to pay rent were insufficient for Nikki High to exercise her market citizenship when a realtor bluntly refused to deal with her. To have meaningful market citizenship, users ought to have the ability to satisfy their needs and desires freely but also to do so under conditions that do not entail harm by providers. Hence, private law must impose on private providers a duty that is inseparable from their extensive rights: to avoid humiliating their counterparties on the basis of their identities.

The project of developing a private law response to market humiliation can be justified under at least three emerging theories, discussed next: Law and Political Economy, Vulnerability, and Relational Justice. From different ideological angles, these approaches explain why we must go beyond discrimination and nondiscrimination laws. They all demonstrate and call for renewed attention to private law and its effects. They also similarly emphasize private law's central role in shaping the duties that market actors owe each other due to their own participation in the market. The broad premise

233. All providers have the power of controlling parts of the supply chain and rely on contracts and their enforceability to conduct their businesses. Most providers also enjoy the power of incorporation and the advantage of limited liability of their owners. Larger businesses have even greater access to benefits thanks to their access to additional sources of power, such as the ability to lobby for legal reforms that would serve them.

uniting these theories buttresses the general claim made here: that market citizenship must come with certain duties to others. With this theoretical support, this Article makes a novel proposal to recognize an anti-humiliation principle *within* private law and accordingly impose on private providers an obligation to treat with dignity contractual counterparties, actual or potential.

1. Law & Political Economy

The rising critical perspective of Law and Political Economy ("LPE") builds on transformative preceding approaches, including legal realism, feminism, and critical race theory, to revive and update challenges to the political roots and results of the conventional legal ordering of the economy.[234] Self-described as "a moral project,"[235] it responds to peak levels of economic inequality and a pinnacle moment in neoliberal hegemony.[236] In particular, and most relevant to the current discussion, LPE analysis calls on legal scholars to acknowledge that the fields of private law, including contract law, are not merely setting up the rules for economic activities. Rather, they are—and have always been—major *political* sites.[237] By renewing this claim, the perspective seeks to counter long decades of denial that became exceptionally dominant due to the vast impact of the law and economics approach.[238] LPE analysis thus demands returning with enhanced force[239] to questions of inequality long resisted or dismissed in the fields of law that are "about the market."[240]

234. *See* Jedediah Britton-Purdy et al., *Law and Political Economy: Toward a Manifesto*, L. & POL. ECON. PROJECT (Nov. 6, 2017), https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto [https://perma.cc/HP9Q-YMWV].

235. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1832 (2020).

236. *See id.* at 1784–94.

237. *See id.* at 1821, 1826; *see also* Hila Keren, *Resilience Drainage and the Role of Private Law*, L. & POL. ECON. PROJECT (Sept. 13, 2021), https://lpeproject.org/blog/resilience-drainage-and-the-role-of-private-law [https://perma.cc/L2C3-UAGE] [hereinafter Keren, *Resilience Drainage*].

238. *See* Britton-Purdy et al., *supra* note 235, at 1795–1800.

239. *Id.* at 1791 ("In this moment, it is newly possible to reorganize the fundamental orientations of legal scholarship.").

240. *Id.* at 1790.

Applying the LPE approach to the issue of market humiliation would underscore the systemic, political, and humanitarian problems that such a market process entails. From this perspective, the pivotal question is how our private laws should respond to humiliating incidents in which some market actors use their power to harm others by wrongly treating them. Relevant here is another LPE argument that calls attention to the fact that private law's building blocks, including corporate law, banking and antitrust laws, tax law, property law, and contract law, have all worked in concert to enrich businesses and their wealthy owners, sometimes to the point of invincibility.[241] The LPE approach would therefore justify restraining market humiliation *via private law* to counterbalance the way the same body of law has long empowered businesses, awarding them the power that some of them later use to humiliate weaker parties.

2. The Vulnerability Theory

The brainchild of legal theorist Martha Fineman, the vulnerability theory assigns the state and its legal system a significant and demanding role in building and securing a just society. The theory's name highlights its descriptive critical insight that vulnerability is universal: all humans, and the institutions they establish, are inevitably vulnerable.[242] Contra neoliberalism, no one is independent or entrepreneurial enough to become and remain successful alone.[243] Instead, people's survival, accomplishments, and well-being heavily depend on state-conferred resources and society's structure.[244] This structure—provided through laws and social institutions—determines the level of one's ability to cope with inescapable

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241. *See generally* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2020).

242. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10–14 (2008) [hereinafter Fineman, *The Vulnerable Subject*] (presenting the concepts of the "vulnerable subject" and the "responsive state" as important to America's approach to inequality).

243. *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 14, 16 (2000) (discussing the myth of independent individuals).

244. *See, e.g.*, Fineman, *The Vulnerable Subject*, *supra* note 242, at 7 (discussing how private ordering via contracts depends on state resources to give those contracts life).

vulnerabilities. To illustrate, no one can avoid sickness, but recovery hinges on access to quality health services.

For that reason, the vulnerability theory defines *resilience*—the resources available for coping with vulnerability—as an essential building block of a just society.[245] Normatively, the theory assigns the state the responsibility of responding to human vulnerability manifestations,[246] envisioning and prescribing what it calls "the responsive state."[247] It accordingly makes a point highly related to the flaws of the nondiscrimination paradigm, explaining that the theory "does not seek equality, but equity."[248] In this view, belonging to certain enumerated groups matters less. Instead, in line with market citizenship, the theory requires that the state ensure justice by creating and sustaining a fair allocation of resilience amongst all its members.[249]

Applying vulnerability analysis to market humiliation opens new paths for coping with it. First, it explains why the behavior is not merely episodic or private but rather presents a social problem. The theory importantly frames the market as an institution vital to accumulating resilience.[250] Accordingly, the extent to which people can participate in and benefit from the market governs their resilience levels. Under this approach, blemishing certain people's market experiences reduces their resilience. Second, vulnerability analysis embraces our mental state and emotions as salient resilience sources.[251] For this reason, the intangible but severe outcomes that inevitably follow being subject to humiliating behavior (described in Part I) further damage victims' resilience.

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245. Martha Albertson Fineman, *Beyond Equality and Discrimination*, 73 SMU L. REV. F. 51, 57–61 (2020) [hereinafter Fineman, *Beyond Equality and Discrimination*] (explaining the core idea of resilience).

246. *Id.* at 61 ("Vulnerability theory is more focused on establishing the parameters of state responsibility for societal intuitions and relationships than it is on setting the limits of state intervention.").

247. *See generally* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) (introducing the vulnerability theory and arguing it requires the state to assume a positive obligation to effectuate equality among its citizens).

248. Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 143 (2017).

249. Fineman, *Beyond Equality and Discrimination*, *supra* note 245, at 60.

250. *Id.* at 58.

251. *See, e.g.*, Kathryn Abrams & Hila Keren, *Legal Hopes: Enhancing Resilience through the External Cultivation of Positive Emotions*, 64 N. IR. LEGAL Q. 111 (2013).

In the face of such threats to resilience, the vulnerability theory calls on the responsive state to act. It specifically demands that the state consider how resilience is already conferred and distributed via its institutions. Critically, such an evaluation must include the resilience allocated to private providers through the market.[252] And to that end, the theory insists that it is essential to "bring *all areas of law*, not just those focused on civil rights"[253] into consideration. In particular, we must examine how the laws pertaining to the market—typically classified as "private" laws—impact resilience[254] and influence public and social conditions.[255]

From this perspective, when some businesses humiliate their counterparties while targeting their identity, they misuse their powers to deplete the resilience of others who must rely on the market. From violating their victims' autonomy to diminishing their emotional reserves and risking their health—these hyper-resilient humiliators engage in what I have elsewhere called "resilience drainage."[256] Moreover, since acts of humiliation drain individual resilience on the basis of identities, they further lead to group-based humiliation.[257] In this way, market humiliation also drains community-based resilience, thereby enhancing the unjust allocation of resilience even more. Overall, the vulnerability theory requires the state to apply private law to combat the resilience drainage that occurs due to market humiliations.

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252. *See* Fineman, *Beyond Equality and Discrimination*, *supra* note 245, at 57–58 (discussing how social institutions and social structures constitute levels of resilience).

253. *Id.* at 55 (emphasis added).

254. *Id.* at 60 (highlighting the importance of a host of laws that are considered "private" to issues of social justice).

255. *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585–86 (1933) (establishing the realist view that contract law is in reality a segment of public law); *see also* Study Grp. on Soc. Just. in Eur. Priv. L., *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653, 668 (2004) (arguing that it is wrong to suppose that there is a sharp separation between the public sphere of constitutional rights and the private sphere of market relations); Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 45–47 (2011) (highlighting how in many ways "contracts are public, not private").

256. Keren, *Resilience Drainage*, *supra* note 237 (coining the term "resilience drainage" and applying it in the context of contracts).

257. *See* Keren, *Market Humiliation*, *supra* note 4 (explaining the operation of collective, group-based, humiliation in the market context).

3. Relational Justice Theory

The relational justice theory, spearheaded by legal theorists Hanoch Dagan and Avihay Dorfman, emphasizes the role of private law in governing interpersonal relations. Like the vulnerability theory, relational justice highlights interdependency as part of the human condition and thus insists that the rules that apply to human interactions cannot be left to public law. Instead, as Dagan and Dorfman have explained in a line of recent publications,[258] private law must be employed in a manner that requires people who use market tools, such as contracts, to respect each other's self-determination and substantive equality.

This insistence on *respect* and *substantive equality* as an intrinsic part of the normative DNA of private law makes relational justice a highly relevant approach to the current discussion of market humiliation. It is so because humiliation, as defined here, is an extreme act of disrespect driven by and reflective of a belief that the other party is somehow inferior. Incidents of market humiliation clearly present acute relational *injustice,* which directly conflicts with the duty conceptualized by Dagan and Dorfman. Further, since the relational justice approach also means that "contract law must set the floor for acceptable ways of people treating one another in and around contracts,"[259] those incidents also specifically represent mistreatments that fall below any floor described by the approach.

Interestingly, Dagan and Dorfman describe their approach as "a theory of just contractual relationships for a liberal society."[260] By self-defining their work as "liberal," the authors

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258. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018); Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. TORONTO L.J. 207 (2021); Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice* (Oct. 26, 2022), https://ssrn.com/abstract=3637034 [https://perma.cc/39KE-FC2K].

259. Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 100 (2022), https://www.cambridge.org/core/journals/legaltheory/article/ precontractual-justice/4DA115918C4BEFC4767596A7B5641143 [https://perma.cc/THB7-UJUE] [hereinafter Dagan & Dorfman, *Precontractual Justice*].

260. *See id.* at 90 (presenting the theory as it relates to the precontractual stage); Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1 (2022), https://academic.oup.com/ajj/article-abstract/67/1/1/6571632 [https://

mark their perspective as different from the LPE approach and the vulnerability theory, both critical of liberalism and explicitly seeking to counter its neoliberal variant.[261] Yet, despite this philosophical difference, relational justice shares with the other two perspectives the claim that setting legal limits on market behavior via private law is needed *because of* the way this body of laws already allocates power to people.

Similar to LPE and vulnerability analyses, the relational justice approach recognizes the "power-conferring" nature of private law.[262] It describes how, for example, contract law and property law award some people normative powers over others while proactively rendering others vulnerable to how this power is used.[263] Such power dynamics exist within the relationship of providers of market-based resources, such as sellers, landlords, and employers, and those who, respectively, seek those resources such as buyers, tenants, and employees. These gaps of power justify requiring the empowered parties to "reasonably accommodate" and respect the autonomy of their more vulnerable counterparties rather than abuse the advantages conferred upon them by law.[264] This last point directly explains why private law, and not only nondiscrimination law, should not tolerate, for example, the humiliating refusal to serve same-sex couples or the demeaning treatment of Black shoppers.

In a recent review essay, Hanoch Dagan specifically considers the objection that imposing a duty not to discriminate via private law amounts to engaging in undesirable "political steering and social planning."[265] In response, he emphasizes that "a libertarian conception of private law" to classify affirmative duties to respect others and avoid discrimination as "external impositions on, or interventions in, private law."[266] By contrast, a relational justice approach would frame such duties

perma.cc/S5JQ-DUQT] (presenting the theory as it relates to the contractual stage). As Dagan and Dorfman explain, the line between precontractual justice and contractual justice is sometimes blurred. *See* Dagan & Dorfman, *Precontractual Justice*, *supra* note 259.

261. Keren, *Resilience Drainage*, *supra* note 237.

262. Hanoch Dagan, *"New Private Law Theory" as a Mosaic: What Can Hold (Most of) It Together?*, 23 GER. L. J. 805 (2022).

263. *Id.* at 813.

264. *Id.* at 816.

265. *Id.* at 815 (quoting JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 391 (1996)).

266. *Id.* at 816.

as "*integral* to the terms of interaction" between market actors.[267]

Taken together, the three justifications discussed here call on jurists to pay much more attention to private law's impact on justice. They also call for monitoring the acts of resource providers more carefully because our private law regime particularly empowers them. All in all, the three recent analyses agree that market actors with superior power must be subject to special duties to prevent the misuse of their power advantage at the expense of others.

B. Recognizing an Anti-Humiliation Principle

The calls to pay more attention to private law's impact on justice and to use it to define the duties that attach to market powers do not instruct us on *how* to execute the plan. Neither do they outline a response to the specific problem of market humiliation. Nor, finally, can existing cases that handle market humiliation through the lens of private law offer an answer.[268]

The last point is admittedly a challenge to any effort to construct and protect an anti-humiliation principle within private law. Even more demanding than this shortage of adjudicated positive examples is the abundance of traditional views that conceptualize private law as a shrine of individualist freedoms. Under those views, there seems to be less room for restraining some on behalf of others.[269] Those obstacles, however, should not deter normative efforts to reconsider and revise the way private law currently operates. To reiterate, the urgent need to engage in such a project directly arises from the expanding normative void created under our nondiscrimination laws.

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267. *Id.*

268. These cases are few and far between and those that exist tend to yield little to no redress for those humiliated. *See, e.g.*, Turner v. Wong, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003) (rejecting a private claim, based on the tort of intentional infliction of emotional distress, in a market humiliation situation).

269. The current state of private law has much to do with traditional views of the division of labor between public and private law and the ideological dominance of private law theories that artificially individualize the human subject and condemn interventions in the private domain in the name of freedom (typically of those with capital). *See, e.g.*, Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575 (2020) (discussing how the freedom of contract under an individualized approach yields neglect of countless contractual parties).

Accordingly, the coming sections propose an original outline of a private law response to market humiliation. First, the outline constructs market humiliation as a new legal claim focused on peer-to-peer behavior instead of the relationship with the state. It concretely delineates a science-based allegation that plaintiffs could establish and courts could later verify. Next, the outline proposes how leading principles or doctrines of contract and tort law can be used to raise the new claim of market humiliation and enable a legal response to this claim. Last, the outline offers a necessary update of available remedies.

1. The Private Claim of Market Humiliation

Regardless of which doctrinal tools will be used, plaintiffs seeking private law redress after being humiliated in the market must first convince courts that what happened to them was not merely an episode of disagreement but rather was severe enough to call for a legal response.

Experience shows that it is seldom enough to merely argue one was humiliated. Indeed, the allegation, especially when made in the abstract, has failed to convince courts,[270] much like it has failed when made under nondiscrimination laws. It is, therefore, essential to create a framework that would allow those humiliated (and their lawyers) to articulate the concrete ways by which the painful encounter was one of humiliation. Such a framework can yield a detailed and provable claim that establishes an adequate factual record and, at the same time, allows courts to verify the claim's credibility.

On this point, the profile of market humiliation, as summarized in Part I, offers a well-founded basis for a new claim of market humiliation. The proposal that follows tracks this profile's six factors to empower victims and their advocates to make compelling pleadings and offer convincing evidence. It also provides courts with a mechanism to evaluate the claims on their merits, replacing the common assumption that without economic or physical injury, there is no ground for litigation.

Structurally, the proposal draws on a known rule of contract law routinely used to determine the severity of contractual breaches, recognizing that only some are "material."[271]

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270. *See, e.g.*, Turner v. Wong, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003) (rejecting an explicit humiliation claim for lack of medical evidence).

271. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. L. INST. 1981).

Similarly, the starting point should be that not every unpleasant interaction in the marketplace would qualify as market humiliation. Instead, this Article suggests that to determine whether a defendant humiliated a plaintiff in the market, courts should consider the following factors:

1. The extent to which the defendant's behavior excluded the plaintiff from participating in the selected market activity or prevented the plaintiff from peacefully engaging in such activity ("#1").

2. The extent to which the defendant had control over the plaintiff's market experience or power advantage, organizational or situational, over the plaintiff ("#2").

3. The extent to which the defendant's behavior would have defeated reasonable expectations of parties engaged in similar market activity or deviated from standards of good faith and fair dealing ("#3").

4. The extent to which the defendant's behavior demonstrated hostility towards the plaintiff ("#4").

5. The extent to which the defendant's behavior related to aspects of the plaintiff's identity more than to the transaction at hand ("#5").

6. The extent to which other people witnessed the defendant's behavior or will likely learn about it through its publicity ("#6").

* * *

Note that the proposed test does *not* require that each and every factor would independently evidence the intensity of the incident. For example, market humiliation should be recognized even if the identity-based hostility was more implied than explicit, such as in the case of Nikki High that opened this Article. Instead, a totality of the circumstances approach should be used: the more the factors, taken together, indicate the event's severity, the greater the justification for a judicial finding that a humiliating act occurred.

Nor do all factors need to be present to make such a finding. For example, if there was no audience to the humiliation (#6), such as in Nikki High's case, a valid claim that carries remedies should be established based on the other indications. That said, it is worth noting at the outset that some market behaviors, including those now exempt from the state's reach under *303*

Creative, do feature *all* the above factors. In such cases, there could be no possible doubt that the proposed test for market humiliation could be satisfied.

To illustrate the test's operation, consider the circumstances in *Masterpiece Cakeshop*. The baker excluded Mr. Craig and Mr. Mullins (#1), using his control of the bakery's space and products (#2), and did so in a manner that was highly unusual—enough to defeat reasonable expectations regarding market transactions (#3). The baker also expressed hostility or disrespect towards the couple's relationship (#4) by explicitly addressing their sexual orientation, which is essential to their identity (#5), all in front of Mr. Craig's mother (#6). In short, according to the proposed test, Mr. Craig's mother was correct to conclude that "[w]hat should have been a joyous occasion had turned into a humiliating occasion."[272]

Likewise, the brutal treatment of Ms. Lester by a McDonald's manager fits the profile's factors with no exceptions. The McDonald's manager prevented Ms. Lester from peacefully buying her lunch (#1), using his status as a manager controlling the restaurant and its employees (#2), and did so in a shocking way, especially given how standard the transaction was (#3). The manager further demonstrated blunt and loud hostility (#4), targeted Ms. Lester's race and gender (#5), and did so in the presence of her mother and the mother's friend (#6). If a court were to discuss the claim proposed here, it thus could and should have found that market humiliation did indeed take place.

Yet, proposing a new claim does not, of course, guarantee success in courts, and the common obstacles that other private law plaintiffs face would surely similarly challenge victims of market humiliation. Central to those obstacles are general problems of access to justice. While admitting the complexity, the goal here is not to remove all barriers (a mission impossible project) but, more modestly, to carve out a new *possible* path. This by itself is not a minor step in the face of paths foreclosed under the nondiscrimination paradigm. It is also worth noting that pro-equality organizations that regularly assist plaintiffs in mobilizing nondiscrimination litigation could and should offer effective ways to mitigate this difficulty.

272. Deborah Munn, *It Was Never About the Cake*, HUFFPOST (Feb. 2, 2016), https://www.huffpost.com/entry/it-was-never-about-the-ca_b_4414472 [https://perma.cc/3JU6-RKAC].

Before identifying doctrinal paths for mobilizing market humiliation claims, it is worth highlighting the main advantages of using the suggested framework compared to litigating the matter in the preemptive manner used in cases like *303 Creative*. Due to its nature, preemptive litigation can never allow for an adequate consideration of the actual intricacies between businesses that seek to exclude certain people and their counterparties. The litigation's structure thus forecloses any ability to evaluate whether the behavior for which approval is sought is wrongful. By contrast, the method suggested here guarantees careful examination of concrete relational dynamics and facilitates a responsible determination of wrongfulness.

Even more importantly, authorizing humiliated individuals to sue under private law is crucial to restoring and affirming their dignity. The ability to pursue justice based on a recognized private right not to be humiliated and a duty not to humiliate has a salient empowering effect. Rather than eliminating the targeted parties from the legal discussion, as *303 Creative* did, it offers them a path of proactive response that they can initiate, lead, and control. Relatedly, as we have seen in Part II, the preemptive litigation in *303 Creative* already deprived victims of market humiliation of the Court's sympathies. By contrast, private litigation makes room for victims' voices, illuminates rather than conceals their suffering, and invites true consideration of their plea. Moreover, whenever such litigation includes a trial by jury, the opportunity to be heard by one's peers carries an additional dignifying potential.[273]

2. Contract Law

Businesses involved in market humiliation incidents heavily rely on powers conferred on them by contract law, namely their right to make contracts and enforce them through the legal system. They heavily draw on such contractual powers to buy or rent a place to operate from, connect with suppliers, hire and supervise employees, get insurance for their activities, manage client transactions, and more. In other words, without

273. *See* Cristina Carmody Tilley, *Private Law, Public Law, and the Production of American Virtue*, 115 NW. U. L. REV. 270, 281–83 (2020), https://scholarlycommons.law.northwestern.edu/nulr_online/301 [https://perma.cc/SD8R-JY89].

the power to make contracts and rely on their enforceability in courts, businesses cannot survive.

The principle of market citizenship and the theories discussed above—LPE, vulnerability, and relational justice—all guide us to recognize and draw normative conclusions from the powers contract law confers on businesses that provide resources to others. This focus, in turn, should lead to a new way of interpreting contract law's principles. It requires ensuring that those who rely on and benefit from the right to make and enforce contracts would not deprive others of their right to get resources through contracts. How, then, could contract law be used against acts that rely on contractual powers but seek to prevent others from similarly enjoying the contractual system?

This Article argues that the principle of good faith is the most appropriate tool to curtail market humiliation via contract law. Following European legal systems,[274] American contract law adopted the duty to handle the contractual process with good faith to maintain its morality.[275] Consequently, both the Uniform Commercial Code and the Restatement (Second) of Contracts declare that the principle of good faith broadly applies to all contracts.[276] And although the American version of the principle is admittedly limited compared to its forcefulness in civil law systems, it is still considered one of the pillars of our law of contracts.[277]

The principle of good faith can straightforwardly be applied to resolve the many cases of market humiliation that are left out by nondiscrimination laws because the party alleging discrimination was able to make a contract. As Ms. Lester's dispute with McDonald's demonstrates, many market

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274. Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 690–91 (2013) (describing the "recent acceptance" of the principle of good faith in American law).

275. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982); *see also* Daniel Markovits, *The No-Retraction Principle and the Morality of Negotiations*, 152 U. PA. L. REV. 1903 (2004); Miller & Perry, *supra* note 274, at 725 (recognizing a justification for a morality-based approach based on the fact that "the terms decency, fairness, and reasonableness are all heavily laden with moral connotations").

276. U.C.C. § 1-304 (AM. L. INST. 2011) ("Every contract or duty within [this Act] imposes an obligation of good faith in its performance and enforcement."); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

277. Miller & Perry, *supra* note 274, at 690 ("The good-faith doctrine is probably one of the most fundamental principles in contemporary contract law.").

humiliations occur while the parties have already established contractual relationships. In these situations, contract law can offer a path to redress for those humiliated by hostile parties. Put differently, without any need for reform, contract law is already set up to handle countless cases of market humiliation that are currently failing under nondiscrimination laws.

Consider again, as an example, the case of Ms. Lester's mistreatment by McDonald's. Because the parties formed a contract for the sale of lunch, the duty to perform this contract in good faith directly applies to their relationship. Thus, when McDonald's humiliated Ms. Lester instead of supplying her with fresh fries, it demonstrated bad faith in performing its obligations under the contract. Such a breach of the duty to perform contracts in good faith is a breach of the contract itself that should entitle Ms. Lester to remedies.[278]

More broadly and more importantly, I argue that courts should generally recognize the humiliating treatment of a party to a contract as a category of bad faith contractual behavior. The conventional understanding of the duty of good faith requires contracting parties to demonstrate commitment to the spirit of their agreement and refrain from harming the fruits each one of them reasonably expects to receive from the contract.[279] These requirements deem market humiliation bad faith: it necessarily violates the *spirit* of the contract, which is to peacefully execute the exchange, while also undermining the victim's reasonably expected *fruits* from such a contract because those are less valuable when they cost agony in addition to the consented price.

While good faith should offer redress for market humiliation after the parties establish contractual relationships, applying the principle to humiliating behavior during the pre-contractual phase is more challenging.[280] For example, when harassment of

278. RESTATEMENT (SECOND) OF CONTRACTS § 205, (AM. L. INST. 1981).

279. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (listing "evasion of the spirit of the bargain" as a recognized type of bad faith); Seidenberg v. Summit Bank, 791 A.2d 1068, 1074 (N.J. Super. Ct. App. Div. 2002) ("[T]he covenant of good faith and fair dealing is contained in all contracts and mandates that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (quoting Sons of Thunder, Inc. v. Borden, Inc., 690 A.2d 575, 587 (N.J. Sup. Ct. 1997)).

280. This might explain why the few calls for contractual coping with racial discrimination only applied their analysis to post-formation situations. *See, e.g.*, Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

shoppers due to their race or Muslim appearance makes them leave the store without making a purchase, the humiliating behavior prevents the making of a contract. The difficulty is even greater in cases like *303 Creative*, in which businesses humiliate by refusing even to begin negotiation while making offensive statements against those they deny. In those scenarios, conventional contract law is currently less equipped to respond. This is because, unlike the civil-law world, "common-law systems have always been reluctant to recognize a duty of good faith in the pre-contractual stage."[281] And yet, some significant exceptions exist,[282] and it is possible to identify some willingness to impose pre-contractual duties.[283]

The current state of the law notwithstanding, market humiliation presents a compelling normative need to utilize the principle of good faith more broadly, including at the pre-contractual stage. As I have previously argued,[284] the principle of good faith *should* classify discriminatory refusals to enter contracts as bad faith in contracting. To justify such reform, principles of Anglo-American equity, such as estoppel, can be solicited. Those can assist in importing from the civil law solutions for the intentional and wrongful prevention of contract

281. Miller & Perry, *supra* note 274, at 700.

282. *See* Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 408 (1964) ("The absence of good faith language is by no means conclusive. Notions of *culpa in contrahendo* and good faith have clearly given rise to many concepts applicable during the negotiation stage, such as the notions of promissory estoppel and the implied in fact collateral contract, which have been employed in order to protect reasonable reliance on a promise."); *see also* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1811–13 (2000) (presenting cases in which the behavior of a party impelled the court to impose a duty to negotiate in good faith, when such a commitment did not arise from the agreement); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 273–85 (1987) (tracing types of behavior that the courts categorized as unfair dealing in precontractual negotiations, including "Refusal to Negotiate" and "Breaking off Negotiations"); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 202–03 (1994) (discussing the common law "duty to serve"); Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 54 n.369 (explaining that a duty to bargain in good faith exists in American labor law).

283. *See* Farnsworth, *supra* note 282, at 222.

284. *See* Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133 (2005) (calling to recognize the freedom to contract of minority parties through an expansion of the duty of good faith to the pre-contractual stage).

formation (captured by the phrase *culpa in contrahendo*).[285] Situations of market humiliation fit this category because humiliating providers control the path to contract, and their intentional behavior is the only reason for the failure of the process.

Further, contractual meaning should be awarded to the fact that humiliating providers are perfectly ready and willing to profit from serving unlimited amounts of people they find unobjectionable as part of their business model. In contractual terms, by their market activity and due to their reliance on the contractual system, businesses are making an implied promise to consider all potential contractual partners fairly.[286] Therefore, while they do not have to transact with individuals who would not follow the terms of the exchange, they cannot legitimately reject people merely due to their identity when they demonstrate willingness and ability to follow these terms.

Drawing on the vulnerability theory, this Article argues that the state that allocates resilience to businesses by letting them benefit from an effective contractual system ought to *condition* the use of this system on adhering to inclusiveness. It should require market actors to use the entire contracting process, including the pre-contractual phase, in good faith. Accordingly, at any stage of the process, the infliction of humiliation should be defined as contractual bad faith. On this point, the relational justice approach can offer additional support through its direct coverage of the pre-contractual stage and its claim that "contract law must set the floor for acceptable ways of people treating one another in and *around contracts*."[287] From this perspective, too, there is no reason to release businesses from their duties towards prospective parties.

Utilizing the good faith principle has several advantages. The first comes from the intrinsic source of the duty, which is to be imposed from within contract law rather than by intervention under external regulations. The second advantage is related. Emphasizing bad faith instead of state protection of specific vulnerable groups focuses the attention on those who

285. *See* Kessler & Fine, *supra* note 282.

286. *See* Aharon Barak, *Constitutional Human Rights and Private Law*, *in* FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW 105, 159–64 (Alfredo Mordechai Rabello & Petar Sarcevic eds., 1998) (discussing the use of the doctrine of good faith as a tool for embracing a contractual equality requirement).

287. Dagan & Dorfman, *Precontractual Justice*, *supra* note 259, at 100 (emphasis added).

misbehave—a shift that can alleviate the narratives of victimhood sometimes (unjustly) attached to state protections.[288] The third benefit arises from the abstract and dynamic character of the good faith principle. Using the principle releases plaintiffs and jurists from endless debates regarding whether a given business is a public accommodation or whether a given injured party belongs to a recognized group. Instead, it broadly applies to all businesses pursuing contracts and the counterparties interested in dealing with them.

In summary, the principle of good faith, writ large, can fill the expanding normative void created by nondiscrimination laws, helping to effectively define market citizenship and more adequately respond to market humiliation.

3. Tort Law

While contract law governs people's voluntary dealings with each other, tort law also covers *involuntary* interactions. Because of this Article's strict focus on market relationships, more often than not, both fields would be highly relevant to incidents of market humiliation. However, recognizing claims under tort law in market humiliation situations can particularly assist when no contract is formed. Tort law is also better equipped to handle the most egregious incidents as it offers punitive damages, which are not readily available under contract law.

Similar to contract law, businesses involved in market humiliation already rely on entitlements conferred by tort law. For example, the ability to protect property against trespassers benefits employers, landlords, private health and education providers, and store owners. Similarly, the reputation of the respective owners is shielded against defamation. These and other safeguards significantly support the market activity of those businesses. Here again, the principle of market citizenship calls on us to find within tort law a way to allocate protections more equitably among members of society. A just tort law should not concentrate mainly on those who have already accumulated property, reputation, and other interests traditionally secured by tort law.

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288. *See* Jonathan Feingold, *Civil Right Catch 22s*, 43 CARDOZO L. REV. 1855 (2022) (explaining that the narrative of civil rights litigation can sometimes produce and perpetuate stereotypes and racial inequality).

As a general starting point, it is essential to accept that the role of tort law goes beyond the often assumed supply of remedies.[289] Rather, much like contract law, this central segment of our private law has salient normative, educational, and expressive powers.[290] It defines when interpersonal engagements cross the line into the domain of wrongdoing.[291] Recognizing that tort law's purpose is to define interpersonal legal wrongs calls attention to the issue of mistreatment that lies at the core of market humiliation. On this issue, the work of Professor Benjamin Zipursky emphasizes that tort law sets up conduct rules that impose "duties not to mistreat others in certain ways and rights not to be so mistreated."[292] Drawing on this idea, this section argues that market humiliation should be acknowledged by tort law as wrongful mistreatment. Accordingly, tort law can and should impose a duty not to humiliate in market relationships and a corresponding right not to be humiliated.

Humiliating mistreatment demands tort law's attention for a synergism of two reasons. One is the injurious nature of the humiliating behavior (explained in Part I). Humiliators should foresee the harm they will cause, even in the rare cases in which they might argue a lack of subjective intention to inflict pain. The other is the public nature of the market. When people choose to run businesses and engage with others for profit, their choice justifies elevated duties. Similarly, extended rights are warranted in this sphere because no one living in modern times can avoid engaging in market relationships.

Further, in alignment with the LPE approach and the vulnerability theory, Zipursky explains how utilizing tort law in cases of mistreatment mandates state involvement in the

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289. Avihay Dorfman, *Relational Justice and Torts*, *in* RSCH. HANDBOOK ON PRIV. L. THEORY 323–28 (Hanoch Dagan & Benjamin C. Zipursky, eds., 2020). This does not mean that the availability of remedies is not critical. *See infra* Section III.B.4.

290. MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 5, 156 (2010) (highlighting the expressive importance of tort damages). For similar powers in the domain of contract law see, for example, Hila Keren, *Guilt-Free Market? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427 (2016).

291. *See generally* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

292. Benjamin C Zipursky, *Torts as Wrongs and Civil Recourse Theory*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 356, 358 (Hanoch Dagan & Benjamin C. Zipursky, eds., 2020).

private domain.[293] Consequently, "the principle of civil recourse" that his approach advocates demands, as a matter of obligation, state commitment to awarding mistreated people rights of action to sue those who wronged them.[294] By doing so, the state simultaneously substantiates the right not to be mistreated before anything happens and empowers victims seeking redress after being mistreated.[295] Significantly, the empowering effect of the power to hold wrongdoers accountable is especially valuable in cases of market humiliation where individuals are disempowered by attacks on their identity, dignity, equality, and self-value. In such cases, victims deserve the "power and respect" that tort law can offer.[296] They must not be left at the mercy of the state's ability to enforce their rights. Instead, they should be offered independent ways to hold wrongdoers accountable, especially given recent challenges to the state's power to do so via nondiscrimination mechanisms.

Market humiliation should also highly concern tort law according to theorists who take an anti-subordination approach to tort law, such as Martha Chamallas.[297] These scholars emphasize the salience of dignity and insist that fighting entrenched patterns of humiliation should not be relegated to civil rights laws.[298] Instead, "any desire for law to provide fuller protection for dignitary harms—especially for those people whose dignity has historically been disregarded—requires the engagement of tort law."[299] Because market humiliation targets people for their undesirable identities and marks them as inferior and less worthy of market participation, it disproportionately inflicts injuries on members of marginalized communities. Therefore, the anti-subordination approach to tort law offers forceful support for the need to carve out a tort law redress.

Pragmatically, several doctrinal paths may be utilized to define market humiliation as a legal wrong via tort law. The

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293. *Id.* at 359.
294. *Id.*
295. *Id.*
296. *Id.* at 371.
297. Scott Skinner-Thompson, *Anti-Subordination Torts*, 83 OHIO ST. L.J. 427, 429 (2022).
298. *See* Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309, 328–29, 332 (2021); *see also* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 256–57 (1998).
299. Chamallas, *supra* note 291, at 329.

main ones include the newer tort of intentional infliction of emotional distress and the creation of a special new tort.[300]

a. *Intentional Infliction of Emotional Distress ("IIED")*

Conceptualizing market humiliation as a relational dynamic that inevitably causes pain organically brings the tort of intentional infliction of emotional distress ("IIED") to mind.[301] Most directly, business providers who target their counterparties' identities surely intentionally inflict much distress on them and expose them to additional health risks. Indeed, IIED is a newer tort, specially invented by the legal realists to overcome traditional common law views that long dismissed the possibility of legal recourse in cases where mistreatments induce only "mental pain and anxiety."[302] Like current works of law and emotions,[303] including on humiliation,[304] earlier tort studies engaged in "bolstering the scientific legitimacy of emotional injury," and their efforts led to adding IIED to the tort "menu."[305] Since then, and in light of the increased social awareness of mental health issues, one would have expected increased use of IIED and the emergence of additional legal mechanisms to protect people's mental well-being.

Unfortunately, however, IIED has received ungenerous treatment by courts over the years. Too often, courts have found that an offensive behavior was not "outrageous" enough or failed to recognize that the resulting emotional distress was "severe"

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300. *Cf.* TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 161–80 (2007) (dedicating a chapter to *Discrimination as Negligence*, in which the author proposes to use the tort of negligence in cases of discriminatory behavior).

301. *See, e.g.*, Alexander Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 1, 6–11 (2018).

302. Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. TORT L. 283, 293, 295, 297 (2019) (discussing the history of the new tort and citing *Lynch v Knight*, 9 H.L.C. 577 (1861), and William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 879–86 (1939)).

303. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

304. *See* Keren, *Market Humiliation*, *supra* note 4.

305. Tilley, *supra* note 302, at 297.

enough.[306] Thus, unless we adopt this Article's new framework, the parsimonious application of IIED will continue to cast a shadow on the prospect of using it in cases of market humiliation.

A telling example of the latter problem arose in a case almost identical to Ms. Lester's humiliation at McDonald's. In this case, a Black woman who purchased coffee and a donut suffered a barrage of loud racial slurs, in front of White shoppers, in response to her request to substitute a stale donut with a fresh one.[307] In court, the buyer explicitly claimed the seller inflicted humiliation on her and that she was mortified by the event.[308] However, contra science, the court downplayed the injury by citing a case suggesting such distress was "merely transitory."[309] This insinuation contradicts the studies discussed in Part I that show that humiliation is an exceptionally long-lasting emotion. The court then concluded that without medicalizing the problem, there is no right to redress. It explained that the buyer's IIED claim must fail because she did not provide evidence that (expensive) "medical, psychological, or other professional treatment" was sought and provided.[310]

Those difficulties notwithstanding, scholars insist on tort law's potential and call to continue the project of critique and revision,[311] with some theorists specifically calling to imagine "what a transformed inclusive tort law might look like."[312] One particularly pertinent example is a recent proposal by Professor Tasnim Motala to change and expand the tort of IIED, making it a vehicle for recovery in cases of racial insults.[313] Although she focuses on race-based humiliation, it is possible to extend the

306. *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (criticizing the requirement of outrageousness as setting the bar too high); Hafsa S. Mansoor, *Modern Racism but Old-Fashioned IIED: How Incongruous Injury Standards Deny "Thick-Skin" Plaintiffs Redress for Racism and Ethnoviolence*, 50 SETON HALL L. REV. 881 (2020) (criticizing, in the context of race, the high bar of severe emotional distress and its medicalization).

307. Turner v. Wong, 832 A.2d 340, 345–46 (N.J. Super. Ct. App. Div. 2003).

308. *Id.* at 349.

309. *Id.*

310. *Id.*

311. Zipursky, *supra* note 292, at 371.

312. Chamallas, *supra* note 291, at 316.

313. Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115, 163–67 (2021).

author's argument to additional instances of market humiliation, such as when "gendered, homophobic, transphobic, and other insults based on group identity result in comparable harms."[314]

Significantly, Professor Motala also takes into account possible resistance on the basis of the freedom of speech of those who insult. However, she unequivocally responds: "An individual's right to emotional tranquility supersedes a First Amendment right to demean. Tort law thus regulates speech that intentionally emotionally injures another in defiance of community standards of decency."[315]

In addition to free speech concerns, another cited source of resistance to the liberalization of IIED is the fear of assigning liability to "ordinary" behavior.[316] However, the six-factor test of market humiliation proposed earlier can alleviate such concern. It can help courts distinguish between mere rudeness that might be considered "ordinary" (if undesirable) and the much more outrageous conduct of humiliation. Only the latter uses power to target and harm people's core identities to wreck their sense of worthiness and belonging.

b. A New Special Tort

In his classical article *Words that Wound*, critical race theorist Richard Delgado made a bold and creative argument that may be an inspiration for developing a tort response to market humiliation.[317] Delgado famously called for using tort law in the case of racial insults. However, he expressed skepticism about reliably fitting those insults into any existing doctrines, including IIED.[318] Delgado, therefore, turned his efforts to proposing, defining, and defending the creation of an *independent* action tort for racial insults.[319]

Predicting resistance to his proposal with arguments such as measuring difficulties and the risk of fraudulent claims, Delgado generally reminded readers that the emergence of new

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314. *Id.* at 119 n.14.
315. *Id.* at 141.
316. Tilley, *supra* note 302, at 329.
317. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).
318. *Id.* at 150–59.
319. *Id.* at 134.

torts is ordinary and necessary.[320] Indeed, he even considered objections based on free speech, although, at the time, insulting defendants had not yet thought about using them.[321] Ultimately, Delgado concluded that since racial insults intentionally injure individuals and harm society, and because they do so without presenting the leading advantages of free speech, defining them as wrongful is justified, even if the freedom to speak freely is undermined.[322]

Delgado's argument as to racial insults can and should be extended to other identity-based assaults that cause humiliation, especially when they happen in the marketplace—an arena which people cannot just avoid. Accordingly, this section argues that market humiliation, as defined here, merits direct recognition as a tort. Doing so would mark the wrongfulness of the behavior and offer a path of recourse to those injured. Just like in the case of racial insults, an independent doctrine seems increasingly needed for all cases of market humiliation in the face of limited redress available under nondiscrimination laws and existing torts.

In general, the new tort of market humiliation envisioned here would require plaintiffs to satisfy two elements. The first would be the occurrence of mistreatment that amounts to market humiliation. For this element, the six-factor test proposed earlier should be used. This would ensure controlled use of the new tort, alleviating the common worry of flooding courts. It would also allow accounting for what Delgado calls "aggravating circumstances,"[323] such as when the humiliating party had a significant power advantage (e.g., a humiliating employer, factor #2) or when the incident occurred in the presence of an audience (#6).

The second element would be proof of injury. Here, adding a mechanism of rebuttable presumption might be needed to overcome the traditional suspicion of emotion-based arguments.[324] The creation of such a presumption is justified by the scientific evidence showing that humiliating behavior leads to intense and long-lasting feelings of mental pain and

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320. *Id.* at 165.
321. *Id.* at 172.
322. *Id.* at 172–79.
323. *Id.* at 180.
324. *See* Motala, *supra* note 313, at 117 (suggesting the solution of a rebuttable presumption in the context of IIED).

frequently to other health problems, as explained in Part I. However, getting remedies for such injuries presents another challenge taken up in the coming section.

4. Private Law Remedies

The above sections have proposed possible avenues to establish the illegality of market humiliation via re-conceptualized private law principles. Yet, improvements in the available causes of action are of limited value without adequate remedies. As the Latin maxim *ubi jus ibi remdium* suggests, where there is a right, there *should be* a remedy.[325] In the case of market humiliation, a remedial problem arises because the injury is mistakenly perceived as a mere feeling while the legal regime remains reluctant to award remedies for emotional harm.[326]

Solutions to this problem thus hinge on coping with both of its aspects. First, it is necessary to insist—as Part I has already done—that market humiliation involves much more than an emotional episode. Context should matter, and the emotion-based component of humiliation must be understood not in isolation but as part of the humiliation process. On this view, the emotional harm of feeling humiliated needs to be linked to its direct cause and conceptualized as the *inevitable result* of the wrongful behavior that induced it. The feeling must also be connected to its ensuing tangible consequences and recognized as the *source* of additional serious injuries that are not emotional.

Second, it is time to reform the misguided traditionalist approaches to emotional harms. In general, and following important feminist and law and emotions works, the credibility and gravity of emotional harms must be recognized. As explained below, such recognition is particularly needed and justified in the context of market humiliation. In this setting, arguments frequently raised against remedies are especially baseless given the information shared in Part I. This section

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325. *Ubi jus ibi remedium*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803110448446 [https://perma.cc/LJL2-8NJR].

326. Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829 (2018) (explaining the many obstacles to receiving remedies for emotional injuries).

discusses objections related to credibility first and then turns to the issue of foreseeability.

a. Credibility

One of the biggest obstacles to receiving significant damages for emotional distress is the myth that anyone can fake or exaggerate emotional injuries to earn unjustified or at least excessive damages. Another central barrier is the presumption that even if they truly occurred, injuries to emotions are transient and easily go away, thus not requiring external remedies. I have generally discussed these fallacies elsewhere, criticizing private law's enigmatic reluctance to compensate for emotional harms while showing full commitment to do so for any other injury.[327] For example, the risk of exaggeration or the claim of temporality never interrupted compensating people for physical pain or reputational harm—both subject to the same problems. I have shown that the assumptions animating the reluctance are baseless and that the devaluation of emotional harms is unjustified, injurious to victims, and toxic to relational norms of behavior. Further, I argued that the traditional failure to compensate victims is particularly wrong today since, under the current dominance of neoliberalism, emotional traits have become an essential part of people's human capital. Any depreciation of this capital thus necessitates a serious response akin to the treatment of other harms to capital.

In addition to those general arguments, a better comprehension of market humiliation, as developed in this Article, can offer concrete ways to cope with the reluctance to remedy humiliation injuries. To start, simply understanding that humiliation is a defined process with a significant behavioral component can solve much of the credibility problem. The six-factor test proposed above can help courts assess the credibility of a claim that a given incident inflicted deep feelings of humiliation. The more indications of a humiliating behavior are demonstrable, the more believable the claim should become. To illustrate, when someone was exposed to loud racial slurs (as Ms. Lester was) or bluntly rejected by a baker (like Mr. Craig and Mr. Mullins were), and when others were at the scene to witness and testify, any suspicion of faked emotions should fade

327. *Id.* at 835.

away. Legal actors must realize that feelings of humiliation are the logical response of human brains and bodies to threats to people's social status and survival. Thus, the more intense and indisputable the threat, the more credible the claim.

Next, once feelings of humiliation are established, studies should be used to refute the myth that the harm is transient or otherwise insignificant. Recall that, outside of the legal arena, it is quite substantiated that humiliation is a uniquely painful emotion that typically lingers. Moreover, the health outcomes of humiliation, such as mental health struggles, can be used to further verify claims of emotional distress. Accordingly, victims' advocates can provide, and courts should seriously consider, for example, evidence of symptoms of depression, indications of social withdrawal, and more.[328]

b. *Foreseeability*

Another typical objection to granting damages for emotional harm, particularly strong in the context of contracts, is that those engaged in transactions predict they might cause economic damage. However, the objection goes, but for the most unusual cases, they cannot foresee causing emotional harm. This objection is rooted, again, in disregarding or at least misunderstanding how emotions operate. This oversight is particularly acute in the context of intentional acts of market humiliation, where, as Part I showed, emotional and health injuries are highly foreseeable. I emphasize this to propose a concrete contract law reform that would recognize *a general right* for emotional damages in cases of market humiliation.

The proposed reform consists of two steps. The first is to move away from special treatment of emotional injuries and apply to them the same rules that apply to any other harm caused by a breach of contract. Here, it should be recognized that

328. To reiterate, the proposal made here focuses on opening a path for private law to make up for the normative void left by nondiscrimination laws. Notably, settling all the risks associated with private litigation is both impossible and lies outside of this Article's scope. That said, the proposal assumes that evidence would be handled under the ordinary rules of evidence. Still, advocates and courts should protect plaintiffs from secondary harm to their dignity due the risk that delicate information would be met with disrespectful questions. To offer such protection, the studies showing that humiliation typically causes the above symptoms should be used to establish credibility and challenges should be limited to questions of authenticity.

section 353 of the Restatement inaccurately "restates" what courts do, portraying more hostility to emotional damages than many courts project.[329] Although it is true that courts around the country too often refuse to award emotional damages, it is also a fact that exceptions are common, and decisions are arbitrary. Indeed, some critics of the Restatement's rule declaring the exclusion of emotional damages have argued that, in reality, it is doubtful whether such a rule even exists.[330] Moreover, many cases denying damages can be elucidated, and sometimes are explicitly explained, as arising not from special treatment of emotional harms but rather from the usual rules pertaining to all other injuries.[331] Thus, the reform proposed here would eliminate section 353 of the Restatement as it hardly reflects the positive law.

The second step is approaching the general damages rules, which apply to all non-emotional injuries, with greater caution. These rules—reflected in section 347 of the Restatement—set the right of injured parties to expectation damages, dividing those damages into two types. The first type, called "general" or "direct" damages, is awarded for losses that typically flow from the breach that occurred. The second type, referred to as "specific" or "consequential" damages, is reserved for losses linked to effects of the breach that only happen under particular circumstances, often due to the injured party's concrete situation.[332] Generally speaking, specific damages are significantly harder to recover due to the imposition of extra limitations.[333]

The problem is that under this classification, the assumption is that emotional injuries belong with the second

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329. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L. INST. 1981).

330. Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U. L. REV. 935, 946 (1992).

331. *See, e.g.*, Sullivan v. O'Connor, 296 N.E.2d 186–89 (Mass. 1973) (explaining that in the case of a disfigured nose caused by a plastic surgery, recovery for "mental distress" is allowed under general principles of contractual damages. Significantly, and unlike the Restatement's approach, the court did not presume that emotional damages are generally excluded or can be awarded only if there is also a bodily harm.).

332. Andrew Tettenborn, *Consequential Damages in Contract—The Poor Relation?*, 42 LOY. L.A. L. REV. 177, 179, 182 (2008).

333. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1854); Tettenborn, *supra* note 332, at 182–83 (explaining that "foreseeability does not form a serious barrier to claims for direct, as compared to consequential, loss.").

(specific) type of damages, rendering recovery difficult.[334] This assumption results from a combination of two beliefs. One is that contracts are about cold transactions that do not establish emotional obligations. The second is that emotions are subjective and individual; thus, any harm to them is specific. However, these beliefs are both unfounded and cannot justify the assumption that emotional injuries should be subject to the rule for specific damages.

Indeed, in many situations, the contract includes obligations with a salient emotional component. A breach of such obligations will *typically* (and thus "generally") cause emotional harm to any injured party encountering it. Known examples include contracts with private hospitals that promised but failed to care for the other party's loved ones, such as an aging parent[335] or a young child.[336] In such cases, nearly all injured parties would have suffered a similar and significant emotional injury, regardless of their specific character or circumstances. Similarly, people who paid for the funeral of their loved one would typically suffer emotional harm in cases of visible damage to the corpse.[337] This harm, too, is direct and general because most similarly situated people would have suffered it.

Likewise, a hostile attack on individuals' core identities when they simply try to shop, work, or rent like everyone else is generally harmful—it would severely hurt most similarly situated people. Therefore, when market humiliation can be proved, the inevitable injury that follows should be classified as general and direct rather than specific and consequential. Such needed re-classification would open the door to remedies regularly available under contract law.

For example, the damage caused to Ms. Lester does not hinge on her personal sensitivity. Instead, most shoppers targeted for their racial identity would have suffered a similar injury. This is so because the reasonably expected value of market transactions includes gaining the fruit of the exchange *without* being harassed for who one is. Correspondingly, businesses can and should foresee that their offensive behavior would cause injury and be ready to pay damages under the general rules of contract law.

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334. Tettenborn, *supra* note 332, at 182–83.
335. Oresky v. Scharf, 126 A.D.2d 614 (N.Y. App. Div. 1987).
336. Johnson v. Jam. Hosp., 467 N.E.2d 502 (N.Y. 1984).
337. Christensen v. Superior Court, 820 P.2d 181, 183 (1991).

To illustrate the acute need for remedial reform along the lines sketched here, consider another recent Supreme Court decision that failed to offer redress in a disheartening case of market humiliation under a misguided analysis of contract law's remedies. In *Cummings v. Premier Rehab Keller*, the conservative majority denied relief for emotional harm to a deaf and legally blind patient who was humiliated by a private physical therapy provider.[338] The provider refused to accommodate the patient's disabilities by way of providing an ASL interpreter. Instead, the provider insisted that a therapist could communicate with the patient in ways that are ineffective and insulting, including gestures she cannot see and notes she cannot understand.[339] There was no dispute that this mistreatment amounted to forbidden discrimination against a protected individual or that the patient suffered emotional distress. However, the majority refused to award damages because it claimed that the remedy is not normally available under contract law.[340]

Ms. Cummings' right to remedy was linked to contract law because the provider that humiliated her received government funding and, by that, consented to following nondiscrimination laws. This "contract analogy" has been interpreted over the years as creating an implied private claim for people who were discriminated against by funded providers.[341] Remedies, however, have been limited to those available under contract law due to the need to put the provider on notice for the risks it accepts when receiving funding.[342] For that reason, it was decided before *Cummings* that funded providers were required to pay punitive damages to those they injured because such a remedy is unavailable under contract law.[343] The decision in *Cummings,* however, added a new limitation: not only should the remedy be available under contract law, it should also be a "usual" remedy that is "normally" available.[344] And, because, according to the majority, damages for emotional distress are not

338. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).

339. Amended Complaint at 3–4, Cummings v. Premier Rehab Keller, P.L.L.C, 2019 U.S. Dist. LEXIS 7587 (N.D. Tex. Jan. 16, 2019) (No. 4:18-CV-649-A).

340. *Cummings*, 142 S. Ct. at 1576.

341. *Id.* at 1566.

342. *Id.*

343. Barnes v. Gorman, 536 U.S. 181 (2002).

344. *Cummings,* 142 S. Ct., at 1571–72.

among “the usual contract remedies in private suits,” they cannot be awarded.[345]

Significantly, while reaching this conclusion, the majority in *Cummings* criticized section 353 of the Restatement for misrepresenting emotional damages as sometimes (if infrequently) available and claimed this statement “does not reflect the consensus rule among American jurisdictions.[346] Accordingly, the majority stated that the humiliating business could not have predicted that it would have to pay damages for the emotional suffering it caused by discriminating against a disabled (potential) patient.[347] However, given the way the physical therapy business treated Ms. Cummings, it is hard to distinguish the case from the classic case of *Sullivan v. O'Connor*, in which a doctor had to pay emotional damages for leaving a patient with a disfigured nose.[348] In both cases, emotional harm was highly foreseeable, given the content of the contract and the nature of the breach.

The dissent, on the other hand, insisted that the provider should have predicted the emotional injury because cases like Ms. Cummings' are among the special situations in which emotional suffering is a “particularly likely” result.[349] Yet, even the supportive dissent failed to recognize that Ms. Cummings' injury is general and thus warrants damages under contract law's *regular* rules—an argument crucial to her ability to win the case. The better reasoning would have been to argue that *Cummings* is a case of market humiliation: When health providers refuse to arrange for proper accommodations and instead offer alternatives that only highlight patients' limitations, they harm patients' dignity. Accordingly, patients with disabilities humiliated in this manner deserve remedies under the usual rules of damages because their injury is not specific to their personality or medical condition but rather is general and direct.

All told, to improve the legal response to market humiliation, we need to update and revise the treatment of emotional injuries under private law in general and contract law in particular.

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345. *Id.* at 1571, 1576.
346. *Id.* at 1574.
347. *Id.* at 1567.
348. Sullivan v. O'Connor, 296 N.E.2d 183, 189 (Mass. 1973).
349. *See Cummings*, 142 S. Ct. at 1577 (Justice Breyer, J., dissenting).

CONCLUSION

Market humiliation is a corrosive relational process to which the law repeatedly fails to respond due to its heavy reliance on the discrimination paradigm. In this process, providers of market resources, from housing and work to goods and services, use their powers to reject or mistreat other market users due to their identities. They humiliate users and harm their market citizenship by depriving them of dignified participation in the marketplace.

This Article has shown how the problem has reached a peak. More than before, the recent decision in *303 Creative* legitimizes market humiliation by granting private providers broad free speech exemptions from nondiscrimination laws. This Article has shown how flawed this decision is and how it threatens the ability of countless people, of various disfavored groups, to fully participate in the marketplace without constantly experiencing or fearing humiliation.

But this Article has not only sounded an alarm in a moment of crisis. It has also sought to offer hope by proposing a path to mitigating the problem and narrowing the normative void left by nondiscrimination laws. We don't have to sit on our hands in dread that *303 Creative* will soon revive a segregated market by inviting more businesses to humiliate. To block and resist this development, this Article has proposed going beyond discrimination: turning to private law and utilizing its tools to fight market humiliation.

The proposed shift to private law admittedly requires making more room within it for a duty not to humiliate. This Article has recommended how to do so and what legal reforms of doctrines and remedies of both tort law and contract law are needed. Following these recommendations can empower people humiliated in the marketplace to take action and seek remedies from those who mistreated them.

Doctrinal challenges aside, turning to private law has the clear advantage of avoiding the flaws of the preemptive litigation strategy used in *303 Creative*. First, suing under private law would at least guarantee victims of market humiliation that their voice and harm will not be left out of the courtroom but rather receive full attention. Second, this Article has proposed a new cause of action and a six-factor test to help establish it. This would allow courts to decide matters of market citizenship based on a rich factual record, verify the credibility

of claims, and ensure that harms to dignity receive adequate legal attention.

Third, utilizing the proposed test would enable factfinders and judges to replace biased ideological analysis of the kind presented by *303 Creative* with a balanced consideration of market actors' citizenship. As part of such a balanced approach, there would not be a need to adhere to an unhinged version of the freedom of speech and extinguish longstanding and fundamental civil rights. Instead, the deeper understanding and nuanced analysis of market humiliation that this Article offers would help effectively and equitably distinguish between content-based resistance to provide certain messages on the one hand and a hostile targeting of disfavored identities on the other.[350] The latter immoral behavior should never be legitimized under law.

Equally important, the promise of developing a private law response to market humiliation goes beyond overcoming challenges presented under nondiscrimination laws. Private law has unique expressive, normative, and remedial powers. Those should be utilized to convey, enforce, and restore the importance of dignified participation in the marketplace. When the market's inclusiveness is under fatal attack, the appropriate and urgent response is to find new ways to guarantee market citizenship for all.

350. *Cf.* John Banister, *On Performativity and Compelled Commercial Speech: Toward a Workable Standard*, 22 COMMC'N L. REV. 74 (2022) (similarly explaining the limits of our compelled speech jurisprudence and demonstrating how they influenced the discussion in *Masterpiece Cakeshop*).