

AN ESSAY IN HONOR OF GREG ALEXANDER

PUBLIC ACCOMMODATIONS & HUMAN FLOURISHING: SEXUAL ORIENTATION & RELIGIOUS LIBERTY

*Joseph William Singer**

Greg Alexander’s monumental contributions to our understanding of property and property law are unequalled. He is also a mensch and that comes through loud and clear in his work. His recent book, Property and Human Flourishing, develops a quasi-Aristotelian theory of property that focuses our attention on the ways property law protects plural incommensurable objective values that regulate social relationships in order to empower us to become the authors of our own lives. This Essay honors him and his contributions by applying his analysis to the fraught question of whether owners of public accommodations must serve the public without regard to sexual orientation when this violates the owner’s core religious commitments. Alexander’s theory suggests a way to rewrite the Supreme Court’s opinion in Masterpiece Cakeshop v. Colorado Civil Rights Commission to attend to the religious liberties of both owners of public accommodations and their customers while protecting equal rights to participate in the marketplace. Property is not about things but about who we are and what it means to be human and humane.

I. PROPERTY & HUMAN FLOURISHING	698
II. SEXUAL ORIENTATION & RELIGIOUS LIBERTY IN PUBLIC ACCOMMODATIONS	700
III. HUMAN FLOURISHING AND PUBLIC ACCOMMODATIONS	701
IV. STAR TREK & PROPERTY; NOT “THINGS” BUT “WHO WE ARE”	713

* Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, Greg Alexander. This project was funded in part by a research grant from Harvard Law School and presented at the Progressive Property conference at Cornell Law School in May 2019. This chapter builds on a speech given at Cornell Law School in October 2018.

Greg Alexander is a *mensch*.¹ There is no word in the English language that adequately conveys the meaning of this Yiddish word. Here is the closest we can get: a *mensch* is a good person, a person of honor, integrity, and decency, a person we admire and hold up as a model for ourselves. But more than that, a *mensch* is someone who is aware of other people, who *sees* them, who respects their dignity, who pays attention to them, who understands that they matter, who knows in his heart that they are the people mentioned in the book of Leviticus when it says that “you shall love your neighbor as yourself.”² Greg’s innate goodness naturally expresses itself in his life’s work, most importantly in his idea that the goal of law is to enable human beings to flourish.

I. PROPERTY & HUMAN FLOURISHING

Greg Alexander’s newest book, *Property and Human Flourishing*,³ summarizes some of his core beliefs and ideas about the way to understand property and property law, as well as the nature of the rule of law and the relation between law, morality, and justice. The book has many illuminating ideas. Here are a few of them.

First, human beings are social creatures.⁴ We are dependent on others to become who we are; we are dependent on others to live.⁵ Our relationships are central to developing our capabilities and our values.⁶ We cannot do these things on our own.⁷ We need other people.⁸

Second, the goal of property law is to promote human flourishing for every single person.⁹ We are ends in ourselves; we have intrinsic value.¹⁰ Flourishing means the full development of our capabilities.¹¹ To flourish, we need the social relationships and the support necessary to become moral actors who seek to do good and promote justice, as well as have the ability to reason critically and searchingly for answers to our questions about the right way to live with ourselves and with others.¹²

¹ See Rabbi Michael Strassfeld, *What Is a Mensch? On Being a Mensch—an Upstanding Member of Society—and Leading an Ethical Life*, MY JEWISH LEARNING <https://www.myjewishlearning.com/article/mensch/> (last visited Oct. 13, 2019).

² *Vayikra (Leviticus)* 19:18 (ואהבת לרעך כמוך).

³ GREGORY S. ALEXANDER, *PROPERTY AND HUMAN FLOURISHING* (2018).

⁴ See *id.* at xii.

⁵ See *id.* at 7.

⁶ *Id.*

⁷ See *id.*

⁸ *Id.*

⁹ See *id.* at 3.

¹⁰ See generally ALEXANDER, *supra* note 3.

¹¹ *Id.* at xiv.

¹² See *id.* at 46.

Third, we have the right to be the authors of our own lives, and we can only do that if we have the social, legal, and material support necessary to do this.¹³

Fourth, in our relationships with others, we have obligations as well as rights.¹⁴ We have duties to ensure that others have as much chance of flourishing as we do.¹⁵

Fifth, human values are objective; they are things that are good in themselves.¹⁶ They are not merely preferences; “we should not torture small children by separating them from their parents” is not the same kind of assertion as “Snow Patrol is my favorite band.” Values are demands we are prepared to place on ourselves and others; they shape the way we should live and should regulate social relationships.¹⁷ They are objective because they can be defended by reasons that could be accepted by all.¹⁸

Sixth, values are plural and incommensurable.¹⁹ They cannot be compared on a single metric.²⁰ They need to be interpreted and applied in particular contexts.²¹ They cannot be measured or weighed against each other in a mechanical manner.²² When values clash, deciding what to do is not like doing the math and seeing how the cost-benefit calculus comes out.²³ It is not like finding rules and applying them mechanically.²⁴ Values need to be interpreted to see what they mean and how they fit together.²⁵ This is a matter of considered judgment and practical reason.²⁶ This requires introspection, conversation, and storytelling, and it cannot be accomplished without a sense of humility and attentiveness to others.²⁷

Finally, property and property law are not just about wealth or the technicalities of resource management.²⁸ They are tools we need to exercise autonomy, to become full mature persons.²⁹ They are rules of the

¹³ See generally ALEXANDER, *supra* note 3.

¹⁴ See *id.* at 40.

¹⁵ See *id.* at 52.

¹⁶ See *id.* at 5.

¹⁷ See, e.g., *id.* at 16–17.

¹⁸ See *id.* at 26–27.

¹⁹ See *id.* at 10–12; for Alexander’s discussion of the relationship between pluralism and incommensurability, see also *id.* at 23–26.

²⁰ See *id.* at 5.

²¹ *Id.* at 30.

²² See *id.* at 5.

²³ See *id.*; see also *id.* at 30.

²⁴ See *id.* at 13.

²⁵ See *id.* at 32–33.

²⁶ See *id.* at 29–30.

²⁷ *Id.*

²⁸ See, e.g., *id.* at 3.

²⁹ See, e.g., *id.* at 8.

game that enable us to live with others so that we all can flourish.³⁰ They enable us to establish social relationships through which we are capable of living and making our lives meaningful.³¹

II. SEXUAL ORIENTATION & RELIGIOUS LIBERTY IN PUBLIC ACCOMMODATIONS

How does this approach to law (and to property) help us think about hard cases? How can the goal of promoting human flourishing help guide analysis, discussion, and decision making? Alexander works through a lot of examples to illustrate his approach. The best way for me to show the utility of his approach is to see how it can help us think through a hard case that involves multiple, conflicting norms and values. Does a baker have a constitutional right to refuse to design and sell a wedding cake to a same-sex couple when same-sex marriage violates his religious beliefs and doing this would (in his view) make him complicit in a sinful act or convey a message of support for it? The Supreme Court addressed this question and gave only a partial answer in the case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.³²

On one side is the shopkeeper, Jack Phillips, who hopes to live his life in a way that affirms his religious convictions.³³ He believes that if he is forced to design and sell the cake, he is being forced to participate in a religious ceremony, to express support for, and to be complicit in, a practice that violates his religious beliefs.³⁴ I was eight years old when the Supreme Court stopped public schools from coercing Jewish children like me to participate in Christian prayers every morning.³⁵ I was, and am, grateful for that ruling. To Phillips, this case is just like that. Government-compelled speech—especially speech one disagrees with—ordinarily violates the first amendment, as does coerced religious conduct.³⁶ Gay customers who want wedding cakes can look elsewhere. The profit motive will induce someone to provide the service they seek. They can acquire what they need without imposing their views on the baker. And it would be natural for them to prefer to deal with a baker who does not object to their relationship. Everyone wins.

³⁰ See generally *id.* at 8–9.

³¹ See *id.*

³² See *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

³³ *Id.* at 1724.

³⁴ *Id.*

³⁵ See *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962).

³⁶ For the Supreme Court’s most recent affirmation of this principle, see *Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31 (AFSCME)*, 138 S. Ct. 2448, 2460 (2018).

On the other side, we have the couple, Charlie Craig and Dave Mul-
lins.³⁷ They want to shop in stores open to the public just like everyone
else. They do not want to be treated like outcasts. They do not want to
have to call ahead to see if they are welcome. They do not want to have
to research bakeries on the Internet to see which ones want customers
like them. They do not want to be excluded from stores because their
religious beliefs differ from those of the shopkeeper.³⁸ Like the baker,
they seek to live their lives true to themselves and to their religious and
moral commitments. The shopkeeper has a rightful claim to religious
liberty, but so do his customers. While the baker has free speech rights,
so does the couple; they want to buy a cake that will help celebrate their
own commitment, their own marriage. The baker is being asked to de-
sign a cake that will express the customers' religious commitments, not
those of the baker. He designs wedding cakes for the public, and they are
part of the public.

There we have two different cases—one for uniform application of
antidiscrimination law and—the other for recognizing some kind of re-
ligious exemption. So, the question is: what would Alexander say?

III. HUMAN FLOURISHING AND PUBLIC ACCOMMODATIONS

Alexander might ask us to focus on several questions. First, what
values are relevant here? Values that come to mind include religious
liberty, equality, dignity, privacy, intimacy, authenticity, neighborliness,
security, opportunity, freedom of association, and hospitality.³⁹ There is
a lot to talk about. Let us focus on autonomy, religious liberty, equality,
and dignity.

Autonomy means the freedom and power to be the authors of our
own lives.⁴⁰ Religious liberty is a part of that. The baker seeks the ability
to go into business and run it in a manner consistent with his deepest
values, free from demands that he engage in behavior that he considers
sinful or against the Word of God.⁴¹ He seeks freedom from being forced
to participate in a religious ceremony that is not his. He wants not to be
forced to convey messages he abhors. The customers also seek the ability
to live their lives in accordance with their own values and “to enjoy as-

³⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

³⁸ See Julie Compton, *Meet the Couple Behind the Masterpiece Cakeshop Supreme Court Case*, NBC NEWS (Dec. 6, 2017), <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976>.

³⁹ See, e.g., ALEXANDER, *supra* note 3, at 5.

⁴⁰ See Farrah Ahmed, *The Autonomy Rationale for Religious Freedom*, 80 MOD. L. REV. 238, 239 (2017); see also Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 268 (2001).

⁴¹ Appellant's Opening Brief at 4, *Masterpiece Cakeshop, Inc. v. Craig* (Colo. App. 2015) (No. 2014CA1351), 2015 WL 13622550.

sociations customary among our citizens,”⁴² such as shopping, forming a family, and getting married. They seek the right to participate in the marketplace without being shunned because of their personal and religious choices, their commitments and beliefs, and their gender identity and sexual orientation.⁴³ They seek the freedom to exercise their own religious freedom, to be themselves, to choose who to love — without being denied access to the marketplace.

The baker seeks *equal freedom* to run his business, as is enjoyed by those who have different religious commitments. He does not want to be forced to shut down his business or end his participation in economic life because of a law that requires him to violate his beliefs. The customers similarly have a claim to equality; they seek equal access to public accommodations. They should not have to call ahead to see if they are welcome in places open to the general public. They should not be turned aside because of their sex, their religion, their sexuality, or any other features of who they are.

Both sides argue for equal autonomy, but the question is: Equal in respect to what? The buyers will say, “equal access to a market that is not segregated in an invidious manner.” The owner will say, “equal freedom to go into business without being forced to be complicit in religious practices to which the owner rejects.”

Second, how should we interpret these values? They need specification so we can fit them together when they pull us in opposite directions or when we face competing versions of each value. To specify and contextualize values, Alexander suggests that we focus on social relationships and the obligations necessary to promote human flourishing.⁴⁴ What relationships are necessary for human flourishing in the context of public accommodations and what obligations do public accommodations have when religious liberties seem to conflict with equality before the law?

The Supreme Court has faced this question before. In 1966, a restaurant owner claimed that he could not serve African Americans in his restaurant because it was against his religion for white and black people to break bread together.⁴⁵ The Supreme Court rejected his claim in *Newman v. Piggie Park Enterprises*, holding that owners of public accommodations have a duty to serve the public without exclusion or segregation

⁴² *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).

⁴³ See *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1725 (2018).

⁴⁴ See ALEXANDER, *supra* note 3, at 40.

⁴⁵ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966).

on account of race and that the owner's religious beliefs cannot exempt him from those obligations.⁴⁶

Owners have liberties, but so do customers. Free exercise of religion is one of our liberties, but so is the liberty to enter the marketplace without invidious discrimination.⁴⁷ In the 1960s, many people believed that racial segregation was ordained by God.⁴⁸ If they had been free to refuse to provide full, equal, and integrated services without regard to race in public accommodations, housing, and employment, then the civil rights laws would have had little effect in the parts of the country where they were most needed, and racial segregation and discrimination would have persisted as a matter of law. It is not possible to achieve the benefits of civil rights laws if religious dissenters are free to violate them and if dissent would be widespread. The burden such laws place on religious freedom must be acknowledged, but our legal tradition since the mid-twentieth century has consistently found that civil rights laws promote compelling government interests that outweigh those burdens.⁴⁹

Today, no one is arguing that we should overrule *Newman v. Piggie Park Enterprises*. Indeed, it was reaffirmed in the *Masterpiece Cakeshop* opinion.⁵⁰ Nor are they arguing that bakers should be free to refuse to design wedding cakes for interracial couples. They are suggesting that the government interest in eradicating racial discrimination is so crucial that it justifies infringing on religious liberty, whereas combatting sexual orientation discrimination is not a compelling government interest, or that, if it is, it is not sufficient to justify the burden on religious liberty.⁵¹ But this distinction between race and sexual orientation discrimination is hard to justify. After all, we are talking about exemptions from public accommodation laws, and legislatures that prohibit "sexual orientation" discrimination do so because they believe that doing so serves a compelling government interest.⁵² And the religious beliefs in *Newman* were as strongly felt as those in *Masterpiece Cakeshop*.

Third, are store owners the only ones with religious liberty claims? No, customers have them too. Public accommodation laws prohibit dis-

⁴⁶ See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968), *aff'g in relevant part*, 256 F. Supp. 941.

⁴⁷ See *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

⁴⁸ See Earl Black, *Southern Governors and Political Change: Campaign Stances on Racial Segregation and Economic Development, 1950–69*, 33 J. POL. 703, 709–10 (1971) (describing how post-*Brown v. Board of Education*, "militant segregationists were elected governor of every southern state at some point," including "70 percent during the period 1954–69").

⁴⁹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

⁵⁰ 138 S. Ct. at 1733.

⁵¹ See *id.* at 1725–26.

⁵² See *Customer Non-Discrimination Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/customer-non-discrimination-act>.

crimination on the basis of religion, but they do so to promote the religious liberties *of the customer*.⁵³ The *Masterpiece Cakeshop* debate focuses on the religious liberties *of business owners* and frames the issue as a contest between religious liberty and equality.⁵⁴ But this suggests that the couple in *Masterpiece Cakeshop* had no religious liberties of their own. While some Christians view homosexuality and same-sex marriage as sins, others do not.⁵⁵ The same is true for other religious traditions, such as Judaism.⁵⁶ And customers need not belong to an established church to have religious freedoms.⁵⁷ Baker Jack Phillips saw marriage as a religious matter and same-sex marriage as a sin,⁵⁸ and if that is so, then he refused to design a wedding cake for Craig and Mullen *because their religious beliefs differed from his own*. Clearly, to Craig and Mullen, their marriage was not a sin; indeed, it was an affirmation of their deepest commitments. The First Amendment protects the religious freedom of all persons, not just those who profess one faith;⁵⁹ it protects atheists, and those who are spiritual but unaffiliated, and it protects those whose fundamental values do not have a name.⁶⁰ The baker is not the only one who has a claim to religious liberty; LGBTQ people have religious lives of their own.⁶¹ This case is *not* a clash between religious liberty and equality. Rather, it is a clash of *religious liberties*, as well as competing claims to equal treatment under law.

The baker may argue that he would have provided a wedding cake for atheists or non-Christians, as long as they were not same-sex couples. His refusal was not because of the customer's religion but because of his own. But that means that his own religious beliefs prevent him from participating in an act that he, *but not his customers*, views as a sin. Whether the customers view the marriage as a sacred act or as a secular but meaningful moment in their lives together, the Constitution protects their freedom to marry.⁶² The baker says that marriage is a religious act

⁵³ See 42 U.S.C. § 2000a(a) (2019).

⁵⁴ See *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723–24, 1727 (2018).

⁵⁵ Alex Vandermass-Peeler et al., *Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas*, PUB. RELIGION RES. INST. (May 1, 2018), <https://www.prii.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/>.

⁵⁶ *Id.*

⁵⁷ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 215 (1963).

⁵⁸ See *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

⁵⁹ See U.S. CONST. amend. I.

⁶⁰ See *id.*

⁶¹ *Explore: Religion & Faith*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/explore/topic/religion-faith>.

⁶² See Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

and he is right; that is why the couple has as much a right to religious liberty as he does.

If a store owner believes it violates his religion to be complicit in a sinful lifestyle, and he defines the provision of goods and services as a form of complicity, and the Constitution protects his right to refuse to serve those who violate his religion, then we would have to delete the word “religion” from civil rights laws. There would be a constitutional right to discriminate against customers based on the fact that the customer’s religious practices and beliefs violate those of the business owner. Rather than protecting the freedom of *customers* to enter stores without regard to the customer’s religion, we would protect the freedom of *store owners* to exercise their own religious freedom by choosing which customers to serve. We would, in effect, cross out the word “religion” in the Civil Rights Act of 1964 and again make it lawful to refuse to serve a customer because of the customer’s religion. And because the Establishment Clause does not allow the law to promote or favor any religion,⁶³ that would mean that *public accommodations would have a constitutional right to discriminate against Christian customers*. But this is not something that anyone is championing or seeking as a goal.

Fourth, is the baker’s religious claim sincere and consistent? While no court will ever question the sincerity or centrality of a shopkeeper’s religious beliefs, that does not mean his conduct is not subject to scrutiny. While we should take the store owner at his word that designing a wedding cake makes him complicit in a sinful act or expresses a message of support for same-sex marriage, we are not obligated to ignore the fact that he did not object to designing wedding cakes for Jewish couples. That is perplexing. If designing a wedding cake for a gay couple means affirming their religious views and personal practices, then does designing a wedding cake for a Jewish couple mean that the baker has repudiated Christ? It does not seem that Phillips viewed it that way. But Jewish wedding ceremonies are religious in nature; they mention God, but they do not mention Christ.⁶⁴ Indeed, the key difference between Judaism and Christianity is the divinity of Jesus⁶⁵—the central tenet of Christianity. But Christian bakers are not refusing to make wedding cakes for Jews. Why is that, when the Jewish marriage ceremony affirms a religious tradition that denies that Jesus was the Son of God? That inconsistency may undermine the claim that there is complicity in making a wedding case

⁶³ See U.S. CONST. amend. I.

⁶⁴ See generally InterFaithFamily, *Issues Specific to Jewish – Christian Weddings*, INTERFAITHFAMILY (Oct. 10, 2019), https://www.interfaithfamily.com/life_cycle/weddings/issues_specific_to_jewish_christian_weddings/.

⁶⁵ *Id.*

for a same-sex couple or that the cake is a message of support for the customer's religious beliefs and practices.

Fifth, if legislatures should be free to prohibit discrimination against customers based on the customer's religion, and if it is true that gay people have religious lives, then how do we choose between the religious liberty of the owner and the customer? Alexander would ask us to focus on the meaning of autonomy and the obligations necessary to human flourishing as they have developed in our society and our laws.⁶⁶ Our history has led us to outlaw segregation in public accommodations and to ensure access to the marketplace without regard to race and religion.⁶⁷

The baker is asking for the right to make customers go someplace else because of *their* religious beliefs, not just his. The customers are asking for the same freedom to shop that Christians take for granted. Our society privileges the religious liberties of customers over those of store owners, and the states that prohibit sexual orientation discrimination seek to grant gay, lesbian, and bisexual customers the "full promise of liberty" guaranteed by the Constitution.⁶⁸ Should the couple be obligated to go somewhere else to find a baker who will serve them? Should they be required to call ahead to see if they are welcome?⁶⁹ Or should businesses open to the public have an obligation to serve the public?

Our society is currently split down the middle on this question. Roughly half the states prohibit discrimination on the basis of sexual orientation and half allow it.⁷⁰ While the *Masterpiece Cakeshop* case was decided on narrow grounds, eight Justices agreed that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."⁷¹ No one, including clergy, can be compelled to participate in a religious ceremony.⁷² The baker could lawfully limit his services to Christians if he did not operate a business open to the general public. He could create a nonprofit religious entity devoted to making wedding cakes for Christian opposite-sex couples or even couples who affirm his particular version of Christianity. But if he opens his business to the general public in pursuit

⁶⁶ See generally ALEXANDER, *supra* note 3.

⁶⁷ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 348 (1964).

⁶⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

⁶⁹ "Some in my band are gay & we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all? [O]r maybe I should fire my gay band members just to be on the safe side." Audra McDonald, *quoted in* Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, N.Y. TIMES (Mar. 27, 2015), http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0.

⁷⁰ See MOVEMENT ADVANCEMENT PROJECT, *MAPPING LGBT EQUALITY IN AMERICA* (2015), <http://www.lgbtmap.org/file/Mapping%20Equality%20for%20LGBT%20Americans%20Post%20SCOTUS.pdf>.

⁷¹ 138 S. Ct. at 1727.

⁷² *Id.*

of profit, the Supreme Court has affirmed that state law “can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”⁷³

Sixth, does designing a wedding cake for a same-sex couple constitute an expression of support for the religious validity of same-sex marriage, compelling the baker to speak words he does not believe? Does the law constitute unconstitutionally-compelled expressive conduct? Colorado allowed other bakers to refuse to write religious messages on cakes that expressed hostility to homosexuality and same-sex marriage.⁷⁴ Why was Masterpiece Cakeshop required to design something that celebrated a same-sex marriage when others were free to refuse to do the opposite?

The majority opinion in *Masterpiece Cakeshop* considered but did not answer this question, and it is a hard one. The majority opinion suggested that the civil rights commission was inconsistent in its claim that any expressive content contained on or in the cake is that of the customer rather than the baker.⁷⁵ It noted that the state civil rights commission’s consideration of Jack “Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.”⁷⁶ Justice Gorsuch’s concurring opinion strongly criticized Justice Kagan’s explanation of why these two sets of cases were different.⁷⁷ He argued that giving bakers the freedom to refuse to place religious or political messages on cakes while denying bakers the freedom to refuse to make cakes for same-sex weddings discriminates on the basis of religion.⁷⁸ Only religiously-neutral government policies are consistent with the free exercise and establishment clauses.

Both Justice Kagan’s concurring opinion and Justice Ginsburg’s dissenting opinion argued that the state had acted neutrally with respect to religion.⁷⁹ Kagan argued that the bakers who refused to write messages they viewed as disparaging or hateful would not have sold cakes with those messages to anyone; they were not discriminating against the customer based on his religious beliefs or his race or his sexual orientation.⁸⁰ Store owners are free to decide what services to pro-

⁷³ *Id.* at 1734.

⁷⁴ *Id.* at 1721.

⁷⁵ *Id.* (“State law . . . also afforded storekeepers some latitude to decline to create specific messages [the storekeeper] considered offensive. Indeed, while the instant enforcement proceedings [against Phillips were ongoing, the Colorado Civil Rights Division itself] . . . concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.”)

⁷⁶ *Id.* at 1730.

⁷⁷ *Id.* at 1735–37 (Gorsuch, J., concurring).

⁷⁸ *Id.* at 1736.

⁷⁹ *See id.* at 1732 (Kagan, J., concurring); *see also id.* at 1749 (Ginsburg, J., dissenting).

⁸⁰ *Id.* at 1733 (Kagan, J., concurring).

vide; that means they can refuse to write messages they deem offensive, especially when those messages disparage groups protected by state antidiscrimination laws. In contrast, Masterpiece Cakeshop was not asked to write a disparaging message. It refused to design and sell a wedding cake to its customers simply because of the customers' sexual orientation.⁸¹ It refused to provide a service that it routinely provided to others. Justice Ginsburg explained:

The bakeries' refusal to make [William] Jack cakes of a kind they would not make for any customer scarcely resembles [Jack] Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied.⁸²

However, according to Justices Thomas and Gorsuch, state neutrality toward religion requires treating all messages the same.⁸³ If bakers are free to refuse to write messages they find offensive, then they must be allowed to refuse to sell wedding cakes which are inherently expressive since they are culturally coded as celebrating a “wedding,” and a baker who does not think the couple has the right to “wed” should be free not to “write” that offensive message by designing a wedding cake.⁸⁴ If bakers must sell a “wedding” cake to a same-sex couple, then they must be compelled to write whatever words the customer wants, even if it is a swastika or a racial epithet.⁸⁵ If, on the other hand, bakers are free to refuse to write offensive messages, then they should be free to refuse to sell wedding cakes to same-sex couples.⁸⁶ The baker argued that he cannot be compelled to speak words with which he disagrees, and so should be free to refuse to write words or bake a wedding cake.⁸⁷

The question of what types of goods and services are expressive is not an easy one. If design is inherently expressive, then where do we stop? Design is key to restaurants, hotels, clothing, invitations, announcements, transportation services, medical and legal and architectural services, insurance companies, etc. If all these involve design, and thus

⁸¹ *Id.*

⁸² *Id.* at 1750 (Ginsburg, J., dissenting).

⁸³ *See id.* at 1746 (Thomas, J., concurring).

⁸⁴ *Id.* at 1743–44.

⁸⁵ *See id.* at 1744.

⁸⁶ *See id.* at 1746.

⁸⁷ *Id.* at 1740–48.

expression, and public accommodations have the right to refuse to “express” support for, or engage in complicity with, same-sex marriage or same-sex relationships, or, for that matter, homosexuality, then a vast range of businesses would have a constitutional right to discriminate on the basis of sexual orientation.

The problem is complex because the Supreme Court did not sufficiently separate the religious and expressive liberties of owners from those of customers. The first question is whether store owners have a First Amendment right to an exemption from civil rights laws to protect the store owners’ religious or expressive freedoms. The second question is whether *customers* have a right to be served regardless of *their* religion or sexual orientation. When the religious freedoms of the store owner clash with those of the customer, we must keep in mind the fact that both have those liberties and that we need to see how they fit together. Consider that bakers who refuse to write religious messages on a cake could be discriminating on the basis of the *customer’s* religion if they would have agreed to write *different* religious messages on the cake. A store that routinely draws crosses on cakes may be discriminating on the basis of religion if it refuses to draw a star of David or a verse from the Koran. The bakers in the William Jack cases refused to write messages on cakes that were disparaging of homosexuality; yet some of those messages were Bible verses. Deciding whether it is religious discrimination against the customer to refuse to write certain Bible verses—while being happy to write other Bible verses—is a complicated question.

Freedom of speech cannot extend as far as allowing store owners to make statements that would deny customers “full and equal enjoyment” of places of public accommodation (in the words of the 1964 federal public accommodations law).⁸⁸ Antidiscrimination law—of necessity—regulates speech based on its content.⁸⁹ Restaurants are not free to post “whites only” signs. Nor can they insult African American customers as they serve them. Employers are not free to create a racially hostile environment in the workplace if they want to comply with antidiscrimination laws. “Access” to public accommodations, housing, and employment is not “full and equal” if customers are subjected to verbal abuse because of their race or religion.

A store would be in violation of a public accommodations law that prohibits discrimination on the basis of religion if it refused to write religious language on a cake when it would provide the same service to other customers seeking to have different religious language written on their cakes. At the same time, refusing to write words that are disparag-

⁸⁸ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (1964).

⁸⁹ See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017).

ing or insulting to a particular group that is protected by civil rights law is arguably not an act of discrimination “because of” religion. Should bakers have to choose between writing whatever the customer wants (including language that would generally be deemed offensive) or not writing anything at all? The answer is probably no. Antidiscrimination laws that prohibit discrimination based on religion were not intended to require bakeries to write swastikas as long as they are also willing to write “happy birthday Joe.”

That does not mean that it is easy to draw a line between “discrimination on the basis of religion” and “refusal to write hateful words on a cake.” Nor is it easy to tell when such refusals constitute discrimination based on the religion of the customer or how to fit the free speech rights of store owners with the free speech rights of customers.

Seventh, do public accommodation laws serve compelling governments interests that are sufficiently strong to justify any incidental effects on religious commitments? The Supreme Court has twice said that the answer to that question is yes: it did so in 1968 in *Newman v. Piggie Park Enterprises* and in 2015 in the *Masterpiece* opinion itself. The government interest in keeping the marketplace open to all, without regard to race, religion, or sexual orientation, is sufficient to justify a lack of exemptions for store owners whose religious beliefs might cause them to deny services to members of protected groups.⁹⁰ Why is that so?

Public accommodation laws enable us to acquire property without discrimination or segregation.⁹¹ Human beings cannot flourish if we cannot acquire the things we need to live.⁹² We also cannot flourish if we experience humiliating treatment when we interact with others in the marketplace or if we are segregated and treated as a subordinate caste. If shopkeepers are free to refuse to sell us property for discriminatory reasons, then we cannot flourish. That rule protects Christians as well as same-sex couples. If your religion requires dealing only with others of your faith, you can do so by operating as a nonprofit religious entity and not offering goods to the general public. Public accommodation laws preserve both religious liberty and access to property and the marketplace by ensuring that, no matter what your religion is, you can find a place to live, a place to work, and a place to shop.

But why not allow the few store owners that feel strongly about it to deny services? Why shouldn't the customer just go elsewhere? And wouldn't the customer rather deal with a store that does not harbor deep objections to the customers' wedding? This assumes that all the world is like the big cities where it is almost certainly true that one can find the

⁹⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

⁹¹ See Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968).

⁹² ALEXANDER, *supra* note 3, at xv.

same services elsewhere. But this is not necessarily true of all small towns or rural areas of the country. Telling someone in a small town in a rural area to “just go someplace else,” may be the same as an order to move out of town, to go to a big city, or to another state. It is not true that one can always find the same services elsewhere in rural areas where a town may have only one provider of that service and the surrounding area is religiously homogeneous.⁹³

Moreover, making access contingent in this way would mean that states would be disabled from achieving the goal that public accommodation laws are intended to achieve. That goal is enabling customers to enter the marketplace knowing it is open to them, that they will not face exclusion, that they will not be humiliated and treated with disdain because of their religion, race, or sexual orientation when they enter places that serve the public.⁹⁴ That set of liberties places obligations on business providers.

Audra McDonald responded to passage of an Indiana law allowing religious exemptions for public accommodations by noting that her band included gay people and wondering whether she should call ahead to see if they would be welcome at the hotel.⁹⁵ *People should not have to call ahead to see if they are welcome in public accommodations.* They should not have to worry whether the store serves Christians or Latinos or lesbians. Nor should they need to read advertisements carefully to see whether there is a humiliating footnote saying, “sorry but we do not serve people like you.” Civil rights laws ensure that housing, employment, and public accommodations are open to all regardless of race, religion, and (increasingly) sexual orientation.⁹⁶ Those laws do not force anyone to profess a religion they do not accept or to express beliefs or views they do not have.⁹⁷ They prevent creation of a caste system that segregates people in inappropriate ways and, which denies their equal humanity and their need and their right to flourish in common with others.

⁹³ Caitlin Rooney & Laura E. Durso, *The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities*, CTR. FOR AM. PROGRESS (Nov. 29, 2017, 7:00 AM), <https://www.americanprogress.org/issues/lgbt/reports/2017/11/29/443392/harms-refusing-service-lgbtq-people-marginalized-communities/>.

⁹⁴ See *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

⁹⁵ Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, N.Y. TIMES (Mar. 27, 2015), http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0; see Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 1 (2016).

⁹⁶ See, e.g., COLO. REV. STAT. § 24-34-601 (2019).

⁹⁷ See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Human flourishing requires space to express and exercise religious liberties.⁹⁸ It also requires the power to choose how to live one's life and what work to undertake.⁹⁹ But since it also encompasses the capacity to acquire property, and to avoid humiliation, segregation, and second-class status when entering the marketplace, human flourishing necessarily limits the legitimate rights of businesses to treat customers unfairly, to deny service that would be provided to others, or to engage in insulting treatment when providing goods and services in a business open to the general public. The ability to have access to property and to live day-to-day in dignity limits the freedom of businesses to segregate or deny service to customers.

While it is true that the country is divided over whether to treat sexual orientation discrimination as a form of sex discrimination, or whether to prohibit or allow sexual orientation discrimination,¹⁰⁰ the consequences of allowing religious exemptions from antidiscrimination laws loom large compared to any incidental effect on religious or expressive liberty. The means and contexts within which one can express religious freedom are well-established and capacious, and no laws prohibit business owners from professing their faith in God. What those laws do prohibit is *denying* service to customers because of the customer's beliefs in God or because of the store owner's beliefs that the customer's religious practices are anathema to those of the store owner. What bolsters this conclusion is the Golden Rule reasoning that stems from the premise that stores should *not* be allowed to discriminate against Christian customers. That premise can only work if stores cannot claim religious exemptions from public accommodation laws. It is the reason that the entitlement to equal access to public accommodations should prevail over the store owner's religious objections. If there is a clash between the religious liberties of the shopkeeper and those of the customer, our civil rights laws have chosen to outlaw segregation by privileging the liberties of the customer.¹⁰¹ This accommodation ensures that Christians have access to the marketplace and cannot be excluded because of their religious beliefs or practices, and same-sex couples are entitled to no less, whether they are Christian or non-Christian.

⁹⁸ Tyler J. VanderWeele, *Religious Communities and Human Flourishing*, 26(5) CURRENT DIRECTIONS PSYCHOL. SCI. 476, 476 (2017).

⁹⁹ See Nathaniel Koloc, *Let Employees Choose When, Where, and How to Work*, HARV. BUS. REV. (Nov. 10, 2014), <https://hbr.org/2014/11/let-employees-choose-when-where-and-how-to-work>.

¹⁰⁰ George Will, *Supreme Court to Decide Whether 'Sex' Includes Sexual Orientation*, NAT'L REV. (Oct. 6, 2019, 6:30AM), <https://www.nationalreview.com/2019/10/supreme-court-discrimination-case-sexual-orientation-civil-rights-act/>.

¹⁰¹ See e.g., § 24-34-601.

IV. STAR TREK & PROPERTY; NOT “THINGS” BUT “WHO WE ARE”

I have not “proved” anything. I have not treated the baker’s arguments as meaningless or without force. I have not made a “killer” argument that would make the other side capitulate or agree to relinquish their claims. And I have acknowledged the difficulty of determining when refusal to write symbols or words on a cake is lawful and nondiscriminatory versus when it denies service because of the *customer’s* religion, sex, marital status, sexual orientation, or gender identity.

Alexander’s approach to legal and normative argument does not give clear answers to hard cases. Rather, it asks us to focus on the values at stake, the ways they promote or impede human flourishing, the social contexts within which those values hold sway, and the way the values and the contexts fit together even when they pull us in opposite directions.¹⁰² The focus in this methodology is not on a procedure that gives an answer; we do not use an objective method to measure costs and benefits and then “do the math” to see how it comes out. The focus is on self-perception, interpretation of values, accommodation of conflicting interests and norms, and—ultimately—a careful judgment, all things considered.¹⁰³ The question is not what reason tells us; the question is how to use reasoning to decide what we will make of the values we embrace. We interpret our foundational texts and traditions, and that act of interpretation is not merely one of passive reception; judges have no alternative but to actively consider all relevant values, analogies, and arguments and then to create a rule that can be justified as fair to all sides that have legitimate interests in the matter.

There is a Star Trek episode in which a scientist wants to dismantle the android, Data, to see how he was made so that more like him can be built.¹⁰⁴ Because Data is a sentient being, the question arises whether he is a machine or a person.¹⁰⁵ If he is a machine, then he is the property of Star Trek and can be dismantled without his consent.¹⁰⁶ The trial is not going well.¹⁰⁷ Riker, the first officer, was forced to act as a prosecutor; Riker is arguing that Data is a machine, and Riker seems to be winning.¹⁰⁸

Captain Pickard is the defense attorney with no idea how to win.¹⁰⁹ Pickard is discouraged so he goes to the pub to speak with Guinan, the

¹⁰² See generally ALEXANDER, *supra* note 3, at 205.

¹⁰³ *Id.*

¹⁰⁴ *Star Trek: Next Generation: The Measure of a Man* (syndicated television broadcast Feb. 13, 1989).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

character played by Whoopie Goldberg.¹¹⁰ (Who wouldn't want to talk to Whoopie Goldberg if you were discouraged?)

Guinan says to Captain Pickard, “[Data is] about to be ruled the property of Starfleet. That should increase his value.”¹¹¹

“In what way?” asks Picard.¹¹²

“Well,” she says, “consider that in the history of many worlds there have always been disposable creatures.¹¹³ They do the dirty work.¹¹⁴ They do the work that no one else wants to do because it's too difficult, or too hazardous.¹¹⁵ And an army of Datas, all disposable, you don't have to think about their welfare, you don't think about how they feel. Whole generations of disposable people.”¹¹⁶

“You're talking about slavery,” Pickard says.¹¹⁷

Guinan replies, “Oh, I think that's a little harsh.”¹¹⁸

Pickard: “I don't think that's a little harsh. I think that's the truth. But that's a truth that we have obscured behind a comfortable, easy euphemism. Property. But that's not the issue at all, is it?”¹¹⁹

Pickard goes back to court with a new final argument: “Now, sooner or later,” he says, “this [scientist] or others like him will succeed in replicating Commander Data. And the decision you reach here today will determine how we will regard this creation of our genius. It will reveal the kind of a people we are . . . It could significantly redefine the boundaries of personal liberty and freedom, expanding them for some, savagely curtailing them for others.”¹²⁰

“Are you prepared to condemn him and all who come after him to servitude and slavery? Your Honor, Starfleet was founded to seek out new life. Well, there it sits. Waiting. You wanted a chance to make law. Well, here it is. Make a good one.”¹²¹

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* For a short clip of this conversation, see Paramount Domestic Television, *Picard & Guinan Discuss Slavery*, YOUTUBE (Nov. 13, 2015), <https://www.youtube.com/watch?v=6Eg67jDh2Ts>.

¹²⁰ *Star Trek: Next Generation: The Measure of a Man*, *supra* note 104.

¹²¹ *Id.*

According to Picard, we have been asking whether Data is property or a person.¹²² But that's not the right question.¹²³ The question is not what Data is, but who we are.¹²⁴

This is one of Greg Alexander's insights. Property is not out there; it is in here.¹²⁵

Property is not a thing; it is a practice.¹²⁶

Picard wins the lawsuit, and Data is deemed to have the right to be the author of his own life.¹²⁷ There is a party to celebrate Data's freedom, but Riker is not there.¹²⁸ Data goes to look for him.¹²⁹

Data says: "Sir, there is a celebration on the Holodeck."¹³⁰

Riker: "I have no right to be there . . . I came that close to winning, Data . . . I almost cost you your life!"¹³¹

Data says, "Is it not true that had you refused to prosecute, Captain Louvois would have ruled summarily against me?"¹³²

"Yes," says Riker.¹³³

Data pauses and says, "That action injured you, and saved me. I will not forget it."¹³⁴

Those two sentences—more than anything else in this Star Trek episode—demonstrate Data's humanity. He *sees* Riker; he understands why Riker did what he did and how much it cost Riker, how the psychic harm is no less real than a physical wound. Data reassures Riker; he recognizes the service Riker did for him and what it meant. Data is not "just a machine" but a person—a sentient being who is learning how to be a *mensch*. Riker is reassured and no longer feels that he must stay away, that he is not welcome at the party, that he has made himself a stranger not welcome among others, not entitled, as they are, to celebrate a person's liberation from an unjust death sentence.

"You're a wise man, my friend," Riker says.¹³⁵

122 *Id.*

123 *Id.*

124 *Id.*

125 See generally ALEXANDER, *supra* note 3.

126 See *id.*

127 *Star Trek: Next Generation: The Measure of a Man*, *supra* note 104.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

“Not yet sir,” replies Data. “But with your help, I am learning.”¹³⁶

Greg Alexander teaches us that property law is not about defining what property is, but about deciding who we are, what obligations we have to each other, and what it means to be human. We’re not wise yet, but Greg, with your help, we are learning.

¹³⁶ *Id.* For an extended version of this conversation between Data and Riker, see Paramount Domestic Television, *Star Trek TNG: ‘Measure of a Man’ Extended Scene: Data and Riker*, YOUTUBE (May 16, 2015), <https://www.youtube.com/watch?v=uzxgzxH8UCs>