Spring 2019

Masterpiece Cakeshop: A Case Study Brought to You by the U.S. Supreme Court

Edward J. Schoen
Rowan University, schoen@rowan.edu

MASTERPIECE CAKESHOP: A CASE STUDY BROUGHT TO YOU BY THE U.S. SUPREME COURT

Pat-a-cake, pat-a-cake, baker's man.
Bake me a cake as fast as you can.
Pat it, and prick it, and mark it with "B"
And put it in the oven for Baby and me![1]

EDWARD J. SCHOEN*

I. INTRODUCTION

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[2] the U.S. Supreme Court ruled seven to two that the Colorado Civil Rights Commission ("the Commission") violated the free exercise rights of a baker, who refused to sell a custom-designed wedding cake to a gay couple, by reflecting hostility toward the baker's religious beliefs during public hearings in the case and treating him differently from three other bakers who objected to creating wedding cakes with messages expressing derogatory views of same-sex marriage.[3] In reaching its decision, the Court sidestepped the chore of reconciling two fundamental principles: (1) whether the baker's refusal to create a wedding cake for a same-sex marriage reception was protected by his First Amendment rights to free exercise of religion and against compelled speech, and (2) whether Colorado has authority to protect the rights and dignity of gay people who seek to purchase goods and services for their wedding through its anti-discrimination statute.[4] Instead, the Court ruled the Commission violated its obligation to consider the baker's sincere religious objections with "the requisite religious neutrality that must be strictly observed."[5] In doing so, the Court acknowledged it postponed the reconciliation of the protections of free exercise of speech and religion and the protection against discrimination on the basis of sexual orientation to future cases, which "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[6]

---

[1] *Pat-a-cake, pat-a-cake, baker's man*, WIKIPEDIA (Dec. 20, 2018), https://en.wikipedia.org/wiki/Pat-a-cake,_pat-a-cake,_baker%27s_man. .

[*] J.D., Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey 08028.

[2] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[3] *Id*. at 1729-32. The facts of the *Masterpiece Cakeshop* case are examined in Part II. Justice Kennedy wrote the majority opinion in which Chief Justice Roberts and Justices Breyer, Alito, Kagan and Gorsuch joined. Justice Thomas filed an opinion concurring in part and concurring in the judgment in which Justice Gorsuch joined. Justice Kagan filed a concurring opinion in which Justice Breyer joined. Justice Gorsuch filed a concurring opinion in which Justice Alito joined. Justice Ginsburg filed a dissenting opinion in which Justice Sotomayor joined.

[4] Debra Cassens Weiss, *Supreme Court Cites Agency Hostility in Ruling for Christian Baker*, ABA JOURNAL (June 4, 2018), http://www.abajournal.com/news/article/supreme_court_rules_for_christian_ baker_who_refused_cake_ for_gay_wedding_ci/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[5] *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Weiss, *supra* note 4.

[6] *Id*. at 1732. Another reported case dealing with a wedding vendor who refused to sell a wedding cake to a same-sex couple is *In the matter of: Melissa Elaine Klein, dba Sweetcakes by Melissa*, Case Nos. 44-14 & 45-14 (Oregon

The *Masterpiece Cakeshop* decision decidedly failed to live up to its advanced billing. Erwin Chemerinsky, Dean of University of California at Berkeley School of Law, had hailed the case as a "blockbuster" involving a "profoundly significant" issues: whether a business has a "constitutional right to discriminate based on its owner's beliefs" or whether the government's interest in eradicating sexual-orientation discrimination is more important than the business's freedom to choose its customers.[7] The Cato Institute declared *Masterpiece Cakeshop* to be "an irresistibly compelling case because it appears to present a stark conflict between rights: the right to be free from discrimination, on the one hand, and the rights of free speech and the free exercise of religion, on the other."[8] The American Bar Association's *Preview of United States Supreme Court Cases* summed up the importance of the case as follows:

> This is one of the most closely watched cases on the Court's docket this term. That's because it deals with a critical and controversial follow-up issue to the Court's ruling in *Obergefell*: If same-sex couples have a right to marry (as they do), then do they also have a right to anti-discrimination protection under state and local laws, as against a wedding-cake artist's rights to free speech and free association?[9]

An article in the *ABA Journal* described *Masterpiece Cakeshop* as "one of the most debated and anticipated of the term, in no small part because it involves the law of cake and whether cake speaks" and because it is "at the forefront of a debate about whether creative professionals," including bakers, florists, caterers and photographers, "must provide their services for same-sex weddings when they have religious objections" to same-sex marriage.[10]

Bureau of Labor and Industries) (Order dated July 2, 2015), accessed on July 16, 2018 at https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf, in which: (n.b. this link works)

> Sweetcakes by Melissa, an Oregon bakery, refused to make a wedding cake for a same-sex couple based on the owners' religious convictions about marriage. The couple filed a complaint with the Oregon Bureau of Labor and Industries, and the ALJ determined the bakery's refusal to make a wedding cake for the couple constituted discrimination based on their sexual orientation, which is prohibited by Oregon's public accommodation law. The ALJ ordered Sweetcakes by Melissa to pay $135,000 in damages to the couple for emotional and mental suffering resulting from the denial of service. The bakery's owners are challenging the Oregon Bureau of Labor's decision in the Oregon Court of Appeals as a violation of their freedom of religion, arguing the First Amendment's protection of religious liberty prohibits such a ruling. Specifically, on appeal, the owners argue the decision violates their rights as artists to free speech, their rights to religious freedom, and their due process rights. It is worth noting, however, that Sweetcakes by Melissa recently closed the bakery.

L. Darnell Weeden, *Marriage Equality Laws Are a Threat to Religious Liberty*, 41 S. ILL. U. L.J. 211, 218-20 (2017).

[7] Erwin Chemerinsky, *Is There a Constitutional Right for a Business to Not Serve Customers?*, ABA J. (Nov. 30, 2017), http://www.abajournal.com/news/article/is_there_a_constitutional_right_for_a_business_to_not_serve_customers/.

[8] Christopher Landau & Sopan Joshi, *Looking Ahead: October Term 2017*, 2017 CATO SUP. CT. REV. 253 (2017).

[9] Steven D. Schwinn, *Can a State Apply Its Anti-discrimination Law to a Wedding Cake Artist Who Refuses to Make a Wedding Cake for a Same-Sex Couple Because of His Religious Objections to Same-Sex Marriage?*, 45 ABA PREVIEW 95 (2017).

[10] Mark Walsh, *Speech, Religion and Bias All Weighed in Masterpiece Cakeshop Case*, ABA J. (Nov. 2017), http://www.abajournal.com/magazine/article/speech_religion_bias_masterpiece_cakeshop/P1. *See also* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017) (anticipating what the potential decision in Masterpiece Cakeshop may have on constitutional law concerning intimate liberties).

Greeted as a blockbuster, *Masterpiece Cakeshop* emerged as a dud in which neither party clearly prevailed. While the Court ruled in favor of Phillips, it did so on more constricted grounds than he sought. The court ruled against the Commission, but hinted that future cases must be resolved with tolerance and without subjecting gay persons to indignities.[11] Perhaps the best explanation for the Court's narrow decision in *Masterpiece Cakeshop* appears in an editorial authored by Christine Emba for *The Washington Post*:

> Here's the complexity: The United States prides itself on its pluralism. And in a pluralistic society, differing beliefs in private inevitably lead to clashes of action in public, as in the *Masterpiece* case. Someone will have to decide which actions are allowed, and thus whose rights take priority in public. Someone will have to choose whether we value more that the baker be able to practice his religion freely or that a same-sex couple be free from one particular form of discrimination.
>
> But how to decide? That is what the court clearly did not want to do in this instance — and wisely so. When judicial review gets ahead of public consensus, it can leave the questions at hand more unsettled, not less. Instead, these decisions are ones that we, as citizens, will need to carefully take up.
>
> The problem is that we aren't ready to. What we are missing is an overarching idea of the common good, one that all citizens have bought into and can share. Because the only way to decide which of two competing rights wins out is to decide which best points us toward the larger good we want to achieve, and prioritize that.[12]

Nonetheless *Masterpiece Cakeshop* provides an excellent opportunity to analyze fundamental and clashing principles underlying the case: whether Phillips' creation of custom designed wedding cakes is a form of protected speech, whether requiring Phillips to sell wedding cakes to same-sex couples violates his right not to engage in compelled speech, whether Phillips can refuse to create a wedding cake for a same-sex couple as an exercise of religion, and whether denying same-sex couples the right to purchase goods and services for their wedding can be constitutionally prohibited under state anti-discrimination laws.

II. *MASTERPIECE CAKESHOP* STATEMENT OF FACTS

Jack Phillips, an expert baker, owned and operated a bakery called Masterpiece Cakeshop in Lakewood, Colorado for 24 years. He offered a variety of baked goods, including cookies, brownies, and elaborate custom-designed cakes for birthday, anniversary and wedding celebrations. Phillips is a devout Christian whose "main goal in life is to be obedient to" Jesus Christ and Christ's "teaching in all aspects of his life."[13] Phillips "seeks to honor God through his work at Masterpiece Cakeshop," and firmly believes that "God's intention for marriage from the beginning of history is that it is and should be the union of one-man and one-woman" and that

---

[11] Christine Emba, *Supreme Court Wasn't Ready to Decide on the Wedding Cake; Neither Are We*, PHILA. INQUIRER, June 11, 2018, at p. A10, http://www.philly.com/philly/opinion/commentary/supreme-court-masterpiece-cakeshop-gay-marriage-lgbt-opinion-20180611.html.

[12] *Id*.

[13] *Id*. at 1724.

"creating a wedding cake for a same-sex wedding would be the equivalent to participating in a celebration that is contrary to his own deeply held beliefs."[14]

In the summer of 2012, Charlie Craig and Dave Mullins entered Masterpiece Cakeshop and told Phillips they were interested in ordering a cake for their upcoming wedding in Massachusetts and ensuing reception in Colorado. They did not mention the design of the wedding cake they envisioned. Phillips told Craig and Mullins that he does not "create" wedding cakes for same-sex weddings, and offered to make them birthday cakes, shower cakes, cookies and brownies. Craig and Mullins then left the shop without any further discussion. The following day, Craig's mother, who had been present in the bakery and witnessed Craig and Mullins' interaction with Phillips, telephoned Phillips and asked why he declined to serve her son. Phillips replied that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage and because Colorado did not recognize same-sex weddings. He further explained that his creating a wedding cake for a same-sex wedding celebrates an event that goes directly against the teachings of the Bible, and his doing so would be viewed as his personal endorsement of that relationship.[15]

At that time Colorado did not recognize same-sex marriages; however, the Colorado Anti-Discrimination Act (CADA), pursuant to amendments enacted in 2007 and 2008, prohibited discrimination in places of public accommodation - broadly defined as "any place of business engaged in sales to the public"[16] - on the basis of sexual orientation.[17] In September 2012, Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in the Colorado Civil Rights Division ("the Division"). In their complaint, Craig and Mullins alleged that they were denied "full and equal service" at the bakery and that Phillips "standing business practice" was not to provide cakes for same-sex weddings.[18] The Division opened an investigation, and the investigator assigned to the complaint determined that, because of his religious beliefs, Phillips declined to sell custom wedding cakes to Craig and Mullins and about six other same-sex couples. The investigator found probable cause that Phillips violated CADA and referred the case to the Commission.[19]

The Commission determined that a formal hearing should be conducted, and forwarded the case to a state administrative law judge ("the ALJ"). On cross motions for summary judgment, the ALJ determined no disputes of material fact existed, decided Phillips' actions constituted discrimination on the basis of sexual orientation, and ruled in favor of Craig and Mullins. Phillips argued that CADA's compelling him to create a cake celebrating a same-sex marriage violated his First Amendment right not to express a message with which he disagreed and his First Amendment right to free exercise of religion. The ALJ rejected the compelled speech argument on the grounds preparing a cake was not protected speech and making Phillips create a cake for a same-sex wedding did not force him to adhere to an ideological point of view. The ALJ rejected the free

---

[14] *Id*.
[15] *Id*.
[16] *Id*. at 1725 (citing COLO. REV. STAT. § 24–34–601(1) (2017)).
[17] *Id*. at 1725 (citing COLO. REV. STAT. § 24–34–601(2)(a) (2017)). The Court quoted the following language from CADA: "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an indiv*id*ual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."
[18] *Id*.
[19] *Id*. at 1726.

exercise of religion argument because CADA was a "valid and neutral law of general applicability" and applying it to Phillips did not violate the Free Exercise Clause.[20]

The Commission fully affirmed the ALJ's decision, and ordered Phillips to "cease and desist" his refusal to sell wedding cakes to same sex-couples, institute staff training on CADA's public accommodations requirements, and prepare quarterly compliance reports for two years documenting the number of customers denied service, the reasons for the denial of service, and a description of the remedial actions taken.[21]

Phillips appealed to the Colorado Court of Appeals. The Court of Appeals affirmed the Commission's decision and order, and rejected Phillips' constitutional arguments. The Court of Appeals determined that selling a wedding cake to a same-sex couple did not "convey a celebratory message about same-sex marriage" and that compelling Phillips to comply with a valid and neutral law of general applicability does not constitute interference with the free exercise of religion.[22] The Colorado Supreme Court declined to hear the case, and Phillips appealed to the U.S. Supreme Court which, as noted above, ruled the Commission violated the free exercise rights of Phillips, because it failed to consider Phillips's sincere religious objections with requisite neutrality. [23]

III. How Did the U.S. Supreme Court Sidestep the Issues?

The U.S. Supreme Court assessed the challenge it faced in resolving the issues presented by *Masterpiece Cakeshop* early in its decision:

> The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.[24]

Having made this preliminary assessment, the Court then quickly established a two-paragraph exit strategy to avoid deciding those "difficult questions":

> One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.
>
> The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally

[20] *Id.*
[21] *Id.*
[22] *Id.* at 1727.
[23] *Id.* at 1732.
[24] *Id.* at 1723.

> but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.[25]

The Court's claim that it was difficult to identify the exact service Phillips failed to provide or the precise religious exercise impeded is misplaced, as Justice Thomas points out in his concurring opinion discussed more fully below. Phillips told Craig and Mullins he would not create a wedding cake for a same sex marriage, and told Craig's mother that he did not create wedding cakes for same-sex weddings because doing so was contrary to his religious beliefs. Hence, by fretting about the exact service Phillips declined to provide or the precise religious exercise Phillips was denied, the Court creates a smoke screen to hide the undisputed fact Phillips refused to create and sell a wedding cake to a same-sex couple.

Having obfuscated Phillips' refusal to create the wedding cake for a same-sex couple, the Court then switches gears and decides the Commission failed to consider the case with "religious neutrality."[26] The Court gleaned this hostility from comments the commissioners made during the Commission's formal, public hearings on May 30, 2014, and July 25, 2014. During the former hearing, commissioners "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community"; and one commissioner suggested that Phillips can believe what he chooses, but cannot act on those religious beliefs if he want to do business in Colorado and that a businessman who wants to do business in the state but has an issue with the law's impact on his religious beliefs better be able to compromise.[27] During the former meeting, another commissioner stated:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has [sic] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[28]

The commissioner then continued his line of thought by comparing Phillips' invocation of his religious beliefs to defenses of slavery and the Holocaust.

Noting that none of the Commissioners objected to these comments during the hearings, that the state court ruling affirming the commissioners' did not mention the comments, and that the commissioners failed to disavow the comments in briefs submitted to the Court, the Court said it "cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case."[29]

The Court buttressed this conclusion by examining three other decisions of the Division dealing with bakers who refused to create cakes which intermingled disparaging comments about same-sex marriage with quotations from religious text.[30] The customer requesting the cakes,

---

[25] *Id*.
[26] *Id*. at 1723.
[27] *Id*. at 1729.
[28] *Id*.
[29] *Id*.
[30] A description of the cakes Jack ordered appears in Justice Ginsburg's dissenting opinion as follows:

William Jack, filed a complaint with the Division in which he alleged that the cakes he ordered reflected his religious beliefs and that the bakers refused to make the cakes because they disagreed with his religious beliefs.[31] In all three cases, the Civil Rights Commission ruled in favor of the bakers and against the customer, because the requested cakes contained language and images which the bakers found to be derogatory and because the bakers offered to sell other products to the customer. In contrast, the Court noted, the Commission ruled against Phillips at least in part because the message conveyed on the cake would be attributed to the customer rather than Phillips, and, in reaching this decision, dismissed Phillips' offer to sell birthday and shower cakes and cookies and brownies to gay and lesbian customers as irrelevant.[32] Hence, the Court concluded, "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [William Jack's] objections."[33]

The Court noted that Phillips pressed the Commission's disparate treatment of his religious beliefs before the Colorado Court of Appeals and that the Court of Appeals addressed this issue "only in passing" in a footnote as follows:

> This case is distinguishable from the Colorado Civil Rights Division's recent findings that [other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed when they refused to create the requested cakes. (Citation omitted.). In those cases . . . there was no impermissible discrimination because the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message.[34]

This "footnote does not," the Court emphasized, "answer the baker's concern that the State's practice was to disfavor the religious basis of his objection," because the difference in treatment of Phillips' and Jack's complaints "cannot be based on the government's own assessment of offensiveness. Just as 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' "[35] Hence the Court concluded, by failing "to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs," "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[36]

> William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] ... 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.'

Id. at 1749.

[31] *Id*. at 1735. This information appears in Justice Gorsuch's concurring opinion.

[32] *Id*. at 1730.

[33] *Id*.

[34] *Id*. at 1730-31.

[35] *Id*. at 1731 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 62 (1943)).

[36] *Id*. Dean Erwin Chemerinsky disagrees the statements cited by the Court are sufficient to demonstrate hostility to Phillips' religious viewpoint. He noted that none of the statements quoted by the Court involved "bakers who were violating the Colorado statute by discriminating based on race, religion, sex or sexual orientation." He continued: "It is ironic that these mild statements were taken as establishing religious discrimination and President Trump's

IV. OTHER WEDDING VENDOR DISCRIMINATION CASES: FLOWERS, PHOTOGRAPHY AND RECEPTION VENUE

In addition to *Masterpiece Cakeshop*, there are a handful of cases dealing with same-sex couples' claims of discrimination against various wedding vendors who refused to make floral arrangements for, or photograph or cater the wedding ceremony and reception.[37] In *State of Washington v. Arlene's Flowers, Inc*., Baronelle Stutzman, the owner of Arlene's Flowers, who for years sold flowers to Robert Ingersoll and Curt Freed, a gay couple, refused to sell them flowers for their marriage on the grounds creating an arrangement of flowers for a same-sex marriage was contrary to her religious beliefs.[38] The Attorney General's Office filed an action on behalf of same-sex couple in Benton County Superior Court, which entered judgment for the same-sex couple and awarded permanent injunctive relief and money damages to Ingersoll and Freed.[39] On direct appeal, the Washington Supreme Court decided (1) Stutzman's refusal to sell flowers to a same-sex couple for their wedding ceremony and celebration constituted discrimination on the basis of sexual orientation contrary to the Washington Law Against Discrimination (WLAD)[40]; (2) WLAD does not violate First Amendment speech protections, because the sale of floral arrangements is not expressive conduct protected by the First Amendment[41]; and (3) WLAD did not violate Stutzman's right to religious exercise provided by the Washington Constitution[42] and by the First Amendment.[43] The Court concluded:

---

repeated calls of a Muslim ban did not." Erwin Chemerinsky, *Conservatives' victories in key cases are a harbinger of what is to come*, ABA J. (July 2, 2018), http://www.abajournal.com/news/article/chemerinsky_a_harbinger_of_what_is_to_come/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[37] Helpful and insightful discussion of these cases can be found in following law review articles: Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons*, 69 RUTGERS U. L. REV. 1593, 1608-12 (2017) and Curtis Schube, *SOGI Laws, Their Threat to Religious Liberty, and How to Combat their Trend*, 64 DRAKE L. REV. 883, 893-901 (2016). *See also* Ayesha Khan, *The Butcher, the Baker, the Candlestick Maker: When Non-Discrimination Principles Collide with Religious Freedom*, 50 Aug. Md. B.J. 42 (2017) and Douglas Laycock, *The Wedding Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49 (2018).

[38] State of Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), petition for cert. filed, 86 U.S.L.W. 3047 (U.S. Jul. 14, 2017) (No. 17-108), vacating judgment, 2018 W.L. 3096308 (June 25, 2018).

[39] *Id*. at 548-51. Notably these wedding vendor cases are not isolated examples of businesses refusing to provide services because of the storeowner's disagreement with the view of customers. Professors Stephanie Barclay and Mark Rienzi report:

> After the recent neo-Nazi demonstrations in Charlottesville, a swarm of businesses reacted by refusing to continue providing services to white supremacist organizations. A salon refused to continue styling the hair of a politician who would not take a position supportive of LGBT rights. A gay coffee shop owner recently refused to serve a group of pro-life activists, ejecting them from his store. . . . If one thinks that any of these businesses are justified in denying their services to individuals, groups, or events to which they object, then one must acknowledge that the government does not have an unassailable interest in coercing the provision of any product or service that is already offered to the public."

Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1629-30 (2018).

[40] *Id*. at 551-53.

[41] *Id*. at 556-60.

[42] *Id*. at 562-65.

[43] *Id*. at 566-67.

> The State of Washington bars discrimination in public accommodations on the basis of sexual orientation. Discrimination based on same-sex marriage constitutes discrimination on the basis of sexual orientation. We therefore hold that the conduct for which Stutzman was cited and fined in this case - refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding - constitutes sexual orientation discrimination under the WLAD. We also hold that the WLAD may be enforced against Stutzman because it does not infringe any constitutional protection. As applied in this case, the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious free exercise under either the First Amendment or article I, section 11 because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations.[44]

In *Elane Photography, LLC v. Willock,* Vanessa Willock e-mailed Elane Photography, LLC to request that it photograph her commitment ceremony to another woman. Elaine Huguenin, Elan Photography's co-owner and lead photographer, responded to Willock and told her that she photographs "traditional weddings" but not same-sex weddings. Seeking to verify Elane Photography's policy, Willock's partner, Misti Collinsworth, e-mailed Elane Photography and asked if it would photograph a wedding without mentioning the sex of the couple. Huguenin sent Collinsworth a list of prices and invited to meet with her discuss her services. Willock filed a discrimination complaint based on her sexual orientation against Elane Photography with the New Mexico Human Rights Commission. The Commission decided Elane Photography discriminated against Willock in violation of the New Mexico Human Rights Act (NMHRA), which prohibits public accommodations from discriminating against people based on their sexual orientation. Elane Photography appealed to the Second Judicial District Court for a trial de novo. On cross motions for summary judgment, the district court granted summary judgment for Willock. Elane Photography appealed that decision to the Court of Appeals, which affirmed the district court's decision. The New Mexico Supreme Court granted certiorari.[45]

Elane Photography argued that its refusal to photograph Willock's commitment ceremony did not violate NMHRA, because the photographs it was asked to take captured the celebration of an event which was contrary to Huguenin religious beliefs and which she did not want to endorse. Elane Photography claimed it would have taken portrait photographs of same-sex customers, but not photographs of the couple holding hands or showing affection for each other, even if "the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual."[46] The New Mexico Supreme Court rejected this argument. It noted that NMHRA broadly prohibits discrimination on the basis of sexual orientation "by any person in any public accommodation" and that Elane Photography's provides wedding photography services to heterosexual couples but refuses to provide those services to homosexual couples under equivalent circumstances. The Court found that Elane Photography's argument wrongfully attempts to make a distinction between an individual's status of being homosexual and his or her conduct in openly committing to a same-sex person. The Court stated, "when a law prohibits discrimination on the basis of sexual

---

[44] *Id*. at 568.
[45] Elane Photography, LLC v. Willock, 309 P.3d 53, 58-60 (N.M. 2013).
[46] *Id*. at 61.

orientation, that law similarly protects conduct that is inextricably tied to sexual orientation," and "there was no basis" to distinguish discrimination based on sexual discrimination from discrimination based on someone's public commitment to a person of the same sex. Hence, "Elane Photography's willingness to offer some services to Willock did not cure its refusal to provide other services that it offered to the general public."[47]

The Court exhaustively examined Elane Photography's claim that requiring it to photograph a same-sex commitment ceremony it violated her First Amendment rights to free speech and free exercise of religion. The court ruled requiring Elane Photography to photograph same sex weddings did not violate her right not to engage in compelled speech contrary to her personal beliefs, because (1) NMHRA does not compel Elane Photography to convey the government's message or to affirm a belief or to host or accommodate another speaker's message, and does not interfere "with Elane Photography's editorial judgment" when it regulates its "choice of clients"[48]; and (2) observers of Elane Photography's photographs are unlikely to associate those photographs with either its owner or its employees and assume Elane Photography "sees nothing wrong with same-sex marriage," any more than people attending the wedding think the photographer and the couple getting married share the same views "on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)."[49] The Court also ruled that NHMRA does not violate Elane Photography's free exercise rights, because (1) "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)," and (2) NHMRA is a neutral law of general applicability."[50]

In *Gifford v. McCarthy*, Cynthia and Robert Gifford, owners and operators of Liberty Ridge Farm, LLC, rent portions of their farm to serve as a venue for wedding ceremonies and receptions, and employ catering, kitchen and wait staff to provide wedding-related services such as a food and beverages, decoration and set-up services, and flower arrangements.[51] When Melisa McCarthy and Jennifer McCarthy, an engaged same-sex couple, sought to use Liberty Ridge as the venue for their wedding, Cynthia Gifford stated the farm did not host same-sex marriages. Alleging the Giffords engaged in unlawful discrimination based on sexual orientation, the McCarthys filed a complaint with the State Division of Human Rights (SDHR). SDHR investigated and found that probable cause existed to support the complaint, and an administrative law judge ("the ALJ") found that Liberty Farms is a place of public accommodation and that the Giffords illegally discriminated against the McCarthys on the basis of their sexual orientation. The ALJ awarded each McCarthy $1,500 in compensatory damages, imposed a fine in the amount of $10,000, and directed the Giffords to cease and desist from engaging in discriminatory practices. The Commissioner of Human Rights adopted the ALJ's finding and recommendations, and the Giffords initiated proceedings to annul the SDHR's determination.

The Court determined that Liberty Ridge's wedding facilities "comfortably" fit within the definition of a public accommodation and that Cynthia Gifford's communicated her unwillingness to allow the McCarthys to marry on the farm upon learning the McCarthys were a same-sex

---

[47] *Id*. at 62.
[48] *Id*. at 65-67.
[49] *Id*. at 69-70.
[50] *Id*. at 73.
[51] Gifford v. McCarthy, 137 A.D.3d 30, 33-34 (N.Y. App. Div. 2016). The case was transferred to the Appellate Division pursuant to the order of the Supreme Court of Renssalaer County under Executive Law § 298 requesting the Appellate Division to review the determination of the State Division of Human Rights. *Id*. at 33, 35.

couple.[52] The Court rejected the Giffords' argument that they denied services to the McCarthys not because of their sexual orientation, but because they opposed same-sex marriages on the basis of their religious beliefs. The Court stated: the "act of entering into a same-sex marriage is 'conduct that is inextricably tied to sexual orientation' and . . . there is no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone's conduct of publicly committing to a person of the same sex."[53] The Court also rejected the Giffords' argument that SDHR's compelling them to cater same-sex weddings was contrary to their sincere religious belief that marriage is "between one man and one woman under God" and therefore violated their religious exercise rights. The Court noted that the First Amendment right of free exercise does not relieve an individual from complying with a valid and neutral law of general applicability, "which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion."[54]

V. DOES CREATING A CUSTOMIZED WEDDING CAKE QUALIFY AS EXPRESSION PROTECTED UNDER THE FIRST AMENDMENT?

In his concurring opinion, Justice Thomas concludes Phillips' creation of custom wedding cakes is expressive.[55] Justice Thomas observes that "the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag."[56] Further, Justice Thomas notes, in determining whether conduct is sufficiently expressive, the Court asks whether the actor intended the conduct to be communicative and whether the conduct is reasonably understood by the viewer to be communicative. Once the Court determines conduct is expressive, Justice Thomas states, "the Constitution limits the government's authority to restrict or compel it.[57]

Justice Thomas then examined factors showing Phillips' creation of custom wedding cakes is expression. Phillips considers himself to be an artist. He includes an artist's paint palette with a paintbrush and baker's whisk in the bakery's logo. He carefully consults with the couple to ascertain their preferences and the details of the wedding to ensure the cake reflects the couple who ordered it. He takes exceptional care sketching the cake's design, choosing the color scheme, creating the frosting, baking, sculpting and decorating the cake, and delivering the cake to the reception. Phillips also thinks the wedding cake symbolically announces that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." In short, "[Phillips'] use of

---

[52] *Id*. at 37.
[53] *Id*.
[54] *Id*. at 38-39. *See* Weeden, *supra* note 6, at 221.
[55] *Masterpiece Cakeshop*, 138 S. Ct. at 1742-43. In contrast the Supreme Court of Washington held that the sale of floral arrangements for a wedding is not expressive conduct protected by the First Amendment, *Arlene's Flowers*, 389 P.3d at 548-51, and the New Mexico Supreme Court ruled photographs of the wedding of a same-sex couple would not be associated with the photographer who took them, *Elane Photography*, 309 P.3d at 69-70.
[56] *Masterpiece Cakeshop*, 138 S. Ct. at 1741-42 (citing respectively: Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991); Texas v. Johnson, 491 U.S. 397, 405-06 (1989); Spence v. Washington, 418 U.S. 405, 406, 409-11 (1974) (per curiam); Schacht v. United States, 398 U.S. 58, 62-63 (1970); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505-06 (1969); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 633-34 (1943); Stromberg v. California, 283 U.S. 359, 361, 369 (1931)).
[57] *Masterpiece Cakeshop*, 138 S. Ct. at 1742.

his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message," thereby qualifying as expressive conduct protected by the Constitution.[58]

Justice Thomas also castigates the determination by the Colorado Court of Appeals that Phillips' conduct was insufficiently expressive to be protected from state compulsion. The Court of Appeals found: (1) reasonable observers would not interpret Phillips' creation of the wedding cake as an endorsement of same-sex marriage, and (2) Phillips can post a disclaimer stating Colorado law prohibits him discrimination on the basis or sexual orientation and his creation of a wedding cake for a same-sex couple does not constitute an endorsement of same-sex marriage.[59] The former argument, Justice Thomas states, "would justify any law that compelled protected speech" and permit public accommodations laws (such as the Massachusetts law prohibiting the exclusion of parade participants on the basis of their sexual orientation) to modify the speaker's message.[60] The latter argument, Justice Thomas claims, would "justify any law compelling speech," which would permit the government to compel "speakers to affirm in one breath that which they deny in the next," and would force speakers to speak when they want to remain silent.[61]

It appears, then, that a good argument exists that creating a customized wedding cake qualifies as expression protected under the First Amendment. That conclusion, however, does not resolve *Masterpiece Cakeshop*, because there was no limitation placed on Phillips' artistic expression. Rather, he elected not to engage in artistic expression when he declined to create a wedding cake for Craig and Mullins. Further, the only speech Phillips engaged in was his conversation with the same-sex couple in which he explained that he would not design a wedding cake for them, because doing so violated his genuinely held religious principles. Phillips can certainly convey that same message to other same-sex couples, place a sign in his store window declaring his religious principles prohibit him from designing wedding cakes for same sex couples, and even place that message in advertisements promoting his bakery. Professor Culhane provides a telling story about a Philadelphia cheesesteak store which illustrates this point:

> Joey Vento, the owner of Geno's Steaks, did not like illegal immigrants--and especially did not like that the area around his South Philadelphia establishment

---

[58] *Id*. at 1742-43. Justice Thomas notes that wedding cakes traditionally have conveyed this message:

> A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *Id*., at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid*. Although the cake is eventually eaten, that is not its primary purpose. See *Id*., at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *Id*., at 97 ("Nothing is made of the eating itself"); Krondl 320-321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple. *Id*. at 1743.

[59] *Id*. at 1744.

[60] *Id*.

[61] *Id*. at 1745 (citing respectively Pacific Gas & Elec. v. Public Util. Comm'n of Cal., 475 U.S. 1, 16 (1986) and Prune Yard Shopping Center v. Robins, 447 U.S. 74, 99 (1980)).

> had recently become populated by Spanish speakers. So in 2006, he slapped a sign on the window where orders are placed: "THIS IS AMERICA. WHEN ORDERING, PLEASE SPEAK ENGLISH." The case dominated local news in Philly. Vento's supporters flocked to his business, while those who were outraged at what they saw as thinly veiled racism queued up right across the street at Pat's King of Steaks, Geno's legendary competitor. Vento was hauled before the Philadelphia Commission on Human Relations, and charged with discrimination against non-English speakers. He argued that he was expressing a political point of view, not discriminating. And he prevailed, because no witnesses could establish that Geno's Steaks actually refused service to anyone who did not speak English. In sum, the Commission vindicated Vento's argument that he was making a protected political statement, however crude and nasty.[62]

In short, there is no First Amendment infringement on Phillips' artistic expression. Phillips, like Joey Vento, can freely express his views on same-sex marriage, and as an artist he may continue to create and design artistic wedding cakes without interference in his artistic expression. Further, because the U.S. Supreme Court reversed the judgment of the Colorado Supreme Court and invalidated the Commission's order, Phillips is now free to refuse to sell wedding cakes to same-sex couples.[63]

VI. DOES REQUIRING PHILLIPS TO SELL WEDDING CAKES TO SAME-SEX COUPLES CONSTITUTE COMPELLED SPEECH?

In his concurring opinion, Justice Thomas emphasizes that Phillips' refusal to sell wedding cakes to same-sex couples stems from his religious faith, which forbids him from celebrating or bearing witness to same-sex marriage.[64] Further, Justice Thomas noted, Phillips follows his religious faith in operating his bakery.

> Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries.[65]

Moreover, Justice Thomas explains, Colorado's justification for requiring Phillips to create customized cakes for same-sex couples – preventing Phillips from denigrating the dignity of same sex couples and subjecting same-sex couples to humiliation, frustration and embarrassment – as "completely foreign to our free-speech jurisprudence." "States cannot," Justice Thomas says, "punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified," because doing so "amounts to nothing less than a proposal to limit speech in the

---

[62] John G. Culhane, *Balancing First Amendment Freedom of Expression with the Anti-Discrimination Imperative*, 24 WIDENER L. REV. 230, 253-54 (2018).
[63] *Masterpiece Cakeshop*, 138 S. Ct. at 1732.
[64] *Id*. at 1744.
[65] *Id*. at 1745.

service of orthodox expression."[66] Such an objective is anathema to free speech. Indeed, Justice Thomas observes, Phillips told Craig and Mullins that he would make them birthday cakes, cookies and brownies but just did not make cakes for same-sex weddings. Justice Thomas said it was difficult to see how that statement "stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment."[67] Further, Justice Thomas states, worries about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25–foot cross, conduct a rally on Martin Luther King Jr.'s birthday, or circulate a film featuring hooded Klan members brandishing weapons and threatening to "bury the niggers."[68]

Hence, according to Justice Thomas, because Phillips's creation of customized wedding cakes is expression and because Phillips religious beliefs required him to refuse to make customized wedding cakes for same-sex couples, the Commission's order directing Phillips to create customized wedding cakes for same-sex couples requires him to engage in expression with which he does not wish to be associated. More particularly, forcing Phillips to create customized wedding cakes for same-sex couples "requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated – the precise message he believes his faith forbids."[69] Hence, the Commission likely violated Phillips' right not to be compelled to engage in speech.

One commentator disagrees that requiring Phillips to create wedding cakes for same-sex marriages is compelled speech.[70] He notes that "creating wedding cakes, even expensive, unique cakes is not necessarily expressive conduct," because wedding cakes are not a traditionally recognized expressive medium and cannot be said to provide a particularized message.[71] Furthermore, Phillips' equation of his artistic cake making with painting and sculpting, as suggested by his bakery's name, decorations and logo, is insufficient to warrant the extension of protections traditionally accorded artists. Otherwise, branding oneself as an artist would be enough to elevate "any craftsperson or artisan or Subway employee" to protected status and permit the self-proclaimed artist to deny service to customers on First Amendment grounds.[72] The commentator concedes, however, that if the cake is "designed to bear a 'particularized message,' it may qualify as speech." He indicates, for example, if Craig and Mullins had asked Phillips to make them a tiered rainbow cake for their reception, the cake might qualify for First Amendment protection, because the rainbow is the widely recognized symbol of LGBT rights movement and would be recognized by observers as expressive speech.[73]

While the commentator's perspective is thought-provoking, it misses the mark. To begin with, Phillips is unequivocally deemed to be an expert designer of wedding cakes and has built his business on that reputation. Secondly, the fact that Phillips did not discuss the design of the

---

[66] *Id*. at 1746.
[67] *Id*. at 1747 (citing respectively Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574-75 (1995); Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000); and Snyder v. Phelps, 562 U.S. 443, 448 (2011)).
[68] *Id*. (citing respectively Virginia v. Black, 538 U.S. 343 (2003), Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), and Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).
[69] *Id*. at 1744.
[70] Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 147 (2018).
[71] *Id*. at 150-51, 156.
[72] *Id*. at 157.
[73] *Id*. at 158.

wedding cake with Craig and Mullins does not eradicate the fact that Phillips himself believes creating wedding cakes for same-sex couples sends messages which were contrary to his genuinely held religious beliefs and with which he did not want to be associated, namely that same-sex weddings are weddings and that same-sex weddings should be celebrated. Hence, it appears compelling Phillips to create wedding cakes for same-sex couples constitutes compelled speech.[74]

VII. CAN PHILLIPS REFUSE TO CREATE WEDDING CAKES FOR SAME-SEX COUPLES UNDER THE FIRST AMENDMENT PROTECTION AGAINST COMPELLED SPEECH?

The U.S. Supreme Court has considered compelled speech in four major decisions.[75] In *West Virginia State Board of Education v. Barnette*, the Court considered the constitutionality of the Board of Education's resolution "ordering the salute to the flag become 'regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag.' "[76] A student's failure to participate in the salute to the flag was deemed to be "insubordination" punished by expulsion from school. Readmission to school was denied until the expelled student complied, and absence from school during the expulsion period was considered to be an unlawful absence and grounds for declaring the student delinquent. The student's parents were liable for prosecution and, if convicted, subject to fines not exceeding $50 and a jail term not exceeding thirty days.[77]

---

[74] Professor Carmella argues that a distinction must be made on religious objections to participating in activities, such as performing abortions or providing abortifacients, which are contrary to the objectors' conscience, and religious objections against activities, such as designing a cake for a same-sex couple, because the actor does not want to appear to endorse the activity. She notes:

> The doctor who refuses to perform an abortion and the baker who refuses to bake a cake for a same-sex wedding share some superficial similarities: both are in a secular business and both make a conscience claim that they do not want to be "complicit" in conduct they deem immoral. Yet their claims are profoundly different, and the doctor's refusal, but not the baker's, is protected by law. One main difference is that while the doctor is directly participating in the offending act, the baker is not. . . . But the "wrong" that troubles the baker--the same-sex marriage--does not occur through his hands. Indeed, I would maintain that the baker, by baking the cake, does not participate at all in the immoral act. Obviously, there is no causation or proximate responsibility, but neither is there participation--not even indirect participation--in the immoral act. The wedding event occurs quite apart from a cake, or flowers, or photographs, or a hall; and the marriage itself continues until a divorce or the death of one of the spouses. The baker's refusal to provide goods and services for the event is a refusal to endorse or affirm the immoral marriage. The act of marrying and being married are acts done by the couple, not the vendors. The wedding vendor cases are about approbation and not about acts done by the couple, not the vendors. The wedding vendor cases are about approbation and not about direct or even indirect participation in an immoral act. This is why the complaints of dignitary harm by customers turned away are so common: the refusal is not about committing a wrong through "my own hands;" it is about sending a message that I disagree with your independent choices and will not lend my approval to them.

See Carmella, *supra* note 37, at 1611-12.

[75] *See* Mark A. Strasser, *What's Fair for Conscientious Objectors Subject to Public Accommodation Laws*, 48 N.M. L. REV. 124, 125-36 (2018).

[76] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943). "What is now required is the 'stiff-arm salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.' " *Id*. at 628-29.

[77] *Id*. at 629.

Students who were Jehovah's Witnesses and refused to salute the flag were expelled from school and threatened with being sent to reformatories for juvenile delinquents, and their parents were prosecuted or threatened with prosecution.[78] Plaintiffs brought suit in federal district court seeking an injunction restraining enforcement of compulsory participation in the salute the flag against Jehovah's Witnesses, whose religious beliefs prohibit them from saluting the flag.[79] A three judge panel granted an injunction prohibiting the enforcement of the salute the flag mandate against the plaintiffs and all other members of the Jehovah's Witnesses.

The Board of Education appealed directly to the U.S. Supreme Court. The Court observed that forcing students to participate in the salute to the flag compels them to declare and affirm a belief in what the flag symbolizes and to "communicate by word and sign his acceptance of the political ideas [the flag represents]."[80] Nor does the improper compulsion to participate in the salute the flag depend on the religious beliefs of the person objecting or the sincerity with which those beliefs are held, because "[w]hile religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual."[81] Furthermore, while infringements of speech may be constitutional "to prevent grave and immediate danger to interests which the state may lawfully protect," the students' refusal to participate in the salute to the flag is "harmless to others."[82] Affirming the district court's issuance of the injunction prohibiting the enforcement of the regulation mandating participation in the salute to the flag, the Court famously declared:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[83]

Similarly, in *Wooley v. Maynard*, George Maynard, a resident of New Hampshire and a follower of the Jehovah's Witnesses faith, covered up the words "Live Free or Die" on his passenger vehicle license plate, because that motto was repugnant to his faith. Mr. Maynard was issued three citations for violating a New Hampshire statute making it a misdemeanor to obscure the figures or letters on any license plate. He was convicted on all three citations, but refused to pay the fines imposed by the district court.[84] Mr. Maynard filed an action in federal district court seeking injunctive and declaratory relief. In his affidavit filed with the District Court, Mr. Maynard stated: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."[85] The District Court issued an injunction enjoining New

---

[78] *Id*. at 630.
[79] *Id*. ("Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it.").
[80] *Id*. at 633.
[81] *Id*. at 634-35.
[82] *Id*. at 639, 642.
[83] *Id*. at 642.
[84] Wooley v. Maynard, 430 U.S. 705, 707-08 (1977).
[85] *Id*. at 713.

Hampshire from arresting and prosecuting the Maynards for covering up that portion of their license plate containing the words "Live Free or Die."[86]

On appeal, the U.S. Supreme Court noted: "New Hampshire's statute in effect requires that [the Maynards] use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty," contrary to the First Amendment, which "protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[87] The Court also determined that the two interests advanced by New Hampshire were not sufficiently compelling to justify the mandate to display the state motto on the Maynards' license plate. The first – that police officers can more readily determine whether passenger cars are carrying the proper license because the motto appears only on passenger car licenses – was belied by the fact that passenger car licenses consist of a specific configuration of letters and numbers, making the passenger licenses readily identifiable. The second – the state's desire to promote an appreciation of history, state pride, and individualism – was insufficient, because it was not ideologically neutral and did not outweigh "an individual's First Amendment right to avoid becoming the courier for such message."[88] The Court concluded "the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates," and affirmed the judgment of the District Court.[89]

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[90] the U.S. Supreme Court ruled that the South Boston Allied War Veterans Council ("the Veterans Council"), an unincorporated association of individuals elected from various South Boston veterans groups which annually organizes and conducts Boston's St. Patrick's-Evacuation Day Parade ("the Parade"), could not be compelled by the government to allow the Gay, Lesbian and Bisexual Group of Boston ("GLIB"), a social organization of persons who are homosexual or bisexual and their supporters, to march in the parade.[91] The Court initially determined that the Parade was expression for purposes of the First Amendment. It was a festive event in which people in costumes and uniforms, marching bands and floats, and colorful flags and banners entertained the spectators lining the streets and the television viewers in their homes.[92] While conceding the Veterans Council was rather lenient in admitting diverse groups with a wide range of messages to its parade, relaxed admissions requirements did not forfeit the parade organizers' constitutional protections.[93] Rather, the Court noted, the First Amendment protects the parade organizers' rights to assemble a multifaceted message of their own choosing, much the same way the First Amendment protects cable operators' selection of programs to be rebroadcast and newspaper editors' assembly of diverse voices on the editorial page.[94]

Because GLIB was formed for the very purpose of marching in and communicating its ideas as part of the Parade,[95] the state court's application of the public accommodations act

---

[86] *Id.* at 709.
[87] *Id.* at 715.
[88] *Id.* at 716-17.
[89] *Id.* at 717.
[90] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).
[91] *Id.* at 560-61, 580-81.
[92] *Id.* at 568-69.
[93] *Id.* at 569-70.
[94] *Id.* at 570.
[95] *Id.*

produced an order essentially requiring petitioners to alter the expressive content of their parade.[96] Such compelled speech violates the fundamental autonomy given to the speakers under the First Amendment to choose the content of their own message.[97] The Court continued:

> Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.[98]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., the U.S. Supreme Court considered the constitutionality of the Solomon Amendment,[99] which was enacted by Congress in response to law schools' "restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military."[100] The Solomon Amendment provided that, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." The Forum for Academic and Institutional Rights, Inc. ("FAIR"), an association of law schools and law faculties, adopted a policy opposing discrimination based a number of factors including sexual orientation. FAIR members sought to prevent military from recruiting on their campuses, because they objected to a policy, subsequently repealed, prohibiting a person from serving in the Armed Forces "if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex."[101] Arguing that "the forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association," FAIR initiated an action in federal district court seeking an injunction against enforcement of the Solomon Amendment.[102] The district court determined that recruiting is conduct and not speech and that Congress could regulate the expressive aspect of the conduct

---

[96] *Id.* at 573.
[97] *Id.* at 574.
[98] *Id.* (citations omitted).
[99] 10 U.S.C. § 983 (2000 ed. and Supp. IV).
[100] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 51 (2006).
[101] *Id*. at 52 (citing 10 U.S.C. § 654, which was subsequently repealed by Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010)).
[102] *FAIR*, 547 U.S. at 52-53.

under the test set forth in *United States v. O'Brien*,[103] and denied the preliminary injunction.[104] The Third Circuit Court of Appeals reversed the district court and remanded for the district court to enter a preliminary injunction against the enforcement of the Solomon Amendment. The U.S. Supreme Court granted certiorari.[105]

The U.S. Supreme Court determined that the Solomon Amendment did not infringe on FAIR's First Amendment right to engage in speech or not to be associated with speech with which it disagreed. The Court noted that the Solomon Amendment "neither limits what law schools may say nor requires them to say anything" and that law schools "remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."[106] While the Court conceded that the law schools provide assistance to the military recruiters and that assistance involved elements of speech, such as e-mails or posted notices on bulletin boards, that assistance was "a far cry" from mandatory salute the flag exercises in *Barnette*[107] and the "live free or die" motto in *Wooley*.[108] Indeed, the Court noted, accommodating the military's recruiting message "does not affect the law school's speech, because the law schools are not speaking when they host interviews and recruiting receptions." Allowing military on campus and providing them with recruiting services are not inherently expressive, do not suggest law schools agree with the recruiters' expression, and do not restrict what law schools may say about military policies.[109] Likewise, allowing the military to recruit at law schools does not "associate" the law school with anything the recruiters might express and does not force a law school to accept members it does not want. Recruiters are "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." Moreover, students and faculty "are free to associate to voice their disapproval of the military's message," and "nothing about the [Solomon Amendment] affects the composition of the group by making group membership less desirable."[110] Reversing the Third Circuit, the Court concluded:

---

[103] In United States v. O'Brien, 391 U.S. 367 (1968), defendant, David O'Brien, was tried and convicted of burning his selective service registration certificate contrary to Section 12(b)(3) of the Universal Military Training and Service Act of 1948, which prohibits the forging, alteration, destruction, and mutilation of a selective service card. *Id*. at 370-71. On appeal, the First Circuit Court of Appeals decided Section 12(b)(3) was an unconstitutional abridgment of O'Brien's First Amendment rights. The U.S. Supreme Court reversed. The Court rejected O'Brien's argument that destruction of his selective service registration card was protected "symbolic speech" protected by the First Amendment. *Id*. at 373. The Court also ruled that, even if the Court assumed the card's destruction was a combination of speech and nonspeech elements, the government interest advanced by Section 12(b)(3) outweighed any incidental restriction on speech. *Id*. at 376. More particularly, the issuance of the draft certificates showing the registration and eligibility of individuals to serve in the military was a legitimate and substantial means of promoting "the constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end," and Section 12(b)(3) is an appropriately narrow means of protecting that interest. *Id*. at 377, 382. The test developed by the Court for resolving such disputes is as follows: "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

[104] *FAIR*, 547 U.S. at 53.

[105] *Id*. at 54-55.

[106] *Id*. at 60.

[107] *Barnette* is discussed *supra* at notes 76-83.

[108] *Wooley* is discussed *supra* at notes 84-89.

[109] *FAIR*, 547 U.S. at 65.

[110] *Id*. at 69-70.

> To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the school children in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.[111]

Neither *Hurley* nor *FAIR* supports the proposition compelling Phillips to create wedding cakes for same-sex marriages triggers unconstitutional compelled speech. To begin with, the

---

[111] *Id*. at 70. *Dale* is a freedom from compelled association case. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the U.S. Supreme Court considered the constitutionality of the expulsion of James Dale from the Boy Scouts because he was homosexual. Active in scouting from ages eight to eighteen, Dale applied for adult membership as an Assistant Scout Master of Troup 73. His membership was approved around the time he left home to attend Rutgers University. At Rutgers, he became active in the Lesbian/Gay Alliance, advocated increasing gay role models for homosexual teenagers, and was identified in a newspaper article as the copresident of the Lesbian/Gay Alliance. *Id*. at 644. The Monmouth Boy Scout Council revoked his adult membership, because Boy Scouts policy denied membership to homosexuals. *Id*. at 644-45. Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court, alleging his expulsion violated New Jersey's public accommodations law, which prohibited discrimination on the basis of sexual orientation. *Id*. at 645. The New Jersey Superior Court ruled that the Boy Scouts was not a place of public accommodation, but rather was a "distinctly private group exempted from coverage under New Jersey's law, and that the Boy Scouts' policy of not admitting homosexuals was protected by the First Amendment freedom of expressive association." *Id*. The New Jersey Superior Court's Appellate Division reversed, holding that the public accommodations law applied to the Boy Scouts and was violated by the expulsion of Dale. *Id*. at 646. The New Jersey Supreme Court affirmed, deciding that the Boy Scouts was a public accommodation and that, because the membership of the Boy Scouts was large and nonselective and inclusive rather than exclusive, and because the organization's practice was to invite or allow nonmembers to attend meetings, the membership of the Boy Scouts was not sufficiently personal or private to warrant First Amendment protection under the freedom of intimate association. *Id*. The New Jersey Supreme Court also said that it was not persuaded the Boy Scouts associate "in order to preserve the view that homosexuality is immoral" and that Dale's membership "does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.' " *Id*. at 647. The New Jersey Supreme Court concluded that *Hurley* does "not require deciding the case in favor of the Boy Scouts because the reinstatement of Dale does not compel Boy Scouts to express any message." *Id*. The U.S. Supreme Court preliminarily laid the foundation of its freedom of association analysis by focusing on the Boy Scouts' mission statement - "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential," *id*. at 649 - the Scout Oath - "On my honor I will do my best to do my duty to God and country and obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight," *id*. - and the Scout Law - "A Scout is: Trustworthy, Obedient, Helpful, Thrifty, Friendly, Brave, Clean, Kind, Reverent," *id*. - all of which, the Court emphasized, underscored the core purpose of the Boy Scouts to instill a system of values and moral beliefs through engagement in expressive activity, *id*. at 649-650. Further, the Boy Scouts claimed "it does not want to promote homosexual conduct as a legitimate form of behavior" and teaches homosexual behavior is not "morally straight," *id*. at 651, and its position statement maintained: "The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate." *Id*. at 652. Admitting Dale to adult membership in the Boy Scouts as an assistant scoutmaster, the Court noted, "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id*. at 653. Relying on *Hurley*, the Court stated that the case must be resolved by balancing "the associational interest in freedom of expression" with the state's interest in eliminating discrimination through its public accommodations law. *Id*. at 658-59. Concluding the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scout's right to freedom of expressive association," the Court held "the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law" and reversed the judgment of the New Jersey Supreme Court. *Id*. at 659, 661.

expression in *Hurley* was the annual parade which takes place on March 17 and combines two celebrations: St. Patrick's Day and, since as early as 1737, the evacuation of royal troops and Loyalists from the City of Boston.[112] The Veterans Council selects the organizations whose members participate in the parade, and, as noted above, declined to approve GLIB's participation in the parade.[113] While each organization selected to participate in the Parade identifies itself and shapes and conveys its own message as a parade participant, the Council decides what message is included (and celebrated) in the Parade.[114] As the Court noted:

> Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.[115]

The *Hurley* expression differs from the *Masterpiece* expression, because the assembly of the expression in a parade is different from the assembly of expression on a wedding cake. The former involves the assembly of disparate groups in a parade to form a message. The latter involves the expression of a single baker opposed to same-sex marriage because his fundamental religious beliefs.

Secondly, and perhaps more importantly, the Court determined that Massachusetts public accommodation law was "peculiarly applied" when it mandated the inclusion of GLIB in the Parade.[116] "There is no dispute," the Court noted, "about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. [The Veterans Council] disclaim[s] any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march."[117] Hence Massachusetts public accommodations law was applied, not to prevent discrimination against individuals denied access to a place of public accommodation, but to alter the message the Veterans Council wished to convey in its parade. The court explained:

> Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation . . . once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of *declaring the sponsors' speech itself to be the public accommodation*. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication

[112] *Hurley*, 515 U.S. at 560.
[113] *Id.* at 560-61.
[114] *Id*. at 574.
[115] *Id*.
[116] *Id*. at 572.
[117] *Id*.

> produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[118]

In short, public accommodations laws cannot be used to gain admission to or alter an individual's or an organization's speech, because the speech itself, rather than individuals discriminated against, becomes subject to accommodation. In contrast, when Colorado orders Phillips to create wedding cakes for same-sex couples, Colorado does not change Phillips' speech or alter his message that he opposes same-sex marriage because it is contrary to his religious principles. Hence *Hurley* does not support Phillips' claim of compelled speech.[119]

Likewise, *FAIR* does not support the contention that Colorado's accommodation law compels Phillips to engage in speech, because allowing military recruiters on campus is not inherently expressive and does not associate the law school with anything the recruiters might say. In contrast, as noted above, Phillips creation of wedding cakes arguably is expressive conduct. Moreover, Phillips has garnered a reputation for creating artistic wedding cakes, which are eagerly sought by his customers and whose authorship is recognized by the wedding guests and enforced by his routine participation and direction in the cake cutting part of the wedding celebration. Hence, unlike *FAIR*, the elements of expressive conduct and association are present in *Masterpiece Cakeshop*.

In contrast to *Hurley* and *FAIR*, however, compelling Phillips to create wedding cakes for same-sex marriages seems to fall within the purview of *Barnette* and *Woolley*, both of which involved compelled speech contrary to sincerely held religious beliefs.[120] As noted above, creating wedding cakes can safely qualify as protected expression, and, like the school students forced to participate in the salute the flag and the New Hampshire residents forced to carry the state's motto on their license plate, Phillips objects to the creation of wedding cakes for same-sex couples, because designing the wedding cakes is compelled expressive conduct which conflicts with his religious beliefs. Hence Phillips has a good argument that Colorado's public accommodating law mandating his creation and sale of wedding cakes to same-sex couples violates the First Amendment protection against compelled speech. Notably, however, a significant difference exists between *Barnette* and *Wooley* and the situation confronting Phillips. In both *Barnette* and *Wooley* the state's interest in compelling speech contrary to genuinely held religious beliefs was weak. That, as is more fully discussed in Part IX, cannot be said about the interest advanced by the state's public accommodation law in *Masterpiece Cakeshop*, namely eliminating discrimination against protected classes in the sales of goods and services.[121]

---

[118] *Id*. at 572-73 (emphasis added).

[119] Nor does *Elane Photography*, 309 P.3d at 69-70, discussed *supra* at notes 45-50, in which the New Mexico Supreme Court ruled requiring Elane Photography to photograph same sex weddings did not violate her right not to engage in compelled speech contrary to her personal beliefs.

[120] There is no indication Colorado's public accommodation law altered Phillips' message that he refuses to provide a wedding cake for same sex marriages. Likewise, because Phillips' business practice is to participate in the wedding reception to conduct the cake cutting ceremony and because he has gained considerable recognition as an artistic designer of wedding cakes within the Lakewood, Colorado, community, there likely may be an association of Phillips with approval of same-sex marriage. Hence both *Hurley* and *FAIR* are arguably not controlling on *Masterpiece Bakery*.

[121] Kyle C. Velte, *Religious Freedom, Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOK. L. REV. 1109, 1151-52 (2017) ("[T]he purpose

VIII. CAN PHILLIPS REFUSE TO CREATE WEDDING CAKES FOR SAME-SEX COUPLES UNDER THE EXERCISE OF RELIGION CLAUSE?

This is a difficult question to answer, because it places two fundamental rights – the right to be free of discrimination in the purchase of goods and services and the right to exercise religion – in opposition to each other. Most U.S. Supreme Court decisions have considered the constitutionality of statutes which effected infringements on the exercise of religion, and, at first blush, it seems that *Masterpiece Cakeshop* is the opposite, because it deals with an accommodation law which seeks to protect individuals against discrimination. Nonetheless, despite its laudable intentions, the Colorado public accommodation law is a government statute which triggers infringement on the baker's religious exercise rights and hence must pass constitutional muster.

Prior to 1990, the U.S. Supreme Court resolved cases which challenged legislation on the grounds it infringed on the party's religious exercise rights by examining whether the infringement advanced a compelling interest of sufficient magnitude to override the interest claiming Free Exercise Clause protection. In *Sherbert v. Verner*, Adell Sherbert, a member of the Seventh-day Adventist Church was fired from her job, because she would not work on Saturday, the Sabbath Day of her religion.[122] Ms. Sherbert's application for unemployment benefits was denied by the Employment Security Commission on the grounds her refusal to work on Saturdays disqualified her under a provision of the unemployment law that required her to accept suitable work when offered. The Commission's finding was sustained by the Court of Common Pleas, and, upon appeal, affirmed by the South Carolina Supreme Court, which rejected her claim that the unemployment compensation law as applied to her abridged her rights under the Free Exercise Clause.[123] In reversing that ruling, the U.S. Supreme Court noted that the South Carolina Supreme Court decision cannot succeed against an Exercise of Religion claim unless there was no infringement on her free exercise rights or because the burden on her free exercise right is justified by a compelling state interest.[124] Significantly, a South Carolina statute provided that, when textile plants are authorized to operate on Sundays, no employee who is conscientiously opposed to Sunday work can be compelled to work on Sunday. Hence, "South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which . . . infringes the Sabbatarian's religious liberty."[125] Moreover, South Carolina failed to demonstrate a compelling justification for infringing on Ms. Sherbert's religious exercise. South Carolina claimed before the U.S. Supreme Court that permitting her to collect unemployment benefits might trigger specious unemployment benefit claims or dilute the unemployment compensation fund. Those interests, however, were not raised before the South Carolina Supreme Court, and, even if they were, there was no evidence those concerns warranted a substantial infringement of religious liberties.[126]

In *Wisconsin v. Yoder*, parents who were members of the Amish religion and Mennonite Church challenged a Wisconsin statute that required children to attend public or private school

---

behind antidiscrimination laws goes well beyond expressing any government's message because they (1) protect individuals from humiliation and dignitary harm and (2) guarantee that goods and services are freely obtainable in the marketplace.").

[122] Sherbert v. Verner, 374 U.S. 398, 399 (1963).

[123] *Id*. at 399-402.

[124] *Id*. at 403, 410.

[125] *Id*. at 406.

[126] *Id*. at 407.

until reaching age 16.[127] The parents insisted that requiring their children to attend school beyond completion of eighth grade was contrary to their Amish religious beliefs and way of life, because doing so would expose them and their children to the censure of the church community, endanger their own and their children's salvation, and threaten the survival of the Amish community.[128] The parents were charged, tried, and convicted of violating the compulsory school attendance law and fined the sum of $5 each.[129] The Wisconsin Circuit Court affirmed the convictions, but the Wisconsin Supreme Court sustained respondent's claim under the Free Exercise Clause and reversed the convictions, determining that the State failed to demonstrate its interest in establishing and maintaining an educational system overrides the parents' free exercise of their religion.[130] The U.S. Supreme Court affirmed, ruling that, in order for Wisconsin to compel Amish students to attend school beyond the eighth grade contrary to their religious beliefs, Wisconsin must demonstrate there is no interference with the free exercise of religious or "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[131] The Court determined that the Amish parents demonstrated convincingly that accommodating their religious objections by not compelling one or at the most two years of education will not impair the physical or mental health of their children or their ability to become self-supporting and responsible citizens, and that the State failed to demonstrate with particularity how its interest in compulsory education would be adversely affected by granting and exemption to the Amish.[132]

The U.S. Supreme Court reached a similar decision in *Thomas v. Review Board of Indiana Employment Section Division*.[133] Eddie Thomas, a Jehovah's Witness, worked for several years in the roll foundry in the Blaw-Knox Foundry, which fabricated steel for a variety of industrial uses. The roll foundry closed, and Blaw-Knox transferred him to the department that fabricated turrets for military tanks. On his first day on the job, Thomas realized his work was weapons related. He confirmed that all of the other departments in which there were openings engaged in the same work. Unable to transfer to another department and claiming his participation in the manufacture of military weaponry was contrary to his religious beliefs, he quit his job and applied for unemployment benefits. His application for unemployment benefits was denied. That decision

---

[127] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
[128] *Id*. at 209.
[129] *Id*. at 208.
[130] *Id*. at 213.
[131] *Id*. at 214.
[132] *Id*. at 234-36. The court noted:

> [T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Id. at 235-36.
[133] Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).

was reversed by the Indiana Court of Appeals, but sustained on appeal to the Supreme Court of Indiana, which determined that "it was unclear what his belief was, and what the religious basis of his belief was" and that "another Jehovah's Witness had no scruples about working on tank Turrets."[134] Deciding the denial of unemployment benefits to Thomas violated his right to free exercise of religion, the U.S. Supreme Court reversed the Supreme Court of Indiana.[135] The U.S. Supreme Court ruled that it was not within judicial purview to evaluate whether the employee "correctly perceived the commands of their common faith."[136] Rather, the narrow function of the reviewing court was to determine whether the worker "terminated his work because of an honest conviction that such work was forbidden by his religion."[137] Furthermore the interest advanced by Indiana for denying unemployment benefits – that widespread unemployment would result – was not supported by evidence and did not constitute a sufficiently compelling reason to infringe on Thomas' free exercise right.[138]

In 1990, the test of "whether the challenged action imposed a substantial burden on the practice of religion, and, if it did, whether it was needed to serve a compelling government interest,"[139] was upended by the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*.[140] In *Smith*, two members of the Native American Church sought unemployment benefits from the State of Oregon after they were fired from their jobs for ingesting peyote for sacramental purposes. The State of Oregon denied the benefits, because consuming peyote was a crime; the Oregon Supreme Court, applying the compelling interest balancing test, ruled the denial of benefits violated the Free Exercise Clause.[141] Noting that "conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs,"[142] the U.S. Supreme Court reversed, ruling the compelling interest balancing test "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," because every regulation of conduct as applied to a religious objector was presumed to be invalid, and the protection of religious liberty does not require such a result.[143] Rather, the right of free exercise of religion does not exempt an individual from the obligation to comply with a "valid and neutral law of general applicability" simply because the law mandates conduct contrary to the individual's religious beliefs.[144] Hence, because the

---

[134] *Id*. at 709-13.
[135] *Id*. at 720.
[136] *Id*. at 716.
[137] *Id*.
[138] *Id*. at 719.
[139] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014). This test was used in *Sherbert* discussed *supra* at notes 122-126, and *Yoder* discussed *supra* at notes 127-132.
[140] Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).
[141] *Id*. at 875.
[142] *Id*. at 879.
[143] *Id*. at 888. Following *Smith,* concern arose that the elimination of the compelling interest balance test and the passage of the Religious Freedom Restoration Act (RFRA), discussed below in note 145, would trigger an increase in claims by religious claimants seeking exemptions from laws everyone else is required to obey. Professors Barclay and Reinzi dispute that claim contending their "empirical analysis" demonstrates "religious exemption requests remain much less common than other expressive claims, and are less likely to result in invalidation of government actions." They conclude: "Thus, far from creating anomalous preferential treatment that threatens the rule of law, a religious exemption framework simply offers a similar level of protection courts have provided for dissenting minority rights housed elsewhere in the First Amendment." Barclay, *supra* note 39, at 1596.
[144] *Smith,* 494 U.S. at 879.

ingestion of peyote was prohibited under Oregon law and that law was a valid and neutral law of general applicability and therefore consistent with the Free Exercise Clause, the denial of unemployment compensation was permissible under the First Amendment.[145]

Constitutional protection of religious exercise is not provided, however, when the statute is not a neutral law of general applicability. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the U.S. Supreme Court considered the constitutionality of ordinances passed by the City of Hialeah prohibiting the unnecessary or cruel killing of animals. The ordinances were passed in response to the announcement of Ernesto Pichardo, the president and priest of the Church of the Lukumi Babalu Aye, Inc. (the Church"), whose congregants practice the Santeria religion, that the Church leased land in the City of Hialeah on which it planned to erect a church, school, cultural center and museum. Pichardo also proclaimed that the Church would bring into the open the practice of the Santeria faith, which included ritual animal sacrifice "performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration"[146] Claiming that the ordinance violated their rights under the Free Exercise Clause, the Church and Pichardo filed an action for declaratory judgment against the City of Hialeah.

The District Court found there were four compelling reasons supporting the enactment of the ordinance: (1) animal sacrifices present a substantial health risk to the practitioners and the general public, because the animals to be sacrificed are uninspected and often kept in unsanitary conditions and animal remains are found in public places; (2) animal sacrifice inflicted emotional injury to children who witness the sacrifice; (3) the method of killing the animals was unreliable and inhumane and the animals sacrificed experienced "a great deal of fear and stress"; and (4) the City had a compelling interest in restricting the slaughter or sacrifice to areas zoned for slaughterhouse use. Concluding that the compelling interests of the City outweighed the interest of the Church and its congregants in the free exercise of religion, the District Court ruled in favor

---

[145] *Id*. at 890. Congress responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which provides (1) laws that are neutral toward religion may impose the same burden on the exercise of religion as laws intended to burden the exercise of religion, 42 U.S.C. § 2000bb(a)(2); (2) the government is prohibited from substantially burdening a person's exercise of religion even if it stems from a rule of general applicability 42 U.S.C. § 2000bb-1(a), and (3) the government is prohibited from substantially burdening the exercise of religion, unless the government demonstrates the burden furthers a compelling government interest and is the least restrictive means of attaining that interest, 42 U.S.C. § 2000bb-1(b). Notably, however, RFRA identified the "Necessary and Proper" clause as the enumerated power for regulating federal agencies, and the exercise of free speech clause as the enumerated power for regulating the states, *Hobby Lobby*, 134 S. Ct. at 2761. The U.S. Supreme Court subsequently decided in *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997), that Congress exceeded its authority under the exercise of free speech clause, because the "stringent test RFRA demands" vastly exceeds "any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." *Id*. at 533-34. In response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 STAT. 803, 42 U.S.C. § 2000cc et seq. RLUIPA amended RFRA's definition of the exercise of religion to eliminate any reference to the First Amendment and to define the exercise of religion to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A). RLUIPA also mandated that the exercise of religion "be construed in favor a broad protection of religious exercise, to the maximum permitted by the terms of this chapter and the Constitution," 42 U.S.C. § 2000cc-3(g). The Supreme Court upheld this legislation against an Establishment Clause challenge in Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."). As amended, RFRA provides "very broad protection for religious liberty," which goes "far beyond what this Court has held is constitutionally required." *Hobby Lobby*, 134 S. Ct. at 2767. *See City of Boerne*, 521 U.S. at 514 ("neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest").

[146] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525-28 (1993).

of the City of Hialeah.[147] The Eleventh Circuit Court of Appeals affirmed in a one-paragraph *per curiam* opinion, which stated the ordinance was consistent with the Constitution and noted the District Court applied a standard which was stricter than the standard applied in *Smith*.[148]

The U.S. Supreme Court reversed, deciding the objective of the ordinances was "the suppression of the central element of the Santeria worship service,"[149] because:

> [T]he ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.[150]

The Court also decided the ordinances "fall well below" the minimum standards of "general applicability," because the ordinances are underinclusive with respect the killing of animals except those occasioned by religious sacrifice, underinclusive with respect to the city's interest in public health by failing to address the killing and disposal of animals by hunters and the disposal of animal remains in restaurants' garbage, and underinclusive because of the exemption provided for the slaughter or processing for sale of small numbers of hogs and cattle per week.[151] Because the ordinances were neither neutral nor of general application, strict scrutiny applied.[152] Since the ordinances were "underinclusive to a substantial extent" to the interests advanced by the City of Haileah and "only conduct motivated by religious conviction . . . bears the weight of the government restrictions," the ordinances failed to meet the strict scrutiny standard and were unconstitutional and void."[153]

It would appear, then, that Phillips cannot refuse to create wedding cakes for same-sex couples on the grounds doing so violates his rights under Exercise of Religion Clause. Restrictions on religious exercise rights no longer have to be supported by a compelling government interest to pass constitutional muster, and the operative presumption employed in *Sherbert*, *Yoder* and *Thomas* that the constitutional protection of religion exercise rights invariably prevails has been terminated by *Smith*. Further, because Colorado's public accommodation law appears to be a "valid and neutral law of general applicability,"[154] its constitutionality under the Exercise of Religion Clause is determined by *Smith,* and unintended and incidental infringement on the religious freedom of Phillips does not make the accommodation laws unconstitutional. Notably this conclusion is supported by the decisions of the Washington Supreme Court in *Arlene's*

---

[147] *Id*. at 529.
[148] *Id*. at 530.
[149] *Id*. at 542.
[150] *Id.* Furthermore, the Hialeah city attorney requested an opinion from the attorney general of Florida as to whether the City could enact an ordinance "making religious animal sacrifice unlawful." The attorney general responded that the ritual sacrifice of animals for purposes other than consumption was illegal under both state and the City of Hialeah's ordinance. *Id*. at 527. This buttresses the Court's conclusion the ordinance was drafted for the purpose of suppressing the religious practices of the Santeria.
[151] *Id*. at 543-46.
[152] *Id*. at 546.
[153] *Id*. at 547.
[154] Velte, *supra* note 121, at 1154 ("antidiscrimination laws are "neutral law[s] of general applicability" and thus do not impermissibly violate the right to the free exercise of religion).

Flowers,[155] the New Mexico Supreme Court in *Elane Photography*,[156] and the New York Appellate division in *Giffords*,[157] all of which determined that, because their respective public accommodation laws were valid and neutral laws of general applicability, mandating the sale of floral arrangements, the photographing of a commitment ceremony, and the rental of a reception venue did not constitute compelled speech contrary to the florist's, photographer's, or the caterer's religious views. Hence, it is unlikely Phillips can refuse to create and sell wedding cakes to same-sex couples on the grounds of the Free Exercise Clause.[158]

This conclusion is supported by an essay entitled "Contemplating Masterpiece Cakeshop," authored by Professors Terri Day and Danielle Weatherby, in which they note that "[o]pponents of marriage equality are increasingly asserting their own religious beliefs to justify discrimination against LGBT members in public accommodations."[159] Further, they state, if Phillips and other business owners are permitted to invoke their exercise of religion rights to refuse to serve LGBT customers, the government not only acquiesces to discrimination but undermines public accommodation laws, which "prevent the economic and social balkanization prevalent when businesses decide to serve only their own kind, and ensures the uninhibited flow of intra- and interstate commerce."[160] The authors note that both public accommodation laws and the government protection of free exercise of religion advance an important public purpose: maintenance of the social order. Indeed, public accommodation laws were enacted for the purpose of maintaining social order, and First Amendment protection of religious expression has traditionally been tailored to achieve the same purpose. Hence, while individuals can believe polygamy is consistent with their religious philosophy, anti-polygamy statutes can curb the practice of engaging in polygamy in order to preserve social order.[161] Likewise, while members of the Native American Church can believe ingesting peyote in violation of criminal law is a valid component of their religious practices, the state can deny unemployment benefits to individuals convicted of violating the law, because religious ceremonies "subversive of good order" cannot "excuse conduct prescribed by valid criminal law which did not specifically target the religious practice."[162] If both public accommodation laws and First Amendment protection of the exercise of religion are to continue to maintain social order, enforcement of accommodation laws must prevail over the exercise of religion.[163]

---

[155] *Arlene's Flowers*, 389 P.3d at 568. *Arlene's Flowers* is discussed *supra* at notes 38-44.
[156] *Elane Photography*, 309 P.3d at 73. *Elane Photography* is discussed *supra* at notes 45-50.
[157] *Gifford*, 137 A.D.3d at 38-39. *Gifford* is discussed *supra* at notes 51-54.
[158] *See* Velte, *supra* note 121, at 1154 ("To date, courts that have considered the Antidiscrimination Question have rejected the [exercise of religion] arguments put forth by the Religious Right. It takes little effort to unmask these legal arguments for what they are--part of the Religious Right's long-game: to establish "a conservative Christian social order inspired by religious law. To achieve this goal, they seek to remove religious freedom as an integral part of religious pluralism and constitutional democracy, and redefine it in Orwellian fashion to justify discrimination by an ever wider array of 'religified' institutions and businesses.")
[159] Terri R. Day & Denielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 W&L L. REV. ONLINE 86, 96 (2017).
[160] *Id*. at 99 (citing Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 293 (Colo. App. 2015)).
[161] *Id*. at 97 (citing Reynolds v. United States, 98 U.S. 145 (1878) (upholding a criminal polygamy law that punished conduct, rather than belief, that was "in violation of social duties or subversive of good order")).
[162] *Id*. at 98 (citing Employment Division v. Smith, 494 U.S. 872, 890 (1990) (reaffirming Congress' power to regulate criminal conduct that affects interstate commerce and is "subversive of good order")).
[163] *Id*. at 102. Moreover, the authors argue, failure to enforce public accommodation laws endangers interstate commerce and inflicts economic losses:

Similarly, Professor Kyle Velte contends that enforcement of antidiscrimination statutes does not violate the Free Exercise Clause, because (1) antidiscrimination laws are valid laws which prohibit conduct the state is free to regulate,[164] (2) antidiscrimination laws are not grounded in any religious ideology, but rather protect residents and visitors from discrimination based on membership in a protected class,[165] (3) antidiscrimination laws "are generally applicable, because they do not target religiously motivated conduct and do not provide broad opportunities for secular exemptions,"[166] and (4) antidiscrimination claims do not present "hybrid" claims, because any speech claim fails in discrimination cases thereby eliminating the presentation of independent constitutional claim.[167] Professor Velte also notes that these four reasons comply with the requirements laid down by the U.S. Supreme Court in *Smith* for determining whether the enforcement of a criminal statute violates free exercise rights. [168]

IX. DO SEXUAL ORIENTATION DISCRIMINATION LAWS TRUMP THE FIRST AMENDMENT PROTECTION AGAINST COMPELLED SPEECH?

Professor Lawrence G. Sager notes that public accommodation laws are "remarkably widespread." They "exist in forty-five states, in the District of Colombia, and in a number of cities, and all of them "bar discrimination on race, sex, nationality, and religion, and about half bar discrimination on grounds of sexual orientation and/or gender identity."[169] Professor Lucien Dhooge reports that a "growing number of states, thirty-one in all, prohibit discrimination in private or public employment or both on the basis of sexual orientation with a smaller number of states extending protection on the basis of gender identity," and that twenty-one states and the District of Columbia "prohibit businesses deemed to be public accommodations from refusing to serve prospective patrons on the basis of sexual orientation."[170]

> One of the reasons the Framers discarded the Articles of Confederation and designed a whole new constitutional framework was to empower a strong federal government to regulate interstate commerce. The adverse economic effects caused by private discrimination in public accommodations are measurable. Moreover, state approval of this type of discrimination has substantial, negative effects on interstate commerce and encroaches on federal powers to regulate interstate commerce. Indeed, states that acquiesce to discrimination by enabling religious objections like Jack Phillips' will suffer economic losses as people and businesses flee to more LGBT-friendly environments, resulting in economic barriers or creating commercial balkanization. Ultimately, state sanctioned private discrimination in public accommodations will affect interstate commerce, which raises potential Dormant Commerce Clause concerns.

Id. at 99-100.

[164] Kyle C. Velte, *Defeating the Religious Rights Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 49 (2016).

[165] *Id*.

[166] *Id*. at 50.

[167] *Id*. at 50-51.

[168] *Id*. at 49.

[169] Lawrence G. Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U. L.J. 585, 586-87 (2016).

[170] Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation – Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 320-21 (2015). Professor Dhooge also provides an interesting analysis of the statutes' approach in prohibiting discrimination on the basis of sexual orientation and defining public accommodations. *Id*. at 338-39. He also finds the statutes are "relatively uniform" in identifying protected classes. He notes:

Professor John Culhane argues that enforcement of sexual orientation discrimination laws advances an important societal interest that outweighs the right of free expression.[171] He notes that the U.S. Constitution and federal, state and local laws have "enshrined anti-discrimination imperatives in law" to offer protection to enumerated categories of people, and that "the history of discrimination against the LGBTQ community has been no less harrowing" than discrimination suffered by racial minorities, especially African-Americans and Native Americans, women, and religious minorities.[172] Even so, comparatively little protection against discrimination has been accorded to LGBTQ people. No protection against discrimination is provided by federal law as of 2018, except for a "contested reading of 'discrimination based on sex' under the Civil Rights Act."[173] Further, only "[a]bout half the states, and many localities, offer protections to sexual minorities (sometimes including the trans-community, but sometimes not)." Hence, "in the rest of the country, it remains possible to fire a gay employee, reject a lesbian couple's attempt to purchase a home, and - yes - turn away a gay couple that enters a bakery to buy a wedding cake."[174] This permits businesses to inflict "dignitary harm" to LGBTQ people when the businesses deny basic services for no good reason and, in many places, leaves them to struggle to find a place to serve them.[175] Not enforcing discrimination laws on the grounds of protecting religious expression, he notes, would "permit a painter [to] invite the public to his gallery at which he painted portraits of them for a fee but [refuse] to paint black people" and a "musician [to] invite the world to his studio where he wrote songs about them for a fee but [refuse] to do so for Jews or Muslims." Surely, he says, the "First Amendment protects a lot, but not that conduct."[176] LGBTQ people deserve the same protection. "Where laws offer protection based on sexual identity, their very presence signals recognition that the state's interest in gathering that class under the anti-discrimination imperative is compelling," and "slicing and dicing the categories enumerated in the law, and then to decide that some of them are less important than others, is to create protection with an asterisk."[177]

The First Amendment prohibition against compelled speech protects the interests of speakers who do not want to be associated with or compelled to declare and affirm a belief they do not share. More particularly, as noted above, forcing Phillips to create wedding cakes for same-sex weddings requires him to acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated – the precise message he believes his faith forbids. Protecting Phillips from compelled speech is an important First Amendment safeguard. Nonetheless,

---

> All of these statutes, with the possible exception of Minnesota, include heterosexuality, homosexuality and bisexuality within the term "sexual orientation." These statutes, with the possible exceptions of Delaware and Vermont, also extend the definition to include perceived orientation of persons by others. However, only eighteen of these statutes expressly include gender identity or expression. The definitions of gender identity and expression vary slightly among those statutes extending protection to this group.

Id. at 340-41.

[171] Culhane, *supra* note 62, at 230.

[172] *Id*. at 245.

[173] *Id*. at 247.

[174] *Id*. at 247-48.

[175] *Id*. at 246-47. Professor Culhane notes that Lambda Legal, a leading national LGBTQ legal advocacy organization, maintains a regularly updated list of state anti-discrimination laws protecting on the basis of sexual orientation and gender identity. *In Your State*, LAMBDA LEGAL, https://www.lambdalegal.org/states-regions/in-your-state (last visited Jan 30, 2019). *Id*. at 247 n.78.

[176] Culhane, *supra* note 62, at 250-51.

[177] *Id*. at 251. Professor Culhane's argument that public accommodation laws must be enforced at the expense of restricting the right of religious exercise differs sharply from Justice Thomas' position that enforcement of accommodation laws improperly compels speech contrary to the First Amendment as discussed *supra* at note 69.

granting Phillips an exemption from public accommodation laws on the grounds of compelled speech would allow all businesses to claim their sincerely held religious beliefs, which must be accepted at face value and are exempt from evaluation or question, exempt them from providing goods and services to same-sex couples. Preventing the infliction of "dignitary harm" to same-sex couples certainly outweighs Phillips' claim of compelled speech, particularly because he can take various steps – e.g. placing a sign in his store window informing the public of his religious convictions[178] – to demonstrate his lack of association with the speech he abjures. In short, enforcement of public accommodation laws outweighs Phillips' claim of compelled speech. As noted by Professor Mark Strasser,

> The First Amendment right not to speak is less robust than commonly thought, especially when the State is not prescribing the content of the message at issue. Further, when the public does not understand the message unless further explanation is offered, the "message" itself likely does not trigger First Amendment guarantees. Public accommodation laws are of growing importance because the Nation seems to be growing increasingly fractured along a variety of fault lines. This is not the time to gut such laws merely because some individuals have sincere reservations about providing services for members of disfavored groups. The claimed right not to speak in these vendor cases has no basis in the First Amendment as currently understood. Further, recognition of such a right would do great harm and lead to further tearing of the social fabric, a result that no one should applaud.[179]

Hence, it appears that protecting same-sex couples from sexual orientation discrimination by enforcing public accommodation laws trumps the right of individuals to avoid compelled speech which conflicts with their genuinely held religious beliefs.[180]

---

[178] If such a sign were posted, Phillips may not be asked to provide services he would otherwise feel compelled to refuse. While posting that sign may cause some existing and potential customers to choose another bakery, it is less deleterious than refraining from baking wedding cakes at all, and pales by comparison to the indignity inflicted on same-sex couples who are denied goods and services in the marketplace. *See* Culhane, *supra* note 62, at 237 ("[T]he proper balance to strike in cases pitting anti-discrimination imperatives against the freedom of expression allows the conscientious objector to state his or her view, but not to deny service based on it. Because difficult questions can arise as to when a statement of belief shades into a coercive (and therefore unacceptable) message, I propose that legislators create safe-harbor language that would perhaps be written into existing anti-discrimination laws, and that, if followed, would be a defense against discrimination claims. Business owners, employers, or realtors who choose other language to express their beliefs could do so, but at the risk that the language would be interpreted as "disinviting" protected classes of people to use their services - and therefore be deemed to run afoul of anti-discrimination laws.") *See* Alex Riley, Religious Liberty vs. Discrimination: Striking a Balance When Business Owners Refuse Service to Same-Sex Couples Due to Religious Beliefs, 40 S. Ill. U. L.J. 301, 318-20 (2016) (providing a model statute to allow refusals by those in the wedding industry to provide goods and services to same-sex weddings).

[179] *Id.* at 144.

[180] *See* Adam K. Hersh, *A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN L. REV. 260, 317 (2018):

> But the question is not whether religious conflicts between sellers and buyers or employers and employees are desirable; they are inevitable in a pluralistic society. Rather, the question is: When such conflicts arise, which side should be allowed to invoke the force of law? The answer that prevents religious fracturing and allows for pluralistic discourse is that government should avoid supporting parties who seek to exclude participants from the market on religious grounds and should instead support parties who risk exclusion from

X. Recap

The discussion and analysis provided above supports the following conclusions:

(1) While a good argument exists that Phillips' creation of customized wedding cake qualifies as expression protected under the First Amendment, his refusal to create a wedding cake for Craig and Mullins obviates any infringement on Phillips' artistic expression.

(2) Compelling Phillips to create wedding cakes for same-sex couples likely constitutes compelled speech, because doing so forces him to acknowledge same-sex weddings should be celebrated contrary to his religious beliefs and, because he is a successful and well known baker, he is associated with the wedding cake.

(3) Phillips has a good argument that Colorado's public accommodating law mandating his creation and sale of wedding cakes to same-sex couples violates the First Amendment protection against compelled speech, provided the interests advanced by protecting his right of expression outweigh the interests advanced by enforcement of Colorado's public accommodation law.

(4) Phillips cannot refuse to create wedding cakes for same-sex couples under the Exercise of Religion Clause, because Colorado's public accommodation law appears to be a valid and neutral law of general applicability, and unintended and incidental infringement on the religious freedom of Phillips does not make the accommodation law unconstitutional.

(5) Because the interests advanced by enforcement of Colorado's public accommodation law in protecting same-sex couples from sexual orientation discrimination substantially outweigh the First Amendment interest advanced in protecting Phillips from compelled speech, Phillips likely cannot succeed in his compelled speech claim.

XI. Summary and Conclusion

In *Masterpiece Cakeshop*, the U.S. Supreme Court ruled in favor of Jack Phillips, a baker who refused to create a wedding cake for a same-sex couple, because doing so violated his deeply held religious beliefs. The U.S. Supreme Court reversed the decision of the Colorado Court of

---

> the market--the victims of religious discrimination, not the perpetrators. A constitutional rule providing that answer is one that will ensure confident pluralism's endurance in the face of ineradicable difference.

Another commentator argues in favor of narrowly tailored exemptions for those individuals who refuse to sell goods and services on the basis of their sincerely held religious beliefs. *See* Sarah Jackson, *The Unaccommodating Nature of Accommodations Laws: Why Narrowly Tailored Exemptions to Antidiscrimination Statutes Make for a More Inclusive Society*, 68 ALA. L. REV. 855, 876 (2017):

> A narrowly tailored exemption for these objectors, rather than a black and white consideration of permissible encroachments on rights, could protect the people on both sides of the issue. The *Sherbert* compelling interest test is an option for situations in which the competing interests are those of individuals, rather than a state interest burdening an individual's liberty. In these wedding vendor cases, two individuals are protected by a state antidiscrimination statute and their opposition is protected under the First Amendment. A narrow exemption provides an avenue for the states to continue pursuing antidiscrimination ends while still respecting the religious liberty of individuals.

Appeals upholding the determination of the Colorado Human Rights Commission that the baker's refusal violated Colorado's public accommodations law prohibiting discrimination on the basis of sexual orientation. The U.S. Supreme Court also invalidated the order of the Commission requiring Phillips to cease and desist his refusal to create cakes for same-sex couples, because the Commission failed to consider Phillips's sincere religious objections with requisite neutrality.

The U.S. Supreme Court's decision, like the month of March which comes in like a lion and leaves like a lamb, failed to live up to the heightened expectations that the decision would be a blockbuster. Instead, the U.S. Supreme Court sidestepped the chore of reconciling two fundamental principles: whether the baker's refusal to create a wedding cake for a same-sex marriage reception was protected by the First Amendment and whether Colorado has authority to protect the rights and dignity of gay people who seek to purchase goods and services in the marketplace. In that sense, the decision is a dud. Neither party prevailed, and Jack Phillips remains free to refuse to create wedding cakes for same-sex couples. Perhaps it is all for the better. Perhaps the country simply is not ready for a U.S. Supreme Court decision choosing whether a baker's ability to practice his religion freely is more important than the right of a same-sex couple to be free of discrimination in the purchase of goods and services.

Nonetheless, while those excited about the prospects for a blockbuster decision are likely disappointed, *Masterpiece Cakeshop* might have an alternative use: serving as a case study permitting students to analyze fundamental and clashing principles underlying the case: whether Phillips' creation of custom designed wedding cakes is a form of protected speech, whether requiring Phillips to sell wedding cakes to same-sex couples violates his right not to engage in compelled speech, whether Phillips can refuse to create a wedding cake for a same-sex couple as an exercise of religion, and whether denying same-sex couples the right to purchase goods and services for their wedding can be constitutionally prohibited under state anti-discrimination laws.