THE RIGHT TO SAY, BUT NOT TO DO: BALANCING FIRST AMENDMENT FREEDOM OF EXPRESSION WITH THE ANTI-DISCRIMINATION IMPERATIVE

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"*At some point, you have to decide what counts as speech and what doesn't. Otherwise, all human behavior could be said to be expressive*."[1]

INTRODUCTION

What accommodation should the law strike between two competing imperatives: the right to free expression and the right to be free from discrimination? Consider three cases in which the issue might be raised.

The first is an actual case, about to be decided by the Supreme Court at the time of this writing. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[2] pits Jack Phillips, a cake designer, against a gay couple, David Mullins and Charlie Craig. The couple tried to buy a cake for their upcoming wedding, but Phillips refused to do so on religious grounds – under his interpretation of Christianity, marriage is limited to opposite-sex unions.[3] Since Colorado has a law protecting against sexual orientation discrimination in places of public accommodation,[4] the couple complained of their treatment to the Colorado Civil Rights Commission.[5] Phillips argued that his closely related freedoms of religion and expression protected his decision, but he lost at every administrative and judicial level in Colorado.[6] When the Colorado Supreme Court sided with Mullins and

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[1] Adam Liptak, *Where to Draw Line on Free Speech? Wedding Cake Case Vexes Lawyers*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/us/politics/gay-wedding-cake-free-speech-first-amendment-supreme-court.html (quoting Eugene Volokh).

[2] The case below is captioned Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[3] *Id.* at 276. The facts set forth here are taken from the appellate decision, which in turn relied on the record established by the Administrative Law Judge ("ALJ") in the civil rights case. *Id*. at 276-79.

[4] COLO. REV. STAT. § 24-34-601 (2017).

[5] *Masterpiece Cakeshop, Inc.*, 370 P.3d at 276.

[6] After the ALJ made findings of fact and ruled in favor of the couple, the case went before the Colorado Civil Rights Commission, which affirmed. *See id*. The Colorado Court of Appeals again affirmed. *Id.* The freedom of religion argument did not gain traction because Colorado does not have a law that protects non-compliance with laws of general

Craig, Phillips filed a petition for *certiorari*, which was granted.[7] The case was argued in December 2017, and will be decided in the very near future.[8] The outcome is difficult to predict, as the Justices – especially Justice Kennedy, who is likely the deciding vote – seemed sympathetic to both sides.[9]

The second, hypothetical case involves a young teenaged girl who goes into a different bakery, also in search of a cake—but for her father's birthday. The cake designer and the teen have an animated discussion, and the girl shares with the designer some idea as to what images will appear on the cake. At some point during the conversation, the girl mentions that she has "two dads" – whereupon the designer says: "I'm sorry dear, but in that case I can't create the cake for you. I don't support same-sex relationships."

The third, hypothetical case takes us back to Jack Phillips's cake shop, but on an alternate Earth. But now imagine that Phillips does not object, but that his business partner – who has nothing to do with cake design – overhears the conversation. When Craig and Mullins return to pick up the cake, the partner refuses to ring up the sale. In this case, he has an objection to same-sex unions, even though alternate-Earth Phillips does not.

These cases highlight the difficulty of deciding whether, and to what extent, the law should define and protect one's freedom of expression, and when it should not. The *Masterpiece Cakeshop* case often elicits sympathy for Phillips, but only by submerging the interests of the couple in enjoying the benefits of the non-discrimination law. The other two cases seem likely to tilt empathy toward the teenager and the couple. But perhaps there is an accommodation that would protect those affected by discrimination in all of

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applicability on the basis of religious belief. *Id.* at 288-92. Without such a law in place, the Supreme Court's holding in *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), controls. In *Smith*, the Court held that allowing religious exemptions to neutral laws would lead to a chaotic situation in which everyone could decide for themselves which laws to obey, and then put the state to the burden of demonstrating a compelling reason for the law. *Id.* at 879.

[7] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[8] All of the documents in the case, including both the audio file and a transcript of the oral argument, are collected under one webpage at the popular website, SCOTUSblog. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ (last visited May 3, 2018).

[9] *See e.g.*, Transcript of Oral Argument at 51, 62, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [hereinafter "Transcript of Masterpiece Cakeshop Oral Argument"]. At times, Justice Kennedy seemed confounded by Phillips' attorney's argument, wondering at one point how she could distinguish a pre-made cake from one he'd be designing for the couple. *Id.* at 5. He also asked the attorney for the United States (involved on Phillips' side, as an amicus) whether the position he was advocating amounted to "an ability to boycott gay marriages." *Id.* at 27. But when questioning the attorney for the state of Colorado, he expressed concern about the state's conduct, finding it "neither tolerant nor respectful of Mr. Phillips' religious beliefs." *Id.* at 62.

the cases, including *Masterpiece Cakeshop*, while recognizing the expressive interest of those with sincere beliefs.

This article locates that accommodation in existing First Amendment jurisprudence and principles. I argue that the 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.

This proposal requires foregrounding. I begin by discussing freedom of speech and expression with special regard to the specific context in which they are implicated in many of the cases that have caused the greatest number of problems for courts. The article next turns to the anti-discrimination laws, locating them within their historical and societal framework as both means of, and rhetorical commitment to, full participation in civic life by often-marginalized members of society – not just members of the LGBTQ community, but every group protected by these laws.

Turning then to the conflict that has lately erupted between the imperatives of freedom of expression and the right to be free of discrimination, I focus on recent cases involving (mainly) sexual orientation discrimination and the pushback grounded in arguments about freedom of speech (usually framed as "expression") and religion.

The article then considers – and rejects – a couple of other proposed solutions to resolving the conflict, before arguing for the "say it, don't do it" compromise. Although my proposal is fashioned to address the freedom of expression issue, it should prove similarly useful for cases that pit freedom of religion against anti-discrimination laws.

I. DEFINING AND LIMITING THE CONSTITUTIONAL PROTECTION OF "FREE EXPRESSION"

The First Amendment to the United States Constitution is not self-defining; or at least it has not been *interpreted* to be. While the amendment states, simply, that Congress shall pass "no law . . . abridging the freedom of speech,"[10] in fact myriad laws and regulations impose restrictions on all kinds of speech. One cannot speak fraudulent statements with impunity,

[10] U.S. CONST. amend. I.

nor defame someone, nor, if laws prohibit doing so, publish works considered to be "obscene."[11] In each case, other values are thought to overwhelm the speaker's interest in freedom of speech. And then, there are so-called "time, place, and manner" restrictions, which purport only to regulate the conditions under which speech can occur, rather than the speech itself.[12] But the line between speech and the conditions under which it may be uttered is hazy, and undoubtedly results in muzzling at least some speech.[13]

The project of defining the limits of permissible government regulation of speech, then, is fraught and probably unresolvable, at least broadly speaking. But there are several guidepost and rationales for protecting free speech as constitutional proposition, and these can be useful in determining how we might look at various laws. Perhaps the most-often cited of the theoretical justifications for protecting speech (and therefore the most shopworn) is the "marketplace of ideas" rationale.[14] Sometimes this is taken to mean that the truth will come out if competing ideas and views are put forth; and sometimes it is expressed slightly differently, to mean that public law and policy will be better if informed by broad debate. While we can rightly question whether these justifications are empirically valid in an

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[11] The Supreme Court has long held obscenity not to be "speech" within the meaning of the First Amendment, thereby defining the problem away without satisfactorily resolving it as a theoretical matter. *See generally* KATHLEEN M. SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW (6th ed. 2016) (discussing and criticizing the case law in this area). Attempts to squeeze other kinds of potentially harmful speech, including "depictions of animal cruelty," have consistently met with failure. *See e.g.*, United States v. Stevens, 559 U.S. 460, 469 (2010).

[12] For a detailed explanation on these types of restrictions, see Kevin Francis O'Neill, *Time, Place, and Manner Restrictions*, THE FIRST AMEND. ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions (last visited May 3, 2018).

[13] This tension, and the possibility of squelching speech through purportedly neutral laws, has been recognized by both academics and the Supreme Court itself. For instance, in a partial dissent to Heffron v. Int'l Soc. for Krishna Consciousness, Justice Brennan took issue with a rule restricting distribution of literature at the Minnesota State Fair. 452 U.S. 640, 662 (1981) (Brennan, J., dissenting in part). While the majority saw the rule as a reasonable crowd-control restriction (and therefore valid as a "time, place, manner" law), Brennan's partial dissent worried that the Court's "general, speculative fear of disorder" had "placed a significant restriction on . . . core First Amendment rights." *Id*. at 660. *See also* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations,* 78 Nw. U. L. REV. 937, 946 (1983) ("[W]henever the intended meaning of people's expression relates to the time or the place or the manner of the expression, a time, place, or manner regulation may prohibit the substantially valued, expressive activity. Thus, from the liberty perspective, these regulations may abridge . . . freedom.").

[14] This approach dates back to Justice Holmes' classic dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) ("[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

era of deceptive "bots" and Russian-created "fake news,"[15] these related justifications are often important to courts as they wrestle with whether a given law impermissibly infringes on speech. There is also a more skeptical view of why we protect speech: We do not trust the government to do so, and fear that the laws they create will favor their own interests. Political heresy, as Shakespeare recognized, is not the true heresy: its *suppression* is the evil we ought to worry about.[16]

Another reason to protect free speech is more directly related to the cake-baker's refusal in *Masterpiece Cakeshop*: We protect speech and its non-verbal equivalent because of the value we attach to personal liberty and autonomy.[17] So Jack Phillips claims that baking and designing cakes is an intrinsically expressive act, and that the state should therefore not be permitted to hold him accountable for the discriminatory consequences of his actions – at least, not without a compelling justification.[18]

Of course, these justifications for protecting speech shade into each other, at times imperceptibly. A few examples will suffice. In *Citizens United v. Federal Election Commission*,[19] the Supreme Court deemed money spent on campaign ads to be speech; the case seems mostly

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[15] *See, e.g.,* David Remnick, *Mueller's Indictment Ends Trump's Myth of the Russia "Hoax"*, NEW YORKER (Feb. 18, 2018), https://www.newyorker.com/sections/news/muellers-indictments-end-trumps-myth-of-the-russia-hoax.

[16] *See* WILLIAM SHAKESPEARE, THE WINTER'S TALE act 2, sc. 3. Paulina says: "It is an heretic that makes the fire, Not she which burns in't." She recognizes that the king's attempt to shut her up by threats is itself the greater threat to order and decency than the "heresy" she utters. *Id.*

[17] Taking a more positivist approach to the question, we might also say that expressive speech is protected because the First Amendment so requires. But that simply states a conclusion without analyzing its soundness, as a matter of history or policy. Certainly some of the Supreme Court's most ardent defenders of free speech rights have voiced skepticism about the extent to which symbolic, expressive conduct – even if clearly political – is "speech." *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting) (expressing disagreement, or at least doubt, with the majority's view that expressive speech is "'akin to 'pure speech' and therefore protected by the First and Fourteenth Amendments").

[18] The Court probably should not have chosen this case to resolve the conflict, because it does not present a sharp focus on the competing interests in play. As the Colorado courts held, Phillips put a quick end to the conversation after the couple, along with Craig's mother, entered the bakery. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015). The Colorado Court of Appeals noted that Phillips did not ask for any details about the cake. *Id*. at 276. He was unwilling to make any cake for the wedding because they were a same-sex couple. *Id.* at 276-77. As the ALJ stated, "for all Phillips knew, [Mullins and Craig] might have wanted a nondescript cake that would have been suitable for consumption at any wedding." Craig v. Masterpiece Cakeshop, Ltd., Initial Decision Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, (CR 2013-0008), https://www.aclu.org/sites/default/files/field_document/initial_decision_case_no._cr_2013-0008.pdf.

[19] 558 U.S. 310 (2010).

concerned with speech as important to informed debate, and with getting more voices in the democratic process listened to. As the Court stated: "Political speech is indispensable to decision-making in a democracy."[20] But the *Citizens United* majority also involves the "distrust of government" rationale, as Justice Kennedy wrote for the majority, "speech . . . is the means to hold officials accountable to the people – [so] political speech must prevail against laws that would suppress it by design or inadvertence."[21]

In other cases, such as *West Virginia Board of Education v. Barnette*,[22] this idea of distrust of government was eloquently expressed: "If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[23] So the Court, in that case, threw out a law that required saluting the American flag.[24]

Barnette plainly involves expressive conduct, as well. The students were not speaking – the whole point of their protest was to *refrain* from speaking, and perhaps from saluting and standing, too. In other cases, like *Barnes v. Glen Theatre*,[25] the Court acknowledged that nude dancing in adult theaters was protected speech under the First Amendment but (pardon the pun) barely. In that case, the Court upheld an ordinance that required "exotic dancers" to wear g-strings and "pasties."[26] In reaching its decision, the Court deployed the test that had been crafted in *O'Brien v. United States.*[27] There, O'Brien was prosecuted for burning his draft card, an act he engaged in to protest the Vietnam war.[28] The *O'Brien* test holds that, where speech is primarily "expressive" or "symbolic," the government can regulate it in accordance with a four-part test: (1) the law must be within the constitutional remit of the government; (2) it must further an important or substantial governmental interest that is (3) unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedom must be no greater than necessary to the furtherance of that interest.[29]

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[20] *Citizens United*, 558 U.S. at 349. The Court's opinion ignored the high agency costs involved in cases involving corporate speech. For an extensive, historically anchored discussion of how concern about those costs has long driven campaign finance laws, see Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Laws,* 92 GEO. L. J. 871 (2004). The point in the text, however, is independent of one's view of the merits of the Court's view of corporate speech.

[21] *Citizens United*, 558 U.S. at 312.

[22] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[23] *Id.* at 642.

[24] *Id*. at 644.

[25] 501 U.S. 560 (1991).

[26] *Id.* at 565.

[27] 391 U.S. 367 (1968).

[28] *Id.* at 369-70.

[29] *Id.* at 376-77.

Why is such a test even necessary? Nothing like it applies in the mine run of First Amendment cases. Why does the government have more leeway to regulate where speech is primarily "expressive"? To answer these questions, it will help to think a bit more deeply about the challenges posed by expressive speech.

Back in 1983, the legal scholar Frederick Schauer turned a questioning eye on the protection of expressive speech.[30] Like Eugene Volokh,[31] Schauer worried that the realm of "expressive speech" is in principle limitless – because every action one takes has an expressive component. So, he provocatively asked: What is so special about speech?[32] There are all kinds of things people do that express who they are, and what they believe: playing sports; emoting; having sexual relations; working; choosing and wearing certain clothing; even walking.[33] But people do not usually think the First Amendment protects these activities – most of the time. So the challenge is to determine when these sometimes quotidian activities become imbued with constitutional protection.

Here is the challenge he poses: "[A]n adequate theory of free speech must explain the way in which the activities encompassed by the first amendment are importantly distinct from activities that do not receive such unique cherished protection."[34] When we try to justify protecting speech on the particular ground of self-expression, we run into the problem that speech is not really different from other kinds of expression that we do not protect, or that we protect only under the rubric of "general liberty," which only requires the government to have a rational basis in order to restrict.[35]

Schauer has identified the difficulty in cases where this notion of "freedom of expression" surges to the fore.[36] One context in which the Supreme Court has struggled to provide consistent guidance is in the closely related area of freedom of association, which is unfortunate because our associational choices are among the most central to our self-expression and definition. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[37] involved a private group that had been authorized by the City of Boston to organize the annual St. Patrick's Day parade. The Gay, Lesbian

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[30] Frederick Schauer, *Must Speech Be Special?,* 78 NW. L. REV. 1284, 1289 (1983). In a more recent article, Toni M. Massaro argues that the interest in protecting freedom of expression ties not only to autonomy, but to the furtherance of democracy, too. Toni M. Massaro, *Tread On Me!*, 17 U. PA. J. CONST. L. 365, 386 (2014).

[31] *Supra* note 1.

[32] Schauer, *supra* note 30, at 1289.

[33] Schauer, *supra* note 30, at 1291.

[34] Schauer, *supra* note 30, at 1289.

[35] Schauer, *supra* note 30, at 1292-93; *see also Fundamental Rights*, THE CON LAW GUY, https://theconlawguy.com/con-law-topics/fundamental-rights/ (last visited May 6, 2018) ("If the right is not fundamental, then it is just a mere liberty interest entitled to rational basis review.").

[36] *See generally* Schauer, *supra* note 30 (discussing these types of cases).

[37] 515 U.S. 557 (1995).

and Bisexual Group of Boston ("GLIB"), an organization that was formed to express the members' pride in their sexual identity, requested a permission to march in the parade, but was denied.[38] The group then brought suit under Massachusetts's public accommodations law, claiming that the refusal to allow them into the parade's ranks constituted discrimination based on sexual orientation.[39] GLIB had prevailed from the trial court level all the way through to the Massachusetts Supreme Court, largely on the basis that a parade – especially one that was generally as unfussy about who could participate as this St. Patrick's Day event – did not convey a coherent expressive message.[40]

The Supreme Court disagreed, finding that even the parade's less-than-coherent message was nonetheless a form of expression, and therefore protected speech.[41] In a decision surprisingly short on discussion of GLIB's compelling interest in being free from discrimination (as established by the Massachusetts public accommodations law itself), the justices held that forcing the parade organizers to carry GLIB's message would interfere with their expressive rights, however philosophically incoherent.[42] The Court cited *O'Brien* only once; did not employ the test set forth in that case; and held that the anti-discrimination law, in this context, did not serve an "important, governmental interest."[43] The Court then brushed aside GLIB's concern about their own rights, positing instead that the group would have had "a fair shot" at obtaining a parade permit of their own.[44]

As will be discussed, *Hurley* is neither the last nor the only word from the Court on how to reach an accommodation between laws that purportedly limit expression and those that serve other governmental interests. But it is notable because it underscores the difficulty of the project of defining and limiting the range of conduct that is to count as protected expression for First Amendment purposes. While the Court may have been correct in stating that a parade is "expression, not just motion,"[45] it is hard to construct a principled reason for protecting parades but not, say, marathons, or something more aesthetically pleasing, such as a well-played

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[38] *Hurley*, 515 U.S. at 561.

[39] *Id*.

[40] *Id.* at 562-63 (summarizing the trial court's findings that the parade's organizer was not selective, that the messages were "eclectic," and sometimes even conflicting).

[41] *Id*. at 568-69.

[42] *Id*. at 579-80.

[43] *Id.* at 577.

[44] *Hurley*, 515 U.S. at 578. This statement only makes sense if limited to a situation like a parade, which is not a typical form of "public accommodation." Otherwise, any business owner could defend discrimination by noting that a plaintiff would have a "fair shot" of being served elsewhere.

[45] *Id.* at 568.

tennis match.[46] And if the anti-discrimination imperative is not an important governmental interest, why not?[47]

There are two questions in play here. The first is whether the conduct is "expressive enough" to qualify for protection. If the first question is answered affirmatively, the second is whether the government can nonetheless restrict it in service of some other goal. As *Hurley* shows, the first question is informed by how centrally the Court happens to think the activity relates to purposeful (perhaps even political) speech; in the end, though, the decision is largely an aesthetic one.

As for the second question, *O'Brien* applies, and the second and fourth parts of that test[48] are especially relevant in most cases. The law "must further an important or substantial governmental interest" and "the incidental restriction on alleged First Amendment freedom must be no greater than necessary to the furtherance of that interest."[49] In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("FAIR"),[50] the Supreme Court addressed both questions. A unanimous Court held that the association of law schools had no enforceable First Amendment right to keep military recruiters off campus,[51] despite the schools' argument that the exclusion served the important expressive purpose of signaling opposition to the military's "don't ask, don't tell" law – which allowed gays and lesbians to serve in the armed forces so long as they stayed mum about their sexuality.[52]

First, the Court held that the schools' conduct was not expressive conduct.[53] Distinguishing *Hurley*, the Court wrote: "Unlike a parade organizer's choice of parade contingents, a law school's decision to allow

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[46] *See* David Foster Wallace, *Roger Federer as Religious Experience,* N.Y. TIMES (Aug. 20, 2006), http://www.nytimes.com/2006/08/20/sports/playmagazine/20federer.html ("The human beauty we're talking about here is a beauty of a particular type; it might be called kinetic beauty. Its power and appeal are universal. It has nothing to do with sex or cultural norms.").

[47] The Court attempted to skirt this conclusion by noting that GLIB could have expressed its view in a different way, perhaps by hosting a (potentially much more fabulous) parade of its own. *Hurley*, 515 U.S. at 570.

[48] *Supra* note 29.

[49] *Supra* note 29.

[50] 547 U.S. 47 (2006).

[51] *See id.* at 70. The schools faced the loss of federal funding for their stance because of a then-recently enacted law, the Solomon Amendment, which required schools to offer military recruiters the same access to its campus and students that schools provided to other recruiters that received the most favorable access. *See id.* at 54.

[52] *See id.* at 68. In application, the "don't ask, don't tell policy" was wildly and tragically inconsistent, and depended as much on the views of military higher-ups at particular locations as it did on the terms of the law. For a devastating and historically rich account of the policy that draws on many interviews of service members, see NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA (2009).

[53] *Rumsfeld*, 547 U.S. at 66-68.

recruiters on campus is not inherently expressive."[54] The Court further explained that while flag-burning, for example, is "sufficiently expressive to warrant First Amendment protection,"[55] excluding the military from campus to protest an anti-gay law was not.[56] Accordingly, some things are symbolic speech, while others are not. We do not know why.

Then, the Court held that *even if* the university's refusal to host military recruiters was somehow seen as expressive, the law was nonetheless justified under the *O'Brien* test.[57] Although the decision must be interpreted in light of heavy judicial deference to the military, Chief Justice Roberts's language in finding that the government had met its burden is striking: "Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. *The Court of Appeals' proposed alternative methods of recruiting are beside the point.*"[58] But under the second part of the *O'Brien* test, the availability of alternative means is not "beside the point" – it is the point.[59]

The law of expressive conduct, in sum, is messy. That is hardly surprising. While the Supreme Court has difficulty enough knowing how literally to take the First Amendment's command that "no law" can restrict the freedom of speech, complexities multiply when the "speech" is symbolic or expressive rather than verbal. The two questions– whether the conduct is even "speech-y" enough to qualify for protection, and if so, how to balance that speech-like thing with other interests – are related in ways that are not easy to understand or articulate, but it seems clear that Schauer identified a serious issue.[60] At least to the extent that speech is protected for its value as self-expression, it needs to be weighed against competing interests. While it seems obvious that some expressive speech, such as a work of art – even an abstract one[61] – should receive some protection against government censorship, expressive speech raises with particular urgency the need to look closely at the other side of the rights ledger.

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[54] *Rumsfeld*, 547 U.S. at 64.

[55] *Id.* at 66 (citing Texas v. Johnson, 491 U.S. 397, 406 (1989)).

[56] *Id*.

[57] *Id*. at 68.

[58] *Id.* at 67 (emphasis added).

[59] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80, 88 (1980) (holding that a law requiring a shopping mall owner to allow "certain expressive activities" on his property did not violate his First Amendment rights, because no one would believe that the owner was supporting the messages conveyed).

[60] *Supra* notes 32-35.

[61] In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the Court strained mightily to analogize the parade to "[the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." 515 U.S. 557, 569 (1995). One wonders whether the Justices have ever attended a St. Patrick's Day Parade.

And it is not just military policy implicated in *Rumsfeld v. FAIR* that constitutes a compelling counterweight. Our long, uneven slog toward equality is given enforceable expression through anti-discrimination laws, which compel business owners, employers, and home sellers to follow the same equality principle as must state and federal governments, under the United States Constitution.

II. THE ANTI-DISCRIMINATION IMPERATIVE

"Enumeration is the essential device used to make the duty not to discriminate concrete . . . ."[62]

It is hardly necessary to go into detail as to why the United States Constitution, as well as federal, state, and local laws, has enshrined anti-discrimination imperatives in law. As the above quote indicates, in the United States, the legal approach to ending discrimination has been to list categories of people who qualify for legal redress. This enumeration approach is designed to offer protection to those groups that have been the victims of discrimination. Racial minorities, especially African-Americans and Native Americans, have been subject to unspeakable cruelties for centuries. Women could not even vote until less than a century ago, and still face pervasive discrimination of various, overlapping types in many contexts, but perhaps especially in employment. Religious minorities continue to be on the receiving end of terrible offenses, often involving violence. Much of 2017 was consumed by challenges brought in federal courts against three of the current President's efforts at executive orders restricting immigrants from several Muslim-majority countries, with a number of courts finding the bans animated by religious discrimination.[63]

The history of discrimination against the LGBTQ community has been no less harrowing. Only recently was the right of same-sex couples to marry given constitutional recognition,[64] and it was not until 2010 that the "don't ask, don't tell" federal law discussed in the previous section was finally repealed.[65] In the private sector, LGBTQ people have been fired because of their sexual identity,[66] cast out of lodging,[67] and – as in the *Masterpiece Cakeshop* case – denied basic business services.[68]

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[62] Romer v. Evans, 517 U.S. 620, 628 (1996).

[63] As of this writing, the issue still had not been resolved. For a comprehensive timeline of the orders and their harrowing journey through federal courts, see *Legal Challenges to the Trump Travel Ban,* WIKIPEDIA, https://en.wikipedia.org/wiki/Legal_challenges_to_the_Trump_travel_ban#cite_note-judgeblocks-13 (last visited May 3, 2018).

[64] Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

[65] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 11-321, 124 Stat. 3515-3517 (2010).

[66] For an example of harassment, and subsequent firing of a gay man because of his sexual orientation, see Mark Joseph Stern, *Gay Man Tormented at Work and then Fired for*

On the most basic level, laws prohibiting discrimination are designed to grant historically marginalized groups access to the marketplace – whether that be in the context of jobs, housing, or just the plain ability to conduct business in the public square without being refused service simply because of who one happens to be. Of course, under a libertarian approach, there should not be a need for the law to step in, because – except for cases like the Jim Crow laws in place in much of the South until the 1960s, which themselves skewed the market[69] – "rational actors" would not harm their financial interests by turning away potential customers.[70] In the *Masterpiece Cakeshop* case, a clutch of self-styled "law and economics" professors filed an amicus brief making a weak version of this argument, positing that the market will take care of situations such as the one before the Supreme Court – everyone will get what they want, even if some people have to hie themselves to another vendor.[71] Thus, even if there is some discrimination that the law should account for, allowing a religious exemption is ultimately harmless, because no one will be denied the services they seek.

There are a few problems with this approach. First, it downplays the extent to which actors are motivated by all sorts of non-economic considerations. In a competing amicus brief, a group of behavioral economists had this to say in response to the neo-classical economic view: "The intersection of traditional economics and other social sciences – especially psychology – reveals the ways in which rational decision-making is *not* the norm. Rather, decisions in the real world are often impacted by cognitive limitations, biases, and mental shortcuts."[72]

Second, it ignores the dignitary harm that people suffer when they are denied basic services for no good reason. The law and economics brief ends up making that point, intentions notwithstanding. The group seems confident that LGBTQ people turned away can get services elsewhere, and

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Being Gay has no Legal Recourse, Court Rules, SLATE, (Oct. 30, 2015, 11:48 AM), http://www.slate.com/blogs/outward/2015/10/30/anti_gay_harassment_missouri_man_cannot_sue_for_sexual_orientation_discrimination.html (noting that Missouri law offered the former employee no legal protection).

[67] For an up-to-the-minute example, see Cervelli v. Aloha Bed and Breakfast, 2018 WL 1027804 (Haw. Ct. App. Feb. 23, 2018).

[68] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

[69] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 252-53 (1964) (detailing the effect of laws and practices on African-Americans' inability to access basic services).

[70] *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 413 (2011) ("Rational agents are assumed to make important decisions carefully, and to use all the information that is provided to them.").

[71] *See* Brief for Law and Economics Scholars as Amici Curiae Supporting Petitioner at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

[72] *See* Brief of Scholars of Behavioral Science and Economics as Amici Curiae Supporting Respondents at 7, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

refer to a list of friendly places![73] But this overlooks the fact that there are many places in the country where a gay or lesbian couple would struggle to find a place to serve them, and, more crucially, these scholars' moral vision has only one eye: While they bewail the harm to folks like Jack Phillips, who just want to stay true to their deeply held values, they are blind to the harm to identity, dignity, and *self-expression* that comes from being turned away. But this coin has two sides, and the marketplace move is just a way to divert attention from the plain fact that one of the parties is going to suffer a loss here – even if that loss is not felt in the pocketbook, or, ultimately, in the inability to access public accommodations.

Consider that, even in 2018, no federal law protects LGBTQ people. The list of protected classes covered by the Civil Rights Act of 1964 includes race, sex, religion, and national origin in its sweeping protections in the areas of housing, education, employment, and public accommodations.[74] In 1967, people over the age of forty were granted employment discrimination protection through the Age Discrimination in Employment Act.[75] The Americans with Disabilities Act, signed into law in 1990, offers broad protections to the disabled, in areas ranging from employment to public services and public accommodations, and imposes requirements on businesses to take affirmative, often expensive, steps to facilitate access to public spaces.[76]

Yet the only federal protection even arguably available to LGBTQ people is based on a contested reading of "discrimination based on sex" under the Civil Rights Act.[77] About half the states, and many localities, offer protections to sexual minorities (sometimes including the trans-community, but sometimes not).[78] But in the rest of the country, it remains possible to fire a gay employee, reject a lesbian couple's attempt to

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[73] Brief of Law and Economics Scholars as Amici Curiae Supporting Petitioner, *supra* note 62, at 3.

[74] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964). The original law has been amended several times to add new protections, such as the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991), and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009).

[75] 29 U.S.C. § 621 (2018).

[76] 42 U.S.C. § 12101 (2018).

[77] Increasingly, United States courts of appeal are finding, in both the employment and education contexts, sexual orientation and gender identity discrimination is "sex discrimination," as defined under the federal Civil Rights Act of 1964. For a good discussion of the issues in the employment context, *see* Matthew W. Green, Jr., *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination under Title VII,* 20 J. GENDER RACE & JUST. 1 (2017).

[78] 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 May 7, 2018).

purchase a home, and – yes – turn away a gay couple that enters a bakery to buy a wedding cake.

The *Masterpiece Cakeshop* case happened to arise in a state that does offer protection to the LGBT community, or else Mullins and Craig would not have any recourse at all. Yet some of the most prominent champions of Phillips' right to affirm his religious beliefs do not even think that the couple deserves anti-discrimination protection in the first place. Ryan T. Anderson and Sherif Girgis, for instance, see these laws as a hammer, "designed and applied to needlessly penalize conscientious refusals to participate in morally controversially actions to which many people reasonably object, wounding moral and religious integrity and depressing pluralism."[79] However, this willful blindness to the harm suffered by the victims of discrimination only highlights the urgency for these laws to be enacted. Dignity, and the *expressive act* of selecting a cake for a special occasion, cannot even come into play as dignitary rights worthy of protection until the law recognizes LGBTQ people, historically discriminated against, as "deserving."

There are costs to the parties on both sides of the expressive conduct divide. Rather than returning to Jack Phillips' bakery (where the couple never even got to *ask* for a custom-made cake), consider another case that recently occasioned a petition for *certiorari*, *State v. Arlene's Flowers*.[80] In that case, arising in Washington State, the conflict is starkly drawn: Baronnelle Stutzmann, the owner of the eponymous flower shop, had for years sold flowers to a gay couple, Robert Ingersoll and Curt Freed.[81] Problems only arose when the couple told her they planned to marry, and asked her to provide the flowers for the event.[82] She demurred, on the grounds that creating an arrangement for a same-sex wedding "would damage her relationship with God."[83] Litigation ensued under the state's public accommodation law.[84] Here is a true conflict, and we can genuinely empathize with both sides. Both attach meaning to marriage. Both are trying to do what they consider to be the right thing, by their own lights. And, significantly for me, there seems in this case to be a level of genuine, mutual respect. Whose right to self-expression should prevail, and why?

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[79] JOHN CORVINO ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION, 185 (Oxford 2017).

[80] 389 P.3d 543 (Wash. 2017), *petition for cert. filed*, 86 U.S.L.W. 3047 (U.S. Jul. 14, 2017) (No. 17-108).

[81] *Id*. at 549.

[82] *Id*.

[83] Brief in Support of Petition for Writ of Certiorari at 9, Arlene's Flowers, Inc. v. Washington (Jul. 14, 2017) (No. 17-108).

[84] *Arlene's Flowers*, 389 P.3d at 550.

III. A COUPLE OF SUGGESTED RESOLUTIONS – AND WHY THEY FAIL

In the many amicus briefs that were filed in *Masterpiece Cakeshop*, one solution that stood out was proposed by some of the nation's leading First Amendment voices.[85] Just draw a line between conduct that is "expressive speech," and conduct that is not.[86] I have already explained why I think that line comes down to a matter of taste, and the statements in support of both sides just underscore the point.[87] Volokh, who sides with the couple here, reached a different conclusion in a case involving a wedding photographer.[88] There, he thought, the photographer's artistic role protected him from having to create images that offended his beliefs.[89] But bakers, he said, are like chefs, who, "however brilliant cannot claim a free speech clause right not to serve certain people at his restaurant, even if his dishes look stunning."[90]

Why draw the line, there, though? At oral argument, Justice Kagan seemed incredulous at the attempt by Phillips's attorney, Kristen Kellie Waggoner, to distinguish the activities of baking and meal preparation.[91] After simply declaring that hairstylists, tailors, and make-up *artists* were not engaged in expressive conduct protected by the First Amendment, Waggoner swept chefs into the same constitutional no-man's-land.[92] Here is the brief exchange:

> **Waggoner**: "Your Honor, the tailor is not engaged in speech, nor is the chef engaged in speech, but…"
>
> **Justice Kagan**: "But why…whoa. The baker is engaged in speech, but the chef is not engaged in speech?"[93]

Soon thereafter, Justice Sotomayor wondered when the Court had "ever given protection to a food," and mused about sandwich artists.[94]

The difficulty of line-drawing here should sound the tocsin that just perhaps this entire exercise is not worth the candle. (Interestingly, the

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[85] *See* Brief of American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae Supporting Respondents at 1, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

[86] *Id*. at 5.

[87] *Supra* Part I.

[88] Brief of American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae Supporting Respondents, *supra* note 85, at 4-5.

[89] Brief of American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae Supporting Respondents, *supra* note 85, at 4-5.

[90] Liptak, *supra* note 1.

[91] Transcript of Masterpiece Cakeshop Oral Argument, *supra* note 9, at 13-14.

[92] Transcript of Masterpiece Cakeshop Oral Argument, *supra* note 9, at 12-14.

[93] Transcript of Masterpiece Cakeshop Oral Argument, *supra* note 9, at 14.

[94] Transcript of Masterpiece Cakeshop Oral Argument, *supra* note 9, at 15-16.

candlestick maker was about the only "expressive artist" not mentioned during the Court's wearying discussion of the many wedding busybodies.)

That is not to say that a free expression argument would never be proper. No one was forcing Phillips to write a specific message on the cake – that would clearly be compelled speech, and obnoxious to the First Amendment.[95] But there is no such thing as a "gay wedding cake," or at least not one specifically designed as such. Phillips could have made a cake similar to what he would create for any couple; the fact that he "says it in frosting" is not relevant, at least not in any workable constitutional sense. Reconsider the third hypothetical case: Phillips and his (alternate-Earth) business partner are simply two people engaged in commerce, albeit with quite different skills and tasks. The First Amendment will collapse under its own weight if a routine business sale, of whatever product, is imbued with expressive significance. A cake created as a museum piece would be different, but that is not the creation involved in this case.[96]

Further, consider the related objection to Phillips' position by the prominent First Amendment litigator, Floyd Abrams.[97] He almost always sides with the proponents of free speech, but in this case he understandably worries that a ruling for the bakery would admit of no principled stopping place – not only in terms of what counts as protected expression but, of greater concern to him, in how sweeping a protection the Supreme Court would be creating.[98] It would not be possible to limit the holding to cases involving conflicts between LGBTQ folks and those standing on their right to turn them away:

> Could a painter invite the public to his gallery at which he painted portraits of them for a fee but refused to paint

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[95] For an example of compelled speech, see Wooley v. Maynard, 430 U.S. 706, 707 (1977) (holding a New Hampshire law that required residents to display the state motto "Live Free Or Die" on their license plates was unconstitutional). In a remarkably perspicacious essay for the New York Times, the philosopher John Corvino ably distinguished *Masterpiece Cakeshop* from another Colorado case where a baker had been asked to design a Bible-shaped cake "decorated with an image of two grooms covered by a red X, plus the words 'God hates sin. Psalm 45:7' and 'Homosexuality is a detestable sin. Leviticus 18:22.'" John Corvino, *Drawing a Line in the "Gay Wedding Cake Case*," N.Y. TIMES, (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/opinion/gay-wedding-cake.html. In that case, the baker gave the customer the icing so that he could write whatever design he wished into the cake; she did not simply refuse to sell him a cake. *Id.* In *Masterpiece Cakeshop*, Phillips refused to sell the potential customers *any cake at all*, based on his objection to the context in which it would be displayed and consumed. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276-77 (Colo. App. 2015).

[96] As an example of how a common object can be transformed into a unique work of art (and, crucially, not a "line-item" for general sale), consider the dresses of the Italian designer Roberto Capucci. *See* Roberto Capucci, *Art into Fashion,* PHILA. MUSEUM OF ART, http://www.philamuseum.org/exhibitions/411.html (last visited May 6, 2018) (describing exhibits and showing photos of some of the dress-sculptures).

[97] *See* Liptak, *supra* note 1 (quoting Floyd Abrams).

[98] *See* Liptak, *supra* note 1.

> black people? Could a musician invite the world to his studio where he wrote songs about them for a fee but refused to do so for Jews or Muslims? The First Amendment protects a lot, but not that conduct.[99]

In other words, it is not just about cake – or even just about LGBTQ customers. Attempts to distinguish racial discrimination because of its different history are unavailing, because they ignore this vital point: 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. To begin 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.

This discussion brings us to another attempt to line-draw: The suggestion that the right of refusal should be limited to services associated with weddings. The argument is as follows: Marriage and weddings are "different," because people have strongly held views about that issue, and we should create space for refusals of conscience. The most influential version of the proposal, championed by Robin Fretwell Wilson, would create a "hardship exemption" that would compel wedding-related businesses to provide services to couples whose unions they oppose when the services were not otherwise reasonably accessible.[100]

This proposal, which was shopped around as a compromise to states when they were considering allowing gay and lesbian couples to marry, reads as a misguided attempt to draw the line that Floyd Abrams rightly worried cannot otherwise be delineated. It can be seen as supporting (or at least leading to) the market segmentation that the law and economics professors see as a solution to the expression/discrimination conflict. It is not typically presented as a compromise that would apply only to objections to gay and lesbian weddings, but that is clearly what the proponents had in mind. It would be much harder (as in, impossible) to argue for an exemption for business owners who objected to interracial weddings. Proponents were confident, it seems, that there would be few, if any, objections on that basis; otherwise, the proposal would have been utterly unpalatable. But no one should believe the idea is anything other than an attempt to allow objections to gay and lesbian weddings only.

No matter the proposal's likely limitation, though, it suffers from a deeper problem: it is entirely unworkable. This conclusion is dramatically illustrated through an email conversation I had a few years ago with Fretwell Wilson (who was kind enough to indulge my many questions and hypotheticals). Consider this exchange:

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[99] Liptak, *supra* note 1 (quoting Floyd Abrams).

[100] *See* Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Health Care Context, in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 77-102 (Douglas Laycock et al. eds., 2008).

> **JGC**: A man walks into a florist's shop to buy some flowers for a wedding. The owner who's working there shows him some appropriate flowers and wraps them up. The man then says: "Write on the card: 'To the Gayest Couple I Know: Ted and Fred." May the owner then refuse the sale on religious grounds?
>
> **RFW**: I would say if the flowers are for Ted and Fred's wedding, then yes, the florist could refuse… If the flowers are not for Ted and Fred's wedding, then no, the florist would not be permitted to refuse to sell them. Here it would have significance to me that the flowers are not to be carried by a wedding party member or used in the wedding or reception, neither were they requested by or on behalf of the couple for the wedding . . . ."[101]

At first, Wilson says that if the flowers are "for" the wedding, refusal to sell them is proper. But then she writes that it "would have significance" to her that the flowers were not intended to be used in any of the ways she lists, which are, I suppose, more central to the ceremony itself. When the person proposing the exception cannot clearly decide when it applies, the proposal should be scrapped. And never mind how a florist would know the answers to any of the questions Wilson suggests are important, absent the most ridiculous interrogation, since the witch-burning scene in the film *Monty Python and the Holy Grail*.[102]

We could easily multiply the complexities. What if the flowers are to be used in a *recommitment* ceremony, five years later? Might that not be as objectionable to the owner's religion as the wedding itself? And if these laws would cover that situation, how much further would they extend? Would they cover the second hypothetical case previously discussed, where a kid's effort to buy a cake for the birthday celebration for one of her two fathers leads all the way back to their union? It seems not, but it is easy to foresee a legal argument on that basis. Do we really want courts sorting through this wreckage after the fact? And then there is the separate issue of whether the refusal can be overcome by the so-called hardship example. How, exactly, would *that* work? Do we really want the judicial (or administrative) apparatus to whir into motion over whether there is a suitable hairstylist who will work a gay wedding within a reasonable radius of the refusing business owner? No, we do not.

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[101] This email exchange was pasted directly from the author's email archives.

[102] The scene is a farcical take on legal logic. It can be accessed at Isaac Fankhauser, *monty python-witch scene*, YOUTUBE.COM (Aug. 23, 2006), https://www.youtube.com/watch?v=yp_l5ntikaU.

IV. THE PROPOSED SOLUTION: SAY IT, DON'T DO IT[103]

The genuine, strongly held views on both sides in cases like *Masterpiece Cakeshop* illustrate the need for a compromise – one that tries to find some common ground. This common ground, however, cannot be the outright refusal of a business owner to pick and choose among customers. A case that arose under very different circumstances in Philadelphia points the way towards a possible solution.

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 had recently become populated by Spanish speakers.[104] So in 2006, he slapped a sign on the window where orders are placed: "THIS IS AMERICA. WHEN ORDERING, PLEASE SPEAK ENGLISH."[105]

The case dominated local news in Philly.[106] 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.[107]

Vento was hauled before the Philadelphia Commission on Human Relations, and charged with discrimination against non-English speakers.[108] He argued that he was expressing a political point of view, not discriminating.[109] And he prevailed, because no witnesses could establish

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[103] The argument and examples in this section draw heavily on two articles I wrote for Politico. *See* John Culhane, *The Most Important Cake in America,* POLITICO (Dec. 4, 2017), https://www.politico.com/magazine/story/2017/12/04/cake-supreme-court-case-gay-marriage-216006; John Culhane, *Business Owners Must Serve Gays*, POLITICO (Apr. 14, 2015), https://www.politico.com/magazine/story/2015/04/business-owners-must-serve-gays-116965.

[104] For an account of the story, see Jeff Gammage, *Ten Years Later, Geno's 'Speak English' Sign Taken Down,* PHILLY.COM (Oct. 14, 2016, 1:08 AM), http://www.philly.com/philly/news/20161014_Ten_years_later__Geno_s__Please_Speak_English__sign_taken_down.html.

[105] *Id*. (detailing the story through 2016, when the sign finally came down).

[106] *See* Morgan Zalot, *Wit' Out: Geno's Cheesesteak Removes Controversial 'Speak English' Decree, Heir Says 'It's Not About a Sign'*, NBC 10 PHILA. (Oct. 14, 2016, 8:26 AM), https://www.nbcphiladelphia.com/news/local/Genos-Speak-English-Sign-Gone-Cheesesteak-Joey-Vento-396986481.html; Claire Sasko, *Geno's Steaks Has Removed Its "Speak English" Sign*, PHILLY MAG. (Oct. 13, 2016, 10:03 AM), https://www.phillymag.com/news/2016/10/13/genos-steaks-english-only/; Danya Henninger, *Controversial 'speak English' sign is gone from Geno's Steaks*, BILLY PENN (Oct. 12, 2016, 9:38 PM), https://billypenn.com/2016/10/12/controversial-speak-english-sign-is-gone-from-genos-steaks/.

[107] *See* Alexis Sachdev, *Geno's sign comes down, but immigrants aren't quick to forgive*, METRO (Oct. 19, 2016), https://www.metro.us/philadelphia/geno-s-sign-comes-down-but-immigrants-aren-t-quick-to-forgive/zsJpjr---n4t9MT10siTfw (stating that after the Geno's owner displayed the "Speak English" sign, "[s]uddenly, his rival, Pat's King of Steaks, had an influx of loyal customers").

[108] Gammage, *supra* note 104.

[109] Gammage, *supra* note 104.

that Geno's Steaks actually refused service to anyone who did not speak English.[110] In sum, the Commission vindicated Vento's argument that he was making a protected political statement, however crude and nasty.[111]

This, then, is how the law can validate business owners' rights to free expression without trampling the rights of customers to access services that should be available to all comers. Like Joey Vento, Phillips and like-minded objectors can certainly freely express – even broadcast – their views on same-sex marriage and any other issue they care about, but they should not be entitled to actually refuse to serve anyone for those reasons.

Another case, just decided by a Hawaii appellate court, highlights where that line should be drawn – but was not.[112] Diane Cervelli and her lesbian partner, Taeko Bufford, called Phyllis Young, the sole proprietor of the Aloha Bed and Breakfast in Hawai'i Kai, to make a reservation for the couple's upcoming trip to the island.[113] During a phone conversation, Young stated that she had a room available, but upon learning that Cervelli was in a lesbian relationship, said this: "We're strong Christians. I'm very uncomfortable accepting the reservation from you."[114] She then refused the reservation, and hung up on Cervelli.[115] Two subsequent calls to Young from Bufford were rebuffed.[116] Young's first sentence is a clear, protected exercise of her First Amendment rights. The second sentence is ambiguous, but the ambiguity should be resolved against Young given her subsequent refusal to make the reservation.

I have high hopes for this approach. Imagine how the case would have been different had Craig and Mullins been able to go online to learn that Phillips—on his bakery's website—had declared himself "guided by Christian principles," or had written, more directly, "I believe that marriage is the union of one man and one woman." They likely would have sought out a more accommodating cake shop, since no one wants their wedding serviced by someone who opposes their very union. Craig and Mullins might have taken a similar step if Phillips had posted a sign with such a message in the store's window, but that is more awkward—especially if it is inside the store and could not, therefore, have been seen until the parties were face to face. Given that choice, Phillips (assuming, as seems likely, he is a decent person) would likely try to avoid the awkwardness.

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[110] John Culhane, *Business Owners Must Serve* Gays, *supra* note 103. According to Mary Catherine Roper of the ACLU, many "testers" had been sent to the joint to see whether they'd be refused service; they were not. *Id*.

[111] John Culhane, *Business Owners Must Serve* Gays, *supra* note 103.

[112] Cervelli v. Aloha Bed and Breakfast, 2018 WL 1027804 (Haw. Ct. App. Feb. 23, 2018).

[113] *Id*. at *2.

[114] *Id.*

[115] *Id*.

[116] *Id*.

The American Civil Liberties Union ("ACLU") filed an amicus brief making a weak version of this point.[117] They recognized that owners can post a sign saying that the company provides services to all comers, but that doing so does not indicate agreement with the law.[118] This commonsensical approach takes its cue directly from two Supreme Court cases: *Rumsfeld v. FAIR*, previously discussed, and *PruneYard Shopping Center v. Robins.*[119] In both of those cases, the Court laid heavy emphasis on its conclusion that no one would reasonably believe that the petitioner – the law schools or the owner of the shopping mall – were speaking, or even endorsing, the viewpoints they were being required to accommodate.[120] That was especially true since they retained the right to send their own clear and competing message – that they were merely following the law, without expressing agreement with it. So the ACLU brief smartly tracks the logic of those cases, and stops there. But there is no reason Phillips and like-minded folks cannot go further and express clearly and unambiguously their own, contrary views.

This is a controversial compromise. The anti-discrimination side sees messages like Phillips as unwelcoming and therefore potentially undermining the anti-discrimination imperative. They might have the effect of driving away business from same-sex couples just as surely as actual discrimination. And Phillips' supporters do not like the "say it, but don't do it" idea, either, because they see the compromise as "outing" him as antagonistic to the LGBTQ community. A group of legal scholars argue that Phillips and others with similar views might not want to broadcast their idea that same-sex marriages are sinful.[121]

But the alternative, of course, is that business owners like Phillips can ambush prospective customers who have no way of knowing they are about to be turned away. If Phillips' conviction is so strong, it seems reasonable for him to take steps to reduce the possible embarrassment and loss of dignity that a refusal would cause. Of course, he does not have to do this. But he cannot refuse service to customers, either.

If this approach were followed to its logical endpoint, people would patronize only businesses that shared their views and philosophy. But that is a fact of life anyway; some people shop at Walmart, others at Whole Foods. There is a combination of economic, political and social reasons for this. My proposal would just mean that people choosing a wedding vendor

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[117] *See* Brief in Opposition to Petition for Certiorari at 9-10, n.3, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

[118] *Id*.

[119] 447 U.S. 74, 87 (1980).

[120] Rumsfeld v. FAIR, 547 U.S. 47, 65 (2006); PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

[121] Brief of 34 Legal Scholars as Amici Curiae Supporting Petitioners at 18-19, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

would have one more thing to consider, not a threat to social harmony in America. In fact, it would *reduce* the chance of potential conflict.

This approach could be useful, too, in states that have religious freedom laws as well as anti-discrimination laws—Illinois[122] and New Mexico,[123] for example. Those states might allow religious objections to outweigh government interests in certain cases, but they typically do not allow someone to ignore anti-discrimination laws in the name of religion.[124] They do, however, allow those who have religious objections to dealing with customers in certain contexts to make their views known, and that is the right balance to strike in these emotional, highly personal, cases.

V. CONCLUSION

When the Supreme Court held, in *Obergefell v. Hodges*,[125] that the United States Constitution requires states to afford marriage rights to gay and lesbian couples on the same basis as they do for opposite-sex couples, problems and conflicts were anticipated.[126] Before the decision even came down, many on the right began arguing that the law would need to carve out space for conscientious objectors. This argument was hardly novel, as every civil rights advance has occasioned pushback; it was not too long ago that private actors, such as Bob Jones University, claimed a right to discriminate against interracial unions based on their deeply held beliefs.[127]

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[122] In its general definitional section, the Illinois Human Rights Act makes it unlawful to discriminate on the basis of a host of protected statuses, including: "race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service…" 775 ILL. COMP. STAT. ANN. § 5/1-103(Q) (West 2018), and then applies that protection to several different areas, including public accommodations. *Id*. § 5/5-102. Under the state's Religious Freedom Restoration Act, the free exercise of religion cannot be burdened, even by a law of general applicability, unless the state has a compelling reason for doing so, and the least restrictive means are used toward that goal. *Id*. § 35/15.

[123] N.M. STAT. ANN. § 28-1-7 F. (West 2018) (state's Human Rights Act prohibits discrimination on the basis of "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap . . ." in public accommodation). The statute also covers employment and housing, among other topics. To view New Mexico's Religious Freedom Restoration Act, see *id*. § 28-22-3.

[124] For a discussion and example of how religious freedom and anti-discrimination laws clash, see Ryan T. Anderson, *Clashing Claims*, NAT. REVIEW (Aug. 23, 2013, 4:00 AM), https://www.nationalreview.com/2013/08/clashing-claims-ryan-t-anderson/.

[125] 135 S. Ct. 2584 (2015).

[126] *See* John Culhane, *The Gay Marriage Fight Isn't Over,* POLITICO (June 26, 2015), https://www.politico.com/magazine/story/2015/06/gay-marriage-legal-backlash-119468 (cataloguing laws enacted in conservative states to stem the effect of the decision and predicting similar future consequences).

[127] The current millennium dawned with the ban still in place. It was lifted in early 2000. *See Bob Jones U. OKs Interracial Dating,* CBS NEWS (Mar. 3, 2000, 9:50 PM), https://www.cbsnews.com/news/bob-jones-u-oks-interracial-dating/.

While these beliefs are often strongly and genuinely held, they cannot be deployed as a means of separating historically marginalized groups from their civil rights. The LGBTQ community continues to be such a group, as dramatically evidenced by the plain fact that there is still neither federal nor consistent state anti-discrimination protection for them. Passing such laws continues to be a goal for the community. And when these milestones are finally attained, allowing them to be pushed aside based on sincerely held beliefs – easy to state, hard to disprove – is a cruel irony. It should be possible to honor these beliefs by reminding people, perhaps through clear statutory language, that the First Amendment does indeed protect their expression. But whatever content the shifting, ill-defined right to "self-expression" may have, it cannot be interpreted so broadly that every business has a veto over every LGBTQ person's right to access basic public goods on the same basis as everyone else. The commitment to equality is empty if so easily defeated.