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## The Broader Implications of Masterpiece Cakeshop

Douglas Laycock

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# The Broader Implications of *Masterpiece Cakeshop*

Douglas Laycock\*

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In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>1</sup> the Supreme Court held that on the facts there presented, the Free Exercise Clause protected a wedding-cake baker who conscientiously objected to making a cake for a same-sex wedding. The decision has been widely described as a very narrow ruling on odd facts.<sup>2</sup> My central claim in this Article is that the opinion has much broader implications than have been recognized.

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1. 138 S. Ct. 1719 (2018).

2. See, e.g., KAREN MOULDING & NATIONAL LAWYERS GUILD LESBIAN, GAY, BISEXUAL RIGHTS COMMITTEE, SEXUAL ORIENTATION AND THE LAW § 11:1 (Oct. 2018 Update) (“the decision on extraordinarily narrow grounds actually proved, at least in the immediate debate, to be a dud”); Rodney W. Harrell, *State Religious Free-Exercise Defenses to Nondiscrimination Laws: Still Relevant After Masterpiece Cakeshop*, 87 UMKC L. REV. 297, 314 (2019) (“the Court resolved this case narrowly on facts that are not likely to be repeated”); Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple*, N.Y. TIMES, June 4, 2018, <https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html> [<https://perma.cc/KWV6-Z6Z3>]; Eugene Volokh, *The Masterpiece Cakeshop Decision Leaves Almost All the Big Questions Unresolved*, REASON: THE VOLOKH CONSPIRACY (June 4, 2018, 10:49 AM), <https://reason.com/volokh/2018/06/04/the-masterpiece-cakeshop-decision-leaves>

I do not mean merely that a narrow judicial statement of a new right may evolve over time into a much broader right, although that is certainly true.<sup>3</sup> And I do not mean merely that Justice Kavanaugh is likely to be more sympathetic to the free exercise of religion, and less sympathetic to gay rights, than Justice Kennedy would have been, although that is probably also true. I mean that the *Masterpiece* opinion, as written, combined with a bit of savvy lawyering on the part of those representing conscientious objectors, logically leads to a general protection for conscientious objectors, at least in religiously important contexts such as weddings.

Since same-sex marriage first became a prominent public issue in 2004, I have advocated for marriage equality with religious exemptions—full legal equality for same-sex marriages, with exemptions that protect non-profit religious organizations from having to celebrate or recognize those marriages, and with religious exemptions for very small for-profit businesses from having to assist with the wedding or its celebration so long as other providers of the same goods or services are readily available.<sup>4</sup> I have never doubted that the conscientious objectors who claim this exemption are discriminating on the basis of sexual orientation, but I have argued that they should have an affirmative defense to protect the free exercise of religion. The solution to this conflict is to protect the rights of each side—the right of both same-sex couples and conscientious objectors to live their own lives by their own deepest values and in accord with their deeply felt identity. As has been explained elsewhere, sexual minorities and religious minorities make fundamentally similar claims on the larger society.<sup>5</sup>

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[<https://perma.cc/ZB43-VSF8>]; Amy Howe, ScotusBlog, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-Sex-Wedding-Cake Case [Updated]*, (June 4, 2018, 4:07 PM), <https://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/> [<https://perma.cc/VWE6-RBFR>].

3. Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139.

4. This advocacy appears in articles, briefs, and letters to legislators and other policy makers. These materials are collected in DOUGLAS LAYCOCK, RELIGIOUS LIBERTY VOLUME THREE: RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE LEGISLATION, AND THE CULTURE WARS 763–976 (2018), and DOUGLAS LAYCOCK, RELIGIOUS LIBERTY VOLUME FOUR: FEDERAL LEGISLATION AFTER THE RELIGIOUS FREEDOM RESTORATION ACT, WITH MORE ON THE CULTURE WARS 695–863 (2018).

5. Douglas Laycock, *Liberty and Justice for All*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 24, 26–27 (William Eskridge & Robin Fretwell Wilson eds.

Government should not interfere with sexual orientation, and it should not interfere with the exercise of religion, without the most compelling reasons.

The *Masterpiece* opinion does not go so far, but it is consistent with this view. The Court set the right tone, insisting on the need to respect the rights and dignity of both sides. “[G]ay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. . . . The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”<sup>6</sup> “At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. . . . [T]he Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs.”<sup>7</sup>

The Colorado Civil Rights Commission and the Colorado Court of Appeals had failed to treat the baker’s religious commitments with either neutrality or respect, and their obvious bias violated the Free Exercise Clause.<sup>8</sup> This bias was manifested in hostile comments and in unequal treatment of customers and bakers on opposite sides of the moral debate over same-sex marriage. Savvy officials can suppress their hostile comments. But savvy conscientious objectors can smoke out unequal treatment by sending testers to request goods and services that retailers who support same-sex marriage are likely to refuse. A state that protects these liberal retailers while penalizing religious conscientious objectors violates the Free Exercise Clause under *Masterpiece*, and on reasonable readings of the Court’s recent free-exercise precedents.

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2018); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206 (2010); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416–30 (1997).

6. *Masterpiece*, 138 S. Ct. at 1727.

7. *Id.* at 1727, 1731.

8. *Id.* at 1729–32.

## I. THE DOCTRINAL BACKGROUND OF THE FREE EXERCISE CLAUSE

Deeper analysis of *Masterpiece* has to begin in 1990, with *Employment Division v. Smith*.<sup>9</sup> *Smith* changed the law of free exercise in important ways, but 29 years later, the meaning of that change remains unsettled. Mr. Smith consumed peyote at a worship service of the Native American Church,<sup>10</sup> where the central ritual is the supervised consumption of peyote in a highly structured ceremony.<sup>11</sup>

Hallucinogenic drugs have been used for religious purposes throughout human history and all around the world.<sup>12</sup> Peyote is a naturally occurring hallucinogen. One consumes peyote by eating the bud of a cactus plant; it is tough and hard to chew, and it often causes nausea or vomiting.<sup>13</sup> So there has never been a significant recreational market for peyote. But American Indians were using it for religious purposes when the earliest Spanish explorers arrived, and probably for millennia before that, and they still are.<sup>14</sup> The Native American Church teaches total avoidance of all other drugs, including alcohol, and is generally viewed as a positive influence in the lives of its members.<sup>15</sup> Religious use of peyote by the Native American Church has long been exempt from the federal drug laws,<sup>16</sup> and after the Court's decision, Congress extended the protection to all American Indians and preempted contrary state law.<sup>17</sup>

Smith was fired when his supervisor learned that he had attended the peyote service. He did not sue over his discharge, but

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9. 494 U.S. 872 (1990).

10. *Id.* at 874.

11. Robert L. Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 AM. J. PSYCH. 695, 695–96 (1971).

12. See Brief of the Council on Spiritual Practices, *et al.*, as Amici Curiae in Support of Respondents 4–10, in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2237542 (collecting scholarly sources).

13. EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS 83, 187 (2d ed. 1996); James S. Slotkin, *The Peyote Way*, in *TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY* 96, 98 (Dennis Tedlock & Barbara Tedlock eds. 1956).

14. OMER C. STEWART, PEYOTE RELIGION: A HISTORY 17 (1987).

15. Bergman, *supra* note 11, at 698.

16. Listing of Additional Drugs Subject to Control; Temporary Exemption From Record-Keeping Requirements, 31 FED. REG. 4679 (Mar. 19, 1966), now codified as 21 C.F.R. § 1307.31 (2018).

17. 42 U.S.C. § 1996a (2012).

he did apply for unemployment compensation. The Supreme Court had repeatedly held that workers were entitled to unemployment compensation when they lost their jobs for religious reasons—for refusing to work on the Sabbath most commonly,<sup>18</sup> or for refusing to make weapons.<sup>19</sup>

The relevant legal rule came from two leading cases, *Sherbert v. Verner*<sup>20</sup> and *Wisconsin v. Yoder*.<sup>21</sup> *Sherbert* and *Yoder* held that government may not burden a religious practice unless that burden is necessary to serve a compelling government interest.<sup>22</sup> So, for example, government could refuse to exempt people who conscientiously objected to paying taxes.<sup>23</sup> But there was no such compelling interest in withholding unemployment compensation from workers with religious practices that conflicted with their employers' demands,<sup>24</sup> or even in an extra year or two of formal education for Amish children.<sup>25</sup>

In *Smith*, the state claimed a compelling interest in a no-exceptions drug-enforcement policy. Smith replied that the tightly controlled religious use of peyote was not dangerous, so that the state's interest was nowhere near compelling. That is how the case was argued, but that is not how the Court decided it.

Instead, and without being asked, Justice Scalia said the state didn't have to show a compelling interest at all. If the law was neutral and generally applicable—a phrase he never defined—it could be applied even to the central ritual of a worship service.<sup>26</sup> The opinion appears to say that if the law is neutral and generally

18. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963).

19. *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

20. 374 U.S. 398 (1963).

21. 406 U.S. 205 (1972).

22. *Id.* at 215 ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert*, 374 U.S. at 403 ("any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest'") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *id.* at 406 ("only the gravest abuses, endangering paramount interest, give occasion for permissible limitation") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

23. *United States v. Lee*, 455 U.S. 252, 258–60 (1982).

24. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141–42 (1987); *Thomas*, 450 U.S. at 718–19; *Sherbert*, 374 U.S. at 406–09.

25. *Yoder*, 406 U.S. at 221–29.

26. *Emp't Div. v. Smith*, 494 U.S. 872, 878–89 (1990).

applicable, the state doesn't have to have any reason at all for refusing religious exemptions.<sup>27</sup> It can just say no. *Smith* was 5-4, the work of four conservatives (Justices Rehnquist, Scalia, Kennedy, and White) plus Justice Stevens.

The rhetorical tone of the opinion was hostile to religious exemptions. Lower courts responded to the rhetoric and initially said that pretty much every law was neutral and generally applicable—even a zoning law that categorically excluded churches.<sup>28</sup> The city had a reason for excluding churches that was more than just hostility to churches, so according to the Eighth Circuit, the law was neutral and generally applicable.<sup>29</sup>

But *Sherbert* and *Yoder* were *not* overruled. Scalia had only five votes, and it's a reasonable inference that one of those five said he wouldn't vote to overrule anything. So *Sherbert* and *Yoder* were distinguished and given new explanations.

*Yoder* had held that Wisconsin could not require the Amish to send their children to high school. Scalia claimed that *Yoder* was based on a hybrid of free exercise and the parents' right to control their children's education.<sup>30</sup> This hybrid-rights theory seemed to contemplate that if you combined a failed parental-rights claim with a failed free-exercise claim, the two failed claims would somehow add up to a successful hybrid claim. That never made any sense, and almost nothing has come of the hybrid-rights theory.<sup>31</sup> It

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27. See Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 630 (2003) ("laws that are neutral and generally applicable require no justification, no matter how seriously they burden the religious claimant, or how trivial the government interest is in their execution").

28. The zoning ordinance listed a number of specific uses in commercial zones but did not list churches. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 466 n.1 (8th Cir. 1991) (setting out the ordinance). The city "unequivocally interpreted" this listing to categorically exclude churches. *Id.* at 468 n.2. The City Council subsequently passed a resolution making even more explicit its view that churches were excluded. *Id.* at 467.

29. *Id.* at 472. See also Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 777-78 & nn.188-89 (1998) (noting other examples).

30. *Smith*, 494 U.S. at 881-82.

31. See *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231 (3d Cir. 2008) (rejecting hybrid parental-rights and free-exercise claim, and reviewing earlier decisions rejecting or minimizing the exception); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573, 587-605 (2003) (attempting to defend the exception, but reviewing the many cases refusing to apply it or interpreting it in ways that make it meaningless); Lund, *supra* note 27,

is notable principally for Scalia's choice to rely on an unenumerated right—a category of rights that he always said he didn't believe in<sup>32</sup>—rather than the textually explicit Free Exercise Clause.

The more important reinterpretation was what Scalia said about *Sherbert v. Verner*, the first of the unemployment-compensation cases. He said that the law in *Sherbert* was not neutral and generally applicable, because the state accepted “at least some” reasons for refusing available work.<sup>33</sup> You don't forfeit unemployment compensation if you decline a job far beneath your skill level, or two hundred miles from your home. You don't have to work in a strip club or a massage parlor. There weren't many acceptable reasons for refusing work and demanding a government check instead, but there were “at least some.” Because the state accepted some secular reasons for refusing work, it had to also accept religious reasons. Mrs. Sherbert was still constitutionally entitled to her unemployment compensation, even after *Smith*. But *Smith* was not, because the Court treated the case as a challenge to Oregon's drug laws rather than as a challenge to its unemployment compensation laws. In an earlier decision in the same case, the Court had reasoned that if Oregon could imprison *Smith* for religious use of peyote, surely it could withhold unemployment compensation.<sup>34</sup>

The implications of the Court's explanation of *Sherbert v. Verner* were initially subordinated to the opinion's hostile rhetoric about exemptions. But think about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are. Exceptions grease the wheels for legislation; legislators often exempt their friends and contributors, and they exempt interest groups that might be strong enough to block passage of the bill. There were no exceptions in the law banning peyote,<sup>35</sup> but such

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at 630–32 (collecting opinions and articles dismissing the exception, including a Justice Scalia opinion that is plainly inconsistent with any version of the hybrid-rights exception).

32. See *Troxel v. Granville*, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting) (arguing that parental rights are not judicially enforceable because the Constitution does not mention them).

33. *Smith*, 494 U.S. at 884.

34. *Emp't Div. v. Smith*, 485 U.S. 660, 671 (1988).

35. The Oregon drug laws had a medical exception, but the state told the Court that that exception did not apply to peyote because it was a Schedule I drug. Brief for Petitioners 13–14 & n.6, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126846.

across-the-board total prohibitions are fairly unusual. If a law that burdens religion is not neutral, or not generally applicable, it still has to be justified by a compelling government interest.<sup>36</sup> And *Smith's* discussion of *Sherbert* implies that not many laws are neutral and generally applicable.

The Court returned to the issue in 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>37</sup> Santeria is a Cuban religion that combines elements of Catholicism with elements of Yoruba religion from West Africa.<sup>38</sup> Its central ritual is the sacrifice of small animals.<sup>39</sup> There were an estimated 50,000 Santerians in South Florida, mostly practicing in secret.<sup>40</sup>

When the Church of the Lukumi proposed to take the faith public, Hialeah passed four ordinances to prohibit animal sacrifice. They were drafted to ban Santeria without affecting any of the other myriad reasons why humans kill animals.<sup>41</sup> The most tightly targeted of these ordinances made it a crime to *unnecessarily* kill an animal *in a ritual or ceremony, not for the primary purpose of food consumption*.<sup>42</sup> Omit any ritual and the ordinance did not apply. Make the ritual secondary to food production, or persuade the city that killing the animal was necessary, and the ordinance did not apply. The city said this ordinance was neutral and generally applicable; no one could sacrifice an animal as so defined. The church had not gotten a single vote in the lower courts,<sup>43</sup> which highlights how *Smith* was initially received.

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36. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not ‘water[ed] . . . down,’ but ‘really means what it says’ (alteration in *Lukumi*) (quoting *Smith*, 494 U.S. at 888)); *Smith*, 494 U.S. at 884 (“our decisions in the unemployment cases stand for the proposition that where a state has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason”).

37. 508 U.S. 520.

38. *Id.* at 524.

39. *Id.* at 525.

40. *Id.*

41. *Id.* at 535 (“almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result.”).

42. *Id.* at 551 (setting out Ordinance 87-52).

43. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989) (ruling against the church even before *Smith*, on other grounds), *aff'd mem.*, 936 F.2d 586 (11th Cir. 1991) (after *Smith*), *reh'g and reh'g en banc denied* (unreported; without

The Supreme Court reversed, 9-0. These ordinances were not neutral,<sup>44</sup> they were not generally applicable,<sup>45</sup> and the Court said they didn't come close.<sup>46</sup> The Court discussed neutrality and general applicability in separate sections of the opinion.<sup>47</sup> It still did not define either term. It discussed neutrality in terms of "targeting" religion, the "purpose" or "object" of a law, and discrimination "because of" religion.<sup>48</sup> But no such language appeared in the section on general applicability. Instead, the Court applied what amounts to a standard.

The city said that animal sacrifice undermined government interests in public health and in protecting animals. But the ordinances failed to regulate other activities that undermined those same interests, to the same or greater degree.<sup>49</sup> And not just other killings of animals, the most obvious analogy. The city's health officer admitted that the garbage dumpsters of restaurants were a bigger health hazard than the carcasses of sacrificed animals. But one was banned and the other was not. So the ban on sacrifice was not generally applicable.<sup>50</sup>

It was an element of the offense that killing the animal be unnecessary, and the city said that religious killings were unnecessary. Of course they are unnecessary only if the religion is false, which is clearly what the city believed. No American government gets to decide which religions are true and which are false, but the Supreme Court did not say that. It made a different point of broader potential application: that when the city said that secular killings were necessary but religious killings were not, it "devalues religious reasons for killing" animals, "judging them to be of lesser import than nonreligious reasons."<sup>51</sup>

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a dissenting vote); DOUGLAS LAYCOCK, RELIGIOUS LIBERTY VOLUME TWO: THE FREE EXERCISE CLAUSE 153-54 (2011) (reviewing the litigation in the court of appeals, and summarizing its four-sentence order affirming on the opinion of the trial court). I was lead appellate counsel for the church, so I report these unreported facts from personal knowledge.

44. *Lukumi*, 508 U.S. at 532-40, 542 (opinion of the Court); *id.* at 540-42 (plurality opinion).

45. *Id.* at 542-46 (opinion of the Court).

46. *Id.* at 543 ("these ordinances fall well below the minimum standard necessary to protect First Amendment rights.").

47. *Id.* at 532-42 (neutrality); *id.* at 542-46 (general applicability).

48. *Id.* at 532-35, 538, 542.

49. *Id.* at 543.

50. *Id.* at 544-45.

51. *Id.* at 537.

So once again, if we take the Court's reasoning seriously, many laws will fail the test of general applicability; many laws that burden religion will require compelling justification. Any time the government prohibits a religious practice but exempts some analogous secular practice that undermines the alleged government interest, it decides that the secular practice is more important, more valuable, more something that makes it more deserving of exemption. Government devalues the religious practice as compared to the secular practice.

I do not claim that the Court understood or consciously intended all of this in *Smith*, or even in *Lukumi*. "Neutral and generally applicable law" was an undefined intuitive concept in *Smith*. A criminal prohibition with literally no exceptions qualified if anything did, so the Court had no occasion to examine the concept or clarify its intuition. *Lukumi* made clear that *Smith* had not repealed the Free Exercise Clause and that the requirements of neutrality and general applicability had enforceable content. But *Lukumi* was at the other end of the continuum from *Smith*, with laws that obviously were neither neutral nor generally applicable, so the Court said that it "need not define with precision" the meaning of general applicability.<sup>52</sup>

But the rule that secular exceptions generally require religious exceptions is not some creative reinterpretation dreamed up years after the opinions were issued. The requirement was there in *Smith* if one read carefully. *Smith* unambiguously concluded that the unemployment compensation law in *Sherbert* was not neutral or generally applicable, and much followed from that conclusion.

I noted the opinion's two sides at the time, reading its rhetoric to suggest a general rule of no exemptions and its many limits as creating "enough exceptions and limitations to swallow most of its new rule."<sup>53</sup> If the exceptions and limitations were not taken seriously, then *Smith* created "the legal framework for persecution."<sup>54</sup> But if the Court were serious about the limitations

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52. *Id.* at 542.

53. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 54.

54. *Id.* at 54, 59.

and exceptions, “then much religious exercise can still claim judicial protection.”<sup>55</sup>

I have not quite been accused of making this up years after the fact, but I have been accused of now making an argument that “would largely eviscerate *Smith’s* no-exemptions-required rule.”<sup>56</sup> If *Smith* really laid down a flat rule that no exemptions are required, then renewed attention to the requirement of “generally applicable law” would do substantial damage—perhaps even “eviscerate”—that alleged rule. But the question is whether *Smith* created such a rule for nearly all challenged laws, or only for those laws that are truly neutral and generally applicable, and if the latter, what counts as neutral and generally applicable. I elaborated the protective reading of *Smith* at the time:

In such individualized decisionmaking processes, the Court’s explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth. . . .

The other point in the Court’s explanation of its unemployment compensation cases is secular exemptions. If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons. . . .

The requirement that religious conduct get the benefit of secular exemptions is a requirement of broad potential application. . . .

Exemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion. . . . [S]uch a discriminatory pattern of exemptions shows that the legislature’s goals do not require universal application, and that the legislature values the exempted secular activities more highly than the constitutionally protected religious activities. This pattern of exemptions reflects a legislative judgment that the free exercise of religion is less important than the demands of some special interest group of no constitutional significance. But that is a judgment inconsistent with the constitutional guarantee.<sup>57</sup>

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55. *Id.* at 42.

56. James M. Oleske, Jr., *Free Exercise (Dis)Honesty* 42, <https://ssrn.com/abstract=3262826>, forthcoming in 2019 WIS. L REV.

57. Laycock, *supra* note 53, at 49–51.

All these implications were clearly there from the beginning, but few seemed to notice. Between *Smith* and *Lukumi*, lower courts gave no weight to *Smith*'s limitations and exceptions. After *Lukumi*, that began to change. But on its facts, *Lukumi* was an extreme case; the ordinances were clearly enacted to suppress a single religious practice. Government lawyers argue that every law is neutral and generally applicable except a few rare laws as extreme as the ordinances in *Lukumi*. And a few lower courts have actually attended to the issue and then agreed.<sup>58</sup>

But more courts have concluded that even one or a few secular exceptions, if they undermine the interest the law is alleged to protect, show that the law is not generally applicable. Most prominently, Newark had a rule that police officers must be clean shaven, with a medical exception for officers with skin conditions that make it difficult to shave. That was it; only one relevant exception. But the court of appeals said that Newark had to also exempt Muslim officers religiously obligated to grow a beard. Newark had made a value judgment that medical needs are more important than religious needs, and that value judgment is what *Smith* and *Lukumi* forbid.<sup>59</sup> The *Newark* opinion in the Third Circuit was written by a judge most readers will have heard of, Samuel Alito. There are nine or so similar decisions in courts around the country.<sup>60</sup>

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58. A leading case, and probably the most extreme of these decisions, is *Stormans Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015). It is analyzed at length in Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016). *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649–55 (10th Cir. 2006), holds a zoning law generally applicable. Most zoning laws are highly individualized and subject to many exceptions, but in this case the city had apparently never granted an exception for any daycare center, which was the church's requested use.

59. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364–66 (3d Cir. 1999).

60. *Ward v. Polite*, 667 F.3d 727, 738–40 (6th Cir. 2012) (holding rule prohibiting counseling student from referring same-sex couple to another counselor not generally applicable where there were exceptions for other values conflicts and for failure to pay); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206–12 (3d Cir. 2004) (holding permit requirement for keeping animals not generally applicable where there were exceptions for zoos, circuses, hardship, and extraordinary circumstances); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (holding zoning ordinance that excluded synagogue not neutral and not generally applicable where there was exception for lodges and private clubs); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165–68 (3d Cir. 2002) (holding textually absolute rule prohibiting posting or attachment of any sign to government property not neutral where variety of exceptions had been made in practice); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 885–86 (D. Md. 1996) (holding landmarking ordinance subject

## II. THE SECULAR EXCEPTION IN *MASTERPIECE CAKESHOP*

This at last brings me back to *Masterpiece Cakeshop*. *Masterpiece* is one of a handful of cases where conscientious objectors in the wedding business refuse to assist with a same-sex wedding and get sued under a state public-accommodations law, or in a few of the cases, feel threatened by such a law and sue to enjoin its enforcement or have it declared unconstitutional as applied to their religiously motivated actions.

These vendors understand marriage as an inherently religious relationship, and therefore they understand weddings as inherently religious events. Jack Phillips, the owner and cake artist at Masterpiece Cakeshop, testified to this understanding, citing various scriptural bases for marriage and concluding that his objection “has everything to do with the nature of the wedding ceremony itself, and about my religious belief about what marriage is and whether God will be pleased with me and my work.”<sup>61</sup> “The issue was the nature of the event and that I cannot participate in such a ceremony based on my sincerely held religious beliefs.”<sup>62</sup>

The wedding vendors’ job is to make their part of the wedding the best and most memorable it can be; they quite reasonably understand themselves to be promoting and celebrating the wedding and the marriage. The Washington florist in a similar case had happily served her long-time gay customer, knowing that the

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to strict scrutiny where there were exceptions for financial hardship to owner, substantial benefit to city, and best interests of community); *Rader v. Johnston*, 924 F. Supp. 1540, 1551–56 (D. Neb. 1996) (holding requirement that freshman live in dorm not generally applicable where one-third of freshmen were exempt for diverse array of reasons); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 15–16 (Iowa 2012) (holding ban on steel-wheeled tractors not generally applicable where state and county permitted other wheel coverings that did similar damage to roads); *Horen v. Commonwealth*, 479 S.E.2d 553, 556–57 (Va. Ct. App. 1997) (holding ban on possession of bird feathers not neutral where there were exceptions for taxidermists, academics, researchers, museums, and educational institutions). There is also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297–99 (10th Cir. 2004), which reversed summary judgment for defendants where a single exception granted to another student, and earlier exceptions granted to plaintiff, suggested that defendant had a system of individualized exemptions. But *Axson-Flynn* curiously distinguished individualized exemptions from categorical exemptions, even though *Lukumi* relied on many categorical exceptions, and even though categorical exemptions are generally broader, giving favored treatment to more people, than individualized exemptions.

61. Joint Appendix 167, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4232758.

62. *Id.*

flowers were for his same-sex partner, but she said that she could not do the wedding.<sup>63</sup> To believers like these, the wedding is a religious event that is religiously prohibited. It is a sacrilege, and they cannot participate.

These cases have mostly been litigated under state-law protections for religious liberty. They have mostly been in blue or purple states, because those are the only states with state-wide gay-rights laws.<sup>64</sup> And before the Supreme Court's decision in *Masterpiece*, the religious claimants nearly all lost—a photographer in New Mexico,<sup>65</sup> a baker in Oregon,<sup>66</sup> a bed and breakfast in Hawaii,<sup>67</sup> a wedding venue in New York,<sup>68</sup> videographers in Minnesota,<sup>69</sup> the florist in Washington.<sup>70</sup> The Washington florist has lost again on remand,<sup>71</sup> and a website designer in Colorado has lost a pre-enforcement challenge to the law that was at issue in *Masterpiece*.<sup>72</sup> Religious claimants continue to lose in these cases in part because the judges have so far read *Masterpiece* narrowly, and

63. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2015), *vacated*, 138 S. Ct. 2671 (2018).

64. On the extremely small chance that anyone is reading this Article decades from now, when usage might have changed, blue states are states where the Democratic party has a normally reliable majority. In red states, the Republican party has a normally reliable majority. Purple states are more closely contested states that may swing back and forth between the two major parties.

65. *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

66. *Klein v. Or. Bur. of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), *review denied* (Or. June 21, 2018), *vacated*, 2019 WL 2493912 (U.S. June 17, 2019).

67. *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Hawaii Ct. App. 2018), *cert. rejected*, 2018 WL 3358586 (Hawaii July 10, 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

68. *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div. 2016).

69. *Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *appeal pending*, No. 17-3352 (8th Cir.).

70. *State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2015), *vacated*, 138 S. Ct. 2671 (2018).

71. *State v. Arlene's Flowers*, No. 91615-2, 2019 WL 2382063 (Wash. June 6, 2019) (emphasizing the passages in *Masterpiece* favorable to gay rights, *id.* at \*6-7, acknowledging that *Masterpiece* precludes adjudicatory bodies from discriminating against religion, *id.* at \*8, but concluding that the state's Attorney General remains free to discriminate against religion, *id.* at \*9-11).

72. 303 Creative LLC v. Elenis, No. 16-cv-02372, 2019 WL 2161666 (D. Colo. May 17, 2019) (disregarding *Masterpiece* on the ground that the Court "avoided a ruling on the merits," *id.* at \*3, and granting summary judgment to the state enforcement officer on the basis of a pro-government reading of *Smith* and *Lukumi*, *id.* at \*11). This case involved only the provision prohibiting communications suggesting that some customers would be unwelcome on the basis of their membership in a protected class. Plaintiff's challenge to the provision requiring that it serve such customers was dismissed for lack of standing. *Id.* at \*3 n.5; Order Granting in Part and Denying in Part Motion to Dismiss, ECF No. 52.

more fundamentally, because the records in these cases were compiled before *Masterpiece*, so they did not contain evidence of discrimination of the sort on which *Masterpiece* relied.

A California baker won on free-speech grounds in a state trial court.<sup>73</sup> Given the California Supreme Court's resistance to religious exemptions,<sup>74</sup> it seemed likely that this decision would be reversed, but for whatever reason—possibly the intervening decision in *Masterpiece*—the plaintiff state agency did not appeal.<sup>75</sup> At least two other cases, each involving ordinances enacted by blue cities in red states, are still pending in state courts.<sup>76</sup> The Oregon case is still pending in the state courts on remand, and presumably, a new cert petition will be filed in the Washington case.

*Masterpiece* arose in Colorado, which has no statute protecting religious practices from the state and no decision squarely deciding whether the free exercise clause of the state constitution creates a right to religious exemptions.<sup>77</sup> So federal claims played a larger

73. Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc., No. BCV-17-102855 (Cal. Super. Ct. Feb 5, 2018), <https://globalfreedomofexpression.columbia.edu/cases/departement-fair-employment-housing-v-cathys-creations/> [https://perma.cc/WC5X-LA24].

74. N. Coast Women's Care Medical Group, Inc. v. San Diego Cty. Sup'r Ct., 189 P.3d 959 (Cal. 2008) (refusing to exempt medical practice where one physician declined to provide artificial insemination to lesbian patient and patient was successfully treated by another physician in the same practice); Catholic Charities of Sacramento, Inc. v. Sup'r Ct., 85 P.3d 67 (Cal. 2004) (refusing to exempt Catholic Charities from obligation to cover contraception in its employee insurance plan); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (refusing to exempt owner of small building from renting to unmarried couple).

75. Appellant's Opening Brief 9, Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc., No. F0077802 in Cal. Ct. App. 5th Dist., 2018 WL 5014291 (Oct. 12, 2018). This is an appeal from a denial of attorneys' fees to the defendant baker. The chronology in plaintiff's appellate brief is unclear. It says that the trial court entered judgment on May 1, 2018. *Id.* at 12. The state had sixty days to appeal. Cal. R. of Ct. 8.104. *Masterpiece* came down on June 4, within that sixty-day period. But plaintiff filed its motion for attorneys' fees on May 10, before *Masterpiece* and long before the time for appeal had expired. Brief at 12. The state's brief does not clarify. Respondent's Brief, 2018 WL 6002854 (Nov. 13, 2018).

76. Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018) (rejecting challenge to ordinance requiring calligraphers to produce invitations and other goods for same-sex weddings), *review granted* (Ariz. Nov. 20, 2018); Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc., No. 2015-CA-00745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (holding that printer did not discriminate on the basis of sexual orientation when he refused to print t-shirts for a gay-pride festival), *review granted* (Ky. Oct. 25, 2017). Note that *Hands on Originals*, the Kentucky case, is not a wedding case, but also that it presents a more straightforward free-speech claim, because the printer is being asked to print an explicit message in somewhat permanent form).

77. COLO. CONST. art II, § 4.

role. The *Masterpiece* baker, Jack Phillips, claimed that his cakes were works of art protected by the Free Speech Clause. And if you look at the pictures of his cakes, that claim is not crazy.<sup>78</sup> But it is hard to find a logical stopping point. If cake decorating is speech, lots of businesses may involve elements of speech. At the oral argument, Phillips's lawyer had great difficulty persuading justices that she could draw a manageable line between products that were speech and products that were not.<sup>79</sup>

Phillips also had a federal free exercise claim. But for that, he had to show that the Colorado law was not neutral, or not generally applicable. His lawyers obviously doubted whether he could show that; they gave much more attention to the free speech claim.<sup>80</sup>

No one who supported the state and the same-sex couple took the free-exercise theory seriously. A prominent law professor on a listserv, which I am not permitted to cite, said that the Court would reject the free speech theory and then dispose of the free-exercise theory in a paragraph. This widespread disdain for the free-exercise claim resulted from the rhetoric of *Employment Division v. Smith* still dominating close textual analysis of *Smith* and *Lukumi*.

I frequently collaborate with Thomas Berg at St. Thomas University in Minnesota. Professor Berg and I filed an amicus brief devoted solely to free exercise.<sup>81</sup> We argued for an exemption only for small businesses and only for events directly related to the wedding. This focus on the religious context would lead to a much narrower exemption than the free speech theory, which would have protected even simple bigots in any expressive context instead of just those with sincere religious objections in religious contexts.

The Colorado public-accommodations law had no explicit secular exceptions. But we said that it had been enforced in discriminatory ways that created an *implicit* secular exception, and this secular exception meant that the law was not generally

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78. See *Masterpiece Cakeshop*, <https://www.masterpiececakes.com> [<https://perma.cc/P2GH-GGQL>].

79. Transcript of Oral Argument 11–20, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 6025739.

80. See Brief for Petitioners 16–38, *Masterpiece*, 2017 WL 3913762 (free-speech claim); *id.* at 38–46 (free-exercise claim); *id.* at 46–48 (hybrid-rights claim).

81. Brief of Christian Legal Society *et al.* as Amici Curiae in Support of Petitioners, *Masterpiece*, 2017 WL 4005662.

applicable. The Court did not say that, but it relied on much of the same evidence to say something that led to nearly the same place. It said that the law was not neutral, because Colorado's enforcement pattern showed hostility to religion.<sup>82</sup>

Some of the Civil Rights Commissioners had made hostile statements on the record, blaming religious liberty for slavery and the Holocaust and calling Jack Phillips's religious commitments "despicable."<sup>83</sup> Views of that sort are very widespread, and some commentators have publicly defended these comments,<sup>84</sup> but public officials have now been warned not to talk about them. So those facts may not recur.

The other evidence is more important. A Christian activist named William Jack went to three different bakers, requesting cakes in the shape of a Bible, with scriptural quotations hostile to same-sex marriage. Some of the messages were offensive from the perspective of most people who did not already share Jack's views. Jack had not requested just any anti-gay cake, but explicitly *religious* anti-gay cakes. Each baker refused to make his cake, he charged them with religious discrimination, and the Civil Rights Division (the prosecuting arm of the Commission) dismissed the charges.<sup>85</sup>

The same Colorado law that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of "creed," which the accompanying regulations define to include any religious practice or belief.<sup>86</sup> So the Colorado courts had to explain why the *Masterpiece* baker violated the statute and the bakers in the William Jack cases didn't. And in the course of doing that, the Colorado Court of Appeals said some deeply inconsistent things.

Most fundamentally, it said that refusing to make a cake closely associated with same-sex couples discriminated on the basis of

82. *Masterpiece*, 138 S. Ct. at 1729–32.

83. *Id.* at 1729–30.

84. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 138–43 (2018).

85. *Masterpiece*, 138 S. Ct. at 1730–31.

86. COLO. REV. STAT. § 24-34-601 (Thomson Reuters 2015) (prohibiting discrimination on the basis of protected classifications); 3 COLO. CODE REGS. § 708-1:10.2(H) (clarifying that the law's prohibition of creedal discrimination protects "all aspects of religious beliefs, observances or practices . . . as well as the beliefs or teachings of a particular religion, church, denomination or sect").

sexual orientation, but that refusing to make a cake closely associated with conservative Christians did *not* discriminate on the basis of religion.<sup>87</sup>

For the protected bakers, the court assumed that the cake's message would be the bakers' message and not just the customers'; the protected bakers could lawfully object to "the offensive nature of the requested message."<sup>88</sup> For Jack Phillips, the court said that a wedding cake would send no message, but if it did send one, it would be the customer's message, not the baker's.<sup>89</sup>

The protected bakers' willingness to produce cakes with other "Christian themes" for other Christian customers was treated as exonerating.<sup>90</sup> Petitioner's willingness to produce other cakes and baked goods for same-sex couples was treated as irrelevant.<sup>91</sup>

For Jack Phillips, the fact that he would merely be complying with the law meant that he would send no message.<sup>92</sup> For the other bakers, this argument went unmentioned.

The court also said that in the William Jack cases, the customer wanted objectionable words or symbols on the cake, but that in Jack Phillips's discussion with the same-sex couple that sued him, he did not learn what they wanted on their cake.<sup>93</sup> This argument has been picked up very widely on the same-sex couples' side of the debate,<sup>94</sup> but it is deeply disingenuous.

In the actual transaction, Phillips could surely assume that the couple wanted *some* words or symbols on the cake, and an essential part of his task was to help them choose those words and symbols.<sup>95</sup> In any event, the very purpose of a wedding cake is to celebrate the

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87. Compare *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. Ct. App. 2015) (holding that opposition to same-sex marriage shows motive to discriminate on the basis of sexual orientation, because the two are "closely correlated"), *rev'd*, *Masterpiece*, 138 S. Ct. 1719, *with id.* at 282 n.8 (concluding that opposition to religious message does not show motive to discriminate on the basis of religion).

88. *Id.* at 282 n.8.

89. *Id.* at 286.

90. *Id.* at 282 n.8.

91. *Id.* at 282.

92. *Id.* at 286.

93. *Id.* at 285, 288.

94. See Kendrick & Schwartzman, *supra* note 84, at 155; Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMM. 171, 189-90 (2019).

95. Joint Appendix at 161, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4232758.

wedding and the marriage, with or without an inscription. As even the Colorado court said, the couple asked Phillips to “design and create a cake to *celebrate* their same-sex wedding.”<sup>96</sup>

And under the rest of the Colorado court’s reasoning, the case would have come out the same way even if the conversation had lasted longer and the couple had said they wanted two men in tuxedos, “David ♥ Charlie,” a rainbow, or any other more explicit message. The court’s logic would still have said that it would be the customer’s message, not the baker’s; that the baker would merely be doing what the law required; and that refusing to produce a message so closely associated with same-sex couples discriminated on the basis of sexual orientation. I do not believe that the Civil Rights Commission or the Colorado Court of Appeals would rule any differently in a case where the couple requested an explicit message.

Most fundamentally, I don’t believe it because if refusing a cake with an explicit message is protected, then the conscientiously objecting bakers win. They just need to know enough law to keep the conversation going until the explicit message is chosen or revealed. Protection for explicit messages would not be much help to florists or caterers, but it would largely solve the problem for bakers, printers, calligraphers, and website designers. And the gay-rights side of this debate will not settle for that. A pending Kentucky case does involve an explicit message—a printer asked to make t-shirts with the words “Lexington Pride Festival 2012” and a series of rainbow-colored circles—and the enforcement agency and its amici are all arguing that the printer discriminated when he refused to print that message and that his free-speech rights are no defense.<sup>97</sup>

Even if the Colorado court’s alleged distinctions were more persuasive, and even if they succeeded in placing the two sets of bakers in different doctrinal categories under state law, that would not change the bottom line. The conscience of bakers who support same-sex marriage, or refuse to oppose same-sex marriage, is

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96. *Craig*, 370 P.3d at 276 (emphasis added), *rev’d*, *Masterpiece*, 138 S. Ct. 1719.

97. *Lexington Fayette Urban Cty. Human Rights Comm’n v. Hands on Originals, Inc.*, No. 2015-CA-00745-MR, 2017 WL 2211381, at \*1 (Ky. Ct. App. May 12, 2017), *review granted* (Ky. Oct. 25, 2017).

protected. The conscience of bakers who object to same-sex marriage is not protected.

This discrimination is like the ordinance in *R.A.V. v. City of St. Paul*,<sup>98</sup> where racial epithets were illegal, but “racist,” “bigot,” and a vast range of other offensive epithets were permitted. State law placed the two sets of epithets in different doctrinal categories, and the correlation between the epithets hurled and the speakers and viewpoints regulated was imperfect. But these distinctions could not save a regime that effectively “license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”<sup>99</sup> It is no more defensible for Colorado to allow one side to follow the dictates of conscience while requiring the other side to submit its conscience to the demands of any customer who walks in the door.

The Supreme Court did not invoke *R.A.V.*, and it did not rely on all the evidence I have outlined. But it relied on important parts of it. It noted the inconsistency about whether any message would be the baker’s message or the customer’s message,<sup>100</sup> and the inconsistency about the bakers’ willingness to provide other goods and services to the protected class.<sup>101</sup> And it focused on the Colorado court’s statement that the protected bakers could refuse to provide the “offensive” message that William Jack had requested. “A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness.”<sup>102</sup>

Much of the commentary has treated the Court’s decision as confined to an odd set of facts, and as avoiding the underlying question of whether wedding vendors with conscientious objections can be required to assist with same-sex weddings.<sup>103</sup> But these facts are readily reproducible. Wedding vendors seeking exemptions can send testers like William Jack to request an offensively conservative religious version of the same goods or services. And we can confidently expect state enforcement officials to react just as they did in Colorado, protecting the conscience of

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98. 505 U.S. 377 (1992).

99. *Id.* at 392.

100. *Masterpiece*, 138 S. Ct. at 1730.

101. *Id.*

102. *Id.* at 1731.

103. *See supra* note 2.

the vendors they agree with. If liberal business people don't have to provide conservative religious goods or services that *they* find offensive or violative of conscience, then *Masterpiece* says that conservative believers don't have to do same-sex weddings that offend them and violate *their* conscience.

This means that the Supreme Court has gone much further than is generally recognized toward protecting wedding vendors. And it has taken a substantial step toward the protective understanding of *Employment Division v. Smith*—that even one or a few secular exceptions make a law not neutral, or not generally applicable. If the law is not neutral, or not generally applicable, religious conscientious objectors are entitled to an exemption unless there is a compelling government interest in requiring them to comply. And the state's willingness to grant secular exemptions seriously undermines any claim to a compelling interest in enforcing the law without exceptions.

### III. RATIONALIZING UNEQUAL TREATMENT

This requirement to treat claims consistently will be effective only if courts take it seriously. States will try to manipulate their rules to justify unequal treatment of objectors they agree with and those they don't. One such attempted manipulation is the argument that *Masterpiece* and the William Jack cases were distinguishable because only William Jack asked bakers to write explicit messages in frosting.<sup>104</sup> But even if that distinction were valid, it could not be generalized; the next conscientious objector may wait until explicit words are requested, and the next William Jack may not request explicit words or symbols but just explain that the cake is for an offensive celebration.

In *Masterpiece*, four Justices accepted a manipulative argument with much broader potential application. Justice Kagan's concurrence and Justice Ginsburg's dissent both argued that the state's discrimination could have been justified on the ground that the protected bakers would not sell an anti-gay cake to anybody, but Phillips would sell wedding cakes to opposite-sex couples.<sup>105</sup>

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104. See *supra* notes 93–97 and accompanying text.

105. *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring); *id.* at 1750 (Ginsburg, J., dissenting).

But as Justice Gorsuch's concurrence explained, this reaches the preordained result by manipulating the level of generality.<sup>106</sup> It treats the anti-gay cake as having a distinctive message, but the pro-gay cake, the cake for the same-sex wedding, as merely generic. If the anti-gay cake is a unique product because of its message, then the category is not cakes, or wedding cakes, but cakes with a particular message. And with or without words or symbols, the point of a wedding cake is to celebrate the wedding and the marriage. This may be clearest when the message is explicit; a wedding cake with two brides, two male names, or the like is a cake that Phillips would not sell to anybody. But with or without such symbols, the cake sends a celebratory message in support of a same-sex wedding. Even the Colorado court acknowledged this when it was simply describing the facts and not yet trying to justify its decision.<sup>107</sup>

Here's another way to think about the same point. The attempt to rationalize what Colorado did would treat an anti-gay cake and a gay-pride cake as two different products, and the protected bakers wouldn't make one of those products for anybody. But it treats the same-sex wedding cake and the opposite-sex wedding cake as the same product, distinguished not by their different messages, but only by the identity of the customer. State law can treat each of these pairs of cakes as comprising one product or two. But it cannot say that one pair of cakes is the same—just one product—and that the other pair is different—two distinct products. Both pairs are the same at one level of generality—two cakes about gay rights, or two cakes about weddings—and both cakes are different at a more specific level of generality, expressing opposite views of the common subject matter. We come back to the same basic contradiction. The Colorado courts, and the liberal Justices, treated Jack Phillips as making a decision about the customer, but the protected bakers as making a decision about the message.

Colorado invoked this distinction to avoid enforcing its statute in a generally applicable way. Colorado prohibits discrimination on the basis of sexual orientation, and on the basis of creed, in the same terms in the same statute. It has asserted an interest in preventing

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106. *Id.* at 1737–39 (Gorsuch, J., concurring).

107. *See supra* note 96 and accompanying text.

discrimination against groups that have historically been the targets of widespread discrimination, or on the basis of classifications that have historically been the bases for widespread discrimination. It did not have to include both religion and sexual orientation in that protection, but it quite sensibly chose to do so. That choice defined the reach of Colorado's interest in the case. The state's conclusion that the law did not apply to the William Jack bakers undermined its interest in ending discrimination to the same extent as a conclusion that Masterpiece Cakeshop was entitled to exemption from the law on grounds of religious liberty—or less plausibly but more parallel to the William Jack holdings, that Masterpiece had not violated the law.

Lawrence Sager and Nelson Tebbe endorse these alleged distinctions between *Masterpiece* and the William Jack cases, but they also make a much more sweeping claim.<sup>108</sup> They repeatedly invoke Charles Black's famous defense of the desegregation decisions: African-Americans' right to equal treatment trumped any alleged white right not to associate, because there was no equivalence between the white and black populations in the American South in the middle of the twentieth century.<sup>109</sup> "[A] whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station."<sup>110</sup> Professor Black briefly described a system of pervasive segregation in every aspect of life that "comes down in apostolic succession from slavery and the *Dred Scott* case,"<sup>111</sup> in which blacks were denied voting rights and barred "from all political power,"<sup>112</sup> in which separate facilities were "almost never really equal" and black schools were "so disgracefully inferior to white schools" that to call them equal was a "Molochian child-destroying lie."<sup>113</sup>

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108. Sager & Tebbe, *supra* note 94, at 173, 187, 187–88.

109. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

110. *Id.* at 424

111. *Id.*

112. *Id.* at 425.

113. *Id.* at 425–26. Moloch was "a Canaanite deity associated in biblical sources with . . . child sacrifice." Noah Tesch, *Moloch*, in *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Moloch-ancient-god> [<https://perma.cc/UF2M-LLHF>].

He might have added that in this system, whites controlled the vast majority of economic power and resources; nonwhite income per capita in the South was about half of white income.<sup>114</sup> There was an African-American middle class in major cities,<sup>115</sup> sustained in part by segregation, which created a self-contained African-American market. But many or most African-Americans were economically dependent on the whites who oppressed them.<sup>116</sup> Threatened or actual violence further enforced the system.<sup>117</sup> This system had the overwhelming support of whites in the South, and intense social pressure forced most potential dissenters to keep any doubts to themselves.<sup>118</sup> Southern “moderates” were segregationists who were reluctant to defy the courts.<sup>119</sup>

Sager and Tebbe’s assertion that the LGBT community is in a similar situation today is absurd, and they make essentially no effort to support their claim. Certainly gays and lesbians were treated badly in the past, and the problem has not been entirely

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114. Data squarely comparable to current data on same-sex couples have been difficult to find, but several data sets yield a consistent picture. Among male workers employed for twelve months in 1939, urban nonwhites in the South earned 41% of what whites earned; rural nonwhites earned 37%. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 105 tbl.9 (2d ed. 1971). In 1950, black male income as a proportion of white male income in southern Standard Metropolitan Areas ranged from 37% in Montgomery, Alabama to 76% in El Paso, Texas (where only 2.4% of the population was black). Calculated from *id.* at 124–25 tbl.12. The central tendency appears to have been just over 50%. *Id.* Either this was a good bit better than in 1939, possibly because of the post-war boom, or the situation in the largest cities was a good bit better than in smaller cities, or a combination of the two. I could not find data for the South in 1960, but nationwide, white median family income was \$5835; the nonwhite median was \$3233, or 55% of white income. STATISTICAL ABSTRACT OF THE UNITED STATES 1962 at 334, tbl.450. Of course the numbers for African-Americans would have been worse in the South. BECKER, *supra*, at 116.

115. See J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 34 (1961).

116. See *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (noting that “fear of community hostility and economic reprisals” led many members of National Association for the Advancement of Colored People to drop their membership when city demanded membership lists); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting “uncontroverted showing” that disclosure of NAACP’s membership lists had resulted in “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”).

117. *Bates*, 361 U.S. at 524 (noting “substantial uncontroverted evidence” of “harassment and threats of bodily harm” when NAACP membership was revealed); *Patterson*, 357 U.S. at 462 (recognizing “threat of physical coercion” for NAACP members).

118. See, e.g., PELTASON, *supra* note 115, at 9–10 (reporting how federal judges were ostracized for enforcing the Supreme Court’s desegregation decisions).

119. *Id.* at 33–35.

solved. We might plausibly say that the combination of sodomy laws, moral disapproval, and employment discrimination was a “system” designed to keep gays and lesbians in the closet. But even at its peak, that system was not remotely so pervasive, and did not reach nearly so many parts of life, as segregation in the American South. And any such system has been declining for decades. Most obviously, the sodomy laws had not been enforced for many years before they were finally held unconstitutional in 2003.<sup>120</sup>

In contrast to monolithic southern-white support for subordinating African-Americans when Professor Black wrote, Gallup reports that 67% of Americans believe that same-sex marriages should be valid and with the same rights as traditional marriages.<sup>121</sup> The Public Religion Research Institute found 62% support with a somewhat larger sample size and somewhat differently worded question.<sup>122</sup> In the PRRI survey, 31% strongly supported same-sex marriage, and only 14% were strongly opposed.<sup>123</sup> Majorities in every state now support gay-rights legislation<sup>124</sup> – which of course does not mean that it can be passed everywhere, especially without religious exemptions – and gay reporters write optimistic columns about rapid progress in red states.<sup>125</sup>

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120. *Lawrence v. Texas*, 539 U.S. 558, 567–72 (2003) (reviewing the long history of non-enforcement with respect to consensual sodomy in private). Police surveillance designed to enforce the sodomy laws at least in public restrooms was a serious hazard for gay men at a time when most were in the closet and had difficulty finding each other. One famous such incident was the arrest in 1964 of presidential aide Walter Jenkins for a same-sex encounter in a YMCA changing room. Laura Smith, *When LBJ's Closest Aide Was Caught in a Gay Sex Sting, the President Caved – the First Lady Stood Up*, *TIMELINE* (Sept. 28, 2017), <https://timeline.com/walter-jenkins-gay-lbj-21d71a731021> [https://perma.cc/WZ23-673A].

121. Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, *GALLUP* (May 23, 2018), <https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx> [https://perma.cc/7MDF-M8UD].

122. Daniel Greenberg, Maxine Najle, Oyindamola Bola & Robert P. Jones, *Fifty Years After Stonewall: Widespread Support for LGBT Issues – Findings from American Values Atlas 2018*, <https://www.pri.org/research/fifty-years-after-stonewall-widespread-support-for-lgbt-issues-findings-from-american-values-atlas-2018/> [https://perma.cc/Q7QX-3Y2C].

123. *Id.*

124. *Id.*

125. Samantha Allen, *How “Real America” Became Queer America*, *N.Y. TIMES*, March 13, 2019, <https://www.nytimes.com/2019/03/13/opinion/lgbt-trump-red-states.html> [https://perma.cc/S59H-DU2K].

The LGBT community votes without hindrance and is an important part of the working coalition of one of our two major political parties; it is guaranteed strong political support from that party. It is not segregated; there are no segregated facilities or segregated schools to be equal or unequal.

In Census Bureau data, same-sex couples report higher educational achievement, higher rates of employment, and higher median incomes than opposite-sex couples.<sup>126</sup> Read that sentence again; these are unexpected data. These differences hold even when all cohabiting same-sex couples, married and unmarried, are compared to married opposite-sex couples; the differences are larger when only same-sex and opposite-sex married couples are compared. These data on income and education are radically different from similar data by race, even today and nationwide, let alone in the segregated South in 1960.<sup>127</sup>

There are well over half a million same-sex married couples in the country,<sup>128</sup> and the number of litigated cases of religiously motivated refusals to provide goods or services to all those weddings appears to be in the very low two digits at most.<sup>129</sup> No

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126. *Characteristics of Same-Sex Couple Households: 2005 to Present*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html> (hereinafter *Same-Sex Couple Households*). The information in the text comes from Tables 1 and 2 of the 2017 data.

127. For income, see Kayla Fontenot, Jessica Semega & Melissa Kollar, *Current Population Reports: Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU at 28, 31 (tbl.A-1), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf> (reporting median income for white households as \$65,273, compared to \$40,902 for black households). For education, see *Educational Attainment in the United States 2018*, U.S. CENSUS BUREAU tbl.1, <https://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html> (reporting total population and numbers of degrees by race, from which it can be calculated that 33% of whites and 23% of African-Americans have a bachelor's degree or higher). Racial differences in employment are less dramatic. See *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T LABOR: BUREAU LABOR STATISTICS, at tbl.5 under Employment Status, <https://www.bls.gov/cps/cpsaat05.pdf> [<https://perma.cc/8XKC-BLCW>] (reporting that in 2018, 60.7% of whites and 58.3% of blacks were employed).

128. Adam P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of Obergefell v. Hodges*, WILLIAMS INST.: UCLA SCHOOL OF LAW, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Obergefell-2-Year-Marriages.pdf> [<https://perma.cc/BD3D-ZQAY>]; *Same-Sex Couple Households*, *supra* note 126 (reporting similar numbers).

129. I list ten at notes 65–76 *supra*. One of those (*Hands on Originals*) is not a wedding case, and two (*Brush and Nib* and *303 Creative*) are pre-enforcement challenges, not suits or administrative complaints by an actual couple referred elsewhere. Kendrick and

doubt there are other couples who preferred to work with a vendor who genuinely welcomed their business and who decided that it wasn't worth the time, trouble, and aggravation to sue the conscientious objector who referred them elsewhere. Some couples see such a referral as gravely offensive, but almost certainly, other couples see it as a minor matter if done civilly, part of the friction of living in a pluralistic society. Whatever the total numbers, it is impossible to conjure a systemic problem out of this handful of known cases.

Of course I do not claim that all problems of hostility to the LGBT community have been solved. Sporadic discrimination and even violence continues. In some communities, discrimination is still widespread, and in those places, if most wedding vendors (or the only wedding vendor) discriminate, religious exemptions must be denied on compelling interest grounds.<sup>130</sup> No doubt all these problems are worse, and more widespread, for transgender persons than for gays and lesbians. There is still much work to be done. But making martyrs of a handful of conscientious objectors is a singularly counterproductive way of attempting that work.

The polling data and the socio-economic data show that these remaining problems are very far from systemic. They are not remotely comparable to the plight of African-Americans when Charles Black wrote. Refusal to protect religious liberty cannot be justified by the absurd claim that conservative Christians today systematically suppress gays and lesbians in the way that southern whites systematically suppressed African-Americans through the mid-twentieth century.

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Schwartzman list two state administrative-agency cases that I had trouble locating and do not list above. Kendrick & Schwartzman, *supra* note 84, at 133 n.2. They also list a Michigan case that appears to have focused on the vendor's literal speech explaining his conscientious objection rather than his conduct in serving or not serving some same-sex couple. *Country Mill Farms, LLC v. City of E. Lansing*, 280 F. Supp. 3d 1029 (W.D. Mich. 2017). Probably both they and I have missed some. Whatever the exact number, it is very small.

130. This has long been my position. See Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 199–201 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. 2008) (setting out this position and its rationale); LAYCOCK, VOLUME THREE, *supra* note 4, at 766 (setting out this proviso in the statutory text we proposed to state legislatures considering marriage legislation); Douglas Laycock, *Religious Liberty, Health Care, and the Culture Wars*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 21, 32–33 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper, eds. 2017) (further explaining the rationale and applying this principle to Catholic hospitals with local monopolies over reproductive health care).

The Republican Party still opposes gay-rights laws, and neither Congress nor red states have enacted such laws. The election of Donald Trump was a major setback, reflecting many sources of alienation among his voters, including the strength of the reaction to racial, sexual, and LGBT equality, but also including the existential fears of conservative Christians. They foresee not just that the supporters of sexual freedom will gain more rights, but that conservative believers will continue to lose rights—that their freedom to live their own lives in accordance with their faith is targeted and on course to elimination. The wedding-vendor cases, which generate publicity all out of proportion to their number, fuel this fear. So do all the other culture-war disputes that put religious liberty at issue. The Solicitor General's alarming and foolish answer at the oral argument in *Obergefell*—that tax exemption for churches would be at issue in the wake of same-sex marriage<sup>131</sup>—drove this fear to greater heights, creating widespread panic in conservative churches.<sup>132</sup> Congress and red states will never enact gay-rights laws without meaningful religious exemptions; religious exemptions are essential to further progress for gay rights.

Like the LGBT community, conservative believers are a minority group with important rights at risk. Recall that only a third of the population opposes same-sex marriage. Evangelical Protestants are only a quarter of the population,<sup>133</sup> and 35 percent of them support same-sex marriage.<sup>134</sup> The remaining 65 percent are only a sixth of the population, and presumably, only some of them feel strongly about the issue. Two-thirds of Catholics support

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131. Oral Argument on Question 1, at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556 *et al.*), 2015 WL 1929996.

132. See, e.g., David Bernstein, *The Supreme Court Oral Argument That Cost Democrats the Presidency*, REASON: THE VOLOKH CONSPIRACY (DEC. 7, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm\\_term=.7d17f2985d24](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm_term=.7d17f2985d24) [https://perma.cc/584N-2HL8] (Dec. 7, 2016) (surveying this and similar issues, and reporting widespread alarm about the Solicitor General's answers in conservative and religious websites and publications).

133. Pew Research Center, *America's Changing Religious Landscape* (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [https://perma.cc/ECH5-T74D].

134. Pew Research Center, *Attitudes on Same-Sex Marriage* (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [https://perma.cc/4QPU-SNHD].

same-sex marriage, identical to the number in the general population.<sup>135</sup> Religious conservatives have been steadily losing on sexual issues at least since the 1960s, and in less dramatic ways for longer than that.

Today, the views of religious conservatives are extremely unpopular. They are routinely accused of bigotry, hate, and evil.<sup>136</sup> The wedding vendors who refer same-sex couples elsewhere are often (I assume routinely, but I don't know that) targeted with boycotts, vandalism, hate mail, and defamatory reviews on consumer websites.<sup>137</sup> The bakers who turned away William Jack did so because of strong moral disapproval of what he was doing and asking them to do—moral disapproval strong enough to overcome their self-interest in maximizing sales. He experienced that moral disapproval just as same-sex couples experience moral disapproval when turned away by conservative Christians.

Conservative religious views on some issues deserve to be unpopular. But these views are constitutionally protected religious beliefs. Other Americans can disapprove and try to persuade, but as the Supreme Court said in *Masterpiece*, government must treat these views with neutrality and tolerance.<sup>138</sup> Disapproving private citizens can express their disapproval in many ways, but they too would do well to treat these constitutionally protected beliefs with greater tolerance

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135. *Id.*

136. See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869–71 (collecting examples); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DETROIT MERCY L. REV. 407, 415–17 (2011) (collecting more examples); *supra* notes 83–84 and accompanying text (noting statements of Civil Rights Commissioners and their defenders).

137. See *State v. Arlene's Flowers*, No. 91615-2, 2019 WL 2382063, \*3 (Wash. June 6, 2019) (briefly noting threats and hostile messages directed to conscientious objector in that case); *infra* note 140 and accompanying text (citing reports from Jack Phillips concerning Masterpiece Cakeshop); Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231, 253–54 (Micah Schwartzman, Chad Flanders & Zoe Robinson, eds. 2016) (collecting news accounts about Sweet Cakes by Melissa and boycotts of the whole state of Indiana); *Indiana Pizza Restaurant Says It Wouldn't Cater a Gay Wedding, Supports Religious Freedom Law* (April 1, 2015, 5:12 PM), <https://abcnews.go.com/Business/indiana-pizza-restaurant-cater-gay-wedding-supports-religious/story?id=30045085> [<https://perma.cc/HEN2-BJVS?type=image>] (describing threat of arson and a flood of defamatory Yelp ratings against a pizza restaurant that merely answered a reporter's question about whether it would cater a same-sex wedding).

138. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

What is ultimately at stake for both sides is the right to live their own lives in accord with their own identities and their own deepest values. When Masterpiece Cakeshop declined to do a same-sex wedding, it did not threaten those rights for the same-sex couple. They understandably felt offended and insulted on that one occasion. But their lives went on as before: insofar as anything that Jack Phillips did, they still loved each other, they were still married, they did not have to change their jobs or occupations, they did not have to violate their conscience or their understanding of marriage or of sexual attraction. They continued to live in accord with their own identity and values.

The situation is very different for conscientious objectors ordered to help celebrate same-sex weddings. They must permanently surrender either their conscience or their occupation to comply with a state order enforceable by fines, damage awards, and the power to punish for contempt of court. Jack Phillips quit making wedding cakes in response to Colorado's order. He gave up forty percent of his business and forty percent of his income, and laid off most of his employees, to follow his conscience.<sup>139</sup> And until and unless his right to act on conscience is finally resolved, that loss is permanent. If he had made the opposite choice, violating his conscience and disrupting or severing his relationship with his God, that loss would also have been permanent.

What we have here are two minority groups, sexual and religious, each subject to hostile treatment or regulation supported by the other, and each entitled to constitutional protection. Colorado was right to protect both groups against discrimination. And it was right to hold that bakers deeply offended by the William Jack cakes did not have to make those cakes. It was wrong to refuse parallel protection to Jack Phillips and Masterpiece Cakeshop.

#### IV. CONTINUING LITIGATION

Colorado, and at least some gay activists in Colorado, remained determined to get Jack Phillips. He reports that his store has been vandalized and that he has received death threats and countless

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139. Brief for Petitioners 2, 6, 28, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762.

hateful phone calls and e-mails.<sup>140</sup> And he has received repeated requests for cakes that the purported customer knows he will not make.<sup>141</sup> Cakes honoring Satan have been a popular request.

One such test order came on the day the Supreme Court agreed to hear his case. It would not have served the tester's purpose to order a wedding cake, because Phillips was no longer making wedding cakes for anybody. And the person ordering surely knew that; the news was on his website.<sup>142</sup> The tester was Autumn Scardina, a practicing lawyer who describes her firm and its members as "passionate supporters of LGBT rights."<sup>143</sup> So she asked for a cake that was blue on the outside, and pink on the inside, and she said it was to celebrate her gender transition.<sup>144</sup> Phillips's wife said they could not make that cake.<sup>145</sup> Scardina filed a complaint with the Civil Rights Commission, which is why we know her identity. And a month after the Supreme Court's opinion, the Commission's director found that Masterpiece Cakeshop had again violated the law.<sup>146</sup>

Masterpiece responded with a federal lawsuit to enjoin further enforcement efforts by the Civil Rights Commission. The court denied the Commission's motion to dismiss the claims for injunctive relief, rejecting the Commission's argument for *Younger* abstention because Masterpiece had adequately alleged that the state was proceeding in bad faith.<sup>147</sup> The relevant allegations were

140. Complaint ¶¶ 159–63, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074 (D. Colo.), ECF No. 1 (Aug. 14, 2018).

141. *Id.* ¶ 4.

142. *Masterpiece Cakeshop*, <http://masterpiececakes.com/wedding-cakes/>. As of June 2019, the content of this page has been blocked or removed. The page as it appeared in April 2019 is available at <https://perma.cc/N7BM-UFD4>.

143. *Scardina Law*, <https://www.scardinalaw.com/Family-Law/LGBT-Law.shtml> [<https://perma.cc/UP77-BWGP>].

144. Determination 2, Charge No. CP2018011310 (Colo. Civil Rights Div. July 2, 2018). This Determination does not appear to be available on the website of the Colorado Civil Rights Commission, but it is available on Pacer as Exhibit A to the Complaint in the ensuing litigation, *supra* note 140.

145. *Id.* at 3.

146. *Id.* at 3–4.

147. Order 17–23, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074 (D. Colo.), ECF No. 94 (Jan. 4, 2019) (hereinafter Order). *Younger* abstention generally requires federal courts to defer adjudication of challenges to state law when the claim could be presented in a state enforcement proceeding that was pending before the federal case was filed. See *Younger v. Harris*, 401 U.S. 37 (1971).

of undisputed facts, and the court agreed with Masterpiece on how to characterize those facts, finding bad faith in the continued unequal treatment of Masterpiece and the bakers that had been protected in the William Jack cases.<sup>148</sup> For readers inclined to blame Republican judges for all such decisions, this one was rendered by Judge Wiley Daniel, an African-American judge appointed by Bill Clinton.<sup>149</sup>

Two months later, in early March 2019, Colorado's Attorney General announced a settlement in which both Masterpiece and the Commission dropped all claims against each other.<sup>150</sup> But that settlement did not bind Scardina, who filed a new lawsuit against Masterpiece and Phillips in early June.<sup>151</sup> She now alleges that the gender-transition cake was really just a birthday cake, and that Phillips refused to make a birthday cake for a transgender customer.<sup>152</sup> This allegation appears to be at least in some tension with her earlier allegations to the Civil Rights Commission.

Scardina's complaint about her gender-transition cake is a step beyond the Supreme Court's decision in one way that seems important to me: it does not involve a wedding. The cake would not be served in a religious context, or even in an analogous context; there is no religious equivalent to a gender-transition celebration. I think that Phillips should still be protected, but for me, this is a somewhat harder case than a wedding cake.

Perhaps it would be harder for the Court as well. The *Masterpiece* opinion did not emphasize the religious significance of weddings, and it did not even mention Phillips's religious

148. Order, *supra* note 147, at 17–23.

149. Federal Judicial Center, *Wiley Young Daniel*, <https://www.fjc.gov/history/judges/daniel-wiley-young> [<https://perma.cc/PQU4-DGGR>].

150. Lawrence Pacheco, *State of Colorado and Masterpiece Cakeshop Agree to End All Litigation* (Mar. 5, 2019), <https://coag.gov/press-room/press-releases/03-05-19> [<https://perma.cc/ENJ6-FR6X>]; see also Elise Schmelzer, *Masterpiece Cakeshop, State of Colorado, Agree to Mutual Ceasefire over Harassment, Discrimination Claims*, DENVER POST, Mar. 5, 2019, <https://www.denverpost.com/2019/03/05/masterpiece-cakeshop-colorado-mutual-cease-fire-over-claims/> [<https://perma.cc/27KR-3BS3>] (reporting additional details).

151. 4CBS Denver, *Third Discrimination Suit Filed Against Masterpiece Cakeshop*, <https://denver.cbslocal.com/2019/06/06/discrimination-lawsuit-lakewood-jack-phillips-masterpiece-cakeshop/> [<https://perma.cc/P973-K44U>].

152. Complaint ¶¶ 13–23, *Scardina v. Masterpiece Cakeshop Inc.*, No. 2019CV32214, Dist. Ct. for the City and Cty. of Denver, <https://www.courthousenews.com/wp-content/uploads/2019/06/ScardinaMasterpiece-COMPLAINT.pdf> [<https://perma.cc/K6L2-6VG8>].

understanding of marriage and weddings, but it did briefly contrast weddings with other goods and services. The Court “assumed” that requiring clergy to perform wedding ceremonies over their objections would violate free exercise, said that this exception to civil-rights laws must be “confined,” and then noted that “there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.”<sup>153</sup> Is a gender-transition cake such a good?

I think not; Phillips should be protected from making a cake to celebrate a gender transition. The gender-transition cake is still a demand that Phillips commit his talents to celebrating something deeply at odds with his religious faith. A celebration inherently includes a message—that the event celebrated is a good thing, worthy of celebrating. That is why Scardina specified a celebration, at least as she initially told the story. And Phillips’s claim of conscience is still narrowly focused on a particular celebration and on a message with high religious significance for him.

Narrow focus goes to the argument about compelling government interest. An exemption for merchants who refuse to serve gays or transgender persons at all, or in a wide range of transactions, would inflict much more harm on the LGBT community. It would threaten frequent refusals of goods or services instead of very occasional refusals in a few religiously sensitive situations. If Scardina had really ordered just a birthday cake, I think that Masterpiece should not be protected. But an exemption for celebrating gender transitions would not threaten widespread refusals of goods or services to transgender persons. I do not think that the state’s interest in this narrowly focused claim is compelling.

And as the federal district court explained, enforcement of the Colorado law would still be discriminatory. Colorado has not abandoned or repudiated the position it took in the William Jack cases. It is apparently still the state’s position that secular bakers with views the state agrees with do not have to make cakes they find offensive, but conservative bakers with views the state disagrees with do have to make cakes they find offensive. So the Colorado law is still not generally applicable in my view; it is

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153. *Masterpiece Cakeshop, Ltd. v Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727–28 (2018).

still administered with hostility to religion and so is not neutral in the Supreme Court's view. Either way, the compelling interest test still applies.

Colorado backed away from pursuing Phillips and a test case, but the private plaintiff has sued Masterpiece again, and more cases are in the pipeline.<sup>154</sup> If this issue returns to the Court, Justice Kennedy will no longer be there; Justice Kavanaugh will be. With Kennedy's retirement, there is no one left from the Court that decided *Employment Division v. Smith*.<sup>155</sup> There has been a generational transition in the conservative legal movement.

The modern conservative legal movement began in reaction to what it perceived as the activism of the Warren Court.<sup>156</sup> It emphasized deference to the political branches, and that was the theme of the *Smith* opinion. Justice Scalia wasn't hostile to religion; he was hostile to the judicial balancing of interests inherent in the compelling government interest test. Better that small religions be disadvantaged, he said, than that judges balance the believer's interest in every religious practice against the government's interest in regulating that practice.<sup>157</sup>

Scalia plainly envisioned that the victims of his decision would be small religions and idiosyncratic religious practices.<sup>158</sup> He did not foresee that our largest religions—his religion—would need the protections of religious liberty for moral teachings of great importance to them.

Both of these things have changed. Today's conservative judges are as activist as the Warren Court ever was. Decades in the judicial majority can lead you to believe that judicial activism is a good thing. If you have the power, you will eventually decide to use it. And in the highly visible culture-war cases, the victimized religions today are conservative Christians—Catholics and evangelicals most frequently. The Court's conservatives have vigorously

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154. See *supra* note 152 (new Masterpiece suit); *supra* notes 71–72, 76 (cases in pipeline).

155. 494 U.S. 872 (1990).

156. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (condemning many Warren Court decisions as unprincipled).

157. *Smith*, 494 U.S. at 889 n.5, 890 (rejecting a system “in which judges weigh the social importance of all laws against the centrality of all religious beliefs”).

158. *Id.* at 890 (“leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in”).

enforced the federal Religious Freedom Restoration Act, most notably in the contraception cases.<sup>159</sup> If the Court takes another wedding-vendor case, and if Jack Phillips's amicus brief tells the story of the carefully contrived case of the gender-transition cake and the district court's finding that the state acted in bad faith, the conservatives are likely to see persecution—a concerted effort to force Phillips to surrender his faith or his business. They will likely want to protect wedding vendors with a clear rule that states cannot misinterpret or evade. Lest this paragraph be misunderstood: active enforcement of textually explicit constitutional rights is generally a good thing. And the Free Exercise Clause is a textually explicit right. Other recent decisions are far more activist and dubious, but it is no part of this Article to survey those decisions here.

Some religious conservatives look forward to *Smith* being overruled. That could happen; four Justices recently invited litigants to explicitly present the question.<sup>160</sup> And that would be a better solution than the one I have outlined here. Overruling *Smith* would eliminate arguments about whether secular exceptions, like that granted to the William Jack bakers, are really exceptions and really analogous to the challenged regulation of religious practice. Courts could go directly to what should be the real issues: whether a religious practice has been burdened and whether that burden is justified by a compelling government interest.

*Masterpiece* points the way to a solution that is more complicated, but perhaps easier for the Court than a square overruling: the Court will build up the protective parts of *Smith*, the requirement that laws burdening religion be neutral and generally applicable. Any secular exception that undermines the interest offered to justify regulation of religion will show both that the law is not generally applicable and that it serves no compelling interest. Such an exception may be written into the law, or it may emerge as a matter of interpretation. It may be labeled as an exception, or as a

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159. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (unanimously relying on RFRA to protect right to use mildly hallucinogenic tea in worship service).

160. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Alito, J., concurring in denial of certiorari).

gap in coverage, or as a claim that one side simply didn't violate the law and the other side did.<sup>161</sup>

*Masterpiece* gets most of the way there. Its emphasis on the state's hostility to Phillips's faith did it the hard way; it means that those working to minimize the holding can still read it as a motive case.<sup>162</sup> But that hostility was inferred from the objectively unequal treatment of Phillips and the other bakers. It is a very short step to make that focus on objectively unequal treatment even more explicit, and to make objectively unequal treatment dispositive, whether or not the factfinder draws an inference of actual hostility.

## V. CONCLUSION — THE BIGGER PICTURE

Either overruling *Smith* or enforcing a serious requirement of general applicability would lead to much better protection for religious liberty. And that would be a good thing not just for conscientiously objecting wedding vendors, but for a broad range of cases. Do not assume that this battle over legal doctrine is only about abortion, contraception, and same-sex weddings. The culture-war cases grow out of deep moral disagreement about matters relating to sex, and they get all the headlines, but they are not the typical cases.

The typical cases about religious exemptions present far less controversial conflicts between pervasive government regulation and diverse religious practices.<sup>163</sup> They mostly — not exclusively — involve the small religious minorities that Justice Scalia thought he was disadvantaging in *Smith*. Despite its deep division in *Masterpiece* and the contraception cases, the Supreme Court *unanimously* protected a Muslim prisoner's right to grow a beard,<sup>164</sup> a church's right not to be sued for discrimination by an employee in a position of religious leadership,<sup>165</sup> another church's right to use

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161. See Laycock & Collis, *supra* note 58, at 17–19 (exploring ways in which exceptions can be fully intended and communicated outside the text of a statute or regulation).

162. See Kendrick & Schwartzman, *supra* note 84, at 146–54 (analyzing and criticizing *Masterpiece* as a motive case).

163. See Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164–71 (2016) (collecting examples).

164. *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

165. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

a mildly hallucinogenic tea in its worship services,<sup>166</sup> and a third church's right to sacrifice small animals.<sup>167</sup> Illustrative lower court cases have involved Sabbath observance,<sup>168</sup> grooming rules<sup>169</sup>, Amish buggies and Mennonite tractors,<sup>170</sup> unnecessary autopsies,<sup>171</sup> churches feeding the homeless,<sup>172</sup> and zoning rules that prevent religious groups from creating places of worship.<sup>173</sup>

And then there is Mary Stinemetz, the Kansas woman who died for her faith, in America, in the twenty-first century. She was a Jehovah's Witness, so she could not accept a blood transfusion, and she needed a liver transplant. Bloodless liver transplants were available in Omaha, and they were actually cheaper than any transplant hospital in Kansas. But Kansas Medicaid had a rule: we don't pay for out-of-state medical care. She sued under the state constitution, and she eventually won,<sup>174</sup> but by then it was too late. Her condition had deteriorated to the point that she was no longer medically eligible for a transplant. She died soon thereafter.<sup>175</sup> If you support *Employment Division v. Smith*<sup>176</sup> and oppose religious exemptions, your explanation has to address why Mary Stinemetz should not have gotten one. *Smith* led Kansas officials to believe that they never have to consider religious exemptions—that they

166. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

167. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

168. *Filinovich v. Claar*, No. 04 C 7189, 2006 WL 1994580 (N.D. Ill. July 14, 2006)

169. See, e.g., *EEOC v. Geo Grp. Inc.*, 616 F.3d 265 (3d Cir. 2010) (Muslim veil); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (Native American long hair); *Litzman v. N.Y.C. Police Dep't*, No. 12 Civ. 4681, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (Orthodox Jewish beard).

170. See, e.g., *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

171. See, e.g., *Stone v. Allen*, No. 07-0681, 2007 WL 4209262 (S.D. Ala. Nov. 27, 2007); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990). *Yang* played a prominent role in the legislative hearings that led to the federal Religious Freedom Restoration Act. See, e.g., *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 116 (1992) (remarks of Rep. Edwards, chair of the subcommittee) (noting that William Yang's testimony had provided "new insight into the importance of this legislation").

172. *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012); *Abbott v. City of Fort Lauderdale*, 783 So.2d 1213 (Fla. Dist. Ct. App. 2001).

173. See Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URBAN L.J. 1021 (2012) (collecting and analyzing cases).

174. *Stinemetz v. Kan. Health Pol'y Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011).

175. Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, KANSAS CITY STAR, Oct. 25, 2012, <http://www.kansascity.com/news/local/article310218/Jehovahs-Witness-who-needed-bloodless-transplant-dies.html> [<https://perma.cc/6CCN-7VU6>].

176. 494 U.S. 872 (1990).

didn't have to talk to Mary Stinemetz or take her seriously. And they didn't.

As the case of Mary Stinemetz graphically illustrates, and as Jack Phillips's surrender of nearly half his business illustrates less dramatically, religious liberty reduces human suffering. It reduces social conflict. It is one of America's great contributions to the world. We should not let it slip away, either in legal wrangling or in a bitter culture war. And the Supreme Court's opinion in *Masterpiece* is an important step toward restoring federal constitutional protection for religious liberty.