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Masterpiece Cakeshop and Its Implications

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MASTERPIECE CAKESHOP AND ITS IMPLICATIONS

The following is a transcript of a 2018 Federalist Society panel entitled *Masterpiece Cakeshop* and Its Implications. The panel originally occurred on November 15, 2018, during the National Lawyers Convention in Washington, D.C. The panelists were: Thomas C. Berg, James Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law (Minnesota); Gerard V. Bradley, Professor of Law, University of Notre Dame Law School; and Louise Melling, Deputy Legal Director and Director of Center for Liberty, ACLU.

[RECORDING BEGINS]

BILL SAUNDERS: Hi. My name is Bill Saunders. I am the Chairman of the Religious Liberties Practice Group, and I welcome you all to this session. Thank you for coming. I want to just say two things. Number one, if you're interested in these issues, please join our practice group and participate as much as you'd like. We'd love to have many of you. This may be an issue you have been involved in. Please join us. The second thing is I just want to turn the program over to the [Moderator] who will introduce the panel and conduct the session. But again, thank you for coming.

MODERATOR: Thank you very much, Bill. I am going to give just a brief introduction for our various panelists. In typical Federalist Society form, we have an all-star lineup to talk about a very important case today. The full bios for our illustrious panelists are in your handout materials, and are also on the app and on the website, so you can read more about them.

But first, to my left and your right, is Tom Berg. Professor Berg is a Professor of Law and Public Policy at the University of St. Thomas School of Law. He is the author of many articles and several books, including perhaps the leading casebook on today's topic, entitled *Religion and the Constitution*, which he published with Michael McConnell and Christopher Lund through Wolters Kluwer.[1] And he clerked for Judge Alvin Rubin on the U.S. Court of Appeals for the Fifth Circuit. So thank you for joining us, Professor Berg.

To his left is Gerry Bradley. Professor Bradley is a Professor of Law at the University of Notre Dame, where he also co-directs with John Finnis at the Natural Law Institute. He's written numerous articles that bear on today's

[1] *See generally* MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION (4th ed. 2016).

discussion, including a book entitled *Challenges to Religious Liberty in the Twenty-First Century*, published by the Cambridge University Press in 2012.[2] He also participated in the *Masterpiece Cakeshop* case. He signed an amicus brief, along with 33 other legal scholars, in support of the petitioners.[3]

And then last, but certainly not least, Louise Melling. Louise is the Deputy Legal Director for the ACLU and the Director of its Center for Liberty. She served as counsel for the Obergefell petitioners in the landmark 2015 decision of *Obergefell v. Hodges*.[4] And she served as counsel for Charlie Craig and David Mullins, the two individuals who asked Jack Phillips to create a wedding cake in the *Masterpiece Cakeshop* case.[5]

So without further ado, I'm going to turn it over to Professor Berg who's going to give a brief overview of the case and then his take on it.

THOMAS BERG: Thank you. Jack Phillips, the owner of Masterpiece Cakeshop in suburban Denver, designs and creates custom wedding cakes and other baked goods.[6] He declined a request for a wedding cake from a couple, Charlie Craig and David Mullins, on the ground that he does not design cakes to celebrate same-sex weddings because of his religious belief that marriage is only for one man and one woman.[7] The Colorado Civil Rights Commission held Phillips liable for sexual orientation discrimination, ordering him to design same-sex wedding cakes if he designs wedding cakes at all.[8] The state courts upheld the order, but the Supreme Court reversed, seven votes to two.[9]

Phillips had presented two First Amendment arguments.[10] The first was that penalizing him for his refusal to create the cake compelled him to express a message that he opposes, namely, celebration of a same-sex marriage.[11] The second was that it violated his right to the free exercise of religion.[12] The Supreme Court ruled based on free exercise.[13] The standard for the Free Exercise Clause under the Court's precedents is that the law in question must be "neutral [toward religion] and generally applicable."[14]

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[2] *See generally* GERARD V. BRADLEY, CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY (2012).

[3] *See generally* Brief of *Amici Curiae* 34 Legal Scholars in Support of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n, 138 S. Ct. 1719 (2018) (No. 16-111).

[4] *See generally* Brief for Petitioners, Obergefell v. Hodges, 135 S. Ct. 2484 (2015) (No. 14-556).

[5] *See generally* Brief in Opposition, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n, 138 S. Ct. 1719 (2018) (No. 6-111).

[6] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

[7] *Id.*

[8] *Id.* at 1726.

[9] *Id.* at 1722, 1726.

[10] *Id.* at 1726.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1732.

[14] Thomas C. Berg & Douglas Laycock, Masterpiece Cakeshop *and Protecting Both Sides*, BERKELEY CTR. FOR RELIGION, PEACE, & WORLD AFF. (Dec. 4, 2017), https://berkleycenter.georgetown.edu/respons

The Court held that the State, in applying its non-discrimination law, had acted not neutrally, but with hostility towards Phillips's religious beliefs and actions in two ways.[15] The first aspect of hostility involved statements by two commissioners denigrating Phillips's beliefs in ways that the Court held were improper for officials charged with adjudicating his case fairly.[16] For example, one commissioner said that Phillips's acts were an example of "us[ing your] religion to hurt others," which she called a "despicable piece[] of rhetoric" and analogized to religious defenses of slavery and the Holocaust.[17]

The second evidence of non-neutrality toward religion was that the State had earlier allowed three other bakers to refuse a fundamentalist Christian's requests for cakes with religious messages *against* same-sex marriage.[18] The State had said that those refusals did not discriminate against the customer's religious belief, but that Phillips's refusal to create a cake celebrating a same-sex marriage discriminated against same-sex couples.[19] The Court noted particularly that the State had reasoned inconsistently about the two sets of bakers.[20] To take just one example among several inconsistencies: The Commission and courts had said that the same-sex wedding cake would reflect the customers' message, not the baker's (so Phillips could not decline to create the cake).[21] But they treated the anti-gay cake as reflecting the other bakers' message, not the customers' (so therefore said that the other bakers could decline to send that message and thus decline to create the cake).[22]

That's a quick summary of the case and what the Court held. Let me give my own quick thoughts. I approach the conflicts between same-sex marriage and religious liberty from the perspective of having supported both rights in Supreme Court briefs and in articles. Douglas Laycock and I filed a brief supporting the same-sex couples in *Obergefell* and a brief supporting in Jack Phillips in *Masterpiece Cakeshop*.[23] The Court was correct to hold that same-sex couples should be able to live consistently with their identity by being civilly married. Jack Phillips, likewise, claimed the right to live

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es/masterpiece-cakeshop-and-protecting-both-sides; *see* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993); Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

[15] *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

[16] *Id.* at 1729.

[17] *Id.*

[18] *Id.* at 1730.

[19] *Id.* at 1730–31.

[20] *Id.* at 1730.

[21] *Id.*

[22] *Id.*

[23] Brief Amici Curiae of Douglas Laycock et al., Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556tsacLaycock.pdf; Brief Amici Curiae of Christian Legal Society et al., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), https://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_christian_legal_socy.pdf.

consistently with *his* identity, his religious belief about the nature of marriage.

The very arguments that underlie protection of same-sex marriage also support strong protection for religious liberty. Both same-sex partners and traditional religious believers seek to protect a fundamental component of their identity—including freedom to pursue conduct that flows from that identity, whether the conduct is marrying a life partner or living according to God's principles. Both also claim the right to live their identities in public settings, not just in the closet, so to speak. Same-sex couples should have access to civil marriage and to goods and services in the marketplace. But religious believers likewise have a strong interest in living out their beliefs, not just in church, in the house of worship—in the closet, so to speak—but in their daily lives, through religious charities, and (like Jack Phillips) in their livelihoods.

Many folks, perhaps some on this panel, think that one side in this struggle—same-sex couples or religious conservatives—must prevail and supress the other side. That is a recipe for dangerous cultural conflict and resentment and for human suffering either way. Religious freedom exemptions in the for-profit sphere do need to be limited and carefully defined. But Jack Phillips fits within a limited category: small vendors forced to provide, in this case, expressive goods or services to endorse or celebrate an event (a wedding, here in the vast majority of cases) to which they deeply object and where other providers are readily available.

The *Masterpiece* opinion fits the project of protecting both sides, especially in its holding that a state must protect religious objectors to gay marriage if it allows secular (or religious) objections to anti-gay messages. This principle of consistency, of no double standards, is potentially powerful. Left-leaning states and cities will be unwilling to force socially liberal vendors to produce goods with conservative religious messages in violation of their conscience. Those states cannot then turn around and require religiously conservative vendors to produce goods with messages in violation of their conscience.

But it's unclear whether courts will enforce this requirement of consistency seriously. Four Justices in *Masterpiece* signaled that they would not.[24] Justice Kagan's concurrence and Justice Ginsburg's dissent, each joined by another Justice, argued that the two sets of bakers were actually different.[25] Justice Kagan acknowledged that the State hadn't reasoned consistently about the two bakers, but she argued that they *were* different and could be distinguished if you reasoned it through correctly.[26] The protected

[24] *See id.* at 1732–34, 1748–52.

[25] *Id.*

[26] *Id.* at 1733. Because of this inconsistency, Justice Kagan (joined by Justice Breyer) concurred with the majority that the State had shown hostility toward Phillips. *Id.* at 1732–34.

bakers, she said, refused to make a cake that they would not have made for any customer (i.e. one with an anti-gay message)—while Phillips refused to sell same-sex couples a cake, a wedding cake, that he would have made for an opposite-sex couple.[27]

But that ignores that a custom-designed wedding cake also has a message. The content of that message on the cake might be explicit, even if it's symbolic—and symbolic content is protected speech as well. Imagine a rainbow design, for example, on a wedding cake: that is a cake that Jack Phillips would not sell to anybody. Phillips never got to the point of discussing such a design with the couple, Craig and Mullins. But his design process seems very likely to produce such symbolism because he testified that his process involves learning his customers' "desires, their personalities, [and] their personal preferences," so as to "design the perfect creation for the specific couple."[28] That process aims to present the marriage in an affirming light, which Phillips said he could not in conscience do.[29]

Even without explicit symbols, a wedding cake still sends an affirming message.[30] The cake says, explicitly or implicitly, that this marriage is to be celebrated; and in context, it is a same-sex marriage that is to be celebrated.[31] Context matters to determining the cake's message.[32] As Justice Alito observed in a hypo at oral argument, if you have a cake that says "November 9, A Great Day," that means something very different when it's provided for a birthday party on that date versus when it's provided for an anniversary celebration of Kristallnacht.[33] So there is a strong case that the custom-designed wedding cake is expressive.

I don't believe that this conclusion opens the door to widespread denials of wedding services by the tailor, or the hair stylist, or some of the other providers that were brought up as hypotheticals at oral argument. Couples cut the wedding cake as a central symbol celebrating their union. There is no such ritual for tuxedos or hairdos. Making people look good is not a celebration of the marriage. We have another case coming back to the Court at some point, the *Arlene's Flowers* case about a florist; we can talk about that, I'm sure, in the question and answers.[34]

This discussion is about the cake's message, which sounds in Phillips's compelled speech claim. But the Court decided the case based on

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[27] *Id.* at 1733.

[28] Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2018 CATO SUP. CT. REV. 139, 153 (2018) (internal quotations omitted).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Transcript of Oral Arg. at 68, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

[34] *See generally* State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

the Free Exercise Clause.[35] In fact, Phillips's free exercise claim overlapped with the free speech claim. The other bakers were allowed to refuse cakes with messages, and therefore, Phillips's free exercise claim for consistent treatment depended on showing that his custom wedding cake has a message, too. I expect that a religious claimant will usually have to show that such a message is involved if he or she seeks to rely on the favorable treatment given in other, similar cases.

There are multiple other reasons why we will not have many refusals that would present constant indignities for gay and lesbian couples. Businesses have commercial incentives against turning away customers. In jurisdictions where non-discrimination laws exist—and after all, those are the relevant jurisdictions—the dissenters from gay marriage are likely to be a minority in the first place. They may face boycotts and other non-governmental pressures if they refuse service. There are many incentives not to refuse. And in those cases where refusal would cause material loss of access to goods or services because of a lack of alternative providers, there would be a compelling interest in denying an exemption.

An exemption does mean that same-sex couples will very occasionally be referred elsewhere and feel insulted and demeaned. That harm is real, but it can't be considered in isolation. The baker forced to violate his faith also suffers dignitary harm: a coercive order rejecting and overriding his deepest identity. And in material terms, his harm is greater. When Craig and Mullins lose this case, they still get to live their lives by their own values. They still celebrate their wedding, still love each other, will still be married, and still have their occupations. If Jack Phillips the baker lost, by contrast, he would not get to live his life by his own values. He would have to violate his conscience repeatedly, making wedding cakes for every same-sex couple who requests, or else abandon his occupation. Those permanent harms on the objector's side are greater than the short-term dignitary harm on the couple's side.

MODERATOR: Thank you very much.

GERARD BRADLEY: Religious liberty was planted in America by Protestants working on distinctly Protestant soil.[36] Their handiwork was, nonetheless, supple enough to absorb the shock of Roman Catholicism during the 19th Century and to survive the death of the implicit Protestant establishment by the beginning of the 20th.[37] By the end of World War II, American religious liberty had successfully incorporated Judaism into the

[35] *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[36] *See* Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN.COM (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/.

[37] *See generally id.*

new tri-faith America, thus the Judeo-Christian tradition.[38]

And by that time, American religion had Balkanized into some 250 different sects, at least according to one Supreme Court Justice. According to another Justice, Robert Jackson, who observed in 1944 in *U.S. v. Ballard* that in this country, "[s]cores of sects flourish . . . by teaching what to me are queer notions."[39] Now these sects included Jehovah's Witnesses, who characteristically believed in no human government.[40] God's sovereignty over the universe is undivided.[41] They refused to salute the flag, and they bitterly denounced Catholics, yet the Witnesses won big religious liberty victories in the Supreme Court in cases where they did these things.[42]

Now, in the 1960s, American religious liberty digested religious individualism. What I mean is that existentialists who doubted God and other loners who professed no creed and belonged to no sect won Supreme Court victories, too. And here I'm thinking of the *United States v. Seeger* and *Illinois v. Frazee*.[43] Now, each of these encounters left its mark. Religious liberty in America changed, but grew stronger and more inclusive as it encountered each of these new challenges, even in the 20th Century as America experienced profound secularization. But the American institution of freedom of religion weathered that challenge, too.

But I think that identity politics, which suffuse the same-sex wedding vendor cases, pose a grave threat to religious liberty. Indeed, for the first time in American history, it recently became respectable to publicly oppose religious liberty and its overarching value in our polity. Now, this unprecedented turn is ominous. It will not only—or is not only already diminishing our constitutional law, it will remap our common life, for religious liberty has always been a strategic lynch pin of our political culture. Now, of course, Americans in the past often opposed particular claims of religious liberty by Latter-Day Saints concerning polygamy, by Catholics who resisted Protestant observances into public schoolrooms, and by Native American parents claiming their rightful authority to direct the religious upbringing of their children.

In past debates about the precise scope of religious liberty, though, no one publicly questioned the great and general value of religious liberty itself. But what's happening now is different. Opposition back then was to a

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[38] Anna Grzymala-Busse, *Once, the 'Judeo-Christian Tradition' United Americans. Now It Divides Them*, WASH. POST (Apr. 17, 2019, 7:45 AM), https://www.washingtonpost.com/politics/2019/04/17/once-judeo-christian-tradition-united-americans-now-it-divides-them/.

[39] United States v. Ballard, 322 U.S. 78, 94 (1944).

[40] *Jehovah's Witnesses and Their Beliefs*, PBS (2017), https://www.pbs.org/independentlens/knocking/beliefs.html.

[41] *See id.*

[42] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–27 (1943).

[43] *See generally* United States v. Seeger, 380 U.S. 163 (1965); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989).

specific activity of a particular religious group, say Mormon plural marriage. What's happening now is happening to religion across a broader front of issues, while the percentage of Americans who belong to some sort of religious body or church, or even say that they believe in God, are at all-time lows.[44]

And the brunt of this new hostility to religious liberty is not being borne by religious minorities, either. Christians who adhere to what was, until recently, America's common morality are instead its chief victims. Besides, when Mormons, and Catholics, and Indians found themselves on the short end of the religious liberty stick, no one associated religious liberty itself with unjust discrimination or with demeaning anyone's dignity. Much less did anybody associate religious liberty with hatred or bigotry, but now many people do.

Now, someone might be thinking that all this really means is that the sexual revolution is threatening religious liberty, and what's new about that? Well, think again. The Religious Freedom Restoration Act passed unanimously in the House and with just three dissenting votes in the Senate in 1993.[45] I noticed the rebellion against sexual morality when I was in high school. How could any teenage boy not notice? And I discovered that college life was in full debauch mode when I enrolled at Cornell in 1972. No, the sexual revolution is part of the gale-force headwind buffeting religious liberty, but sexual freedom itself is not nearly sufficient to threaten religious liberty. Only identity politics could do that.

And here are three illustrations of what I mean. And I speak here not exactly of implications of the Court's decision in *Masterpiece*, where the decision was narrow and rooted in contingent facts. I speak rather of the way the wedding vendor cases, all of them, really, are litigated, and how many of them, if not most of them, have been decided, again, based in and on identity politics. Okay, three illustrations of what I mean. One is that what believers invariably understand themselves to be doing, which is steering clear of their own immoral involvement in the bad conduct of other persons—in these cases, at least if they're litigated, by forced reconceptualization replaced with a substitute. Namely, the personal status or identity of some punitive victim, of some person self-identifying or presenting as a member of a supposedly vulnerable group.

Thus, Jack Phillips's refusal to supply anyone, straight or gay, with a cake for celebrating what he regarded as an ersatz marriage is reconceptualized as discrimination against his gay customers. Innkeepers

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[44] Alexa Lardieri, *A Poll Finds U.S. Membership in Religious Institutions Hits an All-Time Low*, U.S. NEWS (Apr. 18, 2019, 4:01 PM), https://www.usnews.com/news/national-news/articles/2019-04-18/gallup-poll-finds-us-membership-in-religious-institutions-is-at-an-all-time-low.

[45] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

who refuse to rent to fornicators are charged with discriminating on grounds of marital status. Employers who cannot conscientiously distribute contraceptives discriminate against women. Well, you get the idea. Now, this override of the believer's self-understanding amounts to religious stereotyping. Indeed, a religious stereotyping which I used to think would not happen again in an American courtroom.

Now compounding this first error is the prevalent notion that where public authority recognizes or would recognize the religious liberty of, say, Jack Phillips, the State would be putting its own imprimatur on Phillips's unjust discrimination. And the thought even more often is that the State would be putting an imprimatur not only on his discrimination, but even on the normative premise that Jack holds, namely, that marriage between two men or two women is morally impossible.

But it doesn't work that way, as I at least partly just suggested. Besides, no one ever suggested that when the Jehovah's Witnesses won the flag salute case, the Supreme Court was endorsing their denial of United States sovereignty in favor of God's undivided sovereignty. Lawmakers who recognize Amish claims about limited schooling do not thereby ratify Old Order Anabaptist beliefs. You do not profess, endorse, ratify, or show the slightest real sympathy with Native American beliefs by supporting their right of access to peyote-infused rituals. Now this claim about a state imprimatur is, I think, jerry-rigged to make the facts of the wedding vendor cases fit an identity politics morality tale.

Now, the third area, the third illustration builds upon these first two mistakes. This one is often styled dignitarian harm. And the idea, as far as I can tell, seems to be that when one is refused a service due to the provider's—to the service provider's moral qualms about what you're doing, your person or identity is demeaned, and your dignity is attacked. Now, there are many mistakes in this way of thinking. One mistake is about dignity itself, which has to do with the inherent qualities of persons which make them rights bearers and worthy of respect. Dignity, properly understood, is not prone to be compromised by others' bad behavior toward you, or even their bad opinion of you.

But let's leave this mistake aside. In this context, what we're really talking about is perceived insult, about a same-sex couple's feeling that they have been humiliated or demeaned, even though no word has been spoken, no gesture made, that means anything more than "it's against my conscience to participate in what you're doing." Then again, we are here securely in the realm of identity politics, where self-esteem, at least for those who happen to be in favor, rules. Now, of course, *Obergefell* trafficked promiscuously in this same identity politics. The opening sentence of that case introduces a liberty which includes, and here's the Court speaking, "[which] includes the

right[of] persons, within a lawful realm, to define and express their identity."[46] And surely the center of gravity in *Obergefell* is the idea that the law can and should express the community's affirmation of each person's intimate and self-defining choice of a companion, of that companion to ward off what Justice Kennedy described as "the universal fear that a lonely person . . . call out only to find no one there."[47]

Now, no doubt, the appeals of aggrieved sexual minorities are very powerful these days, but I think even they could not threaten religious liberty if identity politics had not already infiltrated and hollowed out religious liberty itself. Before sexual identity could emerge as the colossus that it is in our political culture, religion had to be reduced from a set of beliefs and truth claims about the way the cosmos really is to nothing more than one singular expression of ineffable spiritual experiences, and/or the collective identity creed, the collective of one's religious tribe. Religion had to be re-described over, against a self-understanding of many, but far from all believers as raw subjectivity, as a realm of faith conceived itself as feeling and emotion, of faith as some inner domain of me outside the domain of rationality and of the objective order of things. Indeed, I submit that only after the public realm in America was secularized, and religion privatized, and further, that religion in the private sphere be treated as just one of many possible sources of personal identity, only then could American religious liberty be threatened by the rival claims of others to define themselves sexually, and to do so without having to endure the moral criticism of others, including believers.

MODERATOR: Thank you, Professor Bradley. Ms. Melling, thank you.

LOUISE MELLING: Thank you. Thank you for having me. One of the things about going last is that some of my points have been made. So I'm not going to talk about doctrine. Rather, I want to make five points for you to consider, as you think about the questions presented in *Masterpiece* and similar cases.

So the first point is to put the issue in perspective, which is to say these conversations are genuinely hard. And I think they're genuinely hard because, when conversations arise about a conflict between religion or speech and LGBT people or the Hobby Lobby variety about women's rights, it's because we're at a moment of change in society and usually at a moment of profound change. The conversation around LGBT rights and the advances for LGBT rights are sometimes referred to being as like a tectonic plate shift in terms of where we've been, with societal norms having long looked one way, and then looking another way. Change is actually just incredibly hard, and people of faith are on both sides of those debates. People of faith have

[46] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).
[47] *Id.* at 2600.

strong feelings against, for example, serving same-sex couples, and people of faith are supportive of laws requiring service.

It has been asked how big is the disruption, or how robust is the resistance. I note that there are the cases about public accommodations and resistance to serving LGBT people in wedding services because of faith. But the objections are not limited in that way to wedding services. There are also cases arising, for example, about a right to fire an employee because of an institution's faith—in that case, the employee was a transgender individual; to refuse to provide healthcare, including in the LGBT context because of faith; and to refuse to place children who are up for adoption or foster placement with certain families because of faith objections.[48] So the question isn't limited to the public accommodation sphere.

At the end of the day, the question is whether we're going to accept into the law and the culture LGBT rights in full form. Remember that the claims in *Masterpiece* are not about a legislative debate. We're talking about a constitutional debate. The question is whether the Constitution protects the right of Jack Phillips in *Masterpiece* to refuse service, and if it does, you can't go back to the legislature and keep having your debate in the legislature. It's a constitutional debate.

Second, and this has already been alluded to, this debate is in no way limited to the context of LGBT rights. I'm sure by now many of you, because you pay attention to these issues, have heard about the *Piggie Park* case.[49] Piggie Park, a barbecue franchise in South Carolina, soon after passage of the Civil Rights Act of 1964, refused to comply with the prohibition on discrimination based on race in public accommodations. The owner justified the refusal because of his faith, and because integration was contrary to his faith, he wouldn't serve black customers in his restaurant.[50]

I think we know about *Bob Jones University*.[51] *Bob Jones University* was a case decided in the Supreme Court in 1983. In that case, Bob Jones was arguing, based on its faith, the right to refuse to admit students who believed in, or advocated, or practiced interracial dating.[52] And there are a series of other cases—they didn't go to the Supreme Court—where women contested that they were paid less than men. In those cases, the employers were religious schools, and the religious schools said, "It's my faith that men should be head of households, and therefore, that's my justification for this."

In all of those cases, the courts said no to the question of a religious

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[48] *See, e.g.*, Kelsey Dallas, *8 Religion-Related Cases to Watch When the Supreme Court is Back in Session*, DESERET NEWS (Sept. 22, 2019, 10:00 PM), https://www.deseret.com/indepth/2019/9/22/20869076/8-religion-related-cases-to-watch-when-the-supreme-court-is-back-in-session.

[49] *See generally* Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968).

[50] Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966).

[51] Bob Jones Univ. v. United States, 461 U.S. 574, 579–81 (1983).

[52] *Id.* at 580.

exemption. And so the question I ask today is why should LGBT rights be different? Why should today's debates be different? And if you think they should be different, what is the rationale for the difference? Tom's offered one version of a rationale for that. I think both Alliance Defending Freedom and the U.S. Department of Justice in *Masterpiece* said they should be different. And I say I think it's a struggle to defend that rationale.

Third, I think there are plenty of people who believe in LGBT rights, as well as in the claims advanced by Masterpiece Cakeshop. And I would just ask you to think about that and think about what equality then means.

You may make decisions about costs and where you want to land in this debate, but what does equality mean if, after you sit down and Jack Phillips says to you, as he did to Dave Mullins and Charlie Craig, the clients in *Masterpiece*, "For whom is this cake?" And Dave and Charlie say, "Oh, for us." And Jack says, "I can't make that cake." What does it feel like to be turned away in that context? Debbie Munn, Charlie's mom, described it.[53] Debbie talks about going out to the car after they've been refused, after Jack has said no.[54] She talks of being in the back seat and seeing her son's shoulders shaking. He's crying.[55] And he said, "I feel like I'm just not good enough."[56] We have to put that harm in the mix, as we also do have to put in the mix the cost to Jack Phillips and Masterpiece, and what it means to be told that you must sell wedding cakes for all if you're going to sell wedding cakes, that you can't discriminate based on that.

Fourth, Tom is arguing that there can be limited claims for speech. Keep in mind that the speech claim in *Masterpiece* was informed and infused by religion, but the speech claim should be independent of religion when you really look at the claim. The argument in the case in many ways came down to an argument that a custom-made item is different. Custom-made was art and custom-made was speech and therefore different. And the Justice Department tried to narrow that further to say the speech claim was about custom-made items for celebratory events.

I respect that effort to try to figure out the narrow argument for this claim, but I think it's a huge challenge. (A) The claim is constitutional, so in that sense it's hardly narrow. (B) Can it really be that narrow? If you read the transcript of the oral argument, you'll see that the Justices—I don't think they were just playing—were struggling with what the parameters of the speech claim would be in *Masterpiece*. And when we look in other contexts, the conversation about what is seen as participating in the event is much

[53] Debbie Munn, *How It Feels When Someone Refuses to Make Your Son a Wedding Cake*, TIME, https://time.com/4991839/masterpiece-cakeshop-supreme-court-gay-discrimination/ (last updated Oct. 27, 2017, 2:48 PM).

[54] *Id.*

[55] *Id.*

[56] *Id.* (paraphrasing).

broader than art or expression. When I show up and I set up the chairs, am I participating in the event? For some people, this too is a violation of conscience. How far does the theory go?

Which brings me to my last point which is about the argument that having exemptions will quiet the storm, that that's the way that we could reduce conflict. I think that argument often comes from a very good place, a very good place in terms of a conflict and also an optimism, that we can find a way to understand one another through that process. I have much less faith that it is, in fact, true that granting exemptions will quiet the storm. And I think there's a difference, sometimes, between legislative and constitutional exemptions, and I understand that the context I'm going to talk about is different.

But if you look in the reproductive rights context, very, very soon after *Roe*, more than 40 state legislatures provided protections for doctors and institutions that did not want to participate in abortions. We all know that hasn't quieted the storm in any way. That hasn't quieted the storm in terms of a debate about abortion, as well as a debate about the reach of conscience claims, with the conscience claims, as we all know, running now to contraception; running now to providing insurance coverage for contraception; running to certifying that you don't want to provide insurance coverage for contraception, at least if you think that will then trigger contraceptive coverage; running also to referrals; running to information; and I think the instance that I find most surprising, running even to providing treatment for somebody following an abortion.

The call for the exemptions has continued to expand in that context, and I think that it is a very real possibility it would as well in the context of LGBT rights. So this debate is about LGBT rights. This is about speech. This is about religion. But at the end of the day, it goes back to core points about how we think about anti-discrimination norms and how we think about anti-discrimination law.

MODERATOR: Wonderful. Thank you very much. Good arguments. So we're going to have some Q&A in a minute. Before that, I'm going to ask our panelists to engage on a couple of questions with each other so they can have a chance to respond to some of the points that have been made. But we will break right at 5:00 so that everybody can be prepared for the evening's activities.

So why don't we start where, Louise, where you sort of ended, which is this concept of exemptions. So, in the context of free exercise, the Supreme Court has set out a standard about neutral rules of general applicability in the *Smith* case, which I think Professor Carpenter had mentioned earlier.[57] And

[57] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

in recent years, we have seen a couple of exemptions to the *Smith* test for neutral rules of general applicability. So a couple terms ago, there was the *Hosanna-Tabor* case that recognized administerial exemption to the employment laws, and then now we have *Masterpiece Cakeshop*.[58]

And one of the things that's interesting in the *Masterpiece Cakeshop* case is that it's barely cited by the majority opinion. I think Professor Carpenter says that it's reaffirmed, but Justice Gorsuch writes a separate opinion, joined by Justice Alito, pointing out that it is, in his words, "controversial" amongst some of the Justices.[59] In the context of the *Masterpiece Cakeshop* case, I'm wondering what you all think about the receptiveness of the *Smith* neutral rules of general applicability test and how it sits at 1 First Street.

LOUISE MELLING: First?

MODERATOR: Sure.

LOUISE MELLING: There are two cases that are similar to *Masterpiece* in their basic facts where there are cert. petitions now pending before the Supreme Court. One comes out of Oregon, *Sweet Cakes by Melissa*—and if I am off on names of the cases, feel free to correct me—and then there's one out of Hawaii involving a bed and breakfast.[60] One of those cases squarely presents in the cert. petition the question of whether *Smith* should be overruled. I will say, I was actually surprised in *Masterpiece* that that was not one of the cert. questions.

MODERATOR: And how do you think about where this doctrine stands today, in particular, in the Supreme Court?

THOMAS BERG: When Justice Alito was on the Third Circuit, he wrote two or three opinions that rested on the following proposition: When the government makes an exception for one secular interest that similarly undermines the state interest as a religious exception would, then the law is not neutral or generally applicable. The classic case of this involved a Muslim police officer in Newark who wore a beard as a command of the Qu'ran and violated a department rule that said officers could not wear beards.[61] However, the department had made an exception for officers with a medical reason.[62] The medical need grew out of a condition, especially common

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[58] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[59] *Masterpiece Cakeshop*, 138 S. Ct. at 1734; *see also Courthouse Steps:* Masterpiece Cakeshop v. Colorado CRC *Decided*, THE FEDERALIST SOC'Y (June 4, 2018), https://fedsoc.org/events/courthouse-steps-masterpiece-cakeshop-v-colorado-crc-decided (Professor Dale Carpenter explaining that ideas from *Smith* and *Lukumi* are reaffirmed in *Masterpiece Cakeshop*).

[60] Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051, 1056 (Or. 2017); Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 923 (Haw. Ct. App. 2018).

[61] Fraternal Order of Police Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

[62] *Id.*

among African-Americans, where your skin is highly sensitive and you need a beard to protect it.[63] The department had made that exception.[64] Judge Alito said that this medical exception undermined the government's interest, in uniformity of dress, the same way that an exception for Muslim claimants would.[65] Therefore, the law was not generally applicable, and it was not neutral toward religion because it treated a medical reason for wearing a beard as more important than a religious reason.[66] In contrast, the Constitution (through the Free Exercise Clause) says that a religious reason for acting is very important.[67] Therefore, you have to treat the religious reason the same as the protected secular reason.[68]

In that case, I think, Judge Alito tried to give as much protection for free exercise as he could within the *Smith* rule. Douglas Laycock and I filed a brief in *Masterpiece* arguing for the exemption-friendly approach that Alito had applied in the *Newark* case.[69] I think that approach makes a lot of sense. But it also shows a lower court judge—one who's now on the Court—indicating that the *Smith* rule, taken in its broadest (anti-exemption) terms, is not good for religious freedom. There was a different attitude toward this among conservatives in 1990, when Justice Scalia wrote the *Smith* opinion, than there is now. Then, "judicial restraint" limits on the legitimacy of judges overruling majorities were a more central part of conservatism.

Today conservatives tend to emphasize more the need to restrain the government through constitutional norms, I think, including the free exercise of religion.[70] What the Court will do with this question, I don't know. They could partially or wholly overrule *Smith*.[71] Could they move in the direction of a *Newark* kind of rule: requiring various exemptions without totally overruling *Smith*? I think that's possible. They don't like to completely overrule a decision, but there are certainly ways to temper the *Smith* rule. And in fact, as Laycock and I argue in our scholarship, the *Smith* rule shouldn't have been read as hard-nosed as it was thought to be in the first place because it would then be inconsistent with precedent before it.[72] So there is definitely

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 366.

[66] *Id.*

[67] *See id.*

[68] *Id.*

[69] *See generally* Brief Amici Curiae of Christian Legal Society et al., *supra* note 23; *Newark*, 170 F.3d 359.

[70] This shift among conservatives from respecting majorities to limiting them presents a much bigger topic, on which many Federalist Society members have an interest in various areas beyond the free exercise of religion.

[71] Appellant George Q. Ricks filed a certiorari petition during the editing process of this transcript. *See* Petition for Writ of Certiorari, Ricks v. State of Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed*, (July 10, 2019) (No. 19-66).

[72] *See, e.g.*, Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016); Thomas C. Berg & Douglas Laycock, Masterpiece Cakeshop *and*

the possibility that the Court will temper *Smith* further.

MODERATOR: Please.

GERARD BRADLEY: Well, I don't think *Smith* will be overruled. I don't think it ought to be. I guess I'm a kind of duck that goes "meow" because I'm one of the very few people who's considered to be a religious conservative, or at least a friend of religious liberty, who's argued in print and in lectures that *Smith* was rightly decided. And I continue to think it was rightly decided. I don't think the Court's going to tinker too much with that.

I also would suggest, as kind of going beyond [the Moderator's] question, I suppose, that the better way to think about the issues that we've been talking about during this symposium, or this exchange, really is probably better spoken about as an initial matter and mainly not in terms of exemptions from non-discrimination laws or anything else. But rather, I think the best way to go about thinking about this is to just think that one, a lawmaker, a generic lawmaker with care of the common good—and really, part of that care involves taking everyone's interests seriously and respecting their rights—how does that person think all the way through to a statute or some provision of law concerning the wedding vendors and like cases?

And I don't think that it helps to sort of start by thinking, "Well, here is the norm of justice that applies to the case, non-discrimination across the board." And there may be some exceptions to that. Rather, I would say that's not the way to think about it but to think your way through to what the law should be once everyone's interests and rights are fully specified. And to think as respecting Jack Phillips's rights, for example, is part of that process. And I think if we do that, we can work then to the institutional questions and treat them as the secondary and derivative questions that they are.

LOUISE MELLING: I just have to note for the record that the ACLU thought *Smith* was wrongly decided as providing too little protection for religious liberty.

GERARD BRADLEY: Well, who'd have thunk it? Chuck Schumer introduced RFRA. Who'd have thunk it? [Laughter]

LOUISE MELLING: But I do think taking account, obviously, of everybody's interest produced the same kind of vibrant debate that we have now. That's true whether you call it exemptions. That's true whether you call it a constitutional right. We're just going to continue to have those vibrant debates. That was true if you look back at the claims, for example, in *Obergefell*, in terms of several briefs being filed saying if the Court were to recognize LGBT equality, that will be a threat to religious liberty. So people

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Reading Smith *Carefully*, TAKE CARE (Oct. 30, 2017), https://takecareblog.com/blog/masterpiece-cake shop-and-reading-smith-carefully-a-reply-to-jim-oleske.

have deep commitments and deep faith on both sides, and so the discussion will be no more simple than this conversation about *Masterpiece*.

MODERATOR: If we could back up a little bit to sort of how the Court actually decided the *Masterpiece Cakeshop* case. It's something we talked about a little bit at the beginning. Professor Berg mentioned it. But I'm sort of curious what your take on it is. As Professor Berg mentioned, the Court honed in on one set of comments by one of the members of the Colorado Civil Rights Commission, and then Justice Kennedy in his majority opinion says that "[t]he record shows no objection to these comments from other commissioners."[73] And later, the state court ruling, reviewing the Commission's decision, does not mention those comments, much less express concern with them.

And in the way that the Colorado Civil Rights Commission litigated the case in the Supreme Court, Justice Kennedy continues that they did not disavow those comments in their briefs filed in this Court, that is, the Supreme Court.[74] So I'm curious, what, if anything, we take away from *Masterpiece Cakeshop* in this treatment of those comments from the commissioner to infer discriminatory animus or intent of a multi-member body from the comments of one of, in this case, the commissioners. We can start with Professor Berg.

THOMAS BERG: Jurisprudentially, the conservatives on the Court do not generally favor relying on statements of individual decision makers to show intent and strike down an otherwise valid action. That was one of Justice Scalia's bugbears, and I think others feel the same way. So what about *Masterpiece* made that case different? The opinion points out that it's an adjudication.[75] These commissioners were deciding the case as judges, and we don't want it that you walk into court and the first thing the judge says to you is, "I think your position in this case is one of the most despicable pieces of rhetoric I can think of." Even the appearance of bias by a judge is a problem.

You could think of *Masterpiece* as a case about the administrative state. The same commissioners who prosecute civil rights actions, who bring enforcement actions, and are tasked with the job of enforcing the law fully, are also the judges to decide the fair interpretation of the law. That melding of functions is common in the administrative state. I think you could read *Masterpiece* as a reaction to that melding of functions.

In the Washington florist case, *Arlene's Flowers*, the florist, Barronelle Stutzman, raises claims of hostility based on statements by the Attorney General of Washington, who made it a sort of mission to go after

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[73] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).
[74] *Id.* at 1721.
[75] *Id.* at 1724.

her.[76] Does *Masterpiece*, which focused on hostile statements by adjudicators, have the kind of traction to go further to hostile statements by the prosecutor? I don't know. It would be a change in jurisprudence for conservative Justices to go a long way with claims that the government officials were unconstitutionally hostile.

MODERATOR: Care to respond, anyone?

GERARD BRADLEY: I don't think it's clearly mistaken to do what the Court did. I do think, as many people do—this is not imaginative or creative on my part—I think the Court kicked the can down the road because it didn't know what to do with the issue.

LOUISE MELLING: I totally agree.

MODERATOR: Louise, anything?

LOUISE MELLING: I completely agree with that. Completely agree with that.

MODERATOR: I see we have very healthy queues at both of the stand-up mics, so why don't we open it up to questions for the panelists from the audience? We can just alternate between the two mics. And I'd just ask the panelists to try to keep your answers, obviously, responsive and powerful, but short so that everyone can ask their questions. Why don't you start on this side?

QUESTIONER 1: Hello. Thank you for the panel. This question goes to Ms. Melling, but any of the panelists can feel free to weigh in. You mentioned in the wake of the Civil Rights Act of 1964, there were cases where there was an individual who, I guess, claimed that he was religiously compelled to discriminate on the basis of race, something to that effect. But I guess, in that situation, you had, really, a conflict of rights. I mean, you had the First Amendment on the one hand protecting religion, but you also had the Civil Rights of Act of 1866 and 1964, not to mention the 14th Amendment. So it was a conflict of rights there where the people spoke on both issues. Assuming the *Cakeshop* case had to do with discrimination on the basis of sexual orientation, which I don't accept, but assuming that's the case, where exactly are the rights of gays and lesbians protected anywhere?

LOUISE MELLING: So in Colorado, they're protected—

QUESTIONER 1: Federally. Federally speaking, yes.

LOUISE MELLING: Oh. Well, in Colorado, they're protected, so that was the predicate. They're expressly protected under Colorado's civil rights statute. Federally, under the Public Accommodations Law, there is no

[76] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1217 (Wash. 2019).

protection for sex, period. There are cases now up before the Supreme Court about whether the prohibitions on sex discrimination in employment law reaches discrimination based on sexual orientation and gender identity. Several lower courts and court of appeals have held it does. The question is being teed up for the Supreme Court.

QUESTIONER 1: Okay.

LOUISE MELLING: There's a very interesting body of cases before '64, one even in the '70s which are just—they're just surprising, where even the Court talks about God wanting the races to be separate. Now, these are all very, very old, but they're surprising.

QUESTIONER 1: Okay.

MODERATOR: Please?

THOMAS BERG: I think the *Piggie Park* case is a red herring. Nobody has made, or is arguing seriously, a claim to refuse all service to gay people in generalized commercial contexts, which was the claim in *Piggie Park*. You could distinguish that case in terms of the breadth of that claim: it would activate a much more compelling interest in access to goods and services, as well as interest in the basic dignity of people. You can make a distinction between refusing the person overall and, on the other hand, refusing a particular form of conduct or a particular disagreement about the nature of something like marriage. To refuse to serve anyone in any context is an attack on dignity. I think I agree with Gerry that even such an attack can't *take away* your dignity, but we don't really want to protect attacks on dignity. But that claim of refusal is very different from anything that's been claimed in any of the wedding cases.

The tougher question is whether race and sexual orientation should be treated the same in analogous factual situations, like refusing to bake a cake for an interracial wedding versus a same-sex wedding. That's the real comparison; *Piggie Park*, as I said, is a red herring. But in comparing these two kinds of discrimination, the way I look at it is not that sexual orientation is lower in seriousness than all the other forms of discrimination; it's that race is the highest, higher than all the others. We have virtually no exemptions for race discrimination in any law, anywhere. We have exemptions for sex discrimination. Some free exercise claims for sex discrimination have lost, as Louise pointed out, but we also have exemptions for sex discrimination based on religious grounds. We have all sorts of exemptions for religious discrimination based on religious grounds. But not for race. So to me, the argument is that race is constitutionally unique. It would take a longer time to lay that all out, but I'll stop there.

MODERATOR: Thank you. Over here?

QUESTIONER 2: To what extent do you believe the holding of *Masterpiece* is limited by the special facts of the case, namely, the discriminatory application by the Colorado Civil Rights Commission of the Colorado law? Would, in another state that applies its anti-discrimination law evenly, a service provider be protected similarly to Mr. Phillips if he refused to provide service on religious grounds?

GERARD BRADLEY: No, I think it depends—the holding is limited to its facts, and the facts could be replicated, but they would be replicated contingent facts. So I don't think there's anything that as a matter of principle or general legal protection that can be generated from *Masterpiece*. I do think the Court just left that matter entirely open. And people, including maybe people on this panel, although not myself, have tried to read the tea leaves as best they can as to what a majority probably would do on the basic question in a case that didn't involve these unpleasant facts. And I think that's maybe worth doing, but highly speculative.

LOUISE MELLING: I think the piece of *Masterpiece* that may wind up generating the most debate going forward is the discussion about William Jack versus Jack Phillips. And I think that was probably the point—

GERARD BRADLEY: Yep. Um-hmm.

LOUISE MELLING: But yet, the big question just remains.

MODERATOR: Please.

QUESTIONER 3: Right. I'm wondering if the—this hasn't been spoken about by the panel as a matter of discrimination versus *discrimination*. Gerard brought up kind of, well, we're going to have a rule against discrimination, and then make exceptions. And I don't think that that would be a positive regime. I'm concerned that there's not enough consideration of this, *Smith* notwithstanding, and the notion of neutrality as a question of discrimination against *discrimination*, it's simply alright to discriminate against people who are characterized as intolerant as a class. And that's something that, obviously, due to the narrow facts and decisions, wasn't addressed here, but I'm wondering, as a kind of a theoretical question, if that doesn't concern the panel.

LOUISE MELLING: Certainly, as a matter of fact, I think the public discourse about the case often is framed in terms of the dignity interests. Both sides are articulating the dignity interests, and both sides articulating the ways in which they feel subject to discrimination in culture, and who does and doesn't have a place in public society. And so I think those frames exist. There are cases certainly arising, early cases challenging contraceptive coverage rules, for example, where parties—I believe it was the Bishops or the Catholic Conference—argued that the laws may have been discriminatory because they were passed with an eye toward who wasn't

providing contraception, or because of how they were enforced. And so that frame that I think you're suggesting has been argued in the courts before, and I assume that that will continue to be argued.

MODERATOR: Tom, did you want to say anything?

THOMAS BERG: Part of the logic, actually, of the unequal enforcement point was that William Jack, who wanted the anti-gay cake, had brought a claim of religious discrimination when his request was refused.[77] And the Commission said that wasn't religious discrimination but that refusing the same-sex cake was sexual orientation discrimination.[78] One way to describe what happened in the Commission in *Masterpiece*, and in Colorado law—and in general, I would say, in how the progressive side analyzes these cases—is that they read sexual orientation discrimination broadly to encompass discrimination against conduct that is inextricably tied to orientation, like a relationship, like marriage. I support that reading. But then they read *religious* discrimination narrowly.

In that narrow reading, a state action is not religious discrimination unless it's against your affiliation: unless it's discrimination simply because you're a Christian, simply because you're a Muslim. If the state's ground for acting against you is anything about your conduct, then under this narrow reading, that's totally different from discrimination against your religion—because conduct and religion don't really go together. I don't think that's consistent: to connect sexual orientation and conduct but not connect religious identity and conduct. My argument is that in both of these situations, conduct and an identity are inextricably tied together. They are tied together for the religious believer, too.

LOUISE MELLING: I have things to say, but I'll wait until we hear from other questioners.

MODERATOR: Are you sure?

LOUISE MELLING: No, it's okay. I'll wait. They'll probably come out.

QUESTIONER 4: This sort of builds off the question. So what does the anti-discrimination law, like, favoring non-discrimination, what does that mean for the use of religious neutrality by the Court in the future?

THOMAS BERG: Can you maybe pinpoint that question a little more?

QUESTIONER 4: Alright. Sorry. I won't take everyone's time. I guess just kind of like, you know how the Court desires judges to be kind of

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[77] *Masterpiece Cakeshop*, 138 S. Ct. at 1734–35 (2018) (Gorsuch, J., concurring).
[78] *Id.* at 1735.

neutral in deciding religious matters, not being like, "Yeah, we believe your beliefs. We don't believe your beliefs. Are they sincere? Not sincere? We want to be neutral." That kind of . . .

GERARD BRADLEY: I mean, this is only a part, and probably a small part of a fuller response, but I would note that there're two senses of neutrality in play in almost any Supreme Court discussion of issues like this. And in almost any discussion, like ours, of these issues, namely, the neutrality among religions and between and among the different religious sects and individual religious world views, that's one thing. But there's also the neutrality, so-called, between religion as such and what's often not always called non-religion, occasionally called irreligion. Now the latter, I think, is unfounded and ought to be ripped out of the constitutional law as soon as possible. But I do think a more cautious statement than that would be that the Supreme Court, I think, is indicating its dissatisfaction with that broader neutrality between religion and non-religion.

Now it's not ready to articulate a doctrine or actually say it's rejecting this larger neutrality between religion and non-religion, but if you look at the results of cases including *Hosanna-Tabor*, *Greece v. Galloway*, *Trinity Lutheran*, the Court's decisions, the result in these cases are hard to square with this broader neutrality. And one thing that's telling, I think, is that the Court in *Hosanna-Tabor*, speaking through the Chief Justice, took up an argument made by the EEOC, I think here during the Obama administration, I think representing the administration's views.[79] But the EEOC arguing that case—that the Lutheran Church in that case—Lutheran Church School had rights, it had rights over personnel, but they just didn't have any rights over personnel as a church.[80] They had the same rights as any other expressive group, like the Boy Scouts or a Republican Party, for example.[81]

And what's telling about it—so this was a view that was truly religion neutral. There was nothing special about the religious character of this expressive association. It was just an expressive association. And the Court dismissed that, simply saying, "Well, there is a Free Exercise Clause, you know." And religion is singled out for a special positive treatment in the Constitution. That's just one example of many where I think the Court continues to stand by this broader neutrality as a matter of doctrine. It will recite it in a case at the appropriate early moment but is not behaving as if it's bound by it.

MODERATOR: Thank you. Mr. Mitchell?

MR. MITCHELL: I'm wondering if the panelists could comment

[79] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 698 (2012).
[80] *Id.* at 706.
[81] *Id.* at 712–13.

on the Religious Freedom Restoration Act, both at the federal and state level, and the way it applies to the dignitary and stigmatic harms inflicted on same-sex couples who are told, "Sorry, I'm not going to bake a cake for your wedding." And specifically, I think most people on the left would agree that there is a compelling governmental interest in preventing these dignitary and stigmatic injuries that occur when wedding vendors turn aside same-sex couples.

If that's true, I can think of things that are far more stigmatizing and demeaning to homosexual couples than that. For example, Fred Phelps and the Westborough Baptist Church when they show up at funerals with the signs.[82] We know what the signs say. Pastors who preach from the pulpit that homosexual behavior is a sin, that homosexuals are going to hell if they don't repent. If there's a compelling governmental interest in stopping Jack Phillips from inflicting these dignitary harms on his customers, doesn't it logically follow that there's a compelling governmental interest in censoring the sermons of pastors who denounce homosexual behavior from the pulpit or censoring the behavior of Fred Phelps? Or is there a way to distinguish the two?

LOUISE MELLING: So, first of all, under RFRA, you see, at least when Justice Kennedy was on the Court, you see the same struggle between religious liberty claims and anti-discrimination claims. In *Hobby Lobby*, Justice Kennedy has his out, in a sense—and yes, I'm talking as if the Court was all Kennedy because in some ways it was, in many cases—where he says "The Court will certainly countenance the claim of Hobby Lobby; the Court will take seriously the assertion of the substantial burden." But he said, the Court has a way both to recognize Hobby Lobby's harm and to continue to provide contraception—or this is what they thought on that day—by saying that the government could have offered the accommodation to the for-profit businesses, the same process that was available to the religiously affiliated non-profits. That was hotly contested, but still . . .

And then, in the case challenging the accommodation, the Court said, "Well, we have people of faith objecting to providing the coverage, and we have the potential harm if the coverage isn't provided. But there might be an agreement, so go back down." So I don't know that we know yet. There was a RFRA claim that might have presented that question in the *Harris Funeral Home* case where there's now a cert. petition pending, but the RFRA claim isn't asserted in that case on cert. The funeral home dropped that question going up.

THOMAS BERG: When the case involves speech, the First Amendment says that there cannot be a compelling governmental interest in

[82] *See* Snyder v. Phelps, 562 U.S. 433 (2011).

preventing the communicative impact of the speech. That's Fred Phelps and Westboro Baptist, etc., where the harm comes through the message. And the dignitary harm from Jack Phillips refusing to design the cake is primarily from the message of disapproval or dismissal that his refusal communicates. The progressive response against Phillips is to say that his action is conduct, not speech. But that doesn't work if his conduct in designing a custom cake celebrating a wedding has a strong expressive element. The Supreme Court has a doctrine about expressive conduct, shown in, for example, the flag burning cases. There, the conduct of burning a flag also communicates a message, and the Court has twice struck down laws that were based solely on the communicative impact of that expressive conduct.[83] So if Jack Phillips is engaged in expressive conduct, then I think his claim falls squarely within other cases. I basically agree with your point; this is how it shakes out in terms of doctrine.

LOUISE MELLING: I just want to say three things back to Tom. So first is what the law regulates is what you do when you make a product. So to my mind, the focus on the cake is an effort to divert your eye from what the law was intending, what the law targets. The law targets your conduct when you have a product; the question is whether you will discriminate in the person to whom you sell it. The law is regulating that conduct. Second, in some sense, every act of discrimination is expressive in that somebody is motivated to say no to somebody for some reason. Third, if we think about the case coming out of, I think it's Washington, lots of conduct is expressive, but that doesn't put it squarely in the free speech doctrine. Consider the case where there was a tent city, basically, set up in D.C. to protest homelessness.[84] That was expressive, but that was treated as expressive conduct, not expression, even though it had a robust message.[85]

MODERATOR: Over here, please.

QUESTIONER 6: Yes, for Ms. Melling. I was interested in what I take to be, in essence, kind of policy arguments. What kind of a world do we want to live in? Do we really want to have a rule where the state can't come in and defend certain rights? But let me try to turn it around a little bit, that the position that Colorado is taking is that it is necessary for Colorado to mediate between claims, rights claims, from two private parties that are at loggerheads with each other. And this is substantially different from a claim in which the state is asserting its own interest or its own rights—that if the issue is about the rights of an individual against the state, then the worst thing that happens for the state is the state loses and has to make some

[83] *See generally* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

[84] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984).

[85] *Id.* at 306.

accommodation.

But if the state's argument is that it is mediating rights claims among individuals, then doesn't that put the state in the position of being able to hide behind somebody's rights claims using what may be, at the time, the most kind of popular or politically useful position in order to grow the power of the state? Shouldn't we be concerned about inviting the state into mediating these individual rights disputes, and shouldn't that be a reason to treat the state's arguments more suspiciously?

LOUISE MELLING: So, mega question. I think that depends on how you think about the state. I see anti-discrimination laws, obviously, as passed by a majority trying to tip a balance so as to protect a minority, and therefore, see the state power is often necessary to make advances. I'm not sure I answered your question.

GERARD BRADLEY: Well, there is something distinctive. You put your finger on something distinctive about many of the contemporary arguments about religious liberty and other person's rights. At least, typically, in the past, the religious claimant, whether it was Jehovah's Witnesses, or Christian Scientists, or somebody else, was stacked up against the state itself, insofar as they were seeking relief of some institutional regularity, or rule-keeping, or a norm, like police officers must not have beards, but some men, many Muslim men, want to have a beard. So there's a way in which it wasn't pitting one person against another. Whether we describe it as a clash of interests or a clash of rights at this point, I think, doesn't matter. And that is new, newish, in our situation. Although I think fundamentally, it doesn't present a new sort of normative challenge because I think always in questions involving the kinds of things we're talking about, the question is whether the resolution in mind is fair to everybody, fair to everyone. Not so much fair to the state, but state insofar as the state is the political community.

So even in an institutional context, just for example, the question would be about, let's say a prisoner wants kosher food. You'd say, "Well, it's really between the prisoner and the chef in the kitchen at the prison." Well, yes and no. It is that, but it's also a matter of fairness to other people, namely, is it fair for me claiming a religious reason to get better food that everybody would want but aren't going to get because they're not asserting a religious reason? So I think, actually, at the bottom of almost all religious liberty disputes and questions is a matter of fairness between and among people—especially if you consider the fairness of favoring religious reasons for doing something as opposed to non-religious. So I think that there is this new surface feature, which is a challenge to our thinking. But I think, fundamentally, it remains the same question of fairness to everyone, which doesn't mean, by any means, the believer always wins. That's not true at all,

but it is a matter of being fair to Jack Phillips as well as everybody else.

MODERATOR: I think we have just enough time for Tom to respond, and then we'll have to break. So apologies to those who didn't get to ask questions. We'll try to be available after the panel. Tom gets the last word.

THOMAS BERG: A final comment: I would not yoke the effort for religious liberty to an effort to repeal the active welfare state, or what conservatives might label the intrusive state.[86] The latter is a much bigger battle for conservatives to win. The good thing about accommodations is that they make it possible to protect religious liberty, an important constitutional value, even as we go on and fight in other forums about whether we're going to have big government or small government overall. If religious conservatives have to overturn the New Deal in order to get religious liberty protected, that's not a good strategy. [Laughter]

MODERATOR: And with that, we'll conclude. Please join me in thanking our panelists for their time.

[86] [In retrospect, this comment may not have been responsive to the questioner. But it seemed relevant, at a Federalist Society gathering, as a response to some religious and political conservatives who criticize religious exemptions. They say that a conservative challenge should be made to an unjust law in its entirety, not merely in its application to religiously motivated behavior. *See* Hadley Arkes, *Backing Into Relativism*, FIRST THINGS (June 2019), https://www.firstthings.com/article/2019/06/backing-into-relativism (criticizing conservative jurisprudence for offering exemptions rather than, for example, "question[ing] the very coherence of a law that bars discrimination based on 'sexual orientation'"). —TB]