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Masterpiece's Equal Treatment of the Religious and Expressive Freedoms Under the First Amendment

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MASTERPIECE'S EQUAL TREATMENT OF THE RELIGIOUS AND EXPRESSIVE FREEDOMS UNDER THE FIRST AMENDMENT

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ABSTRACT

This thesis aims at examining the validity of free speech claims for religious exemptions on the one hand and reviewing the *Masterpiece* Court's holdings on the current complex entanglement of religious exemption theories, on the other hand; and finally, it also provides a possible suggestion for co-existing between two constitutional values without an all-or-nothing solution.

As to the free speech argument, the Court would likely decide that a compelled speech argument should succeed if, and only if, the vendor's good or service is expressive under the Free Speech Clause. For a baker, the Court would protect making a custom cake bearing messages through images or texts as a symbolic expression, but it would not protect making a generic or artistically decorative cake either as a pure or symbolic expression.

As to the free exercise argument, this thesis insists that this is a permissible rejection within the scope of the vendor's product options because it does not violate full and equal enjoyment, which could be interpreted as being the customer's equal access to goods and services based on the right of vendors to choose what to sell, as Justice Kagan stated. Furthermore, it argues that procedural-equal treatment should be given equal access to the vendors, including the vendors who decline to provide their goods and services due to religious and secular reasons when refusal is permissible. The differences between discriminatory declination and permissible rejection rely on whether the vendor could supply his goods or services to all other customers; in other words, the refusal is within the right of vendors to choose what to sell. Here, the official or government agency could have the discretion to determine whether the vendor's refusal could be a discriminatory or conscientious declination. If they did not give the vendor opportunities to consider the reasons for refusals in a principled rationale, it could constitute a substantial burden on religious believers by deprivation. And then, the Supreme Court's ruling in *Masterpiece* should be understood to require procedural-equal treatment, applicable to religious and secular vendors alike.

CONTENTS

I. THE LEGACY OF *MASTERPIECE*

In *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*,[1] the Supreme Court confronted the conflict between *eradicating discrimination* based on sexual orientation, which enforces social equality for LGBTQ people, and *reassuring freedoms of religion and expression*, which operates according to the limitation of compliance with the law. Aspirations for LGBTQ equality by social movements have been more influential than ever before, while social disregard for religion has gradually expanded. Most people are skeptical about religious exemptions because they could operate under the assumption that these exemptions give privilege to religious people.

LGBTQ people claimed their rights in 1986, when anti-discrimination based on sexual orientation arose as a constitutional issue in *Bowers v. Harwick.*[2] Even though it failed, there has been a continuing demand for decisions since then to recognize sexual liberty and non-discrimination due to sexual orientation. The Court recognized pervasive social discrimination against LGBTQ people in *Romer v. Evans*,[3] which established the animus doctrine and assured heightened scrutiny. In *Lawrence v. Texas*[4] of 2003, the Court established the sexual liberty of LGBTQs by abolishing laws against sodomy acts, and in *United States v. Windsor,*[5] the Court declared the Federal Defense of Marriage Act[6] unconstitutional for disallowing a tax refund and estate tax exemption for surviving spouses of same-sex marriage. Finally, in *Obergefell v. Hodges*,[7] it allowed same-sex marriage as a fundamental right under the Fourteenth Amendment.[8]

In opposition, since 1990, the Court discarded the favorable attitude toward the religious accommodations of *Sherbert v. Verner.*[9] Instead, the Court established the *Smith* rule, which prevents the

[1] 138 S. Ct. 1719 (2018).
[2] 478 U.S. 186 (1986).
[3] 517 U.S. 620 (1996).
[4] 539 U.S. 558 (2003).
[5] 570 U.S. 744 (2013).
[6] DEFENSE OF MARRIAGE ACT (DOMA) of 1996, 1 U.S.C. 7 (1996) (Struck down, June 26, 2013); In *United States v. Windsor*, the Court declared Section 3 of DOMA unconstitutional under the Due Process Clause.
[7] 135 S. Ct. 2584 (2015).
[8] U.S. CONST. amend. XIV § 1 (Due Process Clause)
[9] 374 U.S. 398 (1963).

challenge of religious exemptions when the law is generally applicable, whether or not the law imposes a substantial burden on religious practices in *Employment Div. v. Smith*.[10] Religious groups and conservative politicians made their efforts to secure religious exemptions through legislation, such as the federal RELIGIOUS FREEDOM RESTORATION ACT (RFRA),[11] RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)[12] and state-RFRAs—another nickname is mini-RFRAs[13]—against the government practices with which they did not agree concerning their beliefs.

Eventually, the movements of both sides have led to conflicts in society. There were battles between conservatives and progressives in a political aspect, between believers with deeply held religious convictions and LGBTQ peoples concerning the pursuit of their liberty in a social aspect, and between civil rights movements to promote anti-discrimination acts for sexual orientations and RFRA legislation movements in a legal aspect.[14] The predicted conflict between these two groups[15] finally came to the surface through *Masterpiece* three years after the Court established the right to same-sex marriage as a fundamental right in 2015.[16]

Masterpiece's story is simply this. Phillips, who operated a local bakery Masterpiece Cakeshop, refused

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[10] 494 U.S.at 879 (1990).

[11] RELIGIOUS FREEDOM RESTORATION ACT (RFRA), 42 U.S.C. §2000bb - 2000bb-4 (1993); The federal RFRA defined that "government substantially burdens a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. §§2000bb1-(a), (b)).

[12] RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA), 42 U.S.C. § 2000cc-2000cc-5 (2000).

[13] RFRA states should apply strict scrutiny to religious rejection cases by balancing between government interests for protecting sexual orientation and religious freedom. Colorado did not enact RFRA, but there are 21 states which have RFRAs in 2015 - Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia. (*State Religious Freedom Restoration Acts*, NCSL (May 4. 2017) http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx#RFRA).

[14] *Burwell v. Hobby Lobby Stores, Inc*. 573 U.S. 682 (2014).

[15] *Obergefell,* 135 S. Ct. at 2625 (Roberts, J., dissenting) (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N. C. L. REV. 375, 385-386 (1985), "heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict").

[16] The Court decision could influence society by instructing "which arguments seem legitimate and which parties deserve our sympathies." (Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 HARV. J. L. & PUB. POL'Y 711, 750 (2019)).

to make a wedding cake for a gay couple, Craig and Mullins, because Phillips said it was contradictory to his religious beliefs. Thus, according to the Colorado Anti-Discrimination Act (CADA),[17] which bans discrimination based on sexual orientation, the Colorado Civil Rights Division issued a probable cause and referred the case to the Civil Rights Commission.[18] The Commission found it proper to provide a formal hearing and sent the case to a State Administrative Law Judge (ALJ).[19] Finally, ALJ determined that Phillips' actions constituted prohibited discrimination in Craig and Mullins's favor, based on sexual orientation. After the Colorado Court of Appeals affirmed the Commission's determination and remedial order,[20] the United States Supreme Court heard the case and delivered its decision, which was divided 7–2 in favor of Phillips. In the decision, the majority decided that the Colorado government agent compromised "neutral and respectful consideration," which is religious neutrality when it showed "clear and impermissible hostility toward [Phillips's] sincerely held religious belief" about marriage.[21]

Masterpiece delivers two important social and political messages. First, the Supreme Court made efforts to strike a balance between a gay couple's rights and religious rights by supporting both sides. It delivered to the public a message that the Court had given "neutral and respectful consideration" to both sides and was not driven by its political powers into this cultural and religious war. It was especially symbolic that Justice Kennedy delivered the opinion of the Court for religious liberty in this case, while he wrote the majority opinion in *Obergefell,* which decided to cast a vote in favor of same-sex marriage.

Second, two progressive Justices cast cross-votes against their political roots. One of the Justices as a concurring opinion was Justice Beyer, nominated by President Clinton, and the other was Justice Kagan, nominated by President Obama.[22] This cross-voting means the decisions of Justices were not affected by

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[17] COLO. REV. STAT. (C.R.S.) §24-34-601 (2008, amended 2014)
[18] *Masterpiece,* 138 S. Ct. at 1725-26.
[19] *id.* at 1726.
[20] *id.* at 1726-27.
[21] Justice Thomas further delivered his opinion that the government violated Phillips' free speech rights. (*id.* at 1740-48 (Thomas J., concurring).
[22] *Current Supreme Court justices: See who sits on the highest court in the land*, ABC-7.COM (October 6, 2018) https://abc7chicago.com/politics/current-supreme-court-justices-see-who-now-sits-on-the-highest-court/4428808/

their political attitudes, and they depended only on their constitutional reasoning. In effect, their opinions were not against their supporters, because this opinion did not deny the gay couple's rights, but only focused on the narrow duty of the governmental power, which means that the official should not treat ordinary religious people harshly even if society does not accept their opinions.

However, this result was disappointing to both parties because the Court sidestepped the significant issues, of what value trumps the other, and submitted an ad hoc solution, which was fact-specific. It was a "pyrrhic victory" for the baker. He stopped creating wedding cakes[23] and faced another lawsuit.[24] Moreover, LGBTQ people considered this decision as "a disappointing step backward."[25]

Therefore, this thesis aims at examining the validity of free speech claims for religious exemptions in light of the recent Supreme Court ruling, on the one hand, and reviewing the Court's position on the current complex entanglement of religious exemption theories, on the other hand; and finally, it provides a possible suggestion for two constitutional values, protecting religious expression and eradicating discrimination in public accommodations to coexist through the analysis of *Masterpiece* without an all-or-nothing solution.

To achieve this goal, this thesis reviews two constitutional claims: free speech and free exercise claims. First, as to the free speech claims, the symbolic speech doctrine and the compelled speech doctrine will be examined from the doctrinal perspective, and the constitutional scope of expression protection within

("Stephen G. Breyer: Nominated by former Pres. Bill Clinton, took seat Aug. 3, 1994 … Elena Kagan: Nominated by former Pres. Barack Obama, took seat Aug. 7, 2010")

[23] Jack Phillips*, I'm the Masterpiece Cakeshop baker. Will the Supreme Court uphold my freedom?,* WASHINGTON POST (April 26, 2018 at 2:55 p.m. CDT) https://www.washingtonpost.com/opinions/im-the-masterpiece-cakeshop-baker-will-the-supreme-court-uphold-my-freedom/2018/04/26/3f04cf42-4896-11e8-827e-190efaf1f1ee_story.html

[24] Nico Lang, *Masterpiece Cakeshop owner in court again for denying LGBTQ customer- Christian business owner Jack Phillips is being sued by a transgender woman who tried to order a trans-themed birthday cake from his Colorado bakery-*, NBCnews (April 15, 2020, 2:30 PM CDT) https://www.nbcnews.com/feature/nbc-out/masterpiece-cakeshop-owner-court-again-denying-lgbtq-customer-n1184656

[25] Tim Fitzsimons*, 'Dangerous' or balanced? Bakery ruling elicits mixed reaction from LGBTQ groups - Gay rights groups are disappointed that a Colorado baker can refuse to make a wedding cake for a gay couple, but relieved that the ruling only applies to this case-,* NBCnews (June 4, 2018) https://www.nbcnews.com/feature/nbc-out/dangerous-or-balanced-bakery-ruling-elicits-mixed-reaction-lgbtq-groups-n879901

commercialism will be reviewed from the policy perspective.[26] Finally, this thesis will confirm that the free speech of religion can be protected to a minimum by the compelled speech doctrine. However, this would not save the majority of the religious people in the current *Masterpiece* case and public accommodations.

Before reviewing the second free exercise claims, this thesis will explain what the constitutional attitude toward religious accommodations is to resolve confusion over the religious exemption, and will identify the legislative challenges and the judicial limitation surrounding the *Smith* rule and its exception.[27] And then, comparing the confrontational interpretations of *Masterpiece*'s decision from both narrow and broad perspectives, this thesis presents possible candidate interpretations for religious exemptions that can protect both values while maintaining the court's view of the *Smith* rule. [28]

[26] Chapter II deals with the free speech claims.
[27] Chapter III deals with the premises.
[28] Chapter IV deals with the free exercise claims.

II. FREE SPEECH CLAIMS

Recently religious exemption claims in public accommodations have tended to include free speech claims.[29] Free speech claims seem to be better than the argument relying on the religious exemption as to the Free Exercise Clause, which has obstacles in the *Smith* rule. Under the free speech jurisprudence, even if expressions of one's beliefs are "offensive or irrational,"[30] or "provocative and challenging,"[31] the First Amendment protects that speech and prohibits state laws restricting that speech unless the laws satisfy strict scrutiny. Furthermore, the government cannot establish what speech is right and protected by determining what messages are offensive.[32] So, religious objectors have accepted free speech claims for litigant tactics.[33]

Generally, the public accommodation laws do not target any of the messages or viewpoints, but they regulate discriminatory acts. So, a rational basis review should be applied. The Court affirmed that those laws govern conduct only.[34] However, if the conduct which the law targets is itself a form of pure expression, the review of the law could be subject to strict scrutiny.[35] If it is expressive conduct, which means that expression exists together with conduct, intermediate scrutiny should be applied.[36]

In *Masterpiece*, Phillips' main argument was based on the Free Speech Clause, especially the

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[29] Daniel O. Conkle, *Equality, Animus, and Expressive and Religious Freedom Under the American Constitution: Masterpiece Cakeshop and Beyond*, *in* LA LIBERTÉ D'EXPRESSION EN DROIT COMPARÉ [FREEDOM OF EXPRESSION IN COMPARATIVE LAW] 2 (Gilles J. Guglielmi, ed.; Les Edition Panthéon-Assas, forthcoming 2020).
[30] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 641-42 (1943).
[31] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).
[32] *Barnette,* 319 U.S. at 642 ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, region, or other matters of opinion or force citizens to confess by word or act their faith therein.")
[33] Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361, 384 (2004)); see, *Washington v. Arlene's Flowers, Inc*, 389 P. 3d 543, 511 (Wash. 2017), *Brush & Nib Studio, LC v. City of Pheonix*, 448 P. 3d 890, 902 (Ariz. Ct. App. 2018); *Klein v. Or. Bureau of Labor & Indus*, 410 P.3d 1051, 1064 (Or. Ct. App. 2017); *Telescope Media Grp. v. Lucero*, 936 F. 3d 740, 750 (8th Cir. 2019); and *Masterpiece*, 138 S. Ct. at 1723.
[34] "The Court addressed a public accommodations law that did not on its face, target speech or discriminate on the basis of its content but focused on prohibiting the act of discriminating against individuals in the provision of publicly available goods, privileges and services."(*Hurley v. Irish-American Gay*, 515 U.S. 557, 572 (1995))
[35] See, *Brush & Nib*, 418 P. 3d at 906 (Ariz. Ct. App. 2018).
[36] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

compelled speech theory from *Hurley v. Irish-American Gay*.[37] He believed creating cakes is "a form of art," and he wanted to use his "artistic talents" for God.[38] He argued his creation was an expression celebrating the customers' weddings, which, in his view, is a combination of one man and one woman. His celebratory expression was not for same-sex marriage. However, the public accommodation law forced him to provide services for same-sex marriage by imposing penalties on him. So, he and his attorney, and amici curiae, argued that baking cakes constituted compelled speech because his conduct with artistic skills is inherently expressive. However, protection of his refusal as free speech or compelled speech might hurt the dignity of same-sex couples, whose protection was the purpose of the anti-discrimination act.

The *Masterpiece* Court did not allow for the free speech claims because it was difficult to view artistically decorative cakes as a form of expression.[39] However, the Court suggested that some actions in public accommodations can be recognized as speech. Therefore, this chapter will review cases in which the Court considered whether the behavior of vendors, including bakers creating cakes, could be considered as expressive.

The Court has recognized the symbolic speech doctrine that some actions could be expressive when they satisfy some requirements. Furthermore, the Court arguably established compelled speech, especially in the public accommodation law. Considering the Court's decisions, in future cases, the Court would likely protect a custom cake with a message through images or texts but would not recognize pure or artistically decorative cakes as speech.

1. SYMBOLIC SPEECH DOCTRINE

[37] 515 U.S. 557 (1995).
[38] *Mullins v. Masterpiece Cakeshop, Inc*. 370 P.3d 272, 276-77 (Co. Ct. App. 2015); Brief for Petitioners at 1-2, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).
[39] *Masterpiece*, 138 S. Ct. at 1723.

Under the First Amendment, expressive conducts are not explicitly protected, unlike "oral and written speech."[40] However, the Court affirmed expressive conduct as protected speech in several decisions because sometimes a straightforward behavior is more effective and powerful than one word "precisely because of its communicative attributes."[41] Moreover, "the line between speech and conduct … is not always clear."[42] The Court acknowledged, "symbolism is a primitive but effective way of communicating ideas."[43] It included actions such as burning the American flag,[44] displaying a red flag,[45] refusing to salute the American flag,[46] burning a draft card,[47] wearing a black armband,[48] or wearing a uniform displaying the swastika.[49] Those are examples of so-called "symbolic speech." The Court has expanded this area of symbolic speech.[50]

To affirm symbolic conduct as "inherently expressive,"[51] the Court required two prongs of the *Spence* test: the speaker should intend to make the conduct "communicative," which is a subjective condition, and a reasonable viewer should understand that the conduct is "communicative," which is an objective condition.[52] In this test, the most crucial factor that differentiates speech from other activities is only

[40] The First Amendment defined, "to the United States Constitution prevents the government from making laws which … abridge the freedom of speech, the freedom of the press…" (U.S. CONST. amend. I. (Free Speech Clause)).
[41] *Barnes v. Glen Theatre*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring).
[42] *Arlene's Flowers*, 389 P. 3d at 1225.
[43] *Hurley*, 515 U.S. at 569.
[44] *Barnette,* 319 U.S. at 633-34.
[45] *Stromberg v. California*, 283 U.S. 359, 369 (1931).
[46] *Barnette*, 319 U.S. at 632, 642 (1943).
[47] *O'Brien*, 391 U.S. at 367-77 (1968); "The *O'Brien* test holds that, where speech is primarily "expressive" or "symbolic," the government can regulate it in accordance with a four-part test: **(1)** the law must be within the constitutional remit of the government; (2) it must further an important or substantial governmental interest that is **(3)** unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedom must be no greater than necessary to the furtherance of that interest." (John G. Culhane, *The Right to Say, But Not to Do: Balancing First Amendment Freedom of Expression with the Anti-Discrimination Imperative*, 24 WIDENER L. REV. 235, 240 (2018)).
[48] *Tinker v. Des Moine Independent Community School Dist*., 393 U.S. 503, 505-6 (1969).
[49] *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 (1977).
[50] It does so while the courts tried to limit "the broad wording of the first amendment." (Ellen S. Podgor, *Symbolic Speech*, 9 IND. L. REV. 1009, 1012 (1976)).
[51] *Compare with Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,* 547 U.S. 47, 64 (2006) ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive.")
[52] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (citing *Spence v. Washington*, 418 U.S. 405 (1974) and *Tinker*, 393 U.S. 503 (1969)) ("the conduct should be intended to be communicative" and "it should reasonably be understood by the viewer to be communicative.")

"communicative" property on both subjective and objective prongs.

Justice Thomas's opinion is a broad interpretation of communicability. He gave the only opinion supporting free speech claims. He indicated that the *Spence* requirements were satisfied by showing the baker's affirmative participation in making each cake[53] for the intentional condition, and he also explained wedding cake history concerning what the average person perceives[54] to be the intention when the person finds a wedding cake in a ceremony[55] for the reasonableness condition. If goods or services were used as a method of expression, they could be an expression. However, traditionally, cakes or food have not been acknowledged as a medium of expression,[56] and there was no precedent.[57] To assess communicability, he invoked intuition by comparing the act of creating cakes with nude dancing, which the Court recognized as a threshold for protected speech. In *Barnes v. Glen Theatre, Inc*., the Court recognized nude dancing could communicate an "erotic message," but stated carefully that it is "expressive conduct within the outer perimeters of the First Amendment, although only marginally."[58] He stated, "Phillips' creation of custom wedding cakes … clearly communicates a message – certainly more

[53] "Phillips considers himself an artist… Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates-sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."(*Masterpiece*, 138 S. Ct. at 1742) (Thomas, J., concurring)

[54] When the average person see the wedding cake, the person can recognize that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." (*id.* at 1742-3 (Thomas, J., concurring)).

[55] "to mark the beginning of a new marriage and to celebrate the couple" (*Id.* at 1743 (Thomas, J., concurring)).

[56] Professor Post also pointed it out. (Robert Post, *An Analysis of DOJ's Brief in Masterpiece Cakeshop,* TAKE CARE, (Oct. 18, 2017), https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop ("It is for that reason that heightened First Amendment scrutiny has typically been reserved for laws that distort meanings conveyed in what the Court has called "media for the communication of ideas," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), in which participants are understood to be self-consciously seeking to address public ideas and matters… It is quite clear that baking is not such a medium.")

[57] Other Justices or most scholars are skeptical that it is expression. Justice Sotomayor mentioned, "the primary purpose of a food of any kind is to be eaten."(Transcript of Oral Argument at 15, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111)) And Justice Kennedy stated that ordinary people seldom found a wedding cake as a protected speech.(*Masterpiece*, 138 S. Ct. at 1723 ("[t]he free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.")) Scholars supported this conclusion by arguing that traditionally cakes or food did not have been acknowledged "as a medium of expression."

[58] *Glen Theatre*, 501 U.S. at 565-66; However, even though there was not one single opinion for majority, it was concluded that the law which restrict this dancing was constitutional, because it could satisfy the intermediate scrutiny.

so than nude dancing."[59]

To support this opinion, one could offer the interpretation that the First Amendment has broadly protected the speech, which includes artistic expression, such as nude dancing and custom wedding cakes.[60] They emphasize "artistic" skills. This art theory, which accepts artistic works as protected speech, can support this broad perspective. Several circuit courts confirmed this theory, such as the sixth, seventh, ninth, and tenth circuit courts.[61] However, other circuits, and even the Supreme Court, never have done so. One reason why the Court did not accept this art theory might be that it is difficult to define what the art is. If the Court defines art as expressive conduct, it will cause more severe problems because all human activities are, to some degree expressive,[62] so that protected speech claims could challenge most of all governmental actions, which restrict conduct. So, the Court should discern protected expressions from ordinary expressive activities of people's lives.[63]

Others argued in a narrow way that protected speech needs a particularized message requirement,[64] which means that the message entailed by the conduct should be able to be expressed in one or two sentences intended by the speaker. However, the Court did not require this additional requirement. As to *Hurley*, "[a] speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[65]

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[59] *Masterpiece,* 138 S. Ct. at 1743 (Thomas J., concurring).
[60] Scott W. Gaylord, *Is a Cake Worth a Thousand Words: Masterpiece Cakeshop and the Impact of Antidiscrimination Laws on the Marketplace of Ideas*, 85 TENN. L. REV. 361, 388 (2018).
[61] *See, e.g. ETW Corp v. Jireh Publ'g. Inc*., 332 F.3d 915, 924 (6th Cir, 2003); *Piarowski v. Ill. Cmty. Coll. Dist*. 515, 759 F.2d 625, 628 (7th Cir. 1985); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015); The 8th circuit court stated in its dicta, "there is no question that the government cannot compel an artist to paint" without precedent. (*Telescope,* 936 F. 3d at 752.); *Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc.*, 2018 WL 747835 (Cal. Super. Ct., Bakersfield Dep't, Feb. 5, 2018) (baking a wedding cake is artistic expression, and regulation unconstitutional under strict scrutiny).
[62] Post, *supra* note 56 ("We could multiply such examples indefinitely. American social life is filled with events that can legitimately be characterized as 'deeply expressive.'")
[63] Adam Liptak, *Where Do Draw Line on Free Speech? Wedding Cake Case Vexes Lawyers*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/us/politics/gay-wedding-cake-free-speech-first-amendment-supreme-court.html (quoting Eugene Volokh) ("At some point, you have to decide what counts as speech and what doesn't. Otherwise, all human behavior could be said to be expressive.")
[64] *Mullins*, 370 P.3d at 286.
[65] *Hurley*, 515 U.S. at 569. ("a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.")

So, the Court declared that a "narrow, succinctly articulable message"[66] is not a condition of protected speech.

Therefore, the promising final interpretation of communicability came from the majority's opinion, which restricts protected speech case by case, relying on the burden of proof. Justice Kennedy pointed out the substantial likelihood that some sort of public accommodation activities are expressive even though he seemed to be denying the symbolic speech argument for merely making wedding cakes. Kennedy considered that the results would be different from *Masterpiece* when the order from a customer was "cakes with words or images celebrating the wedding."[67] Justice Ginsburg agreed with this opinion.[68] Given that the Court did not consider "written or spoken words" [69] as "a condition of constitutional protection,"[70] those elements can be understood as a kind of index for communicability[71] to limit protected speech practically, but not theoretically.[72]

By reference to recent lower courts' decisions, the Court would not likely acknowledge creative works, such as custom wedding cakes[73] or floral arrangements,[74] as a form of expression. The lower courts and

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[66] *Id.* at 558.
[67] *Masterpiece*, 138 S. Ct. at 1723.
[68] "As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all."" *Masterpiece*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).
[69] The Colorado Court of Appeals also can support this argument because it already "acknowledged that 'a wedding cake, in some circumstances, may convey a particularized message celebrating [a] same-sex marriage,' depending on its 'design' and whether it has 'written inscriptions.'" (*Mullins*, 370 P.3d at 288).
[70] *Hurley*, 515 U.S. at 569; *Masterpiece*, 138 S. Ct. at 1738.
[71] However, it does not mean that this conduct should have particularized messages (Gaylord, *supra* note 60, at 394).
[72] Protected speech is "special." Some scholars tried to establish the special elements for protected speech, such as the pursuing values through free speech. (Leslie Kendrick, *Use Your Words: On the Speech in Freedom of Speech*, 116 Mich. L. Rev. 667, 680-681 (2018)) However, there is no agreement on how to distinguish protected speech from unprotected speech, or symbolic speech from mere conduct. Thus, the Court seemed to recognize the difference between them as it decided historically, rather than theoretically. *See,* e.g. *Telescope Media*, 936 F. 3d at 750-51 ("The Larsens' videos are a form of speech that is entitled to First Amendment protection. The Supreme Court long ago recognized that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn*, 343 U.S. at 502; see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981). Indeed, "[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas." Joseph Burstyn, 343 U.S. at 501. "They [can] affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.*")
[73] *Klein v. Or. Bureau of Labor & Indus*, 410 P.3d at 1064-74, especially at 1072-73.
[74] *Arlene's Flowers, Inc*, 389 P. 3d at 1224-25.

state courts restrict their extensive applications by repeating precedents, such as making wedding films,[75] or at best accepting a few exceptions, only where the goods or services included words or images, such as wedding invitations[76] or T-shirt designs with words celebrating a same-sex wedding.[77] However, others, such as floral arrangements, collecting wedding albums, or baking wedding cakes, were not accepted because the state or lower courts treated them as unprotected conduct.[78] All these decisions depended on whether goods or services have words, images, and the like.

In the case of a baker, the Court would protect making a cake bearing messages through images or texts as a symbolic expression, but it would not protect making a generic, artistically-decorative cake as either a pure or symbolic expression. Therefore, if creative works are protected speech as expressive conduct, intermediate scrutiny should be applied according to the *O'Brien* test when the government restricts those expressive conducts.

2. COMPELLED SPEECH DOCTRINE

If a vendor declines those provisions to protected classes, the public accommodation law can force him or her to provide those goods and services to these classes. However, if the conduct forced by the government according to this law is expressive, it can constitute compelled speech, in which case, strict scrutiny should apply.

The reason why compelled speech violates free speech rights is that the First Amendment protects not only a right to speak but also a right to be silent and refrain from speaking.[79] So, free speech includes

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[75] *Telescope Media*, 936 F. 3d at 750-51.
[76] "Plaintiffs' custom wedding invitations, and the process of creating them, are protected by the First Amendment because they are **pure speech**. Each custom invitation created by Duka and Koski contains **their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork**. Additionally, Duka and Koski are intimately connected with the words and artwork contained in their invitations." [emphasis added] (*Brush & Nib Studio,* 418 P. 3d at 908)).
[77] *Lexington-Fayette Urban County Human Rights Comm'n v. Hands on Originals*, 592 S.W. 3d 291 (Ky, 2019).
[78] *See, e.g. Arlene's Flowers*, 441 P. 3d at 1228; *Klein*, 410 P.3d at 526.
[79] Erwin Chemerinsky, CONSTITUTIONAL LAW 1129 (2nd ed. 2005).

ensuring the "autonomy over the message."[80] It means "*choices* of what to say and what to leave unsaid."[81] The speech "may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner"[82] because the First Amendment not only protects "a speaker's desired message but also ensures that the government cannot conscript a speaker's properties to serve as a courier for another's message." If the government action constitutes compelled speech, the courts should apply strict scrutiny. Even if the creative works compelled are expressive conduct where intermediate scrutiny should be applied, compelled speech claims can bring strict scrutiny to the case.[83]

The public accommodation laws do not target speech but conduct, so it does not consist of compelled speech.[84] However, the Court in *Hurley* had recognized that compelled speech theory could apply to public accommodations in a particular application, where the law applies to expressive conduct.[85] In *Hurley*, a parade organizer planned a parade event, and she picked who would participate in the parade.[86] She prevented a gay organization from performing in her parade, and her denial could consist of discrimination based on sexual orientation under the public accommodation law.[87] So, the state forced the private parade operator to add the unit of the gay organization with whose speech the operator did not agree.[88] The Court held that the parade was a form of expression and that forcing the operator to add the unit constituted compelled speech by altering the operator's speech.[89] So, the state government violated

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[80] *Hurley,* 515 U.S. at 576. [capitalized and emphasis added]
[81] *Hurley*, 515 U.S. at 573 (citing *Pacific Gas & Electric Co. v. Public Utilities Com*., 475 U.S. 1, 11, 16 (1986) (plurality opinion))
[82] *Pac. Gas.* 475 U.S. at 12 (plurality opinion) (citing *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 100 (1980) (Powell, J. concurring))
[83] *Hurley*, 515 U.S. at 577.
[84] *Id.* at 572 (the laws typically focus "on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.")
[85] *Id.* at 572-73; Gaylord, *supra* note 60, at 403 ("if application of a public accommodations law targets speech or discriminates on the basis of its content, then the statute has the effect of declaring the sponsors' speech itself to be the public accommodation."[quotation mark omitted])
[86] *Hurley*, 515 U.S. at 560-61.
[87] *Id.* 561-62.
[88] *Id.* 562-63.
[89] *Id.* 572-81.

the First Amendment free speech right of the operator.

However, there are two rebuttals against compelled speech claims in public accommodations. One is attribution theory, which asserts that when the wedding cakes deliver a message of celebrating a same-sex marriage, "that message is more likely to be attributed to the customer than to"[90] the baker from the perspective of reasonable persons so that it does not constitute compelled speech. The other is compliance theory, which insists that when the baker's action is merely to serve his customers equally by abiding by the law, it does not convey a message with which he disagrees from the perspective of reasonable persons.[91] However, the Court would not be likely to accept these arguments, because it did not establish the additional prongs according to the attribution and compliance theories, so that the compelled speech idea could succeed if and only if the conduct is expressive under the symbolic doctrine.

(1) Likelihood of Misattribution

The *Mullins* court decided that the observers would not attribute the ordered message to the baker[92] when the baker accommodates the speech of others, such as customers, through expressive conduct. On the contrary, in *Hurley*, even though the parade accommodates other speakers in units and showed the mixed expressions of each unit, the Court determined that it was speech because the spectators considered each unit's expression as a part of the whole[93] as if the operator intended to show it. This determination means that the operator in *Hurley* was speaking, so that the parade's message may be changed with the other unit's speech.

However, the *Mullins* court stated that when the vendor is not speaking, it does not constitute compelled speech relying on *PruneYard Shopping Ctr. v. Robbins*.[94] In this case, some students distributed

[90] *Mullins*, 370 P.3d at 286; The New Mexico court advances the same point: "It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so." *Elane Photography, LLC. V. Willock,* 309 P.3d 53, 66 (N.M. 2013)
[91] *Mullins,* 370 P.3d at 286.
[92] *Id.* at 287.
[93] *Hurley*, 515 U.S. at 577.
[94] 447 U.S. 74 (1980).

pamphlets in a shopping center, which was open to the public. However, the private owner of the shopping center prohibited their speech on the premises. The Court held that a shopping center owner should permit a particular speech on its property under the state law. Even if the allowed speech is different from his opinion, the Court upheld this law because ordinary persons think that the opinions delivered in the pamphlets could not be identified with the owner when the owner did not engage in speech activities. Furthermore, the owners could dissociate themselves from those opinions because they could post notice of a disclaimer that they disagree with the messages and that this conduct was intended to comply with the law.[95] Here, the Court focused on two issues: whether the owner is speaking and whether there are any disclaimers to avoid a misattribution.

However, this conclusion is inconsistent with *Pacific Gas & Electric Co. v. Public Utilities Com*.[96] The facts in *Pacific Gas* were the same pattern as in *PruneYard*. The gas company was forced to accommodate a third-party, to include its newsletter in the company's billing envelopes and distribute them to the company's customers under the state law.[97] If the Court would have followed *PruneYard*'s reasoning, this compulsion should not have constituted compelled speech because the spectators would likely know who the author of the message was.

Furthermore, the company had a disclaimer, stating that it was not the opinion of the company in its envelope. However, the *Pacific Gas* Court held it was unconstitutional. It stated that the disclaimer did not require the company to be forced to react to the third party's message when it disagrees with the message.[98]

The *Mullins* court interpreted that the inconsistency between *PruneYard* and *Pacific Gas* was related to the method of conscription of speech dissemination, stating "that the government may not **commandeer** a

[95] *PruneYard,* 447 U.S. at 87 ("signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.")
[96]475 U.S. 1 (1986); Gaylord, *supra* note 60, at 409-10.
[97] *Pac. Gas.* 475 U.S. at 20-21; *Mullins*, 370 P.3d at 284.
[98] *Pac. Gas.* 475 U.S. at 15 n.11 (plurality opinion) ("nothing to reduce the risk that [the company] will be forced to respond when there is strong disagreement with the [third-party]'s message.")

private speaker's means of accessing its audience by requiring that the speaker **disseminate** a third-party's message [emphasis added]."[99] However, this interpretation concluded too early because it did not consider the possibility of the right not to speak. While the case is related to the governmental use of the speech method as well as to the right to be silent, the more critical question is about whether the government intervened in the right not to speak, which the free speech jurisprudence protects through the compelled speech doctrine.

One promising interpretation is that when the government "force[s] a [vendor] to respond to the unwanted message," it is unconstitutional no matter to whom the reasonable person thinks that the message would belong.[100] *Pacific Gas* means that a person who is forced to express speech with which he or she disagrees does not necessarily engage in his own speech to constitute compelled speech. However, in *PruneYard*, the owner has a lesser possibility of being forced to respond to the unwanted message. Therefore, compelled speech would increase the "likelihood of misattribution" of reasonable persons.[101]

In this context, between *PruneYard* and *Pacific Gas*, there are two differences. The first one is related to whether there are risks of misattribution when the speaker accommodates the third-party's speech. In *PruneYard*, the premises were open to the public, so that there was less possibility of misunderstanding the third party's message as being equivalent to the owner's message. By contrast, in *Pacific Gas,* the third-party's message was delivered through the company's private means to communicate to its customers so that there was a high risk of misattribution between the company and the third-party.[102] Second is related to the meaning of a disclaimer. In *PruneYard*, the disclaimer was an exemption from compelled speech, while the disclaimer was insufficient to require the compelled speech in *Pacific Gas*. This interpretation is applicable to *Hurley* as well.

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[99] *Mullins,* 370 P.3d at 284.
[100] Gaylord, *supra* note 60, at 410.
[101] *Hurley*, 515 U.S. at 577. ("without deciding on the precise significance of the likelihood of misattribution")
[102] *Pacific Gas*, 475 U.S. at 12 (1986) (plurality opinion); "concern that access to this [public] area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets."

Accordingly, in public accommodations, when a vendor is forced to provide goods or services with messages with which he or she disagrees, the likelihood of misattribution is meant to be about compelled speech, but not about the responses to compelled speech.[103] So, the *Mullins* court's statement is misleading: "the public has no way of knowing the reasons supporting [the baker]'s decision to serve or decline to serve a same-sex couple"[104] because the court stated the responses.[105]

Because the vendor speaks through the provision of goods or services in public accommodations, commentators refuse to apply Hurley's peculiar application to the ordinary vendor case because the vendor is not speaking privately. However, if the likelihood of misattribution increases when the vendor creates the goods and services with the ordered message with which he or she disagrees, this compulsion may violate the right not to speak. In other words, this would be the same result regardless of whether the vendor is speaking.

(2) Compliance theory

Even after solving the misattribution rebuttal, one big issue which remains is compliance theory. The *Mullins* court stated that "a reasonable observer would understand that its compliance with the law [was] not a reflection of its own beliefs,"[106] even if the government forces a baker to accommodate others' messages with which he or she disagrees. This court relied on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,*[107] as precedent.

In *Rumsfeld*, law schools declined military recruiters' requests to gain access to their students because

[103] Justice Kennedy did not answer this question and simply pointed out that the Colorado Division recognized the messages on the cakes as the bakers' speech in other cases, Jack's cases; and then in Phillips case, they determined that Phillips' cake was not attributed to the baker but to the customer. However, there were no Court's review or denial against the Colorado's standard. (*Masterpiece,* 138 S. Ct. at 1730) ("any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism.")
[104] *Mullins,* 370 P.3d at 287.
[105] *Arlene's flower*, 389 P. 3d at 557 (2017) ("an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.")
[106] *Mullins*. 370 P.3d at 276.
[107] *Rumsfeld*, 547 U.S. 47 (2006).

they disagreed with the military's policies, which was the "don't ask don't tell" policy. So, the government refused funding to the school under federal law.[108] The law school argued that the law forced them to send "the message that they see nothing wrong with the military's policies" when they treat military recruiters like nonmilitary ones.[109] Precedent restricts the government from requiring that an individual "speak the government's message."[110] However, the Court responded that the spectators such as "students" would distinguish between "speech [that] a school sponsors" from "speech the school permits because [the school is] legally required to do so."[111] This means that, from the reasonable person's perspective when the vendor is forced to accommodate others' speech, this enforcement constitutes compliance with the law rather than compelled speech. The *Mullins* court followed *Rumsfeld*'s reasoning.[112]

However, this interpretation is inconsistent with *Wooley v. Maynard*.[113] The *Wooley* Court held that forcing a Jehovah's Witness to display the "Live Free or Die" government slogan on his license plate was unconstitutional.[114] The Jehovah should deliver government speech. If the Court had applied this reasonableness standard to *Wooley* like *Rumsfeld*'s reasoning, the result might have been different from *Wooley*'s original decision because reasonable observers would not likely attribute the statements represented on an official license plate to the drivers of such standard plates, but they might have concluded that the person just pursued a legal requirement.[115] This difference was related to the reasonable person's standard, which was used in *Rumsfeld*, but not in *Wooley*. Considering this inconsistency, it is dubious that the reasonableness standard is a well-established constitutional theory.

Even without the reasonableness standard, there is another difference between *Rumsfeld* and *Wooley*. In

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[108] *Id.* at 64-65.
[109] *Id.* at 64-65.
[110] *Id.* at 63.
[111] *Id.* at 65.
[112] *Mullins*. 370 P.3d at 286.
[113] *Wooley v. Maynard*, 430 U.S. 705 (1977).
[114] *Id.* at 715-17.
[115] R. George Wright, *Speech and Discrimination in Consumer Contexts*, 48 STETSON L. REV. 1, 6-7 (2018).

Rumsfeld, it appeared neither that the law schools accepted the military recruiters' policies as a speech, nor that the law limited the law schools' speech opposing the military's policies.[116] Here, the point is that the government forcing conduct was not identified as speech with which the schools disagree, so there was nothing to be compelled.[117]

Therefore, when the government forces vendors to accommodate other's messages or to alter the vendor's message to other's speech, with which he or she disagrees, it would likely constitute compelled speech as long as creating goods or services are expressive. This is because it would violate the right to autonomy over the content of the vendor's own speech, even for compliance with the law.

As long as conduct providing goods or services constitute a form of speech, expressive conduct, it would likely constitute compelled speech when the public accommodation laws force the vendors to provide goods or services, including a message with which he or she disagrees. In other words, a compelled speech argument should succeed if, and only if, the vendor's good or service is expressive according to the meaning of the Free Speech Clause.

3. UNSUCCESSFUL ARGUMENT TO LIMIT A VENDORS' RIGHT TO FREE SPEECH IN PUBLIC ACCOMMODATIONS

Many commentators have worried about opening a floodgate of religious expression for businesspersons against public accommodation laws when this idea of broad protected speech protection operates without restrictions in public accommodations.[118] This is because the dominant view of the First Amendment of the Constitution is the minimization of government intervention. Therefore, as long as it is

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[116] *Rumsfeld*, 547 U.S. at 65; Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 42 (2016) ("[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies.")

[117] *Id.*

[118] *Opposing with* Gaylord, *supra* note 60, at 412 ("The relatively few First Amendment challenges to public accommodations laws that have been working their way through the courts bear this out.")

protected speech, requests for religious expression in public accommodations will be brought to bear on a broad acceptance of exceptions, as opposed to narrow ones. Some commentators have said many businesspersons are engaged in creative work, such as designing clothing or architecture, and that they would rely on this speech claim for their refusals.[119] This is precisely the concern of the majority in *Masterpiece*.

The dominant perspective of the Court on the Free Speech of the First Amendment is based on a marketplace of ideas theory.[120] This means that the government should abstain from interfering with individual liberty because each theory or idea will succeed on its own merit under minimal government intervention. This brought a laissez-faire approach to the regulation of speech and expression.[121] The Court has recognized unprotected speech in a few areas, such as incitement to obscenity, defamation, fighting words, fraud, speech integral to criminal conduct, child pornography, genuine threats, imminent lawless action, and so forth.[122] Other than these categories, the Court has been unwilling to add other forms of expression under its regulations.[123]

To solve this problem, there are two possible suggestions: one is to exclude the expression of for-profit businesspersons, and the other is to reduce the scope of protected speech for expressive conduct in public accommodations by narrowly interpreting the symbolic speech doctrine.

The first suggests considering the for-profit expressive conduct as categorical unprotected speech. One commentator tried to limit this expressive conduct in public accommodations, by relying on those values that free speech jurisprudence pursues, such as "democratic self-governance, autonomy, truth-seeking, or

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[119] Professor Greene pointed out two tiers of criticisms: that vendor's products are not protected speech because they are ordered from their customers; and even if they are protected speech, this recognition will open the door to "all sorts of businesspersons as similarly covered." (Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667, 679 (2019))
[120] Justice Oliver Wendell Holmes, Jr. established this theory as a legal concept in his dissenting opinion of *Abrams v. United States*, 250 U.S. 616 (1919).
[121] Gaylord, *supra* note 60, at 373 (citing *Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 161 (1973) (Douglas, J., concurring) ("…under the laissez-faire regime"))
[122] Gaylord, *supra* note 60, at 374; Alexander Tsesis, *Balancing Free Speech*, 96 B. U. L. REV. 1, 28 (2016).
[123] Gaylord, *supra* note 60, at 375.

distrust of government."[124] Most commentators understand that there should be a distinction. However, there is no agreement about what the overriding value should be in free speech jurisprudence. Therefore, drawing this line is not about setting a clear and robust standard, but about asking what to consider as a matter of degree.[125]

One may argue that the vendors accept the premise that a business is a place of public accommodations and that they should comply with the rule of anti-discrimination.[126] One of the reasons behind this idea is based on the interpretation of *Hurley*'s peculiar application.[127] Scholars who declined to apply *Hurley* in public accommodations argued that *Hurley'*s reasoning could be available except to the operator because a parade is not a general activity in public accommodations, which are for-profit through transactions. The operator in *Hurley* was a non-profit entity. However, generally, vendors' activities in public accommodations are for-profit, and the requests of customers cause the relationship.

To restrict the vendor's free speech in pursuing profit is an attempt to exclude certain groups from complying with free speech protections. However, this attitude is inconsistent with recent decisions of the

[124] Kendrick, *supra* note 72, at 680-681; Scholars tried to distinguish speech forms of activities as protected speech from other economic activities. Some argued commercial speech cannot be protected speech under the autonomy theory. (*Id*, at 703, citing from Seana Valentine Shiferin, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 98-102 (2014); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 996 (1978)); The other is to distinguish commercial speech from protected speech, focusing on the question on what the people think is the essence of free speech jurisprudence. Even if it is difficult to determine which value is the core of free speech jurisprudence, the existence of drawing the line between them becomes clear. At that time, the essential question is not whether it is necessary to distinguish protected speech from other activities, including commercial activitism but what elements should be required to distinguish protected speech from other activity. (Kendrick, *supra* note 72, at 703). ("it has clarified what is necessary to answer such questions: a view about what sets "freedom of speech" apart from the protection given to other activity, including economic activity. Such a view will tell us which activities implicate freedom of speech and which do not.")

[125] *Id*. at 686. ("That is, (1) how distinguishable is an activity covered by a right from [an] activity outside of it, and (2) how much protection should it get?")

[126] For example, the Oregon Court of Appeals decided that "the vendors accept the premise that the business is a place of public accommodation under the law and that it must generally open its doors to customers of all sexual orientations, regardless of vendors' religious views about homosexuality." (*see*, *Klein*, 410 P.3d at 531).

[127] Conkle, *supra* note 29, at 24 n. 109 (he argued, "The First Amendment provides stronger protection in certain noncommercial settings, sometimes permitting objectors to resist the application of anti-discrimination laws even though the laws are properly regarded as content-neutral," and agreed with this idea by relying on Hurley.)

Court. In 2018, there were two compelled speech-related decisions, *Janus v. AFSCME, Council 31,*[128] and *NIFLA v. Becerra*.[129] The Court "expressly rejected a similar categorical argument that sought to exclude a class of speakers," such as public employees, "from the First Amendment's protection against compelled speech,"[130] because this exclusion would "empower [] states to manipulate public discussion and deny citizens an uninhibited marketplace of ideas in which truth will ultimately prevail."[131] This exclusion can undermine the bedrock principle of free speech.

To be sure, sometimes a business practice, such as a commercial advertisement, can be restricted even if it is related to free speech.[132] The *Hurley* Court also stated that the state could "prescribe what shall be orthodox in commercial advertising."[133] However, it also is limited for and only for preventing customers from being confused or deceived.[134] It is consistent with the free speech jurisprudence that fraudulent speech could not be protected.[135] However, "outside that context, it may not compel [speech] with which the speaker disagrees."[136] When public accommodations law manages the operation of the business and the activities controlled by the business operation are deemed to be a speech, it could be protected by the free speech clause.[137] Thus, the constitutional interpretation cannot limit the scope of free speech or of

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[128] *Janus v. American Federation of State, County, and Municipal Employees (AFSCME), Council 31*, 138 S. Ct. 2448 (2018) (holding that collection of the union fee from non-union members violates the First Amendment right to free speech of non-union members)

[129] *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018) (holding that the requirement that licensed covered facilities give notice regarding publicly provided family planning services unduly burdened protected speech "by imposing a government-scripted, speaker-based disclosure requirement that was wholly disconnected from California's informational interest.")

[130] *Janus*, 138 S. Ct. at 2469-70.

[131] *NIFLA*, 138 S. Ct. at 2374 ("In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles."); James A. Campbell, *Compelled Speech in Masterpiece Cakeshop: What the Supreme Court's June 2018 Decisions Tell Us About the Unresolved Questions*, 19 FEDERALIST SOC'Y REV. 142, 149 (2018).

[132] So, another theory tries to narrow down commercial limitation to the business settings. It focuses on the fact that the public accommodations laws deal with "business operation," or business practice, which contained decisions to avoid selling or creating customer's requests based on the protected traits, especially sexual orientation. (*Elane Photography,* 309 P.3d at 68.)

[133] *Hurley*, 515 U.S. at 573 [citation omitted]

[134] *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

[135] *303 Creative LLC v. Elenis,* 385 F.Supp. 3d 1147, 1154 (D. Colo. 2019)

[136] *Hurley*, 515 U.S. at 573 [citation omitted]

[137] Analogy with *Hobby Lobby*, 573 U.S. at 709-13.

groups protected by the First Amendment because they are engaged in commerce.

The second suggests heightening the threshold of protected speech by narrowing down the scope of symbolic speech, at least in the commercial context.[138] However, such an attempt is to confuse what should be protected speech and what values can take priority. In determining what protected speech is, it is not necessary to consider government interests. It will be reviewed in the balancing test between harm to protect rights and other government interests.[139] Free speech is not an absolute right so that the Court would give priority to the value of full and equal enjoyment without discrimination, in that public accommodations are the space that satisfies the most basic needs of man rather than functioning as a discourse. To be sure, as previously stated, to avoid this consequence, the opinion of the majority in *Masterpiece* narrowed down the scope of symbolic speech in a practical sense, stating that a cake with words or images could result in a different judgment.[140]

In sum, the Free Speech doctrine can protect the vendor's good or services as speech, if, and only if, the vendor's good or service is expressive according to the Free Speech Clause. Thus, in the case of a baker, the Court would protect making a cake bearing messages through images or texts as a symbolic expression, but it would not protect making a generic, artistically decorative cake as either a pure or symbolic expression. As a result, a baker's compelled speech argument should prevail in the first situation, when the cake includes messages through images or texts. In other words, the public accommodations law could not be used to require a baker to make a cake with which he or she disagrees. However, this should not prevail on a compelled speech theory in *Masterpiece* itself.

Religious objectors have accepted free speech claims as litigant tactics.[141] However, what they want to

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[138] *See* note 123.
[139] Greene, *supra* note 118, at 678-79.
[140] *Masterpiece*, 138 S. Ct. at 1723.
[141] Garry, *supra* note 33, at 384; Austin Rogers, *A Masterpiece of Simplicity: Toward a Yoderian Free Exercise Framework for Wedding-Vendor Cases*, 103 MARQ. L. REV. 163, 199 (2019); *see Arlene's Flowers,* 389 P. 3d 543

do is not speech but exercise their own religious convictions. So, rather than putting the free speech doctrine at risk, giving new interpretations may be more appropriate to meet their needs for free exercise in a new context, of how their beliefs might conflict with other constitutional values.[142]

(Wash. 2017), *Brush & Nib*, 418 P. 3d 426 (Ariz. Ct. App. 2018); *Klein v. Or. Bureau of Labor & Indus*, 410 P.3d 1051 (Or. Ct. App. 2017); of course, *Masterpiece*.

[142] One of consideration is this, *see* Rogers, *supra* note 141 at 203.

III. PREMISES FOR UNDERSTANDING FREE EXERCISE CLAIMS

The *Masterpiece* Court drew only fact-specific conclusions, that did not give any solution or guidance for solving the same issues, even though it reviewed almost every issue that could be addressed in the free exercise jurisprudence. Two weeks after *Masterpiece*, when the Court had another chance to decide this question, it was unwilling to arrive at a resolution "between religious freedom and LGBT equality"[143] in *State v. Arlene's Flowers*.[144] The next year in 2019, when the Court confronted a similar baker case in *Klein v. Or. Bureau of Labor & Indus*,[145] the Justices' conclusion was to follow *Masterpiece*'s rule after a long consideration.[146]

To understand the reasons behind this requires the answering of the following issues: first of all, considering what the fundamental principles of constitutional attitudes are toward religion, and secondly, how the dynamics of legislative movements and judicial interpretations have changed attitudes toward religious beliefs since the *Smith* decision in 1990.

Before reviewing *Masterpiece*'s application of *Church of Lukumi Babalu Aye v. City of Hialeah*[147] as a precedent, this chapter describes the rules and their historical development to define the core arguments of *Masterpiece* and their historical status. Particularly, this is done to identify which conception of religious equality developed through religious exemptions can best help us to understand the neutrality which the courts were trying to demonstrate through *Lukumi*. In conclusion, the Court would pursue procedural-equal treatment that applies for permissible exemptions in general toward religious exemptions since the

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[143] Klint W. Alexander, *The Masterpiece Cakeshop Decision and the Clash between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1103-1105 (2019).
[144] *Arlene's Flowers*, 138 S. Ct. 2671 (2018)
[145] *Klein,* 139 S. Ct. 2713 (2019)
[146] Robert Barnes, *Supreme Court passes on the case involving a baker who refused to make a wedding cake for a same-sex couple*, WASHINGTON POST (June 17, 2019) https://www.washingtonpost.com/politics/courts_law/supreme-court-passes-on-new-case-involving-baker-who-refused-to-make-wedding-cake/2019/06/17/f78c5ae0-7a71-11e9-a5b3-34f3edf1351e_story.html ("The Supreme Court deliberated for months about whether to take the Oregon case. The delay indicates that there were behind-the-scenes negotiations, though the justices did not reveal them. Instead, they simply sent the matter back to an Oregon appeals court and told it to look again in light of the Colorado decision.")
[147] *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993).

Smith Court declared the rule of general applicability, rather than substantive-equal treatment for impermissible religious accommodations under the *Sherbert* test in the pre-*Smith* era.

1. TWO IDEALS OF EQUALITY AND ITS EMBODIMENT IN THE EQUAL TREATMENT OF RELIGIOUS FREEDOM

Religious accommodations seem to be a privilege toward religion. Under the *Lemon* test, the government violates the Establishment Clause "if the government's primary purpose is to advance religion, or if the principal effect is to aid or inhibit religion, or if there is excessive government entanglement with religion."[148] The Court has recognized that it is impermissible under the establishment clause when the government facilitates a particular religious practice.[149] Otherwise, it may violate the free exercise clause when the government tries to refrain from accommodating religious practices. This tension is inherent in the First Amendment, and many scholars have tried to reconcile this tension.[150]

This issue can be reduced to conflict among equality conceptions. This is because the establishment works for formal equality between religions and non-religions as well as among religions, but free exercise seeks to guarantee substantive equality by accommodating politically unpopular religions. Therefore, this part reviews two ideals of equality necessary to understand religious exemptions; substantive equality, and formal or procedural equality. And finally, it concludes that the understanding of the religious exemption changed from substantive-equal treatment, which protected particularity of religious practices even when the exemption is generally impermissible, to procedural-equal treatment, which allows hearing the religious exemptions when the exemption is generally permissible.

(1) treat like alike, unlike differently, and never do wrong

[148] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[149] Chemerinsky, *supra* note 79, at 1454.
[150] *Id.*

The equality in the Constitution reflects two axioms: never to do people wrong[151] and to treat like cases alike and unlike cases differently.[152] The former is a general principle, so that religious freedom also entails this ideal as religious equality. The latter can be well-explained in the equal protection clause. It "requires the state to treat similarly-situated persons similarly, or to provide a sufficient justification for any dissimilar treatment."[153] It also can be embodied in full and fair enjoyment of fundamental rights.[154]

The former starts with the idea that one should not treat others unfairly or wrongfully. It can go further to the idea that officials should not treat certain groups with hostility caused by racism or sexism. The meaning of the Equal Protection is understood to "guard one part of society against the injustice of the other part."[155] It can be realized "by checking the tendency of legislative majorities to be vindictive."[156] Professor Carpenter viewed its origin as Note 4 in *United States v. Carolene Products*:[157] "prejudice against discrete and insular minorities … tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."

The animosity towards certain groups can cause the legislative process to be "poisoned and poisonous"[158] with unfairness. These groups could not influence the political and democratic process due to political unpopularity so that they would likely not be protected. The animus doctrine defined animus or hostility as "a bare congressional desire to harm a politically unpopular group."[159] It cannot constitute a

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[151] Dale Carpenter, *Windsor Products: Equal Protection form Animus*, 2013 SUP. CT. REV. 183, 185 (2013) ("Animus doctrine… asserts that just as individuals have a moral and sometimes legal duty not to act maliciously toward others, the group of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.") (Citing John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 157 (1980) ("To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively."))
[152] *See, 303 Creative*, 385 F.Supp. 3d at 1154.
[153] *303 Creative*, 385 F.Supp. 3d at 1154.
[154] Professor Conkle also recognized religious equality comes from the Free Exercise Clause. (Conkle, *supra* note 29, at 2)
[155] James Madison, *Federalist 51, in* THE FEDERALIST PAPERS 347 (Jacob E. Cooke, ed., Wesleyan, 1961).
[156] Carpenter, *supra* note 151, at 185-86.
[157] *Id.* at 184.
[158] *Id,* at 184.
[159] *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

legitimate governmental interest.[160] The animus doctrine implies the correctness of injustice through judicial holdings. Thus, the anti-animus argument is more meaningful and useful for targeted minorities than for targeted groups. They have fundamental rights or are classified as such under the Constitution because the animus gives minorities weapons to strike down the legitimacy with which the law discriminates against them, and to which the judiciary defers. Arguments based on the violation of fundamental rights such as religious freedoms or equal protection based on race or gender, can guarantee strict scrutiny without the animus argument. However, minorities who are outside of those constitutional protections could rely on the animus doctrine under the Equal Protection Clause, so that the standard of review of the law targeting minorities should be heightened scrutiny. Even if the animus doctrine for equal protection is favorable to the unclassified minorities, anti-animus equal treatment could be fully admitted to ensure religious equality for recognition of discrimination but not for heightened scrutiny.

The latter is two-fold: that of treating likes alike, and of that treating unlikes differently. The lower courts described this principle well as it is embodied in the Equal Protection Clause of the Fourteenth Amendment, which "requires the state to treat similarly-situated person[] similarity, or to provide a sufficient justification for any dissimilar treatment."[161]

The former means *treating persons equally.* "When two persons have [an] equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect."[162] It can be viewed as "formal equality." This requires that the government should treat them equally when one is "similarly-situated" to another.[163]

However, sometimes this equal treatment without consideration of specific situations of where a person is located could bring inequality to him or her. So, the latter is required. It implies the need to *treat persons as equals,* with equal concern and respect. All persons are equal because they have equal dignity

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[160] *Id.*
[161] *See 303 Creative*, 385 F.Supp. 3d at 1154.
[162] *Equality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 27, 2007) https://plato.stanford.edu/entries/equality/
[163] *303 Creative, 385* F. Supp. 3d at 1154.

so that the government should treat them with neutral and respectful consideration of their differences. This can be understood as "substantive equality."

(2) What Conception of Equality the *Sherbert* Test Pursues and the *Smith* Decision

Religious equality generally means that discrimination against particular religions by the government should be prohibited, including animus-driven discrimination.[164] Religious freedom requires the government to accommodate free exercise according to religious convictions, such as religious exemptions.[165] This accommodation seems to give particular religious conduct privilege in comparison with other secular conducts that are subject to the law of general applicability. The Constitution limits the free exercise of religion under the Establishment Clause.[166]

Professor McConnell came up with two different theories over religious exemptions against the burden government imposes on religious liberty. First, the no-exemption theory explains that the purpose of free exercise is only "to prevent [the] government from singling out [a] religious practice for peculiar disability"[167] due to religious tenets when "laws … directly and intentionally penalize religious observance."[168] The law is neutral toward religions when it pursues only secular purposes without aiming at religious practices. This could be understood as formal or procedural equality.[169] In other words, free exercise requires equal treatment between religious and secular conduct.[170] When the exemptions for other secular conscientious reasons are permissible, the religious exemption should also be required under this no-exemption theory.

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[164] Conkle, *supra* note 29, at 4. This is generally accepted.
[165] Conkle, *supra* note 29, at 4.
[166] Conkle, *supra* note 29, at 5.
[167] McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990).
[168] *Id*. (Citing Robert H. Bork, *The Supreme Court and the Religion Clauses, in* "TURNING THE RELIGION CLAUSES ON THEIR HEADS": PROCEEDINGS OF THE NATIONAL RELIGIOUS FREEDOM CONFERENCE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS 84 (1988)).
[169] James M. Delise, *Religious Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination*, 6 COLUM. J. RACE & L. 115, 133 (2016).
[170] McConnell, *supra* note 167, at 1418.

Under the exemption theory, free exercise requires religious exemption even when government actions have "incidental or unintended effects" on religious actions.[171] It includes such elements as "majoritarian presuppositions, ignorance, and indifference," as well as hostility towards religion.[172] The theory concerns not only discrimination over religion in general but also with disparate consideration towards religious minorities. So, it assures the idea that judicially recognized exemptions which remove the hierarchy among religious groups should give religious minorities equal opportunity to obey religious tenets according to their religious convictions.[173] This sensitive treatment for religious groups can be understood as substantive equality,[174] which includes "indirect discrimination or disparate impact, reasonable accommodation, affirmative action, systemic discrimination, and unfair discrimination."[175] In other words, this theory can argue that, even when the exemptions for any secular conscientious reasons are not permissible, the religious exemption should also be required for resolving the injustice that democratic procedures could not be used due to religious minorities.

One big difference between these theories is how to deal with the facially neutral law. This is the case where there are no other secular exceptions. A religious believer cannot challenge this law according to the no-exemption theory.[176] Religious exemptions would not be acceptable if there is no secular and general conscientious exemption, similarly situated with a religious one. However, under the exemption theory, a religious objector can be entitled to have careful consideration from the standpoint of a religious person.[177] This can be considered as religious sensitivity.[178] Religious exemptions would be acceptable if the burden is imposed on certain religious practices, even when there is no secular and general

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[171] *Id.*
[172] *Id.*
[173] Delise, *supra* note 169, at 128.
[174] *Id*. at 133.
[175] Professor Fredman pointed out, "[i]n all these jurisdictions, several substantive conceptions of equality have jostled with the equal treatment principle for prominence. These include indirect discrimination or disparate impact, reasonable accommodation, affirmative action, systemic discrimination, and unfair discrimination." (Sandra Fredman, *Substantive equality revisited*, 14 INT'L J.CONST. L. 713, 715 (2016)).
[176] McConnell, *supra* note 167, at 1418-19.
[177] McConnell, *supra* note 167, at 1418-19.
[178] Delise, *supra* note 169, at 128.

conscientious exemption.

2. THE *SMITH* RULE AND ITS EXCEPTIONS

Most commentators have emphasized that religious accommodations, including religious exemptions, are protected as "a basic constitutional value."[179] The religious exemption was recognized in the *Sherbert* test, which requires strict scrutiny when the government substantially imposes burdens on religious conduct. This comes from a view of substantive equality for religious exemptions.

The Court kept this stance toward religious exemption before 1990. It pursued the *Sherbert* test that says government action, which imposes a substantial burden on religious practice, can be justified when it has the least means to achieve a compelling government interest. However, the Court changed its attitude toward formal equality in 1990. This was called the *Smith* rule and held that religious exemptions could not challenge government action that is generally applicable. However, there has been controversy over the thirty years related to the issue of where the Court should place its position on religious exemption between *Smith* and *Sherbert*.

Therefore, this part determines that the court's attitude toward religious exemptions has shifted from substantial-equal treatment to procedural-equal treatment unless the religious practices are directly related to religious doctrine or operative determination of religious institutions or institutions. *Smith*'s interpretation of the *Sherbert* test can also be understood consistently in terms of this procedural equality. This development related to these exemptions would become the basis for the understanding of *Masterpiece*. To confirm, this part reviews some kinds of religious exemptions in *Smith*'s dicta and the attitude of the judgments after *Smith*.

[179] As a representative, *see*, Conkle, *supra* note 29, at 5.

(1) The *Smith* Rule and neutrality

In *Smith*, a religious believer who consumed peyote for a worship purpose under the tenets of the Native American Church, which taught digestion of peyote in its central ritual,[180] was fired due to his attendance of the religious peyote service. When he applied for unemployment compensation, the government refused his claim because peyote use was banned and criminalized under Oregon law. The Court established the *Smith* rule, "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[181] Finally, according to this rule, the Court held that the law was not aimed at promoting or restricting religious beliefs and therefore did not violate the free exercise clause.[182]

The Court in pre-*Smith* was in favor of religious believers. The Court followed the *Sherbert* test that, if the government imposes a substantial burden on religious objectors, it should have a compelling interest to be achieved by restrictive means. In this context, the religious exemption recognized in the *Sherbert* test would likely come from substantive equality because it cares for the particular situation of religious beliefs and its practices. However, the *Smith* rule seeks formal equality because it was grounded on the idea that all humans are equal.

However, the court did not strictly pursue *Smith*'s rule. The court said that during analysis, *Smith* had opened up another interpretation for the exceptions of the *Smith* rule by explaining three types of exceptions, explicitly and implicitly: religious autonomy exclusion, hybrid rights claims, and individualized assessment. The validity of these exceptions was controversial among commentators because they were explained in dicta.

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[180] Douglas Laycock, *The Broader Implication of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 170 (2019), citing Robert L. Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 AM. J. PSYCH. 695, 695-96 (1971).
[181] *Smith*, 494 U.S. at 879.
[182] *Smith*, 494 U.S. at 878-79; *Lukumi*, 508 U.S. at 533.

(2) Exceptions

a. Religious autonomy exclusion: *Hosanna-Tabor*

The Court in *Smith* discerned the physical act from "lend[ing] its power to one or the other side in controversies over religious authority or dogma.,"[183] which falls into the religious autonomy area. This means that if the law interferes with the internal decision of religious autonomy, then this is not a case where the *Smith* rule should be applied.

Recently, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*[184] reaffirmed this principle as a ministerial exception. The Hosanna-Tabor Church and School fired its employees after the employee suffered from and was treated for narcolepsy. She was a minister, as well as a teacher. She filed her case, and the government agency decided in favor of her.[185] However, the Court declared that it was unconstitutional because the ministerial exception gives the religious institution certain rights to control employment matters without interference from the government[186] even if its decision to fire was related to discrimination of a protected class. The Court clarified that the religious group has the right to shape its own faith and mission through its appointment under the free exercise clause, and the establishment clause prohibited government involvement in the church's decisions.[187] Furthermore, the Court did not apply the *Smith* rule even though the law was neutral and generally applicable[188] because the religious organization can be exempted absolutely.[189]

In *Masterpiece*, the Court also recognized the exclusion that a member of the clergy, such as priests,

[183] *Id.* at 877.
[184] *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).
[185] *Id.* at 177-179.
[186] *Id.* at 190-196.
[187] *Id.* at 188-189.
[188] *Id.* at 189-190.
[189] *Id.* at 196.

should not be compelled to participate in same-sexual wedding rituals opposing their religious doctrine.[190] However, the Court implied that this autonomous exclusion could not be applied to the public accommodations, by differentiating this religious exemption entitled to the religious organization and its constituents, from the religious exemption claimed by the business entity.

b. Hybrid rights claim: like *Yoder*

The Court in *Smith* stated that if the claim is related to religious expression, this can fall into the class of a "hybrid situation" where "the free exercise clause in conjunction with other constitutional protections, such as freedom of speech," can "bar application of a neutral, generally applicable law."[191] In other words, religious objectors may use their free exercise claims to reinforce their other protected rights.[192]

For example, in *Yoder*, Wisconsin required that all children should attend public schools until age sixteen. However, Amish parents refused to send their children to those schools after the eighth grade, insisting that their religious convictions prevented them from requiring a high school education for their children. So, they were prosecuted under state law. The Court stated this public education requirement is "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[193] This Court upheld the Amish parents' religious rights and educational rights for their children.

In *Smith*, the Court explained this hybrid rights exception explicitly, but it was not applied to the case.[194] So, after this decision, some lower courts resisted accepting this exception as an existing doctrine

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[190] *See*, *Masterpiece*, 138 S. Ct. at 1727 ("When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.")

[191] *Smith*, 494 U.S. at 876-82(The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections. See, *e. g., Cantwell,* 310 U.S. at 304-307; *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

[192] *Smith*, 494 U.S. at 882; *Telescope Media*, 936 F. 3d at 759.

[193] *Yoder*, 406 U.S. 205 (1972).

[194] *Smith*, 494 U.S. at 881-882 ("[t]he present case does not present such a hybrid situation…")

because it was dictum in *Smith* so that it was not binding.[195] However, the Court did not explicitly overrule the case of this hybrid claim.[196]

However, there was another issue as to the meaning of conjunction. There are two possible interpretations. One is supplement theory that free exercise claims are potential where the other claims are successful. If so, the free exercise claim could be assessed as a supplement of others or "surplusage" in a meaningless or declaratory way.[197] In other words, it did not give many implications for the free exercise claims, other than they "also have religious significance." Usefully, the other side can argue a combination theory that, when another incomplete constitutional claim accompanies a failed free exercise one, this combination can carry out one complete and independent claim. If so, the hybrid exception "would probably be so vast as to swallow the *Smith* rule."[198] However, this theory would be difficult to apply to the case if it could not answer how the two rights could be combined, and what minimum requirements this incomplete coalition should contain. So, it has been unsettled, even though it was not overruled.

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[195] Some Circuit Courts, including Second, Third, and Sixth Circuit, did not apply this doctrine due to dicta(*See*, e.g., *Combs v. Homer-Center Sch. Dist*., 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."); *Watchtower Bible & Tract Soc. of New York, Inc. v. Vill. of Stratton*, 240 F3d 553, 561 (6th Cir. 2001); *Knight v. Conn. Dep't of Pub. Health*, 275 F3d 156, 167 (2d Cir. 2001) ("[T]he language relating to hybrid claims is dicta and not binding on this court."); But First, Seventh, Eighth, Ninth, Tenth Circuit Courts do so(*see, e.g*., *Miller v. Reed*, 176 F3d 1202, 1207 (9th Cir. 1999) (applying a "colorable claim" approach, under which strict scrutiny applies if the person asserting a free-exercise claim brings an additional constitutional claim that has a "fair probability or likelihood, but not a certitude, of success on the merits" (internal quotation marks omitted)); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 465 (8th Cir. 1991); *Brown v. Hot, Sexy & Safer Prods. Inc*., 68 F.3d 525, 539 (1st Cir. 1995); *Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (a theater student was denied an exemption from delivering what she considered offensive dialogue in a class exercise); *Telescope Media Grp. V. Lucero*, 936 F.3d 740, 758 (8th Cir, 2019)).

[196] *Telescope Media*, 936 F. 3d at 759-760; Rather, one commentator stated, "[A] legal realist would tell us … that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously." (Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U CHI L. REV. 1109, 1122 (1990))

[197] 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); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 630-32 (2003) (collecting opinions and articles dismissing the exception, including a Justice Scalia opinion that is plainly inconsistent with any version of the hybrid-rights exception); Laycock, *supra* note 180, at 180.

[198] *Lukumi,* 508 U.S at 567 (Souter, J., concurring in part and concurring in the judgment)

Therefore, the hybrid right claim could be used under the supplement theory, so that the religious exemption theory would be useless or redundant.[199]

c. The Most Controversial Issue: the *Sherbert/Lukumi* Test

The most controversial issue was whether the *Smith* Court overruled the *Sherbert* test. Before *Smith*, the operative rule was the *Sherbert* test. In *Sherbert*, a religious believer of the Seventh-Day Adventist Church was fired because she declined to work on Saturday, which was the Sabbath Day under her belief. Since these religious reasons were not justified, she was also denied unemployment compensation benefits under the South Carolina Unemployment Compensation Act because this did not give eligibility for benefits of unemployment compensation to those who did not provide good cause for his or her unemployment.[200] If the government imposes a substantial burden on religious practices,[201] it should have a compelling state interest.[202] Applying this *Sherbert* rule, the Court held that this disqualification would be unconstitutional.

However, the *Smith* Court turned its position by a new rule of neutrality and general applicability. Even if the law was neutral and generally applicable, the Court should use the balancing test when the government imposes burdens on religious exercise. *Smith* declared that there is no exception when the law is neutral and generally applicable.[203] It is in line with the connotation of equal protection which prevented from "deny [ing] persons of [any] classes the full enjoyment of that protection which others enjoy."[204] This exemption theory can be called formal or procedural equality for religious exemptions.[205]

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[199] Only *Telescope Media* used this theory after *Masterpiece*. (*Telescope Media*, 936 F. 3d at 759-60)
[200] *Sherbert*, 374 U.S. at 399-410 (1963).
[201] *Id. at* 403-06.
[202] *Id. at* 406-09. Furthermore, it did not violate the Establishment clause, because it did not foster her religious belief. (*Id. at* 409-10.) finally the Court decided unconstitutional.
[203] However, there is one exemption related to religious autonomy, such as deciding their religious leaders and two exceptions, which are called hybrid claims and individualized exemption claims. The former can allow the religious objection claims when they were pursued with other First Amendment claims (the *Yoder* rule). And the latter can allow that there is an individualized good cause claim (the *Sherbert* test). In practice, the Court allowed this claim related to unemployment compensations.
[204] *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879); Delise, *supra* note 169, at 128.
[205] *Id.* at 133.

However, the Court tried to retain the *Sherbert* test in a limited situation, such as the unemployment compensation areas, as follows:

> "The *Sherbert* test, it must be recalled, was developed in a context that lent itself to *individualized governmental assessment* of the reasons for the relevant conduct… [O]ur decisions in the unemployment cases stand for the proposition that where the 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." [emphasis added][206]

The *Smith* Court tried to change the meaning of the *Sherbert* test in order to adhere to, but not to overrule, the test as precedent.[207] In *Smith*, the Court transformed the *Sherbert* test, in that strict scrutiny would be applied when the government, which has an "individualized governmental assessment of the reasons for the relevant conduct," refuses to provide this system to the religious believer.[208] When the state government, which has the discretion to establish "good cause" standards for secular or individual exemptions, imposes a "religious hardship" on religious believers by refusing to extend that system to their cases,[209] "the law [could be] tainted by a discretionary process and therefore, [would] not [be] generally applicable."[210]

However, the meaning of the *Sherbert* test that the *Smith* Court read differs from the original one. In the pre-*Smith* era, this test means that the government gave the religious objectors a case-by-case judgment. This infers substantive equality, substantive-equal treatment. However, the transformed *Sherbert* test in *Smith*[211] means that the government allowed the religious objectors to have an individualized assessment. So, it infers procedural equality, procedural-equal treatment. The Court did not explicitly overrule the *Sherbert* test, but in this context, the Court thoroughly changed its position towards

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[206] *Smith*, 494 U.S. at 884.
[207] Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty,* 83 Neb. L. Rev. 1178, 1185 (2004).
[208] *Smith*, 494 U.S. at 884.
[209] *Id.*
[210] Duncan, *supra* note 207*,* at 1185, *see Sherbert,* 374 U.S. at 400 n. 3
[211] *See*, Duncan, *supra* note 207, at 1184-86. Under the title of "the transfiguration of *Sherbert*," it explained how to change *Sherbert* doctrine in *Smith* and *Lukumi*.

religious exemptions.

The Court's changed position results in the abandonment of the *Sherbert* test as a substantive-equal treatment. Even if this was not the case, the effectiveness of the transformed *Sherbert* test was controversial. First, the Court explained the *Sherbert* test in dicta, which was nonbinding. Second, it virtually seemed to be difficult for courts to apply the *Sherbert* test[212] because the Court did not give any specific directions as to when the *Smith* rule could be excluded other than when the government targets religion.

This situation changed in *Church of Lukumi Babalu Aye v. City of Hialeah*.[213] In this case, the Church of Lukumi Babalu Aye practiced based on Santeria, the Afro-Caribbean religion, whose worship included a ritual of animal sacrifice.[214] After approvals to establish a church, the city council adopted the ordinance, which banned animal sacrifice with special exceptions for state-licensed activities.[215] The Court held that the ordinance was unconstitutional because it was neither neutral nor generally applicable, and it did not satisfy strict scrutiny.[216]

The Court instructed on two points. One is that the city ordinance was *not neutral* because it targeted religious practices, and it was proven through the ordinances' text and operation[217] by gerrymandering of exemptions.[218] The other is that it was *not generally applicable* because prohibition to achieve the government interests of preventing cruelty to animals and protecting public health applied only to certain religious rituals without any explanations so that it was underinclusive.[219] Lawmakers' discriminatory

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[212] Actually, there are no cases where the courts applied this test before Lukumi. (Laycock, *supra* note 180, at 178).
[213] *Lukumi,* 508 U.S. 520 (1993)
[214] *Id. at* 524-25.
[215] *Id. at* 526-28.
[216] *Id. at* 546.
[217] "this religious exercise has been targeted is evidenced by Resolution 87-66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87-40, 87-52, and 87-71."
[218] *Lukumi*, 508 U.S. at 542 ("ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings.")
[219] *Lukumi,* 508 U.S. at 542-546 ("it was drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or

statements proved especially hostile towards religion.[220] Therefore, strict scrutiny should be applied.[221] However, the rule that targeted religious conduct for disparate treatment could not satisfy this scrutiny.[222]

The first reasoning of neutrality did not differ from *Smith*'s. In *Smith*, the Court reasoned that the law of general applicability should be challenged when the government targets religious practices. By similar reasoning, the Court in *Lukumi* proved that the ordinance targeted particular religious practices and finally declared that the free exercise clause prohibits "subtle departures from neutrality."[223]

It was clear that the ordinance was aimed at suppressing specific religious practices. Cases like *Lukumi,* which showed discriminatory intent towards religion, were rare. Even with these facts, it could be sufficiently proven that they were not neutral, which allowed the *Lukumi* Court to strike down the ordinance. However, the Court went further and added another reasoning for evaluating general applicability. Given that there were no cases in lower courts that religious claims were reviewed after *Smith*,[224] this had a significant impact on the lower court. According to this *Lukumi'*s reasoning that one or more secular exceptions can show that the law is not generally applicable, the lower courts tried to consider the religious exemption claims carefully.[225]

Lukumi's reading of the *Sherbert* test was the same as the *Smith* decision.[226] The state law, which punished anyone who killed any animal unnecessarily, was seemingly neutral and generally applicable on

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approved by express provision and that these ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction.")

[220] *Lukumi,* 508 U.S. at 540-42.

[221] *Id.* at 531-532; Furthermore, the Court added that neutrality and general applicability were interrelated, so that one failure would likely indicate that the other had not been satisfied.

[222] "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." (*Id.* at 546).

[223] *Id.* at 2227 (Citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

[224] Laycock, *supra* note 180, at 178 ("Between *Smith* and *Lukumi*, lower courts gave no weight to Smith's limitations and exceptions.")

[225] According to Professor Laycock's investigation, there are nine or more decisions following this reasoning. *See*, *Id.* at 180 n.60.

[226] Duncan, *supra* note 207, at 1185-86.

its face.[227] However, the law allowed exceptions under the discretion of officials to decide which animal killings were necessary. This is the individualized assessment system for exemptions. In other words, the Court considered this exception as a permission process related to "circumstances in which individualized exemptions from a general requirement are available."[228] Therefore, the *Smith* and *Lukumi* Court changed the understanding of the *Sherbert* test from substantive equality to procedural equality, which means equality of opportunity to use the system. The Court instructed that, when the legislature provides the individualized assessments for secular reasons to ordinary people, the religious objectors can also use those systems.

Otherwise, the *Lukumi* decision read by some lower courts further broadly distorted the *Sherbert* test. The courts held that when there were one or more secular exceptions, the state should allow an exception for religious objectors,[229] even though the government did not have hostility toward religion. According to Judge Alito, who later became a Justice in the Supreme Court, it was unconstitutional because the government "[t]reat[s] religious interests as less important than the analogous secular interests that are exempted."[230] When government action creates exemptions for secular reasons but not for religious reasons, this would be unequal treatment between secular and religious practices. Thus, this "actually creates a categorical exemption."[231] Therefore, the courts could exempt religious objections according to a categorical exemption for secular reasons, created by cases previously determined by the administrative agency, even though the government did not have an individualized assessment system for exemption in its legislation.

However, in order to read like the decisions of the lower courts, it is necessary to solve the preliminary

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[227] *Lukumi,* 508 U.S. at 537.
[228] *Id.*
[229] Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors*, 2017 CATO SUP. CT. REV. 139, 164 (2017-2018); *See*, e.g. *Fraternal Order of Police*, 170 F.3d 359 (3d Cir. 1999) (Alito, J. holding that the government should allow Muslim police officers to wear beards for religious reasons, when the other officer permitted an exception for medical reasons.)
[230] Berg, *supra* note 229, at 165.
[231] *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

question: why religious and conscience exemptions can be understood as similarly situated to other reasons, or in other words, why religious exemptions are in the same categorical exemption as other secular reasons. For example,[232] it should be proven why this religious exemption should be included in the same category of medical exemption before determining that what is less protected should be determined as a matter of degree. The similarity between religious exemption and the medical exemption was only that both requested an exemption to the rule. By relying only on this fact, it would be difficult to view it as being in the same category. Needing an additional rationale for these categorical exemptions. Furthermore, it should be understood that this reading differs from the procedural-equality treatment pursued by *Smith* or *Lukumi* because the procedural-equal treatment means the provision of an equal opportunity to assess the exemption system by the same officials while the categorical-equal treatment requires only an equal outcome.

In sum, the Court has shifted its stance of religious exemptions from the *Sherbert* test to the *Smith* rule, or, in other words, from substantive-equal treatment to procedural-equal treatment. When the rule is generally appliable, religious practices could not be exempted under the *Smith* rule. However, if there exists an individualized assessment system for secular exemptions, the government should apply this system to a religious exemption under the modified *Sherbert* test in *Smith* dicta. These two principles, linked to each other, could be reduced to the procedural-equal treatment. Other than this exemption issue, the Court independently has recognized the area of autonomous exception for the teaching of religious doctrine and operation of the religious institution, and also arguably hybrid rights claims exemptions.

3. CHALLENGES TO THE *SMITH* RULE

[232] *Id,* at 364-66. (deciding that the internal order of the police department that the police should be shaved violated the Free Exercise rights when it did not allow religious exemptions while it allowed medical exemptions)

Conservative commentators and religious groups have argued that it was not "embedded in the law" because the rule of general applicability was not adequately analyzed,[233] even though the Court explicitly declared the *Smith* rule. Legislative bodies have been challenging at the federal and state levels, urged by conservatives and religious groups. However, such state legislations were also problematic because they were far from representing a judicial interpretation. So, commentators have suggested that to solve the interconnected problems would be returning to pre-*Smith*.

(1) Legislative and Litigant Challenges through the RFRA Movement

After *Smith*, many criticisms were raised in a pervasive area such as the academy, religious groups, and political groups.[234] It created nonpartisan cooperation toward the restoration of religious freedom.[235] It resulted in Congress's enactment of the Religious Freedom Restoration Act in 1993. However, in *City of Boerne v. Flores*,[236] the Court held that RFRA, which intended to restore the *Sherbert* test, was unconstitutional as applied to the states because Congress had exceeded its constitutional power when it sought to apply RFRA against state governments.[237]

In *City of Boerne*, the city authorities tried to expand their powers to the church located in a historic preservation district by an ordinance banning new construction. So, the Archbishop of San Antonio argued that this expansion violated the RFRA, which protects religious exemptions through the *Sherbert* test. The Court struck down the RFRA because the RFRA seemed to be "an attempt to invoke substantive change in constitutional protection." Congress has no authority to create new rights by legislation, so it may not interfere with each state's general authorities to regulate for the health and welfare of their

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[233] Brief for Petitioners, *supra* note 38, at 35; Conkle, *supra* note 29, at 24-27.
[234] For example, "The Court's decision in *Smith* generated a significant amount of public consternation." "one legal commentator recalls, "God may not have died in 1990, but from the uproar in the legal community that year, His chances of survival in the American polity appeared rather slim," "A large and bipartisan coalition quickly formed to push Congress to pass legislation that would better protect Americans' religious freedom." (Paul Baumgardner & Brian K. Miller, *Moving from the Statehouses to the State Courts: The Post-RFRA Future of State Religious Freedom Protections*, 82 ALB. L. REV. 1385, 1390 (2018))
[235] *Id*.at 1392 (citing Martina E. Cartwright*, Book, Chapter and Verse: The Rise and Rise of the Freedom of Conscience Movement Post*-Windsor *and* Obergefell, 23 CARDOZO J.L. & GENDER 39, 60-61, 61 n.185 (2016).)
[236] *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).
[237] *Id.* at 535.

citizens,[238] including determining the substance of religious exemptions. Congress could exercise its legislative authorities under section five of the Fourteenth Amendment to remedy or prevent the rights under the Fourteenth Amendment.[239]

This does not mean that religious exemptions are not a right guaranteed by the Free Exercise Clause. The implication of *City of Boerne* was not that the Free Exercise Clause did not guarantee religious freedom, but that Congress should not create new rights or revise fundamental rights beyond the Court's interpretation by legislation. Congress did not discuss the validity of the *Smith* rule the Court established, but it provided provisions that contradicted the rule. It is an intrusion of the judicial authorities of interpretation established in *Marbury v. Madison*[240] when Congress tried to change the Court's interpretation.

It led Congress to "determine [how] states enforce the substance of its legislative restrictions." So, it was unconstitutional that Congress made the RFRA without any limitations established through the Court's precedent,[241] such as the *Smith* rule. As a result, Congress enacted RLUIPA, which regulates religious institutions and their places, but still, did not follow the instructions of *City of Boerne*.[242]

Therefore, this holding did not resolve the disputes: whether religious exemptions should be allowed under the Free Exercise Clause, and if possible, how to do so, because it was not related to the interpretation of religious exemptions under the free exercise, while it delivered the holding related to the authorities of Congress. However, most courts and commentators read this decision as meaning that the Court viewed religious exemptions as not protected under the Free Exercise Clause. This interpretation is correct from the point of view that the *Smith* rule was established under the Constitution. However, from

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[238] *Id*. at 534.
[239] U.S. CONST. amend. XIV § 5
[240] "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." *Marbury v. Madison*, 5 U.S. 173, 177 (1803).
[241] Justice Stevens added that RFRA violated the Free Exercise Clause because it preferred certain religious practices (*City of Boerne*, 521 U.S. at 536-544 (Stevens, J., concurring)).
[242] Steve Sanders, *RFRAs and Reasonableness*, 91 Ind. L.J. 243, 253 (2016) (RFRAs and RLUIPA gave privilege to religions by giving them more protection from general laws than the Constitution requires.)

the perspective that the *Smith* rule was unsettled, it is not.

It reignited the legislation movement of RFRA at the state level so that the states with RFRA expanded to nineteen states in 2015.[243] This exemption argument under federal and state RFRAs made for political debates such as a pro-life argument and the opposition of same-sex marriage, as well as unusual religious exercises. Notably, after *Obergefell v. Hodge*, which recognized same-sex marriage as a fundamental right, 11 states have drafted RFRA legislation as opposing this decision in 2015 alone, and two states would succeed in the enactment of mini-RFRAs.[244] They also have issues raised in *City of Boerne*.

Furthermore, under the *Smith* rule, there are no explanations of why the hybrid claim exemption and the religious autonomous practices exemption can be allowed when the law is generally applicable and why this should distinguish *Sherbert* exemptions from other exemption claims.

As such, the movement aroused conflict between the legislature and judiciary, between conservatives and progressives, between religious groups and LGBTQ supporters, so that it brought fragmentation within civil society.

(2) Returning to Pre-*Smith*

Due to these legislative challenges and interpretive challenges, several conservative commentators have insisted on returning to the pre-*Smith* test, which means the original *Sherbert* test. As previously stated, the Court did not overrule the *Smith* rule but implied that the *Sherbert* test could be applied to the religious exemption cases. So there have been controversies over the judicial interpretation of religious

[243] Jonathan Griffin, *Religious Freedom Restoration Acts*, NCSL Vol. 23, No. 17 (May 2015) http://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx); Frank S. Ravitch, *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 BYU L. REV. 55, 59, 85.; Baumgardner & Miller, *supra* note 234, at 1393.

[244] *Id.* at 1393; explaining Kansas's failure to enact RFRA, Cartwright, *supra* note 235, at 61; Ed Pilkington, *Kansas Republican Leaders Get Cold Feet Over 'Anti-Gay'Bill*, GUARDIAN (Feb. 24, 2014), https://www.theguardian.com/world/2014/feb/14/kansas-republican-lawmakers-criticise-anti-gay-marriage-bill ; Joshua Sato, *Indiana's Religious Freedom Restoration Act Sparks Controversy*, ABA (March 31, 2015) https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/indianas-religious-freedom-restoration-act-sparks-controversy/

exemptions. As well, after *Smith*, the legislative bodies enacted Federal and Mini-RFRAs for restoring the *Sherbert* test. As was pointed out in *City of Boerne*, the issue was controversial because those legislations did not accept the constitutional interpretation, such as the *Smith* rule, concerning religious exemptions.

Secondly, it will raise, as Professor Lund stated, "constitutional luck." Where the state has exceptions on its legislation or adjudication, a person who practices his or her religious beliefs can be protected, but "only because the government happens to have protected someone else."[245] So, returning to the pre-*Smith* era would remove the element of this luck.

Therefore, several commentators have insisted that it was better to return to a customized assessment, which means the *Sherbert* test in the pre-*Smith* era. Several commentators believe that the transformed *Sherbert* test will apply only on rare occasions,[246] so it could not protect religious people. Supporters of the former argument of the original *Sherbert* test insist that exemptions are not an unfair privilege but historically that they have been granted to religion.[247] Furthermore, state-RFRAs may cause unfettered religious accommodations against *City of Boerne* so that they may give religious objectors impermissible exemptions as a privilege.[248] So, they argued that the Court should go back to the pre-*Smith* rule.

However, there are several concerns about returning to pre-*Smith*, the original *Sherbert* test. First, it could bring a floodgate of religious exemptions to the courts. Furthermore, it "will open the door to serious disagreements among the lower courts over when and under what circumstances business owners can refuse to serve same-sex couples."[249]

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[245] Lund, *supra* note 197, at 644.
[246] Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL., 119, 194 (2002); Duncan demonstrated "how [the transformed *Sherbert* test] can be used to protect religious liberty in a wide variety of cases." (Duncan, *supra* note 207, at 1190-98).
[247] Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 724-727 (2017).
[248] Thus, Professor Sanders urged, "'Reasonableness' for religious liberty stakeholders, then, means refraining from abusing the privilege that religious accommodations provide, and not exploiting the fact courts are likely to accept most claims about religious belief at face value." (Sanders, *supra* note 242, at 253).
[249] Ariane de Vogue & Eli Watkins, *Supreme Court Won't Take Up Case of Florist Who Refused Service for Same-Sex Couple*, CNN (June 25, 2018, 10:53 AM ET), http://www.cnn.com/2018/06/25/politics/supreme-court-

Second, this can cause the misunderstanding that privileges are given to religious practices. Religious exemptions can operate, in effect, as an absolute right if the governmental actions influencing religious conduct should satisfy strict scrutiny. This is because heightened scrutiny will make religious objectors succeed. After all, it is hard to meet this standard. Several previous decisions demonstrated this proposition. For example, the Court in *Yoder* balanced an Amish exemption against the state's "paramount" interests of education.[250]

Furthermore, the Court in *Gonzales* provided a sincere religious exercise for church members drinking the hoasca CSA(CONTROLLED SUBSTANCES ACT)[251] prohibited prevail to the three governmental interests was denied, protecting the church members' health and safety, and preventing the public from using it for recreation and complying with a 1971 UN convention on Psychotopic Substances.[252] As far as *Smith* is concerned, protecting "religious divergence" might prevail over government interests unless the regulation promotes "an interest of the highest order."[253] In *Hobby Lobby*, the government did not meet strict scrutiny even though the third-party's interest was a compelling governmental interest. The Court held that the government did not find out the least restrictive means. [254]

However, the supporters insist that these concerns can be removed, given facts that courts in the pre-*Smith* era have admitted the *Sherbert* test to a strictly limited area, such as unemployment compensation. Furthermore, when the compelling government interests are about eradicating discrimination in public

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flowers/index.html. This article was written in favor of LGBTQ's rights.; *Supreme Court won't hear case of florist who refused service for same-sex couple*, CNN Wire (Jun 25, 2018 / 01:10 PM CDT). https://kfor.com/news/supreme-court-wont-hear-case-of-florist-who-refused-service-for-same-sex-couple/

[250] *Yoder*, 406 U.S. at 213, 221.

[251] 21 U.S.C. ch. 13 § 801 et seq.

[252] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-438 (2006).

[253] *Smith*, 494 U.S. at 888; The Court's concern was that "[t]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from, compulsory military service, *see, e. g., Gillette v. United States*, 401 U.S. 437 (1971), to the payment of taxes."

[254] In *Hobby Lobby*, Justice Kennedy concurred with the majority, stated that "[a]mong the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restricts other persons, such as employees, in protecting their interests, interests the law deems compelling." And it "require[s] neutrality toward religion." (*Hobby Lobby*, 573 U.S. at 739).

accommodations, the Court would not always give priority to religious exemptions. Even though federal RFRA and mini-RFRAs reflect the original *Sherbert* test, decisions of federal lower courts and state courts under the RFRAs were not consistent. Moreover, some scholars support that anti-discrimination interests could be compelling interests to interfere with religious exemptions even though the Court would restore the pre-*Smith* balancing test.[255] Therefore, to secure heightened scrutiny is a reliable protection for religious freedom, but it is not absolute.

According to precedents, there are two kinds of limitations under the First Amendment. From *United States v. Lee*,[256] religious exemptions should not violate the third-party's free exercise. The Court decided that "accommodations violate the First Amendment if they coerce third-parties to participate in practices that they do not share."[257] From *Estate of Thornton v Caldor*,[258] the Court held that "religious accommodations are impermissible when they force third-parties to affirm faiths that are not their own" under the Establishment Clause.[259] Furthermore, even with a return to the pre-*Smith* test, it is unclear that the religious exemption argument would prevail over the third party interests, LGBTQ's rights, which public accommodations law tries to protect by eradicating discrimination.

Therefore, *Masterpiece* was expected to accomplish two things: first is whether the Court would return to the existing position on the religious exemption, procedural-equal treatment, to pre-*Smith*, substantive-equal treatment, and second is what will result from the balancing test with a third party if strict scrutiny

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[255] Professor Conkle argued, "preventing discrimination provides a compelling justification that overrides wedding vendors' free exercise rights." (Conkle, *supra* note 29, at 27-30)

[256] *United States v. Lee*, 455 U.S. 252 (1982) (deciding that when an Amish employer rejected to pay social security taxes based on his religious beliefs, it was unconstitutional under the free exercise clause was unconstitutional because "[g]ranting an exemption from social security taxes to an employer operates to **impose the employer's religious faith on the employees**."[emphasis added])

[257] Following this decision, *see*, *Brush & Nib Studios,* 418 P. 3d 426 (Ariz. Ct. App. 2018); *Telescope Media.* 936 F. 3d 740 (8th Cir. 2019); *Fulton v. City of Phila*. 922 F.3d 140 (3rd Cir. 2019)

[258] *Estate of Thornton v. Caldor*, 472 US 703 (1985) (deciding that when the law prohibited an employer's declination of an employee who rejected to work on his Sabbath, this statute is unconstitutional under the establishment clause because it provided "unyielding weighting in favor of Sabbath observers over all other interests.")

[259] Following this decision, *see*, *ACLU v. Azar,* 2018 U.S. Dist. LEXIS 175470 (N.D. Cal. 2018)

is accepted when the pre-*Smith* would be acceptable.

IV. *MASTERPIECE*'S EQUAL TREATMENT UNDER THE FREE EXERCISE CLAUSE

In *Masterpiece*, therefore, theoretically, the critical issue was to determine whether the religious exemption could be allowed, and determine whether the governmental interests in protecting the third-parties by eradicating discrimination would prevail in terms of religious freedom if the exemption could be allowed. In other words, the Court should have decided whether to go back to the *Sherbert* test prior to the *Smith* decision and also should have determined whether to accept the *Sherbert* test revised in *Smith*'s dicta if the Court would adhere to the *Smith* rule.

Phillips' argument was "the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment."[260] Phillips argued that, due to different treatment between Phillips and the three bakers who refused to create the cake with "religious messages opposing same-sex marriage," "the Commission has contravened the Free Exercise Clause's neutrality and general-applicability requirements."[261]

On the institutional level, the Court could apply the *Smith* rule to this CADA in *Masterpiece*. This rule means that the legislation should not be challenged by religious objections when it is generally applicable. To avoid this rule, the baker should invoke the claims under the mini-RFRA, which the state enacts. Otherwise, the baker should repugn the general applicability and argue religious exemptions. However, Colorado did not have any type of RFRA, and CADA did not allow any exceptions for declination to provide goods and services to protected classes.[262] So, Phillips needed to directly trigger regulations of

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[260] *Mullins*, 370 P.3d at 288.
[261] Reply Brief of Petitioners at 23 *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); *See* Brief of Christian Legal Society, at 18-29, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); Furthermore, "Phillips's most powerful argument … was that the same anti-animus principle that protects gays and lesbians must be applied with equal force to protect religious minorities."(*Id*. at 41-46) (Leslie Kendrick & Micah Schwartzman*, The Etiquette of Animus*, 132 HARV. L. REV. 133, 138 (2018)).
[262] *Masterpiece*, 138 S. Ct. at 1724-25.

CADA or the Commission's application by invoking the First Amendment on the federal constitutional level.[263] In this case, the Free Exercise claims can apply to the state through the Fourteenth Amendment.[264]

In conclusion, the Court held that the Civil Rights Commission compromised their duty of neutrality toward religion so that it violated the free exercise right of Phillips, the baker. The majority decided that the Commission's adjudication was not satisfied to implement the "neutral and respectful consideration" due by showing hostility towards religion through disparate treatment between conscientious-based refusal and religious-based refusal and discriminatory statements. Seven Justices agreed that the Commission had hostility toward religion according to official demeaning statements, while five Justices accepted that the Commission treated this religious objection case of Phillips differently from secular refusal cases. However, this violation was only related to the state agency, but not the state legislature. The Court ensured the *Smith* rule in determining that CADA was neutral and generally applicable so that it did not allow for the religious exemptions.

The Court's reasoning showed two significant meanings for the lower courts. One was that the Court confirmed the *Smith* rule in the public accommodation law, and the other was that the determination of whether the state agency which deals with particular cases has fulfilled its neutral obligation toward religion could be made separately even if the applicable law is neutral.

Following this Court's decision, the lower courts, in subsequent cases, determined their cases in these two ways. On the one hand, the courts ensured that the state public accommodation law was neutral so that the *Smith* rule should be applied as long as the regulations would not target religious beliefs or

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[263] Brief for Petitioners, *supra* note 38, at 14-15, 16-24; Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention at 5-10, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

[264] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Sherbert*, 374 U.S. at 410 (In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider [the] appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment.)

practices.[265] Therefore, ordinary religious exercise claims,[266] such as that "their religion requires them to engage in conduct that the government forbids[267] or it forbids certain conduct that the government requires,"[268] could not be reviewed under the neutral and generally applicable law. On the other hand, the subsequent courts reviewed the agency-related issues independently on whether the action of state agencies were neutral toward religion when the state agency dealt with the case. Even though the Court gave two elements, disrespectful remarks of officials and disparate treatment, to point hostility towards religion, among the subsequent lower courts cases, there were no cases to determine that the state agency compromised its duty of neutrality according to these two elements.

This chapter discusses the *Masterpiece*'s reasons more carefully and argues that this Court recognized the procedural-equal treatment into which the *Smith* Court transformed the *Sherbert* test.

1. *MASTERPIECE*'S REASONS

The *Masterpiece* Court determined that the official should have a neutral and respectful consideration towards religion relying on *Lukumi* as sole precedent. *Lukumi* held that "the government [] cannot impose regulations that are hostile to the religious beliefs [] and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[269] Furthermore, the hostility towards religion can be proven through "[f]actors relevant to the assessment of governmental neutrality"[270] It contained that "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history,

[265] *Smith*, 494 U.S. at 878-79; *Lukumi* 508 U.S. at 531.
[266] *Telescope Media*, 936 F. 3d at 759.
[267] *See Lukumi,* 508 U.S. at 534 (Evaluating whether those who practice Santeria could perform an animal sacrifice, the religion's "central element," even though it was illegal.)
[268] *See Gillette*, 401 U.S. at 461 (considering a claim that conscientious objectors should have been able to avoid military conscription during the Vietnam War).
[269] *Lukumi,* 508 U.S. at 534; *Masterpiece*, 138 S. Ct. at 1731.
[270] *Lukumi,* 508 U.S. at 540; *Masterpiece*, 138 S. Ct. at 1722.

including contemporaneous statements made by members of the decisionmaking body."[271]

Masterpiece dealt with two governmental bodies, legislative and adjudicatory.[272] The Court did not find out any flaws in the legislative, such as hostility or animus. If there had been any hostility toward religion in the democratic process of CADA, the Court would have accepted the animus doctrine from *Lukumi*. Thus, this would have resulted in a lack of compelling government interest. However, the Court did not apply *Lukumi* to the legislature. Furthermore, it repeatedly showed that the Court followed the *Smith* rule, that generally applicable law should not be challenged by religious objections.[273]

In contrast, the Court targeted the adjudicatory body, the Colorado Civil Rights Commission. Before *Masterpiece*, the Court discussed only the legislation issues, even though the matter was related to the acts of an administrative agency.[274] While *Lukumi* dealt with the legislature's activities, the Court expanded *Lukumi* to adjudication and built out a new rule for them that officials in adjudicatory agencies should have "neutral and respectful consideration" toward religious believers. Applying this rule to the case, the Court held that the Commission violated this duty by showing that "a clear and impermissible hostility toward the sincere religious beliefs that motivated [baker's] objections."[275] Furthermore, according to *Lukumi*, the Court did not use strict scrutiny because there were no compelling interests by proving animus of government.[276]

The Court in *Masterpiece* pointed out two elements to prove this. The first, which seven Justices voted

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[271] *Lukumi,* 508 U.S. at 540; *Masterpiece*, 138 S. Ct. at 1722.
[272] Duncan, *supra* note 207, at 1198-99 (One can say the Court can grant individualized assessment exemptions at three levels: a process of discretionary review created by a legislature, by a governmental institution, and by institutional rules.)
[273] "The Court's precedents make clear that the baker… might have his right to the free exercise of religion limited by generally applicable laws."(*Id.* at 1723-4); "while … religious and philosophical objections are protected [under the First Amendment], it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."(*Id.* at 1727); "It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."(*Id.* at 1728).
[274] Mark L. Rienzi, *Administrative Power and Religious Liberty at the Supreme Court*, 69 CASE W. RES. L. REV. 355, 376-80 (2018).
[275] *Masterpiece*, 138 S. Ct. at 1729.
[276] Kendrick & Schwartzman, *supra* note 261, at 166.

for, was that there were several "inappropriate and dismissive comments[277] [to] show[] lack of due consideration" with no restraint of their statements.[278] Three comments made by the two Commissioners described Phillips's religious beliefs as justifying historical discrimination, such as "slavery" or a "holocaust."[279] These statements indicated that the official did not have neutrality towards Phillips' beliefs.

The other, which was supported by five Justices, was about religious "gerrymander[ing]"[280] in which there was disparate treatment between Phillips's case and the other cases of "bakers who objected to a requested cake based on conscience and prevailed before the Commission." Christian Jack requested three bakers to create a cake with messages, which contained hostile words toward same-sex marriage.[281] All three bakers refused to make these cakes. The Civil Rights decided that the bakers did not violate the rule when they refused services due to the offensiveness of the ordered messages. It could be allowed "because each baker was willing to sell other products [to Jack], including those depicting Christian themes, to the prospective customers,"[282] but they would not have sold the same kind of cake Jack ordered from them to any customers. In *Masterpiece*, Phillip was pleased to sell any other baked cakes and any cakes on the shelves, but not the custom cakes for a same-sex wedding. He did not sell those custom cakes to any customers, including Mullins' mother. He did not want to do so because his religious beliefs banned this creation. As to his belief, the custom cakes were offensive to him. However, the same

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[277] There were three statements which the Court considered as inappropriate: 1) on May 30th, 2014, at the public hearing, one commissioner's statement: "what he wants to believe,… if he decides to do business in the state," he cannot act on his religious beliefs.(Tr 23 cited by *Masterpiece*, 138 S. Ct. 1719 at 1729) 2) on the same day, a few moments later, the same Commissioner's statement: "if a businessman wants to do business in the state and he's got an issue with the-the law's impacting his personal belief system, he needs to look at being able to compromise."(id.) 3) on July 25th, 2014, in the meeting, another Commissioner's statement: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be-I mean, we-we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to-to use their religion to hurt others." (Tr. 30 cited by *Masterpiece*, 138 S. Ct. 1719 at 1729)

[278] *Masterpiece*, 138 S. Ct. 1719 at 1729-30.

[279] *Id.* at 1729.

[280] *Lukumi,* 508 U.S. at 534; Kendrick & Schwartman, *supra* note 261, at 138.

[281] The problematic messages were these: "God hates sin, Psalm 45:7" and "homosexuality is a detestable sin. Leviticus 18:22" (Joint Appendix at 232-233; cited in *Masterpiece*, 138 S. Ct. at 1749).

[282] *Id.* at 1730.

Division decided that Phillips violated the CADA because "the treatment of the conscientious-based objections [of Jack's requests] contrasts with the Commission's treatment of Phillips' objection."[283] Furthermore, the other superior bodies such as ALJ(Administrative Law Judge) or the Colorado Court of Appeals did not correct this unequal treatment between previous conscientious—based objection cases and Phillips' religious-based objection case. Different treatments among equally situated cases show that the state has lost its neutrality towards religious vendors.

Therefore, the Court concluded that, due to these two factors, the official compromised "neutral and respectful consideration" towards religion in the Commission's decision on Phillips's case.[284][285]

2. DISPUTES AFTER *MASTERPIECE*

The Court clearly expressed that the officials compromised neutral and respectful consideration by inferring animus toward religion through two reasons: discriminatory statements by two officials and disparate treatment between conscientious and religious refusals.

The *Masterpiece* Court used *Lukumi* as precedent. According to *Lukumi*, this disparate treatment could have been seen as an exception to the *Smith* rule because the Court reasoned that neutrality and general applicability was divided. In *Lukumi*, the structural underinclusiveness[286] could break the *Smith* rule of general applicability, while violation of neutrality proved that the government intended to target religious practices through showing the legal text and discriminatory statements during the passage of the ordinance. Several lower courts which follow *Lukumi* as precedent, accepted categorical exemption for religious practices if there was one or more secular exemption.

[283] *Id.*
[284] *Id.*
[285] Did not get the "benefit of a fair and impartial adjudicatory process" (Alexander, *supra* note 143, at 1100.
[286] In *Lukumi*, the city ordinance regulated religious practices to achieve governmental goals, while conduct for secular purpose was exempted. This instructed underinclusiveness. (*Lukumi,* 508 U.S. at 542-46).

In *Masterpiece*, the Colorado Commission had three previous cases to allow the vendors' refusals for conscientious reasons. Thus, for commentators, it was the important issue of whether the Court should interpret those cases as categorical exemptions like several lower court decisions following *Lukumi*.

(1) Narrow Interpretation to define *Masterpiece* as fact-specific

In terms of narrow interpretation, the two elements, disparate treatment and demeaning remarks were fact-specific, so that they have no meaning for the following religious vendors' cases in public accommodations. Generally, the Court does not investigate whether the official's action independently violates neutrality when the law was generally applicable. However, unusually, the Court in *Masterpiece* determined whether each state agency, the legislature, and the administrative, fulfilled the duty of neutrality toward religion, and it found anomalies from the Commission, the adjudicatory body, but not the state legislature. So, it made the case fact-specific, and its breach could have been sufficiently proven only by hostile statements even without disparate treatment.[287] In particular, since the public accommodation laws do not recognize exceptions in general, it would be difficult to find exemptions for the vendor's refusals, and it would be more challenging to find disparate treatment between religious cases and other cases. Thus, it seemed that malicious statements were more essential than disparate treatment.

Furthermore, the commentators who supported a narrow interpretation are skeptical even about the reasons by which the Court found a compromise of the neutral and respectful consideration. They pointed out two issues. First, they found that the Court misread the facts. They explained that, for instance, as to these statements that "what[ever] he wants to believe… if he decides to do business in the state," he cannot act on his religious beliefs," and "if a businessman wants to do business in the state and he's got an issue with the-the law's impacting his personal belief system, he needs to look at being able to

[287] The majority opinion considered that each of evil statements or disparate treatment could prove a violation of neutrality. However, Justice Kagan's concurring opinion did not agree with the reason that disparate treatment made the government non-neutral, but only agreed with the hostility of the officials' statements. (*Masterpiece*, 138 S. Ct. at 1733-34 (Kagan, J., concurring)).

compromise,[288] the Commissioner merely relied on the judge's statement in *Elane Photography, LLC v. Willock*,[289] which, as they stated, was "simply reflect[ion of] the current state of anti-discrimination law."[290] Furthermore, this even applied to the most problematic statement that

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be-I means, we-we can list hundreds of situations where freedom of religion has been used to justify discrimination. Moreover, it is one of the most despicable pieces of rhetoric that people can use to -to use their religion to hurt others[291]

This was delivered after the Commission decided to deny Phillips' claims even though it might be the expression of a hostile attitude.[292] So, they criticized that it was "manufactured."[293]

Second, even if the state Commission and courts could have found hostility by several Commissioners, it would not have overruled the decision of the Commission. Justice Ginsburg stated that even if the comments of some Commissioners were biased against religion, several proceedings with superior bodies had assured protection for Phillips' rights due to independent judgment even though the results were the same as the Commission's. It would be difficult to determine other judgments were also tainted with animus. Moreover, while the government in *Lukumi* was a sole body without other related bodies, in *Masterpiece*, there was a judiciary hierarchy that made it possible to revoke or review the lower adjudicatory decision.[294]

However, the majority reduced the duty of neutrality to tolerance,[295]and mandated the agency to have

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[288] Tr. 23 cited from *Masterpiece*, 138 S. Ct. 1719 at 1729.
[289] *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013)
[290] Kendrick & Schwartzman, *supra* note 261, at 140-41.
[291] Tr. 30 cited from *Masterpiece*, 138 S. Ct. at 1729.
[292] Kendrick & Schwartzman, *supra* note 261, at 140-41.
[293] *Id.* at 139.
[294] *Masterpiece*, 138 S. Ct. at 1751-52. (Ginsburg, J., dissenting)
[295] "Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs."(*Id. at* 1731) "In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious belief."(*Id.* at 1731) "… all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs…"(*Id.* at 1732)

"every appearance" of respectfulness with tolerance.[296] Moreover, it invalidated the determination of the state agency due to the violation of this duty. Thus, some commentators accused the Court of distorting the mere "etiquette" issue as a "reasonable justification."[297]

Therefore, it seems that when the Court suggested hatred statements as the only element, this would be insufficient to prove animosity toward religion. However, this insufficiency does not mean that the Court should completely abandon the animus doctrine. Instead, more objective evidence is needed to prove it.

(2) Attempt to Broaden reading and Returning to the Pre-*Smith* Era

As to commentators, who interpreted *Masterpiece*'s holding broadly with its dicta, they focus on different treatment between conscientious refusals by three bakers in the cases of Jack and religious refusals in the case of Phillips. From this perspective, *Masterpiece* could be interpreted to uphold the *Sherbert/Lukumi* test, because the three previous cases of Jack established the categorical exemptions for secular reasons.[298] The majority held that the determinations of the Commission did not rely on "a principled rationale for" different treatment in these two instant cases.[299] As to the attribution issue, the Commission accepted that the messages of the requested wedding cake "would be attributed to the customer" in Phillips' case, while the cases in Jack did not mention this element. As to the alternative provision issue, the willingness to sell other goods was considered in Jack's case but not in Phillips' case.[300] This inconsistency continued to the state courts' decisions.[301] Furthermore, it would indicate the hostility toward religion at the state level.[302]

Therefore, the commentators suggested that the Court provide a clue to return to pre-*Smith* to protect these politically unpopular religious groups, because *Masterpiece* proved that the state government would

[296] *Id.* at 1731.
[297] Kendrick & Schwartzman, *supra* note 261, at 135, 164-66.
[298] Berg, *supra* note 229, at 164.
[299] *Masterpiece*, 138 S. Ct. at 1731.
[300] *Id*. at 1730.
[301] *Id.* at 1731.
[302] Berg, *supra* note 229, at 166.

have hostility toward religion.[303] They insisted on a substantive-equal treatment toward religious exemptions.

In opposition to using the animus doctrine for religious vendors in public accommodations, several commentators criticized those arguments as "inverting animus."[304] They were concerned that recently, a challenge toward anti-discrimination had increased not by minorities but by majorities, who sometimes might have had a discriminatory attitude toward minorities, whom anti-discrimination law should protect, like the "reverse racism" claims against affirmative action.[305] They considered that *Lukumi* was misleading in *Masterpiece*. He pointed out that there is a big difference between the Santeria in *Lukumi* and the conservative Christian, Phillips. The former is "a minority religion practiced by racial and ethnic minorities," but the latter is a majority religion whose believer is "prominently white and free to express their faiths openly." The animus doctrine should be used for "reform[ing] the systems in which have made the secondary social status of historically oppressed groups"[306] like *Romer* and *Windsor*. In other words, it should be used to break down "the broader social and political context that suggested resistance to, if not hostility toward, same-sex couples and their relationships,"[307] which have oppressed gays' lives through institutions and practices.[308]

One might be skeptical that *Masterpiece* did not accept this restoration argument, but rather adhered to

[303] *Id,* at 167.
[304] Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 *SUP. CT. REV.* 257 (2018).
[305] *Id.* at 259.
[306] *Id.* at 262
[307] *Id.* at 278;
[308] Professor Sager and Professor Tebbe also focus on the reality citing Charles Black's desegregation. (Larry Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 173 (2019)) (Applying a "reality principle," Black made legally relevant the social fact that segregation worked to perpetuate white supremacy. We argue that similar attention to the social structure of antidiscrimination laws excludes the errant interpretation of *Masterpiece*); Laycock, *supra* note 180, at 167. (citing Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) ("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.")

the *Smith* rule. Furthermore, a substantive-equal treatment cannot secure the religious exemptions under the balancing tests even though it would have reversed the *Smith* rule. The *Masterpiece* Court suggested that the governmental interest for eradicating discrimination would prevail under the third-party harm principle. In *Masterpiece*, the Court declared the principle related to the third-party harm as follows,

> [W]hile those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

Citing *Piggie Park,* the *Masterpiece* Court did not allow for a refusal to provide goods and services to protected classes for fair and full enjoyment, at least in public accommodations. According to this dicta, the Court would likely decide that the protection of the third parties by eradicating discrimination would prevail when vendors claimed their religious exemptions under the RFRA. To be sure, the Court did not clearly express yet how much harm to third parties will materialize, or in other words, on what standard, by what elements, and to what degree the harm should be specified. Thus, these questions should be defined in future cases, but this uncertainty would not make the Court recognize religious exemption.

It is true that recently the influence of religious people on society has been weakened.[309] For this reason, however, it is difficult to apply the animus doctrine to assure religious exemptions because its purpose is to realize equality for those who are not politically influential and so cannot prevail on the democratic process through substantive equality.

Therefore, the narrow interpretation overlooked the importance of disparate treatment while the broad interpretation exaggerated and distorted the *Sherbert* test according to the lower courts which interpreted the *Lukumi* decision.

(3) Procedural-Equal Treatment: Equal Opportunity for the Use of Individualized Assessment

[309] Sanders, *supra* note 242, at 261 ("the hegemony of Christian religious preferences in politics and law seems to be on the decline, and the cultural tectonic plates have shifted rapidly.")

Here, this thesis reviewed that the Supreme Court's attitude toward religious exemption was procedural-equal treatment. As discussed above, the narrow interpretation and the broad interpretation of the *Masterpiece* decision could not draw conclusions consistent with the procedural-equal treatment pursued by the Court after *Smith*.

The split opinions in the *Masterpiece* Court were about the doctrinal baseline issue on how to view the vendor's refusal as harmful or not.[310] The majority believe that the conclusions may differ depending on the following baseline questions. For example: "[i]f a baker refused to design a special cake with words or images celebrating the marriage"[311]; or if "[a] baker's refus[ed] to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the case, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it."[312] These refusals might have been "different from a refusal to sell any cake at all."[313] However, these questions did not give any guidance to the lower courts when they confronted similar cases to solve the conflict between these two values, but rather, they seemed to pass on the responsibility.

It was not clear for the Court to determine whether the disparate treatment among secular and religious exemptions was related to the *Sherbert* test. No matter what the answer is, if the vendor's refusal is discriminatory, the courts would conclude that public accommodations law may not allow exemption according to the *Smith* rule. In the case of discriminatory refusal, the conclusion is right. However, one more thing needs to be considered: the public accommodation law may allow a permissible rejection depending on the purpose of the public accommodation law, full and equal enjoyment. In other words,

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[310] In determining whether there is harm in *Hobby Lobby*, there is a controversial debate over how to draw the baseline. If the inclusion of contraceptive payments is a baseline in the revised law, religious exemption is a deprivation of benefits of employees. However, if not before the revision, the baseline is not included in those benefits, and the religious exemptions impose a zero effect on employees. (Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 3, in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 336 (Micah Schwartzman et al. eds., 2016); Brady, *supra* note 247, at 722.). Likewise, in public accommodations, relying on the baseline, the Court could determine what is harmful or not. The *Masterpiece* Court had focused on how this can be resolved doctrinally.
[311] *Masterpiece*, 138 S. Ct at 1723.
[312] *Id*.
[313] *Id.*

discriminatory refusals should not be allowed, but there may be permissible rejection under the public accommodations law. In particular, the opinion of Justice Kagan, which was related to the vendor's right to choose what to sell, was noteworthy.

The purpose of the public accommodation law is to guarantee full and equal enjoyment of goods and services. This purpose can be replaced by eradicating discrimination against any customers, especially against protected traits. Here, the vendors should fulfill their duty to provide equal access to all customers. There is no right of the vendor to choose customers in the provision of goods and services. However, as Justice Kagan mentioned, the vendor also has the right to make choices about the goods and services he will provide.[314] The vendor's declination can be done according to whether goods or services are intended to be sold or not. The former is permissible, but the latter is not. In addition, the state agency can determine whether the refusal could be allowed.

The majority dealt with the issue of whether the related state applied the case with consistent and principled rationale. The majority considered that discriminatory treatment was not justified because they did not apply a consistent standard to the cases between secular and religious exemption, whereas the opposing opinions of Justice Kagan and Justice Ginsburg determined that it was justified because they were applied consistently. These two opinions showed the opposite results toward each other, but both opinions have two things in commons. The first is that the existence of an individualized assessment system of determining whether the refusal toward protected classes is permissible, and the second is that if the state has a principled standard of such a system, it should be consistently applied.

All Justices would likely support the first statement because it serves the purpose of public accommodations law. The purpose of public accommodation law is to eradicate anti-discrimination in public accommodations by assuring full and fair enjoyment of accommodations. Justices reasoned that they could allow the vendor's refusal within this objective. In light of the purpose of the anti-

[314] *Masterpiece*, 138 S. Ct. at 1733 note * (Kagan, J. concurring) ("**A vendor can choose the products he sells**, but not the customers he serves—no matter the reason.")

discrimination act, full and equal enjoyment means to guarantee all citizens access to public accommodations no matter their race, color, religion, or sexual orientation.[315] When the vendor intends to refuse to provide goods or services based on a trait of protected classes, it is not allowed under the public accommodations law. For example, it cannot be denied when the vendor does not want to provide it due to particular religious supporters or gays and lesbians.

However, if the vendors do not compromise the purpose of the full and equal enjoyment and would have refused all the customers, this general refusal does not violate public accommodations law. This law restricts vendors' right to choose their customers because it imposes duties to secure their customers' equal access to goods and services on vendors, but it could not force them to decide what products or services the vendors will offer.[316] Once the vendor has decided to provide or to sell certain products or services, the law may restrict the vendor when he or she does not provide them to every customer, especially the customers who have protected traits under the public accommodation law. However, the law cannot constrain the vendor's decision of what products or services he or she will provide in the market. The vendor could have the right to refuse to provide products which he or she intends not to sell. The state agency, or commission, has authorities to determine whether this refusal is permissible, and it is the procedural-equal treatment of the *Sherbert* test,[317] read by *Smith* and *Lukumi*, that gives the agency the same opportunity for assessment.

As a religious exemption, the vendor can claim permissible refusals within the right to choose what to

[315] *See*, CIVIL RIGHTS ACT, 42 U.S. C. § 2000a. ("All persons shall be entitled to the **full and equal enjoyment** of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, … without discrimination or segregation on the ground of race, color, religion, or national origin.") However, twenty-five states prohibit discrimination based on sexual orientation and twenty-one states prohibit discrimination based on gender identity while the federal act did not consider sexual orientation or gender as a protected class. (*State Public Accommodation Laws,* NCSL (April 8, 2019) https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx).

[316] *Masterpiece*, 138 S. Ct. at 1733 note * (Kagan, J., concurring)

[317] However, other than in a public accommodations area, substantive equality is required because "most religious accommodations are very different than state support for a privileged faith….[which] are designed to make room for religious minorities in our political community by giving them space to follow practices that are out of step with majoritarian norms." (Brady, *supra* note 247, at 733).

sell, but not discriminatory refusals. It is at the discretion of the agency to decide on the range of product options that determine what constitutes an acceptable denial and what constitutes a discriminatory objection. However, the opinions of *Masterpiece* suggest two general requirements to establish this general individualized assessment. First, the criteria for determining what product or services is general for equal access should be consistent in all cases, and, second, they should be included in the scope of product selection.

As to the first element, Justice Gorsuch and Justice Kagan agreed. Justice Gorsuch pointed out that the general level of cakes was inconsistent when the case was determined in the state government.[318] He saw the provision of 'wedding cakes' as a general level for the duty to provide equal access.[319] For example, if a baker provides a wedding cake to a heterosexual couple, but not to a gay couple, it violates the law, and it is not within the right to choose what to sell.

However, the opinion of Justice Gorsuch was misleading because it argued that it could be offensive to provide the same wedding cakes for same-sex marriages. Justice Gorsuch presumed that the wedding cakes for same-sex marriages is different from general wedding cakes. It is a special request to the baker. However, as Kagan correctly pointed out,[320] there is no distinction between cakes supporting same-sex marriage and heterosexual marriage. Furthermore, Justice Gorsuch's argument cannot be admitted by the right of vendors to choose what to sell. He included the purpose of the product within the right of vendors, but it was beyond this right because there is no difference between a cake supporting same-sex marriage and opposite-sex marriage when choosing products and services.

From this point of view, *Masterpiece*'s baker cannot be saved through religious exemptions because he intended not to provide his custom cake for same-sex marriages that did not fall within the scope of the right of vendors. Therefore, the views of Judge Kagan and Judge Ginsburg seem to be justified in this

[318] *Masterpiece*, 138 S. Ct. at 1738 (Gorsuch, J., concurring)
[319] *Id.*
[320] *Masterpiece*, 138 S. Ct. at 1733 note * (Kagan, J., concurring)

regard. They classified the two events as follows. According to Justice Kagan, "the three bakers in the Jack cases did not violate [anti-discrimination] law… [because] [i]n refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else-just as CADA requires."[321] The opinion of Justice Ginsburg had the same reasoning. The baker, Phillips, would not sell to Craig and Mullins a cake "he would provide to a heterosexual couple"[322] for no reason other than discrimination based on sexual orientation. In contrast, the other three bakers treat the religious believer, who requested religious words with a demeaning image, equally "as any other customer would have been treated – no better, no worse."[323]

These views allowed rejection if the requested message was offensive to the baker. This was categorized as a refusal to give to all customers, which is a permissible refusal. If the vendor is subjectively displeased with the ordered message, so that the vendor cannot provide this product to any customers, the vendor can reject it. At this time, the offensiveness cannot be determined objectively by the government. Offensiveness can be seen as an example of a reason for permissible rejections.

The preposition to apply this assessment requires good faith interpretations of refusals. This theory does not mean that all declinations of vendors toward customers implicitly grounded on the discriminatory minds, should be allowed or justified. These declinations should not even be considered because they must be viewed as violations of the spirit and purpose of the public accommodation laws. However, the refusal of personally offensive messages against their religious convictions may be allowed, only when they do not violate the full and fair enjoyment by rejecting certain groups protected by the public accommodation law. This is because the official cannot judge what offensiveness is and because the vendors should be treated equally as a citizen. In good faith, most of the religious believers might have the willingness to provide other goods or services to all customers other than what their religious

[321] *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring).
[322] *Masterpiece*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting).
[323] *Masterpiece*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting).

convictions do not allow them to provide. What should be emphasized here is that while religious oppositions cannot challenge the *Smith* rule that all citizens equally should follow, at least they have equal rights to use an assessment system that can be recognized as a legitimate refusal by the government.

Some may rebut relying on the official's duty of civility to citizens that he or she should give reasons to the religious people.[324] They might be right. What is important here is not that the results should be the same, but rather, that the reasons for determination are given to the religious objectors through the same procedure. If not, the government should give reasons for the disparate treatment by meeting strict scrutiny. However, the Commission in *Masterpiece* failed to show a principled rationale for discretion to determine what should be included within the right of vendors.

This conclusion can be explained by examples. Suppose the baker was ordered to create a cake with a religious message or with a color or a symbol for supporting a specific sexual orientation. It the baker refuses to provide the cake in both cases, this behavior would constitute a violation of the public accommodation law. However, when the baker thinks the ordered message for the cake is offensive so that he cannot create the cake for any customers, he can refuse to provide it. Even if the offensiveness which the baker has is unreasonable, the refusal should be allowed.

However, it would be difficult for the vendor to refuse to create the goods because the products would be used for same-sex marriage or certain religious events, and this fact hurts the vendors. If asked to decorate a cake of the same shape and color as the same cake offered at a heterosexual marriage or another event, the refusal would be assessed as discriminatory conduct, because it would be beyond the right of vendors.

One might consider that the free exercise claim could overlap the free speech claim. Furthermore, the free exercise claims may cause the same results with the free speech claims because the free exercise is deeply related to the religious message. However, there is one difference between the speech claim and

[324] Some commentators argued that the Commission fulfilled their duties of civility because it gave reasons to the religious people, despite the two commissioners' mistakes. (Kendrick & Schwarzman, *supra* note 261, at 166).

the free exercise claim. When the free speech clause protects the expressive conduct, it requires subjective and objective elements for communicability, while the free exercise claim needs what is subjectively offensive. In the former case, aggressive messages that the user does not allow should be recognized by reasonable people as messages, but in the latter, subjective aggression may be recognized.

Religious believers are ready to continue to violate the law or to give up their jobs if the law forces them to act in a way they consider to be forbidden, based on their convictions if those small parts of religious exemptions would be not carved out. LGBTQ supporters insist that anti-discrimination culture should be settled in society even by accepting legal enforcement and abandoning persuasion toward religious believers.[325] Such disagreement is contributing to deepening social conflicts. What the court should do at this point is not to grant exemption privileges to the forbidden area, or to limit the free exercise in public accommodations, but to inform vendors what the scope of the allowance is. Reducing full and equal enjoyment to eradicating discrimination places a limit on the conduct of vendors. However, when the courts determine whether the refusal of a vendor is permissible in the light of the right of vendors to choose what to sell and the duty of vendors to provide equal access to their customers, it allows vendors to enjoy freedom and to embrace the responsibility in public accommodations. And *Masterpiece* can be consistent with the *Sherbert* test, which the *Smith* Court read as a procedural-equal treatment.

In sum, as to the free exercise argument, this thesis insists that it is a permissible rejection within the scope of the vendor's product options because it does not violate the full and equal enjoyment, which could be interpreted as the customer's equal access to goods and services based on the right of vendors to

[325] The lawsuits will be allowed when the vendors revealed their hostility toward customers based on protected traits under the public accommodation law because the laws require anti-discrimination. However, Professor Sanders suggests relying on persuasion of justness and reasonableness, rather than a lawsuit which compels religious people to do that with which they disagree. It would bring LGBTQ supporters the ultimate victory for the gay movements. (Sanders, *supra* note 242, at 264-265). However, they took the easy way to get a win. (*Id*. at 265) ("[t]he point is that the movement cannot afford to assume that it can consolidate and extend its political and legal successes without bothering to continue persuading people of the justness and reasonableness of its cause, especially as that cause now transitions to new priorities and strategies.") Therefore, it resulted in severe conflicts between religious people and LGBTQ supporters.

choose what to sell, as Justice Kagan stated. Furthermore, it argues that procedural-equal treatment should be given equal access to the vendors, including the vendors who decline to provide their goods and services due to religious and secular reasons. The differences between discriminatory declination and permissible rejection rely on whether the vendor could supply his goods or services to all other customers; in other words, the refusal is within the right of vendors to choose what to sell. Here, the official or government agency could have the discretion to determine whether the vendor's refusal could be a discriminatory or conscientious declination. If the official or government agency did not give the vendor opportunities to consider the reasons for refusals in a principled rationale, it could constitute a substantial burden on religious believers by deprivation. And then, the Supreme Court's ruling in *Masterpiece* should be understood to require procedural-equal treatment, applicable to religious and secular vendors alike.

V. SUMMARY AND CONCLUSION

The *Masterpiece* Court faced solving the conflict between eradicating discrimination based on sexual orientation and assuring freedom of religion and expression. However, the Court did not answer this issue but gave the vendor a 'pyrrhic victory.' It brought severe disputes to the forefront of society again.

Therefore, this thesis aimed at examining the validity of free speech claim for religious exemptions on the one hand, and reviewing the Court's position on the current complex entanglement of religious exemption theories on the other hand, and finally, it gave a possible suggestion to coexist between two constitutional values without an all-or-nothing solution.

As to the free speech argument, a compelled speech argument should succeed if, and only if, the vendor's good or service is expressive according to the meaning of the Free Speech Clause. In the case of a baker, the Court would protect making a cake bearing messages through images or texts as a symbolic expression, but it would not protect making a generic, artisticallydecorative cake as either a pure or symbolic expression. As a result, a baker's compelled speech argument should prevail in the first situation, when the cake includes messages through images or texts. In other words, the public accommodations law could not be used to require a baker to make a cake with which he disagrees. However, this should not prevail on a compelled speech theory in *Masterpiece* itself.[326]

There is an attempt to limit free speech arguments claimed by vendors in a commercial context to view them as unprotected speech. However, this endeavor would be difficult to fulfill. Free speech claims may be ruled out by the balancing test since this is not an absolute right. Furthermore, for those who claim religious freedom, it would be more appropriate to seek a new interpretation of the free exercise clause rather than to urge free speech claims that can only be partially protected.[327]

[326] Chapter II. 1 and 2.
[327] Chapter II 3.

The Court adhered to the *Smith* rule except when the government explicitly triggered animus toward religion. However, the *Smith* Court did not explicitly abandon the *Sherbert* test. Instead, the Court changed its meaning through another interpretation in dicta. The original *Sherbert* test before *Smith* protected religious freedom by reflecting religious susceptibility when the courts determined whether the government imposed a substantial burden on religious practices, while the modified *Sherbert* test read by *Smith* protected religious practices by ensuring the opportunity to use an individualized assessment system. This means the Court's position toward religious freedom transitioned from substantive equality to procedural equality, equality of opportunities. Furthermore, several decisions by the lower courts have developed this transformed test into a categorical exemption that ensures the same outcomes as secular reasons.[328]

As to the free exercise argument, this thesis insists that it is a permissible rejection within the scope of the vendor's product options because it does not violate the full and equal enjoyment, which , as stated by Justice Kagan, could be interpreted as the customer's equal access to goods and services based on the right of vendors to choose what to sell. Furthermore, it argues that procedural-equal treatment should be given equal access to the vendors, including the vendors who decline to provide their goods and services due to religious and secular reasons when within permissible refusal. The differences between discriminatory declination and permissible rejection rely on whether the vendor could supply his goods or services to all other customers; in other words, the refusal is within the right of vendors to choose what to sell. Here, the official or government agency could have the discretion to determine whether the vendor's refusal could be a discriminatory or conscientious declination. If they did not give the vendor opportunities to consider the reasons for refusals in a principled rationale, it could constitute a substantial burden on religious believers by deprivation. And then, the Supreme Court's ruling in *Masterpiece* should be understood to require procedural-equal treatment, applicable to religious and secular vendors alike.[329]

[328] Chapter III.
[329] Chapter IV.

Religious people are concerned that they are being treated unequally by society and their convictions ignored without justification. If civility means anything, it is to provide justification for when citizens are treated differently.[330]

[330] Kendrick & Schwartzman, *supra* note 261, at 164-66; Leah Litman, *Dignity and Civility, Reconsidered*, 70 HASTINGS L.J. 1225, 1238-39 (2019).

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