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Equality, Animus, and Expressive and Religious Freedom Under the American Constitution: Masterpiece Cakeshop and Beyond

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The American Constitution values both equality and freedom. The Equal Protection Clause of the Fourteenth Amendment, for example, forbids discrimination on various grounds, including race and sex. For its part, the First Amendment protects the most treasured of American freedoms: freedom of speech and freedom of religion. The First Amendment, like the Fourteenth, applies only to governmental action; neither amendment directly controls the private sector. Even so, Congress and other legislative bodies, acting by statute, can promote equality or freedom in ways that the Constitution permits but does not require. And this legislative action can extend to private businesses and other private actors.

The sometimes competing demands of equality and freedom can generate intense controversy, with one value or the other ultimately prevailing. In the Twentieth Century, for example, ending deeply embedded practices of racial discrimination required that business owners give up a measure of freedom, the freedom to choose their employees and clientele as they see fit. In a momentous development, Congress enacted the Civil Rights Act of 1964, which prohibited racial discrimination in various private-sector contexts.[1] The Supreme Court upheld the Act against constitutional challenges,[2] including an objection grounded on religious freedom.[3] The Court recently reaffirmed this judgment, making it clear that religious freedom generally must give way to the prevention of racial discrimination.[4]

The Civil Rights Act also included prohibitions on religious and sex-based discrimination, and state and local legislatures—exercising their authority under the American system of federalism—have gone further. More than twenty states, plus dozens of cities in these states and elsewhere, have enacted legislation barring discrimination on the basis of sexual orientation or gender identity and have extended these prohibitions to

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[1]Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

[2]See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[3]*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402–03 n.5 (1968) (per curiam) (rejecting religious freedom claim of restaurant owners who objected to serving black customers).

[4]See *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2783 (2014) (declaring that racial discrimination in employment cannot "be cloaked as religious practice to escape legal sanction").

places of "public accommodation," that is, private businesses that serve the general public. Under these laws, the covered businesses are barred from discriminating against gay, lesbian, or transgender individuals in the provision of goods or services. These state and local laws, combined with the advent of same-sex marriage,[5] have generated religious-freedom objections, mainly from religiously conservative wedding vendors. The wedding vendors, including bakers, florists, and photographers, contend that the First Amendment requires an exception to the anti-discrimination laws, one that protects their freedom to deny goods or services to same-sex couples for the celebration of weddings that the vendors regard as religiously impermissible.

The wedding vendor controversy replicates the debate surrounding the Civil Rights Act of 1964, and it presents a similar question: which should prevail, the promotion of equality or a competing claim of individual freedom? But the current debate, as a matter of constitutional doctrine, has taken peculiar turns. In the first place, religious objectors have joined their claims of religious freedom with claims of expressive freedom, thus relying on each of two provisions in the First Amendment: the Free Exercise Clause, which protects the free exercise of religion, and the Free Speech Clause, which includes a prohibition on compelled speech. Second, the objectors, ironically, have met the equality claim of same-sex couples with an equality claim of their own, contending that religious equality requires the government to grant religious exemptions from anti-discrimination laws, at least if the government grants nonreligious exemptions or otherwise is shown to have acted with animus or hostility to religion in rejecting the objectors' arguments.

In this Essay, I will attempt to untangle the constitutional strands of the current controversy and explain how and why they have come together as they have. I will begin by sketching the contours of contemporary American law with respect to the free exercise of religion. As we will see, the Supreme Court's 1990 decision in *Employment Division v. Smith*,[6] designed to simplify the law, instead has led to complexity and confusion. Next, I will outline the Court's interpretation of the Free Speech Clause, highlighting the constitutional prohibition on compelled speech. I then will turn to the wedding vendor issue and the Supreme Court's widely publicized 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[7] which confronted this issue without squarely resolving it. My discussion will highlight the ambiguities in the Court's reasoning and the questions that remain unsettled.

The questions left open in *Masterpiece* are likely to return to the Supreme Court,

[5]Initially recognized in some states but not others, same-sex marriage became a nationwide constitutional right in 2015, when the Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[6]494 U.S. 872 (1990).

[7]138 S. Ct. 1719 (2018).

and, in the remainder of the Essay, I will offer three suggestions for resolving them when they do. First, the Court should reject the wedding vendors' compelled speech argument. Second, the Court should repudiate *Smith* and reinstate its earlier, more generous interpretation of the Free Exercise Clause, according to which religious objectors have a presumptive—but not absolute—constitutional right to religious exemptions from laws that substantially burden the exercise of religion. But third, in applying this interpretation in the wedding vendor context, the Court should conclude, as it has for racial discrimination in similar settings, that preventing discrimination against same-sex couples outweighs the competing value of religious freedom, so the religious objectors cannot be excused from the challenged laws and instead must comply. My second and third suggestions, taken together, would permit the wedding vendor controversy to be framed and resolved transparently, as the conflict of competing values that it is: equality on the one hand, religious freedom on the other.

I. THE FREE EXERCISE CLAUSE: EQUALITY AND FREEDOM

The Free Exercise Clause of the First Amendment protects the "free exercise" of religion. As construed by the Supreme Court, the Clause protects both religious equality and religious freedom.

Religious equality generally precludes the government from discriminating against religion, or any particular religion, in the conferral of legal benefits or in the imposition of legal burdens. In other words, the government generally cannot target religious individuals, organizations, or practices, as such, for special disadvantage.[8] In *McDaniel v. Paty*,[9] for example, the Supreme Court ruled that the Free Exercise Clause precluded Tennessee from disqualifying clergy members from serving as lawmakers.[10] Likewise, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[11] the Court found that a Florida city's ban on animal sacrifice was intended and designed to regulate a Santería religious practice, as such, and therefore violated the Free Exercise Clause. To this extent, the Free Exercise Clause is like the Equal Protection Clause of the Fourteenth Amendment, forbidding a particular sort of purposeful or deliberate governmental discrimination.

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[8]See D. O. CONKLE, *Religion, Law, and the Constitution*, Foundation Press, 2016, p. 55. In fact, a general (albeit not categorical) prohibition on religion-based discrimination is found not only in the Free Exercise Clause but also in the First Amendment's Establishment Clause. See *ibid.*, p. 57–60.

[9]435 U.S. 618 (1978).

[10]See also *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding that Missouri violated the Free Exercise Clause when it refused to provide a playground resurfacing grant to a church simply because it was a religious organization); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (holding that Montana violated the Free Exercise Clause when it excluded religiously affiliated schools from a state scholarship program providing private-school tuition assistance).

[11]508 U.S. 520 (1993).

Animus-based discrimination against religion is an especially egregious form of religious discrimination. Animus-based lawmaking targets religion for disadvantage without any plausible justification, such as preventing tangible harm or preserving the separation of church and state. Instead, it targets religion, or religious individuals or groups, on the basis of nothing more than bias, dislike, or hostility toward the religious beliefs in question or against the people who hold them.[12] In a recent case challenging presidential travel restrictions, for instance, the challengers argued that the restrictions were purposefully designed to discriminate against Muslims and were motivated by nothing more than President Trump's religious animus against them.[13]

Religious equality is a widely accepted constitutional value, resting at the core of the Free Exercise Clause. As a result, it is generally agreed that the Clause forbids most forms of governmental discrimination against religion, including but not limited to animus-based lawmaking.

The Free Exercise Clause also protects religious freedom. This protection sometimes goes beyond religious equality by requiring the government to accommodate the free exercise of religion—that is, to exempt religious practices from otherwise applicable laws—even when secular practices receive no comparable protection. This special accommodation can be seen to discriminate in religion's favor, and, as a result, it is more controversial than the protection of religious equality. Indeed, religious accommodation itself is constitutionally limited by the Establishment Clause of the First Amendment, which generally forbids the government from promoting religion. Properly understood, however, the accommodation of free exercise through the conferral of religious exemptions does not promote religion. Rather, it promotes *religious freedom*, a basic constitutional value. More precisely, it honors the constitutional value of religious voluntarism, that is, the freedom of individuals to make religious decisions for themselves, free from governmental compulsion or improper influence. This value can be

[12]Even outside the context of religion, animus-based lawmaking—lawmaking based merely on bias, dislike, or hostility—violates deep-seated constitutional understandings and should be regarded as categorically impermissible. Notably, the Supreme Court has relied on this principle to protect gays and lesbians, among others, from discriminatory laws. For a helpful account, see W. D. ARAIZA, *Animus: A Short Introduction to Bias in the Law*, NYU Press, 2017. Judicial declarations of animus, however, are highly contentious and inflammatory, because they entail a legal and moral condemnation of the lawmakers in question. For this reason among others, I have argued elsewhere that the Supreme Court should avoid declarations of animus when it can, for example, if the challenged law is subject to invalidation on other grounds. See D. O. CONKLE, « Animus and Its Alternatives: Constitutional Principle and Judicial Prudence », *Stetson L. Rev*., vol. 48, 2019, p. 195.

[13]Claiming an Establishment Clause violation, the challengers presented powerful evidence of presidential animus, but the Supreme Court, citing separation-of-powers considerations, applied deferential review and rejected the challengers' claim. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2416–23 (2018).

imperiled when laws substantially burden the exercise of religion even if they do not target religion and therefore do not violate religious equality. Accordingly, a Free Exercise Clause requirement of religious accommodation—within limits—should not be understood to violate the Establishment Clause.[14]

Prior to 1990, the Supreme Court honored the value of religious voluntarism by interpreting the Free Exercise Clause to favor religious accommodation—within limits. In particular, the Court read the Clause to require close constitutional scrutiny of laws that imposed substantial burdens on religiously motivated conduct, scrutiny that sometimes resulted in constitutionally required exemptions for the religious believers whose freedom the laws impaired. More precisely, a religious exemption was required unless the government could satisfy a constitutional test of "strict scrutiny" by showing that the challenged law served a "compelling" governmental interest that demanded the law's application, without exception, even to the religious objector.[15] This test was difficult but not impossible for the government to satisfy. As a result, the Court granted some exemption claims but rejected others. For example, the Court granted religious objectors relief from various work requirements in the context of unemployment compensation,[16] and it exempted members of an Amish community from a requirement that they send their children to high school.[17] Conversely, the Court rejected other exemption claims, including that of an Amish employer who objected to paying social security taxes for his employees[18] and, notably, that of religious schools seeking tax-exempt status despite their violation of a governmental policy forbidding racial discrimination.[19]

In 1990, the Supreme Court's doctrine took a dramatic turn. In its landmark decision in *Employment Division v. Smith*,[20] the Court abandoned its strong, albeit qualified, support for religious accommodation under the Free Exercise Clause. Instead, the Court broadly declared that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or

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[14]See D. O. CONKLE, *Religion, Law, and the Constitution, op. cit.*, p. 172–73. Even when accommodation is not required by the Free Exercise Clause, it is permissible, within limits, in the discretion of the government. See *ibid.*, p. 173–88.

[15]See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

[16]*Sherbert*, 374 U.S. 398; *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

[17]*Yoder*, 406 U.S. 205.

[18]*United States v. Lee*, 455 U.S. 252 (1982).

[19]*Bob Jones University v. United States*, 461 U.S. 574 (1983).

[20]494 U.S. 872 (1990).

proscribes).'"[21] On this view, the Free Exercise Clause simply does not require religious exemptions, no matter how great the burden on religious freedom and regardless of whether the government is pursuing a compelling objective.

The Court's new doctrine was designed to simplify the law. Yet even as it announced its decision, the Court in *Smith* introduced significant elements of ambiguity by reinterpreting, rather than overruling, its prior holdings. In so doing, the Court suggested that its new approach to the Free Exercise Clause was subject to at least two caveats or exceptions, albeit of vague and uncertain scope. In each of these two situations, religious exemptions would still be required unless the government could satisfy strict scrutiny.

The first exception, applicable in so-called "hybrid situations," addresses cases in which the religious objector relies not only on religious freedom but also on some other claim of constitutional right. Whether this hybrid-claim exception makes sense, and exactly how the dual constitutional claims are to be aggregated, are questions that have never been fully answered. But the recognition of this exception in *Smith* permitted the Court to preserve, rather than overrule, its earlier decision exempting the Amish from compulsory high school. In that case, the Court explained, there was a claim of parental rights as well as religious freedom.[22]

The second exception, grounded in the Free Exercise Clause alone, is what I will call the comparable-treatment exception. The scope of this exception is quite uncertain, but it sometimes requires a religious exemption when the law in question exempts or excludes comparable secular conduct. The exception thus draws upon, even as it expands, the core requirement of religious equality by suggesting that religious conduct sometimes warrants protection even when there is no targeted, purposeful discrimination against it. As initially introduced in *Smith*, the comparable-treatment exception was designed to preserve the Court's pre-*Smith* unemployment compensation rulings, and it seemingly was confined to that and similar settings involving "individualized governmental assessment of the reasons for the relevant conduct."[23] As the Court explained, "our 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."[24]

Three years after *Smith*, however, the Court clouded—and arguably expanded—the scope of the comparable-treatment exception in *Lukumi*, the animal sacrifice case. As

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[21]*Ibid.*, p. 879, quoting *United States v. Lee*, 455 U.S., p. 263 n.3 (Stevens, J., concurring in the judgment).

[22]See *ibid.*, p. 881–82.

[23]*Ibid.*, p. 884.

[24]*Ibid.*, quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion).

noted earlier, the Court in *Lukumi* found purposeful discrimination against the Santería religion, a clear violation of religious equality. But the Court's opinion went further, emphasizing that the no-exemptions doctrine of *Smith* applies only to "generally applicable" laws and suggesting that (whatever the government's purpose) a law might not qualify as "generally applicable" if it includes secular exemptions or exclusions, even ones that are categorical rather than individualized or discretionary.[25] Under a broad reading of *Lukumi*'s discussion of "general applicability," the comparable-treatment exception to *Smith* might be triggered by the presence of secular exemptions or exclusions of any sort, thus demanding comparable religious exemptions unless the government can satisfy strict scrutiny.[26]

Beyond these hybrid-claim and comparable-treatment exceptions, whatever their scope and meaning, the Supreme Court recently has recognized a third exception to the rule of *Smith*, an exception designed to protect the institutional autonomy of religious institutions. Thus, the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[27] ruled that the Free Exercise Clause gives religious organizations the right to hire and fire ministers and other religious leaders as they see fit, without regard to otherwise applicable employment discrimination laws.[28] The Court conceded that the challenged laws were "neutral and generally applicable" within the meaning of *Smith*, but it found *Smith* inapplicable and ruled that a religious exemption was constitutionally required.[29]

Since *Smith*, the American law of religious exemptions has been further complicated by developments in Congress, state legislatures, and state courts. The Religious Freedom Restoration Act of 1993 (RFRA),[30] a congressional statute, effectively supersedes *Smith* in the federal-law context. As the law's title suggests, RFRA "restores" the pre-*Smith* approach to religious exemptions, now as a matter of statutory law rather than constitutional right. Accordingly, RFRA requires religious exemptions from federal laws that substantially burden the exercise of religion unless the government

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[25]See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–46 (1993).

[26]Under this interpretation, "[i]f there are exceptions for secular interests, the religious claimant has to be treated as favorably as those who benefit from the secular exceptions." D. LAYCOCK, « The Supreme Court and Religious Liberty », *Cath. Law.*, vol. 40, 2000, p. 25, p. 35; see *ibid.*, p. 25–36.

[27]565 U.S. 171 (2012).

[28]In fact, the Court found that this "ministerial exception" from employment discrimination laws was required by both the Free Exercise Clause and the Establishment Clause. *Ibid.*, p. 181, p. 188–89.

[29]*Ibid.*, p. 189–90. Indeed, the Court found that in this setting religious organizations are entitled to absolute, not presumptive, constitutional protection, so the government cannot overcome the exemption, not even by claiming a compelling justification. See *ibid.*, p. 196. The Supreme Court reaffirmed and extended *Hosanna-Tabor* in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

[30]42 U.S.C. §§ 2000bb to 2000bb–4.

can satisfy strict scrutiny. State laws are not subject to the federal RFRA,[31] but they are subject to another federal statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[32] RLUIPA reimposes pre-*Smith* standards in two discrete state-law settings: land-use regulations, and regulations affecting prisoners and other institutionalized persons.

Twenty-one states have gone further, extending the pre-*Smith* approach to a full range of state laws by adopting their own, state-law RFRAs. And state courts in other states have achieved the same result as a matter of state constitutional law. All in all, some thirty or more states have either adopted state-law RFRAs or have interpreted their state constitutions to afford similar protection.[33] The remaining states are bound by RLUIPA in its selective areas of coverage, but they are free to reject claims for exemptions from other state laws as long as they comply with *Smith*'s interpretation of the Free Exercise Clause. As we have seen, *Smith* generally precludes exemption claims, but it is subject to the three exceptions noted earlier, exceptions that are themselves of uncertain scope.

Rather than simplify the law of free exercise, *Smith* and its aftermath have created a patchwork, indeed, a veritable maze of complexity. Thus, religious objectors might find their claims rejected under the rule of *Smith*, but then again they might not—depending on the jurisdiction, the subject-matter of the challenged law, and the possible application of one of *Smith*'s indeterminate exceptions.

II. THE FREE SPEECH CLAUSE AND COMPELLED SPEECH

The Free Speech Clause of the First Amendment protects "the freedom of speech." This provision protects religious as well as nonreligious speech. It also extends to non-verbal expression, that is, expressive conduct that communicates a message without the use of words as such. Burning an American flag as an act of political protest, for instance, has been protected as a form of symbolic expression.[34]

The Free Speech Clause provides only limited protection against the content-neutral regulation of speech or expression. Under prevailing Supreme Court doctrine, content-neutral laws—laws that restrict speech or expression without regard to its particular message or subject matter—are subject to First Amendment review, but they typically are evaluated under a relatively lenient balancing test. Under this test, the

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[31]See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (ruling that Congress exceeded the scope of its constitutional power in attempting to extend RFRA to the states).

[32]42 U.S.C. §§ 2000cc to 2000cc–5.

[33]For elaboration and documentation of these state-law developments, see D. O. CONKLE, *Religion, Law, and the Constitution, op. cit.*, p. 145–51.

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

government is free to engage in content-neutral regulation if the regulation is "narrowly tailored to serve a significant governmental interest,"[35] a test that is satisfied as long as the government's interest is "sufficiently substantial" and the restriction on expression is not "substantially broader than necessary" to protect that governmental interest.[36] Under this constitutional test, the government has considerable room to regulate the time, place, or manner of expression, for instance, by imposing content-neutral restrictions on the size or location of billboards[37] or by prohibiting excessive noise.[38] As long as such laws are not unduly restrictive, they are likely to be upheld.

By contrast, it generally is unconstitutional for the government to engage in content-based regulation, that is, regulation that targets speech or expression because of its message or subject matter. Such regulation typically can be justified only if it is necessary to serve a "compelling" governmental interest, a test of strict scrutiny that is at least as strong as the pre-*Smith* constitutional test under the Free Exercise Clause and that, indeed, may very well be stronger.[39] Even so, in this context as in that one, a sufficiently powerful governmental justification can satisfy strict scrutiny, thus permitting the law to stand. For example, the Supreme Court has upheld the content-based regulation of speech that provides material support to foreign terrorist organizations,[40] and it has ruled that states can bar judicial candidates from personally soliciting campaign funds, a content-based restriction that, according to the Court, is necessary to ensure public confidence in the integrity of the judiciary.[41]

Notably, the Supreme Court has ruled that the Free Speech Clause protects not only the right to speak, but also the right to refrain from speaking. The constitutional law surrounding issues of compelled speech is complex, uncertain, and unsettled.[42] At its core, however, the Court's doctrine presumptively forbids the government from dictating the content of speech or symbolic expression by forcing citizens to express messages or opinions with which they disagree. Speech compulsions of this sort are treated as content-

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[35] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

[36] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805, 808 (1984). The test for content-neutral regulation is essentially the same regardless of whether the regulation affects verbal expression or nonverbal expression, such as symbolic acts of communication. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); *Clark*, 468 U.S., p. 298.

[37] See *Taxpayers for Vincent*, 466 U.S., p. 806–07 (suggesting that the First Amendment would permit even a complete prohibition on billboards as long as the prohibition was content-neutral).

[38] See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a prohibition on "loud and raucous" sound trucks).

[39] See, e.g., *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799–805 (2011); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015).

[40] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25–39 (2010).

[41] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665–73 (2015).

[42] See E. VOLOKH, « The Law of Compelled Speech », *Tex. L. Rev.*, vol. 97, 2018, p. 355.

based regulations that, like comparable speech restrictions, trigger strict scrutiny.[43] This presumptive protection against compelled speech extends to religious as well as nonreligious objectors. In its 1943 decision in *West Virginia State Board of Education v. Barnette*,[44] for example, the Supreme Court held that public schools could not require school children to salute the American flag or to recite the Pledge of Allegiance. The successful challengers were Jehovah's Witnesses, who claimed that the state was requiring them to violate their religion by worshiping a "graven image." The Court's decision, however, protected all children who refused to participate in the flag salute or pledge, whatever their reason.[45] Decades later, the Court reaffirmed and extended *Barnette* in another case brought by Jehovah's Witnesses, ruling that the State of New Hampshire could not require objecting citizens—religious or nonreligious—to display the state's motto, "Live Free or Die," on their automobile license plates.[46]

The strict scrutiny that governs content-based speech compulsions is at least as strong as the test for content-based speech restrictions.[47] But the protection here, as elsewhere, remains presumptive rather than absolute; it can be overridden by a "sufficiently compelling" justification.[48]

III. *MASTERPIECE CAKESHOP*

The complexities and permutations of contemporary free exercise and free speech law—along with the vagaries of American federalism—have come to the fore in recent wedding vendor controversies, including the *Masterpiece Cakeshop* case, which reached the Supreme Court in 2018.[49] Masterpiece Cakeshop is a small Colorado corporation that is owned by baker Jack Phillips and his wife.[50] Citing his religious objection to same-sex marriage, Phillips refused the request of a gay couple, Charlie Craig and David Mullins, that he create a custom-made cake for their same-sex wedding reception. Throughout

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[43]As the Court has explained, "compelling individuals to speak a particular message" alters the content of their expression and therefore qualifies as a "content-based regulation of speech." *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

[44]319 U.S. 624 (1943).

[45]See *ibid.*, p. 634–35, p. 642.

[46]*Wooley v. Maynard*, 430 U.S. 705 (1977).

[47]Cf. *Barnette*, 319 U.S., p. 633 (suggesting that "involuntary affirmation" may demand "even more immediate and urgent grounds" of justification than "censorship or suppression of expression of opinion").

[48]*Wooley*, 430 U.S., p. 716.

[49]*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

[50]Phillips, as an individual, and Masterpiece, as a corporation, both were parties to the case. But their legal positions were essentially identical, and the Supreme Court drew no distinction between them. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–75 (2014) (permitting closely held corporations to assert religious freedom claims). For convenience, I will refer to Phillips and not to Masterpiece.

much of the United States, such a refusal, whether or not religiously grounded, would have been entirely lawful. There is no federal prohibition on sexual-orientation discrimination in places of public accommodation,[51] and fewer than half of the states have extended their public accommodation laws in this manner. But this case arose in Colorado, one of the states that has. More precisely, Phillips was subject to the Colorado Anti-Discrimination Act (CADA), which prohibits discrimination on various grounds, including sexual orientation, in any "place of business engaged in any sales to the public and any place offering services… to the public."[52] Invoking this statute, Craig and Mullins filed a charge with the Colorado Civil Rights Commission. After multiple hearings, the Commission ruled in the couple's favor, and the Colorado Court of Appeals affirmed the Commission's decision.[53]

Not surprisingly, Phillips relied on religious freedom in resisting the Colorado law, arguing that he should be exempted from CADA in the circumstances at hand. But his religious freedom objection was complicated and frustrated by the piecemeal pattern of free exercise law that, as explained previously, has arisen in the aftermath of *Employment Division v. Smith*.[54] Because CADA is a state law, not federal, Phillips could not rely on the federal Religious Freedom Restoration Act (RFRA),[55] which restored the pre-*Smith* approach to religious exemptions in the federal-law context. Likewise inapplicable was the Religious Land Use and Institutionalized Persons Act (RLUIPA),[56] which extends only to state laws involving land use or institutionalized persons. Phillips still could have invoked the pre-*Smith* approach if, like a majority of the states, Colorado had elected to adopt that approach as a matter of state law. In fact, however, Colorado has neither enacted a state-law RFRA nor construed its state constitution in a similar fashion. As a result, Phillips was forced to rely exclusively on the First Amendment, which brought him face-to-face with *Smith*, according to which the Free Exercise Clause generally does not require religious exemptions.

Circumventing *Smith* would require creative legal arguments, and Phillips and his advocates and allies were up to the task. First, Phillips advanced the novel claim that he was a "cake artist" who was protected not only by the Free Exercise Clause but also by

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[51]Title II of the Civil Rights Act of 1964, addressing certain places of public accommodation, forbids discrimination only "on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). By contrast, Title VII, addressing employment, includes a prohibition on sex-based discrimination, and the Supreme Court has interpreted this prohibition to include employment discrimination based on sexual orientation or gender identity. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

[52]*Colo. Rev. Stat.* § 24–34–601; see *Masterpiece*, 138 S. Ct., p. 1725.

[53]*Craig v. Masterpiece Cakeshop, Inc*., 370 P.3d 272 (Colo. Ct. App. 2015), *rev'd*, 138 S. Ct. 1719 (2018).

[54]494 U.S. 872 (1990).

[55]42 U.S.C. §§ 2000bb to 2000bb–4.

[56]42 U.S.C. §§ 2000cc to 2000cc–5.

the Free Speech Clause, including its prohibition on compelled speech. This argument obviously implicated the hybrid-claim exception to *Smith*. But the argument went further, contending that the Free Speech Clause, in itself, was sufficient to protect Phillips and any other objecting "cake artist," whether religious or not. In addition, citing *Lukumi*'s discussion of "general applicability,"[57] Phillips advanced a broad understanding of the comparable-treatment exception to *Smith*, according to which the granting of secular exemptions from a law triggers a presumptive right to religious exemptions as well. That exception applied here, he argued, because the Colorado Civil Rights Commission, in effect, had granted secular exemptions in similar circumstances when bakers had been charged with violating CADA's prohibition on *religious* discrimination. In support, Phillips cited several recent decisions in which the Commission had rejected religious discrimination claims against socially progressive bakers who, as a matter of conscience, had refused requests from a conservative Christian customer to create and decorate cakes bearing messages that opposed same-sex marriage on religious grounds. Finally, not to leave any litigation stone unturned, Phillips advanced an even more contentious claim, asserting that the Commission's failure to accord his objection equal regard was not merely the incidental byproduct of its rulings in the other cases. Instead, he argued, the Commission had treated him unfairly by design, rejecting his objection on the basis of religious animus and hostility toward Phillips and the religious beliefs that he espoused.

However contentious and convoluted these various arguments might seem, they prevailed in the Supreme Court—but only to a degree. In a surprisingly lopsided, 7–2 ruling, the Court found in favor of Phillips, but the Court's decision did little to resolve the wedding vendor controversy more generally. Ironically, although the Court's opinion addressed broader issues, its judgment rested on Phillips' most extreme and inflammatory argument: that the Commission had dismissed Phillips' objection on the basis of constitutionally illicit religious animus against him.[58] As discussed earlier, governmental action grounded in religious animus is an especially pernicious form of purposeful discrimination on the basis of religion, infringing the core Free Exercise Clause requirement of religious equality. Like other aspects of the First Amendment, the prohibition on purposeful religious discrimination is presumptive, not absolute. But the Supreme Court's finding of animus eliminated any possible argument that the government had a compelling justification for its action.[59] Rather, according to the Court,

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[57]See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–46 (1993).

[58]See generally D. O. CONKLE, « Animus and Its Alternatives: Constitutional Principle and Judicial Prudence », *op. cit*., p. 203-206 (arguing that judicial declarations of animus are inflammatory and politically divisive and therefore should be avoided when possible).

[59]In fact, the Court concluded only that animus played a role in the Commission's decision; it did not conclude that animus—as opposed to other, legitimate considerations—played a decisive or determinative role. Cf. L. G. SAGER & N. TEBBE, « The Reality Principle », *Const. Comm.*, vol. 34, 2019, p. 171, p. 177–78 & n. 24 (contending that the Court should have proceeded to strict scrutiny, permitting the government to argue that there was an independent, compelling justification for the Commission's

the Commission's action was fatally contaminated by its bias and hostility against Phillips and his conservative Christian beliefs, rendering its action irremediable.[60]

The Supreme Court's opinion in *Masterpiece* was authored by Justice Anthony Kennedy, a centrist jurist who was well aware that he would soon be announcing his retirement from the Court. Justice Kennedy apparently was seeking to preserve his legacy as a judicial champion of the constitutional rights of gays and lesbians but also a strong supporter of religious freedom.[61] In any case, his *Masterpiece* opinion offered respectful consideration, and a measure of hope, to each side of the ongoing cultural conflict surrounding gay and lesbian rights, same-sex marriage, and religious freedom. Viewed in this light, Kennedy's opinion was itself a "masterpiece" of sorts. To be sure, Kennedy ultimately ruled for Phillips on the basis of religious animus, but his opinion also included a skeptical discussion of Phillips' broader free speech and free exercise arguments, noting the difficulties and complexities that they presented and highlighting the strength of the government's competing interest in protecting gays and lesbians from discrimination.

In his compelled speech argument, Phillips contended that for him to create a cake specifically for a same-sex wedding or wedding reception—even a cake bearing neither words nor content-laden images—would be tantamount to his own endorsement of the same-sex marriage. The usual test for expressive conduct or symbolic communication, however, goes beyond the actor's subjective understanding of his conduct to ask whether reasonable observers would agree that the conduct in fact communicates in the manner the actor believes.[62] Here, it seems doubtful that reasonable observers would agree with

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decision); see generally D. O. CONKLE, « Animus and Its Alternatives: Constitutional Principle and Judicial Prudence », *op. cit.*, p. 202-203 (discussing the problem of mixed motives in the context of animus claims).

[60]See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018) (noting that "the State's interest could have been weighed against Phillips' sincere religious objection" but only if "the requisite religious neutrality" had been observed); cf. *ibid.*, p. 1734 (Gorsuch, J., concurring) ("judgmental dismissal of a sincerely held religious belief… cannot begin to satisfy strict scrutiny").

[61]Over the course of his career, Justice Kennedy authored several important decisions protecting gay and lesbian rights, culminating in the Supreme Court's 5-4 decision recognizing a constitutional right to same-sex marriage. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). At the same time, he supported religious freedom even in the controversial case of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), also a 5-4 decision. In *Hobby Lobby*, the Court ruled that the federal Religious Freedom Restoration Act required that closely held for-profit corporations be granted relief from a federal requirement that they provide their employees with health insurance coverage for contraceptives to which the companies' owners objected on religious grounds. Kennedy did not author the Court's opinion in *Hobby Lobby*, but he joined the opinion and provided the critical fifth vote for this ruling. See *ibid.*, p. 2785–87 (Kennedy, J., concurring).

[62]See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Phillips' understanding of the meaning of his cakes, including, in particular, his belief that each cake carries with it his own approval of the wedding. It therefore is not surprising that Justice Kennedy described "the free speech aspect of this case" as "difficult."[63] As Kennedy observed, "few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech,"[64] much less a personal endorsement by the baker of the wedding for which the cake was made.[65] To be sure, Kennedy went on to note the possible "application of constitutional freedoms in new contexts," and he added that "[i]f a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all."[66] And he later called Phillips' legal position "not unreasonable" in a discussion that included a description of Phillips' speech-related contentions.[67] But Kennedy plainly was wary of the compelled speech argument and its potentially far-reaching implications.[68]

With respect to the Free Exercise Clause as well, Justice Kennedy suggested that factual variations might make a difference. Even so, he emphasized that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and that their interests in freedom and equality "must be given great weight and respect by the courts" in the consideration of religious or other objections to same-sex marriage.[69] More specifically, he continued, "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."[70] Kennedy acknowledged that members of the clergy could not be compelled to perform same-sex weddings[71]—a right of refusal that might be derived from, or linked to, the institutional autonomy exception to *Smith* that the Court

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[63]*Masterpiece*, 138 S. Ct., p. 1723.

[64]*Ibid.*

[65]But see *ibid.*, p. 1742–1744 (Thomas, J., concurring in part and concurring in the judgment) (arguing that Phillips' creation of a custom-made wedding cake qualified as expressive conduct that would reasonably and properly be understood to communicate a message celebrating the wedding, the couple, and the beginning of their marriage).

[66]*Ibid.*, p. 1723 (opinion for the Court by Kennedy, J.)

[67]*Ibid.*, p. 1728. Focusing on the specifics of the case, Justice Kennedy found it potentially significant that Colorado itself, at the time Phillips refused to make the cake, had not yet legalized same-sex marriage within the state. See *ibid.* (Craig and Mullins had asked Phillips to create a cake for a wedding reception in Colorado that was to follow their wedding in Massachusetts, where their marriage would receive legal recognition.)

[68]"[A]ny decision in favor of the baker would have to be sufficiently constrained," wrote Kennedy, "lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." *Ibid.*, p. 1728–29.

[69]*Ibid.*, p. 1727.

[70]*Ibid.*

[71]*Ibid.*

recognized in *Hosanna-Tabor*.[72] But he emphasized that clergy were uniquely situated and that the right to object must be carefully confined. Otherwise, "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[73]

After expressing his skeptical view of the general First Amendment arguments of Phillips and other wedding vendors, however, Justice Kennedy moved on to his surprising conclusion: that Phillips must prevail in the case at hand because the Colorado Civil Rights Commission had shown illicit religious animus toward him. According to Kennedy, the Commission had "compromised" the "neutral and respectful consideration to which Phillips was entitled" by showing "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[74] In other words, the Commission, in supporting the equality claim of the gay couple, itself had violated Phillips' right to religious equality under the Free Exercise Clause. To justify this counterintuitive holding, Justice Kennedy relied on the combination of two sets of circumstances: first, statements made by members of the Commission during its adjudicatory hearings in the case; and second, the Commission's arguably disparate decisions in the CADA cases in which other objecting bakers had successfully escaped liability. As noted earlier, Phillips had cited those other CADA cases in contending that CADA, in reality, was not "generally applicable" and that his exemption claim properly fell within the comparable-treatment exception to *Smith*. For Kennedy, however, the other CADA cases were significant because, in combination with the commissioners' statements in Phillips' own case, they supported an inference of religious animus.

According to Justice Kennedy, the record in Phillips' case indicated that "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[75] He cited statements by two members of the seven-member Commission. One said that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state'" and if "'the law's impacting his personal belief system, he needs to look at being able to compromise.'"[76] Kennedy observed that these statements, taken alone, were open to various interpretations, but "they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights

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[72]*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).
[73]*Masterpiece*, 138 S. Ct., p. 1727.
[74]*Ibid.*, p. 1729.
[75]*Ibid.*
[76]*Ibid.*

and the dilemma he faced."[77] And Kennedy found this unfavorable interpretation confirmed by the following statement of a second commissioner, which he regarded as obviously problematic:

> "Freedom of religion and religion [have] 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."[78]

According to Justice Kennedy, this commissioner wrongly disparaged Phillips' faith, not only by describing his religious beliefs as despicable—comparable even to beliefs supporting slavery and the holocaust—but also by characterizing his religion as "merely rhetorical—something insubstantial and even insincere."[79]

Kennedy noted that the comments of these two commissioners had triggered no objection from other commissioners, nor, later, from the Colorado Court of Appeals. And the sentiment expressed, he concluded, was "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation."[80]

The other CADA cases, according to Kennedy, provided "[a]nother indication of hostility" toward Phillips and his religious views.[81] As Kennedy explained, the Commission on three occasions had permitted objecting bakers to refuse the request of a conservative Christian customer for cakes bearing religious images and text disapproving same-sex marriage,[82] including, for example, the image of a Bible and the statement that "[h]omosexuality is a detestable sin."[83] In these cases, the Commission had found no

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[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.* Justice Kennedy arguably took the two commissioners' statements out of context and misinterpreted or exaggerated their significance. See L. KENDRICK & M. SCHWARTZMAN, « The Etiquette of Animus », *Harv. L. Rev.*, vol. 132, 2018, p. 133, p. 138–43.

[80] *Masterpiece*, 138 S. Ct., p. 1729. Justice Kennedy noted that the commissioners' remarks were made "by an adjudicatory body deciding a particular case," permitting him to leave open the question of whether similar statements by lawmakers could be used to determine "whether a law intentionally discriminates on the basis of religion." *Ibid.*, p. 1730.

[81] *Ibid.*, p. 1730.

[82] In fact, these three cases were resolved by the Colorado Civil Rights Division. The Division found no probable cause to proceed, and the Commission summarily affirmed the Division's rulings.

[83] See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. Ct. App. 2015), *rev'd*, 138 S. Ct. 1719 (2018).

religious discrimination by the bakers, and therefore no violation of CADA, because the bakers had been willing to provide the customer with other products and had objected only to the particular images and words that he had requested.[84] Kennedy conceded that these cases might be distinguishable from that of Phillips. But he emphasized that they, too, involved "bakers who objected to a requested cake on the basis of conscience," and he noted that the Commission's reasoning, in two respects, "could reasonably be interpreted as being inconsistent" with its treatment of Phillips' claim.[85] First, the Commission had concluded in Phillips' case that "any message the requested wedding cake would carry would be attributed to the customer, not to the baker,"[86] but it had not addressed this argument in the other cases. Second, the Commission had ruled in favor of the other bakers in part because they were willing to provide other products to their religious customers, but it had "dismissed Phillips' willingness to sell 'birthday cakes, shower cakes, [and] cookies and brownies'… to gay and lesbian customers as irrelevant."[87]

Justice Kennedy's opinion may have been a masterpiece for himself and his judicial legacy, but his animus reasoning was highly contentious[88] and, in any event, was indeterminate in scope. Two dissenting Justices found the reasoning utterly unpersuasive.[89] But even for those who joined Kennedy's 7–Justice majority opinion,[90] the Court's animus rationale was hardly clear-cut. Especially unclear was the relative importance of the commissioners' statements, on the one hand, and the other CADA cases, on the other. Further clouding the scope of the Court's holding, moreover, were two concurring opinions addressing the significance of the other CADA cases. Five of the seven Justices who joined Kennedy's opinion also wrote or supported one of these two concurrences. And these five were divided on the question of whether the differing outcomes in the other CADA cases, without more, necessarily required a ruling in favor

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[84]As the Colorado Court of Appeals explained, the Commission "found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message." *Ibid.* In a somewhat tendentious reading of this language, Justice Kennedy suggested that it implied that the Commission itself (and perhaps the Court of Appeals)—as opposed to the objecting bakers—had determined that the requested religious message opposing same-sex marriage was indeed offensive, adding to Kennedy's concern about disparate treatment and official hostility to Phillips in the case at hand. See *Masterpiece*, 138 S. Ct., p. 1730-1731.

[85]*Masterpiece*, 138 S. Ct., p. 1730.

[86]*Ibid.*

[87]*Ibid.*

[88]Cf. L. KENDRICK & M. SCHWARTZMAN, *op. cit.*, p. 170 (claiming that Kennedy's opinion "misread the facts, distorted animus doctrine, and failed to apply that doctrine with principled consistency").

[89]Justice Ginsburg wrote the dissenting opinion for herself and Justice Sotomayor. See *Masterpiece*, 138 S. Ct., p. 1748–52 (Ginsburg, J., dissenting).

[90]I am including Justice Thomas, who supported the Court's judgment and who joined Justice Kennedy's opinion in part. See *ibid.*, p. 1740–48 (Thomas, J., concurring in part and concurring in the judgment).

of Phillips. Two Justices said no; the other three said yes.

In the first concurrence, Justice Kagan, joined by Justice Breyer, argued that the other cases were relevant only to the extent that their *reasoning* suggested hostility to Phillips' religion. The differing *results*, she said, were fully justified, because the cases were readily and obviously distinguishable. According to Kagan, the other bakers did not violate CADA by discriminating on a prohibited ground—religion—because they would not have made the requested anti-same-sex-marriage cakes for any customers, whatever their religion.[91] By contrast, she argued, Phillips did discriminate against the same-sex couple on a prohibited ground—sexual orientation—because they "requested a wedding cake that Phillips would have made for an opposite-sex couple."[92] The different outcomes "could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief."[93]

In the second concurrence, Justice Gorsuch strongly disagreed in an opinion that was joined by Justice Alito and supported by Justice Thomas in his own separate opinion.[94] According to Gorsuch, it did not matter that Phillips would have been willing to make an identical cake, bearing neither words nor content-laden images, for an opposite-sex couple. Because the cake here was requested specifically for a same-sex wedding celebration, it was a cake "celebrating same-sex marriage" no less than the cakes bearing specific messages in the other cases were cakes "denigrating same-sex marriage."[95] Thus, in his view, Phillips and the other bakers were similarly situated. None of them "actually *intended* to refuse service *because of* a customer's protected characteristic," because "they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else)."[96] The bakers in the other CADA cases "would have refused to sell a cake denigrating same-sex marriage to an atheist customer," but Phillips likewise "would have refused to

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[91]Likewise, on this view, there presumably would be no violation of CADA if *conservative* bakers refused to make cakes with *pro*-same-sex-marriage text or images for any customers, whatever their sexual orientation. Cf. *Lee v. Ashers Baking Company Ltd*., [2018] UKSC 49 (U.K. S. Ct.) (finding no unlawful discrimination when a bakery refused to provide a cake inscribed "support gay marriage" because the objection was to the message, not the customer's identity).

[92]*Masterpiece*, 138 S. Ct., p. 1733 (Kagan, J., concurring).

[93]*Ibid.*

[94]See *ibid.*, p. 1740 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas went on to address Phillips' compelled speech argument, finding a presumptive violation of the Free Speech Clause. See *ibid.*, p. 1740–48.

[95]*Ibid.*, p. 1736 (Gorsuch, J., concurring). Even without words or other content-specific elements, he argued, a wedding cake "conveys a message... [I]t celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding." *Ibid.*, p. 1738. Notably, Justice Gorsuch also joined the separate opinion of Justice Thomas, who found that Phillips' creation of a custom-made wedding cake qualified as expressive conduct under the Free Speech Clause. See *ibid.*, p. 1742–44 (Thomas, J., concurring in part and concurring in the judgment).

[96]*Ibid.*, p. 1735 (Gorsuch, J., concurring).

sell a cake celebrating same-sex marriage to a heterosexual customer."[97] As a result, "it was the kind of cake, not the kind of customer, that mattered to the bakers."[98] In deciding the cases differently, Gorsuch concluded, the Commission had "failed to act neutrally by applying a consistent legal rule."[99]

It remains to be seen whether a majority of the current Court (now the post-Kennedy Court) would agree with Justice Kagan or instead with Justice Gorsuch. Justice Kagan's opinion was joined by Justice Breyer, and Justice Sotomayor joined a dissenting opinion in *Masterpiece* that shared Kagan's perspective on this point, finding the other CADA cases properly and easily distinguishable.[100] On the other side, Justice Alito joined the opinion of Justice Gorsuch, and Justice Thomas likewise indicated his agreement. That leaves Chief Justice Roberts, who joined Kennedy's opinion but neither of the concurrences, and the newly appointed Justices Kavanaugh and Barrett, who did not participate in *Masterpiece*. If two or more of these three Justices were to adopt Gorsuch's reasoning and find it controlling in *Masterpiece*, the scope of the Court's decision might be far broader than an initial reading of Kennedy's opinion would suggest. Under this understanding, the statements of religious hostility in the adjudicatory record were not essential to the Court's holding, nor was the specific reasoning that the Commission invoked in discussing the other CADA cases. Rather, the Commission's disparate results under CADA—finding that the other bakers acted lawfully but that Phillips did not—were enough to show a violation of the Free Exercise Clause.[101]

A large number of states (and many cities) have public accommodation laws that, like Colorado's, include both sexual orientation and religion as forbidden grounds of discrimination. Like Colorado, these other jurisdictions are likely to deny exemptions to religious wedding vendors who object to providing goods or services for same-sex weddings. Unlike Colorado, the commissions and courts of these other jurisdictions might be meticulously neutral and respectful in their discussion of the religious objectors and their religious beliefs. At the same time, if confronted with cases alleging religious discrimination by vendors who have objected to the specific content of particular religious messages, the commissions and courts are likely to agree with Justice Kagan's opinion in *Masterpiece*. In other words, they are likely to find unlawful sexual-orientation discrimination by religious vendors who object to providing goods or services for same-sex weddings but no unlawful religious discrimination by vendors who object to

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[97] *Ibid.*, p. 1736.

[98] *Ibid.*

[99] *Ibid.*

[100] See *ibid.*, p. 1749-1750 (Ginsburg, J., dissenting). Justice Ginsburg died in September 2020 and has since been succeeded by Justice Barrett.

[101] Cf. D. LAYCOCK, « The Broader Implications of *Masterpiece Cakeshop* », *BYU L. Rev.*, vol. 2019, p. 167 (elaborating—and endorsing—a broad understanding of *Masterpiece* comparable to that of Justice Gorsuch).

customer requests for specific religious messages opposing same-sex marriage.[102] Although such a distinction might seem reasonable, it will not be sufficient if the Gorsuch opinion is deemed controlling. Instead, the differential case results will be enough, without more, to trigger a finding of unconstitutional religious animus or, at a minimum, a presumptive right to a religious exemption under the comparable-treatment exception to *Smith*, a presumption that could not be overcome without compelling justification.[103]

IV. BEYOND *MASTERPIECE*: TOWARD A RECONCILIATION OF COMPETING RIGHTS

Given the uncertainties surrounding the Court's decision, the issues raised by *Masterpiece* have not disappeared. They continue to be litigated and are likely to return to the Supreme Court.[104] The question thus becomes: how should the Court resolve these issues?

As I noted at the outset, the wedding vendor controversy replicates an earlier debate surrounding the Civil Rights Act of 1964, and it presents a similar question: which should prevail—equality, on the one hand, or a competing claim of individual freedom, on the other? In addressing the Civil Rights Act, and in other settings as well, the Supreme Court's answer with respect to racial equality has been clear and unequivocal: the promotion of racial equality overrides competing claims of freedom, including

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[102]These latter results, and therefore the allegedly improper disparate treatment, could be generated by litigation-oriented "tester" customers who request religiously themed anti-same-sex-marriage products or services. See *ibid.*, p. 186–87.

[103]In his opinion, Justice Gorsuch appeared to embrace a broad reading of the comparable-treatment exception, citing *Lukumi*'s discussion of "general applicability" and stating that the Colorado Civil Rights Commission could not "apply a more generous legal test to secular objections than religious ones" unless it could satisfy strict scrutiny. *Masterpiece*, 138 S. Ct., p. 1737 (Gorsuch, J., concurring), citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–44 (1993); cf. *ibid.*, p. 1739 (stating that a law falls within the doctrine of *Smith* only if it is "applied in a manner that treats religion with neutral respect"). Since *Masterpiece*, in a series of cases arising during the COVID-19 pandemic, the Supreme Court has considered the scope of the comparable-treatment exception in the context of pandemic-related governmental orders that restricted religious worship services to a greater degree than certain permitted secular activities. See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. — (Nov. 25, 2020).

[104]Various wedding vendor cases are in the judicial pipeline, including two that the Supreme Court has vacated and remanded for further consideration in light of *Masterpiece*. See *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. S. Ct. 2017), *vacated and remanded*, 138 S. Ct. 2671 (2018); *Klein v. Oregon Bureau of Labor and Industries*, 410 P.3d 1051 (Or. Ct. App. 2017), *vacated and remanded*, 139 S. Ct. 2713 (2019). In one of these two cases, the state court already has reaffirmed its earlier decision, rejecting the First Amendment claims of a florist, and the florist in turn is seeking Supreme Court review, asking the Justices to resolve the issues left open in *Masterpiece*. See *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. S. Ct. 2019), *petition for cert. filed*, No. 19-333 (U.S. S. Ct. Sept. 11, 2019).

religious freedom. And the Court has defended this conclusion directly and transparently, finding that laws preventing racial discrimination satisfy strict scrutiny because they serve a compelling governmental interest that demands uniform application, even to religious objectors, thus overriding the objectors' religious freedom and defeating their claims for religious exemptions.

Consider, by contrast, the manner in which the Justices, to date, have addressed the wedding vendor controversy and, more broadly, the issue of religious exemptions from otherwise applicable laws. Instead of clarity and transparency, we have seen ambiguity, hair-splitting distinctions, and highly contentious rationales and arguments. Through its decision—and non-decisions—in *Masterpiece*, the Supreme Court has stretched the meaning of religious animus, clouded the rule of *Employment Division v. Smith*[105] and the scope of its comparable-treatment exception, and left open the possibility of a far-reaching conception of compelled speech that would exempt even non-religious objectors from the normal operation of anti-discrimination laws.

I do not doubt that the issues in play are complex and controversial, and I cannot hope to fully address them here. Even so, I believe that the Court can do better than it has, and, in the remainder of this Essay, I will offer three suggestions. First, the Court should reject the compelled speech argument in the wedding vendor context. Second, it should repudiate the rule of *Employment Division v. Smith*, bringing back the pre-*Smith* interpretation of the Free Exercise Clause. Under this approach, a substantial burden on the exercise of religion, without more, is sufficient to trigger a presumptive constitutional right to a religious exemption—a right that can be overcome if, but only if, the government can satisfy strict scrutiny. And third, in applying the pre-*Smith* approach in the wedding vendor context, the Court should find strict scrutiny satisfied, thereby rejecting the vendors' claims for religious exemptions.

A. THE WEDDING VENDORS' COMPELLED SPEECH ARGUMENT IS UNPERSUASIVE

In considering the compelled speech argument, the first question, of course, is whether the creation of a custom-made wedding cake should be regarded as expressive conduct within the scope of the Free Speech Clause. Other wedding vendor cases have presented similar questions. For example, is the Free Speech Clause implicated by a wedding florist's creation of decorative floral arrangements or by the photography of a wedding photographer? Is the work of such vendors like that of a musician or artist, whose work clearly would qualify for free speech protection? In an *amici curiae* brief in *Masterpiece*, two prominent constitutional scholars addressed these issues, contending that a wedding photographer should be protected by the Free Speech Clause but that a

[105] 494 U.S. 872 (1990).

baker, no matter how creative and beautiful his cakes, should not.[106] The two scholars apparently could not agree about a wedding florist, their brief being silent on that issue.[107]

These questions are interesting and difficult, but they ultimately miss the point. Even if the work of a wedding vendor is sufficiently expressive to fall within the general scope of the Free Speech Clause, the compelled speech argument hinges on a more narrow issue: does the vendor's expressive conduct in fact convey, to a reasonable observer, the message to which the vendor objects, that is, does it convey his or her personal approval and endorsement of the same-sex wedding? As discussed earlier, this seems unlikely. In any event, and more important, the government is not *targeting* the vendor's conduct in order to dictate its expressive content or to require the vendor to communicate a message of the government's choosing. As a result, the regulatory action should not be treated as content-based and therefore should not trigger free speech strict scrutiny. Rather, the governmental action—forbidding the discriminatory denial of goods or services, a business practice that *normally* is neither speech nor expressive conduct under the Free Speech Clause—should be treated as a content-neutral regulation that has, at most, an incidental *effect* on expression.[108]

As I explained earlier, content-neutral regulations are not immune from free speech scrutiny, but they generally trigger a relatively lenient balancing test that, in the current situation, the government can easily satisfy.[109] Indeed, as I argue below in

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[106]See *Brief of American Unity Fund and Professors Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111). The brief noted that cakes bearing specific words or images might require a different analysis. See *ibid.*, p. 10, p. 18–19.

[107]The brief discussed various other occupations, arguing that graphic designers and singers, for example, should be protected by the Free Speech Clause but that clothing designers and hairdressers, among others, should not. See *ibid.*, p. 4, p. 11–13.

[108]See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). This analysis should apply even if the vendor's product or service includes specific language or content-laden images, as long as the vendor is a business serving the general public that is being required merely to provide the very same product or service on a nondiscriminatory basis. To be sure, some lower courts have ruled otherwise, finding anti-discrimination laws content-based as applied to objecting wedding vendors whose products or services are expressive in nature, leading the courts to invoke strict scrutiny and to hold that the laws cannot be applied to vendors who object to same-sex weddings. See, e.g., *Telescope Media Group v. Lucero*, 936 F.3d 740, 750–58 (8th Cir. 2019) (2-1 decision accepting compelled speech argument of commercial wedding videographers); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 902–17 (Ariz. S. Ct. 2019) (4-3 decision accepting similar argument by vendors of custom wedding invitations). I think these lower-court rulings are mistaken.

[109]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. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995) (permitting a group of military veterans, as parade organizers, to exclude a gay pride group from marching in the parade); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (permitting the Boy Scouts, a nonprofit group engaged in "expressive association," to preclude an

discussing the Free Exercise Clause, the government here can satisfy even strict scrutiny. *A fortiori*, it can satisfy this more forgiving constitutional test.

B. THE SUPREME COURT SHOULD REJECT THE RULE OF *SMITH* AND RETURN TO ITS PRE-*SMITH* INTERPRETATION OF THE FREE EXERCISE CLAUSE

Turning, then, to the free exercise of religion, the current state of American law is fractured and problematic. In its 1990 decision in *Employment Division v. Smith*,[110] the Supreme Court broadly declared that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability. In so doing, the Court upended its earlier interpretation of the Free Exercise Clause, which had prevailed for more than a quarter century. Now, some three decades later, the Supreme Court is being asked to change directions once again.[111] Four Justices recently have hinted that they might be inclined to take this step, noting with apparent concern that the Court in *Smith* "drastically cut back on the protection provided by the Free Exercise Clause."[112] In my judgment, the Supreme Court should indeed reverse course once again, rejecting the rule of *Smith* and returning to the pre-*Smith* approach. Such a ruling would simplify and consolidate the law of free exercise. It would put an end to contentious debates about the scope of *Smith* and its exceptions even as it implemented an approach that already dominates American law due to legislative and state-law developments.

At the time of *Smith*, the Court might have supposed that its new interpretation of the Free Exercise Clause would simplify the law by minimizing, if not eliminating, claims for religious exemptions from otherwise applicable laws. Instead, from 1990 to the present, there have been continuing requests for religious exemptions in a wide variety of settings, both under the Free Exercise Clause and under parallel free exercise regimes created by Congress and the states. The rule of *Smith* has not settled the law. Instead, the rule—controversial from the beginning—has been subject to ongoing and mounting pressure, both in the Supreme Court and in the broader political and legal culture. As explained earlier, the Court itself, in *Smith* and in later decisions, compromised whatever clarity its new doctrine might have provided by recognizing various exceptions to the general rule that it declared. The comparable-treatment exception, in particular, is

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openly gay man from serving as a scoutmaster). But this protection should not be extended to vendors in the commercial marketplace. Cf. *Brush & Nib Studio, LC*, 448 P.3d, p. 929 (Bales, J., dissenting) ("[E]quality prevails when we are dealing with public accommodations such as businesses serving the public.").

[110] 494 U.S. 872 (1990).

[111] The Court has agreed to consider the continuing viability of *Smith* in a case likely to be decided in the spring of 2021. See *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020), *granting cert. to* 922 F.3d 140 (3d Cir. 2019).

[112] *Kennedy v. Bremerton School District*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., statement respecting denial of certiorari).

exceedingly ambiguous and is potentially capacious. As *Masterpiece* reveals, moreover, some Justices are inclined to treat disparate treatment as tantamount to deliberate religious hostility and animus, rendering the governmental action unconstitutional on that basis. And in many legal contexts, the rule of *Smith* has been categorically repudiated and replaced by legislative action or by state judicial decisions. As a result, the pre-*Smith* approach now dominates American law, governing federal law throughout the United States and state law in a majority of the states.

To be sure, the pre-*Smith* approach, which commanded overwhelming political support in the immediate aftermath of *Smith*,[113] has itself become controversial in the last two decades. Recent state-law RFRA proposals, for instance, have generated fierce political opposition. But most of the opposition is not directed to the pre-*Smith* approach as a general legal standard. Rather, it comes from advocates of equality and nondiscrimination who believe that religious objectors should not be able to obtain exemptions when the government is seeking to advance a competing interest in equality, especially the equality of gays, lesbians, and transgender individuals.[114] In other words, the concern is directed mainly to the outcome of cases like *Masterpiece*. Addressing this concern, however, does not require a general rejection of the pre-*Smith* approach. Instead, it would be enough to conclude that the promotion of equality provides a compelling justification sufficient to satisfy strict scrutiny and therefore to overcome the religious objection. I will return to that issue shortly, defending just such a conclusion. For now, suffice it to say that the pre-*Smith* approach already is broadly applicable in the United States and that it need not be understood to privilege religious freedom at the expense of equality.

Returning to the pre-*Smith* interpretation of the Free Exercise Clause would provide a national standard for resolving claims for religious exemptions. The federal RFRA, RLUIPA, and comparable state laws would not disappear, but they likely would (and should) be interpreted to provide essentially the same protection as the Free Exercise Clause. Americans once again would have the same level of free exercise protection throughout the United States, and that protection would extend to state as well as federal laws. Moreover, at least as compared to *Smith* and its exceptions, the legal standard would be relatively straightforward and transparent, giving religious objectors presumptive protection from substantial burdens on the exercise of religion but permitting the government to overcome that presumption for compelling reasons.

Because it would simplify and consolidate the law, returning to the pre-*Smith* approach would be sound as a matter of jurisprudential judgment. It likewise would be sound as a matter of constitutional principle. As explained earlier, the Free Exercise

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[113]See D. O. CONKLE, *Religion, Law, and the Constitution*, *op. cit*., p. 124.
[114]See *ibid.*, p. 149-151.

Clause is properly understood to protect religious freedom as well as religious equality. And religious freedom, in its most basic and fundamental sense, means religious voluntarism—the freedom of individuals to make religious decisions for themselves and to guide their conduct accordingly.

In her separate opinion in *Smith*, Justice Sandra Day O'Connor, a centrist jurist much like Justice Kennedy, strongly objected to the Court's rejection of its earlier interpretation of the Free Exercise Clause.[115] In so doing, she rebuked the Court for its failure to understand the importance of religious voluntarism and to recognize that it can be imperiled even by laws that are neutral and generally applicable, which "can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[116] As Justice O'Connor observed, "conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[117] But she emphasized that the protection afforded to religiously motivated conduct was and should be presumptive, not absolute, adding that courts had shown that they were "quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[118] Indeed, applying the pre-*Smith* approach in the case at hand, which concerned the religious use of an otherwise illegal drug, O'Connor found strict scrutiny satisfied and would have rejected a religious exemption on that basis.[119]

Justice O'Connor was right to support the Court's pre-*Smith* doctrine. The Free Exercise Clause should honor the value of religious voluntarism by offering presumptive, but not absolute, protection against laws that substantially burden the exercise of religion. The aftermath of *Smith*—complete with doctrinal exceptions and statutory and state-law variations—has demonstrated unrelenting pressure on the approach that the Court adopted in that case. Both as a matter of jurisprudential judgment and as a matter of constitutional principle, the Court should repudiate the rule of *Smith* and return to its prior doctrine.

C. PREVENTING DISCRIMINATION PROVIDES A COMPELLING JUSTIFICATION THAT OVERRIDES WEDDING VENDORS' FREE EXERCISE RIGHTS

Under the constitutional doctrine that the Supreme Court should apply, the Free

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[115]See *Smith*, 494 U.S., p. 892–903 (O'Connor, J., concurring in the judgment).

[116]*Ibid.*, p. 901.

[117]*Ibid.*, p. 893.

[118]*Ibid.*, p. 902.

[119]*Ibid.*, p. 903–07. Three dissenting Justices agreed with Justice O'Connor's rejection of the Court's new doctrine and therefore agreed that strict scrutiny was appropriate, but they argued that the government could not satisfy that test and that a religious exemption should be granted. See *ibid.*, p. 907-921 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

Exercise Clause requires religious exemptions from laws that substantially burden the exercise of religion unless the government can satisfy strict scrutiny. As applied to wedding vendors who object on religious grounds, the legal penalties that public accommodation laws entail, including fines and judicial orders, rather clearly qualify as substantial burdens.[120] The laws impose substantial coercive pressure on the objecting vendors, impairing their freedom to make religious choices and to act upon those choices as a matter of religious conscience. Even so, their right to an exemption is presumptive, not absolute. It can be overcome if the government can satisfy strict scrutiny.

To satisfy strict scrutiny in the religious exemption context, a law must serve a compelling governmental interest that requires the law's application, without exception, even to the religious objectors. Strict scrutiny is a demanding test, one that the government cannot easily satisfy. Exactly how demanding is a matter of debate. Justice O'Connor's understanding of the test—that it calls for "sensible balances between religious liberty and competing state interests"[121]—might suggest that the test is flexible enough to permit the denial of exemptions in many cases. In the aftermath of *Smith*, however, the federal RFRA, as well as RLUIPA and the various state-law RFRAs, have adopted statutory definitions of strict scrutiny that could be read to require a test that is quite demanding indeed. According to these statutes, the government cannot "substantially burden a person's exercise of religion," that is, it must grant a religious exemption, unless it can "demonstrate[ ] 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."[122] Even this language, however, is capable of stronger or more moderate readings. Indeed, at the same time that it adopted this language for the federal RFRA, Congress noted with approval Justice O'Connor's reference to "sensible balances."[123]

As I have suggested, one reason for returning to pre-*Smith* law under the Free Exercise Clause is to simplify the law of free exercise. In furtherance of this objective, the Supreme Court should declare that the test of strict scrutiny under the Free Exercise Clause is identical to the test adopted by Congress in RFRA and RLUIPA, a declaration that probably would induce state courts likewise to adopt the same approach in

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[120]See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–79 (2014) (finding a substantial burden under the federal RFRA when a federal law imposed large financial penalties on employers who refused to provide their employees with health insurance coverage for contraceptives that the employers found objectionable on religious grounds).

[121]*Smith*, 494 U.S., p. 902 (O'Connor, J., concurring in the judgment).

[122]The quoted language is drawn from the federal RFRA, 42 U.S.C. § 2000bb–1(a), (b). RLUIPA includes substantially identical provisions. See 42 U.S.C. § 2000cc(a)(1); 42 U.S.C. § 2000cc–1(a). State-law RFRAs likewise have adopted this or similar language.

[123]See 42 U.S.C. § 2000bb(a)(5).

interpreting their state-law RFRAs and state constitutional law.[124] The Court should further declare that free exercise strict scrutiny should be understood and applied vigorously, with keen recognition of the fundamental value of religious voluntarism. At the same time, there must be room for the government to vindicate its compelling interests. The test should be strict but not always fatal, demanding but not impossible to satisfy. Not every claim for a religious exemption can or should be granted.

In the wedding vendor context, the government presents a justification that is sufficient to satisfy even this demanding version of strict scrutiny. Its interest, the prevention of discrimination against gay and lesbian couples, readily qualifies as compelling. The more difficult question is whether this interest requires that the law be applied, without exception, even to the religious objectors. After all, the disadvantaged couples generally will be able to obtain the same goods or services elsewhere, with minimal inconvenience and little if any tangible injury. Accordingly, one might argue, the government can accommodate religious objectors without undermining its general interest in preventing discrimination. The couples will not be denied the goods or services that they seek; they simply will not obtain them from the particular vendors who object. This argument is not implausible, but it should be rejected. It is true that the discrimination of wedding vendors causes no significant tangible harm to same-sex couples. But they suffer a more serious injury: the indignity of being denied goods or services by a commercial business that serves the general public. The legislative judgment reflected in the challenged laws is powerful and persuasive: that full equality for gays and lesbians includes a right to equal treatment—and the equal treatment of their weddings and marriages—in the commercial sphere. And the legislature is free to conclude that this right to equal treatment can tolerate no exceptions, not even for religious objectors.[125]

In addressing comparable issues arising under the Civil Rights Act of 1964, the Supreme Court has concluded that the government has a compelling interest in redressing racial discrimination and that this interest does not permit exceptions for religious objectors. In the particular context of public accommodations, it has ruled against a commercial vendor who refused, on religious grounds, to serve African-American customers.[126] Likewise, and more recently, the Court has made it clear that commercial employers cannot rely on religious objections to avoid the Civil Rights Act's prohibition

[124]The Supreme Court has no authority to dictate the resolution of state law questions.

[125]This is not to say that states and cities are *required* to forbid discrimination on the basis of sexual orientation, nor that, if they do, they cannot *choose* to include exemptions for religious objectors, even in the commercial sphere. See generally D. O. CONKLE, *Religion, Law, and the Constitution*, *op. cit.*, p. 173–88 (discussing the government's power to accommodate religious freedom even when the Free Exercise Clause does not require it to do so).

[126]*Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402–03 n. 5 (1968) (per curiam).

on racial discrimination in employment.[127] The Court has applied similar reasoning even outside the commercial sphere and, notably, even when the religious objector was discriminating only against individuals who engaged in interracial dating or interracial marriage. Thus, in *Bob Jones University v. United States*,[128] the Court rejected the free exercise claims of religious schools that sought tax-exempt status despite their violation of a governmental policy forbidding racial discrimination. The Justices concluded that the governmental policy served a compelling interest—the eradication of racial discrimination in education—and that the policy properly applied, without exception, even to the religious objectors, including a religious school that admitted students of all races but that prohibited interracial dating and interracial marriage on the basis of religious doctrine.[129]

If extended to sexual orientation and religious objections to same-sex marriage, these various precedents, taken together, strongly support the conclusion that the government has a compelling justification for rejecting religious exemptions. To be sure, one could attempt to distinguish these precedents by arguing that racial discrimination is uniquely odious in the United States, linked as it is to the grotesque history of African slavery and its continuing legacy.[130] But at least in the commercial sphere, legislatures should be free to treat other forms of discrimination, including discrimination based on sexual orientation, in a similar manner.[131] The Court therefore should follow its precedents with respect to race,[132] concluding that here, too, the government satisfies

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[127]See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (declaring that racial discrimination in employment cannot "be cloaked as religious practice to escape legal sanction" because the government "has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal").

[128]461 U.S. 574 (1983).

[129]*Ibid.*, p. 604 (finding that the government's compelling interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs" and that the "interests asserted by petitioners cannot be accommodated with that compelling governmental interest"); see *ibid.*, p. 605 (concluding that a ban on interracial dating and interracial marriage violated the governmental policy because it was a form of forbidden racial discrimination).

[130]In an *amicus curiae* brief supporting the wedding vendor (albeit on free speech grounds), the government of the United States advanced such an argument in *Masterpiece*. See *Brief for the United States as Amicus Curiae Supporting Petitioners*, p. 31–33, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111).

[131]See *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1235 (Wash. S. Ct. 2019) (finding that "eradicating barriers to the equal treatment of all citizens in the commercial marketplace" provides a compelling justification for rejecting religious exemptions for wedding vendors who refuse to provide goods or services for same-sex weddings), *petition for cert. filed*, No. 19-333 (U.S. S. Ct. Sept. 11, 2019).

[132]The government's interest in preventing discrimination, even racial discrimination, does not override religious freedom in every setting. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (holding that religious organizations have the right to hire and fire ministers and other religious leaders as they see fit, without regard to otherwise applicable employment discrimination laws).

strict scrutiny and therefore overcomes the wedding vendors' claims under the Free Exercise Clause.[133]

V. CONCLUDING OBSERVATIONS

I have discussed the complexities of American free speech and free exercise law, especially as they relate to the wedding vendor controversy, and I have offered three suggestions for resolving this dispute and for improving and clarifying the law. First, the Supreme Court should reject the wedding vendors' compelled speech argument. Second, the Court should repudiate *Employment Division v. Smith*[134] and reinstate its earlier interpretation of the Free Exercise Clause. And third, applying that interpretation in the wedding vendor context, it should find strict scrutiny satisfied and therefore should reject the vendors' free exercise claims.

I believe that my suggestions are sound, but even if I am mistaken, I am confident that the current state of the law is unacceptable. The law of free exercise should be transparent, not opaque, and it should be uniform, not piecemeal. And the wedding vendor controversy should be resolved, through forthright judicial balancing, as the conflict of competing values that it is: the equality of same-sex couples, on the one hand, and the religious freedom of the objecting vendors, on the other.

[133]The government's satisfaction of strict scrutiny also provides an additional reason for rejecting the wedding vendors' compelled speech argument. As discussed earlier, I do not believe that the Free Speech Clause should trigger strict scrutiny in this context. But even if it does, the government should still prevail.

[134]494 U.S. 872 (1990).