

The Wedding-Vendor Cases

41 *Harvard Journal of Law and Public Policy* 49 (2018)

This is based on my contribution to a panel discussion at the 2017 National Student Symposium of the Federalist Society, the prominent conservative legal group. We were asked to comment on the stunningly one-sided report of the United States Commission on Civil Rights, and I do that very briefly, but by the time the Symposium met, the 2016 election had rendered that report obsolete.

Most of this article is a scholarly version of the free exercise argument in Masterpiece Cakeshop, with responses along the way to Marci Hamilton at Cardozo and William Marshall at North Carolina. What is new here, in addition to the Civil Rights Commission, is some broader context for how the wedding-vendor cases arose and have been litigated, and responses to Professor Hamilton's oral assertions that claims of religious liberty are all about sex discrimination and that religious liberty should be entirely left to legislatures.

I. The Report of the Commission on Civil Rights

We were originally asked to address the report on religious liberty from the United States Commission on Civil Rights.¹ That report was rendered obsolete by the 2016 election, except in the sense that about half the country probably agrees with it.

1. U. S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NON-DISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.pdf [<https://perma.cc/GHK8-YFWZ>].

The Civil Rights Commission is an advisory body.² The Commission delivered its report to an administration that would have agreed with some of it. But the Obama Administration certainly would not have agreed with the tone. President Obama was much better on religious liberty than conservatives give him credit for.³

The Trump Administration is very different, and it remains unpredictable. Religious liberty is looking better in some ways for conservative Christians. It's looking worse for Muslims, but apart from the various versions of the travel ban,⁴ it is so far not as catastrophically worse as I had feared. Religious liberty may be less protected for liberal Christians and all other non-Christians; they are not the religions this Administration cares about. The Attorney General has issued memoranda that promise to enforce all existing protections for religious liberty and appear to make that promise evenhandedly for all faiths.⁵ Perhaps the Administration's enforcement priorities will also be evenhanded; time will tell.

The Commission's report addresses only a very narrow slice of issues: the sometime conflict between religious liberty and other civil rights.⁶ Just a quick reminder: religious liberty *is* a civil right.⁷ Issues relating to gay rights and contraception have dominated religious liberty debates in recent years; they have taken most of the oxygen out of the room. But most religious liberty issues have nothing to do with sex, gay rights, or contraception.

2. See 42 U.S.C. § 1975a (2012) (specifying the Commission's duties, none of which include any power to regulate or enforce); *United States v. Wilson*, 290 F.3d 347, 350 (D.C. Cir. 2002) ("The Commission's functions are purely investigatory and advisory—it has neither the power to enforce federal law, nor to promulgate any rules with the force of law").

3. See Douglas Laycock, *Opening Essay: Protecting Religious Liberty in the Culture Wars*, in *DEEP COMMITMENTS: THE PAST, PRESENT, AND FUTURE OF RELIGIOUS LIBERTY* 21, 32-33 (2017) (text at notes 38-43 [in Section IV.B of volume 4]) (reviewing range of Obama Administration positions, which were mostly but not always supportive of religious liberty); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 862 (text at note 135 [in Section IV.B of volume 4]) (concluding, after detailed analysis, that Obama regulations on contraception "offer a serious plan to protect religious liberty without depriving women of contraception").

4. Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. No. 8,977 (Jan. 27, 2017).

5. Press Release, Dep't of Justice, Attorney General Sessions Issues Guidance on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty> [<https://perma.cc/EK3L-HTCB>].

6. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 1.

7. See Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 497 (2014).

Counting from *Employment Division v. Smith*⁸ forward, there have been eleven merits decisions in the Supreme Court on free exercise claims brought either under the Constitution or under federal religious liberty legislation. Only two of them were about contraception.⁹ None were about wedding vendors or gay rights, but now there will be one: the Court has granted review in a wedding-vendor case.¹⁰ Nine of the eleven cases decided so far were about a great diversity of things unrelated to sex.¹¹ And this does not include the six cases on freedom of religious speech, which were about speech on a wide range of topics.¹² A more extensive study of cases in the Tenth Circuit and its district courts found a similar pattern. Apart from the flurry of substantially identical cases about contraception, there weren't many cases and they weren't about sex.¹³ There is a risk of throwing out religious liberty for all kinds of religious minorities because of the deep hostility between the two sides about sex.¹⁴

8. 494 U.S. 872 (1990) (holding that the Free Exercise Clause offers only scattered protections against neutral and generally applicable laws).

9. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

10. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

11. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2212 (2017) (right of churches to equal access to state funding of playgrounds); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (Muslim prisoner's right to grow beard); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (right of religious organizations to hire and fire ministers); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (right to use mild hallucinogenic in worship services); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (right to exercise religion in prison); *Locke v. Davey*, 540 U.S. 712 (2004) (right of theology majors to equal access to financial aid); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (right to build worship space); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (right to sacrifice animals); *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (right to receive unemployment compensation after losing job for using illegal drug in a worship service).

12. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (statement of faith); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001) (student Christian club); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (religious magazine); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (cross in public forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (movies on family life); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (student Christian club).

13. Luke W. Goodrich & Rachel Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. (forthcoming 2017), <https://ssrn.com/abstract=3067053> [<https://perma.cc/8HNW-NKJB>].

14. See Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3 (examining how deep disagreements over issues related to sex have undermined support for religious liberty);

The title of the Commission's report is *Peaceful Coexistence*, but the text shows no interest whatever in peaceful coexistence; it calls for unconditional surrender by those claiming a right to religious liberty.¹⁵ The majority adopted every argument it ever encountered against protecting the actual exercise of religion and in favor of protecting only the right to believe.¹⁶ It adopted arguments that have nothing to do with the nondiscrimination laws that are its charge—arguments that would tend to suppress religious liberty universally and not just in the context of other civil rights laws. Examples include the conclusory assertion that protecting religious beliefs but not practices is “fairer and easier to apply,” and even the absurd argument that religious liberty deserves little protection because religious beliefs and practices can change over time.¹⁷ Its review of the cases is mechanical, wooden, and in places, inaccurate.¹⁸ When you say that the Establishment Clause has received more consistent judicial developments than other clauses,¹⁹ you forfeit much of the little credibility you may have had.

The formal recommendations are question-begging if read literally. The Commission says that exemptions are bad when they're overly broad; that we should not unduly burden other civil rights or civil liberties; that we should apply *Smith* except when there's controlling authority otherwise.²⁰ How much is overly, unduly, or controlling is not addressed in the findings or recommendations, but the majority's view is clear from the commissioners' separate statements.²¹ They

Douglas Laycock, *Sex, Atheism, and Religious Liberty*, 88 U. DET. MERCY L. REV. 404, 411-19 (2011) (text at notes 30-67 [in Section IV.B of volume 4]) (same).

15. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 27 (appearing to recommend elimination of religious exemptions by interpretation and legislative amendment); Charles C. Haynes, *The Deeply Troubling Federal Report Targeting Religious Freedom*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/16/the-deeply-troubling-federal-report-highlighting-religious-freedom/?utm_term=.aa310ca816b6 [<https://perma.cc/6JQB-6CNK>].

16. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 25-27 (Findings and Recommendations).

17. *Id.* at 26.

18. See *id.* at 5-17 (reviewing cases). For inaccuracies, see, e.g., *id.* at 6 n.10 (citing a free speech case, *Healy v. James*, 408 U.S. 169 (1972), as an Establishment Clause case); *id.* at 8 n.20 (stating that religious organizations are “generally treated as private organizations even though qualifying for various tax exemptions”). This last sentence implies a deeply mistaken premise. It is fundamental to the separation of church and state that religious organizations are private actors. Even direct financial assistance would not make them state actors, see, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982), and tax exemption certainly does not make them state actors.

19. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 6.

20. *Id.* at 26-27.

21. *Id.* at 29-41.

are opposed to religious exemptions, but they offer little reasoning in support of that view and make no attempt to grapple with the real issues. They announce at the beginning that the rights they prefer are preeminent, and therefore, they always prevail in case of any conflict.²²

II. The Litigation

Enough about the Commission. What are the real issues on the questions it addressed? The contraception issue has gone away by administrative rulemaking. The Trump Administration has issued new interim final rules that expand the range of employers eligible for the exemption and abandon the existing regulations' measures to provide free contraception to women whose employers are exempted from providing it.²³ Now a variety of plaintiffs claim that this broadened exemption is unconstitutional,²⁴ but the constitutional claims in that litigation have little prospect of success.

The wedding-vendor cases²⁵—do florists, bakers, wedding planners, and the like have to provide services for same-sex weddings—are not going away. These cases have mostly been a matter of state law, and so at first appeared to be not much affected by the election. The discrimination claim does not arise under federal law; there is no federal gay-rights law. And even if the Supreme Court interprets sex discrimination to cover sexual orientation and gender identity—an issue that is rapidly percolating in the courts of appeals²⁶—the

22. *Id.* at second page preceding page i, 25.

23. 26 C.F.R. § 54.9815-2713AT (Treasury); 29 C.F.R. § 2590.715-2713A (Labor); 45 C.F.R. §§ 147.131-147.132 (Health and Human Services). These regulations are available at 82 Fed. Reg. 47,838 (Oct. 13, 2017).

24. *See, e.g.*, Complaint, Massachusetts v. U.S. Dep't of Health & Human Servs., No. 1:17-cv-11930, 2017 WL 4466414 (D. Mass. Oct. 6, 2017). [This case was dismissed for lack of standing, 2018 WL 1257762 (D. Mass. March 12, 2018). Other cases, on behalf of women working for exempted employers, may get past that hurdle. I still believe they are likely to lose on the merits.]

25. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

26. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034 (7th Cir. 2017) (holding that Title IX protects against gender-identity discrimination), *petition for cert. filed*, No. 17-301, 2017 WL 3713066 (U.S. Aug. 14, 2017); Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination), *rehearing en banc granted*, No. 15-3775, 85 U.S.L.W. 1647 (2d Cir. May 25, 2017); Hively v. Ivy Tech Cmty.

federal public-accommodations law does not prohibit sex discrimination, and it applies only to hotels, restaurants, gas stations, and entertainment venues.²⁷ So there is no federal nondiscrimination law that on any remotely plausible interpretation would reach the wedding-vendor cases. This issue remains to be fought out under state law, in state legislatures, and in Congress.

The most promising religious liberty defenses in these cases have also been based on state law—on state constitutions and state Religious Freedom Restoration Acts.²⁸ The only federal issues are a claim that the required conduct is compelled speech,²⁹ a claim that the ban on sexual-orientation discrimination is not neutral and generally applicable,³⁰ and a claim (which usually has not been preserved) that *Employment Division v. Smith* should be overruled.

None of these claims is obviously lacking in merit, but each has doctrinal and realist problems. No long-term strategist would choose these polarizing cases either to test the meaning of “generally applicable law” or to seek a reconsideration of *Smith*. The Court’s conservatives might bite on one of these federal issues because they see religious oppression and have no other way to help. There is more than one potential swing vote on these issues, but all the attention will be on Justice Kennedy. Kennedy was part of the majority in *Smith*, and he has written all the gay-rights opinions.³¹

Whatever the difficulties, the Court has agreed to decide *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³² the case of a baker

Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that Title VII protects against sexual-orientation discrimination); *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination, but that gay plaintiff had sufficiently alleged claim of gender stereotyping); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination), *petition for cert. filed*, No. 17-370, 2017 WL 4022788 (U.S. Sept. 7, 2017) [cert. denied, 138 S. Ct. 557 (2017)]. The Second Circuit en banc held in *Zarda* that Title VII does prohibit employment discrimination on the basis of sexual orientation. 883 F.3d 100 (2d Cir. 2018).]

27. 42 U.S.C. § 2000a (2012).

28. See Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3, at 844-45 & nn.22-26 (collecting these provisions).

29. See Brief for Petitioners at 16-37, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, 2017 WL 3913762 (U.S. Aug. 31, 2017).

30. See *id.* at 38-46; Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016) [too late for volume 2; maybe someday in a volume 6] (arguing that many laws are less than “generally applicable” as the Court has interpreted that phrase).

31. *Id.*; see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

32. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017), *granting cert. to Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015).

who declined to make a cake for a same-sex wedding. And the baker's case is much stronger than the preceding two paragraphs suggest. A statute that was arguably neutral and generally applicable on its face has been revealed by discriminatory enforcement to be very far from neutral or generally applicable in practice.

A Christian activist named William Jack, who is not a party to the litigation, smoked out the state of Colorado and forced it to make explicit what is usually left to speculation: the refusal to protect conscientious objectors in these cases is discriminatory and one sided.³³ Colorado protects conscientious objectors who support gay rights or marriage equality, but it does not protect conscientious objectors who oppose marriage equality. Because the law is not applied equally, it is not neutral and generally applicable, and it is therefore subject to strict scrutiny under the Free Exercise Clause.³⁴

What little we know of William Jack is not very attractive, but he served a purpose. Jack asked a baker to create a cake inscribed with the quotation, "Homosexuality is a detestable sin. Leviticus 18:22." The baker refused, and Jack filed a complaint alleging religious discrimination. Of course not all opposition to marriage equality is religious. And many religious believers who conscientiously object to assisting with same-sex weddings would not invoke this verse from Leviticus.³⁵

But a customer who wants Leviticus on his cake is requesting a religious message. The same public accommodations law that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of religion.³⁶ And the implementing regulations specify that this prohibition includes discrimination on the basis of religious practice or on the basis of "the beliefs or teachings of a particular religion, church, denomination, or sect."³⁷ It does not matter that Jack's religious belief and practice is extreme and offensive. The question is not whether the baker discriminated against Christians in some generic sense, but whether he discriminated against Jack on the basis

33. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

34. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

35. Jack Phillips, the owner of Masterpiece Cakeshop, cited the first two chapters of *Genesis*, *Mark* 10:6-9, and *Ephesians* 5:21-32, all of which affirmatively describe marriage in terms of male and female, and none of which explicitly condemns same-sex relationships or uses any such word as "detestable." J.A. at 157-58, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, 2017 WL 4232758 (U.S. Aug. 31, 2017).

36. COLO. REV. STAT. § 24-34-601 (2017).

37. 3 COLO. CODE REGS. § 708-1:10.2(H) (2017).

of his particular religious belief. No one but a very conservative Christian or Jew would request this cake.

Jack Phillips, the owner and cake artist of Masterpiece Cakeshop, who refused to make a cake celebrating a same-sex wedding, is squarely on the opposite side of the same divisive issue from the baker who refused to make William Jack's cake condemning same-sex relationships. The Colorado Court of Appeals engaged in flatly inconsistent reasoning to explain why Phillips's act of conscience was illegal and unprotected while the other baker's act of conscience was legal and protected.

The Court of Appeals said that Phillips's objection to the message he said his cake would send—his confessed “opposition to same-sex marriage”—discriminated against the same-sex couple that wanted him to send that message.³⁸ The protected baker also objected to “the offensive nature of the requested message,” but the court said that refusing to make a cake with that message did *not* discriminate against the very conservative Christian requesting that message.³⁹

The protected baker's willingness to produce cakes with other “Christian themes” for other Christian customers was treated as exonerating.⁴⁰ But Phillips's willingness to produce other cakes and baked goods for the couple suing him and for other same-sex couples was treated as irrelevant.⁴¹

For the protected baker, the court assumed that the cake's message would be the baker's message and not the customer's; the baker could lawfully object to “the offensive nature of the requested message.”⁴² For Phillips, the court said that his cake would send no message, but if it did send a message, it would be the customer's message, not the baker's.⁴³

For Phillips, the fact that he would merely be complying with the law meant that he would send no message.⁴⁴ If the other baker had created the cake with the offensive message from Leviticus, he too would merely have been complying with the law. But in his case, this argument went unmentioned.

The court also said that the other baker refused to put objectionable words on the cake, but that in Phillips's discussion with the couple suing him, he did not learn what they wanted on their cake.⁴⁵ But Phillips could surely assume that they wanted *some* words or symbols on the cake, and an essential part of

38. *Craig*, 370 P.3d at 282 n.8.

39. *Id.*

40. *Id.*

41. *Id.* at 282.

42. *Id.* at 282 n.8.

43. *Id.* at 286.

44. *Id.*

45. *Id.* at 285, 288.

his task was to help them choose those words and symbols. In any event, the very purpose of a wedding cake is to celebrate the wedding and the marriage, with or without an inscription.

And under the court's reasoning, the case would have come out the same way even if the conversation had lasted longer and the couple had specified an explicit message celebrating marriage equality. The court's logic would still have said that it would be the customer's message, not the baker's; that Phillips would merely be doing what the law required; and that refusing to produce the requested message discriminated on the basis of sexual orientation.

Refusing to make a cake because of disagreement with the cake's message either discriminates against the group associated with that message or it does not. The message on the cake is either the baker's message, or the customer's message, or perhaps the message of both the baker and the customer. The answer to such questions cannot depend on whether the state, or the court, agrees with the message.

But that is precisely what the state's answers depended on. The Civil Rights Commission and the Court of Appeals each found William Jack's Leviticus message offensive, and they protected the conscience of the baker who refused to spread that message. They did not find a same-sex couple's wedding cake offensive; they were offended by the idea that anyone might have a religious objection. The Court of Appeals analogized Phillips's religious belief to a belief so "irrational" that it could only be a pretext for discrimination.⁴⁶ In free speech terms, this is viewpoint discrimination. In free exercise terms, it is neither neutral nor generally applicable. We should protect the conscience of all bakers, not just the ones we agree with.

Nor can this unequal treatment be rationalized on the ground that the protected baker would not make a cake with a derogatory message for anybody. That is just a way of relabeling the clear viewpoint distinction between the messages. Both bakers were in the business of producing custom cakes that say what the customer wants. The baker who refused to produce cakes attacking marriage equality was protected; the baker who refused to produce cakes celebrating marriage equality was not.

III. The Underlying Social and Political Conflict

Masterpiece Cakeshop and similar cases have been polarizing legally because they are polarizing morally and politically. We teach our children that America

46. *Id.* at 282.

offers liberty and justice for all, but we're not doing so well on the part about "for all." A Pew Forum survey found the country evenly split on religious exemptions in the wedding-vendor cases, but the scariest thing about that survey is that only eighteen percent could muster at least some sympathy for both sides.⁴⁷ More than eighty percent expressed none or not much sympathy for the people they disagreed with. These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other. They're evenly balanced nationwide, but in blue states, one side gets crushed, and in red states, the other side gets crushed. Professor Hamilton's position explicitly,⁴⁸ and Professor Marshall's as a practical matter,⁴⁹ is that the religious side should just lose. It has no rights; it can be and should be crushed.

To be clear, I think that both sides are equally guilty here. I defend the *rights* of conservative Christians, but I do not defend their frequent intolerance or their views on the issues. I am a secularist, a modernist, and a civil libertarian. I support gay rights and marriage equality because they are essential to the identities of gays and lesbians. And I support religious liberty because it is essential to the identities of people who take religion seriously.

Conservative Christians put marriage equality on the ballot to boost voter turnout and crush the idea once and for all. In the process, they gave the idea of marriage equality much greater national prominence than it was achieving on its own.⁵⁰ And they lost. Their claims to liberty are impeached by their hostility to liberty for those they disagree with. But individual rights have never depended on the attractiveness of those claiming the right. The law protects free speech for speakers we disagree with,⁵¹ and it should equally protect liberty for religions we disagree with.

We should enforce religious liberty just as we enforce other civil liberties, and that requires judicial enforcement. We don't entrust the enforcement of

47. *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RES. CTR. (Sept. 28, 2016), <http://www.pewforum.org/2016/09/28/2-americans-divided-over-whether-wedding-related-businesses-should-be-required-to-serve-same-sex-couples/> [<https://perma.cc/MQM7-2GGZ>].

48. Marci A. Hamilton, *The Cognitive Dissonance of Religious Liberty Discourse: Statutory Rights Masquerading as Constitutional Mandates*, 41 HARV. J.L. & PUB. POL'Y 79, 80 (2018).

49. William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J.L. & PUB. POL'Y 67, 69-72 (2018).

50. See generally TINA FETNER, *HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM* (2008).

51. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) ("[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

any other civil liberty or protection for minority rights to the majoritarian branches; it doesn't work.⁵² If you look at the exemptions that legislatures have enacted, some of them are quite sensible, and some of them are quite ridiculous. For example, no judge has ever created an exemption to vaccination laws under a general religious liberty provision. But forty-seven state legislatures have enacted exemptions to vaccination laws,⁵³ despite obvious collective-action problems and risks to public health.⁵⁴ And legislators are incapable of exempting the religions that most need protection because they're seriously unpopular. Congress will not enact legislation to protect the Muslim minority in the country, and there will probably be no more exemptions for conservative Christians in blue states. Judicial enforcement of minority rights is uneven and sometimes inconsistent, in religion cases as with other civil liberties, but it is more reliable than legislative protection and the only hope for protection in many cases. This right should not be different from all other rights.

In the contraception litigation, and in the wedding-vendor cases, government demanded for the first time in American history that our largest religious minorities violate core religious teachings. We never tried that before. Of course that demand produced social conflict. Resistance to civil marriage or other new rights for same-sex couples will be deepest and longest if religious dissenters perceive an existential threat to their own community. The demand that religious dissenters pay for contraception and emergency contraception and that they affirmatively assist with same-sex weddings created that sense of existential threat. There was no conflict over contraception until government demanded that dissenters pay for it, and the legal pursuit of wedding vendors greatly escalated the conflict over same-sex marriage. As the Court recognized in one of its greatest opinions, “[a]ssurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support.”⁵⁵ And conversely, when rights to personal liberty are demonstrably insecure, there will be more fear and jealousy of government, less willingness to live under it, and less willingness to accept its policies.

52. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

53. Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 886 nn.119-20, 914 (2013) (collecting these statutes). California repealed its exemption after Lu compiled her list. 2015 Cal. Legis. Serv. ch. 35, § 4 (West).

54. See, e.g., Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccination Refusal*, 63 BUFF. L. REV. 881 (2015) (summarizing medical evidence and reviewing legal arguments).

55. *Barnette*, 319 U.S. at 636.

Same-sex civil marriage is a great advance for human liberty, but the gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet. Until the 2016 election, I thought we were headed towards that result. And in the long run, the social forces generating greater support for same-sex marriage and gay rights are probably unstoppable. But in the near and intermediate term, I now worry as much about progress for the LGBT community being stopped, reversed, or rolled back as I do about religious dissenters being crushed. Two Trump appointments to the Supreme Court would put everything up for grabs.

We could protect both religious minorities and sexual minorities if we were serious about civil liberties. They make essentially parallel claims on the larger society.⁵⁶ First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct.

Second, no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation changes over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control.

Third, both religious and sexual minorities face the argument that their conduct is separable from any claim of protected legal rights, and thus subject to regulation with few limits. Courts rejected a distinction between sexual orientation and sexual conduct because they correctly found that both the orientation and the conduct that follows from that orientation are central to a person's identity.⁵⁷ Religious believers face similar attempts to distinguish their religious beliefs from the conduct based on those beliefs. This is the premise

56. See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 *Nw. J.L. & Soc. POL'Y* 206, 212-26 (2010); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 *YALE L.J.* 2411, 2416-30 (1997).

57. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885, 893 (Iowa 2009). The distinction is unambiguously rejected, without ever being formally stated, in *Obergefell*, *Windsor*, and *Lawrence*.

of *Employment Division v. Smith*, refusing (with poorly defined exceptions) to protect religiously motivated conduct from burdens imposed by generally applicable laws.⁵⁸ But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians.

Fourth, both same-sex couples and religious dissenters seek to live out their identities in ways that are publicly visible and socially acknowledged. Same-sex couples claim the right to participate in the social institution of civil marriage and to live their lives as a couple in public as well as in private. Religious believers likewise claim a right to follow their faith not just in worship services, but in the charitable works of their religious organizations, in their daily lives, and in their professions and occupations.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. One side sees bigotry; the other side sees sin. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population,⁵⁹ each is subject to substantial risks of intolerant and unjustifiably burdensome regulation wherever the other side can muster a majority.

The two sides also have very different understandings of what it is they're disagreeing about. The religious liberty claim in the wedding-vendor cases rests on the view that marriage is an inherently religious relationship and therefore that a wedding is an inherently religious ceremony.⁶⁰ Even if the couple understands their marriage in wholly secular terms, many religious believers will understand it in religious terms because, for them, civil marriage merely implements the underlying religious relationship.⁶¹ These conscientious objec-

58. See *Emp't Div. v. Smith*, 494 U.S. 872, 878-90 (1990).

59. See Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3, at 869-71 (text at notes 176-88); Laycock, *supra* note 14, at 414-17 (text at notes 43-61).

60. See, e.g., J.A., *Masterpiece*, *supra* note 35, at 157-58 (setting out the individual petitioner's religious understanding of marriage); *id.* at 167 (stating that his refusal to assist with same-sex weddings "has everything to do with the nature of the wedding ceremony itself, and about my religious belief about what marriage is and whether God will be pleased with me and my work" (emphasis added)).

61. R. R. Reno, *Government Marriage*, *FIRST THINGS*, Dec. 2014, at 3, 4 (stating with

tors refuse to facilitate or recognize a relationship that, in their view, is both inherently religious and religiously prohibited.

The job of the wedding planner, the photographer, and the caterer is to make each wedding the best and most memorable it can be. They are promoting it, and the conscientious objectors say they cannot do that. This creative and promotional role is narrower for bakers and florists, but I think it's sufficiently clear for them as well. Their piece of the wedding is also to be the best and most memorable that it can be.

I would not grant exemptions for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage or the sexual relationship. I would not grant exemptions to large and impersonal businesses even in the wedding context. But for very small businesses where the owner will be personally involved in providing any services, we should exempt vendors from doing weddings and commitment ceremonies, so long as another vendor is available without hardship to the same-sex couple.

We should also exempt marriage and relationship counselors. It does nobody any good to pair a same-sex couple with a counselor who thinks the very existence of their relationship violates God's law. Complaints about counselors are not about obtaining counseling; they're about driving conservative Christians from the helping professions.

Opponents of exemptions ask if businesses should be free to refuse service to anyone who has sinned in some other way. Sometimes this is offered as a *reductio ad absurdum*; sometimes it is offered to show that conscientious objectors are singling out gays and lesbians. But they are not singling out gays and lesbians; they are singling out weddings.

Nearly everyone agrees that the pastor and the church itself do not have to do the same-sex wedding.⁶² Why does everyone agree on that? Maybe it's just a concession to political reality. But the principled explanation is that inside the church itself is a religious context, and the church has to have some capacity to make its own rules. A Catholic or Baptist wedding contrary to Catholic or Baptist teaching would not be a Catholic or Baptist wedding at all. It would be a sham. And government cannot require such a sham because of the constitu-

approval that in "the past, government *recognized* marriage," and complaining that now "the courts have *redefined* rather than recognized marriage" (emphasis added)).

62. Every state that enacted marriage equality by legislation expressly exempted clergy from officiating at weddings. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1253-54 (2014). I believe that every marriage bill included this exemption when it was introduced. Professor Wilson calls this statutory exemption "hollow" and "illusory," because the clergy were already protected by the Constitution. *Id.* at 1169, 1189.

tional rules against “government interference with an internal church decision that affects the faith and mission of the church itself” and against taking sides in “controversies over religious authority or dogma.”⁶³

Other forms of perceived immorality, and other purchases by same-sex couples, do not arise in the same context. When same-sex couples, or sexually active but unmarried couples, or divorced and remarried couples, or lawyers who pad their hours, or criminals who have served their time, or any other less than perfect human being, come in to buy a restaurant meal or a new suit or a widget or whatever, they are not asking the seller to assist with their wedding. Exemptions for weddings do not imply a general right to refuse service.

And of course we rarely see these cases outside the wedding context. We don’t see businesses refusing to sell to anybody who’s led a sexually impure life. It doesn’t happen. The market incentives would overwhelm it, and the religious commitments don’t speak to it. Very few Christians teach that they should never do anything for those who have led sinful lives. They teach instead that we’re all sinners.⁶⁴ So the real cases we get are about weddings and things very closely connected to weddings. And I think that those cases are special.

Even in the typical case when another wedding vendor is readily available, same-sex couples understandably complain about the dignitary harm of being turned away and of experiencing the first vendor’s moral disapproval.⁶⁵ That emotional harm is often real, but it cannot be considered in isolation. We must also consider the dignitary and emotional harm on the religious side.

Those seeking exemption believe they are being asked to defy God’s will—to disrupt the most important relationship in their lives. They believe they’re being asked to do serious wrong that will torment their conscience for a long time thereafter. That’s an important part of why we have religious liberty guarantees. Viewed in purely secular terms, we have emotional harm on both sides.

We also have a long and clear line of free speech cases. Preventing offense, preventing emotional harm, or preventing insult is not a compelling government interest.⁶⁶ The wedding-vendor cases involve conduct, not speech, but

63. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012).

64. See, e.g., *Romans* 3:23 (“For all have sinned, and come short of the glory of God. . .”).

65. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2574-78 (2015). For a response, see Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 *YALE L.J. FORUM* 369, 376-78 (2016) (text at notes 44-55 [in Section IV.B of volume 4]).

66. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017) (plurality opinion) (disparaging trademarks); *id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment); *McCullen v. Coakley*, 134 S. Ct. 2518, 2531-32 (2014) (abortion counseling); *Snyder v. Phelps*,

they arise in contexts where state RFRA or state constitutions—or the federal Constitution if the state civil-rights law is not neutral or not generally applicable—require compelling-interest justification for restricting religious practice.

Finally, there's a way in which the balance of hardships clearly and unambiguously tips in favor of the religious objector. The offended gay couples are referred to another wedding vendor, or readily find one, and they still get to live their own lives by their own values. They will still love each other. They will still be married. They will still have their occupations or professions. But the conscientious objector who is denied exemption does not get to live his own life by his own values. He is forced to repeatedly violate conscience or to abandon his occupation and profession. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation, and that far outweighs the one-time dignitary or insult harm on the couple's side.

There may still be places, mostly rural, where every (or the only) wedding vendor in the area objects to assisting with same-sex weddings. Then we have to deny exemptions; it is impossible to protect both sides. A local monopolist, or a united oligopoly, cannot be permitted to deny same-sex couples or anyone else access to the market. But in most of the country, we could protect both sides if we cared to do so. It's a matter of tolerance and political will. It's a matter of being serious about liberty and justice—for all and not just for our own side in the culture wars.

562 U.S. 443, 458 (2011) (anti-gay hate speech); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag burning); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-57 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15, 18-26 (1971) (profanity).

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