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Gay Rights Versus Religious Liberty

The Case of Jack Phillips and Masterpiece Cakeshop

Anthony Walsh, Boise State University

Abstract

The "first liberty" of the United States is religious liberty as contained in the Bill of Rights forbidding Congress to interfere with citizens' rights to exercise their religion. The legalization of same-sex marriage has seen the subordination of this right to public accommodation laws because religious wedding vendors have been required either to relinquish their consciences or face financial ruin. The iconic case involving constitutional rights clashing with anti-discrimination laws is that of Colorado baker, Jack Phillips. Phillips' free exercise, free speech, and freedom from involuntary servitude rights are addressed. In similar cases involving other matters, the Supreme Court has ruled that the rights enumerated in the Constitution trump the unenumerated rights granted by state statutes.

Keywords: Jack Phillips, Masterpiece Cakeshop, First Amendment, same-sex marriage, Free Exercise Clause

The First Amendment: Free Exercise

Who would have thought at the dawn of the twenty-first century that wedding cakes would provide fodder for rancorous political debate as aspects of the First and Thirteenth Amendment constitutional rights are matched against public accommodation statutes protecting gays and lesbians from discrimination? The United States Supreme Court in *Lawrence v. Texas* (2003) invalidated all anti-sodomy laws, and twelve years later it legalized same-sex marriage in *Obergefell v. Hodges* (2015). As a libertarian, I applaud these decisions as having freed gays and lesbians from state intrusion and allowed them leeway to define how they will lead their lives. As welcome as these victories were, the downside is that Christian

business owners are becoming the new pariahs targeted for state intrusion denying them leeway to define how they will lead *their* lives. The intolerance, intimidation, hate, and legal threats once aimed at gays and lesbians are now aimed at people who believe that the institution of marriage should be limited to one between man and woman, and who act on that belief by refusing to provide customized services to facilitate a same-sex wedding.

It is not the desire for marriage commitment among gays and lesbians that poses a problem for religious business owners, it is the demands of gays and lesbians requiring them to provide customized services celebrating their weddings that violate their religious consciences. The iconic case involving a constitutional right clashing with anti-discrimination laws is the case of Colorado baker, Jack Phillips, owner of Masterpiece Cakeshop. In 2012, Phillips refused to bake a custom cake celebrating the same-sex wedding of Charles Craig and David Mullins and was charged with violating the Colorado Anti-Discrimination Act (CADA). According to the ACLU, which joined with the state and Craig and Mullins in the civil action against Phillips: "The [Colorado Civil Rights] Commission also ordered Masterpiece Cakeshop to change its company policies, provide 'comprehensive staff training' regarding public accommodations discrimination, and provide quarterly reports for the next two years regarding steps it has taken to come into compliance and whether it has turned away any prospective customers" (ACLU 2013).

A district court upheld the commission's ruling and Phillips was *ordered* to bake same-sex wedding cakes if asked to do so and threatened with jail for contempt of court if he refused. The judge cited Colorado state law prohibiting businesses from refusing service based on race, sex, national origin, or sexual orientation. In *Bostock v. Clayton County* (2020), the Supreme Court ruled against discrimination based on sexual orientation or gender identity, but Craig and Mullins did not deny that Phillips told them that he would bake them any kind of cake and sell them any and all "off-the-shelf" products, but he would not bake a cake for the celebration of a same-sex wedding. Thus, he did not refuse to sell Craig and Mullins a cake based on their sexual orientation, but rather based on the requested cake's symbolic representation of a ceremony that Phillips sees as repugnant to God. Baking a custom cake celebrating a same-sex marriage is tantamount to endorsing it, but the court essentially told Phillips that he has no right to follow his faith, must create compelled speech, and must outwardly embrace same-sex marriage or face financial ruin and jail.

The requirement of Phillips to submit he and his staff to "sensitivity training" to mold their thoughts in the "correct" direction smacks of totalitarianism, and his forced submission of reports to the state is essentially designed to tell that he cannot exercise First Amendment rights and to demonstrate to CADA that he has abandoned his religious beliefs. Phillips appealed the ruling to the Colorado Supreme Court, which refused to hear the case. An attorney for the ACLU's LGBT Project, applauded the court's decision, saying, "We all have a right to our personal beliefs, but we do not have a right to impose those beliefs on others and harm them" (ACLU 2013). But who is imposing their personal beliefs and harming whom? Phillips was minding his own business baking cakes and not imposing anything on anyone. He did not preach on Craig and Mullins' doorstep, let alone demand that they accept his message. It was Craig and Mullins that came to him requesting (which CADA turned into a demand) that he bake them a cake for their wedding, which Phillips saw as asking him to symbolically join them in celebrating their wedding. If Phillips does not have the right to

impose his beliefs on Craig and Mullins, which he did not, they should not have the right to use state law to attempt to impose their beliefs on Phillips, which they did.

When the state attempts to impose a set of beliefs on anyone that he or she finds repugnant, and then orders them to perform an act that affirms those beliefs, we have state tyranny. The pretense of state neutrality to religion is laid bare, for the state could hardly be less neutral to religion than when it places one private citizen at the disposal of another, even though it violates the conscience of the laborer and makes him a little more than a vassal. James Madison referred to religious conscience as the "most sacred of property," but religious individuals are being forced to use that property, and the property that constitutes their livelihood, to serve a practice that violates their consciences. In *Cantwell v. Connecticut* (1940) Justice Owen Roberts wrote in a unanimous opinion that people have the inalienable right to *act* on their faith: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . Thus the Amendment embraces two concepts—freedom to believe and freedom to act."

Although Roberts' observation is consistent with the way the authors of the Constitution viewed religious liberty and with decades of Supreme Court precedence, in *Employment Division v. Smith* (1990), the Supreme Court overturned traditional free exercise jurisprudence. Prior to *Smith*, the state could not deny religious exemptions without demonstrating a compelling state interest, which had to be pursued in the least restrictive way. The issue in *Smith* was whether the state of Oregon erred in denying unemployment benefits to two men belonging to the Native American Church who were fired for using sacramental hallucinogenic peyote in their religious practice. The Court ruled that burdens on religious freedom no longer had to be justified by a compelling state interest if laws are neutral and generally applicable. This ruling was widely condemned because as Richard Duncan notes: "under *Smith* the general rule seems to be that government may prohibit what religion requires or require what religion prohibits" (2001, 850). Justice Scalia opined that if religious groups or individuals want an exemption from a generally applicable law, they should seek it through the political process. This would subject matters of conscience to legislative whim. However, Scalia offered an exception for cases involving "hybrid rights"; that is Free Exercise claims conjoined with Free Speech or other First Amendment claims. Because of the *Smith* holding, most religious freedom cases have relied on the Free Speech Clause, although many simultaneously bring a religious liberty claim.

In 1993 Congress passed the Religious Freedom Restoration Act (RFRA) to protect religion following *Smith*. The RFRA recognizes that religiously neutral laws can burden the free exercise of religion as much as laws that intend to do so, and thus requires the courts to apply strict scrutiny to laws burdening religion. The RFRA states that government may only burden the free exercise of religion if it is in furtherance of a compelling governmental interest, and it must use the least restrictive means of furthering that interest. The RFRA was passed by a unanimous vote in the House, and only three senators voted against it in the Senate. Despite the overwhelming support for the RFRA by Congress and President Clinton, the Supreme Court struck it down as applied to state and local governments in *City of Boerne v. Flores* (1997). The issue before the Court in *Boerne* was simply the denial of a building permit to a church's application to build in a defined historical district of Boerne, Texas, but it had far-reaching consequences for religious liberty. The Court ruled that Congress acted

constitutionally by enacting the RFRA, but it may not determine the manner in which states enforce the substance of their legislation. The federal RFRA does not apply to the states, and thus claims of violation of religious liberty cannot be brought against the states under it.

In certain later cases, the Court has shown a willingness to grant broad religious exceptions to laws of general applicability, such as in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006). This case involved a small Brazilian religious group whose members receive communion in the form of a tea called *hoasca* brewed from plants containing a schedule I hallucinogenic substance. A shipment of the substance sent to the group was seized by customs, which threatened the group with prosecution. The Government acknowledged that its actions constituted a substantial burden on the sincere exercise of the group's religion but argued that this burden was overridden by a compelling state interest and that applying the Controlled Substances Act was the least restrictive means of advancing it. The compelling interest involved protecting the health and safety of group members and preventing the acquisition of the substance from non-church members. The question before the Court was "Does the Religious Freedom Restoration Act of 1993 require the government to permit the importation, distribution, possession and use of an otherwise illegal drug by a religious organization?" The Court found in favor of the religious group, ruling that the government was unable to show that its claim of compelling interest outweighed the burden imposed on the group's free exercise of religion.

Another such case is *Holt v. Hobbs* (2015), which involved an Arkansas prison inmate who claimed his right to grow a half-inch beard he believed is required by his Muslim faith. Not all Muslims are required to wear a beard, but the Court held that under the guarantee of the Free Exercise Clause, the protection is not limited to beliefs that are shared by all members of a religious sect. Prison officials had denied Holt that right, citing as a compelling interest the possibility that contraband could be hidden in a beard. In a unanimous decision, the Supreme Court ruled that Holt's right to live according to his religious conscience outweighs the burden placed on the prison's security risk since it can find less restrictive ways of maintaining safety and security. Phillips is likewise asking that his religious conscience not be burdened, and that gays and lesbians can access less restrictive ways of meeting their needs for customized wedding services.

Thus, in these cases the Court appears to have returned to the plain words of the Free Exercise Clause, that is, it guarantees not just freedom of belief, but also "free exercise." Religious liberty is not much use if it cannot be acted upon: "Totalitarian governments are no doubt quite satisfied for religious believers to think what they want as long as it is never manifested . . . religion is public, not private, communal, not just individual, and a matter of action and not just propositional belief" (Trigg 2011, 118). Freedom of worship means only that you can worship where and when you please, but the free exercise of religion means freedom to act on that message without fear of reprisal. The Free Exercise Clause "was not intended to be consigned to the realm of thought, but was designed to protect practices" (Rogers 2019, 170). The right to worship is enfeebled without a corresponding right to exercise one's belief by saying "No!" to state bureaucrats who want to deny vendors the free exercise of their faith. If the state can deny some individuals the "first liberty," it can deny all liberties to all people.

As a right of conscience, the free exercise of religion is an inalienable right, and as Thomas Jefferson said: "The rights of conscience we never submitted, we could not submit. We are answerable for them to our God" (1784). The state plays God and acts unconstitutionally when it seeks to command people's thoughts and behavior in matters of religious conscience. Jefferson also stated, "no provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority" (1809). Justice Robert Jackson's words in *West Virginia State Board of Education v. Barnette* (1943) are instructive: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." It would seem that the Colorado courts have relegated Jackson's words as a quaint old-fashioned homily meant for a simpler era in their belief that they may prohibit what religion requires and require what religion prohibits.

The First Amendment: Free Speech

The Phillips case also engages free speech rights. As useful as it is in such cases, relying on free speech claims when the real issue is religious objection, enfeebles the Free Exercise Clause and makes it a sub-category of the Free Speech Clause. In effect, this is saying that religious free exercise can receive the same constitutional protection as secular conduct, but nothing more. This is not what the founders meant free exercise to be. They made the Free Exercise Clause the "first liberty" distinct from others, and certainly not one to be bracketed with the Free Speech Clause. If the founders meant it the way that current jurisprudence sees it, they would not have included the Free Exercise Clause in the First Amendment in the first place. The Office of Legal Policy makes the point that the framers of the Constitution used language that implies that the Free Exercise Clause has more force than the Free Speech Clause because in the former they used "prohibiting," and in the latter they used "abridging." The Office notes that:

> "prohibiting" and "abridging" function substantively as part of the description of the categories of laws the government is disabled from enacting. Moreover, "prohibiting" and "abridging" are denotatively and connotatively distinct. "Prohibiting" means to forbid or prevent, while "abridging" means to reduce or limit. Thus, "prohibiting" connotes a finality, certitude, or damning not present in "abridging," which connotes limitations falling short of the finality of prohibition or prevention (1986, 17).

In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), Justice Sandra Day O'Connor also noted the special place in which the Constitution's framers placed religious liberty: "The First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order." Thus, the Free Exercise Clause as more force in its meaning and language than other constitutional provisions, as the distinction between "prohibiting" and "abridging" makes clear. Other constitutional rights provide leeway for interpretation (what does "unreasonable" or "excessive" mean in the Fourth and Eighth Amendments, respectively, mean?), but the Free Exercise Clause is singularly absolute:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Both clauses are complementary protections of religious liberty, as Michael Paulsen notes: "As I have written elsewhere, the two clauses protect a single central value, religious liberty, from two different angles. The Establishment Clause forbids government *prescription* in matters of religious exercise. The Free Exercise Clause forbids government *proscription* in matters of religious exercise" (2014, 1607). The Free Exercise Clause was designed to shield religious people from state persecution; it is a fortress of conscience against all assaults and necessarily entails the right to conscientiously object to public accommodation laws that require the faithful to engage in conduct by facilitating a practice they consider sinful.

Of course, although the wording of the Free Exercise Clause is absolute, it still has to be interpreted, as seen in *Gonzales* and *Smith*. The first case in which it was interpreted was in *Reynolds v. United States* (1879). This case involved George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, who was charged with bigamy under the federal Morrill Anti-Bigamy Act. Reynolds claimed that it was his religious duty to practice polygamy because he faced damnation if he did not, and to deny him this practice was a violation of the Free Exercise Clause. The United States Supreme Court ruled against Reynolds. In delivering the unanimous opinion of the Court, Chief Justice Morrison Waite wrote:

> Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice? (167).

It is clear that the state cannot allow all religious practices to hide under the umbrella of the Free Exercise Clause. It cannot allow acts that jeopardize the health and safety of its citizens in the name of prescriptions or proscriptions some religious sects insist the Bible demands when it does not. Reynolds claimed that the Bible prescribes polygamy, citing figures such as David and Solomon. However, the Bible does not endorse all that it records, but it plainly does endorse the heterosexual nature of marriage. I do not believe any biblical scholar would argue otherwise. Thus, for the state to demand of a citizen that he or she participate in any other than an opposite-sex marriage by providing special customized services that facilitate one clearly contravenes the intent of the Free Exercise Clause.

The Free Speech Clause is interpreted as both the right to speak freely and the right to refrain from speaking. Religious expression is conduct, and the courts have treated conduct as speech when conduct conveys a message. Traditionally, free speech protection applied only to verbal utterances: "However, as other delivery mechanisms were held to fall within the ambit of free speech law, freedom of speech was increasingly understood to involve a broader 'freedom of expression,' and categories such as speech-plus-conduct, expressive conduct, and symbolic expression were developed" (Kersch 2006, 265). The Supreme Court has a simple test for determining if conduct is expressive and triggers First Amendment protection: (1) Conduct is expressive if a person intended to express a particular message, and (2) that message is understood by the audience as it was intended. Accordingly, a free speech claim is triggered if someone is forced to convey an unambiguous message with which he or she disagrees.

This is illustrated in *Wooley v. Maynard* (1977). George Maynard viewed the New Hampshire motto, "Live Free or Die" on his vehicle's license plate as repugnant to his religious beliefs. Maynard did not wish to convey that message, so he cut "or Die" off his plate and was convicted of violating state law. The Supreme Court overruled his conviction and held that state interest in requiring the motto did not outweigh his free speech rights, including "the right of individuals to hold a point of view different from the majority and to refuse to foster an idea they find morally objectionable." It also held that to require him to do so was compelled speech and that the state may not invade "the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control."

The precedent established by *Wooley v. Maynard* is a victory for freedom of expression and freedom to abstain from expression against state coercion. The Court ruled that individuals have a right to hold a point of view that differs from the majority and to refuse to foster an idea they find morally objectionable. This ruling means that state regulation of conduct with an expressive component must be subject to strict scrutiny. The precedent established by this case is a victory for freedom of expression and freedom to abstain from expression against state coercion. Maynard was free not to affirm a message objectionable to him *created by others*. How much more egregious would it have been had he been coerced into *creating* the very message he found repugnant? This would be doubly obnoxious because he would be compelled both to act and to speak affirmatively, not just compelled to silently affirm a message.

Maynard was obviously not compelled to create the message to which he objected, but Phillips and other religious small business owners across the country are being compelled by state public accommodation laws to create the very messages that they oppose. When state compulsion creates a clash between what people believe and what they must communicate, rather than sacrificing a person's beliefs and free expression, the state could direct those wishing services a provider considers repugnant to other providers who do not. This achieves state interests by "the least restrictive means" (see *Burwell v. Hobby Lobby Stores, Inc.*, 2014) and protects dissenters' religious free exercise and free speech rights. If a person refuses to bake a custom cake containing a celebratory message for a same-sex wedding, create floral arrangements, or photograph one, that person is communicating disagreement with such a ceremony. Compelling them to labor in furtherance of same-sex marriage is tantamount to compelling them to speak in favor of it. By his refusal, Phillips was communicating disagreement with its message and exercising his or her right not to be forced to affirm it.

A more recent free speech case involving religious objections to complying with a state statute is *National Institute of Family and Life Advocates v. Becerra* (2018). In 2015, California passed its Reproductive FACT Act (RFA) mandating that pro-life pregnancy centers provide information to their patients on how to obtain a state-funded abortion. The RFA compelled the speech of those with whom the California legislature ideologically disagreed while leaving unburdened the free speech rights of those with whom it agreed and congratulated themselves by calling it "forward thinking." The National Institute of Family and Life Advocates sought to enjoin the enforcement of the act as forcing staff and volunteers to violate their consciences in violation of their First Amendment rights. In *Becerra*, the Supreme Court ruled the RFA unconstitutional, noting that there is no such requirement in California that abortion clinics

post pro-life information in their facilities. The Court noted: "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" Justice Kennedy's concurring opinion provided a stinging rebuke to California's self-congratulatory statement that the RFA was part of California's "forward thinking":

> But it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

James Madison spoke passionately about the inalienable right of exercising religious conviction at the General Assembly of the Commonwealth of Virginia in 1785: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right" (in Curry and Battistoni 2000, 150). Baking a cake and inscribing it with words conveying a message makes that baker a publisher, and a publisher has the right to refuse to publish anything he or she wants. There used to be a saying in America, "You can say anything you want, but you can't make someone else say it for you." This seems no longer to be true as it relates to speaking for same-sex marriage. Thomas Jefferson's words on commerce are appropriate here: "The policy [of good governments] is, to leave their citizens free, neither restraining nor aiding them in their pursuits. Though the interposition of government, in matters of invention, has its use, yet it is in practice so inseparable from abuse, that they think it better not to meddle with it" (1903-4, 255). Jefferson is saying that the voluntary exchange of goods and services *agreeable to both parties* free of state pressures is the only moral basis of commerce.

This obviously does not mean that vendors should be allowed to discriminate against anyone on the basis of their ascribed status, but as noted frequently in this paper, and by Justice Kennedy (see below), the refusal of Craig and Mullins by Phillips was based not on what they are but on what they are doing. That is, on the basis of requiring him to facilitate and endorse a message he did not want to send. Nevertheless, there are those that continue to analogize wedding vendor cases with racial discrimination, pointing most often to *Heart of Atlanta Motel v. United States* (1964). The case was brought by Moreton Rolleston, the owner of the Heart of Atlanta Motel, who challenged the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, color, religion, sex or national origin. Rolleston challenged the Act on Fifth and Thirteenth Amendment grounds. Rolleston refused to accept Black patrons, arguing that to require that he do violates his Fifth Amendment rights by depriving him of his property without due process of law and of his ability to choose his customers and operate his business as he saw fit. He also claimed that forcing him to rent rooms to Blacks

violated the Thirteenth Amendment provision against involuntary servitude. The Supreme Court ruled against Rolleston, holding that the Fifth Amendment did not forbid the regulation of interstate commerce and thus his due process rights had not been violated. As for his Thirteenth Amendment claim, the Court ruled that the amendment was enacted to end discrimination, and therefore it could not be used as a tool to support discrimination.

This case is distinguishable from Phillips' and other wedding vendor cases in at least two ways. First, Rolleston's refusal was based squarely on racist grounds, which have no constitutional, biblical, or moral support, while religious objectors to providing special services to same-sex couples rely on the support of all three. Society has a bona fide reason to eliminate the racism Rolleston exercised, but it certainly has no reason at all to eliminate the freedom of religion exercised by those who refuse to facilitate or participate in a same-sex wedding. Rolleston's refusal was unreasonable and arbitrary discrimination, while those of religious objectors are reasonable and consistent with their sincerely held religious beliefs that are supposed to be constitutionally protected.

Second, the Thirteenth Amendment was not enacted to end discrimination, although we may find it implicit in its wording. It was enacted to end slavery and involuntary servitude, period. If discrimination is read into it, it is the distinction between the person who must labor unwillingly for custom services (not just generic services) and those who are the beneficiaries of that labor. Unlike demands for customized services, Rolleston was not subjected to involuntary servitude because he did not have to create anything special for Black guests, the rooms were just there awaiting occupancy. Nor did he have to participate in any way in the activities of his guests in their rooms. On the other hand, religious business owners have happily supplied gays and lesbians with generic goods and services—cakes, cookies, flowers, photographs, and so on, for any occasion—with the sole exception of providing special services for a same-sex celebratory occasion. This refusal is not based on gay and lesbian animus in a way that Rolleston's was based on racial animus but on matters of constitutionally protected religious conscience. As Justice Kennedy noted below in *Masterpiece*, religious objectors are objecting to special customized services for same-sex weddings that would force them to send a message they do not wish to convey, not homosexuals who are welcome to any of their generic services. The refusal to cater to sex-sex marriages cannot thus be analogized to discrimination based on racial status.

Thirteenth Amendment: Involuntary Servitude

When Phillips was told that he cannot say "No!" when ordered to work for the benefit of others he was placed in a position of involuntary servitude. As Deborah Dewart put it in a writ of certiorari before the Supreme Court: "A requirement to actively perform personal services imposes a direct and crushing burden—a critical component in some cases. Courts decline to specifically enforce personal service contracts because enforcement might constitute involuntary servitude. . . . Thirteenth Amendment concerns lurk just beneath the surface" (2012, 130–31). The Thirteenth Amendment ended slavery and involuntary servitude in the United States in 1865, the relevant part reads: "Neither slavery nor involuntary servitude, except as punishment for a crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to its jurisdiction." Courts have the authority to require a person to perform affirmative acts a person has a legal duty to perform, but this only

applies to civic duties such as serving on juries, paying income tax, and selective service registration. The Free Legal Dictionary points out that: "It has generally been held that this power [of involuntary servitude] does not extend to compelling the performance of labor or personal services, even in cases where the obligated party has been paid in advance."

The United States Congress has defined involuntary servitude plainly in U.S. Code §7102, with section B ("the use or threatened use of a law or legal process") being particularly relevant to the present case.

> The term "involuntary servitude" includes a condition of servitude induced by means of—(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process. The term abuse or threatened abuse of the legal process means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

United States Supreme Court rulings have been consistent with U.S. Code §7102. In *Bailey v. State of Alabama* (1911), Justice Holmes noted that involuntary servitude has a broader meaning than slavery: "The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." Justice Holmes' use of the term "badges" is apropos. A badge of slavery harkens back to some locations in the Old South where slaves sometimes wore copper badges to identify them as available for hire by others on behalf of their masters. Being identified as a Christian vendor is arguably a badge of slavery identifying them as also available for hire by anyone for any task regardless of how repugnant to their beliefs it may be. This is plainly involuntary servitude and asks them to surrender their right of religious conscience or lose their livelihood and face crippling fines if they refuse.

In *United States v. Kozminski* (1988), the Supreme Court defined involuntary servitude as a compulsory condition in which someone must perform work on behalf of another or be subject to legal sanctions. According to the Court, it is a condition:

> in which a person lacks liberty especially to determine one's course of action or way of life" . . . [it] necessarily means a condition . . . in which the victim is forced to work [for the benefit of another] by the use or threat of physical restraint or physical injury, or by the use or threat of *coercion through law or the legal process* . . . we find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but *to work or be subject to legal sanction* (emphasis added).

Constitutional law thus explicitly forbids what state civil rights commissions have attempted to do by forcing business owners to provide their services to facilitate same-sex

weddings against their conscience. Compelling Phillips to create custom cakes unwillingly is art at gunpoint in violation of the Free Exercise and Free Speech Clauses, part B of U.S. Code §7102, the intent of the Thirteenth Amendment, and thus his right to self-determination is fundamentally denied. Anyone's access to the customized services of another in conformity with public accommodation laws must be construed narrowly when it runs up against the inalienable First Amendment rights, the private use of private property, liberty of contract, and freedom from involuntary servitude.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

Phillips' case eventually made it to the Supreme Court as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018). The crux of Colorado's case was that the commission's actions were not aimed at Phillips' religious beliefs or practices but rather at his refusal to sell Craig and Mullins a custom cake based on their sexual orientation. It is true that on its face the commission is simply directing him to bake a cake, but how can baking a cake with a message abhorrent to his religious beliefs *not* be directed at his religious beliefs? And how was Phillips' refusal based on the customers' sexual orientation when it was acknowledged by Craig and Mullins that he would sell them any baked goods they desired except a cake to celebrate same-sex marriage? As the Court noted, it was the kind of cake, not the kind of customer, that Phillips refused.

In delivering an 8-1 majority opinion in favor of Phillips in *Masterpiece*, Justice Kennedy noted that CADA acted with "clear and impermissible hostility toward the sincere religious beliefs that motivated his action." The Court noted: "some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery." It was also noted that: "government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate." The Court also took note of a Commission statement to the effect that Phillips can believe "what he wants to believe, but he cannot act on his religious beliefs." Evidently, the Commission accepted the position that the Free Exercise Clause should be limited to belief and worship. In oral arguments preceding the decision, Kennedy chided the ACLU's argument that opposition to same-sex marriage is discrimination based simply on sexual orientation "is just too facile."

In *Masterpiece*, the Colorado Civil Rights Commission's (CCRC) position was that the statute under which Phillips was charged was neutral and generally applicable. However, it was found to be neither neutral nor generally applicable in practice, as illustrated in the case of William Jack.

Jack approached three bakers and asked them to prepare cakes with messages disapproving of same-sex marriage on religious grounds, which they refused as offensive to their secular convictions. Mr. Jack filed a complaint with the CCRC claiming religious discrimination. In Phillips' case, the Colorado Court of Appeals said that his refusal to endorse the message on the cake would send his undenied "opposition to same-sex marriage," and that this amounted to discrimination against the couple wanting him to send their message. In the secular bakers' case, however, the court said that objections to the "offensive nature of the

requested message" did not discriminate against Jack. The CCRC ruled that the bakers' willingness to create cakes with other Christian themes for Jack exonerated them, while Phillips' willingness to create other cakes with secular themes for Craig and Mullins did not exonerate him. Thus, the court ruled in the case of the secular bakers, the cake's message would be theirs and not Jack's, so they need not express it. In the Phillips case, the court held that the message would be the gay couple's and not Phillips,' and thus he must create it and affirm the message.

In both cases, it was the kind of message on the cake, not the kind of customer that was the determining factor in refusal. I support fully the right of Phillips and the secular bakers to decide what commissions they will accept and which they will not, otherwise we only have the illusion of freedom. Nevertheless, there is a clear double standard here; either it is the baker's message or it is the customer's, it cannot be one thing in Phillips' case and another thing in the case of the secular bakers. Doug Laycock had a number of concerns with the different ways the different cases were handled and the hostility toward religion of the court:

> 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. In free speech terms, this is viewpoint discrimination. In free exercise terms, it is neither neutral nor generally applicable. (2018, 782)

In their writ of certiorari to the Colorado Court of Appeals, Gates, Shanefelt, and Epstein (2017, 13) also took note of the discriminatory way the state of Colorado operates in matters of religious liberty. They noted that there are a number of sites that serve only same-sex weddings and state: "Although many of these sites explicitly provide services exclusively for same-sex weddings, the Colorado authorities have not applied CADA against these sites. Instead, using an explicit double-standard, it is only the tiny minority of religious bakers who face the full fury of the Colorado law."

Although the Court ruled in Phillips' favor, it did so only on narrow procedural grounds. It ruled only on the grounds that the Commission did not employ religious neutrality and was disrespectful and hostile to Phillips' rights to the free exercise of his religion. The Court's narrow ruling did not address the broader issues of free exercise, free speech, and involuntary servitude. It appears as though the Court is most reluctant to dive into the real constitutional meat of religious claims against the tyranny of state civil rights commissions.

Shortly after Phillips prevailed in *Masterpiece*, Colorado sued him again, this time because he declined to design a cake celebrating the gender transition of attorney Autumn Scardina. Scardinia told Phillips that she wanted: "a three-tiered white cake" with a "large figure of Satan, licking a nine-inch black dildo. I would like the dildo to be an actual working model that can be turned on before we unveil the cake" (quoted in Harsanyi, 2019). Scardina claimed that Phillips refused to create the requested obscenity for her simply because she is transgender, not because of the message. It is doubtless true that few bakers would create such a cake, regardless of their religious beliefs or the customer's sexual identity. One of the commissioners

hearing the suit called Phillips a "hater", and others actually voiced their support for the comments that the Supreme Court in *Masterpiece* called disrespectful and hostile. After the Alliance Defending Freedom filed a federal lawsuit against the state on Phillips' behalf, the Commission dismissed the case. Instead of appealing the Commission's dismissal, Scardina filed a lawsuit with a district court seeking more than $100,000 in damages, fines, and attorney's fees. On April 29, 2020, the district court refused Phillips' motion to dismiss the case, thus burdening him with more years of expensive and emotionally draining litigation.

The Double Standard in the Application of Public Accommodation Laws

There is a clear double standard in the way Colorado applied public accommodation law. The cases of Phillips and the secular bakers share all legally salient features in that they all refused service to statutorily protected persons (religion or sexual orientation). The gaping difference in these cases is that religious vendors are required to labor in furtherance of service for same-sex weddings, but when religious people are denied services because their views offend secular sensibilities their complaints fall on deaf ears. Religious wedding vendors are compelled to either speak the same-sex marriage message or lose their livelihood, but secular vendors are not compelled to speak the Christian message. From a libertarian point of view, neither side should be compelled to associate themselves with a message with which they do not agree.

As noted above, the Supreme Court did not rule on Phillips' Constitutional rights in *Masterpiece*, and thereby left open the issue of whether state public accommodation laws may compel speech, but there are other cases in which the Court addressed the issue. In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* (1995), the Supreme Court unanimously ruled that private organizations were permitted to exclude a group if it represented a cause contrary to the values or message the organization wants to convey. The case involved the South Boston Allied War Veterans Council, organizers of the annual St. Patrick's Day Parade, refusing the Irish American Gay, Lesbian, and Bisexual Group of Boston a place in the parade. In the opinion, Justice Souter wrote that to require private citizens to include a group advancing a message that the organizers do not wish to convey in order to make private speech conform with the public accommodation requirements of Massachusetts violated the fundamental rule that everyone has the right to choose the content of their message and to decide for themselves what to say and what not to say. This ruling means that the government lacks the power to mandate the speech of individuals or organizations when they do not agree with the message that other groups want to express through them, even if it violates state public accommodation laws. The Court ruled that on its face the Massachusetts statute did not target speech or discriminate:

> The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's expressive content [honoring veterans] and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say.

Thus, public accommodation statutes may not declare a person's speech to be a public accommodation or grant protected individuals the right to participate in that person's speech. The same logic should apply to all public accommodation laws that are unobjectionable on their face. The language of the First Amendment clearly refers to the free exercise of religion as an important substantive value that the state may not prohibit. The absolutist language makes it clear that it does not matter whether a state-imposed burden on religious exercise arises from a law aimed specifically at burdening religion or from a law that in its intent is neutral toward religion. A law's impact depends on what it hits as well as what it aims at. The way public accommodation laws are applied in same-sex marriage cases differs from all Supreme Court precedents on the matter and crushes the rights of objectors. In doing so, public accommodation laws cease to be antidiscrimination statutes and become regulators of religious conscience, speech, association, and labor. Phillips, and others like him, should be afforded the same right that the parade organizers in *Hurley* had; that is, the "autonomy to choose the content of [his] own message and, conversely, to decide what not to say."

Craig and Mullins claimed only dignitary harm, and Colorado has not attempted to show any harm beyond that. Dignitary harm is not enough to justify restrictions on Phillips' constitutional rights, and surely Phillips had a significant dignitary harm claim. The Constitution does not impose a duty on citizens to avoid offending the dignity of others regardless of whether the indignity suffered is intentional or unintentional. Dignitary harm is covered in tort law, and "the interests protected by the torts that can be considered 'dignitary'—offensive battery, false imprisonment, defamation, intentional infliction of emotional distress, and invasion of privacy" (Abraham and White, 2018, 322). Of course, Phillips did none of these things, and as the Supreme Court noted about dignitary harm in *Masterpiece*, the refusal to participate in a same-sex wedding can "be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth."

We have created statutes to protect the rights of certain members of society that simultaneously disregard the rights of other members, and which have obliterated the distinction between hurt feelings and actionable tort claims. The only tangible harm suffered by Craig and Mullins was the gasoline and time involved in locating a baker willing to accommodate them. In their writ of certiorari to the Colorado Court of Appeals, Gates, Shanefelt, and Epstein (2017, 13) present a Google Maps figure showing that the nearest alternative bakery (Elegant Bakery) is only two-tenths of a mile from Masterpiece Bakery. Contrast the minuscule tangible harm done to the gay couple to the immense tangible harm suffered by Phillips, who has endured huge financial losses, large amounts of time, and the deep emotional stress involved in defending multiple lawsuits. Douglas Laycock notes that "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 harm or insult harm on the couple's side" (2018, 65). We should all be appalled that state governments can and do present their religious citizens with a deplorable choice—obey your conscience or lose your livelihood.

It is instructive to heed the words of James Madison in the 1785 *Memorial and Remonstrance*. He was vehemently opposed to any interference whatsoever by the state on religious matters, as these words attest:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited . . . It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.

Phillips did not bend to legislative authority in the matter of same-sex marriage and was thus degraded "from the equal rank of Citizens." The courts and legislative bodies have gravitated to the point where people with "hurt feelings" have been elevated almost to the rank of a constitutionally protected category. The only "hurt feelings" that seem to matter are those of gays and lesbians who can find numerous businesses willing and eager to provide their marriage needs but chose to go to those which will not, and then destroy them with their "take no prisoners" tactics. Religious dissenters have no legal recourse to soothe their hurt feelings. Those who cheer when anti-discrimination laws are hijacked and weaponized against First Amendment freedoms should pause to consider what the weakening of these constitutional rights really means. While it is religious rights that are eroded today, if history is a guide, it will not end there.

Statutory v. Constitutional Rights

Some see the clash between gay and lesbian rights and religious liberty as a clash between two equally protected rights: "Liberal democracies are faced with what appears to be an irreconcilable clash of two conflicting rights" (Stychin 2009, 729). What we have, however, is a clash between was the framers saw as inalienable rights enumerated in the Constitution and alienable *statutory* rights, which historically have always been reconciled in favor of a constitutional right. As Alexander Hamilton wrote in *Federalist Paper No. 78* (1788): "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." The Constitution sits above and governs all statutory law, and if a statute conflicts with it, the pure commands of the Constitution must prevail.

Statutes are written by a legislative body laying out commands or prohibitions on citizens under its jurisdiction enacted in response to pressing issues. A statute may be amended or repealed as an issue resolves itself, or if it conflicts with the Constitution. Laws enacted by the states are presumptively lawful unless successfully challenged in the courts. If a law is contested, the judiciary must determine if the law passes constitutional muster. When a statute falls afoul of the Constitution it is void, regardless of the good faith of its legislators. The U.S. Supreme Court is the final arbiter of whether the legislature has acted beyond the scope of its authority and has done so on numerous occasions. The *Justia US Law* (2017) website lists 968 state statutes the Court has ruled unconstitutional. In fact, in *all* cases in the past in which statutes have conflicted with the enumerated rights contained in the Constitution have been struck down.

States can grant their citizens more rights than exist in the Constitution, but they cannot take rights away. While it is commendable to provide rights not included in the Constitution, newly minted rights should not be granted preference at the expense of the rights enumerated

in it. Statutory rights are granted by law, and unlike the guarantees of the First Amendment, they are not stated as disabilities on Congress. The uniqueness of the First Amendment lies in the founder's realization the rights contained therein are inalienable and not mere civil privileges granted by the state. Statutory laws that have the effect, even if not the intention, of preventing the free exercise of religion, are violating this First Amendment disability. This does not mean that the statute is unconstitutional per se, it means only that it trespasses into that territory when it does not provide provisions to accommodate exceptions to the law on First Amendment grounds.

Public accommodation laws are laudable in that they assure protected groups access to services, but they are not when they trespass on the constitutional rights of those asked to provide them. Phillips did not refuse his services to Craig and Mullins except in the case of baking them a custom cake to celebrate their marriage. I am assuredly not arguing that CADA is unconstitutional, but the Colorado courts that ran roughshod over Phillips' First and Thirteenth Amendment rights were behaving unconstitutionally in ruling in favor of statutory rights over Constitutionally protected rights. Douglas Laycock deplores such an affront: "If the Court feels free to enforce the unenumerated rights it likes, and to strip all independent meaning from the enumerated rights it does not like, it's hard to see how the existence of a written Constitution affects its decisions . . . To refuse to enforce rights that are expressly in the Constitution is as mistaken as enforcing rights that are not in the Constitution" (1990, 112).

Chai Feldblum believes that the gay rights/religious liberty issue is a zero-sum game: "And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people" (2006, 119). He thus believes that statutory law trumps constitutional law. I believe that there should be no winners or losers in this battle; we can both recognize the legitimacy of same-sex marriage and accommodate religious liberty without burdening either side. As Laycock and Berg state: "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 . . . These things do not change because government says they must" (4). If we take the liberty claims of either gays or religious dissenters seriously, we must in good conscience weigh the claims of the other with equal seriousness. An approach that denies neither same-sex marriage nor the religious objector's refusal to participate in it is attainable. Applying the Supreme Court's "least restrictive means" principle, it is attainable by pointing those gays and lesbians who desire special services to facilitate their marriages to vendors who have no conscientious objections to providing them.

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