

A LIBERAL ANALYSIS OF RELIGIOUS EXEMPTIONS TO PUBLIC  
ACCOMMODATION LAWS

by

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## ABSTRACT

### A LIBERAL ANALYSIS OF RELIGIOUS EXEMPTIONS TO PUBLIC ACCOMMODATION LAWS

by

Michael Doering

The University of Wisconsin-Milwaukee, 2016  
Under the Supervision of Professor Stanislaus Husi

In 2015, the United States Supreme Court effectively made same-sex marriage legal throughout the country. Writing for the majority, Justice Kennedy opined that not extending marriage equality to same-sex couples violated both their autonomy and their right to equal dignity under the law. Three years earlier, a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, and requested that the owner design and create a cake to celebrate their same-sex wedding. The owner declined, advising the couple that he did not provide wedding cakes for same-sex weddings due to his religious beliefs. He was found guilty of violating the Colorado Anti-Discrimination Act for discrimination on the basis of sexual orientation. In this paper, I present a liberal argument for the proposition that narrowly-tailored exemptions ought to be provided to wedding vendors such as Phillips with religious objections to same-sex marriage. In arguing for this claim, I provide a compromise between those who believe that the relevant anti-discrimination provisions should be categorically applied to all businesses open to the public and proponents of religious liberty who maintain that any business with religious objections to same-sex marriage should be able to refuse service to same-sex couples.

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To  
my parents,  
David and Debra  
for all of their support over the years

## TABLE OF CONTENTS

<b>1. Religious Liberty and Equality</b>	4
1.1. The Equality Approach	8
1.2. The Religious Liberty Approach	12
<b>2. A Liberal Account of Religious Exemptions</b>	14
2.1 A Look at <i>Masterpiece Cakeshop</i>	16
A. Sufficient and Intelligible Reasons	17
B. Integrity and Substantial Burdens	20
<b>3. Narrowly-Tailored Exemptions and Compelling State Interests</b>	36
3.1 Compelling State Interests	42
<b>4. Objections and Concluding Remarks</b>	55
Conclusion	63
<b>Bibliography</b>	64

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And finally, much thanks and gratitude to my parents, Debra and David, and my sister Ashley for being supportive of me in my endeavor to master philosophy. I do not want to say it would have been impossible without them but it surely would have been more difficult without their love and support.

In *Obergefell v. Hodges*, the United States Supreme Court effectively made same-sex marriage legal throughout the country.<sup>1</sup> Writing for the majority, Justice Kennedy opined that not extending marriage equality to same-sex couples violated both their autonomy and their right to equal dignity under the law.<sup>2</sup> Even as he argued that the Constitution extends the right to marry to same-sex couples, he also insisted that there are many citizens of the United States who reach the conclusion that same-sex marriage is wrong “based on decent and honorable religious or philosophical premises” and that such people are reasonable, sincere and hold this belief in good faith.<sup>3</sup> In his dissenting opinion, Justice Roberts argued that the Court intervening in the political process on the issue of same-sex marriage would close the minds of those who disagreed with the institution and would have potentially negative consequences for how it would be accepted by the broader society.<sup>4</sup>

It seems, in part, that Justice Robert’s prediction has come true. Although the Court’s decision made it perfectly legal for same-sex couples to get married in all fifty states, a lack of consistent anti-discrimination protections put such couples in a precarious position. For example, a year after the *Obergefell* ruling, Russell Roybal, deputy executive director of the National LGBTQ Task Force, stated that “in a lot of places, [same-sex couples] can go to [their] county clerk and get a marriage license and get married and then get fired the next week because now [they] are openly gay.”<sup>5</sup> The suggestion made by Roybal is that, while achieving

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<sup>1</sup>*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>2</sup>*Ibid.*, 2593-2608.

<sup>3</sup>*Ibid.*, 2594-2602.

<sup>4</sup>*Ibid.*, 2611-2633 (Justice Roberts dissenting).

<sup>5</sup>Liam Stack, “The Challenges That Remain for L.G.B.T. People After Marriage Ruling,” *The New York Times*, June 30, 2016, <https://www.nytimes.com/2016/07/01/us/the-challenges-that-remain-for-lgbt-people-after-marriage-ruling.html>.



marriage equality may have been a net positive for the gay community, the Court's ruling on this matter has not been without substantial social costs.

While the LGBTQ community and its allies strive for adequate anti-discrimination provisions, in the states and municipalities where those regulations are in place, business owners with religious beliefs about the sinful nature of same-sex marriage have been adversely affected as a result of them. In 2014, Christian farm owners in New York were fined \$10,000 for declining to host a same-sex wedding ceremony on their property.<sup>6</sup> A year before that, the Supreme Court of New Mexico found that a business, Elane Photography, violated the New Mexico Human Rights Act by refusing to photograph a commitment ceremony between two women.<sup>7</sup> In June of 2017, the Supreme Court of the United States accepted a similar case which involves this tension between anti-discrimination laws and the religious convictions of certain business owners in the wedding industry. The case involves Jack Phillips, an owner of a bakery who lost a case in the Colorado Court of Appeals for refusing to sell a wedding cake to a gay couple.<sup>8</sup> In effect, Phillips is requesting that he be exempted from the Colorado Anti-Discrimination Act on account of his religious beliefs.

In this paper, I present a liberal argument for the proposition that narrowly-tailored exemptions ought to be provided to wedding vendors with religious objections to same-sex marriage. In arguing for this claim, I reconcile the Court's statement that reasonable citizens can disagree with the institution of same-sex marriage with the government's stated interests

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<sup>6</sup>Sarah Pulliam Bailey, "Farm owners fined for saying no to lesbian wedding," *The Washington Post*, August 19, 2014, [https://www.washingtonpost.com/national/religion/farm-owners-fined-for-saying-no-to-lesbian-wedding/2014/08/19/1cfe5ca2-27dd-11e4-8b10-7db129976abb\\_story.html](https://www.washingtonpost.com/national/religion/farm-owners-fined-for-saying-no-to-lesbian-wedding/2014/08/19/1cfe5ca2-27dd-11e4-8b10-7db129976abb_story.html).

<sup>7</sup>*Elane Photography, LLC v. Willock*, 309 P.3d 56 (2013).

<sup>8</sup>*Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (2015). This case is being heard by the Supreme Court as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

in preventing invidious discrimination. Furthermore, I hope to provide a compromise between those who believe that the relevant anti-discrimination provisions should be categorically applied to all businesses open to the public and proponents of religious liberty who maintain that any business with religious objections to same-sex marriage should be able to refuse service to same-sex couples. I maintain that there are situations in which business owners in the wedding industry are substantially burdened by public accommodation laws and that providing narrowly-tailored exemptions does not undermine the government's compelling interests in applying such laws. At the same time, I believe that the burdens experienced by business owners should be balanced against the harms experienced by same-sex couples who are refused service in the public marketplace.

By limiting my discussion in this way, I am avoiding many other contentious issues such as whether tax-exempt religious organizations should be compelled to facilitate same-sex marriages or whether government officials should be exempted from regulations requiring them to issue marriage licenses to same-sex couples.<sup>9</sup> While some of the arguments I put forward could be extended to these cases, I do not intend the reasoning I employ to be analogous nor would I expect to arrive at the same conclusion were I to address those scenarios. The narrow question I will address in this paper is whether there are scenarios in which wedding vendors should be exempt from public accommodation laws and, if so, what conditions ought to be met for the exemptions to be granted.

In section one I frame the debate as a conflict between two fundamental liberal values and argue that a balancing approach should be used to mediate the seeming conflict. I also

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<sup>9</sup>For discussion of these issues, see Douglas Laycock, Anthony R. Picarello Jr., and Robin Fretwell Wilson, eds., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Lanham: Rowman & Littlefield Publishers Inc., 2008).

explicitly note what the objects of the religious exemptions at issue are (that is, the specific laws which certain businesses ought to be exempt from). In section two, I present a liberal framework developed by Kevin Vallier for deciding when religious exemptions to legitimately enacted laws are warranted. I apply this framework to the facts of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and argue that the petitioner in that case warrants an exemption under the conditions which Vallier set out. In section three, I discuss how the exemptions I defend would be narrowly-tailored and why they would not undermine the government's compelling interests underlying anti-discrimination regulations. I conclude in section four by considering some objections to my view.

## **§1. Religious Liberty and Equality: A Case of Conflicting Values**

One way to frame the dispute between religious business owners in the wedding industry and same-sex couples is as a conflict between two fundamental liberal values: equality and liberty. Equality is enshrined as a political value in the Fourteenth Amendment to the United States Constitution as well as the Civil Rights Act of 1964. While the Fourteenth Amendment extends to all citizens "equal protection of the laws,"<sup>10</sup> Title II of the Civil Rights Act of 1964 was enacted to prevent unjust discrimination in places of public accommodation and to ensure equal access to goods and services. It states:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.<sup>11</sup>

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<sup>10</sup> U.S. CONST. amend. XIV.

<sup>11</sup>Civil Rights Act of 1964, 42 U.S.C.A. § 2000a (1964). In 1990, the Americans with Disabilities Act supplemented the language of the federal law by including disability as a protected class. See Americans with Disabilities Act, 42 U.S.C. § 12182 (1990).

While the federal public accommodation law does not include sexual orientation as a protected characteristic, twenty-one states and the District of Columbia have explicit prohibitions against sexual orientation discrimination in the realm of public accommodations.<sup>12</sup> The definitions of public accommodation utilized in state statutes are also typically broader than the definition utilized in the federal law.<sup>13</sup> For instance, Colorado’s public accommodation law defines a “place of public accommodation” as “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.”<sup>14</sup> I take Colorado’s law to be a model public accommodation law for my purposes. That is, the laws I have in mind when discussing exemptions are those laws which prohibit businesses open to the public from discriminating on the basis of an enumerated list of specified characteristics – sexual orientation being among them. The businesses I have in mind are those which provide goods or services for weddings or comparable events (such as commitment ceremonies).

Wedding vendors who have been accused of violating public accommodation laws invariably cite concerns that their liberty is being undermined by said laws. Specifically, when these cases go to court, the vendors generally argue that the application of public

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<sup>12</sup>Issac Saidel-Goley, “The Right Side of History: Prohibiting Sexual Orientation Discrimination in Public Accommodations, Housing, and Employment,” *Wisconsin Journal of Law, Gender & Society* 31 (2016): 121.

<sup>13</sup> The federal statute limits places of public accommodation to “lodgings, facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment” or any establishment “(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment.” See Civil Rights Act of 1964, 42 U.S.C.A. § 2000a (1964).

<sup>14</sup> Colorado Anti-Discrimination Act, C.R.S.A. § 24-34-601 (2014). A limit placed on this definition is such that places of public accommodation would not include “a church, synagogue, mosque, or other place that is principally used for religious purposes.”

accommodation laws violate their First Amendment rights.<sup>15</sup> The First Amendment to the United States Constitution states, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . .”<sup>16</sup> Phillips, the owner of Masterpiece Cakeshop has cited both the Free Exercise Clause and the Free Speech Clause in arguments before the Colorado Court of Appeals and the United States Supreme Court. Phillips argued that application of Colorado’s public accommodation law compels him to choose between violating his religious commitments and violating the law. In addition, he argued that the conduct of creating a wedding cake is inherently expressive and that any law which compels him to create wedding cakes for particular weddings thereby compels him to express a message of approval for those weddings.<sup>17</sup> Therefore, the law as applied is a burden on his freedom of expression and religious exercise. If this is true, then his business and others like it deserve an exemption from public accommodation laws – or so the argument goes.

Opponents of exemptions, on the other hand, argue that the purpose underlying public accommodation laws is not to violate the constitutional rights of business owners and that the laws effectively do not do so. Rather, their purpose and effect is to guarantee that individuals with particular characteristics are not unjustly discriminated against in the public marketplace. Such discrimination can have tangible material costs such as limiting access to important goods

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<sup>15</sup> Careful legal arguments would actually implicate both the First and Fourteenth Amendments as the rights listed in the First Amendment have only been made applicable against state governments through the Due Process clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>16</sup> U.S. CONST. amend. I.

<sup>17</sup> *Craig*, 370 P.3d at 272.

and services. It can also cause serious, though arguably immeasurable, harm on the dignity of those discriminated against.

The aforementioned positions illustrate that there is a *prima facie* conflict between the value of equality appealed to by proponents of broad application of anti-discrimination provisions and the value of liberty appealed to by their opponents. This conflict can be phrased in simple terms. In order to maintain the equal treatment of minorities in the public marketplace, there need to be limits placed on the liberty of businesses open to the public and their owners. For the purposes of this paper, I concede that this is true with respect to certain immutable characteristics such as sexual orientation. For instance, no business should be allowed to refuse to serve an individual solely based on their sexual orientation. The crux of the debate then, as I see it, is not whether anti-discrimination laws justifiably place limits on the liberty of citizens but what the boundaries of those limits should be.

There are two diametrically opposed positions that one could take regarding this issue. The first, what might be called the ‘equality approach,’ is that the equality of same-sex couples should trump any liberty interests which vendors may have.<sup>18</sup> In effect, this position maintains that the rights to religious exercise and freedom of expression should never include the right to discriminate in the public marketplace on the basis of protected characteristics. The second position may be called the ‘religious liberty approach.’<sup>19</sup> This position maintains that when there is a bona fide religious objection to same-sex marriage present, the business in question should be allowed to refuse service to same-sex couples. In this paper, I take myself to be

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<sup>18</sup> Steven J. Heyman, “A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage,” *First Amendment Law Review* 14 (2015): 48-52.

<sup>19</sup> *Ibid.*, 52-53.

offering a compromise between these two positions which values both the equal treatment of all parties and the liberty interests at stake. Before I turn to my positive argument, I will offer brief arguments for why the ‘equality approach’ and the ‘religious liberty approach’ should be abandoned in favor of an approach that balances the underlying values at play.

### **1.1. The Equality Approach**

As stated earlier, equality as a political value is invoked in both the federal public accommodation law and the Equal Protection clause of the Fourteenth Amendment. Those who defend the equality approach maintain that the value of equal treatment should trump any appeals to religious liberty. My argument against the equality approach is twofold. First, I maintain that any sufficiently robust right to religious exercise will include the right to discriminate in a way that many might see as invidious or unjust. Second, even if this right does not adequately motivate granting exemptions in the public accommodation context, equality interests can be invoked on both sides of the disputes. Thus, any approach which categorically treats the value of equality as superior to religious liberty risks either inconsistent or unfair application.

My first claim is that any sufficient right to exercise religion will include some right to discriminate, perhaps invidiously. One paradigmatic example of this is the so-called ‘ministerial exemption.’ In 2012, the United States Supreme Court decided a case regarding a teacher who filed suit for unlawful dismissal under the Federal Americans with Disabilities Act against her former employer, an Evangelical Lutheran Church and School in Michigan. The Court unanimously held that federal anti-discrimination laws do not apply to the employment of

ministers or religious leaders by religious organizations.<sup>20</sup> There is ample room for debate regarding what positions should count as ‘ministerial’ and which organizations should count as ‘religious.’ But there is almost no disagreement amongst those who value religious liberty that religious organizations should be able to discriminate against *some* classes of individuals in choosing who to hire as ministers. This ability to discriminate is essential to the autonomy of religious organizations. For instance, take a Christian church. Nearly everybody agrees that such a church should be able to discriminate against non-Christians in hiring their minister(s). Perhaps more controversially, many churches believe that women should not, or cannot due to theological fiat, serve in certain positions of religious authority. Thus, many churches discriminate against women when they hire ministers. Both types of discrimination – discrimination against women and non-Christians – would be in plain violation of federal anti-discrimination law if courts and legislators did not recognize an exemption for religious organizations. As stated earlier, there is room for debate regarding the specific details but any sufficient right to religious exercise will include some right to discriminate – the most uncontroversial case being religious organizations having the right to discriminate against non-members of the religion in hiring for positions of religious authority.

A likely response to this point is that it is irrelevant for the current discussion.

Opponents of exemptions to public accommodation laws could easily concede that the ministerial exemption represents a unique and narrow set of cases where exemptions are appropriate and that it does not establish that exemptions would be appropriate in the public accommodation context. This is true and I only point to the ministerial exemption to rebut the

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<sup>20</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).



proposition that religious liberty *never* includes the right to discriminate. If the ministerial exemption is appropriate, then there are at least *some* cases where exempting parties from anti-discrimination laws is appropriate and the value of equality should not universally override religious liberty concerns. I now turn to my second claim, aimed primarily at those who may not believe that the ministerial exemption is appropriate or those who do not think it gives us any reason to believe that exemptions would be appropriate in the public accommodation context.

My second claim is this: both sides of legal disputes concerning the application of public accommodation laws in the wedding industry can appeal to the value of equality in defending their positions. Let us look first at the same-sex couples who have brought law suits against wedding vendors who refused to serve them. Their argument is that by refusing service, vendors have treated them unequally. Let us grant for the moment that this is true. In other words, I am willing to concede that vendors do treat same-sex couples unequally by refusing service to them.<sup>21</sup> Furthermore, they are treating them unequally on the basis of a characteristic explicitly protected by anti-discrimination provisions – sexual orientation. Such unequal treatment is precisely why anti-discrimination regulations were instituted so granting exemptions to them, either legislatively or through judicial review, would seem to undermine their very purpose.

While one of the purposes of public accommodation laws is to prevent unequal treatment by businesses in the public marketplace, application of them often leads to unequal

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<sup>21</sup> Although I am willing to concede this point, it is not obvious that it is true. For example, wedding vendors who refuse service to same-sex couples may make the argument that they would refuse service to *any* customer if they thought that serving said customer would facilitate a religious ceremony they found disagreeable or offensive. In these cases, vendors often argue that they are not refusing service on the basis of sexual orientation but rather because they find the conduct of a same-sex wedding immoral and do not wish to be associated with it. Courts have typically rejected this distinction between conduct and identity characteristics as the conduct of a same-sex wedding is so closely associated with identifying as a homosexual.

treatment by state or federal governments. For instance, take the case of Elaine Huguenin, the owner of Elane Photography. When asked to photograph a commitment ceremony between two women, Huguenin refused citing her religious beliefs. Her refusal was found to be in violation of the New Mexico Human Rights Act. There is one sense in which application of the New Mexico law is perfectly equal. Every business in New Mexico which opens itself up to the general public is subject to this law and cannot refuse customers on the basis of sexual orientation. But not all business owners believe that providing their goods and services to same-sex couples implicates their moral or religious commitments in any significant way. For those that do, laws such as the New Mexico Human Rights Act compel them to choose between living their professional lives in accordance with their religious commitments, obeying the law or possibly giving up their financial and personal stability by shutting down their business.<sup>22</sup> Because of this, New Mexico's public accommodation law and others like it enforce an unequal distribution of burdens and benefits. Religious business owners who believe that operating their business in line with their religious commitments entails refusing service to same-sex couples are burdened by public accommodation laws by having to compromise their religious identity or their financial/personal stability. Business owners who do not share these beliefs are not burdened in the same way.

Thus, the 'equality approach' entails one of two commitments. The first is that courts and legislators should attempt to guarantee the equal treatment of the same-sex couples in the

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<sup>22</sup> In some jurisdictions, the choice of 'shutting down' their business may be too starkly worded. For example, if Elane Photography ceased to operate a publicly accessible website and relied on word of mouth rather than public marketing for business, it could be that courts would not deem her a public accommodation. In that case, the issue of whether she discriminated against would-be customers or whether such discrimination is protected by constitutional amendments or statutes would not even arise. Taking such actions, however, may still risk the financial stability of the business if the website or public marketing was a large producer of business transactions.

public marketplace which would also guarantee the unequal treatment of religious business owners by the government. This would require an account of why we should elevate the equal treatment of one group over that of another. Alternatively, courts and legislators could attempt to draw some sort of line to adjudicate when they favor the equality of one group over another. In this case, equality is not acting as a 'trump' but is operating as one value among many. But this is inconsistent with the equality approach.

### **1.2. The Religious Liberty Approach**

To reiterate, the religious liberty approach maintains that whenever a wedding vendor has a sincere religious objection to same-sex marriage, they ought to be granted an exemption to relevant public accommodation laws. Similar to the equality approach, I object to this approach on two fronts. First, just as there are equality interests on both sides, there are also liberty interests on both sides. Second, even if there is a compelling reason why we should treat 'religious' liberty more importantly than the liberty of same-sex couples in the public marketplace, giving categorical deference to appeals to religious liberty would drastically undermine the purposes of anti-discrimination law.

It is fairly uncontroversial that anti-discrimination laws enforce limits on liberty. If businesses wish to discriminate, then such laws impede their ability to do so. Thus, in the public accommodation context, anti-discrimination laws are a limit on the *negative liberty* on otherwise discriminatory businesses. Negative liberty is often defined as freedom from interference, where such interference can take the form of external obstacles, barriers or constraints. In this case, the constraint on the liberty of business owners takes the form of anti-discrimination laws backed by government coercion and authority. The fact that these laws do

infringe on the negative liberty of certain persons should be relatively uncontroversial and does not automatically entail any particular evaluative judgment about the law.<sup>23</sup>

However, as philosophers working on liberty and freedom have long noted, negative liberty is not the only type of freedom worth caring about. There is also what has often been called *positive liberty* or, alternatively, *autonomy*. I save my full discussion on how the autonomy of same-sex couples can be affected by invidious discrimination for a later section but I will briefly note here how I intend to cash out this claim. Not only does discrimination by businesses affect the autonomy of same-sex couples by limiting their range of options in the public marketplace, it also affects their capacity to be fully autonomous agents by undermining their sense of self-worth and self-respect. Thus, defenders of the religious liberty approach are not categorical defenders of *liberty* per se but liberty of a particular kind, namely, *religious* liberty. Just as was the case with the equality approach, this particular commitment would require an account of why we ought to treat *religious* liberty as more important than the liberty of same-sex couples.

Let us assume for the moment that there is such an account – that is, there are compelling reasons for why we ought to treat *religious* liberty as having a special status. Even if this is true, I maintain that categorical deference to those vendors who have religious objections to same-sex marriage would drastically undermine the purposes of anti-discrimination law. Even if the exemptions were limited to the wedding industry (which could likely be accomplished through statutory provisions – be they federal or state), these

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<sup>23</sup> In fact, I assume throughout this paper that some infringements on the liberty of otherwise discriminatory business owners are justified. I do not believe, however, that categorical application of the law is justified as I believe that exemptions ought to be granted in certain instances.

exemptions would extend to a whole host of businesses: bakers, florists, tailors, restaurants, banquet halls, photographers, hotels, etc. It is also not clear what principled distinction could be made to justify granting exemptions to businesses with religious objections to same-sex marriage but not those businesses with religious objections to interracial marriages or interreligious marriages. Again, this distinction could just be created within the language of a statute but the affordance of even these legislatively crafted exemptions to businesses which have religious objections to same-sex marriage would mean that the potential for same-sex couples to be excluded from an entire part of the public marketplace would be present (even if unlikely). The mere fact that the potential is real, however, and made possible through government efforts should give pause to any liberal who endorses the anti-discrimination principle underlying the 14<sup>th</sup> Amendment's Equal Protection clause.<sup>24</sup>

These are just a few reasons why we should abandon the equality approach and the religious liberty approach in favor of an approach which balances the opposing interests of the parties. No doubt some readers have found them ultimately unconvincing or can think of objections or arguments which I have not considered. This is inevitable as my primary intent in this paper is not to prove that these approaches are wrong (though I believe that they are) but is rather to present a positive argument for granting exemptions. I turn to this argument in the following sections.

## **§2. A Liberal Account of Religious Exemptions**

In the following two sections, I offer a positive liberal argument for granting religious exemptions to public accommodation laws. I call it a 'liberal' argument because liberals are

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<sup>24</sup> It should be stated that this argument is stated on strictly *liberal* grounds. Whatever kind of liberalism one espouses, I assume that it holds some pride of place to the value of equality.

conventionally committed to the values of liberty and equality. Furthermore, a general task of a liberal political philosophy is to conceive of principles or policies which will help citizens live in a society which is pluralistic in nature. In other words, there is deep disagreement amongst citizens regarding matters of morality, religion and philosophy and one task of liberalism is to try and discover a way for citizens to live together in such a pluralistic society with as little conflict as possible.

A core commitment of liberal political theory is a presumption of liberty. That is, liberals generally assume that citizens should be free to conduct their lives in the way they see fit and any government intervention into that freedom requires justification. Kevin Vallier has recently developed a framework for when religious exemptions to legitimately enacted laws are publicly justified. Public justification plays a central role in liberal theories which hold that political rules or laws ought to be, “in some sense, justifiable or acceptable to all those persons over whom the rules purport to have authority.”<sup>25</sup> This insight, which received a thorough treatment in the work of John Rawls, is that publicly justified laws are necessary “for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines. . .”<sup>26</sup> While I do adopt Vallier’s public justification framework going forward, I do not directly argue that it is the appropriate interpretation of what liberal political theory entails as doing so would be beyond the scope of this paper.

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<sup>25</sup> Jonathan Quong, "Public Reason," *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2013/entries/public-reason/>>.

<sup>26</sup> See John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005), 47.

The framework which Vallier set out is in the public justification tradition because he asserted that if the four conditions he laid out are met, then the exemption in question is publicly justified. Vallier argued that there are four conditions which, if met, warrant a religious exemption for any particular person:<sup>27</sup>

(a) if she has sufficient intelligible reason to oppose the law, (b) if the law imposes unique and substantial burdens on the integrity of those exempted that are not off-set by comparable benefits, (c) if the large majority of citizens have sufficient reason to endorse the law, and (d) if the exemption does not impose significant costs on other parties that require redress. If these four conditions are met, then legislative and/or judicial bodies morally should carve out an exemption for those requesting them.<sup>28</sup>

In explicating and modifying these conditions, I analyze a current case before the Supreme Court of the United States, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. While Vallier did suggest that his account may require granting an exemption to religious businesses like Masterpiece Cakeshop, it is my goal in this paper to make this argument explicit.<sup>29</sup>

### **2.1. A Look at *Masterpiece Cakeshop***

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<sup>27</sup> I am using the term ‘person’ here in the legal and not philosophical sense of the word. Whatever philosophers mean by the concept, I am following the Dictionary Act in that my use of the word includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” See Dictionary Act, 1 U.S.C.A. § 1. The Supreme Court also held in *Burwell v. Hobby Lobby* that corporations are able to possess religious beliefs and exercise a religion. See *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014). I think this is contestable but it does not matter much for my purposes as a denial of the claim would not change the substance of my argument.

<sup>28</sup> Kevin Vallier, “The Moral Basis of Religious Exemptions,” *Law and Philosophy* 35 (2016): 3. Vallier noted that legal bodies may have sufficient legal reason to follow judicial procedures (or other legal procedures presumably) if they lead in a direction inconsistent with the framework he defended. Vallier did not point out, however, that there may also be broadly moral or philosophical reasons to think that courts in particular should not follow the dictates laid out by this framework. For instance, one might argue that if courts read these conditions into the First Amendment or other religious freedom statutes, then that might be an impermissible occurrence of judicial discretion. This does not have to be a strictly legal argument. Rather, it could be a broadly moral or philosophical argument regarding the role of judicial review or judges more generally in a democratic society. I do not go into that issue in this paper but it might be more appealing if we limited the argument to what legislators ought to do or what judicial bodies have a pro tanto reason to do provided such a reason is not overridden by other concerns.

<sup>29</sup> This is not meant to indicate that Vallier would likely agree with my reasoning or that the argument I present would be one that Vallier thinks is consistent with his account. Indeed, there is reason to believe that he would disagree with me on multiple points given the fact that I am modifying some of his conditions in substantial ways.

In 2012, Charlie Craig and David Mullins visited Masterpiece Cakeshop and requested that Jack Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, advising Craig and Mullins that he did not provide wedding cakes for same-sex weddings due to his religious beliefs. While he told them that he would create and provide them with any other baked goods other than a wedding cake, they left the shop without purchasing anything and without discussing any potential wedding cake designs with Phillips. Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division. Phillips was found guilty of violating the Colorado Anti-Discrimination Act (CADA) for discriminating against Craig and Mullins because of their sexual orientation.<sup>30</sup>

#### *A. Sufficient and Intelligible Reasons*

The first condition which Vallier set out is that persons requesting an exemption must have “sufficient intelligible reason to oppose the law.”<sup>31</sup> He wrote that “when public reason liberals say that someone has *sufficient* reason to endorse a law or policy, they typically mean that the balance of her justificatory reasons favors the policy.”<sup>32</sup> The same is true for when citizens oppose laws. For someone to have sufficient reason to oppose a law or policy, the balance of their justificatory reasons must favor opposing the law or policy in question. The concept of ‘justificatory reasons’ is often subject to idealization. Vallier proposed a moderate form of idealization in defending his account. For one’s reasons to serve as justificatory under this moderate idealization, they must be epistemically justified and arrived at via sound rules of

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<sup>30</sup> *Craig* 370 P.3d at 276-277.

<sup>31</sup> Vallier, “The Moral Basis of Religious Exemptions,” 3.

<sup>32</sup> *Ibid.*, 5.



inference. They must also be logically consistent or, at the very least, not obviously inconsistent.<sup>33</sup>

The reasons which can serve as epistemic defeaters to laws are also constrained by the intelligibility requirement. The intelligibility requirement can be stated as follows:

*Intelligibility:* A's reason X is intelligible for members of the public if and only if members of the public regard X as epistemically justified for A according to A's evaluative standards.<sup>34</sup>

This definition of intelligibility illustrates that, for a reason to be intelligible to the public, it is not necessary that members of the public accept the reason themselves. For instance, an atheist can see beliefs based on the Bible as epistemically justified for Christians because many Christians take the Bible as authoritative or properly basic. For instance, if we look at the facts of *Masterpiece Cakeshop*, it is uncontested that Phillips has been a Christian for over thirty years and believes in Jesus Christ as his Lord and Savior.<sup>35</sup> Being a Christian for Phillips likely includes the belief that the Bible is an authoritative text on issues of morality and how one should live one's life. Because the Bible proclaims the sinfulness of same-sex relationships,<sup>36</sup> Phillips believes that facilitating same-sex marriages by designing and providing wedding cakes for them would make him complicit in sin and would "displease God."<sup>37</sup> This is an intelligible belief for him to have even if we do not accept the assumptions implicit in his worldview.

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<sup>33</sup> Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (New York: Routledge, 2014), 161-163. Vallier also argues against the 'radical idealization' that is often employed by public reason liberals.

<sup>34</sup> Kevin Vallier and Fred D'Agostino, "Public Justification", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2014/entries/justification-public/>>. See Vallier, "The Moral Basis of Religious Exemptions," 7 and *Liberal Politics and Public Faith*, 183.

<sup>35</sup> *Craig*, 370 P.3d at 277.

<sup>36</sup> Lev. 18: 22, 20:13 NRSV.

<sup>37</sup> *Craig*, 370 P.3d at 277.

The Bible also expresses a straightforward prohibition on males having sexual relationships with other males when it states that “if a man lies with a male as with a woman, both of them have committed an abomination.”<sup>38</sup> As marriage often includes, in part, a sexual relationship, Phillips does not want to facilitate such a relationship which he sees as prohibited by his religious ideology. CADA compels him to do this. Thus, he has an intelligible reason to oppose the law as applied to him.

One possible objection to the intelligibility requirement is that it might seem to be too easy to fulfill. For instance, consider a fictional baker who does not believe that certain types of human beings are people. He justifies this by appealing to a religious text, much like the appeal to Biblical scripture. Furthermore, he firmly believes that only people have birthdays and that it would be morally wrong to provide birthday cakes for non-people. Doing so would require him to go against his religious convictions. Must we see this as an intelligible reason? Assuming for the sake of argument that it does actually follow from a straightforward reading of the fictional text that certain classes of human beings are not really people and that providing birthday cakes to them would be in violation of religious prescriptions, the response would seem to be yes. But those readers tempted to endorse this objection may not fully appreciate that intelligible reasons are not dispositive. We can maintain that all sorts of intelligible reasons can serve as justificatory under this model but yet do not warrant granting exemptions on account of them. For this objection to be compelling, this framework would have to allow exemptions to pass muster which would have consequences that liberals would seemingly not be able to

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<sup>38</sup> Lev. 20:13 NRSV.

endorse given their philosophical commitments. But that would require an additional argument rather than the insistence that the intelligibility requirement is too permissive.

The third condition is that the large majority of citizens have sufficient reason to endorse the law. The reason for this condition is that the appropriate thing for legislators to do if the majority of citizens did not have sufficient reason to endorse the law would be to work to repeal it, not craft specialized exemptions to it. Courts and legal scholars have noted several purposes underlying anti-discrimination laws. Here I simply note them and assume that they serve as sufficient reasons that a majority of people have to support public accommodation laws. The purposes are as follows (in no particular order): 1) to ensure and maintain equal access to publicly available goods and services, 2) to eradicate barriers to the equal treatment of all citizens in the public marketplace, 3) to stigmatize the practice of discrimination in the public marketplace, 4) to maintain the social order, and 5) to prevent dignitary harm.

### *B. Integrity and Substantial Burdens*

The second condition is that “the law imposes unique and substantial burdens on the integrity of those exempted that are not off-set by comparable benefits.”<sup>39</sup> Vallier defined a substantial burden as “one that significantly sets back one’s capacity to advance her interests and core ideals and doctrines.”<sup>40</sup> A person has integrity “when she is true to her character, projects, plans and beliefs.”<sup>41</sup> This definition of integrity draws upon Loren Lomasky’s account of persons and projects. Briefly stated, Lomasky defines projects as those ends “which reach indefinitely into the future, play a central role within the ongoing endeavors of the individual,

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<sup>39</sup> Vallier, “The Moral Basis of Religious Exemptions,” 3.

<sup>40</sup> *Ibid.*, 13.

<sup>41</sup> *Ibid.*, 12.

and provide a significant degree of structural stability to an individual's life."<sup>42</sup> As these projects provide structural stability to our lives, they are partially constitutive of our personal identities. Furthermore, because they are partially constitutive of our identities, our personal integrity is threatened when the government passes laws which impede our ability to accomplish these ends.

My claim is that the personal integrity of Phillips is burdened by the application of Colorado's public accommodation law. There are two ways in which CADA burdens his integrity. The first is that it undermines his ability to live according to what he believes are mandates of his religion. Obviously, I will not attempt to detail, nor do I pretend to know, most of Phillips' religious beliefs or commitments. However, as stated earlier, part of his web of projects and beliefs is likely substantially related to his identity as a Christian. He "believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages."<sup>43</sup> Assuming that his beliefs on this matter are sincere, it is clear that compelling him to use his artistic skills to create wedding cakes for same-sex couples compels him to violate what he takes to be a mandate of his religion. As Christianity is a core doctrine which plays a central role within his ongoing endeavors, CADA burdens his personal integrity by undermining his ability to successfully pursue a project which is central to his identity. In other words, the law compelling him to serve same-sex couples undermines his ability to live out his convictions as a Christian.

I take this first way in which public accommodation laws can burden the personal integrity of wedding vendors to be relatively uncontroversial. If personal integrity involves

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<sup>42</sup> Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 26.

<sup>43</sup> *Craig*, 370 P.3d at 277.

being true to one's beliefs and there is a law which compels individuals to do something in direct violation of what they believe to be a religious obligation, then such a law undermines their integrity by circumventing their ability to live a life fully consonant with their religious identity. The second way, however, is more controversial and it involves the claim that compelling certain wedding vendors to serve same-sex couples is, in effect, compelling them to express a message which they disagree with. In arguing for this claim, I draw significantly from the Supreme Court's free speech jurisprudence. The Supreme Court has historically recognized that the First Amendment protects a speaker's "autonomy to choose the content of his own message and, conversely, to decide what not to say"<sup>44</sup> and that no citizen should be compelled to express by word or act any particular opinion which they disagree with.<sup>45</sup> CADA both undermines Phillips' autonomy as a speaker and compels him to express a particular opinion which he finds disagreeable.

Courts have generally rejected the argument that wedding vendors are compelled to express a message when they are forced to comply with public accommodation laws.<sup>46</sup> In rejecting this argument, courts often insist that treating same-sex couples on a par with opposite-sex couples is not inherently expressive conduct, does not express a message of approval for same-sex marriage and is merely showing compliance with operative anti-discrimination laws. I maintain that this conclusion is incorrect regarding Masterpiece Cakeshop. I further claim that the compelled conduct at play in *Masterpiece Cakeshop* – designing and creating wedding cakes for same-sex couples – expresses a particular message

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<sup>44</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 558 (1995). Also, see *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796-797 (1988).

<sup>45</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>46</sup> *Elane Photography*, 309 P.3d at 53 and *Craig*, 370 P.3d at 277.

which Phillips does not endorse. This burdens his integrity by divorcing his personal convictions from the content of his expression. Alternatively, it requires him to “dis-integrate [his] creativity and [his] conscience.”<sup>47</sup>

In beginning this inquiry into whether the regulated conduct is deserving of First Amendment protections, courts have had to ascertain whether the conduct is expressive. While the text of the First Amendment extends protection to ‘speech’ only, courts have “long recognized that its protection does not end at the spoken or written word.”<sup>48</sup> In other words, courts have interpreted the Free Speech clause to protect conduct which constitutes expression of ideas. A working definition of these acts of expression has been provided by Thomas Scanlon when he wrote that “any act that is intended by its agent to communicate to one or more persons some proposition or attitude” can be considered an act of expression.<sup>49</sup>

The Supreme Court, however, has rejected the view “that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>50</sup> Instead, the Court has opted to extend First Amendment protection only to conduct which is deemed ‘inherently expressive.’<sup>51</sup> In *Spence v. Washington*, the Court developed a test to discern when conduct ought to be deemed ‘inherently expressive.’ I adopt this test because I believe that it provides us with a judicable framework. There are two prongs to the test the Court developed. First, the speaker must have intended to send a particularized message by the conduct. Second, the audience must have understood the

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<sup>47</sup> Richard Garnett, *Symposium: Conscience, conditions, and access to civil society*, SCOTUSblog (Sep. 15, 2017, 4:50 PM), <http://www.scotusblog.com/2017/09/symposium-conscience-conditions-access-civil-society/>.

<sup>48</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>49</sup> Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy & Public Affairs* 1 (1972): 206.

<sup>50</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>51</sup> *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 66 (2006).

message being sent.<sup>52</sup> The test was restated in *Texas v. Johnson* as requiring that an “intent to convey a particularized message was present” and “the likelihood was great that the message would be understood by those who viewed it.”<sup>53</sup>

Considering the first prong, it is not clear how particular the intended message must be. The Court has stated that “a narrow succinctly articulable message is not a condition of constitutional protection” as such an interpretation would not reach “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”<sup>54</sup> Other than insisting that the ‘particularized message’ requirement should not be interpreted too narrowly, the Court has said little else regarding how it should be positively interpreted. There is likely no clear and uncontroversial line to be drawn between messages which are ‘particular’ and messages which are too general to warrant First Amendment protections under this test. What I propose is that the first prong of the test can and should be understood in light of the second. To reiterate, the second prong is that the audience understood the message being intentionally communicated by the conduct in question. We can understand the content of the message conveyed by analyzing what likely message would be understood by the audience who viewed it. If it is determined that there is a likely message which would be understood by those who viewed it, the conduct should be deemed inherently expressive.

Carolina Corbin has defended a similar understanding of the test set forth in *Spence*. She has argued that courts should try to decipher whether particular conduct has what she called a

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<sup>52</sup> *Spence v. Washington*, 418 U.S. 405 (1974).

<sup>53</sup> *Texas*, 491 U.S. at 404.

<sup>54</sup> *Hurley*, 515 U.S. at 569.

'social meaning.' 'Social meaning,' according to Corbin, is "the meaning society attaches to particular conduct in a particular time and place."<sup>55</sup> In analyzing *Masterpiece Cakeshop*, we have to analyze whether a wedding cake, or, more specifically, whether the process of creating one for a specific couple, has a meaning that is understood by society in the current contemporary context. I maintain that it does and that compelling Phillips to design and create wedding cakes for same-sex couples compels him to express a message which is contrary to his religious convictions.

Most of the courts and legal scholars commenting on this case and others like it argue that the message being expressed by the act of making a wedding cake and of providing goods or services to same-sex weddings more generally, if there is one, is approval of same-sex marriage. Thus, proponents of exemptions have argued that compelling wedding vendors with religious objections to same-sex marriage amounts to compelling them to express an approval of same-sex marriage. Opponents of exemptions, on the other hand, deny that serving same-sex couples involves expressing such a message.

Opponents of exemptions are correct to deny that serving same-sex couples involves expressing a message of approval for same-sex marriage but they are incorrect in the assertion that it involves no expression at all. This is because they are incorrect regarding the actual social meaning underlying the production and sale of certain products or services to same-sex couples planning wedding celebrations. The actual social meaning and, thus, the message being expressed by the conduct is the recognition that same-sex marriages are, in fact, marriages. I will now turn to the specific arguments as they relate to the design and sale of wedding cakes.

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<sup>55</sup> Caroline Mala Corbin, "Speech or Conduct? The Free Speech Claims of Wedding Vendors," *Emory Law Journal* 65 (2015): 254.



Masterpiece Cakeshop and Phillips argue that the sale of wedding cakes to same-sex couples expresses a message of approval for same-sex marriage. Those opposing Masterpiece Cakeshop's claim correctly point out that "the business context essentially neutralizes any potential message of endorsement" for same-sex marriage.<sup>56</sup> In other words, during the normal course of business, reasonable observers of business transactions would likely not come to the conclusion that the mere act of selling a product or service expressed a message of approval on the part of the business for either the customer purchasing it, the event it is being purchased for or the conduct taking place at the event. In fact, it seems likely that many businesses are regularly unaware of the details regarding the particular events they provide goods or services for.

What I claim, however, is that a message of approval is not the message which would be likely understood by those who observed the conduct of custom-making a wedding cake. That is, a message of approval is not the social meaning of the design, creation and sale of a custom-made wedding cake to a same-sex couple. This is because the business transaction includes a unique creative dimension (namely the fact that the cake is custom-made for a specific couple) and involves the creation of a symbolic product. When Phillips begins the process of creating a wedding cake, he has an in-depth "consultation with the customer(s) in order to get to know their desires, their personalities, their personal preferences and learn about their wedding ceremony and celebration."<sup>57</sup> Furthermore, Phillips considers himself an artist and custom-makes all of his wedding cakes. He determines the design of the cake through his consultation

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<sup>56</sup> Ibid., 244.

<sup>57</sup> Reply in Support of Petition for a Writ of Certiorari at 6, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-111).

with the customer(s) and then uses his artistic talents to sculpt what can be called a ‘temporary sculpture’ which will serve as a central component of the wedding celebration. A wedding cake is not merely a dessert and its purpose is not merely to fulfill the guests’ appetites after the main meal.<sup>58</sup> It is a symbolic representation meant to communicate a celebratory message.<sup>59</sup> As was written in the petition for the Supreme Court to accept the case, a couple slicing a wedding cake plays a communicative role in signifying that the couple is now married, “slicing a pizza or a pot roast would not have the same effect.”<sup>60</sup>

Not only do wedding cakes play a communicative role at the celebration, but weddings are inherently expressive events. Echoing some points made in the *Obergefell* opinion by Justice Kennedy, Helen Alvare wrote that

marital “status” is the legal and social recognition that the marital union is specially favored because it forms the “keystone of the social order,” is the most favorable and stable place for sexual expression and childrearing, and is a public sign of fidelity, permanence, maturity and social responsibility. It is because state-recognized marriage

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<sup>58</sup> Justice Sotomayor, in oral arguments for *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, stated that “the primary purpose of a food of any kind is to be eaten” and that “some people might love the aesthetic appeal of a special dessert, and look at it for a very long time, but in the end its only purpose is to be eaten.” See Transcript of Oral Argument at 14-15, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, (No. 16-111). It should be mentioned from the outset that she is stating two different things here. Stating that the *primary* purpose of any kind of food is to be eaten is different from stating that is its *only* purpose. We can probably grant that she was just being a little careless with her language and concede that her ultimate point is that the *primary* purpose of any kind of food is not to express a particular message but to be eaten. There are a couple of points with which I would like to respond. First, I am not sure why, even if we should grant her point that expressing a message is not the primary purpose of a wedding cake, that expressing a message could not be some secondary purpose. Also, I just think her point here is mistaken. It is simply not the primary purpose of a wedding cake to be eaten and just because it *can* be eaten does not mean that is its primary purpose. Second, Sotomayor would have to reconcile her claim with the fact that faux wedding cakes have been a trend for quite a while. Some customers wish to have the aesthetic of a traditional wedding cake but, to save money, have purchased faux cakes which are decorated and have designs like ‘real’ wedding cakes but are generally made out of some inedible substance like Styrofoam. This gives us a *prima facie* reason to think that at least some couples do not believe that being edible is a prerequisite for wedding cake to fulfill its primary purpose but rather believe that its purpose is to serve an aesthetic role at the wedding celebration.

<sup>59</sup> For a discussion on the historical symbolism of wedding cakes, see Haley Holik, “You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake is Compelled Speech,” *Regent University Law Review* 28 (2015): 302-304.

<sup>60</sup> Petition for a Writ of Certiorari at 5, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-111).

legally possesses and communicated such a status that over a thousand state benefits flow to it, and myriad obligations attach to it as well.<sup>61</sup>

Alvare went on to say that “state-sanctioned same-sex marriage communicates the perfect equality of same- and opposite-sex married unions.”<sup>62</sup> It is precisely because marital status communicates these messages that marriage equality for same-sex couples is desirable and, according to Kennedy, required by the Constitution. Because wedding cakes communicate a celebratory message about the marriage, they also communicate an implicit celebratory message about the messages which the marital status itself communicates.

Where proponents of exemptions have faltered in their arguments is when they insist that the celebratory message communicated by wedding cakes can be easily attributed to the baker who made the cake. It is possible that, in preparing wedding cakes for engaged couples, Phillips is happy for the couple, approving of their union and may even feel joy on behalf of them. But it is not at all clear that a reasonable observer would likely interpret his conduct in this way or even that his other customers would. For instance, consider a high-class baker in Manhattan who exclusively creates custom-made cakes. When a customer asks him to create an extravagant birthday cake, are we to believe that, in making the cake, he is thereby expressing a celebratory message to the individual who is ultimately going to receive it? Consider another example brought up in oral arguments for *Masterpiece Cakeshop*. If a husband bought a cake which contained the text ‘I’m Sorry,’ would the baker then take responsibility for the apologetic message being communicated.<sup>63</sup> What should we think that the

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<sup>61</sup> Helen Alvare, Symposium: As a matter of marriage law, wedding cake is expressive conduct, SCOTUSblog (Sep. 13, 2017, 2:24 PM), <http://www.scotusblog.com/2017/09/symposium-matter-marriage-law-wedding-cake-expressive-conduct/>.

<sup>62</sup> *Ibid.*

<sup>63</sup> Transcript of Oral Argument at 15, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, (No. 16-111).

baker has to apologize for? It seems unlikely that reasonable observers would come to the conclusion that the baker automatically adopts the celebratory or apologetic message just because such a message was expressed by a product he created and sold.

But the social meaning behind a baker like Phillips sitting down with a couple, discussing their aesthetic and culinary preferences, what type of wedding they are having and then using his artistic talents to design and creating a wedding cake specifically customized for them is not one of approval but of recognition. That is, by doing all of this, he is expressing the message that he recognizes the event he is making the wedding cake for as a bona fide wedding. In other words, the message he would be expressing is “that a wedding has occurred, a marriage has begun and the couple should be celebrated.”<sup>64</sup> Reasonable observers who are aware of the process that Phillips undergoes when he begins the process of creating a wedding cake would likely come to the conclusion that, if he started the process of creating a cake for a same-sex wedding, that he recognized it as an actual wedding. This recognition is the message he is being compelled to express by Colorado’s public accommodation law and it is one with which he disagrees.

The reason expressing this message is so unconscionable and disagreeable to Phillips and others is that, while federal and state governments are now required by law to recognize same-sex marriages, many Christians do not believe that such marriages are legitimate. Indeed, they believe that marriage is a sacred gift to humanity from God and is meant to only be between one man and one woman. Many of them do not believe that same-sex marriages are condoned by God and, thus, do not believe that same-sex marriages are ‘real’ marriages. This

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<sup>64</sup> Reply in Support of Petition for a Writ of Certiorari at 6, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-111).

belief does not have to only rely on Biblical authority. For example, the official position of the United States Conference of Catholic Bishops is that “relationships between two persons of the same sex are not, and can never be, marriages.”<sup>65</sup> But compelling Phillips to create a custom-made wedding cake for a same-sex wedding is compelling him to express to the world that he recognizes them as such. Just as a baker preparing a custom-made birthday cake expresses the message that he is creating the cake for an actual birthday, a baker like Phillips, who only creates custom-made wedding cakes, expresses the message that he judges same-sex weddings to be bona fide weddings once he begins the process of creating a wedding cake for a same-sex couple.

With all of this being said, one could still remain skeptical that the conduct of creating a wedding cake, even a customized one for a particular couple, rises to the level of genuinely expressive conduct. It might still be claimed that the message of recognition is subsumed by the commercial context in which it is purportedly expressed. That is, it is open for opponents of exemptions in these cases to argue that reasonable observers would likely not see the design and sale of wedding cakes as a message of recognition but rather as mere compliance with public accommodation laws. I will offer a brief rejoinder to this line of argument which concerns the contemporary social context. At the time of writing this paper, it has been about three years since marriage equality was granted to same-sex couples in *Obergefell*. Since then, the ruling and its consequences have been much discussed in mainstream and academic literature. Although I believe that the ruling in *Obergefell* was positive, there remains a significant portion

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<sup>65</sup> *Frequently Asked Questions About the Defense of Marriage*, U.S. CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/marriage-andfamily/marriage/promotion-and-defense-of-marriage/frequently-askedquestions-on-defense-of-marriage.cfm> [<http://perma.cc/SJ6M-XTSK>].

of American citizens who believe that unions between members of the same-sex are immoral. Furthermore, public accommodation laws like the ones implicated in New Mexico and Colorado are not in place in all parts of the country. An idealized 'reasonable person,' much less the average citizen, should not be assumed to recognize that a business providing goods or services for same-sex weddings is merely complying with extant anti-discrimination laws as the laws themselves are inconsistent in their application.

In short, what I maintain is that there are two social conditions which give credence to the idea that a reasonable observer would likely see a business providing a customized good for a same-sex wedding as recognition of that wedding: the fact that same-sex marriages are still objectionable to a significant minority of citizens and the fact that anti-discrimination provisions are inconsistently applied across jurisdictions. Stories about businesses refusing to facilitate same-sex wedding ceremonies have become popular in the news media so it is likely that citizens who observe businesses not doing that believe that such businesses recognize the legitimacy of same-sex marriages. This is bolstered by the fact that current anti-discrimination protections for the LGBTQ community are currently represented by a patchwork of provisions rather than a consistent scheme. As stated earlier, it cannot merely be assumed that a business providing goods or services for same-sex weddings is merely complying with public accommodation laws because there are many areas in the United States where that is not what the law actually requires.

It may seem paradoxical that the inconsistency of anti-discrimination laws would provide a reason for certain businesses to be exempt from them.<sup>66</sup> However, I maintain that

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<sup>66</sup> Thanks to Blain Neufeld and Stan Husi for bringing this point to my attention.

this inconsistency in conjunction with the fact that a significant minority of citizens still vocally object to same-sex marriage reflects the current state of the debate. If a vocal minority disagreed with the institution of same-sex marriage yet the federal law prohibited all businesses from refusing service on the basis of sexual orientation (so the federal law just extended the set of protected characteristics), it may be that reasonable observers would interpret Phillips conduct as merely following the law. But the fact that sexual orientation is not a protected characteristic reflects the current debate in the legal literature. That is, scholars are still debating whether sexual orientation should be a protected characteristic. In addition, there is an ongoing policy debate regarding the appropriate scope of anti-discrimination laws. Thus, it is not *merely* that public accommodation laws are inconsistent which gives us a reason to exempt certain businesses but that this inconsistency reflects the fact that there is a live public debate regarding the validity of same-sex marriage as an institution as well as the place of sexual orientation in anti-discrimination law. Compelling businesses to express a message of recognition is compelling them to express that they have a particular opinion in the ongoing disputes about the legitimacy of same-sex marriage when they do not (or even when they have hold an opposing opinion). This is a straightforward violation of their freedom of expression.

Thus, a message of recognition is the social meaning attached to Phillips' conduct and it is a message he disagrees with. CADA compels him to design and create wedding cakes for same-sex couples if he does so for opposite-sex couples and this has the effect of undermining his ability both as a speaker and as an artist to autonomously choose the expressive content of his artistry. It also burdens his integrity by divorcing the expressive content of his artistic

process from his personal identity and from his goal of creating artwork the expression of which is consistent with Christian principles.

Thus far, I have argued that there are two related ways in which public accommodation laws burden the integrity of religious wedding vendors. The first is that the vendors may believe that facilitating same-sex marriages in any way, even by merely providing goods or services to same-sex couples, is a violation of their religious conscience and the law compels them to be so violative. I spent relatively little time arguing for this claim as I believe it is rather uncontroversial. If a central project of mine is to live according to the tenets of a particular religion and a law compels me to violate those tenets, then the law burdens my integrity by undermining my ability to pursue that project. This is essentially analogous to the facts of *Masterpiece Cakeshop*.

The second way in which public accommodation laws can potentially burden the integrity of wedding vendors is by compelling creative wedding vendors to engage in expressive conduct which expresses a message they do not believe. CADA does this in the case of *Masterpiece Cakeshop* by compelling Phillips to express a message of recognition for same-sex marriages. However, even if the law is a burden to Phillips' personal integrity, the question remains whether that burden is substantial or unique. Vallier's definition of substantial burdens as significant setbacks to one's capacity to advance one's interests is not particularly insightful as it requires us to further ask what we mean by a setback being 'significant.' This is not a fault in Vallier's framework as an answer to the question of whether a burden is substantial or significant would most likely depend on a case-by-case analysis. It is also a question courts have to deal with on a regular basis – particularly in cases having to do with religious liberty claims.



There are a couple of methods by which courts and legislators can determine whether a burden is substantial. The first is to look at the theological or religious substantiality of the burden. The second is to assess the substantiality of the civil penalties triggered by one's religious exercise.<sup>67</sup> While there are legal reasons to prefer one method over the other, we do not need to choose just one as a conjunctive analysis will allow us to see if a burden is substantial in the full sense of the term. Furthermore, I maintain that public accommodation laws do substantially burden certain wedding vendors according to this conjunctive analysis.

There are perhaps legal and prudential reasons why courts should avoid doing an analysis into the theological or religious substantiality of burdens imposed by secular laws. For one, such an analysis would raise Establishment Clause concerns as some theories of the Establishment Clause forbid courts from looking into the theology of any particular religion while adjudicating cases.<sup>68</sup> Even if such analyses did not raise any constitutional questions, courts are not in a good position to do any type of theological analysis. Simply put, judges and jurists are not trained to delve into matters of theology or religious studies. Undertaking an analysis into the theology of a specific religion may also cause courts to favor more popular and mainstream religions as they are the most familiar. This would put minority religions at a disadvantage in the courts.<sup>69</sup> In addition to the theological or religious burdens, there is also the question of how substantial the civil penalties triggered by religious exercise are. This could be measured financially, by the amount of jail or prison time or by the substantiality of any other penalty incurred.

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<sup>67</sup> Michael A. Helfand, "Identifying Substantial Burdens," *University of Illinois Law Review* (2016).

<sup>68</sup> *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) and *Hernandez v. Commissioner*, 490 U.S. 680,699 (1989).

<sup>69</sup> There is empirical backing to this worry. See Gregory C. Sisk and Michael Heise, "Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts," *Iowa Law Review* 98 (2012).

Regarding the religious substantiality of the burden, there is good reason to give a significant amount of deference to the individual being purportedly burdened in analyzing whether a burden is substantial. As already stated, courts are not in a good position to judge the theological merit of specific claims. It is also not the case that courts should refer to the official doctrines of a particular sect as an authority and hold these doctrines as central to every practicing member of that sect. For instance, it is possible for a sect to recognize same-sex marriages but for a member of that sect to have a different interpretation of the Bible and to believe that same-sex marriage is sinful. Courts and legislators should not enforce modes of orthodoxy by concluding that a burden is substantial only if the burden is related to a central theological or religious doctrine of an established sect.

Given that we ought to give deference to what individuals perceive as central to their religion in analyzing the religious substantiality of a particular burden, there is good reason to believe that public accommodation laws do impose a substantial burden to the integrity of religious wedding vendors.<sup>70</sup> Such vendors often have to make a choice between following the dictates of their conscience and following the law. Alternatively, they could make the decision to get out of the business altogether. But this both undermines their projects – if such projects include running a business in line with their religious commitments – and potentially has

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<sup>70</sup> In a Supreme Court case in 2014, Justice Ginsburg pushed back against the view that we should give a great amount of deference to religious believers when adjudicating religious liberty claims. She argued that the Court basically ignored “the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.” See *Burwell* 134 S. Ct. at 2799 (2014) (Justice Ginsburg dissenting). This is one reason why I favor a conjunctive analysis as it does not fall into the potential trap of relying solely on the subjective feeling of the religious believer regarding whether a burden is substantial or not.

significant financial costs.<sup>71</sup> The civil penalties imposed on wedding vendors for being found in violation of public accommodation laws is also often pretty substantial, sometimes resulting in fines up to \$10,000.<sup>72</sup>

The burdens vendors face is also *unique* because it only applies to vendors with religious objections to same-sex marriage. Atheists or other religious believers who do not have such objections would not have a similar objection to facilitating same-sex weddings. They would therefore not be burdened with the compelled choice between following their perceived religious obligations, following the law or giving up on their projects by forfeiting their business. Again, if the burden imposed was not unique in this way but was generally applicable, then the correct approach would be to work to repeal the law in question unless it was justified by overriding state interests.

### **§3. Narrowly-Tailored Exemptions and Compelling State Interests**

In this section, I discuss the remaining conditions to be found in Vallier's framework. Concluding that a burden is substantial and unique is not dispositive of whether an individual ought to be granted an exemption. Vallier also stipulated that burdens on one's integrity may be off-set by comparable benefits. There is also the requirement that the exemption does not impose significant costs on other parties which require redress. Before I discuss these conditions in detail, however, I wish to suggest why the exemptions I defend would be narrowly-tailored. This is important because proponents of exemptions often utilize theories of exemptions which are too broad. If a scheme of exemptions is too broad, then it is more likely

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<sup>71</sup> For instance, Phillips had to forego his wedding cake business which was approximately 40% of his business. See Reply in Support of Petition for a Writ of Certiorari at 13, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-111).

<sup>72</sup> Bailey, "Farm owners fined."

that the purposes of public accommodation laws would be undermined by applying it. This, in turn, makes it more likely that courts or legislators should reject such a scheme. In defending a principle or rule which would separate vendors who deserve exemptions from those who do not, it is important to weigh competing interests – that is, the interests of the vendors against the interests of same-sex couples or, alternatively, the interests of the vendors against competing state interests.

This recognition that any scheme of exemptions ought to be narrowly-tailored for the explicit purpose of not undermining the goals of anti-discrimination laws is a weakness in Vallier's account. At the very least, it marks his account as potentially incomplete. Vallier seemed to be focused on developing a model of when exemptions are warranted in individual cases. But when appellate courts, particularly the Supreme Court, analyze cases, they have to be aware that they are also developing doctrines and rules that will potentially be applied to future cases. It is quite likely that offering one vendor an exemption would have virtually no effect on the general purposes of public accommodation laws and would not harm the same-sex couple being denied service in a tangible way. But courts must be cognizant of when they are potentially setting precedent and providing the same exemption to several hundred vendors under a developed rule may in fact undermine the purpose of public accommodation law. This is why it is important to make sure that any scheme of exemptions is narrowly-tailored. We should look beyond whether harm or an undermining of existing law is present in one particular case and analyze whether such harm would be present if the principle used to decide the case was applied universally.

Kristen Waggoner, a lead attorney for Masterpiece Cakeshop, attempted to draw a line between wedding vendors who deserve exemptions and those which do not. In response to questioning from the justices during oral arguments, she suggested that florists, invitation designers and jewelers should be granted exemptions along with Masterpiece Cakeshop but that hair stylists, makeup artists, chefs and tailors should not be. This was because, according to Waggoner, the latter four are not engaged in speech or expressive conduct.<sup>73</sup> Justice Kagan presented an unappealing (and I believe inaccurate) representation of Waggoner's argument when she asserted that Waggoner and other defenders of Masterpiece Cakeshop hold the view "that a cake can be speech because it involves great skill and artistry."<sup>74</sup> This begs the question why hair stylists and makeup artists would not also be engaged in expressive conduct as their craft can also involve great skill and artistic merit. As my argument above suggests, however, while designing and creating a wedding cake does involve a certain amount of skill and artistry, that alone is not sufficient to deem it expressive conduct. It is expressive conduct because it involves creativity and artistry on the part of the vendor *and* because there is a social meaning attached to custom-making a wedding cake for a same-sex couple. The question of whether the business is creative or artistic should not be seen as dispositive. The business also has to be judged to be engaged in inherently expressive conduct according to the tests which the Court itself set out.

This point introduces the first category of vendors which warrant exemptions – vendors whose conduct is deemed as inherently expressive. I concluded earlier that the conduct of making a wedding cake is expressive conduct because it is artistic and creative *and* because

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<sup>73</sup> Transcript of Oral Argument at 11-14, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, (No. 16-111).

<sup>74</sup> *Ibid.*, 13.

neutral observers would likely see Phillip’s process of designing and creating a wedding cake for a same-sex couple as recognition that the couple would soon become a legitimately married couple. This is in no small part due to the fact that Phillips only provided custom-made wedding cakes. If he provided pre-made wedding cakes or if he had a catalog of cakes for customers to choose from, then the case may warrant a different conclusion. But we should not say, like some commentators have, that “customization marks the line between expression and impermissible discrimination.”<sup>75</sup> The salient point is not merely that the product is custom-made but that the process of custom-making the product expresses a particular message. While I maintain that this is the case with Masterpiece Cakeshop, it is not the case with all vendors who provide customized products or services.

The set of members of this first category of vendors is somewhat vague – intentionally so. Courts and legislators would have to be careful in granting exemptions under this criterion. Some of the justices in oral arguments, as well as the solicitors involved, have illustrated misunderstandings about what is actually at issue in these types of cases. It is not the creativity and artistry of the product or service which triggers free speech concerns but whether the creative conduct itself, in the surrounding social context, can be seen as expressing a particular message. Furthermore, the message is not one of approval but of recognition. Where this category is vague, similar to many other jurisprudentially crafted categories, is at the boundaries. Do tailors express recognition of same-sex weddings when they create suits or tuxedos? My intuition is that they do not but it might be a different story for a bridal boutique

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<sup>75</sup> Audrey Uhland, “The Business of Expression: A Commercial, Constitutional, and Historical Evaluation of the Line Between the First Amendment and Antidiscrimination Laws,” *Southern California Interdisciplinary Law Journal* 26 (2017): 409.

which only provides custom-made wedding gowns or a wedding photographer who insists that, in taking pictures of weddings, she is thereby telling a celebratory story about the union.<sup>76</sup>

Either way, an analysis into social meaning would have to be undertaken in each of these cases and it is my view that the amount of wedding vendors who actually belong in this category is relatively low – far lower than proponents or opponents of exemptions generally recognize.

The second category does not have to do with the expression of wedding vendors but in their active participation in the celebration or ceremony. Because of this, it has no bearing on *Masterpiece Cakeshop* but should be considered regardless. This category would include those vendors who, by providing their services, are *active participants* in the wedding ceremony. A paradigmatic example would be an officiant who offers her services to the public. As stated earlier, I believe that there is good reason to give a fair amount of deference to individuals in figuring out whether they are substantially burdened relative to their religious obligations. But when it comes to analyzing whether substantial burdens warrant exemptions in these types of cases, we should be a bit more measured to make sure that the exemptions are not too broad. For instance, a restaurant owner might have a religious objection to desegregating their restaurants. While the Biblical basis for this is dubious, let us assume that there is a religion whose sacred text can be reasonably read as mandating the separate and unequal treatment of individuals based on their race. Granting exemptions based on that reasoning to everybody who claims to believe such reasons would undermine the purpose of the federal public accommodation statute and the anti-discrimination principle expressed in the 14<sup>th</sup> Amendment.

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<sup>76</sup> See *Elane Photography* 309 P.3d at 53.

Similarly, we ought not to give every vendor an exemption simply because they believe that serving same-sex couples is a violation of their religious commitments.

The point behind this category is to allow for the narrow-tailoring of a scheme of exemptions. As the objections are usually framed as objections to the event – that is, the wedding celebration – we should take more seriously the claims of vendors who are compelled by law to actively participate in the event. Just like the previous category, this category is vague at the boundaries and would have to be worked out in practice. For instance, a band hired to perform at a wedding can be said to be participating at the event by providing entertainment but it is not entirely clear whether a caterer is participating by providing the meal or whether a property owner is participating by providing the venue. As is the case with the first category, I expect that this category would be quite narrower than some defenders of exemptions suggest. For instance, if all one does is rent out a property that one owns, I do not think it makes much sense to say that he is thereby a participant in the ceremony as it is unlikely that most people attending would even be aware of his or her existence.

Although this category is vague, there are two rough-and-ready rules to determine when a vendor is *not* an active participant in a wedding ceremony or celebration. First, if the vendor is not present at the ceremony, there is no sense in which he or she is participating in it. This excludes quite a bit of retail stores who claim that facilitating same-sex marriages is a violation of their free exercise of religion. Due to the large amount of religious doctrines, their beliefs on this issue may very well be sincere but we should not allow exemptions to every retail store who claims to have a religious objection to same-sex marriage. Second, if it is likely that attendees would never see you or notice your presence at the ceremony, it is equally likely



that you are not participating in the ceremony. This excludes certain employees at venues, property managers or any businesses or staff whose job may involve them working in conjunction with the ceremony taking place but cannot be properly said to be *participating* in it.

### **3.1. Compelling State Interests**

Earlier in the paper, I noted the purposes underlying public accommodation laws and I will repeat them here. They are: 1) to ensure and maintain equal access to publicly available goods and services, 2) to eradicate barriers to the equal treatment of all citizens in the public marketplace, 3) to maintain the social order, 4) to stigmatize the practice of discrimination in the public marketplace and 5) to prevent dignitary harms. I assume going forward that the government has an interest in fulfilling these purposes and I will also assume for the sake of argument that the government's interest in fulfilling these purposes is compelling. My argument is that applying public accommodation laws to the vendors in the above two categories is not necessary in order to achieve them.

The first purpose is to maintain equal access to publicly available goods and services. The concept 'equal access' includes two further concepts which need to be explicated. First is the issue of 'access.' It is undisputed that the couple who was refused service by Masterpiece Cakeshop received a rainbow themed wedding cake free of charge from another baker. Thus, access to wedding cakes was not a problem in this case. The same goes for many of these types of cases. There are a large amount of various types of wedding vendors available and, if the sample size of these cases is any indicator, same-sex couples generally do not have any significant trouble finding a similar business if they are refused service by one. This suggests

that access is not typically undermined by vendors refusing service on the basis of religious objections to same-sex marriage. If access to goods or services would be prevented by granting an exemption, then that should give judges and legislators pause before granting such an exemption.

As many have pointed out in these cases, however, the interest the government has in maintaining equal access is about more than the mere good or service which is being accessed. *Masterpiece Cakeshop* is about more than access to wedding cake just like anti-discrimination cases in the civil rights era were about more than access to burgers. This brings us to the second interest which the state has: eradicating barriers to the equal treatment of minorities in the public marketplace. The concept of equality presents difficulties, however, as such a concept could warrant different descriptive and normative descriptions depending on one's perspective. One might describe the conduct of Phillips as treating all of his customers equally as he would not sell any person, regardless of sexual orientation, products or services which involve him expressing recognition of the legitimacy of same-sex marriage. On the other hand, it is reasonable to interpret his conduct as treating same-sex couples unequally as he generally designs and creates wedding cakes for opposite-sex couples whenever he is requested to. In that sense, he is treating same-sex couples unequally.

Although both views are plausible, I adopt the former view and propose that the type of unequal treatment that the government should be cognizant of are businesses refusing service *solely* on the basis of protected characteristics. Vendors who fall in either of the two categories I set out are not refusing service based solely on a protected characteristic. Rather, they are refusing service either because they do not want to participate in conduct they find

objectionable or they do not want to be compelled to express a message that they recognize such conduct as valid or legitimate.

To be sure, courts have rejected this type of conduct/identity distinction before. When vendors argue that they are not discriminating on the basis of a protected characteristic (in this case, sexual orientation) but are refusing service because they do not wish to associate themselves with certain conduct (i.e., a same-sex wedding), courts have replied that the conduct is so intertwined with the identity of the individual that they are effectively discriminating on the basis of one's identity. This relies on a particular understanding of when a business can be said to be discriminating against somebody *because* of a protected characteristic. Courts hearing these cases have generally maintained that, for a business to discriminate against an individual because of a protected characteristic means that, but for the fact that they have this particular characteristic, they would not have been refused service. Because same-sex marriage is so tied into one's sexual orientation, but for the fact that these couples are gay, they would not have been denied service.

I am willing to concede that this is the appropriate way to analyze whether conduct is discriminatory. This is why I reject arguments to the effect that Masterpiece Cakeshop is not discriminating against same-sex couples when Phillips refuses to provide them with wedding cakes. But to the question of whether providing narrowly-tailored exemptions would undermine the compelling state interest in maintaining equal treatment, the answer is no. For instance, Masterpiece Cakeshop would similarly refuse to sell a wedding cake to a heterosexual individual if he knew that it was going to go to a same-sex wedding. To make this example seem more plausible, consider a same-sex couple who enlists a family member or friend to purchase

a wedding cake for their wedding. The friend goes to a baker and, during the exchange, the baker figures out that he is being requested to design a cake for a same-sex wedding. Because of this, he declines to make one. This would seem to be a perfectly legal thing for the baker to do considering the general language of public accommodation statutes which typically states that businesses cannot refuse service based on the sexual orientation of the *customer*. But if it is not the customer's sexual orientation the baker objects to but rather the message attached to creating a wedding cake for such an event or the fact that he is being asked to participate in the event, it ceases to be unequal treatment based solely on one's sexual orientation. Such an example gives credence to the idea that the conduct/identity distinction is not as much of an error as courts make it appear. Because businesses can generally refuse to provide goods or services which involve them expressing a disagreeable message or which involves them participating in a religious ceremony which they would rather not participate in, these vendors are not treating same-sex couples unequally by refusing to provide goods or services for same-sex weddings.

The third governmental interest is maintaining the social order. Terri Day and Danielle Weatherby argued that allowing businesses to discriminate in the area of public accommodations has measurable, adverse economic effects. This is also one of the arguments that the Colorado Court of Appeals referred to in their opinion denying Masterpiece Cakeshop's claim. I allow for the fact that even a narrowly-tailored scheme of exemptions may have significantly adverse economic effects and may even undermine the social order. Such an argument would have to be backed up by empirical data, however. The Court of Appeals as well as Day and Weatherby, in making this argument, appealed to a report published by the

Michigan Department of Civil Rights. The fault with their line of argument is that the report does not show what they purport it to show. The report does detail adverse economic and societal effects due to a lack of anti-discrimination laws but, at the time, Michigan lacked any adequate scheme of anti-discrimination regulations for the LGBTQ community, including in the areas of employment and housing. In fact, the report explicitly states that its primary focus was on “data related to employment protections.”<sup>77</sup> As such, the primary focus of the report is not on data related to discrimination in the realm of public accommodations which is what this case is about.

The fourth purpose is to stigmatize the practice of unjust discrimination. Andrew Koppelman argues convincingly that the antidiscrimination project is fundamentally a project of cultural transformation.<sup>78</sup> The ordinary status quo is that businesses can refuse service for any reason that they wish. The federal public accommodation law was primarily enacted in order to protect black Americans from being excluded from broad swaths of the marketplace due only to the color of their skin. According to Koppelman, while the federal civil rights act had several subsidiary purposes, its primary function was to rid society of the evils of structural racism. This involved an attempt to transform the culture which is to say that one purpose of anti-discrimination laws was to rid people of racist beliefs and attitudes. Accordingly, public accommodation statutes which include sexual orientation as a protected class are meant to rid people of bigoted beliefs regarding homosexuals.

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<sup>77</sup> “Michigan Department of Civil Rights Report on LGBT Inclusion Under Michigan Law With Recommendations For Action,” page 11, accessed September 11, 2017, <https://perma.cc/Q6UL-L3JR>.

<sup>78</sup> Andrew Koppelman, “Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law,” *Southern California Law Review* 88 (2015): 619-660 and *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996).

As Koppelman points out, however, the project of cultural transformation is directly at odds with a proposition that many liberals would readily assent to. That is, “part of what defines a free society is that it is none of the government’s business what citizens believe and that the shaping of citizens’ beliefs is not a legitimate task of a liberal state” is directly opposed to the idea that “racism, sexism, and similar ideologies are so evil and destructive of the proper workings of a free society that the state should do whatever it can to eradicate them.”<sup>79</sup>

Working out a solution to this supposed conflict is beyond the scope of this paper so let us assume for the moment that it is a legitimate task of a liberal state to try to stamp out certain illiberal ideologies such as racism, sexism, bigotry, etc. The question then would be whether granting narrowly-tailored exemptions to wedding vendors would undermine that task.

One part of the cultural transformation project that is implicit in developing a scheme of anti-discrimination regulations is the stigmatization of unjust discrimination. This is generally done through a form of sanction. That is, if businesses are found to be guilty of violating a public accommodation statute, they are liable to be fined or sued by the government or would-be customers. Alternatively, citizens might protest the business or stop going altogether. One solution in these types of cases, according to Koppelman, is that wedding vendors “should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory.” In effect, this “will make discrimination rare almost everywhere.”<sup>80</sup> This can be seen as a form of sanction as it is likely that businesses publicly identifying as discriminatory against same-sex couples would receive a large amount of backlash from their community and throughout the country. This is, however, an empirical matter and whether it is true would

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<sup>79</sup> Koppelman, *Antidiscrimination Law and Social Equality*, 1.

<sup>80</sup> Koppelman, “Gay Rights,” 620.

have to be discovered after some exemptions were put in place. If it is not true that such businesses would receive sanction or stigma from the larger community, then that may give us good reason to reconsider applying the scheme of exemptions I defend.

One reason to think that businesses who ‘out themselves’ as discriminatory would receive societal backlash is the cultural shift which has taken place regarding attitudes toward same-sex unions and homosexuality more generally. According to the Pew Research Center, support for same-sex marriage has been steadily growing over the last decade. For instance, in 2010, 48% of Americans opposed the legalization of gay marriage. Seven years later, 62% of all Americans supported same-sex marriage. Support for same-sex marriage also significantly rises among younger generations with 74% of Millennials (individuals born after 1980) being supportive.<sup>81</sup> If this trend holds, a large majority of Americans will support same-sex marriage in the next 10-20 years.

The reason this data is relevant is because whether granting exemptions would undermine the ability of the state to stigmatize unjust discrimination depends in large part on the pervasiveness of discriminatory attitudes. For instance, if exemptions were allowed in the civil rights era for business owners who were willing to post signs reading ‘We Don’t Serve Blacks Here,’ it is arguable that there would be very little stigma associated with it. Similarly, in an area of the country which is home to a particularly large amount of anti-gay prejudice, posting a sign notifying the public that they do not serve same-sex couples would likely not receive much pushback or outcry (at least not from the local community). But attitudes are

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<sup>81</sup> “Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical,” Pew Research Center, last modified June 26, 2017, <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/>.

changing and most people now look upon same-sex marriages in a favorable light. Additionally, there has recently been a large amount of public outcry whenever legislators attempt to carve out exemptions for business owners either in the language of anti-discrimination law or in separate religious freedom statutes. This coupled with the prediction that only a small percentage of business owners would likely risk the financial and reputational costs associated with making one's discriminatory practices public, the amount of wedding vendors who would be effectively granted exemptions would be quite low indeed and would not substantially affect the state's ability to stigmatize discriminatory attitudes or undermine the cultural shift which is already taking place. As stated earlier, however, this is an empirical claim and if it could be shown that these narrow exemptions were taken advantage of by more businesses than originally thought, and that cultural attitudes started to shift back in conjunction with them, there would be a stronger case against granting any exemptions.

The final purpose of public accommodation laws is to prevent the dignitary harm which accompanies unequal treatment in the public marketplace. While I assumed earlier that all of the purposes I have been discussing are legitimate and compelling state interests, there is a fair amount of controversy regarding the place of dignitary harms. For instance, Koppelman claimed that "the dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech."<sup>82</sup> Vallier also insisted that a notion of harm which includes denials of service "may be sectarian, and therefore not a suitable basis for law."<sup>83</sup> According to Vallier, "on more traditional liberal views, a denial of service will not count as harmful because, in nearly all of the relevant cases, gay and

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<sup>82</sup> Koppelman, "Gay Rights," 628.

<sup>83</sup> Vallier, "The Moral Basis of Religious Exemptions," 18.



lesbian couples have dozens of affordable alternative venues to purchase wedding cakes.”<sup>84</sup>

Particularly in public justification models, a sectarian notion of harm is thought to be unsuitable as a basis for law as it is not a notion that everybody can reasonably accept. However, just because the traditional concept of harm which Vallier relies on is ‘traditional’ does not make it any less sectarian. In addition we should acknowledge that dignity harms are referred to as ‘harms’ for a reason. I propose to conceive of dignitary harms as a specific type of harm which occurs when the government does not protect from invidious discrimination against individuals due solely to certain identity characteristics. This type of discrimination undermines the social bases of self-respect which in turn undermines the capacity or ability of individuals to be fully autonomous agents. I believe that the government does indeed have an interest in preventing such harms but that the government does not need to categorically apply public accommodation laws in order to fulfill it.

In order to cash out this claim, I require a notion of autonomy which is relatively uncontroversial but which captures the central idea behind most liberal conceptions of what it means for somebody to be an autonomous agent. There are many formulations of autonomy which are sufficient for this purpose. These can include formulations such as “the ability to reflect on the adequacy of one’s own moral reasons, and to distinguish one’s own reasons from the reasons of others,”<sup>85</sup> “an ideal of people deciding for themselves what is a valuable life, and living their lives in accordance with that decision,”<sup>86</sup> and “the real and effective capacity to

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<sup>84</sup> Ibid.

<sup>85</sup> Gerald F. Gaus, “The Place of Autonomy within Liberalism,” in *Autonomy and the Challenges to Liberalism* (New York: Cambridge University Press, 2005), 298.

<sup>86</sup> Colburn, *Autonomy and Liberalism*, 19.

develop and pursue one's own conception of a worthwhile life."<sup>87</sup> I propose to use a synthesis of these options to formulate the minimalistic conception of personal autonomy I have in mind.

First, to be a fully autonomous agent, one must have the capacity or ability to develop and pursue a conception of the good life in accordance with what one thinks is valuable. It is important for full autonomy that an agent is able to both develop a conception of the good life and actively pursue it. For instance, if an agent was able to develop a particular conception of the good life, becoming a doctor say, but was prevented from going to medical school due to coercive government policies, her autonomy would be undermined. It is also important for the autonomous agent that her conception of the good life be influenced by reasons which are truly her own and not unduly influenced by debilitating social conditions or by the wills of others. No doubt this conception of personal autonomy is incomplete and unsatisfactory as a theory of autonomy but it is enough to illustrate how pervasive discrimination against a particular group of people can undermine these conditions of what being an autonomous agent requires.

Once again, dignitary harms undermine autonomy by undermining the social bases of self-respect. This notion of respect is similar to the conception of respect referred to by Stephen Darwall as recognition respect.<sup>88</sup> Recognition respect consists "in giving appropriate consideration or recognition to some feature of its object in deliberating about what to do."<sup>89</sup> According to Darwall, recognition respect is owed to all persons simply in virtue of the fact that they are persons. As such, persons "are entitled to have other persons take seriously and weigh

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<sup>87</sup> Joel Anderson and Axel Honneth, "Autonomy, Vulnerability, Recognition, and Justice," in *Autonomy and the Challenges to Liberalism* (New York: Cambridge University Press, 2005), 130.

<sup>88</sup> Stephen L. Darwall, "Two Kinds of Respect," *Ethics* 88 (1977).

<sup>89</sup>Ibid., 38.

appropriately the fact that they are persons in deliberating about what to do.”<sup>90</sup> This extends to one’s projects and ends. Since projects are constitutive of our identities, having respect for persons entails that we consider their projects and ends seriously in our deliberations.

To have self-respect, then, is to recognize that one’s own projects and ends are valuable, worth pursuing and should play a role in our practical deliberations. Having respect for oneself involves having a sense that one is a person whose projects and ends are valuable and that one has dignity and moral worth simply in virtue of being a person.<sup>91</sup> There are at least two reasons why self-respect is important for autonomy. One is that self-respect and respectful treatment from others makes it more likely that a person will be autonomous. This is because autonomy and free agency “involves regarding oneself as having the normative authority to be self-determining and self-governing” and a lack of self-respect undermines one’s ability to perceive oneself as having that authority.<sup>92</sup> It is also the case that “self-respect is needed to inspire others to reciprocate with a similar attitude of respect toward oneself.”<sup>93</sup> This is because a lack of self-respect expresses to others that one does not take one’s ends seriously and is effectively inconsistent regarding what one finds valuable. Since one does not take one’s own ends seriously, and expresses this judgment to others, they too fail to take them seriously.

This brief description of self-respect helps to illustrate why discrimination, if pervasive enough and based solely on contingent features of one’s identity, can be harmful and may undermine one’s ability to be a fully autonomous agent. Unequal treatment on the grounds of

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<sup>90</sup>Ibid.

<sup>91</sup> Trudy Govier, “Self-Trust, Autonomy, and Self-Esteem,” *Hypatia* 8 (1993): 110.

<sup>92</sup> Catriona Mackenzie, “Three Dimensions of Autonomy: A Relational Analysis,” in *Autonomy, Oppression, and Gender*, eds. Andrea Veltman and Mark Piper (New York: Oxford University Press, 2014), 18. Also see Paul Benson, “Free Agency and Self-Worth,” *The Journal of Philosophy* 91 (1994): 650.

<sup>93</sup> Marina A. L. Oshana, “Personal Autonomy and Society,” *Journal of Social Philosophy* 29 (1998), 91.

one's identity may give one the impression that one is not truly a person worthy of respect or that one's choices and value judgments do not have worth *simply because of whom one is*. In order to instill self-respect in citizens, Joel Anderson and Axel Honneth have claimed that what is required are "legally institutionalized relations of universal respect for the autonomy and dignity of persons."<sup>94</sup> Two relevant questions at this juncture are whether we have such legally institutionalized relations now and whether granting narrowly-tailored exemptions to wedding vendors would undermine them.

At this point, I do not believe that we do have legally institutionalized relations of universal respect for the autonomy and dignity of same-sex couples – at least not across the board. This is because, as the federal law currently stands, businesses can refuse service solely on the basis of the customer's sexual orientation. I am happily willing to concede, however, that the federal law is insufficient and that the federal public accommodation statute should mirror those statutes which include sexual orientation as a protected class and which define places of public accommodation in a suitably broad way. In those states and municipalities where adequate public accommodation laws are in place, however, there are institutionalized relations of respect for the autonomy and dignity of same-sex couples – at least in the realm of public accommodations.

The question of whether granting narrowly-tailored exemptions to wedding vendors would undermine those relations is asking whether providing such exemptions would undermine the government's obligation to respect the dignity and autonomy of all of its citizens. After all, while respecting the dignity and autonomy of fellow citizens may be a *moral*

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<sup>94</sup> Anderson and Honneth, "Autonomy," 131.

obligation, it cannot be a legally enforceable one as that would involve literally coercing citizens to have particular beliefs and to act on those beliefs. The best we can hope for is that the government institutes regulations which respect the dignity and autonomy of all citizens as thoroughly as possible. The government does this in the public accommodation context by passing laws which make it illegal to refuse service to somebody based solely on the fact that they have certain immutable identity characteristics (sex, race, sexual orientation, etc). This respects their dignity and autonomy because it does not allow them to be excluded from the public marketplace due to an immalleable aspect of their personal identity.

However, the government also needs to respect the autonomy and dignity of wedding vendors with religious objections to same-sex marriage. Simply asserting that the fact that they have such objections plays no role the social policy calculus at all displays a lack of respect for an important part of their identity – their identity as a Christian and as an individual who wants to operate their business in line with Christian principles. It also does not respect their autonomy by compelling them to either participate in a religious ceremony they find offensive or by undermining their ability to control the content of their expression.

The narrowly-tailored scheme of exemptions I propose is a compromise between competing autonomy and equality interests. It still respects the equal dignity of same-sex couples by only granting exemptions to those vendors who have additional reason to discriminate *other than the personal identity of the customer*. However, while Koppelman is correct that same-sex couples should not be protected from harms which result from others expressing disagreement with their lifestyles, they can and should be protected from discrimination which is only justified by the fact that they share certain identity characteristics.

This scheme of exemptions also respects the autonomy of wedding vendors by granting exemptions to those vendors whose autonomy is burdened the most.

#### **§4. Objections and Concluding Remarks**

I conclude in this section by considering a series of objections. The first is that, contrary to what I have argued in prior sections, allowing narrowly tailored exemptions would lead to a whole series of exemptions to anti-discrimination laws beyond those which regulate public accommodations. I do recognize that this is a *possibility* depending on how the exemptions were granted. It is *possible* that courts, in granting the types of exemptions I propose, could set precedent that would lead to a type of slippery slope. But a convincing argument for this claim would have to rely on the actual language that the courts use in granting exemptions and whether certain rules of adjudication were developed. Given the fact that these exemptions have not been granted, it is difficult to accept that this argument is sound. Furthermore, courts are not the only avenue for exemptions to be granted. It is possible, and perhaps preferable, for the exemptions I propose to be granted by the legislature. If specific language referring to wedding vendors and public accommodations was utilized in drafting legislation granting exemptions, it is difficult to see why any kind of broad slippery slope would arise as a consequence.

One could still argue, however, that even within the public accommodation context, the exemptions I propose would be broader than I admit or realize. I can only say to this point that it might be true and, if true, would provide a reason for modifying my account. However, as I suggested earlier, I believe that the vendors who fit into the two categories I put forward (to reiterate, those categories are vendors whose conduct is inherently expressive and those who,

by providing goods or services for weddings, are active participants in the wedding ceremonies), would be quite narrow. Unlike the religious liberty approach explored in the first section, I do not believe that these exemptions would exclude same-sex couples from an entire part of the public marketplace. All of the same types of venues – be they bakeries, photographers or restaurants – would remain open to them. They can just not compel that these businesses engage in any expressive artistry for their wedding ceremony or compel them to participate in it. Such is the price of citizenship in a society which values religious liberty and freedom of expression.

The other objections which I will address have been provided in a recent piece written by Christie Hartley and Lori Watson. It will be worth quoting the summary of their position at length so that I can respond to it point by point:

Here the vendor seeks an exemption from a law whose purpose is to enable and protect a person's standing as an equal citizen. That is, the antidiscrimination law in question protects a person's ability to participate in various spheres of social life as an equal member of society and the ability of the person to pursue a view of the good like fellow citizens. In other words, allowing public discrimination on the basis of factors such as sexual orientation, sex, or race creates a kind of second-class citizenship for some members of society. Such persons don't enjoy the same access to goods, even if identical goods are available elsewhere. And insofar as being denied the rights and liberties that other persons as citizens enjoy in places of public accommodation affects their standing in the public, political sphere, their ability to engage in public reasoning is compromised. Someone might claim that the liberty of the vendor to refuse service to a same-sex couple is a matter of equal standing, too; one might say it is important to one's standing as an equal citizen to enjoy the liberty to live in accordance with beliefs and values fundamental to one's identity. But this is precisely why understanding the role of the criterion of reciprocity and political liberalism's view of public reason is so important.<sup>95</sup>

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<sup>95</sup> Christie Hartley and Lori Watson, "Political Liberalism and Religious Exemptions," in *Religious Exemptions*, eds. Kevin Vallier and Michael Weber (New York: Oxford University Press, 2018), 109-110.

It may be clear from some of my earlier statements and arguments where I disagree with Hartley and Watson but it will be worth it to conclude on these points as I take them to be fundamental disagreements that would likely occur between other political liberals and myself.

To begin, I will note a couple of areas of agreement which might be unsurprising. I agree that the purpose of public accommodation laws is, at least in part, to enable and protect a person's standing as an equal citizen. I also agree that the undermining of this equal standing in the public accommodation context may very well affect their standing in other public and political spheres. Where I expect the locus of our disagreement lies is what we ought to mean by equal standing and what the criterion of reciprocity entails.

First, there is some potential disagreement regarding what it means for a business to discriminate "on the basis of" sexual orientation. As I argued earlier, it is at least plausible for Jack Phillips, for example, to make the argument that he is not refusing service to same-sex couples on the basis of their sexual orientation. He may argue that he is refusing service because he does not want to express a message he finds disagreeable. As I also stated earlier, courts have interpreted discrimination on the basis of specified characteristics to mean that, but for the fact that the individuals had a particular characteristic, they would not have been refused service. This seems true in the case of *Masterpiece Cakeshop* but, as I also pointed out, there seem to be situations in which the customer's identity may not have been implicated but where he or she would have been denied service anyway (if they were not gay but were purchasing the cake for a same-sex wedding, etc.).

Hartley and Watson also echo a point I made earlier when they suggested that someone might argue that "one might say it is important to one's standing as an equal citizen to enjoy



the liberty to live in accordance with beliefs and values fundamental to one's identity."<sup>96</sup> This point is similar to my argument concerning the government's role in respecting the autonomy of all citizens. However, they then imply that this belief relies on a misunderstanding of the criterion of reciprocity. I will first repeat my belief that there are actually equality interests on both sides of the disputes – not just on the side of the same-sex couples who are refused service. I will then conclude by discussing how I understand the criterion of reciprocity and why a narrowly-tailored scheme of exemptions is consistent with it.

Watson and Hartley are right to point out that the equal standing of marginalized citizens is important and is a fundamental purpose of anti-discrimination provisions. However, guaranteeing the equal treatment of same-sex couples by privately owned businesses in the public marketplace necessarily guarantees the unequal treatment of religious wedding vendors by the government. It is not difficult to see why this is the case. Public accommodation laws compel business owners like Jack Phillips to provide goods or services for same-sex weddings, even when they believe that doing so is in violation of their religious obligations. Liberals like Watson and Hartley rightly maintain that doing so is necessary in order to protect their equal standing as a citizen. But this clearly entails involving the government in distributing an unequal scheme of burdens and benefits. Those business owners who do not believe that same-sex marriage is sinful do not have to choose between violating their conscience and violating the law. Public accommodation laws do not burden them in the same way that they burden business owners who *do* believe that same-sex marriage is sinful.

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<sup>96</sup> Ibid.

Of course, that fact alone does not entail anything about the legitimacy or just nature of the laws in question. Any substantial system of laws or regulations is going to burden some citizens over others. For example, laws against murder burden those citizens whose conception of the good life prioritizes murdering people. The fact that this is true should convince nobody that laws against murder are not legitimate and just. But the framework which Vallier developed is set up to exclude exactly those types of cases. That being said, I can see only three reasons (independent of whether my arguments thus far have been sound) why we should discount the equal standing of religious business owners or their liberty interests in the way that Watson and Hartley seem to suggest we ought to: 1) The equal standing of same-sex couples is at greater risk to be compromised in various political or social spheres than the equal standing of religious business owners is. 2) Business owners who believe that they have a religious obligation to refuse to provide goods or services to same-sex couples are unreasonable or, at the very least, are acting unreasonably. 3) The scheme of exemptions I am defending in this paper does not abide by the criterion of reciprocity as it is not one that all reasonable people can accept. I will discuss each of these in turn.

The claim that the equal standing of same-sex couples is at greater risk compared to the standing of religious business owners is likely true in many contexts. However, as I have already shown, the approval for same-sex marriage is on a strong upward trend. Obviously, this trend does not do anything about the fact that there remain huge holes in LGBTQ anti-discrimination protections and the fact that being refused service on the basis of an essential part of one's identity can be a traumatic and harmful experience. However, there are certainly contexts in which the equal standing of religious business owners is at greater risk and I would argue that

the public accommodation context is slowly becoming one of those. There have been several business owners who have either lost their business, their professional reputation or thousands of dollars – sometimes as the result of a disagreement about the moral status of particular conduct (namely, same-sex weddings). I would argue that the equal standing of certain religious business owners and their ability to run their business in line with their religious convictions is at great risk in progressive states with robust anti-discrimination regulations. This is especially true if we are to agree with the view that such is the ‘cost of citizenship’ and that religious business owners should be expected to compromise their religious beliefs if they open up a business to the public. Sometimes this is necessary, and it has been the project of this paper to draw a practicable line between cases where it is and those where it is not, but to treat the equality and liberty interests on one side as categorically inferior to the interests on the other seems to me to be a significant threat to the equal standing of religious business owners.

The second claim is that the religious business owners I have been discussing are either unreasonable or are acting unreasonably. When political liberals use the term ‘reasonable,’ it is often referred to as a term of art. Going back to Rawls, political liberals claim that “persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.”<sup>97</sup> Certainly there are many religious people who are unreasonable or consistently act unreasonably (just as there are many non-religious people who do the same). Religious citizens who would enforce their own moral views by overturning the marriage equality decision are a perfect example of this unreasonableness in action. But if

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<sup>97</sup> Rawls, *Political Liberalism*, 49.

we go to the two broad groups of vendors who warrant exemptions under my view, it is not clear why we should say that these are unreasonable people. There are many wedding vendors who are probably fine with same-sex marriage being a legal institution. At the very least, many of them have likely recognized that the Supreme Court has ruled in *Obergefell* that marriage equality is constitutionally required and that same-sex marriages are here to stay. These vendors are not taking to the streets demanding that the right for same-sex couples to marry be revoked. What they want is to not be compelled by law to either participate in a same-sex wedding ceremony or express a message of recognition for the legitimacy of same-sex weddings. This does not seem unreasonable to me.

This point is closely related to the final objection I will consider which is that the scheme of exemptions I defend does not fulfill the criterion of reciprocity. The criterion of reciprocity dates back to Rawls and it outlines when exercise of political power is proper. Rawls wrote that “our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as justification of those actions.”<sup>98</sup> Citizens fulfill this criterion of reciprocity by utilizing public reasons when attempting to justify political power (constitutional amendments, legislation, government regulation, etc.). Public reasons according to Rawls are reasons which do not rely on any particular religious or philosophical worldview but can be accepted by citizens as free and equal participants of civil society.

The suggestion that the scheme of exemptions I propose does not fulfill the criterion of reciprocity rests on the claim that the reasons justifying it are not ones that all citizens can

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<sup>98</sup> Rawls, *Political Liberalism*, xlv.

reasonably accept. Furthermore, this claim goes back to one of the conditions which Vallier set out in his framework: the intelligibility requirement. Since the intelligibility requirement allows explicitly sectarian reasons to serve as justificatory reasons, it is open for liberals in the Rawlsian vein to object that these are reasons that not everybody can reasonably accept. After all, one of the justificatory reasons for Phillips relies explicitly on Biblical authority. Obviously, citizens who do not see the Bible as a source of authority have no particular reason to accept Phillips' particular reasons as justificatory for them. Thus, the framework which Vallier developed does not abide by the criterion of reciprocity as Rawls defines it.

While I do agree with Vallier on the correct interpretation of public reason liberalism, I do also think that it is possible for the exemptions I defend to be justified by appealing to properly public reasons (in the Rawlsian sense). After all, much of the analysis I have undertaken in this paper has taken conventional constitutional jurisprudence as a starting point. While I remain ambivalent regarding the exact status of the right to be exempt from public accommodation laws and how it should be granted (whether it be basic or subsidiary; by judicial review or via legislative action), I have utilized reasons drawn from work on religious liberty and freedom of expression. Assuming that these are liberal values, and that they themselves can be justified via public reasons, there does not seem to be any particular obstacle to seeing my proposal as abiding by the Rawlsian criterion of reciprocity. The focal point of the disagreement between other political liberals and me would then seem to be in the details of the analysis, that is whether creating a customized wedding cake is *really* expressive or whether being compelled to participate in a wedding ceremony would be a *real* and *substantial* burden on one's religious exercise. Obviously, I think that they are and have spent

the bulk of the paper arguing for that claim. Whether my proposal really does abide by the criterion of reciprocity, then, would seem to live or die by the soundness of my previous arguments.

### **Conclusion**

In this paper, I have provided a liberal argument for providing narrowly-tailored exemptions to public accommodation laws. My approach to this contentious issue has been to balance the equality and liberty interests on both sides of the dispute. That is, I believe that both the same-sex couples and religious vendors have equality and liberty interests at stake and it is my firm belief that a liberal approach should attempt to balance them. No doubt the proposal I have defended seems unsatisfactory to parties on both sides. Proponents of broad exemptions are likely to object that the categories of vendors which deserve exemptions under my account are too narrow and that I am leaving out many other business owners who hold religious objections to same-sex marriage but would be forced by law to facilitate same-sex wedding ceremonies. On the other hand, opponents of exemptions are likely to object that I am allowing religious reasons to serve as justifications for bigotry and invidious discrimination. Needless to say, I do not believe that all people who have religious objections to same-sex marriage are 'bigots' or that all discrimination is necessarily 'invidious.' But I also do not believe that the government should exempt any and all business owners who have religious objections to same-sex marriage as this *would* undermine the primary purpose of anti-discrimination laws. What I have attempted to do, which I stated at the outset was my intent, is to provide a compromise. Such a compromise may seem unappealing to many but such compromises are necessary in societies defined by a plurality of opposing views and opinions.

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