A PRIVATE PRACTICE? COMMERCIAL SPEECH, PUBLIC ACCOMMODATION, AND INDIVIDUAL DIGNITY

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LGBT rights have expanded considerably over the last few decades.[1] In 2015, in *Obergefell*,[2] the U.S. Supreme Court held that equal protection required states to recognize the fundamental right to marriage for same-sex couples.[3] It was the culmination of a decades long political and legal

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[1] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015).

[2] *Id.*

[3] *Id.* at 680–81.

battle, and for many, it was celebrated as a "victory for America."[4] Throughout the nation, same-sex couples would be recognized under the law as equal to other married couples.

However, for many, the legalization of same-sex marriage was proof that the nation had become morally bankrupt.[5] For example, there are some venders who operate in the wedding industry who refuse to provide service to same sex couples.[6] In New Mexico, it was a photographer.[7] In Oregon, it was a baker.[8] In Washington, it was a florist.[9] In Hawaii, it was a bed & breakfast owner.[10] They all argued that the denial of service was for the same reason—providing such a service would have been in violation of their religious beliefs.[11] These violations of public accommodation laws have often been successful because, under federal and state Religious Freedom Acts, public accommodation laws must survive strict scrutiny, even if they are facially neutral and generally applicable.[12]

So, the question has become: whose rights should prevail, the right of equal protection or the right to Free Exercise of Religion? The practical answer may be for a couple to find another vendor who will happily provide the service; but if the baker or florist who rejects service is the only shop in a small town, then these couple's only choice is to resign themselves to the fact that they are treated differently based on their sexual orientation.[13]

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[4] *See* Scott Neuman, *Obama: Supreme Court Same-Sex Marriage Ruling 'A Victory for America'*, NPR (June 26, 2015, 11:30 AM), https://www.npr.org/sections/thetwo-way/2015/06/26/417731614/obama-supreme-court-ruling-on-gay-marriage-a-victory-for-america.

[5] *E.g.*, Christopher O. Akpan, *The Morality of Same Sex Marriage: How Not to Globalize a Cultural Anomie*, 13 ONLINE J. HEALTH ETHICS 1, 2 (2017).

[6] *E.g.*, John Burnett, *Wedding Vendors That Refuse Gay Customers Often Lose in Court*, NPR (June 28, 2013, 3:00 PM), https://www.npr.org/templates/story/story.php?storyId=196691625.

[7] *Id.*; *see also* Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (D.N.M. Dec. 11, 2009).

[8] Burnett, *supra* note 6; *see also* Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051 (Or. Ct. App. 2017).

[9] Burnett, *supra* note 6; *see also* State v. Arlene's Flowers, Inc., 389 P.3d 543, 548 (Wash. 2017).

[10] Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 923 (Haw. Ct. App. 2018).

[11] Burnett, *supra* note 6.

[12] Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1094 (2017).

[13] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1720 (2018).

In 2018, the U.S. Supreme Court had a chance to resolve this issue in the case of *Masterpiece Cakeshop*.[14] In a fractured decision of four opinions,[15] the Court discussed all the issues but gave very few answers. The majority punted on the free speech issue, deciding the case in favor of the baker because of the state's clear hostility towards the baker's religious beliefs.[16] Seven justices joined two separate concurrences and a dissent to voice their beliefs on the free speech issues.[17] The end result was a lot of noise with no real clarity,[18] only the certainty that the issue will be before the Court again very soon.[19]

Accordingly, this Article attempts to resolve the issue by arguing for a balance between free expression rights and public accommodation through an intermediate level of protected speech by professionals. First, the Article reviews the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[20] Next, the Article outlines the precedents for religious freedoms and their recent turn toward using the Free Speech Doctrine to decide such cases.[21] Finally, the Article uses a similar approach by applying a parallel to Government Speech Doctrine as a legal test for compelled speech in contexts.[22]

I. MASTERPIECE CAKE SHOP

In *Masterpiece Cake Shop v. Colorado*,[23] the U.S. Supreme Court had an opportunity to resolve the issues that arise when there is a "confluence of speech and free exercise principles"[24] in a commercial context. Instead, in a 7-2 decision, the majority decided to punt on the free speech issues, focusing on the clear hostility that the state had toward the

[14] *Id.*

[15] *Id.* at 1722.

[16] *Id.* at 1724, 1730–31.

[17] *Id.* at 1722.

[18] *Id.* at 1732–48.

[19] *See* Patrick Gregory, *Supreme Court Has Pick of LGBT Discrimination Controversies*, BLOOMBERG L. (Mar. 15, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-has-pick-of-lgbt-discrimination-controversies-1.

[20] *See infra* Part I.

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] 138 S. Ct. 1719.

[24] *Id.* at 1723.

baker's religious beliefs.[25] However, Justice Kagan,[26] Justice Gorsuch[27] and Justice Thomas[28] wrote separate concurrences and Justice Ginsburg wrote a dissent,[29] in which they all extensively argue the merits of the free speech issue.

The case involved Jack Phillips, a pastry-chef in a suburb of Denver, Colorado.[30] He owns a bakery and designs and creates custom cakes.[31] Phillips is also a devout Christian[32] who believes that his religion and occupation are connected.[33] Because of this, Phillips will not create custom cakes for situations that violate his religious beliefs—particularly same-sex marriages.[34] His argument was that he did not base his decision on the persons, but rather the message inherent to his creations.[35]

A same-sex couple desired to buy a custom-made cake from Phillips for the celebration of their marriage.[36] Phillips declined to make a custom cake for this occasion, but he was willing to sell them other items or to make a cake for a different occasion.[37] The couple decided to file a complaint with the State of Colorado claiming that Phillips had discriminated against them based on their sexuality in violation of Colorado public accommodation law.[38] Phillips countered that he was not discriminating against the couple, but rather that his freedoms of speech

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[25] *Id.* at 1732.

[26] *See id.* at 1732–34 (Kagan, J. concurring).

[27] *See id.* at 1734–40 (Gorsuch, J., concurring).

[28] *See id.* at 1740–48 (Thomas, J., concurring).

[29] *See id.* at 1748–52 (Ginsburg, J., dissenting).

[30] *Id.* at 1724.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See id.* Phillips stated that it is his belief that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.* (citation omitted).

[35] *Id.*

[36] *Id.* At the time, the State of Colorado did not recognize same-sex marriage. The couple were to be married in Massachusetts but were celebrating with their friends and family in Denver. *Id.* In 2015, the U.S. Supreme Court recognized the constitutional right to same-sex marriages. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[37] *Masterpiece Cakeshop*, 138 S. Ct. at 1724. This included birthday cakes, brownies, shower cakes, etc. *Id.*

[38] *Id.* at 1725. The complaint stated that it was standard practice for Phillips not to make cakes for same-sex weddings. *Id.*

and religion allowed him not to be compelled to create a message that violated his sincere beliefs.[39]

The Colorado Commission on Civil Rights (Commission) found that Phillips, as a licensed business owner, was subject to public accommodation law,[40] and that he unlawfully discriminated against the couple based on their sexual orientation.[41] The Commission rejected Phillips's free speech and free exercise claims.[42] First, the Commission did not find that creating a cake was a form of protected speech.[43] Second, the Commission held that the public accommodation law was a facially neutral and generally applicable law not aimed at inhibiting religion.[44]

The Commission ruled Phillips had to create cakes for same-sex marriages or discontinue making cakes altogether.[45] He would also have to train his staff on discrimination law.[46] Finally, he had to submit periodic reports on the cakes he refused to design and the reasoning for each refusal.[47] Additionally, at a subsequent public hearing, members of the commission discussed Phillips and his case with great disdain toward the baker and his beliefs.[48]

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[39] *Id.* at 1726.

[40] *Id.* The Colorado Public Accommodation law reads:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2021).

[41] *Masterpiece Cakeshop*, 138 S. Ct. at 1726. The initial investigation for the Colorado Civil Rights Division found that Phillips had denied several customers who requested cakes for their same-sex wedding celebrations, and an administrative law judge found him in violation of the Colorado Anti-Discrimination Act. *Id.* The Colorado Public Accommodation law reads:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

COLO. REV. STAT. § 24-34-601(2)(A) (West 2018).

[42] *Id.*

[43] *Id.*

[44] *Id.* (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)).

[45] *See id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1729. At the public meeting the commissioner said:

Phillips appealed the order to the Colorado Court of Appeals, which affirmed the Commission's decision.[49] Even though the court agreed with Phillips that he did not make his decision based on the individual persons, but rather the event,[50] the court held that the State's public accommodation laws require no showing of animus towards others in order for there to be a violation.[51] The court had to distinguish Phillips's case from other commission decisions where it upheld a baker's decision to refuse to make cakes based on the message.[52] The court said in those cases, the cake artists refused the service based on the offensive messages, not for religious reasons.[53] Finally, the court did not believe the public would see his cakes as a message supporting same-sex marriage.[54] Phillips then appealed to the Colorado Supreme Court, but certiorari was denied,[55] so he then appealed to the U.S. Supreme Court.[56]

At the U.S. Supreme Court, Phillips argued that the State's decision was compelled speech in violation of the First Amendment.[57] He also argued that the State violated his free exercise by favoring other cake artists decisions to deny service,[58] but ruled against his decision because of his religious beliefs.[59] The State argued that the public accommodation laws do not implicate the Compelled Speech Doctrine, as the rule applies to all speech and it is not based on viewpoint.[60]

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

Id.

[49] *Id.* at 1726–27.

[50] *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276, 283, 286 (Colo. App. 2015).

[51] *Id.* at 282.

[52] *Id.* at 282 n.8.

[53] *Id.*

[54] *Id.* at 287.

[55] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, No. 15SC738, 2016 WL 1645027, at *1 (Colo. App. Apr. 25, 2016).

[56] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 137 S. Ct. 2290 (2017) (granting certiorari).

[57] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018).

[58] *Id.* at 1728.

[59] *Id.* at 1727–28.

[60] *See id.* at 1726.

At the U.S. Supreme Court, the majority ruled in favor of Phillips exclusively on free exercise grounds.[61] It held that the commission had been overtly hostile toward Phillips and his religious beliefs through its disparate treatment of bakers who refused to make cakes, as well as its specific public comments on Phillips.[62] The Court also said that the Commission had dismissed Phillips's willingness to sell other products to the couple as well as create a cake for a different occasion.[63] The Court said that the Commission sent a message that it "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[64] Ultimately, the Free Exercise clause requires neutrality when it comes to judging a respondents' religious claims.[65]

In a separate concurrence, Justice Kagan agreed that the Commission was openly hostile toward Phillips's religious belief, thus it was in violation of the free exercise clause.[66] However, Justice Kagan disagreed that the Commission treated Phillips differently when compared to the other bakers.[67] Justice Kagan argued that the other bakers refused to make a cake they would not have made for anyone;[68] whereas Phillips refused to make a cake he would have made for an opposite-sex couple.[69] Justice Kagan argued that the other bakers were within the requirements of public accommodation law as all customers were treated the same, but Phillips

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[61] The concurrences and dissent did discuss the free speech issues. *See id.* at 1734–48. (Alito & Gorsuch, JJ., concurring, Ginsburg & Sotomayor, JJ., dissenting); *see also* Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154 (2019) (arguing that the celebrating the case as support for religious liberty is wrong). Seemingly, with Justice Kennedy's retirement, it will be on Chief Justice Roberts to be the swing when the issue of free speech v. public accommodation arises again. *See* Patrick L. Gregory, *Supreme Court Has Pick of LGBT Discrimination Controversies (1)*, BLOOMBERG L. (Mar. 15, 2019, 10:21 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-has-pick-of-lgbt-discrimination-controversies-1; *see also* Julie Hirschfeld Davis, *With Kennedy Gone, Roberts will be the Supreme Court's Swing Vote*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/politics/anthony-kennedy-chief-justice-roberts.html.

[62] *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

[63] *Id.* at 1730. "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." *Id.* at 1731.

[64] *Id.* at 1729.

[65] *Id.* at 1731.

[66] *Id.* at 1732. (Kagan, J., concurring).

[67] *See id.* at 1734, 1736.

[68] *Id.* at 1735.

[69] *Id.*

was not.[70] She concluded on the fact that a "vendor can choose the products he sells, but not the customers he serves."[71]

Justice Gorsuch and Justice Thomas also wrote separate concurrences.[72] Justice Gorsuch disagreed with Justice Kagan that all wedding cakes are the same.[73] He focused on the fact that it was a wedding cake celebrating a same-sex marriage, thus it had a message that was being compelled.[74] Justice Thomas focused on the free speech question and wrote that "speech itself [is] the public accommodation."[75] He argued that the cake would have a message as it celebrates the same-sex marriage.[76] Thomas also argued that the customer's dignity was not sufficient to violate Phillips's individual free speech right.[77] He stated that the Court's free speech jurisprudence does not allow for the punishment of "protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."[78]

In dissent, Justice Ginsberg echoed Justice Kagan in stating that the cases were different, as the previous bakers would have refused to make the cakes with offensive messages for any customers,[79] whereas Phillips would make custom wedding cakes for any customers except same-sex couples.[80] The dissent differed in that it argued the prospective cake and its message was never even discussed. Thus, Phillips had only made his refusal based on who the customers were.[81] Finally, Ginsberg dismissed the commissioners' hostile comments, as they were one of many different arbiters on different judicial levels.[82]

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[70] *Id.* at 1733–34.

[71] *Id.* at 1733.

[72] *Id.* at 1740–48 (Thomas & Gorsuch, JJ., concurring).

[73] *Id.* at 1738–40 (Kagan, J., concurring).

[74] *Id.* at 1741–44 (Thomas, J., concurring). Justice Gorsuch cited the commission's reliance on the offensive message in previous cases illustrating that it was more than just baking a cake. *Id*. at 1738–40 (Kagan, J., concurring).

[75] *Id.* at 1741 (Thomas, J., concurring) (citing Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).

[76] *Id.* at 1743.

[77] *Id.* at 1746.

[78] *Id.*

[79] *Id.* at 1749.

[80] *Id.* at 1750.

[81] *Id.* at 1751 n.5.

[82] *Id.*

II. CONFLUENCE OF FIRST AMENDMENT FREEDOMS

A. Conflicting Clauses of the First Amendment

The First Amendment enumerates five civil liberties: disestablishment, exercise of religion, speech, press, and assembly.[83] They are part of a penumbra of the "freedom of thought"[84] as they each allow for citizens to be free to have ideas, express those ideas and not have the government endorse one belief system over another.[85]

However, just as they are complementary,[86] they can also be conflicting.[87] An individual's fundamental rights must be balanced with the fundamental rights of others.[88] Therefore, the government must allow for freedom of speech, such as protests, but in doing so it can not restrict someone's ability to exercise their religion—for example, a protest outside a church would have to have allow space for worshippers to gain access to the building.[89]

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[83] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[84] *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[85] This is sometimes called "Freedom of Mind." *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that government could not compel to students to salute the flag); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (showing that the state could not compel driver to display the state motto on license plate); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (creating a constitutional right to privacy derived from the First, Fourth and Fifth Amendments).

[86] *See, e.g.*, Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 169 (2002) (overturning misdemeanor law requiring Jehovah's Witnesses to get city approval to go door-to-door).

[87] *See, e.g.*, Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (holding that school policy allowing student prayer violated establishment clause).

[88] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (holding that First Amendment rights to free press must be balanced with sixth amendment right to a fair trial).

[89] *See, e.g.,* Snyder v. Phelps, 562 U.S. 443, 456 (2011) (holding that church followed all applicable laws and was in a public forum when it protested a funeral); McCullen v. Coakley, 573 U.S. 464, 476-77 (2014) (holding that state's requirement for a privacy bubble during a protest was too broad).

B. Narrowing of Religious Freedom

1. Establishment Clause

In the mid-20th century,[90] the U.S. Supreme Court developed various tests to help define when the government has created a law "respecting the establishment of a religion."[91] The U.S. Supreme Court has most often applied the three-pronged *Lemon*[92] test, which holds that a government action does not violate the Establishment Clause if: (1) there is "a secular legislative purpose;"[93] (2) the "principal or primary effect must be one that neither advances nor inhibits religion;"[94] and (3) there is not "excessive entanglement"[95] with religion.[96]

In more recent cases, the Court mostly dealt with calls for no religion in civic life,[97] rather than the government endorsing one religion over another.[98] In these cases, the Court has mostly sided with the government

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[90] The U.S. Supreme Court did not confront with any establishment clause cases until Everson v. Bd. of Educ., 330 U.S. 855 (1947).

[91] U.S. CONST. amend. I.

[92] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (striking down Pennsylvania law that allowed for monetary reimbursement to religious schoolteachers); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (outlining the *Lemon* test).

[93] In a series of monument and holiday displays cases, the Court allowed displays when it was mix of secular and parochial, but not when it was primarily religious. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Van Orden v. Perry, 545 U.S. 677 (2005). *Cf.* Allegheny Cty. v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989); McCreary Cty. v. ACLU of Kentucky, 545 U.S. 844 (2005). The Court upheld funding of the parochial schools if the law was primary supporting secular purposes. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist. *Cf.* Tilton v. Richardson 404 U.S. 672 (1971); Mitchell v. Helms, 530 U.S. 793 (2000).

[94] *Lemon*, 403 U.S. at 612.

[95] Agostini v. Felton, 521 U.S. 203, 232 (1997) (upholding law that allowed public school teachers to teach in parochial schools).

[96] *Lemon*, 403 U.S. at 612–13. The current Court has questioned the efficacy of the *Lemon* Test moving forward. *See* Am. Legion v. Am. Humanist Ass'n, 139 U.S. 2067 (2019). The Court has also moved toward overturning any laws that burden religious organizations. *See, e.g.*, Our Lady of Guadalupe School v. Morrisey-Berru 140 S. Ct. 2049 (2020) (denying teachers who work for religious institutions the ability to sue the school).

[97] Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 90, 95–97 (2002) (examining the secular purpose prong of the *Lemon* test).

[98] One exception has been the government treatment of lands sacred to Native American tribes in contrast to its treatment of tax exemptions for the churches and land of western religions. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). "[T]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448. *See generally* Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal*

on two other grounds beyond *Lemon*. First, when there is a long history of the practice, such as beginning legislative sessions with a prayer.[99] Second, when there is government entanglement through either government provided direct aid to religious organization or the government coercing people to support a religion against their will.[100] Ultimately, in establishment law cases, the U.S. Supreme Court has settled on a neutrality principle.[101]

2. Free Exercise

The First Amendment states that the government cannot prohibit the free exercise of religion, such as praying, celebrating, and taking part in rites and ceremonies.[102] The legal test in free exercise cases has ebbed and flowed.[103] In *Shebert v. Verner*[104] and *Wisconsin v. Yoder*,[105] the U.S.

Public Lands, 41 IDAHO L. REV. 475, 476 (2005) (emphasizes the recent increase of indigenous peoples' movements due to the forfeiture of their land).

[99] Greece v. Galloway, 572 U.S. 565, 565–66 (2014) (upholding prayer before city meeting); *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (holding that cross used as a WWI memorial had a secular history outweighing religious symbolism).

[100] Lee v. Weismann, 505 U.S. 577, 587 (1992) (affirming non-denominational prayer at school graduation violated the Establishment Clause). *See generally* Raymond C. Pierce, *The First Amendment "Undergod": Reviewing the Coercion Test in Establishment of Religion Claims*, 35 HAMLINE L. REV. 183, 189–96 (2012) (examining the Coercion Test as defined in *Lee v. Weismann*).

[101] *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–11 (1976) (holding that state could not get involved in internal church matters). Note, in the 2018-19 term, the U.S. Supreme Court granted cert in American Legion v. American Humanist Association. In this case, a WWI memorial is being challenged. The monument is a 32-foot cross that stands in a small park at an intersection and maintained by the State of Maryland. The cross which was constructed long before *Lemon* with donations of private citizens and the American Legion. The monument contains some secular symbols but has also been a site of Christian religious services. There is an expectation that the Court may answer some ambiguities in the Establishment jurisprudence. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[102] *Free Exercise Clause*, CORNELL L. SCH., https://www.law.cornell.edu/wex/free_exercise_clause (last visited July 19, 2021).

[103] William P. Marshall, *Bad Statutes Make Bad Law: Burwell v Hobby Lobby*, 2014 SUP. CT. REV. 71, 75 (2014) (arguing that the statutory protections of free exercise have resulted in all regulations affecting religion to be constitutionally fraught). The first U.S. Supreme Court to examine 'free exercise' denied a Mormon's objection to the criminal polygamy laws as it would have undermined fundamental criminal law, thus "permit[ting] every citizen to become a law unto himself." Reynolds v. United States, 98 U.S. 145, 167 (1878).

[104] 374 U.S. 398, 410 (1963) (holding that the government action denying unemployment based on an individual's religious practices was subject to strict scrutiny).

[105] 406 U.S. 205, 234 (1972) (holding that law requiring Amish children to attend high school violated their free exercise of religion).

Supreme Court applied strict scrutiny to any law that unduly burdened the practice of fundamental religious beliefs.[106] In the subsequent cases,[107] the Court rarely questioned whether religious belief was legitimate, rather it focused on if the practice being inhibited was fundamental to the religion.[108] So, in this era, the Court routinely rejected "free exercise" claims against generally applicable government functions such as taxes,[109] social security registration,[110] and overtime requirement[111] as they did not disrupt fundamental practices of religion.[112] Finally, in *Smith*,[113] the Court added this approach to the Free Exercise Doctrine when it held that facially neutral, generally applicable laws that burdened religious practice would only be subject to intermediate scrutiny.[114]

C. Turning to Free Speech to Protect Religious Freedom

So, in response to the Court's movement toward less constitutional protection of religious rights, two things occurred. When it came to

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[106] *See id.* at 234; *Sherbert*, 374 U.S. at 410.

[107] *See* Quaring v. Peterson, 728 F.2d 1121, 1125 (8th Cir. 1984), *aff'd sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985) (upholding religious belief that having photo taken was in violation of the Second Commandment); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (upholding religious practice of consuming hallucinogen tea by all members of the sect, including children).

[108] *See Quaring*, 728 F.2d at 1125. Prior to 1990, the only bar against government regulation of religion was that it could not: "compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990). But RLUIPA broadly defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C.S. § 2000cc-5(7)(A) (LEXIS through Pub.L. No. 117–26).

[109] Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 378 (1990) (free exercise did not bar state's ability to tax sale of religious literature); Bob Jones Univ. v. United States, 461 U.S. 574, 574–75 (1983) (stating free exercise clause did not bar state's denial of tax-exempt status based upon university's discriminatory practices); United States v. Lee, 455 U.S. 252, 253 (1982) (free exercise clause did not grant Amish exemption from social security tax).

[110] Bowen v. Roy, 476 U.S. 693, 700–701, 712 (1986).

[111] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 303–305 (1985).

[112] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

[113] *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 872 (1990).

[114] *Id.* Recently the U.S. Supreme Court has begun to question the efficacy of *Smith* holding. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (holding that government requirement that same-sex couples be considered for foster care violated organization's free exercise rights).

Establishment Clause cases, those who wanted more religious expression in the civic arena moved away from trying to fight the *Lemon* test and changed the context to free speech by invoking the nascent Government Speech Doctrine.[115] In the area of free exercise, Congress stepped in and passed the Religious Freedom Restoration Act (RFRA).[116] This Act required any federal law burdening free exercise, even if facially neutral and generally applicable, to pass strict scrutiny.[117] Moreover, free exercise became more tied to free speech arguments,[118] specifically the Compelled Speech Doctrine.[119]

1. Government Speech Doctrine

The Government Speech Doctrine is borne out of spending clause cases where parties challenged the government's restriction on funding.[120] In *Rust*,[121] the U.S. Government provided grants to abortion clinics, and in *Southworth*,[122] the state university system required student fees for all clubs even if the students did not support their ideology.[123] In both cases, the U.S. Supreme Court held that the restrictions were constitutional as the government can choose how it spends its money, so long as it does not violate people's rights.[124]

The first case to use the term "government speech" was *Johanns v. Livestock Marketing Association*.[125] The USDA had initiated an advertising campaign titled "Beef. It's What's for Dinner."[126] The

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[115] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[116] 42 U.S.C. § 2000bb. (RFRA does not apply to the states). *See generally* Boerne v. Flores, 521 U.S. 507 (1997). See Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1095 (2017), where twenty-one states have passed similar laws on the state level.

[117] *See, e.g.*, Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA); *see also* Burwell v. Hobby Lobby, 573 U.S. 682 (2014).

[118] *See generally* Ayesha Khan, *The Butcher, the Baker, the Candlestick Maker: When Non-Discrimination Principles Collide with Religious Freedom*, MD. B.J., JULY/AUG. 2017, at 42, 44–46 (outlining a number of cases where public accommodation laws are challenged on First Amendment grounds).

[119] *Id.*

[120] *See* Rust v. Sullivan, 500 U.S. 173 (1991).

[121] *Id.* at 178 (Rust never explicitly used the term "government speech").

[122] Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 221 (2000).

[123] *Id.*

[124] *Id.* at 229.

[125] *See* 544 U.S. 550 (2005).

[126] *Id.* at 554.

campaign was funded through taxes collected on imported beef.[127] The importers sued the government claiming it was compelled speech that they did not support.[128] The U.S. Supreme Court upheld the government's use of the taxes, claiming that the government can control its own message, which is not subject to First Amendment scrutiny.[129]

The Government Speech Doctrine collided with the establishment clause in the case of *Summum v. Pleasant Grove*.[130] In this case, the town of Pleasant Grove, Utah, operated a park that housed privately donated monuments, including one of the Ten Commandments.[131] A small religious sect wanted to donate a monument celebrating its own religious tenets, but the City denied its request.[132] The religious organization sued claiming that the park was a public forum and the denial was viewpoint discrimination.[133]

The U.S. Supreme Court held that the government's action was not viewpoint discrimination, rather the park's monuments were a form of government speech.[134] The Court reasoned that an observer would believe that the speech was that of the government who owned the park, not the private citizens who donated the monument.[135] The Court reasoned that it has long been the case that governments use parks in this way.[136] Finally, when it came to parks, there was a limited space, thus, the government could not take all monuments.[137] Ultimately, the government was the final arbiter of which monuments were placed in the park.[138]

In *Walker v. Sons of Confederate Veterans*,[139] the Court solidified *Johanns* and *Summum* into a formal constitutional test.[140] In *Walker*, the

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[127] *Id.*

[128] *Id.* at 556 (The importers argued that the campaign did not allow them to promote their individual product).

[129] *Id.* at 560.

[130] 555 U.S. 460 (2009).

[131] *Id.* at 465.

[132] *Id.*

[133] *Id.* at 466.

[134] *Id.* at 481.

[135] *Id.* at 472.

[136] *Id.* at 470.

[137] *Id.* at 478.

[138] *Id.* at 473–74.

[139] 135 S. Ct. 2239 (2015).

[140] *Id.* at 2245–46.

State of Texas Motor Vehicle Department had denied the Sons of Confederate Veterans (SCV) a chance to create a specialty license plate for drivers to buy.[141] The State denied the SCV's design because its logo included a Confederate Flag, which the state deemed offensive.[142] The SCV sued claiming it was viewpoint discrimination.[143]

The U.S. Supreme Court ruled in favor of the State applying a three-part test: (1) what was the history of the speech; (2) would the public observe the speech as being conveyed by the government; and (3) who had control over the speech.[144] The U.S. Supreme Court ruled that the State had always commissioned license plates, the public recognized license plates as being from the government, and the State had ultimate control over these specialty plates.[145] The Court argued that just because the State opened the plates to specialty designs and vanity messages did not make the plates a public forum.[146] Justice Breyer, writing for the majority, argued that the State of Texas has the need to be able offer a plate that says "Fight Terrorism" without having to approve a plate that promotes "al Qaeda."[147]

In *Matal v. Tam*,[148] a music group challenged the Patent and Trademark Office's refusal to register the name "The Slants."[149] The PTO argued that the name was offensive to Asian-Americans in violation of the disparagement clause of the Lanham Act.[150] In the courts, the PTO argued that the federal trademark registration was government speech as it was given by the government, had always been, and the government was the final arbiter of the decision.[151] But the U.S. Supreme Court disagreed and

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[141] *Id.* at 2245.

[142] *Id.* The State Motor Vehicles Department approved a Buffalo Soldiers plate the same day it denied the SCV. The Buffalo Soldiers are controversial as they were an all-African American regiment that fought against Native American Tribes in the Plains Wars. *Id.* at 2258.

[143] *Id.* at 2245.

[144] *Id.* at 2247.

[145] *Id.* at 2248–49.

[146] *Id.* at 2250. Justice Breyer stated that if a motorist wanted it to be a purely private message, then they would put it on a bumper sticker. *Id.* at 2249.

[147] *Id. See also* Manhattan Cmty. Access Corp. v. Hallek, 139 S. Ct. 1921 (2019) (holding that public access provider was not a state actor nor was the channel a public forum).

[148] 137 S. Ct. 1744 (2017).

[149] *Id.* at 1751.

[150] *Id.*

[151] *Id.* at 1754.

overturned the disparagement clause as unconstitutional.[152] In regards to the government speech argument, the Court held that the public would not consider a trademark to be originating from the government, rather it would be a message from the private party who was awarded the trademark.[153]

2. Compelled Speech Doctrine

The Government Speech Doctrine conflicts with the Compelled Speech Doctrine.[154] As more private-public partnership occurs, it is often difficult to know when the speech is from a public speaker and when it is from a private speaker.[155] This is an important distinction, as one is constitutionally suspect while the other is acceptable compelled speech.[156]

i. Private Speakers

The government may be able to speak on behalf of the majority, but generally, it cannot compel individual citizens to speak.[157] The earliest cases against compelled speech arose from Jehovah's Witnesses refusing to salute the flag in school because it violated their religious beliefs.[158] The U.S. Supreme Court ruled in favor of the students, holding that the "Bill of Rights denies those in power any legal opportunity to coerce that consent."[159]

In *Wooley v. Maynard* the U.S. Supreme Court upheld the pacifists' refusal to have the New Hampshire State Motto "Live Free or Die" on their license plate.[160] In *Miami Herald Publishing Co. v. Tornillo*, the Court overturned a "right of reply" statute that required newspapers to carry

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[152] *Id.* at 1765.

[153] *See id.* at 1758, 1760 (arguing that it is private speech, the Court stated that the "Federal Government does not dream up these marks.").

[154] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571–72 (2005) (Souter, J., dissenting).

[155] Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV 1 *passim* (2013) (arguing that privatization is undermining employee speech to detriment of the public interest.).

[156] *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015).

[157] Wooley v. Maynard, 430 U.S. 705, 714–16 (1977); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 797–98 (1988).

[158] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 627–29, 631 (1943).

[159] *Id.* at 641.

[160] 430 U.S. at 707, 717.

letters in response to criticisms printed in the paper.[161] In *Hurley*, a unanimous Court overturned a Massachusetts court's requirement that the veteran's association include an LGBT group in its public parade.[162] The Court argued that public accommodation laws violated the private organization's First Amendment rights by compelling the group to speak a message it does not believe.[163] In *Dale*, the Court upheld the Boys Scouts of America's prohibition on homosexuals becoming scoutmaster, which was in violation of state public accommodation laws.[164] The Court argued that it would burden the organization's ability to advocate its own viewpoint, as well as burdening its right to free association.[165] In all of these cases, the Court protected the speakers' ability to have "freedom of mind" for their own beliefs.[166]

In two recent cases, the Court overturned state laws finding them to be forms of compelled speech.[167] In *Janus*,[168] the Court ruled 5-4 to overturn a law that required all public employees to pay union fees.[169] The majority stated that since the money was used for union speech, which some public employees disagreed with,[170] then it amounted to compelled speech.[171] Once again, the majority stated that it was a "cardinal constructional command"[172] not to compel "individuals to mouth support

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[161] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[162] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 *passim* (1995).

[163] *Id.* at 573 ("[T]his use of State's power violates the fundament rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . [O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.").

[164] Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

[165] *Id.* at 661.

[166] The Court does support the government using money collected from private individuals if it was considered to be government speech. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 566–67 (2005). *Cf.* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 384 (2008) (arguing that compelled speech doctrine should focus on the listeners rather than the speakers).

[167] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018).

[168] *Janus*, 138 S. Ct. 2448.

[169] *Id.*

[170] *Id.* at 2460–61.

[171] *Id.* at 2463 ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.").

[172] *Id.*

for views they find objectionable."[173] The majority focused on the dignity of compelled speakers who are "coerced into betraying their convictions."[174] They also went on to state that the compelled speech is worse than demanding silence.[175] Since the unions spoke on political topics, including LGBT rights, then it "occupies the highest rung of the hierarchy of First Amendment values."[176] The Court reiterated that public employees do retain some free speech rights and the government cannot force speech in this context.[177]

In *National Institute of Family and Life Advocates v. Becerra*,[178] the Court ruled 5-4 that a California law that required licensed "pro-life" centers to provide clients information about the availability of state-funded abortions was suspect.[179] The Court held that the law likely violates the First Amendment as it is a content-based regulation that compels the centers to speak a certain message they do not want to speak.[180] The Court recognized that professionals may be compelled to "disclose factual, noncontroversial information in their commercial speech"[181] so long as it only "incidentally burden[s] speech."[182] But, the majority refused to recognize a category of "professional speech" for licensed businesses that would always receive less protection,[183] as this would allow for the government to "suppress unpopular ideas."[184]

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[173] *Id.*

[174] *Id.* at 2464.

[175] *Id.*

[176] *Id.* at 2476.

[177] *See id.* at 2477–78. Justice Kagan, however, would have upheld *Abood*'s balancing test that allowed dissenting union members to only pay into funds for collective bargaining. *Id.* at 2487 (Kagan, J., dissenting).

[178] 138 S. Ct. 2361 (2018).

[179] *See* Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, CAL. HEALTH & SAFETY CODE § 123470 (West 2018). Additionally, any unlicensed "pro-life" center had to put a disclaimer in all of their public advertisement alerting the public that they were unlicensed. *See Becerra*, 138 S. Ct. at 2368.

[180] *Becerra*, 138 S. Ct. at 2374–75. Most pregnancy centers are operated by religious organizations that are pro-life. *Id.*

[181] *Id.* at 2372.

[182] *Id.* at 2373.

[183] *Id.* at 2371–72. Justice Thomas does not claim that there is not a need for a separate category of speech, just refuses to recognize it. *Id.*

[184] *Id.* at 2374. The Court held that the disclaimer requirement burden only speakers who disagree with the state. *Id.*

Writing in dissent, Justice Breyer argued that the majority's sweeping approach puts many reasonable regulations in jeopardy, including most disclosure laws.[185] He states that disclosure laws simply inform the public, which inherently sends a particular message.[186]

ii. Public Employees

Initially, public employees had no speech rights, trading their civil liberty for employment.[187] But, in the 1960s, the U.S. Supreme Court recognized that employees do not completely stop being citizens when they take public employment.[188] In *Pickering v. Board of Education*,[189] the government created a balancing test to protect an employee if they were speaking on a matter of public concern and the speech did not disrupt the government agency.[190] In application, the test centered on the first prong—if the employee was speaking on a matter of public concern—such as corruption, discrimination, mismanagement, etc.—then they were protected.[191]

In *Connick v. Myers*,[192] the Court placed the burden on the employee to prove that the speech was a matter of public concern.[193] If that was met, then the government had to prove it was disruptive to employee disharmony, insubordination, or undermining objectives.[194] Then, in

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[185] *See id.* at 2380–81 (Breyer, J., dissenting). Justice Breyer lists many examples of disclosure laws outside of professional's direct conduct. *Id.*

[186] *Id.* Justice Breyer was the author of *Walker v. Sons of Confederate Veterans* and made a similar argument that the government has to be able to endorse certain messages at the expense of others. *See* 576 U.S. 200, 215–17 (2015).

[187] *See* Alder v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."); Garner v. Bd. of Pub. Works of Los Angeles, 341 U.S. 716, 719 (1951) (stating the city could require its employees to divulge past or present membership in the Communist Party).

[188] *See generally* Wieman v. Updegraff, 344 U.S. 183 (1952); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961); Keyishian v. Bd. of Regents of Univ. of State of New York 385 U.S. 589 (1967).

[189] 391 U.S. 563 (1968).

[190] *Id.* at 568–69.

[191] Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 119–130 (2006) (outlining the string of public employee cases pre-*Garcetti*).

[192] 461 U.S. 138 (1983).

[193] *Id.* at 146–50.

[194] *Id.* at 149–54.

Garcetti v. Ceballos,[195] the Court added a threshold prong—was the employee acting within his or her job duties.[196] If so, then the government could reprimand the employee for any speech.[197] If the employee was not acting within his or her job duties, then the *Pickering* test would apply.[198]

III. BALANCING FREEDOM OF THOUGHT WITH INDIVIDUAL DIGNITY

A. End of Compelled Speech in Commercial Contexts?

First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all."[199] But, in both cases the rights are not absolute, as over the last century, the U.S. Supreme Court has laid out limitations.[200] When it comes to the right to speak freely, it does not apply to libel, sedition, perjury, and obscenity.[201] When it comes to the right against compelled speech, it does not apply to factual disclosures by professionals,[202] public employee speech[203] and other government speech.[204]

But since the beginning of this century, the U.S. Supreme Court has moved toward absolutism when it comes to both political speech[205] and

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[195] 547 U.S. 410 (2006).

[196] *Id.* at 418, 423–25.

[197] *Id.* at 423–25. *Cf.* Lane v. Franks, 573 U.S. 228, 236–40 (2014) (reiterating the *Garcetti* rule and the employment agreement between government and employee).

[198] *Garcetti*, 547 U.S. at 423–24.

[199] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[200] *See generally* KATHLEEN ANN RUANE, CONGRESSIONAL RESEARCH SERVICE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014).

[201] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973); New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that child pornography is unprotected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (creating the fighting words doctrine); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (outlining the incitement test).

[202] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018).

[203] *See Garcetti*, 547 U.S. at 418 (holding that public employees do not have free speech protections when acting within their job duties).

[204] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (upholding reasonable disclosure requirements for attorneys). *Cf. Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371.

[205] *See generally* Ronald K.L. Collins, *Exceptional Freedom–the Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2013) (arguing that the Roberts court is near absolutist when it finds regulations to be content-based).

commercial speech.[206] There is now little regulation to political speech, unless the government can show the speech to be their own.[207] Every regulation of political speech that may have once been considered reasonable, now seems doubtful.[208]

Today, the Court seems to find most speech regulations that it examines to be burdening speech on a matter of public concern, thus receiving heightened scrutiny.[209] Moreover, this scrutiny has been extended to commercial speech as now many commercial regulations are considered to be burdening expressive conduct either as a content based-regulation[210] or on a matter of public concern.[211] Ultimately, the Court has turned "the First Amendment into a sword . . . using it against workaday economic and regulatory policy."[212]

B. Intermediate Scrutiny of Balancing Fundamental Rights

The government needs to be able to protect the rights of the public.[213] In doing so it must balance conflicting rights such as a professional's

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[206] *See generally* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 28 (2017) (arguing that the Roberts courts has chipped away at administrative regulations).

[207] *See* Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200 (2015); *see also, e.g.*, Leah Sellers, *We Should Abolish the Franking Privilege, Mass Constituent Communications, and Other Campaign-Related Government Speech but Frankly, It Won't Be Easy*, 42 U. TOL. L. REV. 131, 135 (2010) (arguing that public funds should not be used for incumbents seeking reelection).

[208] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[209] *See generally supra* note 205 (arguing that the Roberts court is near absolutist when it finds regulations to be content-based). *See, e.g.*, Reed v. Gilbert, 576 U.S. 155 (2015) (holding that the town could not place different requirements for religious signs).

[210] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 562, 563, 565–66 (2011) (striking down the regulation on the sale of patient information).

[211] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) ("This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.").

[212] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[213] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

freedom of thought with that of the public's equal protection.[214] This means that professionals may have some burdens placed upon their individual viewpoint.[215] But there would be greater leeway on such burdens in a commercial context, where regulation has historically received lesser scrutiny.[216]

Most professionals need a license to practice their craft, whether it is an occupational license (e.g. doctors, lawyers) or a business license to open a shop.[217] These licenses are there to insure that the shop is compliant with all regulations.[218] In exchange for the license, the state will put conditions on the shop to operate in a manner that preserves the public interest (e.g. safety, taxes, disclosure, etc.).[219] It has been well-established that the First Amendment is not a defense to such regulations of professionals[220] if the requirement is "reasonably related to the State's interest."[221]

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[214] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (holding that First Amendment rights to free press must be balanced with Sixth Amendment right to a fair trial).

[215] *See, e.g.*, Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985) (upholding attorney regulations requiring disclosure of costs); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employees do not have free speech protections when acting within their job duties); *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2385 (Breyer, J., dissenting) ("If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?").

[216] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563–64 (1980) (applying intermediate scrutiny to restrictions on commercial speech).

[217] *Starting a Business? A Guide to Business Licenses and Permits*, U.S. CHAMBER COMMERCE (Feb. 25, 2019), https://www.uschamber.com/co/start/startup/business-licenses-and-permit-guide. Journalists can never be licensed by the government as it would be violation of the First Amendment. *See* Matthew LoBello, *The Journalism Licensing Program: A Solution to Combat the Selective Exposure Theory in Our Contemporary Media Landscape*, 36 CARDOZO ARTS & ENT. L.J. 509, 530 (2018) (arguing for a private licensing of American journalists).

[218] *See FAQs*, BUS. LICENSES, https://www.businesslicenses.com/faqs.php (last visited July 19, 2021).

[219] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2382 (Breyer, J., dissenting).

[220] *See id.* at 2381–82 (citing a long list of cases that upheld license requirements challenged on constitutional grounds during the New Deal era).

[221] Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (upholding attorney regulations requiring disclosure of costs). *But cf. Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2377–78 (overturning state regulation requiring pregnancy centers to disclose licensure).

In *National Institute of Family and Life Advocates* (NIFLA), the majority reiterated that laws which regulate professional conduct are constitutionally valid so long as they only "incidentally burden speech."[222] In *Masterpiece Cakeshop*, the majority also reiterated that religious and philosophical objections do not allow business owners to "deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[223] The majority further argued that classes of individuals are protected "in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[224]

Yet, in *NIFLA* and *Masterpiece Cakeshop*, the narrow majority ruled against the government action as being hostile to religious beliefs and/or compelled speech.[225] In doing so, the Court has essentially undermined the neutral application of any facially neutral, generally applicable law[226] even if it is only an incidental burden on speech.[227] The fact of the matter is that with such a wide reading of speech, almost all commercial conduct will now be related to speech.[228]

Instead, the Court should consider quasi-expressive professional conduct to be in the realm of commercial speech, thus receiving the lesser protection of *Central Hudson*'s intermediate scrutiny.[229] Then the government's substantial interest in protecting the public's constitutional rights would be balanced with the professional's individual rights.[230]

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[222] 138 S. Ct. at 2373 (citing *O'Brien* test).

[223] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018).

[224] *Id.* at 1728.

[225] *Id.* at 1731; *Nat'l Inst. of Fam. & Life Advocs*., 138 S. Ct. at 2378.

[226] *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1728. Generally, public-accommodations laws do not target speech. Instead, they are targeted at stopping discrimination "against individuals in the provision of publicly available goods, privileges, and services . . . ." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995).

[227] *See* United States v. O'Brien, 391 U.S. 367, 388 (1968) (upholding federal law prohibiting the destruction of selective service cards).

[228] "Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long." Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

[229] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[230] U.S. CONST. amend. XIV.

C. The Parallel with Government Speech

Freedom of Speech is a fundamental right and the government cannot censor speakers due to their unpopular or vile thoughts when it is a matter of public concern.[231] This protection is near absolute in a public forum.[232] But, in the case of commercial speech, the context is different.

First, the place of business is not a public forum where political opinions are usually expressed.[233] For example, when it comes to a bakery, the cake is purchased by a private individual to be used in a private ceremony.[234] Moreover, the conduct is quasi-expressive and it is not inherently political.[235] Baking a cake is not a clear endorsement of gay marriage by the baker.[236] Most people who see the cake used in a private ceremony would not assume that the message wishing a couple luck to be a pronouncement concerning the political beliefs of the baker.[237]

Instead of applying Forum Doctrine Analysis to commercial products, such decorating a cake, the Court should draw a parallel to government speech. Ultimately, the Government Speech Doctrine allows for the circumvention of two constitutional bedrocks—the Establishment Clause and viewpoint discrimination.[238] Ostensibly, if the government is the speaker, then it does not have to be concerned with violating the Establishment Clause concerns of excessive entanglement and

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[231] Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

[232] *See, e.g.*, Snyder v. Phelps 562 U.S. 443 (2011) (overturning jury decision against protest at funeral because the speech was a matter of public concern).

[233] *See* Cornelius v. NAACP Legal Def. & Educ. Fund 473 U.S. 788, 802–803 (1985) (defining traditional public fora as areas which "by long tradition or government fiat have been devoted to assembly and debate" and providing examples such as public streetways, parks, sometimes university campuses, and areas expressly designated by the government (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 44 (1983))).

[234] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1750 (2018) (Ginsberg, J., dissenting).

[235] *See id.* at 1748–52.

[236] In *Masterpiece Cakeshop*, the baker and the couple did not get to the point of discussing the text on the cake as the baker has already denied them the service since they were a same-sex couple. *Id.* at 1740, 1748–52.

[237] The concurrence argued that Phillips was part of the wedding celebration, but this is not a service required by having a license to be a baker. *Id.* at 1740.

[238] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571–72 (2005) (Souter, J., dissenting).

endorsement,[239] as it can choose its own messages.[240] Moreover, when the government is the speaker it can endorse one viewpoint over another without any judicial scrutiny,[241] an idea that is usually anathema to constitutional jurisprudence.[242]

In the Government Speech Doctrine, the Court seemingly places the most emphasis on whether members of the public reasonably perceive the relevant expression to be government speech.[243] This can be applied in the professional context when business conduct is clearly commissioned by a customer. In this context, the speech protection should be for the customer who chooses the viewpoint.

In *Masterpiece Cakeshop*, the dissent suggested that the baker could counter concerns over the source of the message by posting a sign denying their support of same-sex marriage.[244] Justice Gorsuch argued that this requirement would constitutionally "justify any law compelling speech."[245] But in *Walker*, the Court made a similar argument to the dissent when it stated that if people want a message to be their own, then they should put it on a bumper sticker, rather than require the state to produce a license plate (which it considered to be a non-public forum).[246] Similarly, when a customer commissions a service from a public business, then any expressive elements should be considered that of the customer, not the business who can use a different forum.[247]

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[239] *Id.* at 571.

[240] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998)).

[241] *Id.* at 467 (quoting *Johanns*, 544 U.S. at 533).

[242] This goes against most free speech cases which are "[p]remised on mistrust of governmental power, [thus] the First Amendment stands against attempts to disfavor certain subjects or viewpoints." Citizens United v. FEC, 558 U.S. 310, 340 (2010) (overturning campaign finance regulations limiting expenditures by organizations).

[243] Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 35 (2017).

[244] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1748 (2018) (Ginsberg, J., dissenting).

[245] *Id.* at 1745 (quoting Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)).

[246] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 212–13 (2015).

[247] In Matal v. Tam, 137 S. Ct. 1744, 1769 (2016), the Court denied the government's argument that the trademark registration was government speech because the public would not think that the trademarked name derived from the government. In *Summum*, *Walker*, and *Tam,* the Court made assumptions as to from whom the public believed that message came. *See* Hemel & Ouellette, *supra* note 243 at 36.

Justice Gorsuch also argued that "States cannot put individuals to the choice of 'be[ing] compelled to affirm someone else's belief' or 'be[ing] forced to speak when [they] would prefer to remain silent.'"[248] But in the government speech cases, the government does this often to both its employees[249] and the public.[250] Of course, if a public employee does not want to speak on behalf of the government, then he or she can choose to leave the job.[251] Analogously, in the professional context, the business owner can choose not to give such service to anyone or not to be a licensed business that accommodates the public.[252]

D. Legal Test for Compelled Speech in Commercial Context

In the context of government speech, the Court has allowed for the government to balance the Free Speech rights of citizen-employees with the important interests of the government,[253] but only when the regulation serves those interests.[254] This balancing is in order to allow for the government to "best serve the public."[255] Thus, a public employee must bear some limitations to his or her absolute freedoms.[256] Similarly, a licensed business should bear some limitations to his or her freedom in order to uphold the rights of the public.

In balancing the rights in this context, a legal test should examine three questions that parallel the Government Speech Doctrine:

1) *Was the professional providing an ordinary public service?*

2) *Would the public observe the expressive conduct as being from the commercial entity? and*

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[248] *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (2018) (Thomas, J., concurring).

[249] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[250] *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

[251] *See* Lane v. Franks, 573 U.S. 228, 239–40 (2014) (reiterating the *Garcetti* rule and the employment agreement between government and employee).

[252] *See Masterpiece Cakeshop*, 138 S. Ct. at 1748–52 (2018) (Ginsberg, J., dissenting) (arguing that Phillips could choose not to bake wedding cakes at all or he would have to provide them for same-sex couples).

[253] *See supra* Part III.B.

[254] *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2493 (2018) (Kagan, J., dissenting).

[255] *Id.* at 2491.

[256] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

3) *Who had control over the message?*[257]

In applying this test, most professional entities would have control over their message, such as in their advertising and PR campaigns.[258] Media companies which produce their own messages would not be subject to the Doctrine.[259] But for businesses who sell services that include expressive conduct on behalf of their clients, the test could be employed.[260]

If they are a licensed business that is open to the public, then they will be considered acting within their job duties when they are providing services that would apply to the general public.[261] Under the *Garcetti* rule, if a public employee fails the "job duties" prong, then the government's actions are not violative of the First Amendment.[262] Similarly, if the commercial entity was acting within its professional duties as it stipulated in its license requirement, then it will have to follow all facially neutral, generally applicable laws.[263] The business would be protected if it was providing a special service or was refusing a service that it would not provide for someone else.[264]

In the example of the baker, most of the questions would not come out in his or her favor, as the customer usually chooses the text (especially on custom cakes) and the public would know this through experience.[265] *Masterpiece Cakeshop* differs from other compelled speech cases.[266] The context is different than *Hurley*,[267] as the public would believe that the

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[257] *See* Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200, 210–13 (2015).

[258] *Cf. id.* at 213–14 (comparing control exhibited by Texas with the control exhibited by professional entities in advertising and PR campaigns).

[259] *Cf.* Colby M. Everett, *Free Speech on Privately-Owned Fora*: *A Discussion on Speech Freedoms and Policy for Social Media*, KAN. J.L. & PUB. POL'Y 113, 122 (2018) (arguing for regulation against private media censorship).

[260] *See* Chris Chung, *Baking a Cake: How to Draw the Line Between Protected Expressive Conduct and Something You Do*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 378 (2018) (arguing for a legal test to determining expressive conduct).

[261] *See, e.g.*, *Garcetti*, 547 U.S. at 411.

[262] *Id.* at 416–17.

[263] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

[264] Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1732–34 (2018) (Kagan, J., concurring).

[265] *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64–65 (2006) (arguing that the public "[c]an appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so . . . .").

[266] *Masterpiece Cakeshop*, 138 S. Ct. at 1740–42 (Thomas, J., concurring).

[267] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

messages in a parade were endorsed by those who sponsored it.[268] It also differs from *Dale*,[269] as a private organization like the Boys Scouts does not speak on behalf of its paying members as a business entity would speak on behalf of its customers.[270]

In *Janus*,[271] the majority cited *Barnette*[272] as the basis for compelled speech restrictions in professional settings.[273] But, as noted by Justice Kagan, *Barnette* differs greatly from compulsions for professional speakers.[274] In that case the government required the students to "swear an oath contrary to their religious beliefs."[275] But, in *Masterpiece Cakeshop*, the baker was not expressing a message that he believes in the morality of same-sex marriage.[276] Instead, he was producing a pastry that would include a message crafted by the customers for their personal use in a private setting.[277]

There is another analogy in Government Speech Doctrine—the government can force employees to speak on the government's behalf, and the government can also speak on behalf of private citizens if it is the government's own speech.[278] The Court has struck down overbroad loyalty oaths,[279] but has upheld most other compelled speech against public employees acting within their duties.[280] Similarly, the business owners retain their right to express their beliefs either privately or in a public forum for political speech. The business owner cannot be compelled to express a message that denounces his or her sincerely held belief.[281]

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[268] *See id.* at 568.

[269] 530 U.S. 640 (2000).

[270] *See id.* at 697 (Stevens, J., dissenting).

[271] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[272] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[273] *Janus*, 138 S. Ct. at 2463.

[274] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1744 (2018) (Kagan, J., concurring).

[275] *Janus*, 138 S. Ct. at 2494 (Sotomayor, J., dissenting) (citing *Barnette*, 319 U.S. 624).

[276] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[277] *See id.*

[278] *See supra* Part II.

[279] *See* Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).

[280] Cole v. Richardson, 405 U.S. 676, 684 (1972) (stating that "the purpose leading legislatures to enact [loyalty] oaths . . . was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system . . . .").

[281] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

Public businesses should not be able to deny one customer a neutral service that they would provide for other customers.[282]

IV. CONCLUSION

It is the responsibility of the government to balance First Amendment liberties with other fundamental rights. This is not an easy balance, as often the religious beliefs of some conflict with the dignity rights of LGBT individuals. In adjudicating these cases, it is nearly impossible to fully respect one's rights without disrespecting the rights of another.

But the issues of vendors denying services to same-sex couples is not simply an intellectual debate. It is happening all too often—citizens seeking out the same right to market services as others are being denied. The easiest answer may be free speech absolutism: any law that compels someone to speak against their sincere beliefs is invalid.[283] However, these cases are not that clear cut. The services are quasi-expressive. The messages are not necessarily from the business owner. The denial of service is not clearly based on principle, separate from the individual being discriminated against.

Public accommodation laws are facially neutral, generally applicable regulations in the commercial context, which have always received less constitutional scrutiny. Business owners' "freedom of mind" is only incidentally and minimally burdened as they have other fora to clearly express their sincerely held beliefs.

Thus, in a commercial context, where different rights conflict there needs to be balancing. In a public forum or private setting, the answer to unwanted speech is more speech. But in a commercial setting, where a customer is paying for an expressive conduct that relays their message, the customer should be treated like any other citizen. A Jewish florist should have to arrange a bouquet for a Muslim couple (and vice versa). An Atheist should have to make a religious cake if they make wedding cakes. Ultimately, business owners should not be allowed to refuse services to individuals based solely on their gender, race, religion, creed, or sexual orientation; even if it is a business owner's sincerely held belief that they should be able to do so or not. This is the balance that professionals submit to when they open their doors to the public.

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[282] *Masterpiece Cakeshop,* 138 S. Ct. at 1728.

[283] Collins, *supra* note 205, at 415–16.