Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty

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Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty

Gerard A. Hornby*

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"[F]or everyone is orthodox to himself . . . ." 1

I. INTRODUCTION

In recent years, the debate over the idea of an organic, or popular, constitution has taken on new meaning, particularly pertaining to

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the role of religion in public life. The most illustrative example of recent times for the country’s direction regarding constitutional interpretation is the 2016 election of Donald J. Trump. The evangelical support of the candidacy and presidency of Trump—an unabashedly irreligious figure—confirms what, for some, the 2004 “moral values” election heralded: the cementing of an American religious democracy and the end of secular politics.

This proposition, and the rest of this article, is not an argument for religious democracy, a certain political persuasion or party, or even a certain theological advancement, but a recognition of the role of religion in American democracy and constitutional understanding. That so many devout Christians would support a figure so antithetical to their creed ultimately illustrates a deep-seated yearning for socio-religious redemption among the evangelical bloc—primarily in light of the increasing liberalization of American society. In short, this

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2. See, e.g., BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY 85 (2007). By way of example of the relationship between religious voters and constitutional interpretation, consider the shockwaves (and electoral repercussions) felt in the religious community after the oral arguments of Obergefell v. Hodges, 135 S. Ct. 2584 (2015), when Solicitor General Donald Verrilli, Jr. was asked whether constitutional recognition for same-sex marriage would lead to stripping federal tax exemptions from religious colleges that oppose gay marriage, in the same way that federal law strips tax exemptions from colleges that oppose interracial marriage: Mr. Verrilli said that “It’s certainly going to be an issue.” See David French, Yes, Religious Liberty Is in Peril, WALL STREET J. (July 26, 2019, 10:54 AM), https://www.wsj.com/articles/yes-american-religious-liberty-is-in-peril-11564152873.


6. See LEDEWITZ, supra note 2, at 83.

7. Id. at 97 (“So, to say that the democratic will of the people is moving the Court toward a greater acceptance of religion in the public square, is not to assert that this path is better in any sense than the constitutional commitment of the secular consensus. It is simply to say that the people have gone in a different direction and that their opinion must, and will, ultimately control constitutional interpretation.”).

8. In “the American culture wars . . . . [s]ecuring important ground more often leads to new and escalated demands and to more aggressive efforts against remaining pockets of resistance . . . . [T]his gives credence to the sense of existential threat among moral traditionalists, and thus it stiffens their resistance.” Douglas Laycock, Afterword, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 189, 193-194 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Poret Wilson, eds., 2008); see also Michelle Goldberg, Donald Trump, the Religious Right’s Trojan Horse, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html.
is a revival.\(^9\) This revival will continue to exhibit itself in part through a series of judicial decisions concerning the place of religious exemptions and the freedom of conscience in American society.\(^{10}\)

In the midst of this constitutional restructuring is Justice Anthony Kennedy’s opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.\(^{11}\) The opinion left many questions unanswered—answers that will be provided over the coming years through the United States Supreme Court’s redemptive decisions—but provided a key principle of calm in a storm of cultural divisiveness.\(^{12}\) On the other side of the spectrum, and the Atlantic, lies *Lee v. Ashers Baking Company*.\(^{13}\) This 2018 decision handed down by the United Kingdom Supreme Court presents a strikingly similar fact-pattern to *Masterpiece*: a Christian bakery’s refusal to cater for a gay customer.\(^{14}\) Together, the cases illustrate a new approach to the problems posed by the breakdown in public discourse over religious exemptions from generally-applicable laws.

Religious believers, and those acting upon the dictates of their conscience, manifest their beliefs in a variety of different ways across commercial, private, and social spheres, with practices and beliefs universally shared presenting little-to-no legal challenge to society.\(^{15}\) But some religious practices impose both a cultural and financial burden upon others and the state.\(^{16}\) Thus, the extent to

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10. *See* Sean R. Janda, Essay, *Judge Gorsuch and Free Exercise*, 69 STAN. L. REV. ONLINE 118, 120 (2017) (finding that, in decisions from the United States Court of Appeals for the Tenth Circuit, then-Judge Gorsuch gave “broad latitude to religious claimants to define the scope of their religious beliefs and determine what acts (or omissions) infringe those beliefs” and believed that the Free Exercise Clause “repudiates liberal neutrality and enshrines religion as a favored good in the United States”); *see also* Priests for Life v. U.S. Dep’t of Health & Human Servs., 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (concerning religious exemptions under the Affordable Care Act).
12. *See id.* at 1729. Secularists—both believers and non-believers—would and should balk at the manifestly unneutral comments made by the Colorado Civil Rights Commission, linking religious freedom with the atrocities of the Holocaust. *See id.*
13. [2018] UKSC 49 (appeal taken from N. Ir.).
14. *See id.* at [1].
16. *See Brief in Opposition at 25, Masterpiece Cakeshop, 138 S. Ct. 1719 (No. 16-111)* (“Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work . . . . All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion.”).
which legislative exceptions should be made to avoid putting religious actors in the undesirable state of choosing between fidelity to their beliefs and obeying the law is unsettled.\textsuperscript{17} Whether particular religious practices can be accommodated within secular liberal democracies is a challenging and contentious issue. The increased polarization of American and European society has sparked a new chapter in the so-called “culture wars.”\textsuperscript{18} The tension between religious liberty and social cohesion appear in numerous examples, sometimes dealt with differently on both sides of the Atlantic. This article outlines those trends and details how their cause is an increasing refusal of both sides of the cultural debate to accept and appreciate what is at stake here. The article offers some proposed solutions going forward derived from the principles of both \textit{Masterpiece} and \textit{Ashers} that allow sufficient protection for both the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community and those acting upon the dictates of their faith.

\section{II. \textbf{Cakes and Consciences}}

\textbf{A. \textit{Masterpiece Cakeshop}}

\textit{Masterpiece Cakeshop}, a bakery in Denver, Colorado, is owned and operated by Jack Phillips (Phillips), a “devout Christian” whose “main goal in life is to be obedient to Jesus Christ and Christ’s teachings in all aspects of his life,” while seeking to “honor God through his work at Masterpiece Cakeshop.”\textsuperscript{19} Indeed, one of Phillips’s religious beliefs is 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,” and that, therefore, “creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.”\textsuperscript{20}

In 2012, Charlie Craig (Craig) and Dave Mullins (Mullins), a same-sex couple, visited \textit{Masterpiece Cakeshop} to inquire about ordering a wedding reception cake.\textsuperscript{21} Craig and Mullins visited the

\textsuperscript{17} See Cumper, supra note 15, at 195.
\textsuperscript{18} See generally supra note 8, at 193-94; see also Byron York, \textit{Evangelical Leader Shows How GOP Can Finesse Gay Marriage}, \textit{WASH. EXAMINER} (Mar. 27, 2014, 12:00 AM), http://washingtonexaminer.com/evangelical-leader-shows-how-gop-can-finesse-gay-marriage/article/2546413 (quoting Russell Moore, President, Ethics & Religious Liberty Commission, Southern Baptist Convention as stating that “I don’t think the culture wars are over . . . but are moving into a new phase”).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
shop and told Phillips they were interested in a cake for “our wedding.”  

"Importantly, “[t]hey did not mention the design of the cake they envisioned.” Phillips “informed the couple that he does not ‘create’ wedding cakes for same-sex weddings,” and explained that he would make them “birthday cakes, shower cakes, [and] cookies and brownies,” but simply not same-sex wedding cakes. Craig and Mullins thereafter left. The next day, Craig’s mother, who had accompanied the couple, called Phillips and inquired into his declination. Phillips explained his “religious opposition” to same-sex marriage.  

Craig and Mullins soon filed a complaint against Phillips and Masterpiece Cakeshop, alleging discrimination on the basis of their sexual orientation. The case was referred to the Colorado Civil Rights Commission (Commission), and a state Administrative Law Judge (ALJ) oversaw the case. A subsequent investigation by the Colorado Civil Rights Division found that Phillips had “turned away potential customers on the basis of their sexual orientation” on “multiple occasions,” and had openly declared to have “a policy of not selling baked goods to same-sex couples for this type of event”—including selling “cupcakes to a lesbian couple for their commitment celebration.” In a subsequent hearing, the ALJ ruled in Craig and Mullins’s favor, and found that Phillips had violated the state public accommodation law. The ALJ rejected Phillips’s arguments that requiring him to bake the cake would violate his First Amendment right to free speech and right to free exercise of religion. Phillips appeared at two hearings before the Commission, which affirmed the ALJ’s findings. The Colorado Court of Appeals affirmed, and, after the Colorado Supreme Court denied review, Phillips petitioned the United States Supreme Court, renewing his Free Speech and Free Exercise claims, but, this time, against the Commission.

22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 1725.
29. Id. at 1725-26.
30. Id.
31. Id. at 1726.
32. Id.
33. Id. at 1729.
34. Id. at 1726-27.
The Court, made up of Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, Stephen Breyer, Samuel Alito, Elena Kagan, and Neil Gorsuch, found for Phillips.\footnote{Id. at 1722.} Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented.\footnote{Id.} Writing for the majority, Justice Kennedy recognized 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.”\footnote{Id. at 1727.} Nevertheless, the Court found that the “Commission’s treatment of [Phillips’s] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”\footnote{Id. at 1729.} The Court drew attention to comments made by members of the Commission “implying that religious beliefs and persons are less than fully welcome in Colorado’s business community.”\footnote{Id.} Namely, one of the commissioners stated that “religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . . it is one of the most despicable pieces of rhetoric that people can use . . . to hurt others.”\footnote{Id.} For the Court, this “disparag[ing]” treatment was “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”\footnote{Id. at 1732.} The Court avoided the question of where to draw the line between “where the customers’ rights to goods and services became a demand for [Phillips] to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.”\footnote{Id. at 1728.} Instead, the Court focused on the Commission’s treatment of Phillips and found that its “hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.”\footnote{Id. at 1732.} Further, the Court distinguished the Commission’s treatment of Phillips’s case with the Commission’s treatment of three other bakers who had refused to design cakes

\begin{thebibliography}{9}
\footnotesize
\bibitem{1} Id. at 1722.
\bibitem{2} Id.
\bibitem{3} Id. at 1727.
\bibitem{4} Id. at 1729.
\bibitem{5} Id.
\bibitem{6} Id.
\bibitem{7} Id. at 1728.
\bibitem{8} Id. at 1732.
\end{thebibliography}
Let Them Eat Cake

with a requested message that the Commission had deemed “offensive.”44 William Jack (Jack) had requested custom-designed cakes in the shape of a Bible decorated with messages that included “Homosexuality is a detestable sin. Leviticus 18:2.”45 Each baker offered to make the cake in the Bible shape but had refused to decorate the message.46 The Commission found these refusals lawful.47 Jack played an important role throughout all opinions for the Court, and his presence shows an important conceptual point. For the majority, the disparity in treatment between Jack and Phillips by the Commission was telling, as “the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.”48

But for Justice Ruth Bader Ginsburg’s dissent, the difference in treatment between Phillips and Jack forms a critical distinction as “the bakers would have refused to make a cake with Jack’s requested message for any customer, regardless of his or her religion[, and] would have sold him any baked goods they would have sold anyone else.”49 Conversely, “Phillips would not sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others.”50 For Justice Ginsburg, simply change Craig and Mullins’s sexual orientation or sex, and Phillips would have provided a cake; whereas changing Jack’s religion would not have changed the three bakeries’ refusal.51 Clearly then, for Justice Ginsburg, the solemnity of the marriage ceremony, and the part that the cake plays in it, bears little significance. By that reasoning, this is not an issue of speech because the expression involved is not distinguishable. Further still, the Commission’s comments are rendered null by the “several layers of independent decisionmaking” that brought Phillips’s case before the Court, and in particular, that the Colorado Court of Appeals heard the case de novo.52 Instead of this being the crux of the matter for Justice Kennedy, what mattered to Justice Ginsburg is that “Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”53

44. Id. at 1728.
45. Id. at 1749 (Ginsburg, J., dissenting).
46. Id.
47. Id.
48. Id. at 1730 (majority opinion).
49. Id. at 1750 (Ginsburg, J., dissenting).
50. Id.
51. Id.
52. Id. at 1751.
53. Id.
But Justice Kennedy’s opinion was circumscribed, concluding that the resolution of cases arising from similar circumstances “must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.” 54 Justice Kennedy thus left the door open for further interpretation and limited *Masterpiece*’s ruling to the facts of this case.

When *Masterpiece* was handed down, the reaction was unsurprisingly divided, and it came to be an interesting point of semblance in a time of political extremes. 55 Its illustrative value for the times was only strengthened by the existence of a factually similar case across the Atlantic.

### B. Ashers Baking Company

In 2014, Gareth Lee, a gay man living in Northern Ireland, was planning to attend a private event to support legislation for same-sex marriage. 56 Lee is associated with an organization called QueerSpace, a volunteer-led organization for the lesbian, gay, bisexual, and transgendered community in Northern Ireland. 57 Lee ordered a cake for the event from Ashers Baking Company, a business he had used before, and submitted his own graphic design for the cake—a service provided by the bakery. 58 Lee’s requested design was a picture of the Sesame Street characters “Bert and Ernie,” the QueerSpace logo, and the headline ‘Support Gay Marriage.’ 59

Ashers Baking Company is a private company whose owners, the McArthurs, are Christians who “have sought to run Ashers in accordance with their beliefs.” 60 One of the McArthurs’ beliefs is that “the only form of full sexual expression which is consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman within marriage.” 61 When ordering his cake,

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54. *Id.* at 1732 (majority opinion).
57. *Id.*
58. *Id.* at [11]-[12].
59. *Id.* at [12].
60. *Id.* at [9].
61. *Id.*
Lee did not know anything about the McArthurs’ religious beliefs, nor did they know anything about his sexuality.  

When Ashers received Lee’s order, the McArthurs “decided that they could not in conscience produce a cake with that slogan and so should not fulfil the order.” Lee subsequently filed suit in the District Court for Northern Ireland, which found Ashers’ refusal to be direct discrimination and fined the bakery £500 (approximately $650). The Northern Ireland Court of Appeal affirmed the judgement as a case of direct discrimination by association, or by proxy.

In 2018, the case came before the United Kingdom Supreme Court on the question of “whether it is unlawful discrimination... for a bakery to refuse to supply a cake iced with the message ‘support gay marriage’ because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God.” In a per curium opinion authored by President Justice, Lady Marjorie Hale, the United Kingdom Supreme Court found for the Christian bakers, determining that their “objection was to the message, not the messenger.” For Lady Hale, this was not a case of direct discrimination; that is, “on grounds of sexual orientation, A treats B less favorably than he treats or would treat other persons.” Underpinning this reasoning was that “[a]nyone who wanted that message would have been treated in the same way.” Simply put: “[b]y definition, direct discrimination is treating people differently.” An individual’s objection to expression that they fundamentally disagreed with is simply “objection... to the message and not to any particular person or persons.” Neither courts nor governments are in the business of “impos[ing] civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.”

Lady Hale, sympathetic to the dignitary harm suffered by individuals on the basis of their sexual orientation, nonetheless dismissed the conclusion of the Northern Ireland Court of Appeal that

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62. *Id.* at [11].
63. *Id.* at [12].
64. *Id.* at [14]-[15].
65. *Id.* at [16].
66. *Id.* at [1].
67. *Id.* at [22].
68. *Id.* at [20].
69. *Id.* at [23].
70. *Id.*
71. *Id.* at [34].
72. *Id.* at [36].
73. *Id.* at [35].
this was discrimination by association\textsuperscript{74} for two reasons: (1) because “people of all sexual orientations . . . can and do support gay marriage[, s]upport for gay marriage is not a proxy for any particular sexual orientation,”\textsuperscript{75} and (2) there was no evidence “that the [McArthurs’] reason for refusing to supply the cake was that Mr. Lee was likely to associate with the gay community . . . . the reason was their religious objection to gay marriage.”\textsuperscript{76} Thus, the McArthurs were objecting to an idea, not a person.

C. The Devil Is in the Detail: Religion and the Refusal to Accommodate

As is apparent, a prominent area in which the tensions between religion and the rights of others is seen is the marketplace and public service; most commonly, religious business owners refusing service to others on the basis of sexuality and that the lifestyle of the customer is considered sinful and violative of the business owner’s conscience.\textsuperscript{77} These instances and appearances before the bench fit into the larger debate about religious freedom in public life, a debate that “continues to divide and trouble the legal system”\textsuperscript{78} and society on the issue of “collective responsibility in a democratic society.”\textsuperscript{79}

A prominent example was Kim Davis, a Kentucky county clerk.\textsuperscript{80} After the United States Supreme Court legalized gay marriage in \textit{Obergefell},\textsuperscript{81} Davis refused to issue marriage licenses to same-sex couples, claiming to act “under God’s authority,” and declaring that “I can’t put my name on a license that doesn’t represent what God ordained marriage to be.”\textsuperscript{82} Despite her relative ineffectiveness, the case of Davis came to symbolize the increasing cultural polarity, but more so, our increasing inability to coexist peacefully as a pluralistic society.\textsuperscript{83} Some argued that \textit{Obergefell} “redefined Kim Davis’s

\begin{itemize}
  \item \textsuperscript{74} \textit{Id.} at [25] (the court of appeal held that “support for same sex marriage was indissociable from sexual orientation”).
  \item \textsuperscript{75} \textit{Id.}
  \item \textsuperscript{76} \textit{Id.} at [28].
  \item \textsuperscript{77} \textit{See generally} John Corvino \textit{et al., Debating Religious Liberty and Discrimination} 3 (2017).
  \item \textsuperscript{78} Michael W. McConnell, \textit{The Origins and Historical Understanding of Free Exercise of Religion}, 103 Harv. L. Rev. 1409, 1411 (1990).
  \item \textsuperscript{80} Corvino \textit{et al.}, \textit{supra} note 77, at 21.
  \item \textsuperscript{81} Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).
  \item \textsuperscript{82} Corvino \textit{et al.}, \textit{supra} note 77, at 21.
  \item \textsuperscript{83} See Chris Stedman, \textit{Faithiest: How an Atheist Found Common Ground with the Religious} 163 (2012).
\end{itemize}
job.” Davis became a symbol in the so-called “War on Christians;” then-presidential candidate Mike Huckabee described her imprisonment as a “criminalization of Christianity.” Yet, while this misconstrues her position as a public servant in ensuring that administrative process is carried out properly rather than her religion’s sacramental requirements are met, this could have been made even simpler by accommodation: could Davis not simply have her name removed from the licenses or have another clerk issue the licenses? The public hunger for a vehicle to lambast hatred upon the other side of the aisle forces us to lose reason, avoid compromise, and depart from the inclusive purpose of secularism.

Davis is not the only example. Amid the liturgical politicism has been the media-drenched litigation, such as Masterpiece, and the perception that the courtroom is now the battleground for the supposed moral rights of one party and the inherent dignity of another. Why is it important to consider these events and their reporting and eventual litigation? Simply put: “[d]iscourse transmits and produces power.” The idea of a public discourse producing power, in the form of constitutional interpretation, is at the heart of what can be termed a popular, or organic, constitutionalism. The people and the national conversation—whatever its form—have a role in constitutional interpretation: “[l]awyers, including judges, like to pretend that they control constitutional interpretation. But constitutional interpretation changes along with changes in public opinion, especially deep changes in that opinion.” Thus, our national conversations are a reflection of that interpretation. Consider the United Kingdom, a country without a codified constitution but a very robust constitutional tradition and commitment

84. Corvino et al., supra note 77, at 45.
85. Id. at 21.
86. See Berlinerblau, supra note 9, at 196.
89. See Ledewitz, supra note 2, at 90 (describing the jurisprudence of United States Supreme Court Justice John Marshall Harlan II, who “seem[ed] to have in mind something more organic” in interpreting the Constitution).
90. Id. at 83.
to a specific method of function. The past few years have seen that
tradition and method tested in a way that no other Western country
has endured, following the 2016 referendum to depart from the Eu-
ropean Union—the so-called “Brexit.” The reason that, three
years after the vote to leave, the United Kingdom still could not
depart the European bloc, is not a failure of the parliamentary sys-
tem in coping with the departure, but it is the failure of the public
and those elected to agree on what a Brexit, and resultant constitu-
tional shakeup, looks like. The push and pull of legal and political
participation are symptoms, however uncomfortable, of what can be
termed an organic constitutionalism. Similarly, after Masterpiece
failed to offer any conclusive ruling on whether religious vendors
could refuse service for certain individuals, various other cases have
slowly made their way through the court annals presenting a simi-
lar query, some with more success than others.

In Klein v. Oregon Bureau of Labor and Industries, the Oregon
Court of Appeals affirmed a ruling by an administrative judge that
a Christian-owned bakery, Sweetcakes by Melissa, was required by
law to provide a wedding cake for a same-sex couple. The bakery
argued that its refusal to do so was protected by the First Amend-
ment’s freedom of religion and free speech provisions. The admin-
istrative judge found that the Christian bakers violated Oregon’s
public accommodation laws by refusing to provide the same-sex cou-
ples a wedding cake and by communicating their intent to discrimi-
nate based on sexual orientation. In June 2019, the United States
Supreme Court granted writ of certiorari and vacated the standing

91. Professor Explains Britain’s Unwritten Constitution, NPR (Sept. 5, 2019, 4:12 PM),
https://www.npr.org/2019/09/05/758043757/professor-explains-britains-unwritten-constitu-
tion (interviewing Lord Philip Norton, who explained that “we go along with quite a number
of conventions as well that constrain, that people comply with. They have no legal force, but
they are complied with because they’re morally correct. They’re necessary in order to make
the system work.”).

92. The vote, and the resulting years, have led Britain’s leading constitutional expert to
declare that “the age of pure representative democracy is coming to an end.” Vernon Bog-
danor, Brexit Has Shone a Light on Our Constitution. Now It’s Time for Real Self-Govern-
ment, LEFT FOOT FORWARD (Apr. 30, 2019), https://leftfootforward.org/2019/04/vernon-bog-
danor-brexit-has-shone-a-light-on-our-constitution-now-its-time-for-real-self-government/.

93. See generally Helen Lewis, How Britain Came to Accept a ‘No-Deal Brexit,’ ATLANTIC
brexit-became-new-normal/590524/ (explaining the difficulty of applying the referendum re-
sult and determining what a Brexit actually looks like regarding the extent of the United
Kingdom’s departure).

94. See LEDEWITZ, supra note 2, at 90.
95. 410 P.3d 1051, 1057 (Or. Ct. App. 2017), review denied, 434 P.3d 25 (Or. 2018), va-
cated, 139 S. Ct. 2713 (2019).
96. Id. at 1056-57.
97. Id. at 1056.
ruling by the Oregon Court of Appeals, requiring that court to re-
hear the case in light of Masterpiece. The court has yet to rehear 
the case.

In Elane Photography, LLC v. Willock, the New Mexico Supreme 
Court held that a Christian wedding photography company’s re-
fusal to photograph a same-sex couple’s commitment ceremony con-
stituted discrimination based on sexual orientation in violation of 
the New Mexico Human Rights Act and that application of the stat-
ute did not violate the First Amendment. The company made sim-
ilar arguments to that of Sweetcakes by Melissa, but the court 
failed to take into consideration the logical implications of its ruling 
posed by the parties and amicus. The court oddly and dis-
missively found that it “cannot be in the business of deciding which 
businesses are sufficiently artistic to warrant exemptions from an-
tidiscrimination laws.” The court instead relied upon a compel-
ling analogy to a Ku Klux Klan member refusing to photograph an 
African American wedding. By doing so, however, the court failed 
to address the individual nuances of First Amendment jurispru-
dence and consider that an objection to gay marriage is a doctrinal 
objection to a form of marriage posed by religious teaching, whereas 
an objection to the wedding of two African Americans is an objection 
to the people involved.

And in State v. Arlene’s Flowers, Inc., a familiar situation was 
presented: the Christian florist refused to provide flowers for a 
friend’s gay wedding, prompting the friend to sue. The Washing-
ton Supreme Court found that the Christian florist’s flower ar-
rangements were an example of conduct and not speech, holding 
that the arrangements, however unique, were not “inherently ex-
pressive.” The United States Supreme Court thereafter granted 
certiorari, and merely remanded, similarly to Klein, for recon-
consideration in light of Masterpiece. The Washington Supreme Court 
affirmed its original holding after considering Masterpiece. Such 
a ruling further delineates the reasoning of Ashers that is implicit in 
Masterpiece—that the speech on the cake is protected, rather

100. Id. at 71.
101. Id.
102. Id. at 72.
104. Id. at 557 (citing Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 64 (2006)).
than just the cake. Clearly, there will never be a general consensus on what business ventures qualify as expressive conduct for the purpose of the First Amendment, but Elaine’s ruling and Ashers’ reasoning, as well the Colorado Civil Rights Commission’s reasoning in allowing bakers to refuse Jack’s anti-gay message, clearly point in the direction that speech on a designed product is protected. Perhaps a flower arrangement such as a bouquet for a gay wedding does not qualify, but under the above reasoning, it is not difficult to conceive that an arrangement spelling out words (perhaps even the words of the marital parties) would be considered protected.

What the constitution, and anti-discrimination laws, allow is in a precarious balance. Some have called the refusal to serve on the basis of religious belief a “license to discriminate.” Others have vigorously defended religious believers’ ability to act upon the dictates of their conscience. Clearly, neither side can dominate the other without causing further bitterness and strife. Balance, compromise, and accommodation can be achieved, as a further understanding of Masterpiece and Ashers will show.

III. WHAT WE CAN LEARN FROM MASTERPIECE AND ASHERS

A. A Sensible Synthesis?

While some differences do exist between Masterpiece and Ashers, these decisions can work together to offer some key similarities that, when synthesized, provide a fruitful path going forward in dealing with these issues. The importance of studying these two cases together goes to a much broader cultural implication of their judicial interpretations and debate over the form and function of religion in society.

1. Compelled Speech

The issue in Ashers was the refusal of a baker to print the words “Support Gay Marriage” onto a product of his own creation. Lady

109. Lady Hale’s reliance upon Justice Kennedy’s reasoning indicates that this may be the case. See Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [62] (appeal taken from N. Ir.).
110. Id. at [1].
Hale found this simply to be a question of compelled speech. The decision is a reasonable one: the state has an interest in preventing discrimination against persons, but no state is in the business of forcing owners to print ideas that violate the individual’s conscience. Lady Hale drew on Lord Dyson’s statement in *RT (Zimbabwe) v. Secretary of State for the Home Department* that “[n]obody should be forced to have or express a political opinion in which he does not believe,” as well as in Lord Roskill’s decision *Wheeler v. Leicester City Council*, where a local council’s attempt to force a rugby club to express condemnation of a team’s tour of apartheid-era South Africa was found to be unlawful. Lady Hale also drew on decisions of the European Court of Human Rights such as *Buscarini v. San Marino* on the right not to hold religious beliefs. *Ashers* conforms with the principle behind the Colorado Civil Rights Commission’s decision to allow secular bakers to refuse cakes with hateful messages. Interestingly, many prominent members of the gay rights community celebrated and welcomed the ruling in *Ashers*—despite the gay claimant losing—for its affirmation of fundamental freedoms and tolerance that apply to all. Surely, then, this suggests that some values are shared.

But reading Lady Hale’s reasoning in light of *Masterpiece* raises an underlying issue that separates the concurring opinion of Justices Gorsuch and Thomas from the rest of the opinions: is a generic wedding cake classifiable as speech on the same level as the words “Support Gay Marriage”? For Justice Gorsuch, it is more than equivalent to mere words as he refused to subscribe to the idea that the cake is just a cake. Of course, “[a]t its most general level, the cake at issue in Mr. Phillips’s case was just a mixture of flour and

111. Id. at [53].
112. See *An Act for Establishing Religious Freedom*, ENCYCLOPEDIA VA., https://wwwencyclopediavirginia.org/An_Act_for_establishing_religious_Freedom_1786 (last visited Jan. 18, 2019) (“[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . nor shall otherwise suffer on account of his religious opinions or belief.”).
113. [2012] UKSC 38, [42] (appeal taken from Eng.).
114. [1985] UKHL 6, 6 (appeal taken from Eng.).
119. Id.
eggs; at its most specific level, it was a cake celebrating the same-sex wedding” of Craig and Mullins. In contrast with the “secular” convictions afforded by the Commission over Jack’s case, Justice Gorsuch stresses the “religious significance” attached to the wedding cake by Phillips and neglected by the Commission—it is equivocal to “sacramental bread” or a “kippah.” It is the very creation of the cake that is an exercise of religion, as important as the Eucharist or Abrahamic reverence. For Justice Gorsuch, there is no legal distinction between a religious belief and a religious manifestation.

Is this tenable or does Justice Gorsuch’s reasoning afford too much creative stature to Phillips’s fondant and flour? Importantly, the anti-discrimination laws of Colorado regulate conduct, not speech. Even if the baker is considered to be an artist, any artist selling to the public is bound by laws that forbid refusal of service on certain grounds by anti-discrimination statutes. As one amicus framed the debate, if Rembrandt puts “The Descent from the Cross” in his shop window, the First Amendment would not condemn a law barring his refusal, on grounds of ethnicity or religion, of the business of a man who wished to hang the painting in a Roman Catholic Church. But perhaps there is more than just creative stature: a wedding is a distinctly religious ceremony to some believers, and its sincerity is unlikely to be questioned. Such an understanding echoes the emphatic stresses of Justice Anthony Kennedy in Obergefell that the ruling would not threaten the “utmost, sincere conviction[s]” of those who, for religious reason, believe that same-sex marriage should not be condoned. A wedding cake’s place as the centerpiece of a wedding celebration is arguably undisputed. But this still does not answer the question of the

120. Id.
121. Id. at 1739-40.
122. Id.
123. Id. at 1739.
124. Id. at 1740 (Thomas, J., concurring).
125. Id. at 1733 (Kagan, J., concurring).
126. Brief for Floyd Abrams as Amicus Curiae Supporting Respondents at 1, Masterpiece Cakeshop, 138 S. Ct. 1719 (No. 16-111). Abrams also analogized that “[i]f a vendor sells ‘Black Lives Matter’ signs from her stall, she may not refuse on the basis of race to sell her creations to a white customer who she fears will alter that message.” Id.
127. “Asking someone to participate in or celebrate a wedding ceremony is no small matter. And given the millennia-old connection between religion and weddings, it is no surprise that there are wedding vendors who object to participating in one form of wedding or another based on their religious beliefs.” Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 3-4, Masterpiece Cakeshop, 138 S. Ct. 1719 (No. 16-111).
129. See Becket Fund, supra note 127, at 22.
hairstylist or the florist. For Justice Gorsuch, because of the centrality of the cake to the faith, the public accommodation of gay couples with a wedding cake is too heavy a burden upon a Christian.\textsuperscript{130} Yet, does this set dangerous precedent over whether Phillips could lawfully refuse service to gay couples?\textsuperscript{131} As important as the cake is, is it a sacred creation that manifests a religious practice? While courts are not in the position to question the faith, the absolute weight afforded to Phillips would bar equal consideration of the equality interests at stake for his customers.\textsuperscript{132}

In determining whether Lady Hale would agree with Justice Gorsuch’s reasoning, the answer turns upon how a generic wedding cake sold to a same-sex couple that would be sold to an opposite-sex couple is defined. A clue may lie in Lady Hale’s reasoning that the baker’s objection “is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.”\textsuperscript{133} While, indeed, a cake tiered with rainbow-dyed sponge, decorated with fondant indicative of a same-sex wedding, or topped off with two male figurines may pass muster as a legally-objectionable message within Lady Hale’s contours, the decision to flatly refuse to participate in a same-sex wedding in any confectionary manner strikes a wholly different tone.

2. Guilt by Expressive Association

Perhaps the issues of Phillips and Ashers are better understood through their argument that they would be condoning or associating with a lifestyle that they consider sinful and violative of their conscience.\textsuperscript{134} Finding the line between reluctance to associate with another lifestyle and participating in that lifestyle was illustrated by Masterpiece’s oral arguments: is the hairstylist allowed to refuse service to a lesbian wedding, or is a florist allowed to refuse service to a gay wedding?\textsuperscript{135} Or, as Justice Sotomayor asked, is a business allowed to discriminate against a disabled customer because in the

\textsuperscript{130} Masterpiece, 138 S. Ct. at 1738 (Gorsuch, J., concurring) (“If the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.”).


\textsuperscript{132} See generally CORVINO ET AL., supra note 77.

\textsuperscript{133} Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [47] (appeal taken from N. Ir.).

\textsuperscript{134} Id. at [28], Masterpiece, 138 S. Ct. at 1742-43.

\textsuperscript{135} Transcript of Oral Argument at 12, Masterpiece Cakeshop, 138 S. Ct. 1719 (No. 16-111).
proprieter’s eyes, God made only perfect individuals? Or, as Justice Breyer harkened to an earlier landmark Court decision, “maybe Ollie thought he had special barbecue” and merited the protection of an artisan? These examples illustrate the fine line that these cases tread. But a fear of association with a lifestyle that violates one’s conscience arguably does not amount to compelled participation in that lifestyle via speech. If Ollie’s refusal to sell barbeque chicken to African Americans stemmed from his fear of association, the issue would obviously be a discrimination of the person’s lifestyle—not an objection to the speech being compelled. Expression, then, is the key. But, where to draw the line in terms of what services constitute expression is not settled, and Masterpiece does not answer that question.

But compare this with Pichon and Sajous v. France, where a pharmacist refused to provide contraception to three women holding a valid prescription. In a short and unambiguous ruling, the European Court of Human Rights found no interference with the pharmacist’s religious belief. Significantly, the court held that “[e]thical or religious principles are not legitimate grounds to refuse to sell a contraceptive. . . . [because] as long as the pharmacist is not expected to play an active part in manufacturing the product, moral grounds cannot absolve anyone from the obligation to sell . . . " The pharmacist was just a cog.

136. Id. at 23.
137. Id. at 18 (citing Katzenbach v. McClung, 379 U.S. 294, 295 (1964) (holding against a barbecue vendor refusing to serve African Americans that Congress could enforce racial anti-discrimination laws under the Commerce Clause)).
138. See Carmella, supra note 131, at 1616.
139. Id.
140. Masterpiece Cakeshop, 138 S. Ct. at 1723-24 (“The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here.”).
142. Id.
143. Id.
144. Id. The court noted that “Article 9 of the [European Convention on Human Rights] does not always guarantee the right to behave in public in a manner governed by that belief. . . . [A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.” Id.
Does this compare to *Masterpiece*? The wedding cake is central to the religious ceremony; designing one that violates the conscience of the baker is clearly a violation of a fundamental right.\textsuperscript{145} Marriage—in all of its forms—is an inherently spiritual ceremony and it cannot be compared to the refusal of service at a restaurant; most individuals arguably seek only one marriage in their lifetime.\textsuperscript{146} There is no doubt regarding the sincerity of a belief over the participation in such a ceremony.\textsuperscript{147} The cakes ordered by Jack were central to his religious belief; designing them violated the conscience of the individual bakers.\textsuperscript{148} Neither baker could refuse serving the individual or refuse serving a generic cake in the shop window—only direct participation in the ceremony is protected.\textsuperscript{149} Otherwise, compelling such would amount to an unconstitutional violation of conscience.\textsuperscript{150} An African American graphic artist would not be expected to print a leaflet advertising a Klan meeting, but an African American barista would arguably be (legally) expected to serve a Klan member ordering a coffee. However abhorrent the Klan member’s views certainly are, they should not subject him to economic discrimination in a venue open to the general public.\textsuperscript{151} This reasoning is seen in Justice Ginsburg’s dissenting opinion of *Masterpiece*: what is offered to all cannot be denied to one.\textsuperscript{152}

**B. The Failure of Religious Liberty and Inclusive Pluralism**

Arguably, the problems of expressive association stem from a failure of tolerance.\textsuperscript{153} The reason could be a failure of public discourse


\textsuperscript{146} Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1174 (2009) (“The church has relied on the state to give juridical form to marriage, but the state has relied on the religious valence of marriage to give the institution meaning and depth.”).


\textsuperscript{148} See *id.* at 1733 (Kagan, J., concurring).

\textsuperscript{149} State v. Arlene’s Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015) (concerning a florist that refused to design the floral design for a lesbian wedding; the florist had served the lesbian couple for a number of years. Her refusal to sell flowers to the wedding was not an objection to the person but a refusal to participate in a religious ceremony she disagreed with).


\textsuperscript{151} Brief for Respondent at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (“But when a business opens its doors to the public, a State may require that it serve customers on equal terms, regardless of their race, sex, faith, or sexual orientation.”).

\textsuperscript{152} See *Masterpiece*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting).

to engage openly in matters of conscience and value. The effects of entrenchment and lack of openness are not positive, often resulting in hyper partisanship and politicization of issues that are otherwise personal. The dominance of one singular interpretation of one Abrahamic religion in political life also contradicts the American commitment to religious freedom and thereby severely weakens the possibility for inclusive pluralism. Despite the increasing secularization of Americans—so-called “nones”—religion is here to stay for some time to come. Moreover, the emergence of nihilist political and social tendencies over recent years indicates that the Western world needs a form of religious participation to form democratic consensus and trust. Therefore, there needs to be some way to end evangelical politics and partisan-morality. If morality should not be politicized or furthered for political gain at another’s expense, all interests must be fully met so that a mutual dialogue on the purpose and meaning of faith, morality, and values can take place in the public sphere without backlash. The celebration of

154. See id. at 209-10.
155. See, e.g., Trisha Tucker, Some Schools Still Ban 'Harry Potter.' Here’s How They Justify It, GOOD (June 26, 2017), https://education.good.is/articles/harry-potter-censorship-schools. Consider, for example, the attempts to ban certain books from school districts on the basis of morality. Such pervasive attempts to control pedagogy arguably go well beyond foundational creed or religious manifestation. Id.
156. See Larson v. Valente, 456 U.S. 228, 245 (1982) (explaining that “Madison’s vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”).
159. Bruce Ledewitz, Is Religion a Non-Negotiable Aspect of Liberal Constitutionalism?, 2017 MIC H. S T. L. R E V. 209, 230 (2017) (arguing that “[r]eligion is currently a necessary aspect of liberal constitutionalism in America because there are still enough religious voters, sufficiently motivated, to so insist. In the future, however, religion will be a necessary aspect of liberal constitutionalism for a different reason—because secularism will not have, on its own, the necessary sources of meaning to build a sustainable public life.”) (citation omitted).
160. Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. I L L. L. R E V. 839, 878-79 (2014) (“The first step for the religious side would be to focus on protecting its own liberty, and to give up on regulating other people’s liberty. That is, the religious side would have to stop seeking legal restrictions on other people’s sex lives and other people’s relationships. . . . On the other side, the advocates of sexual liberty and marriage equality would have to agree to the same basic proposition: that it is far more important to protect their own liberty than to restrict the liberty of religious conservatives.”).
161. Id. at 877 (“Even on the hot-button culture-war issues, religious liberty provides a model for resolving or ameliorating social conflict. We could still create a society in which
diversity in American life should account for religious diversity. To do so, a healthier, more inclusive pluralism needs to take seriously the question of how to deal with religious differences equitably in a way that retains a commitment to fundamental values such as free speech and non-discrimination. Undoubtedly, there are some religious groups whose tenets fundamentally oppose any idea of pluralistic society and create irreconcilable conflict. But the vast majority of the religiously affiliated are molded by a democratic heritage that promotes social harmony. Neither secularists nor the religious have a place for the other in their ideal vision of society. All that exists is attrition, culture wars, and identity-based politicking. None have a vision of the religious and the secular sharing a public sphere, and our inclusive pluralism is failing as a result.

This is an endemic failure of tolerance and the inclusivity of secularism. A destructive evangelism committed to games of identity politics and anti-science, coupled with a nihilistic secularism

both sides can live their own values, if we care enough about liberty to protect it for both sides.

162. See BERLINERBLAU, supra note 9, at xviii (noting that “secularism, far from being the enemy of religious pluralism, is its guarantor”).

163. See id.; see also Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49, [49] (appeal taken from N. Ir.).

164. Consider, for example, the practices of the Westboro Baptist Church. Despite their practices being protected speech, see Snyder v. Phelps, 562 U.S. 443, 460-61 (2011), it is difficult to imagine a conducive and reconcilable dialogue is possible with them.


166. See Laycock, supra note 8, at 192.


168. “A Pew Forum survey found the country evenly split on religious exemptions in the wedding-vendor cases, but the scariest thing about that survey is that only eighteen percent could muster at least some sympathy for both sides.” Laycock, supra note 145, at 58.

169. Id. (“More than eighty percent expressed none or not much sympathy for the people they disagreed with. These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other. They’re evenly balanced nationwide, but in blue states, one side gets crushed, and in red states, the other side gets crushed.”).

unwilling to engage in any conversation on the benefits of a multicultural dialect, are pervasive.\textsuperscript{171} The purpose of secularism has been mistakenly conflated with and lost in the pugnacity of New Atheism and anti-theism.\textsuperscript{172} And further, anti-Muslim, anti-Christian, anti-Semitic, and anti-secularist rhetoric is widespread and nationalized.\textsuperscript{173} Within a week, the same Court that found abhorrent and inappropriate the Colorado Civil Rights Commission’s comments on the use of religious belief to discriminate, found President and then-candidate Trump’s comments about Islam not sufficient indicia of anti-Muslim prejudice.\textsuperscript{174} Similarly, within a few months, the same Court found constitutional a prison’s refusal to provide an Islamic death-row inmate with the presence of an imam instead of the prison’s Christian chaplain.\textsuperscript{175} The problem encountered with religious differences is a failure to recognize the liberty interests of others.\textsuperscript{176}

1. Evangelical Politics

The so-called gay cake row, or gay wedding cake case, was seen as a measuring stick or temperature gauge for a society stricken by...

\textsuperscript{171} See, e.g., CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 13 (2007) ("[P]eople of faith are in their different ways planning your and my destruction, and the destruction of all the hard-won human attainments that I have touched upon. Religion poisons everything."). See generally Bruce Ledewitz, The Five Days in June When Values Died in American Law, 49 ABRON L. REV. 115 (2016).

\textsuperscript{172} BERLINERBLAUSUPRA NOTE 9, AT 82.


\textsuperscript{174} Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (finding no violation of religious freedom or government impropriety in President Trump’s so-called “travel ban”). Justice Sonia Sotomayor dissented and wrote that “[u]nlike in Masterpiece, where the majority considered the state commissioners’ statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President’s charged statements about Muslims as irrelevant.” Id. at 2447 (Sotomayor, J., dissenting) (citation omitted). These charged statements include “an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s,” a statement demanding the “total and complete shutdown of Muslims entering the United States,” the claim that “there is great hatred towards Americans by large segments of the Muslim population,” and the claim that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” Id. at 2435-36.

\textsuperscript{175} Dunn v. Ray, 139 S. Ct. 661, 661 (2019).

\textsuperscript{176} See Laycock, supra note 160, at 878-79.
division.\textsuperscript{177} Although its history can be traced far back, the so-called “culture wars” and battle over supposed “identity politics” have taken on new weight in recent years.\textsuperscript{178} The gay cake cases occur in the middle of this divide, in which the evangelical bloc has seen itself sidelined by a perceived animus, or least apathy, toward religion in society.\textsuperscript{179} But that begs the question: is America really becoming less religious, or are the politically religious simply getting louder?

To answer that question, consider the following recent development in religious politics. Within its first year, the Trump Administration embarked upon a robust expansion of religious freedom-centered policies,\textsuperscript{180} promising, among other things, to end the so-called “War on Christmas”\textsuperscript{181} and do away with the Johnson Amendment—which prohibits tax-exempt religious institutions from engaging in politics.\textsuperscript{182} Some secular policies have even been defended by the Trump Administration on Christian grounds.\textsuperscript{183} In addition, then-Attorney General Jeff Sessions established a Religious Freedom Task Force within the Department of Justice to target the “dangerous movement, undetected by many, [that] is now challenging and eroding our great tradition of religious freedom”—and cited “the ordeal faced so bravely by Jack Phillips” as one reason for doing so.\textsuperscript{184} Similarly, the Department of Health and Human Services has established a civil rights division to protect medical personnel who, on the basis of conscience, refuse to treat certain patients.\textsuperscript{185} And

\begin{thebibliography}{99}
\item 178. See Laycock, supra note 8, at 192-93.
\item 179. See BERLINERBLAUF, supra note 9, at xxi.
central to President Trump's nominations to the United States Supreme Court have been the nominee's views on *Roe v. Wade* and a woman's abortion rights.\(^{186}\)

But were these protections or this political dialogue necessary? The centrality of these reforms to the Trump Administration, and the importance of the evangelical vote to President Trump, suggests a much wider problem over the perceived status of the religious in society, or rather, of a certain politicized sect of the religious in society. To show the political manipulation behind the current dominant narrative of the supposed War on Christians, consider that a number of faith leaders responded with trepidation to then-Attorney General Sessions' task force, concerned that it would be predominantly focused on pet issues for conservative Christians.\(^{187}\)

Clearly, then, this is not simply a problem between the secular and the religious.

The perceived necessity of the task force, and the resultant disagreement, raises the question of whether religion has been exploited as a political vehicle. The idea that religion has been left behind or that the traditional concerns of religious people have been sidelined is a debatable point. For example, consider that in 2017, a majority of American Buddhists, Hindus, Jews, Protestants, Orthodox Christians, Catholics, and Muslims supported same-sex marriage according to the Public Religion Research Institute's American Values Atlas.\(^{188}\) And in a 2016 poll from the Pew Research Center, less than eight percent of Catholics, white evangelicals, black Protestants, and white mainline Christians responded

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\(^{187}\) Caroline Matas, *Civil Rights Groups Question New Religious Liberty*, HARV. DIVINITY SCH. (Aug. 4, 2018), https://rlp.hds.harvard.edu/news/civil-rights-groups-question-new-religious-liberty-task-force ("Connie Ryan, executive director of the Interfaith Alliance of Iowa, argued that the task force was part of an ongoing attempt by the federal government to 'redefine religious freedom as a means to provide privilege to one particular sect of Christianity and to force the government to sanction discrimination on their behalf' [and posited that] '[f]ollowers have been manipulated into believing their religious freedom trumps all others and they are the victim when barred from fulfilling their God-given rights.").

that using contraceptives is morally wrong. Why the need then for such a task force and why such political zeal from the evangelical base for President Trump? The zeal is a backlash against, symptom of, and part cause of, the lack of common ground needed today in society.

2. Secular Problems

Secular institutions and the public sphere serve the common good by uniting those with differing views and beliefs around a common identity. The tone of public discourse in society today illustrates the current sad state of this goal. Some have argued that this failure can be accounted for by the common failure to believe in common transcendent values; in short, nihilism. The reason could be traced to the push back or hesitation to engage in the dialogue of religiosity or transcendence. America has a tradition of engaging in rhetoric that transcends the material; the inflammatory media treatment of religious exemption cases and the toxic political dialogue denigrates our ability to co-exist. Just as the


190. Conversely, Douglas Laycock raises the question of why the ACLU has chosen to bring more cases against Catholic hospitals for not providing abortion services. See Laycock, supra note 160, at 848.

191. Id. at 879.

192. See BERLINERBLAU, supra note 9, at xviii.

193. See CORNELL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 161 (2004) ("Ought we not be concerned with the forms of dogmatism and authoritarianism in secular garb that trump dialogue and foreclose debate? Democratic practices—dialogue and debate in public discourse—are always messy and impure. And secular policing can be as arrogant and coercive as religious policing.").

194. See Ledewitz, supra note 171, at 116-17.

195. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 31 (1974) ("The secular-rational model neglects the importance of certain elements of law which transcend rationality, and especially those elements which law shares with religion."); see also Ledewitz, supra note 159, at 246 (arguing that "secularism is a function of a worn out hostility to religion and of a materialist ontology").


197. See BERLINERBLAU, supra note 9, at 81-82.
evangelical right fails to account for the different religious or non-religious views of others, secularists fails to account for religious differences with others.198

Justice Kennedy’s Masterpiece opinion is a testamentary push back against the anti-religious rhetoric pervasive in the public sphere.199 This is surprising, both procedurally and politically, for the discussion over the Colorado Civil Rights Commission’s comments was never raised by the petitioner at oral arguments.200 Similarly, Lady Hale’s Ashers opinion reaffirms the commitment to certain secular values.201 Why is this important? Because both the secular and the religious must undergo efforts to find and prioritize common ground as well as ensuring pluralism.202 In short: an inclusive pluralism is needed.203 Taken together, these decisions affirm a commitment to inclusive pluralism that is sorely lacking in both American and European public spheres.204

Western European countries have had to deal with a change in pluralistic makeup on a much larger and more rapid scale than American states have.205 The early First French Republic and American Republic shared common understandings over the protection of religious liberty.206 But that common understanding extended no further and both countries share very little in terms of what the free exercise of religion means.207 Thus, the symptoms of

203. See id.
204. See id. at 865.
205. Muslims now make up roughly 5% of the European population, with countries such as France, Germany, and Sweden holding a Muslim population of 8.8%, 6% and 8% respectively. See Conrad Hackett, 5 Facts About the Muslim Population in Europe, PEW RES. CTR. (Nov. 29, 2017), http://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/. Contrast this with the 1.1% of the U.S. population who identify as Muslim, or even the 2.2% who identify as Jewish. See Besheer Mohamed, New Estimates Show U.S. Muslim Population Continues to Grow, PEW RES. CTR. (Jan. 3, 2018), http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/; A Portrait of Jewish Americans, PEW RES. CTR. (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/chapter-1-population-estimates/.
206. Laycock, supra note 160, at 863.
207. Id. at 864-65 (“France can, and sometimes does, single out religion for discriminatory regulation. . . . Religious organizations in France must obtain licenses from the state, and,
a breakdown in public discourse have exhibited themselves in different ways in Western European countries than in America: “ostensibly” religious insignia are banned in French public schools—including Islamic head scarves, Christian crosses, and kippahs—and major European countries have illegalized full-facial coverings in public—so-called “Burka Bans.” But many of these efforts—particularly in banishing religion from the public sphere—have had counter-availing effects. As well as banishing some women to the home for fear of leaving the house, the ban subjugates the religious expression of individuals. One woman described the niqab as “a huge part of my identity. It’s a very spiritual choice—and now it has also become a sign of protest.” Such legislation is undoubtedly contradictory to the central underpinnings of a free society.

Similar efforts have been made in France to nationalize differing religions to ensure social cohesion: President Emmanuel Macron’s recent efforts to “lay the groundwork for the entire organization of the Islam of France” are just the latest in a series of efforts by French presidents to remake the Islamic religion in the spirit of the Republic. Social cohesion bound by a national norm is a recurring issue for many European countries coming to grips with growing unfamiliar minority cultures: workplace exemptions for activities such as prayer, social mannerisms such as handshaking, and on occasion, these licenses are denied. There are restrictions on religious speech, and especially on evangelism. The state owns most of the churches, and pays for their maintenance, and it pays for religious schools.” (citations omitted).


210. Id.

211. Id.

212. Id.


215. See CUMPER, supra note 15, at 197.

the ritual slaughtering of animals. The question raised by all of this is whether this is an effort to unify differing races, religions, and beliefs around certain unwavering values, or whether it is a sacrifice of pluralism. Inclusive pluralism accounts for differences in belief and opinion as a fundamental norm in the social fabric—even those that some might find abhorrent. But how to deal with those differences is often as problematic as the differences themselves.

3. A Cultural Bargain?

Is it the case, then, that liberal secularists should just give a “free pass” to those with views found to be socially abhorrent? Framing the debate as such is too crude. Instead, the purpose and value of religious liberty must be remembered, and not hijacked by political evangelism or by a dominant norm that eliminates differences in pursuit of supposed social cohesion. Ashers and Masterpiece show a pathway that includes both a commitment to certain unwavering values (the commitment to free speech) as well as reasoned and respectful dialogue (the commitment to an independent recognition of different beliefs on the part of the state). This echoes Lady Hale’s decision in Bull v. Hall, where a Christian couple failed in their appeal of an anti-discrimination penalty for refusing to allow a gay couple to stay at their bed and breakfast. Illustrated here is the push and pull between liberal secularism and religious liberty. Both an ardent secularist and a supporter of religious liberty must welcome a decision like Bull because no one can endorse that kind of discrimination nor defend the supposed sincerity of the opinion as a religious belief—neither the Catholic Church nor any other major ecclesiastical authority has spoken on the moral justification to economically discriminate like this.


218. Letter from James Madison to Jacob de la Motta (Aug. 1820), in JAMES MADISON ON RELIGIOUS LIBERTY 81 (Robert S. Alley, ed., 1985) (only with “mutual respect [and] good will among Citizens of every religious denomination” can we attain “social harmony” and the “advancement of truth”).

219. See Douglas Laycock, The Right of Religious Academic Communities, in RELIGIOUS LIBERTY, VOLUME TWO: THE FREE EXERCISE CLAUSE 473, 493 (2001) (“To decide what innovations a religious tradition can and cannot tolerate is to decide the future content of the faith. It is of the essence of religious liberty that such decisions be made by the religious community, and never by secular authority.”).


But there are some areas, such as marriage, that religious authorities have sincerely spoken upon and beliefs are entrenched; therefore, accommodation and compromise must be achieved.\textsuperscript{222} For the civil libertarian, religious minorities and sexual minorities share much in common in their resistance to “legal and social pressures to conform to majoritarian norms.”\textsuperscript{223} But in reality, this is not the case.\textsuperscript{224} There is a common unity missing in public discourse, and until society learns to accommodate and realize that demanding others to violate beliefs and norms contrary to their identity and conscience is untenable in a liberal democracy, this fight will only intensify.\textsuperscript{225} Phillips of Masterpiece Cakeshop, as well as the McArthurs of Ashers Baking Company, were not asking for a general right to discriminate against gay people.\textsuperscript{226} But instead, these cases became embroiled in a cultural war of words and identities that left the legal nuances of the particular cases behind.\textsuperscript{227}

A bargain can be struck, and a cultural compromise is possible.\textsuperscript{228} Obergefell cannot be overturned, nor can society change the religious views of individuals—either by forcing them to bake a cake or banning their religious garb. Society must be able to consider the individual beliefs and differences of others with respect and deliberation.\textsuperscript{229} This means that certain practical exemptions are necessary: a wedding cake is directly connected to a religious celebration, and while a baker cannot refuse to serve a cake that is sold to all to “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided”).\textsuperscript{220}

\textsuperscript{220} Laycock, supra note 160, at 878-79.
\textsuperscript{221} Laycock, supra note 8, at 189.
\textsuperscript{222} Id.
\textsuperscript{223} Laycock, supra note 160, at 879 (emphasis omitted).
\textsuperscript{224} In his opinion, Justice Kennedy made repeated references that no such right could exist in American law. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018). Lady Hale was equally considerate of the sincere dignity at risk. Lee v. Ashers Baking Co. [2018] UKSC 49, [35] (appeal taken from N. Ir.).
\textsuperscript{227} “Naturally, the religiously devout will see many things differently from the way their fellow citizens do. Taking an independent path . . . is part of what the religions are for.” Stephen L. Carter, \textit{The Resurrection of Religious Freedom?}, 107 Harv. L. Rev. 118, 137 (1993) (emphasis omitted).
a gay couple, small business owners should not have to violate their moral integrity—no matter how retroactive or unpopular those moral norms are—in the marketplace. This protection cannot be afforded to indirect connections to a wedding, but for those personally involved in ensuring that the wedding is the best it can be through their own creative efforts and artistry, protection must be afforded for that person’s conscience. In return, same-sex marriage and the rights of gay participants can surely be left alone. Any refusal of accommodation in the marketplace will be limited to a very few instances—such as a custom-designed wedding cake from a small business owner—but any discrimination against the gay people themselves will be prohibited, i.e., a refusal to sell a cake featured in the window. This protection is limited but significant; its protection for small artisans is undeniably different to that wrongly afforded to Hobby Lobby Stores in allowing an imposition of a specific religious lifestyle upon more than 30,000 employees. Democratic society must compromise some of its demands on others for the purposes of a more inclusive society. If democratic society is to remain committed to the fundamental freedom of conscience,

230. See Laycock, supra note 145, at 63 (arguing that exemptions should not be granted “for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage or the sexual relationship[,] i.e., large and impersonal businesses even in the wedding context. But for very small businesses where the owner will be personally involved in providing any services, we should exempt vendors from doing weddings and commitment ceremonies.”).

231. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”).

232. See Laycock, supra note 145, at 63 (“The job of the wedding planner, the photographer, and the caterer is to make each wedding the best and most memorable it can be. They are promoting it, and the conscientious objectors say they cannot do that. This creative and promotional role is narrower for bakers and florists, but I think it’s sufficiently clear for them as well. Their piece of the wedding is also to be the best and most memorable that it can be.”).

233. “Same-sex civil marriage is a great advance for human liberty, but the gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet.... We could protect both religious minorities and sexual minorities if we were serious about civil liberties.” Id. at 60-61.


235. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014). Central to this understanding is the difference between Phillips and other bakers refusing to create cakes featuring words and symbols that they disagree with and a national store opposed to contraceptives that describes itself as Christian but buys billions of dollars’ worth of stock from China, where as a result of the state’s one-child policy, in place in 2014, 35,000 infants are terminated every day. See Jonathan Merritt, Stop Calling Hobby Lobby a Christian Business, WEEK (June 17, 2014), https://theweek.com/articles/446007/stop-calling-hobby-lobby-christian-business.

236. DACEY, supra note 153, at 209-10.
some conflict is unavoidable—but unmanageable chaos is not.\textsuperscript{237} That is the very purpose of exemptions, without which, “religious groups will likely be crushed by the weight of majoritarian law and culture.”\textsuperscript{238} Moral integrity and sexual identity will thus be left alone, and the fundamental goals of the Free Exercise Clause—peace, equality, and cohesion—will be achieved.\textsuperscript{239}

IV. CONCLUSION

Democratic consensus in constitutional society requires a commitment to compromise and mutual effort, in order to ensure an organic constitution for everyone. What guiding principles come from this discussion? That what is offered to all cannot be denied to one—no matter how abhorrent that person’s lifestyle or beliefs may be.\textsuperscript{240} However, this is subject to the caveat that, even if a service is offered to all, if that service requires expression amounting to speech on the part of the offeror, it cannot be compelled by another when that person objects to the speech on the basis of religion or conscience. The push and pull of religion and the public sphere is more than just another chapter in the breakdown of the socio-political dialogue,\textsuperscript{241} it is a reform of popular constitutionalism. But an inclusive pluralism will take time; its envisioning will arguably take many forms. Socially, a more productive dialogue is necessary; politically, a more embracing collective is needed; legally, a commitment in the vein of Justice Kennedy and Lady Hale to ensuring that fundamental values are not sacrificed must be continued.\textsuperscript{242} Courts cannot change beliefs, no matter how discriminatory, intolerant, or unpopular. But they can—and, indeed, must—retain the principles of tolerance necessary for a free society to ensure that all interests are equally considered.

\textsuperscript{238} Id. (”[M]ajoritarian dominance could radicalize some believers into destabilizing, antisocial activity, including violence.”).
\textsuperscript{239} “Unless the Court and the society it serves broaden their vision of what it means for religion to be exercised freely, we will very likely end up in a society in which the mainline religions flourish, protecting themselves through political clout, and the sparkling diversity of religious life at the margins is snuffed out.” Carter, supra note 229, at 142.
\textsuperscript{240} See Floyd Abrams, supra note 126, at 1-2.
\textsuperscript{241} DACEY, supra note 153, at 72-73.
\textsuperscript{242} “Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support.” W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1949).