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piece of cake?

A BAKER REFUSES TO CREATE A WEDDING CAKE for a same-sex couple because of his religious views on same-sex marriage. The couple claims the baker's refusal violates state anti-discrimination laws. Their case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* now awaits a decision from the U.S. Supreme Court, which must wrestle with complicated questions about conflicting rights. We posed some of those questions to two religious liberty scholars: **Frank S. Ravitch**, Professor of Law and Walter H. Stowers Chair in Law and Religion at Michigan State University College of Law, and **Brett G. Scharffs**, Rex E. Lee Chair and Professor of Law and Director of the International Center for Law and Religion Studies at Brigham Young University's J. Reuben Clark Law School. Their answers follow. ▸

The Supreme Court heard oral argument in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* in December. Is that case better understood as presenting a valid claim of religious free exercise ("the state anti-discrimination law punishes me for following my conscience"), as a legitimate free expression claim ("the state wants to dictate for whom and for what causes I exercise my art"), or as an attempt to circumvent the state's legal efforts to protect individuals and groups from discrimination out of disagreement with the state's purpose?

RAVITCH: The case can best be understood as being about what happens when the state's interest in enforcing content-neutral public accommodation laws conflicts with a public accommodation's asserted free speech and free exercise rights. Therefore, it implicates all three interests. Of course, the underlying legal questions in this case concern significant "culture war" issues, so the positions of the parties reflect the broader perspectives from which the case can be viewed. For those sympathetic to the perspective of Masterpiece Cakeshop, the case is about free exercise and free speech. For those sympathetic with the perspective of the state of Colorado, the case is about enforcement of content-neutral public accommodation laws.

As a practical matter, unless the Court overturns *Employment Division v. Smith*, 494 U.S. 872 (1990), the free exercise claim in this case is pretty weak, so for Masterpiece Cakeshop the best argument lies under the Free Speech Clause. For the state of Colorado, the enforcement of public accommodation laws and whether the law is content-neutral as applied to Masterpiece Cakeshop are important. This raises questions about whether Masterpiece Cakeshop's refusal to create the cake in this case was based on the identity of the customers or on the message that creating the cake would send.

SCHARFFS: I should mention that I joined an amicus brief submitted by law professors in support of Jack Phillips, the cake shop owner.[1] That brief's primary argument was that the state was infringing Phillips' free speech rights by requiring him to use his artistic talents in a way that would violate his sincerely held religious beliefs.

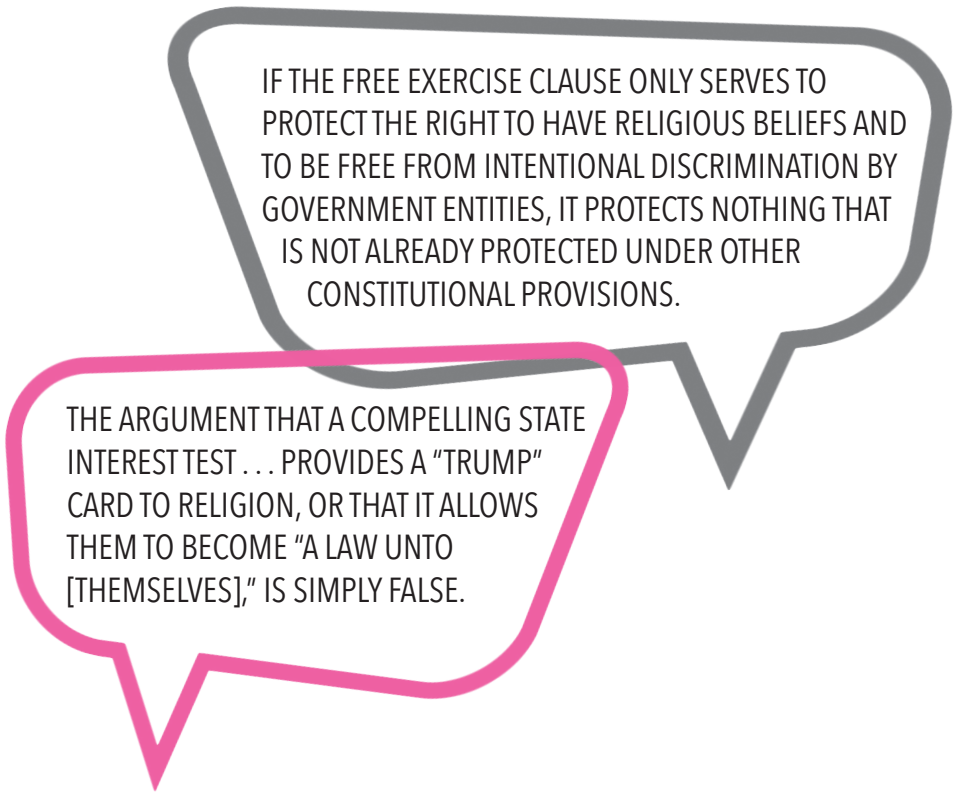
Professor Ravitch is correct that, at its heart, the case presents a question pitting against each other two very important sets of constitutional values — free exercise, free speech, and freedom of association on the one hand and nondiscrimination and equality on the other. Jack Philips believes that the state coercing him to bake a custom wedding cake for a same-sex couple violates his conscientious rights of religious freedom, as well as his free speech right to not be compelled to express views with which he has fundamental conscientious objections. Craig and Mullins believe that, by refusing to bake their cake, Phillips violated the nondiscrimination provisions of Colorado's public accommodations statute, which prohibits discrimination on the grounds of race, religion, and sexual orientation, among other bases. The courts below sided with the customers, and now the baker is before the Supreme Court asking it to reverse those judgments.

For the reasons Professor Ravitch states, the free exercise claim, standing on its own, is quite weak. The Supreme Court held in *Employment Division v. Smith* that laws that do not specifically target religion but only burden religious exercise do not violate the Free Exercise Clause. The Supreme Court could have used this case as an opportunity to revisit the status of *Smith*, which was written by Justice Antonin Scalia. Justice Scalia died while this case was pending, and Justice Neil Gorsuch was on the Court by the time oral arguments were held. But nothing in the questions presented on cert or in the oral arguments suggested that a wholesale reconsideration of *Smith* is likely here. The briefs and oral arguments centered almost exclusively on the freedom of speech claims.

For the couple, the most important precedents are cases involving businesses such as the restaurant in *Katzenbach v. McClung*,[2] which refused to serve black customers. For the baker, the most important precedents are cases involving compelled flag salutes, such as *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where in the 1940s the U.S. Supreme Court reversed itself, first holding in *Gobitis* that compelled flag salutes are constitutionally permissible,[3] and then reversing itself in *Barnette*,[4] holding that it violated the rights of conscience of schoolchildren to compel them to salute the American flag.

In *Employment Div. v. Smith* (1990), the Supreme Court held that the Free Exercise Clause is not violated by generally applicable laws not specifically directed at religion even if those laws substantially burden the ability of the people to exercise their religion. Were the critics who claimed that this decision virtually nullified the Free Exercise Clause right?

RAVITCH: Yes, the critics were correct about this. If the Free Exercise Clause only serves to protect the right to have religious beliefs and to be free from intentional discrimination by government entities, it protects nothing that is not



already protected under other constitutional provisions. Discrimination aimed against a religion, such as occurred in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (intentional discrimination based on religion violates the Free Exercise Clause), would also violate the Equal Protection Clause. One's freedom to have religious beliefs — in the unlikely event that government were to act to limit what people can believe — would be protected under the Free Speech Clause and under the concept of substantive due process.

Unless religious *practices* are protected, the Free Exercise Clause is essentially redundant. The Court's holding in *Smith* has the most negative impact on religious minorities, like the members of the Native American Church at issue in that case. As a practical matter, however, even before *Smith* the Court had a tendency to find ways around the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). Still, at the lower court level that test did serve to protect religious minorities and others not considered in the legislative process in some cases, and today most claims under states' Religious Freedom Restoration Act (RFRA) laws are brought by religious minorities.[5]

Supporters of the *Smith* approach do make some compelling arguments. The most effective rely on the fact that it is very hard to define what religion is under the Free Exercise Clause.[6] As a result, it is quite hard to draw any sort of clear line between the exercise of religion and other ethical systems. Other arguments focus on the notion that *Smith* prevented each person from becoming a law unto himself or herself and that it prevents giving religion favored status.

The problem with all these arguments is that we *do* have a Free Exercise Clause, and like it or not religion *does* receive special consideration under the Constitution. Even if religion cannot be clearly defined, most religious exemption cases involve religions that would fit within any definition of religion, especially the broad definitions the Court has used when these sorts of questions have arisen. Courts having to decide the few cases involving entities that do not fit within such definitions would be faced with extremely hard questions, but the answers would involve the sort of necessarily imperfect line drawing that courts do all the time. Judges do not have the luxury of addressing metaphysical questions when they must decide a case, and lines are often drawn, even if imperfectly so. Moreover, having some sort of balancing test, whether the Compelling Interest test or another test, prevents people from becoming laws unto themselves by weighing religious conduct against the state interest in limiting that conduct.

SCHARFFS: This case is a good example of the violence that *Employment Division v. Smith* has done to Free Exercise jurisprudence. Most casual observers would think that Jack Phillips' central argument should be based upon the Free Exercise Clause, since his objections to baking the cake were based on his religious beliefs. But because the Free Exercise Clause, as interpreted in *Smith*, does not provide Phillips with an argument, the case is instead styled as involving "expressive conduct." Phillips emphasizes the "expressive" side of this equation, arguing that he is being compelled to express and endorse views with which he disagrees. The customers emphasize the "conduct" side of the equation, arguing that Phillips is not being asked to endorse a message, but just bake a cake.

The argument that a compelling state interest test — which existed in Free Exercise jurisprudence prior to *Smith*, and which was reasserted in the Religious Freedom Restoration Act (RFRA), in state Religious Freedom Restoration Acts (state RFRAs), and in other federal laws such as the Religious Land Use and Institutionalized Persons Act (RLUIPA) — provides a "trump" card to religion, or that it allows them to become "a law unto [themselves],"[7] is simply false. When courts apply the compelling state interest test, they ask whether the state has imposed a substantial burden on religious exercise. If the answer is no, the claimant ▸

loses. If the answer is yes, they then ask whether there is a compelling state interest to enforce a law over religious objections. If the answer is "yes," the state wins, unless there is a less restrictive means for the state to accomplish its objective (also known as "narrow tailoring"). Answering these questions involves balancing rights and interests, the antithesis of categorical trump-card jurisprudence.

Prior to *Smith*, when the Supreme Court applied the compelling state interest test for Free Exercise claims, the religious claimants often lost. For example, when religious claimants made arguments that their religious scruples prevented them from paying taxes, courts had no trouble rejecting these claims on the grounds that the state has a compelling state interest in tax laws that treat people similarly regardless of their religion.[8] Even in the *Smith* case, Justice Sandra Day O'Connor wrote a concurring opinion, applying the compelling state interest and siding with the state on the grounds there was a compelling state interest in the enforcement of drug laws. So much for the claimants being a "law unto [themselves]."

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), which prohibited substantial burdens on religious exercise unless justified under a demanding compelling interest test. After the Supreme Court held that RFRA could not constitutionally be applied to the states, many states (though not Colorado) enacted their own versions of RFRA. If Colorado had enacted such a law, what difference would that have made to the legal issues in *Masterpiece Cakeshop*?

RAVITCH: If Colorado had a state RFRA, the primary issue would be whether Colorado could meet the compelling interest test. On that question it would likely boil down to narrow tailoring. There also would be a potential question about whether the state public accommodation law places a substantial burden on Masterpiece Cakeshop. It is important to note that the RFRA claim would not likely reach the Supreme Court if it was decided under a state RFRA, so any case before the Court would involve the very free speech issues currently under consideration, assuming Masterpiece Cakeshop lost the state RFRA claim. If Masterpiece Cakeshop won the state RFRA claim, Craig and Mullins might file a case alleging violations of substantive due process and equal protection.

Colorado has a compelling interest in enforcing its public accommodation law. The harder question is whether enforcing the law in this context would be narrowly tailored enough to meet that burden. Significantly, if the Court finds a free speech violation in the *Masterpiece Cakeshop* case the same question would arise.

Narrow tailoring is an exceptionally hard test to meet, and Colorado would have to show that there were no less-restrictive means available to enforce the public accommodation law. This may be possible, since courts have held that enforcing anti-discrimination laws can be the most narrowly tailored way to meet the compelling interest of preventing discrimination. Yet, the state would have to show that enforcing the law against Masterpiece Cakeshop in particular is narrowly tailored. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006). Colorado would have a strong argument that granting for-profit entities religious exemptions to anti-discrimination laws could lead to broader discrimination. Moreover, since the anti-discrimination law involved is a public accommodation law, the state could argue that if an exemption is mandated there would be places in Colorado where LGBT couples could be denied a particular service entirely.

Another question that would need to be answered is whether Colorado includes for-profit entities in its definition of "persons" under the state RFRA. I argued in my recent book, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge Univ. Press 2016), that states do not need to, nor should they, follow the *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___,134 S. Ct. 2751, 2782 (2014), decision, which granted protection to for-profit entities under the federal RFRA. The reason is

that protection of for-profit entities under RFRA has a negative impact on religious freedom claims by traditional religious entities, including religious nonprofits, and it also could lead to allowing discrimination against members of the LGBT community by for-profit entities that claim a religious exemption.

SCHARFFS: Profesor Ravitch is correct to point out that even if there were a state RFRA in Colorado it would not guarantee Phillips' success. In all likelihood, there is a substantial burden here on religious exercise and a court would find that the state has a compelling interest in enforcing its antidiscrimination laws. The question is whether there is a less-restrictive means for the state to accomplish its interest.

Since the state has acknowledged that it would not force bakers to bake cakes with other messages with which they disagree,[9] there is a good chance that the law is not narrowly tailored, or that it is being applied in a way that is discriminatory. This is the type of balancing that can and should take place in cases like this where important constitutional interests exist on both sides. The burden faced by the customers in being forced to look elsewhere for their cake can be balanced against the burden faced by the baker who would be forced to either stop baking wedding cakes altogether or bake a cake communicating a message with which he strongly disagrees.

My view is that small businesses as well as individuals should be protected by free exercise rights. The key case here is *Hobby Lobby*, where the Supreme Court held that the owners of a business do not sacrifice their free exercise rights simply because they are operating as a corporation. Another important precedent here is *Braunfeld v. Brown*, 366 U.S. 599 (1961), where the Court considered whether a Jewish store owner who objected to Sunday-closing laws had a valid free exercise claim. In my view, the Court was correct to not decide the case on the basis of whether he was running his business as a sole proprietorship or as a corporation. However, I do think the Court erred in finding there was no free exercise burden placed on the store owner — another example of how pre-*Smith* jurisprudence did not result in religious objectors becoming a "law unto [themselves]."

Although religiously based conduct is often subject to the broad police and other powers of the state, should there be areas of religiously motivated conduct protected by the Free Exercise Clause and thus beyond the state's power to control, even under regulations of general applicability that would apply to everyone else? Is it correct to assert that creating such areas of religiously defined immunity from regulations is favorable treatment that is unfair to others?

RAVITCH: The answer very much depends on what is meant by "religiously motivated conduct" and who is exercising that conduct. If we are talking about for-profit entities skirting anti-discrimination provisions, or religious entities trying to avoid liability for sexual abuse, the commentators are correct for a variety of reasons. If, on the other hand, we are talking about a religious entity deciding who to hire as a clergy member or religion teacher, immunity makes more sense. Still, a problem arises under *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), where the Court expanded the definition of clergy to a point many critics assert went too far. Few would argue that a church should be required to hire an atheist clergy member, a synagogue should be required to hire an Anglican pastor to be its rabbi, or that the Catholic Church should be legally required to hire female priests. Yet, as we move further from employees with religious roles, giving religious entities immunity to discrimination becomes highly problematic since immunity, as opposed to a less absolute defense, does not even allow consideration of the underlying issues.

This was an issue in *Hosanna-Tabor*. The fired employee, a teacher who taught primarily secular subjects, filed a discrimination and retaliation claim under the Americans with Disabilities Act. The church asserted that because she was a "called" teacher, meaning she had been called by the church to teach as a "called teacher" at the school, the church could not be questioned on its decision to hire or fire her. The church argued, and the Court agreed, that she was not fired for her disability, but rather for filing a civil claim, which violates the church's tenet of resolving disputes internally. The Court held that because she was a "called" teacher she fell within something known as the Ministerial Exception, which prohibits civil courts from getting involved in religious entities' employment decisions regarding employees with religious functions. This raises significant questions about how far these immunities go and what conduct they may allow. The further we get from someone engaged as a clergy member or religious teacher, and the further the conduct for which the religious entity is immune goes, the more salience the critiques of this sort of immunity have.

SCHARFFS: I agree with Professor Ravitch's characterization of the issues and his analysis of them. Drawing lines at the boundaries will often be difficult, but I think ideological associations of all sorts should be able to use their ideology as a basis for deciding whom ▸

to employ or not. I don't see too much of a problem of favoritism of religion here. If the Republican Party wants to fire an employee who has registered as a Democrat, or who is repudiating the Republican Party, it should be free to do so. Many newspapers and journals employ people based in part on their ideological affinity to the organization. A gay bar should not have to tolerate an employee who insists on wearing a t-shirt expressing homophobic messages. Religious organizations should enjoy similar protections. If anything, the Free Exercise Clause should provide an extra measure of protection for religious associations.

My concern in a case such as *Masterpiece Cakeshop* is there is actually less protection for someone who has religious objections than other types of objections. We doubt the state of Colorado would require a baker to bake a cake with a political or religious message they disagreed with, or to express views about race with which they disagreed. Somehow, the religious objection is viewed as being less worthy than other types of objection. Part of the cost of living in a pluralistic society is that the state cannot compel people to express views with which they deeply disagree.

The Court has an opportunity to protect Mr. Phillips' conscientious rights without doing violence to the anti-discrimination laws. The parties have stipulated that these customers, like all customers, could buy off-the-shelf products without suffering discrimination. Protection from state coercion should be possible for a small business or individual creating a custom order with a clear expressive component.

In the opinion of the Court in *Smith*, Justice Scalia acknowledged that it "may fairly be said that leaving accommodation [of religious conduct] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." Is it just, or consistent with constitutional equality, for religious bodies with many members to be free of onerous regulation because of their adherents' voting power, while small or unpopular religious groups are vulnerable to general laws that demand that they act against their conscientious beliefs?

RAVITCH: The impact of *Smith* has indeed been hardest on religious minorities who are often not considered in the legislative process and who often do not have the power, funding, or numbers to effect legislation. Of course, the compelling-interest test *Smith* eviscerated would also protect members of larger religious groups; although these groups are less often in need of protection from generally applicable laws.

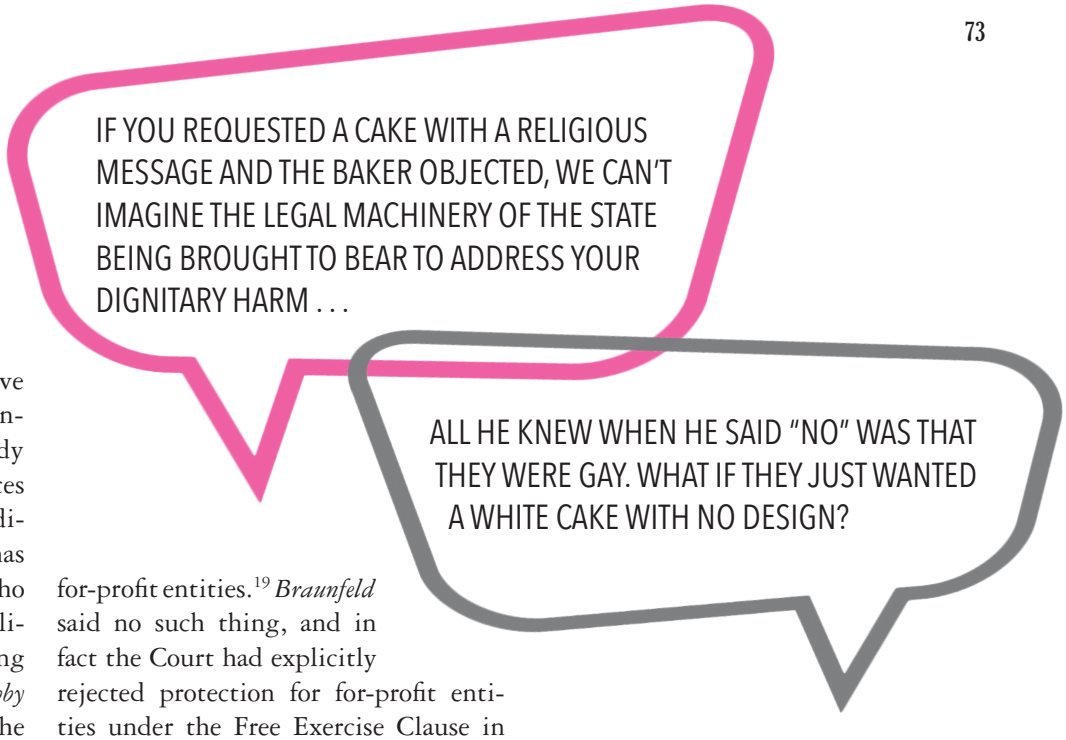
Federal and state RFRAs that were enacted in response to *Smith* also have benefited religious minorities.[10] Were it not for the protection of for-profit entities, the greatest benefits of RFRA often would inure to religious minorities since religions with larger numbers and greater power can often get exceptions to laws for houses of worship and religious nonprofits. The protection of for-profit entities, and the introduction of "religious freedom" laws like the one recently allowed to stand in Mississippi,[11] has weaponized RFRA in a way that it was not weaponized before, and has boosted the arguments of those who say RFRA laws, and religious freedom more generally, primarily support discrimination.

SCHARFFS: One of the ironies of free exercise protection is that we might expect courts to be the best protectors of minority rights. This is the "textbook" justification for judicial review: Majorities will trample minority rights, so we need courts to protect the rights of minorities. This is sometimes described as the counter-majoritarian difficulty facing courts. In the area of the protection of free exercise, the reality has been almost the direct opposite of this view.

For example, in the pre-*Smith* case *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Supreme Court said the Free Exercise Clause did not protect a Jewish Air Force employee who wanted to wear his yarmulke at work. Congress responded by enacting legislation requiring the Air Force to revise its regulations.[12] In *Employment Division v. Smith*, the Supreme Court did not protect the adherents of the Native American Church who wanted to smoke peyote as part of their religious ceremonies. Congress responded by passing legislation explicitly protecting the use of peyote in religious ceremonies.[13] Congress also responded by enacting RFRA, with broad political support across parties, to restore the compelling state interest test,[14] which the Court then found to be unconstitutional as applied to states.[15] Then many states, through democratic processes, enacted state RFRAs. Congress responded by enacting RLUIPA, which reasserted the compelling state interest test in areas of the law where congressional authority is clear.[16] One of the great ironies of the protection of religious freedom in the United States is how responsive to the needs of religious minorities legislatures have been, and how unresponsive to the needs of religious minorities the courts have been.

Should it matter legally if the party claiming immunity from regulation under the Free Exercise Clause or a RFRA is a for-profit corporation rather than an individual?

RAVITCH: It should matter, but according to the Court's decision in *Hobby*



Lobby, it does not. In that case, the Court held that at the very least closely held for-profit entities are protected under RFRA. As I have written elsewhere, this was a misinterpretation of RFRA that has already begun to have negative consequences for religious freedom claims by traditional religious entities, and which has supported the arguments of those who want to cast the whole concept of religious freedom as being about allowing discrimination.[17] Moreover, the *Hobby Lobby* Court paid short shrift to the question of how a corporation, which is an entity created by state law with many constituents, including shareholders, employees, customers, and others, can exercise religion. Hobby Lobby itself had more than 13,000 employees.[18] The Court seemed to assume that the owners of the closely held corporation solely determine how the corporation exercises religion.

Masterpiece Cakeshop could still raise questions even if the Court had not included for-profit corporations within RFRA's protection. Even if for-profit corporations should not be protected under RFRA as a general matter, *Hobby Lobby* involved three corporations that were significant in size. The largest, Hobby Lobby, operated more than 500 stores and had more than 13,000 employees. The smallest, Mardel, operated 35 stores and had almost 400 employees. In contrast, Masterpiece Cakeshop is a single shop owned by Jack and Debra Phillips, who are involved at every level of the daily operations of the business. In this context, it could be harder to separate the functions of the business from the individuals.

In *Hobby Lobby*, the Court cited *Braunfeld v. Brown*, 366 U.S. 599 (1961), for the notion that, even under the Free Exercise Clause prior to *Smith*, the Court had acknowledged protection for for-profit entities.[19] *Braunfeld* said no such thing, and in fact the Court had explicitly rejected protection for for-profit entities under the Free Exercise Clause in a different case, *United States v. Lee*, 455 U.S. 252 (1982). The *Braunfeld* Court never clearly distinguished between the individual owners of the small businesses involved in that case and the businesses themselves. It would be hard to do so because in that context it would be someone like Mr. Braunfeld himself who would have to work if the business were to be open on Friday night or Saturday, just as it would be Jack and Debra Phillips who would be involved in designing and making any cake at Masterpiece Cakeshop.

This, of course, does not mean that Masterpiece Cakeshop will win. Colorado's interest in applying its public accommodation law is exceptionally strong (and Braunfeld lost his case under far more questionable circumstances). Still, the difficulty in separating the business from the individual in *Masterpiece Cakeshop* underscores the difference in both pre-*Hobby Lobby* precedent and in common sense regarding a small shop making a wedding cake vs. a company like Hobby Lobby denying benefits to its many employees or engaging in discrimination.

SCHARFFS: I read *Braunfeld* a little differently. The Court did not address the question of whether the owner had legitimate free exercise interests, even though he was operating as a business. They took this as a given.[20] Then they held (mistakenly in my view) that the Sunday-closing law imposed only an indirect burden on religious exercise and did not violate the First Amendment.[21] The likelihood that large, publicly held corporations will impose, through their management or powerful shareholders, their religious views on employees or customers seems a lot smaller than the possibility that they would impose their social or environmental views. It is odd that we encourage businesses to act in ways that are "socially responsible," but if the source of their social responsibility is religious, then it must not be tolerated.

Concluding thoughts?

RAVITCH: In today's increasingly polarized debates over culture war issues we have lost a sense of compromise on many issues. In *Freedom's Edge*,[22] I argue that extreme social conservatives and extreme progressives are actually cousins joined together by authoritarian tendencies. (This is reflected in Professor Scharff's analysis below of Cromwell's explanation of King Henry's conduct in *A Man for All Seasons*.[23])

The State of Colorado might have decided to leave Jack Phillips to his conscience and dismiss the complaint ▸

against him. After all, Phillips was not denying LGBT customers access to his products generally, but rather only to wedding cakes. Yet, David Mullins and Charlie Craig carefully considered whether or not to file a civil-rights claim against Phillips. In the end the pain they suffered as a result of Phillips' denial to bake their cake — even before he knew what sort of a design they wanted (or whether they wanted a design at all) — caused them to file a claim with the Colorado Civil Rights Commission. This pain should not be overlooked or underestimated.

It would be one thing if a church told Craig and Mullins that it could not marry them. They might have been offended and hurt, but traditional religious entities have always had the right to decide their own doctrines. After all, the government could not force a Catholic Priest to marry a Catholic and a non-Catholic or an Orthodox Rabbi to marry a couple where one of the spouses was not Jewish. Yet, Craig and Mullins were not refused by a nonprofit religious institution based on religious doctrines that apply to all who enter. Rather, they went to a for-profit bakery known for creating great cakes and were willing to pay the cost to buy a wedding cake, but were told "no." It is fair for them to have wondered whether other shops might say no to requests for flowers or photography. It may have also made them wonder what would happen to couples in areas where all the local bakers said "no."

Even then, the pain Craig and Mullins felt might have been balanced with Jack Phillips' very real concerns about complicity in something that goes against his religion. For Jack Phillips, too, there will be great pain if he is forced to be complicit in something he feels he is commanded by G-d to avoid. The state requiring him to make the cake would be just one step removed from the state forcing an observant Jew or Seventh-day Adventist to work on Saturday. There is pain on both sides in this case.

The underlying issues present an opportunity to try to find common ground. One's sexual orientation goes to the core of one's being and autonomy. For a devout person of faith, one's religious commitments also go to the core of one's being and autonomy. Sexual orientation is, of course, biologically determined, while religion is not, but that does not mean that one's religion is negotiable or less a part of that person's humanity. If each side can see the threat posed to the others' humanity and autonomy, perhaps compromises can be reached when possible — and when not, perhaps each side can live and let live.

It is possible that the case will be decided on narrow grounds because the situation arose before the Court decided *Obergefell v. Hodges*.[24] If so, maybe in future situations an accommodation for people like Jack Phillips can be created to prevent the pain caused in this case. Perhaps bakers, florists, and photographers can create networks so that those who oppose servicing same-sex marriages on religious grounds can subcontract orders to similarly qualified colleagues at no additional cost to customers.

Still, the Court must answer the questions before it based on the facts in the record. For me, one fact is determinative: Phillips never spoke with Craig and Mullins about a design. As soon as he learned that they were gay he said that he could not design them a wedding cake. All he knew when he said "no" was that they were gay. What if they just wanted a white cake with no design? To me this is dispositive of the free speech claim because it suggests the denial was based on identity, not on message. I doubt the case will come out this way, but under the facts I think it would be the right result.

Whatever the result, it is my sincerest hope that people of good faith on all sides can work together to avoid turning every cake into a federal case.

SCHARFFS: To me the most interesting underlying question in this case is why the state finds it so important to coerce Jack Phillips to make this cake. The most plausible answer I've heard was suggested by Professor Richard F. Duncan in a Federalist Society-American Constitution Society debate at BYU Law School. Professor Duncan looked to Thomas Bolt's classic play, *A Man For All Seasons*, for an answer. The focus in that play is usually on Sir Thomas More and his reasons for refusing to endorse the King's divorce and remarriage. We rightly focus on how powerfully he felt the imperatives of conscience, and he went to his death because he refused to violate his conscience.

But what about the King? Why did Henry have to kill More? Why not just banish and ignore him?

King Henry's situation also involved a significant redefinition of marriage, one that challenged existing religious views of the institution. King Henry wanted to divorce his wife in violation of church law and marry the woman he loved.

In the play, the character Thomas Cromwell provides the explanation. The King, he explains, is a man of conscience, and as such he is offended by anyone who would disagree with his views of marriage.[25] By declaring More a criminal and ordering his execution, the King renders him an outlaw, someone unworthy of respect or regard, someone whose objection does not need to cause anxiety or doubt. It also sends a powerful message to anyone else who might be thinking of dissenting.

In my view, something similar is going on here. Why can't the state just leave Jack Phillips alone? The couple may have suffered some "dignitary harm" by having someone turn them down, but this is a lot like the dignitary harm each of us experiences when we encounter someone who disagrees with us. If you requested a cake with a religious message and the baker objected, we can't imagine the legal machinery of the state being brought to bear to address your dignitary harm — even though you would be as much a victim of religious discrimination as the couple here is a victim of discrimination on the basis of sexual orientation.

But for the state, putting Phillips out of business is a lot like putting him to death. Yes, he is allowed to keep his head, but he loses his livelihood unless he relents and obeys the state's will. By rendering him something like a criminal, we are able to discount his views as idiosyncratic or cranky.

Based on questions asked by Chief Justice John Roberts and Justice Anthony Kennedy in oral arguments, there appear to be two exit ramps to imposing state coercion that the Court might take. The first is to note that the confrontation in this case arose before the Supreme Court declared same-sex marriage to be a constitutional right.[26] This would create a narrow window of state policy not warranting forcing Phillips to bend his will to that of the state.

A second off-ramp is the religious hostility and bias evident in the record of the Colorado Civil Rights Commission. Justice Kennedy observed that tolerance works best when it is a two-way street, and the Commission does not appear to have been an institution that was tolerant of religion.[27]

To my mind this case is akin to the flag-salute cases. A sympathetic baker who heard about Jack Phillips' refusal to bake this cake gave the couple a rainbow cake, highlighting a symbol of gay pride commonly used on flags. From one perspective, giving the couple the cake they wanted would be akin to forcing Phillips to bake a cake displaying the gay pride flag. We have decided that it is wrong for the state to force dissenters to salute the American flag. It would be unfortunate for the state to force dissenters to "salute" the gay pride flag. The unquestionable ideological message associated with flags provides another basis for the Court to narrowly vindicate Jack Phillips' rights without riding roughshod over antidiscrimination public accommodation laws.

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[1] Brief of Amici Curiae 34 Legal Scholars In Support of Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, ___ S. Ct. ___ (2018) (No. 16-111).

[2] 379 U.S. 274 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964, which prohibited discrimination in public accommodations laws).

[3] *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

[4] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[5] Frank S. Ravitch, Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America at 115, 155 n. 61 (Cambridge Univ. Press 2016) (addressing claims in lower courts after *Sherbert v. Verner*); Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163 (2016) (addressing RFRA claims).

[6] Marci A. Hamilton, God vs. the Gavel: The Perils of Extreme Religious Liberty (Cambridge Univ. Press, Rev. 2d ed. 2014); Winnifred Fallers Sullivan, The Impossibility of Religious Freedom (Princeton Univ. Press 2005); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994).

[7] *Employment Div. v. Smith*, 494 U.S. 872, 879, 885 (citing *Reynolds v. U.S.*, 98 U.S. 145, 167 (1878)).

[8] *United States v. Lee*, 455 U.S. 252 (1982) (requiring an Amish employer to pay Social Security taxes despite his sincerely held religious opposition to the Social Security tax).

[9] The Colorado Civil Rights Commission stated that it would not require "a black baker . . . to make a cake bearing a white-supremacist message for a member of the Aryan Nation" or an "Islamic baker . . . to make a cake denigrating the Koran for the Westboro Baptist Church." Petitioner's Appendix for *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, App. 75a-76a.

[10] Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163 (2016).

[11] *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017), *cert. denied* Jan. 8, 2018.

[12] 10 U.S.C. § 774.

[13] 42 U.S.C. § 1996a.

[14] 42 U.S.C. § 2000bb et seq.

[15] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[16] 42 U.S.C. § 2000cc et seq.

[17] Ravitch, *supra* note 5; Frank S. Ravitch, *Be Careful What You Wish For: Why* Hobby Lobby *Weakens Religious Freedom*, 2016 BYU L. Rev. 55 (2016).

[18] *Hobby Lobby*, 573 U.S. ___, slip opinion at 13.

[19] *Hobby Lobby*, 573 U.S. ___, slip opinion at 16-17.

[20] *See Braunfeld v. Brown*, 366 U.S. 559 (1961).

[21] *See id.* at 606.

[22] Ravitch, *supra* note 5.

[23] *See infra* note 25, and accompanying text.

[24] 576 U.S. ___, 135 S. Ct. 2584 (2015).

[25] Robert Bolt, A Man for All Seasons 119 (First Vintage International Edition, 1990) ("The King's a man of conscience and he wants either Sir Thomas More to bless his marriage or Sir Thomas More destroyed.")

[26] Transcript of Oral Argument at 64–67, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, __ S. Ct. __ (2018) (No. 16-111).

[27] *Id.* at 51–53, 62.