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Barnette and Masterpiece Cakeshop: Some Unanswered Questions

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BARNETTE AND *MASTERPIECE CAKESHOP*: SOME UNANSWERED QUESTIONS

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Justice Jackson's opinion for the Court in *West Virginia State Board of Education v. Barnette*[1] is deservedly famous. Yet, aspects of it raise more questions than they answer. *Barnette* is rightly seen as the foundation of the Supreme Court's compelled speech doctrine. But key parts of that doctrine remain under analyzed by the Court. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[2] offered the Court an opportunity to clarify some of these issues. For religious reasons, Jack Phillips refused to provide a custom-made cake for the wedding celebration of a gay couple, Charlie Craig and David Mullins. The Colorado Civil Rights Commission determined that this violated state public accommodations anti-discrimination law, and the state court of appeals affirmed. After the state supreme court declined to hear the case, the U.S. Supreme Court granted certiorari; much of the briefing and oral argument was about whether requiring Phillips to make the cake would amount to unconstitutional compelled expression.[3] But the Court resolved the matter on narrower, as-applied, Free Exercise Clause grounds.[4] The underlying type of conflict in *Cakeshop*—between a statutorily protected class of persons and providers of services who claim a set of First Amendment objections to providing such services—is not going away any time soon, however,[5] and thus it is fruitful to explore the issues from the *Barnette* line of cases, as refracted through cases such as *Cakeshop*.

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1 319 U.S. 624 (1943).

2 138 S. Ct. 1719 (2018).

3 The more intuitively obvious claim—that applying the law to Phillips would violate his freedom of religion—would have failed under *Emp't Div. v. Smith*, 494 U.S. 872 (1990), which holds that courts should apply only rational basis scrutiny to laws of general applicability that are claimed to violate the Free Exercise Clause.

4 The Court held that "[t]he Civil Rights Commission's treatment of [Phillips'] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips'] objection." *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

5 *See, e.g.*, Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (holding that there was no constitutional violation to apply state public accommodations anti-discrimination law to a florist's refusal to provide flowers for a same-sex wedding); certiorari granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop*, 138 S. Ct. at 1719. *See* Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).

Here are three compelled speech issues either directly implicated in *Barnette* or that flow from the doctrine *Barnette* spawned, all issues present in the *Cakeshop* litigation: (1) What is the proper level of judicial scrutiny when state action is claimed to compel expression unconstitutionally? In the compelled speech area, should the level of scrutiny differ between a law challenged as facially unconstitutional and an argument that an exemption is constitutionally required? What is the relationship, in First Amendment law generally, between as-applied challenges and claims for constitutionally compelled exemptions? (2) What counts as expression for compelled speech doctrine purposes? What is the relevance of whether a reasonable observer would understand the compelled speaker to be advancing her own views as opposed to merely obeying the law? When is compelled speech properly seen as endorsement, and what is the relevance for the doctrine of whether or not compelled speech is properly seen as endorsement? (3) In the more specific setting of providing goods and services, and the intersection between public accommodations anti-discrimination law and compelled speech claims, what is the relevant difference, if any, between denying a good or service without a specific requested message (say, "no cake for your same-sex wedding celebration!") and denying a good or service with a specific requested message (say, "no cake for you if you insist that it say 'God Loves Same-Sex Marriages'")? What counts as even-handed versus improperly discriminatory administrative or adjudicative determinations in this setting?

(1) In the first iteration of compelled flag salute/pledge of allegiance litigation, *Minersville School District v. Gobitis*,[6] treated the matter almost entirely as a Free Exercise Clause case. Plaintiffs were Jehovah's Witnesses arguing on behalf of their public-school children. The claim was not to invalidate the public-school teacher-led pledge, but rather that the Constitution compels an exemption for religious conscience. Three years after *Gobitis* answered no, *Barnette* overruled *Gobitis*. But the Court did not hold that the Free Exercise Clause requires an exemption in this kind of case. Rather, the argumentative terrain shifted to concerns about compelled speech. The Court held that the First Amendment (without clause specification) compels an exemption from public-school teacher-led pledge of allegiance, not that such activity is facially invalid.[7] (And thus public-school teacher-led pledge of allegiance continues throughout the land. How many school-age children know they have a right not to participate?!)[8] Justice

6 310 U.S. 586 (1940).

7 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

8 *Lee v. Weisman*, 505 U.S. 577, 592–96 (1992), invalidated clergy-led prayer at public school graduation ceremonies, on the ground that although the state did not legally coerce the children to attend and pray, nonetheless psychological coercion to attend and pray—or at least be perceived as praying—was present. Accordingly, such clergy-led prayers are unconstitutional on their face; *Lee* is not about an

Jackson didn't discuss levels of scrutiny, but the opinion reads as a strict-scrutiny opinion. Once Jackson identified the constitutional harm—to the freedom to say what one wants to say and not to say what one does not want to say—he put the state to a tough justificatory test, which it failed. The state may seek to advance the end of national unity in many ways, said Jackson, but not by putting words in the mouths of schoolchildren.

In the most famous recent First Amendment exemptions case, *Employment Division v. Smith*,[9] Justice Scalia concluded something quite different about the proper level of judicial scrutiny. When faced with a neutral (i.e., nondiscriminatory) law of general applicability (i.e., not regarding religion alone), courts should adjudicate claims for religious exemption according to rational basis scrutiny only. So long as the state has a reasonable ground for demanding uniform obedience (and for not granting an accommodation), the state wins and the free exercise claimant loses. Thus, Oregon's controlled substances laws could be applied to the Native American Church's time-honored practice of ingesting peyote (a hallucinogenic drug) as part of a religious ritual.

Next, let's consider *United States v. O'Brien*.[10] A federal statute prohibited knowingly destroying a military draft card ("certificate"); O'Brien publicly burned his draft card in an act of political protest; he argued that the Free Speech Clause of the First Amendment protected his conduct. The Court rejected two versions of O'Brien's claim. One was a facial challenge to the statute: that it was unconstitutional because enacted with the purpose of abridging free speech. The Court responded that it wouldn't "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[11] O'Brien also argued that the statute was "unconstitutional as applied to him"[12] because his act of draft card destruction was symbolic speech protected by the First Amendment. The Court rejected this by applying the now eponymously famous *O'Brien* test, which is usually thought of (at least on its face) as intermediate scrutiny.[13] The Court stated

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opt-out. One might think similar psychological coercion exists when public school children are asked to stand and recite the pledge of allegiance—even though formally speaking, after *Barnette*, they may opt out. The Court has never explained how, under the logic of *Lee*, public school teacher-led pledge of allegiance is constitutional. *See* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

9 494 U.S. 872 (1990).

10 391 U.S. 367 (1968).

11 *Id.* at 383.

12 *Id.* at 376.

13 [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

the short version of the test just before the full version: "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[14]

I want to discuss two things here. One, what is the difference between an exemptions claim and an as-applied claim, if any? Two, how does any such difference intersect with the appropriate level of judicial scrutiny? Exemptions claims arise in this way: A law on its face is constitutionally valid, and someone argues that a type of constitutional right is sufficiently powerful to trump whatever state interest there is in 100% uniform application. In this way, we can see Smith and O'Brien as making a similar type of argument—the controlled substances law and the draft card non-destruction law were, facially, not problematic (once we are past O'Brien's argument that improper legislative motive infected the draft card law). We don't need to know specific facts to know whether these laws were constitutional as applied (more on this in a moment when I discuss a typical type of Free Speech Clause as-applied challenge). Smith argued, rather, that his free exercise of religion was significantly burdened by the controlled substances law and that such a burden ought to outweigh any state interest in uniform application. Similarly, O'Brien argued that his freedom of speech was significantly burdened by the draft card law and that such a burden ought to outweigh any state interest in uniform application. At least this is one way of understanding the two claims. We can see the Barnettes' claim in the same light. The law requiring a teacher-led (and student-uttered) pledge of allegiance in public schools was, generally speaking, a valid exercise of state power. The Barnettes were not arguing that the pledge must be invalidated in toto, just that the application to their children significantly burdened their freedom of speech (of the compelled speech variety) and that such a burden ought to outweigh any state interest in uniform application. In this way, although the Court referred to O'Brien's claim as an as-applied challenge,[15] we might do better to see it as a claim for exemption—alongside Smith's and the Barnettes' structurally similar claims.

The standard free speech as-applied challenge is different. Take, for example, an incitement case. Let's assume a law that facially comports with *Brandenburg v. Ohio*[16] and punishes only incitement that is intended to cause imminent lawless action and is likely to cause such action. And let's assume an arrest and prosecution of someone who falls short of one or both prongs

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Id. at 377. *See, e.g.*, Turner Broad. Sys. v. FCC, 520 U.S. 180, 185 (1997) (referring to the *O'Brien* test as "intermediate First Amendment scrutiny").

14 *O'Brien*, 391 U.S. at 376.

15 *Id.*

16 395 U.S. 444 (1969) (per curiam).

of this test—e.g., a charismatic political counter-cultural figure who urges imminent lawless action in a setting where the state can't show beyond a reasonable doubt that such action is likely to occur. This person's constitutional defense isn't that the law is facially invalid, nor that it is unconstitutionally overbroad (I am assuming a law that is not), but rather that because of the balance the Court has deemed the First Amendment to strike between public safety interests and political dissent, the law may not be constitutionally applied to her. This is one version of a classic as-applied challenge. Can we also see this as a claim for exemption? Probably not. My claimant wouldn't be arguing that the law is generally valid but that she has a definable constitutional right in not following it—to speak, or to practice her religion. Rather, she's arguing that the law, constitutionally understood, only goes so far, and that speech beyond that limit isn't properly covered by the statute, so there's no need for an exemption, just a claim of "no proper application."[17] This sounds like a pure statutory interpretation case, though. So let's tweak the hypothetical a bit, and now assume that the law is written broadly enough to cover my hypothetical speaker, i.e., the law punishes incitement that is intended to cause imminent lawless action even if it is not likely to cause such action. Here, the speaker's as-applied challenge is that the law may not constitutionally be applied to her.[18]

Exemptions claims and as-applied claims do share the following quality: both involve weighing, at one stage of the process or another, and as either a first-order matter (on the substance) or second-order matter (regarding institutional concerns), the type and level of state interest against the damage to the claimed constitutional right. This is so despite the Court's usually not using the term "weighing" or "balancing" or anything similar. Thus, *Barnette* is best seen—and easily seen, given Justice Jackson's opinion—as pitting a strong right against compelled speech against a fairly weak state interest in insisting on uniform adherence to the pledge of allegiance rule. *Smith* pits a cardinal constitutional right to freely exercise one's religion against a second-order concern in keeping the judiciary out of the perils of case-by-case determination of which types of state interests can withstand the often idiosyncratic (to most eyes and ears) claims of religious necessity, and simultaneously in avoiding what the majority deemed a kind of anarchy that

17 For an argument that exemptions and as-applied claims are basically the same thing, see Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1597 (2018) ("[R]eligious exemption requests are just a version of what is generally thought of as one of the most common, modest, and preferred modes of constitutional adjudication: the as-applied challenge.").

18 This law may also be unconstitutionally overbroad, but (a) to be unconstitutionally overbroad, it would have to be substantially so, *see* Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973), and (b) the best understanding is that only a person to whom the law *may* be constitutionally applied has standing to raise an overbreadth claim. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503–04 (1985).

would result if every man could be a law entire unto himself. *O'Brien* can be understood as deeming the government's interest in an orderly draft card system as outweighing a dissenter's desire to express his opposition to the war through an illegal action (rather than seeing it as his right to political protest more generally). And in my hypothetical incitement cases, after a long 20th century struggle to understand and refine the right to advocate illegal action, in a political or ideological setting, the Court finally determined that the state interest in preventing intentional and likely imminent lawless action is high enough to outweigh the political speech right, but not otherwise.

The level of scrutiny involved in all of these cases turns primarily on whether the state interest appears on the face of the law to be about expression (or religion), versus whether it appears to be about a non-rights-implicating matter of public health, safety, and the like. Why *Smith* insists on a rational basis test only, whereas *O'Brien* is a kind of intermediate scrutiny, is a question I put aside; in any event, *O'Brien* scrutiny, although formally intermediate, is generally understood as highly deferential to the government. Both cases involve facially neutral laws of general applicability, where there is less presumptive reason to think the state is up to some nefarious purpose involving restriction of religion or speech.[19] The law in *Barnette* was generally applicable in one sense of the term—it didn't single out anyone's religion or speech—but, critically, the law and practice were all about expression, not about conduct more generally that might happen to be expressive. And any law regulating advocacy of unlawful action would also be directly about expression. In both of these latter settings, there is good reason for some kind of elevated judicial scrutiny[20]—either the strict scrutiny I claim the Court employed in *Barnette*, or the kind of categorical balancing present in *Brandenburg* and in a classic set of cases in which the Court permits regulation based on speech content but only pursuant to quite circumscribed tests that are usually strongly rights-favoring.[21]

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19 For arguments about the importance of government purpose in free speech doctrine, see Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

20 This point about the law in *Barnette* (and in many of the compelled speech cases) being not generally applicable, in contrast with the laws in cases such as *O'Brien* and in many religious exemptions cases (such as *Smith*), is a key distinction between my analysis and that of Barclay and Rienzi. *See* Barclay & Rienzi, *supra* note 17, at 1599 ("[I]n the particularly relevant comparator context of compelled speech, courts regularly provide exemptions from generally applicable laws that mirror the exemptions critics fear in the context of religious exercise.").

21 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); *see also* Miller v. California, 413 U.S. 15 (1973) (obscenity); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Otherwise, if a law is content-based, the Court applies a kind of ad hoc strict scrutiny, very difficult for the government to satisfy. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

This leads us back to *Cakeshop*. The Colorado law is neutral and generally applicable,[22] and the claim is for an exemption. This suggests that either the *Smith* or *O'Brien* approach is appropriate, and thus that rational basis or (weak) intermediate scrutiny is in order. There is no need for the kind of fact-intensive inquiry the Court uses in as-applied cases involving statutes that facially regulate expression.[23] And there is no need for the stepped-up scrutiny of *Barnette* and its direct progeny—*Wooley v. Maynard*[24] and *National Institute of Family and Life Advocates v. Becerra*,[25] which involve state insistence that individuals or companies use their property to help the state advance its message; or *Miami Herald Publishing Co. v. Tornillo*[26] and *Pacific Gas & Electric Co. v. Public Utilities Commission*,[27] which make certain speech content triggers to rights of reply that occupy the claimant's property and expression space.

Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston,[28] however, might give us pause before concluding that the state need not satisfy stepped-up scrutiny in cases such as *Cakeshop*. Massachusetts deemed its public accommodations, anti-discrimination law to apply to the private organizers of the annual St. Patrick's Day Parade through the streets of Boston. The state could have adopted a different approach: once it ceded a public thoroughfare to a private group for a short period of time, it could have deemed the space not a place of public accommodation, but rather a space for private conduct (and expression) not subject to the anti-discrimination rules. But the state deemed otherwise, and thus the organizers were subject to a mandate that they not discriminate on the basis of, inter alia, sexual orientation. The organizers didn't want a group known as GLIB marching with a banner proclaiming "Irish American Gay, Lesbian and

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

COLO. REV. STAT. § 24-34-601(2)(a) (2017).

23 I put aside the fact-intensive inquiry the *Masterpiece Cakeshop* Court in fact engaged in, regarding the relevant state actors' hostility toward the baker's religious beliefs.

24 430 U.S. 705 (1977).

25 138 S. Ct. 2361 (2018). I refer to the Court's invalidation of the "licensed notice" provision of California law, requiring (in this case) anti-abortion family planning centers to help the state advertise availability of abortion providers. The Court's invalidation of the "unlicensed notice" provision of California law is much harder to defend. For commentary on *Becerra*, see Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1495–98 (2018).

26 418 U.S. 241 (1974).

27 475 U.S. 1 (1986) (plurality opinion).

28 515 U.S. 557 (1995).

Bisexual Group of Boston."[29] Relevant state actors held that exclusion a violation of the anti-discrimination law, and determined that GLIB was entitled to participate in the parade with its banner. The organizers argued, at the state level and to the U.S. Supreme Court, that this violated their First Amendment right against compelled expression, of the "right not to host/foster another's speech" variety.

Under the rubric set forth above, this looks like application of a neutral law of general applicability, and a claim of constitutionally compelled exemption. That would put this under the *O'Brien* heading, as a speech claim (as opposed to a religion claim, under *Smith*). Indeed, *Hurley* said that the state law is not "unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of content," the focus instead being to protect gays and lesbians (inter alia) from being denied "publicly available goods, privileges, and services."[30] The Court immediately pivoted, though, to this: that the law "has been applied in a peculiar way."[31] There was no claim or evidence that the organizers had excluded gay persons from participation in the parade. "Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."[32] Thus, the state court had required the organizers to "alter the expressive content of their parade."[33] In an extremely interesting sentence, the Court then observed:

> Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation.[34]

But this would mean that any group of persons otherwise protected under the statute would have a right to "participate in [the organizers'] speech,"[35] i.e., to coopt it or at least reshape it, if not intentionally, then in effect. And that would violate "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[36]

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29 *Id.* at 570.

30 *Id.* at 572.

31 *Id.*

32 *Id.*

33 *Id.* at 572–73.

34 *Id.* at 573.

35 *Id.*

36 *Id.*

This is the key moment in the decision; everything that follows is further explanation and refinement of the same. So, first the Court reasoned that this is not a *Zauderer v. Office of Disciplinary Counsel*[37] case, in which the state is requiring dissemination of purely factual and uncontroversial information.[38] The Court next explained that even though the parade organizers may not have been focused and consistent over time on which messages they included or excluded from their parade, that doesn't take away their right to exclude whatever message they think would result from the GLIB group marching under its GLIB banner.[39] After that, the Court distinguished three cases—two cable television "must carry" rules cases, and the case in which state law required a private shopping center to allow various speakers to engage in speech activity.[40] Key facts uniting these three cases are the low risk of misattribution (of the compelled message to the compelled host) and the common practice and ease of the host's posting a disclaimer of connection to various messages seen on the television channels in question or observed at the shopping center. This discussion is the high-water mark in the Court's compelled speech jurisprudence for treatment of misattribution and disclaimer; I will say more about that in Part II. The upshot in *Hurley* is the Court's determination that viewers generally see parades as a whole and that disclaimers in a moving parade would be odd.[41] Thus, the risk of misattribution here is real, and disclaimers are not an appropriate recommended solution.

Hurley does not mention levels of scrutiny. Once the Court determined that the "peculiar" application of the state law would require the organizers to alter their parade message, the case was over. There is a moment after that key analytic work is done when the opinion restates that on its face the law is perfectly valid but that as "applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[42] This is an interesting and perhaps unusual move—to redefine the state interest from the general one immanent in the law on its face to the specific, as-applied one. Once we redefine the state interest as requiring alteration of private speech content, strict scrutiny would seem appropriate and would (usually) be fatal.[43] The opinion then

37 471 U.S. 626 (1985).

38 *Hurley*, 515 U.S. at 573.

39 *Id.* at 574–75.

40 *Id.* at 575–80. For further discussion of these cases, see *infra* text accompanying notes 78–79.

41 *See Hurley*, 515 U.S. at 576–77, 580.

42 *Id.* at 578.

43 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015) (holding that strict scrutiny applies to laws that are facially content-based; the case was about regulation of private speech, though,

makes one more approach at how to see this case: perhaps, it says, we can see the state's objective as "forbidding acts of discrimination toward certain classes . . . to produce a society free of the corresponding biases."[44] That is a legitimate state end, but there is a problem if the means to such an end is to alter the organizer's private message.[45]

Laws of general applicability will have various types of application. Usually they will involve no countervailing claim of constitutional right, and thus a rational basis test is all that is needed to ensure legitimacy. If, however, the application involves administrative evaluation of speech content, then it is correct to employ strict scrutiny. So, for example, a disturbing the peace law is unproblematic facially (from a First Amendment perspective); but if the officer on the beat makes a content determination before deciding if the peace has been disturbed, we now need strict scrutiny.[46] Otherwise, true intermediate scrutiny—not the kind that operates more like rational basis scrutiny (which arguably occurred in *O'Brien* itself)—can often properly balance state objectives against private constitutional rights claims. This is the best way of understanding *Hurley*. Massachusetts' ends are laudable; most times, application of the law will root out constitutionally regulable discrimination; but sometimes—rarely it seems, as this was a "peculiar" case—the means to the laudable end will involve demanding that a private actor alter its expression. Implicit in the unanimous *Hurley* decision is a weighing—the right not to host/foster another's speech gets significant weight, diminishing the weight the state's anti-discrimination interest gets in typical public accommodations cases.

If an iteration of *Cakeshop* returns to the Court, the Court similarly should apply *O'Brien* as true intermediate scrutiny. One among several hard questions will be whether it is proper to see the relevant business activity as expressive and thus as expression being altered by the otherwise unobjectionable anti-discrimination law. Even if the answer is yes (as I suggest in Part II it should be), there is still the matter of determining the

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not about compelled speech). Government should be able to satisfy strict scrutiny when its laws require alteration of speech content in the public health and safety disclosure/notice setting, if the speech is factual and not ideologically controversial. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); *see also Reed*, 135 S. Ct. at 2234–35 (Breyer, J., concurring in the judgment) (setting forth examples of compelled speech in the disclosure/notice setting, where I claim the state action in question should satisfy strict scrutiny).

44 *Hurley*, 515 U.S. at 578.

45 *See id.* at 579.

46 *See* Cohen v. California, 403 U.S. 15, 16 (1971) (invalidating, on strict scrutiny, a disturbing the peace/offensive conduct statute as applied to a person wearing a jacket in a courthouse corridor with the words "Fuck the Draft" visible); Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't, 533 F.3d 780, 787–90 (9th Cir. 2008) (applying a general statute regulating disruption near schools to an anti-abortion truck displaying photos of aborted fetuses; because police made a content-based decision about the photos being disruptive, the court shifted from lower to higher scrutiny).

weight of the state interest in ensuring the provision of goods and services on a nondiscriminatory basis, which seems quite a bit higher than the state interest in ensuring access to a privately organized parade (albeit a place of public accommodation).[47]

(2) The *Cakeshop* issue that took up the most briefing space, and the most oral argument time, was whether Phillips' custom-made wedding cakes should count as expression for Free Speech Clause purposes. Phillips argued that this part of his business involves a kind of artistic creativity or expression[48] and that even though this iteration of artistic creativity is a product for sale in a for-profit business, the First Amendment should cover the cake-making. Note that I am talking about "coverage," not "protection,"[49] i.e., just about whether we are even in Free Speech Clause territory, before we get to questions of levels of scrutiny and state interest. Part of Phillips' argument for First Amendment coverage was that with his custom-made wedding cakes he intends to celebrate and should be understood as celebrating the weddings for which the cakes are made.[50] On the other side, some of the amicus briefs for the state and the gay couple (Craig and Mullins) argued (inter alia) that custom-made wedding cakes do not count as expression for First Amendment purposes. The American Unity Fund brief (by Professors Dale Carpenter and Eugene Volokh) drew a line between "writers, photographers, painters, singers, and similar speakers" who might be hired for a wedding (First Amendment covered expression) and "baking, clothing design, architecture, and other activities" (not First Amendment covered expression).[51] The Freedom of Speech Scholars Brief (by Professor Steven Shiffrin) contended that "[m]usic falls within the scope of the First Amendment; the products of jewelers, florists, chefs, and bakeries do not, even though they involve skill and artistic judgment."[52] And the Brief of Professor Tobias B. Wolff claimed that Phillips' business "is not engaged in

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47 It would have made more sense in the *Hurley* setting for Massachusetts either to have deemed the parade purely private, not subject to public accommodations law, or to have deemed the parade a type of state action, seeing the organizers as stepping into the shoes of the city. If this state action model were followed, then we would see the parade as a type of public forum, and the GLIB group with its banner would have had a right to participate.

48 Brief for Petitioners at 1, 5, 8, 14–15, 17, 18–25, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

49 For more on this, see Greene, *supra* note 25, at 1509–11.

50 Brief for Petitioners, *supra* note 48, at 2, 19, 21.

51 Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents at 1, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Brief of American Unity Fund].

52 Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents at 10, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

its own act of personal expression, it is providing a commercial service."[53] In any event, the gay couple and others contended, the reasonable observer would not understand the custom-made cake to be an expression of the baker's views, but rather of the couple's views; the baker, on this approach, is just following the law in baking the cake.[54] Justice Ginsburg's dissent adopts this position,[55] whereas Justice Thomas' concurrence in part and in the judgment rejects the relevance to compelled speech analysis of what a reasonable observer would think about the connection between a custom-made wedding cake and the baker's views about the wedding.[56]

My views on this are as follows: We should accept Phillips' claim that his custom wedding cake baking constitutes expression for First Amendment coverage; if a reasonable observer would misattribute the cake in this case (had it been made) to Phillips' own convictions, that would be a sufficient ground to deem a prima facie Free Speech Clause violation to have occurred; but whether we should understand Phillips to be endorsing a same-sex wedding celebration for which he is baking a custom cake is not a necessary part of compelled speech analysis for First Amendment purposes. That is because claims such as Phillips' are better understood under a broader rubric—what I call a "not in my name" claim of constitutional right, which is a claim of expressive association.[57] Although such claims may involve misattribution analysis, they need not. This allows us to see, similarly, that we have to proceed with caution when analyzing the constitutionally relevant meaning of a set of private choices in response to a legal prohibition, requirement, or permission.

The arguments against custom wedding cake baking as expressive are first-order and second-order. The first-order argument is that such a baker is just running a business, fulfilling customer demand, producing cakes as if he were producing any other good.[58] But the argument cannot be that he is producing cakes as if he were producing widgets, because the whole point of a made-to-order business (or part of a business) is that the goods aren't fungible. So the critic has to fall back on the claim that even if the cakes

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53 Brief of Professor Tobias B. Wolff as Amicus Curiae in Support of Respondents at 2, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

54 Brief for Respondents Charlie Craig and David Mullins at 34–35, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of Professor Tobias B. Wolff, *supra* note 53, at 14; *see also* Craig & Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286–87 (Colo. Ct. App. 2015); Robert Post, *An Analysis of DOJ's Brief in Masterpiece Cakeshop*, TAKE CARE (Oct. 18, 2017), https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop.

55 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1748 n.1 (2018) (Ginsburg, J., dissenting).

56 *Id.* at 1744 (Thomas, J., concurring in part and in the judgment).

57 *See* Greene, *supra* note 25, at 1478–79.

58 *See* Brief of American Unity Fund, *supra* note 51, at 9–10.

aren't fungible, and are customer-specific, they are still customer design-driven. There would be something to this if the baker were just executing the customer's design. Consider a company that will take your iPhone pictures and make them into a photo album. You select the pictures, determine how they're going to appear, and then the company executes the order. If that's how Phillips produces his cakes, then his claim for First Amendment covered expression would be weak. But it isn't how he produces his custom-made wedding cakes. Rather, he has discussions with prospective customers, gets their ideas, and then has discretion regarding many of the details.[59] A good analogy would be to a trompe l'oeil artist, who creates realistic looking backdrops for (say) people's homes, with significant input from the homeowner but also discretion on how to execute the work.[60] I would assume most readers would say this is First Amendment covered artistic expression. (Again, we are only now talking about coverage—are we in the Free Speech Clause area of tests, scrutiny, state interest, harm to speaker, etc.?—and not about the ultimate outcome of the case.) And consider the strip-club dancers in *City of Erie v. Pap's A.M.*[61] The case ended up presenting several difficult First Amendment questions. Before getting to them, the Court concluded that this kind of nude dancing for money is "expressive conduct," though "within the outer ambit of the First Amendment's protection [i.e., coverage]."[62] One might have said the women involved were just doing this for money, as a business, to satisfy consumer demand. But the Court refrained from saying that, for good reason—how is one then to distinguish, for example, dancers who work for a living with the American Ballet Theatre?

That leads us to the critics' second-order argument. The claim is that if we open the door to seeing custom wedding cake bakers as engaged in First Amendment covered expression, then we will have to see all sorts of businesspersons as similarly covered. Some mention clothing design and architecture; and what about law firms, who engage in speech activity? Underlying this argument is the concern that judges can't consistently adjudicate such claims and that there would be a floodgate of such claims and victories for businesspersons against public accommodations anti-discrimination laws and perhaps other legal protections. My response here is similar to my response in the Free Exercise Clause exemptions setting[63]—we

59 *See* Brief for Petitioners, *supra* note 48, at 7–8.

60 *See, e.g.*, JORDAN MURAL DESIGN, INC., http://www.philipjordan.com/index.html (last visited Nov. 11, 2018).

61 529 U.S. 277 (2000).

62 *Id.* at 289.

63 *See* ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 149–57 (2012); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

should accept the threshold claims of harm to a constitutionally protected interest and develop a kind of constitutional common law to properly balance these harms against state interests in uniform enforcement, interests that are often strong. If there is a good first-order argument for seeing clothing design and architecture as expressive, then we should appreciate that the state can interfere with such expression in all sorts of nefarious ways—both in restricting expression and in compelling it—but vote for the state in situations in which the state interest is sufficiently strong to outweigh whatever hit there is to the speech interest. As a first-order matter, it's hard to deny that clothing-designers-for-hire and architects-for-hire usually have creative expressive discretion packaged with whatever marching orders they have from their paying clients.

If we accept (some) custom wedding-cake baking as expressive—for threshold Free Speech Clause purposes—then it shouldn't matter whether we see this as pure expression or expressive conduct. What should matter for constitutional analysis is the nature of the state action involved. So, if someone is burning a draft card as an act of political protest, that is both pure expression—of a nonlinguistic sort, to be sure, but expression nonetheless—and also conduct (burning something, expressive or not). If the government passed a law banning expressive burning of draft cards, that would trigger strict scrutiny; if it passed a law banning any burning of draft cards, then if applied to an expressive act, we should apply intermediate scrutiny (putting aside whether evidence of dissent-squelching purpose behind an otherwise neutral law of general applicability should elevate the level of judicial scrutiny). Even with a case involving pure expression with no possible expressive conduct twist—say, a painter in her studio—our ultimate concern is with the type of law and its balance with the type of expression. A law banning a certain type of chemical because of danger to health, as applied to a certain kind of paint a painter uses, will get much more relaxed scrutiny than a law banning a certain type of painting. But the First Amendment is in play in both instances.

Part of Phillips' argument was that any custom wedding cake he makes "announces through [his] voice that a marriage has occurred and should be celebrated."[64] And, regarding the cake that Craig and Mullins requested, Phillips argued that "any wedding cake he would design for them would express messages about their union that he could not in good conscience communicate."[65] His brief added, "A person viewing one of Phillips's custom wedding cakes would understand that it celebrates and expresses support for

64 Brief for Petitioners, *supra* note 48, at 2.

65 *Id.* at 21.

the couple's marriage."[66] On the other hand, Phillips recognized that if a reasonable viewer would understand the cake as compelled by law, such a viewer would not assume Phillips supports same-sex marriage; indeed, this is one of the arrows in the quiver of those opposing the compelled speech claim in this setting.[67] Since such an argument would scuttle most of compelled speech case law, Phillips argued that this cannot be the right way to understand the free speech right at stake.[68] Justice Thomas made the same point in his opinion supporting Phillips' compelled speech claim.[69]

Because a reasonable observer would understand speech compelled by law as not necessarily expressing anything about the speaker's actual beliefs, and because we nonetheless have a robust compelled speech doctrine, whether misattribution is or is not present in a given case cannot be the crux of the constitutional analysis. The best way to understand the doctrine is that misattribution is a sufficient, but not necessary, ground for a prima facie claim of right.[70]

Barnette contains no discussion regarding whether one would appreciate the pledge was compelled.[71] Dissenting Justice Rehnquist in

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66 *Id.* at 24.

67 *See* Post, *supra* note 54.

68 Brief for Petitioners, *supra* note 48, at 30–31.

69 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring in part and in the judgment).

70 For related discussion of the misattribution problem in the compelled speech case law, *see* Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 839–44 (2010). Sometimes determining what beliefs to attribute to a particular person, in compelled speech situations, is difficult. One subset of this problem is what to make of a legal permission. So, after *Wooley v. Maynard*, 430 U.S. 705 (1977), was decided, Laurence Tribe wrote that the Court had created a conundrum for persons such as the Maynards: before the decision, if they displayed the "Live Free or Die" motto on their license plate (as opposed to covering it up, which they did and which generated the litigation), they could credibly claim they were just following the law and one should not assume they believed the motto's message; but after the decision, if they now do not cover up the motto, one might assume they believe the motto's message! Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 644 (2001). In his *PruneYard* concurrence, Justice Powell wrote very nearly the converse: before *Wooley*, people such as the Maynards were put to the difficult choice of merely complying with the law or doing that combined with dissenting by putting up (say) a bumper sticker (putting aside the third option of direct disobedience by covering up the motto, which the Maynards did), and, said Powell, if they did not put up the bumper sticker, one might think they agreed with the motto's message! PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980) (Powell, J., concurring in part and in the judgment).

The problem with the Tribe and Powell analyses is that they make too much out of inaction (just as statutory interpreters should not make too much out of legislative inaction). In the face of a legal permission (rather than a prohibition or a requirement), a choice to not take up the permission could mean many things. Permitted to cover up the motto but don't; permitted to put up a dissenting bumper sticker but don't—do the failures to act indicate agreement with the motto's message? They could, but they could also mean inertia or the desire not to stand out. Or probably other options as well.

71 Although reasonable minds might differ on this point, it seems most likely that a compulsory public school pledge of allegiance would be understood as such. Accordingly, reasonable viewers and even the children themselves would appreciate that their mouthing the words of the pledge constitutes no

Wooley echoed the state supreme court's point that displaying "Live Free or Die" on one's car license plate conveyed no endorsement of that message—in part because one may dissent in the same forum, as it were, by putting up a bumper sticker to the contrary.[72] But the majority was unmoved by this argument, and didn't even address it. Similarly, in the two "right of reply" cases in which certain speech content would trigger a right to take up space in another speaker's property—*Tornillo* and *Pacific Gas*—the Court was mostly unconcerned about the fact that readers of the compelled speech would know that such speech was compelled. There is no mention of this in *Tornillo*;[73] in a footnote in *Pacific Gas*, the Court dismissed the possibility of a disclaimer curing possible misattribution as sufficient to undo the constitutional harm to the utility that was compelled by law to carry an unwanted message.[74] But this concern about possible misattribution was not front and center in the Court's analysis. *Hurley* is the one compelled speech case in which misattribution seemed to play a role in the Court's striking down state action. The Court was concerned that "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."[75] And it added: "Although each parade unit generally identifies itself, each is understood to contribute something to a common theme."[76] And this:

> Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.[77]

Misattribution was a concern in *Hurley*, and the risk of such was perhaps a sufficient ground for the holding, but there's no reason to believe the case

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endorsement. Thus, Justice Jackson engaged in rhetorical overkill when he wrote "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943), and when he wrote that a compelled pledge "force[s] citizens to confess by word or act their faith" in government orthodoxy, *id.* at 642. Affirmation and confession are better used for a situation in which the reasonable observer would understand the utterance to be authentic and/or the state is not only compelling the utterance but also not allowing dissent on the point in question. When dissent is open and misattribution is absent, the compelled utterance is not affirming anything or confessing to anything. *See* Greene, *supra* note 8, at 473–78.

72 *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting).

73 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

74 Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 15 n.11 (1986) (plurality opinion).

75 Hurley v. Irish-Am., Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 575 (1995).

76 *Id.* at 576.

77 *Id.* at 577.

would have come out the other way had the Court been satisfied that viewers would have understood the GLIB banner was present under court order. The concern was deeper, or different: that the application of the law interfered with whatever message(s) the parade organizers wished to present.

Finally, although *Hurley* is the one compelled speech case in which misattribution seemed to matter to the Court's striking down state action, in a few cases upholding compelled speech, the Court deemed the absence of likely misattribution significant, as well as the possibility of disclaimer to avoid misattribution. This was so in the two cable television "must carry" cases,[78] and in *PruneYard Shopping Center v. Robins*,[79] where California required some private shopping center owners to permit some unwanted speakers on premises.

We should conclude that misattribution risk is just a factor in an analysis that is best seen as balancing the nature and level of hit to the constitutional right against the state interest. Thus, in *Barnette* we have a significant harm (a compelled *utterance*) and a weak state interest (does the state really need to compel dissenting children to say the pledge to achieve some semblance of national unity?); in *Wooley* we have a lesser harm but still something personal (the cooptation of space on one's vehicle) and a weak state interest (does the state really need to compel dissenting auto owners to carry the motto to advance the message of the motto?). The corporate claimants in the cable television cases are less personally affected by the must-carry rule, and the governmental interest in regulating the monopolistic nature of cable television is pretty strong. Similarly, the business claimant in *PruneYard* is less personally affected by the "must-host" rule, and the state interest in allowing various persons access to a space where people increasingly congregate (shopping centers, in many communities) is, if not compelling, at least a type of interest understood within First Amendment public forum doctrine.

Thus, misattribution is relevant to the harm from compelled speech, and might even qualify as one subcategory of such harm, but (a) even when misattribution is present, the state interest might be high enough to outweigh the claim of constitutional right (it would have to be quite high to outweigh the harm from misattribution, but we should leave open the possibility that it could be), and (b) importantly for analyzing cases such as *Cakeshop* (and *Barnette* and *Wooley*), a harm of constitutional magnitude might exist when the state compels speech, even absent likely misattribution. That is the case with Phillips. If we understand his custom wedding cake-making as expressive, and appreciate that this is so even though it is also business

78 *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 189–90 (1997); Turner Broad. Sys. v. FCC, 512 U.S. 622, 655–56 (1994).

79 447 U.S. 74, 85–88 (1980).

conduct, then even if we dismiss his argument that he is perceived as endorsing the weddings for which he bakes cakes, we might still see a harm of constitutional magnitude in the compulsion (again, before reaching the question of countervailing state interest and balancing).

But what kind of harm is it? If people such as Phillips are not being prevented from speaking their minds, and are not being compelled to endorse messages with which they disagree, we might do better to understand the harm as something other than a violation of the freedom of speech. The thread that runs through the compelled speech cases, and the cases about compelled subsidies for speech, is better understood as sounding in the right of freedom of expressive association. Assuming a custom-made wedding cake constitutes expression (and I have argued above that it often does), then the baker is at least associated with what the cake celebrates. Association is the weaker cousin of endorsement and attribution. It can exist even when we know the state has compelled the connection, and thus when no one reasonably thinks the baker supports the wedding—or that he does not support it. But the cake aids and abets the celebration of the wedding, and thus the baker is complicit in the celebration.[80] The state has forced his creative act to be associated with the celebration, which we may see as occurring (in small part, but in part nonetheless) in his name. All compelled speech claims may be understood as claims of expressive association (or, a right of expressive dis-association), and, in the vernacular, as "not in my name" claims of constitutional right. Thus, even though the harm in compelled speech cases may sometimes be understood in other ways—the use of the body in *Barnette* (via utterance); the use of personal property in *Wooley*; the use of business property in *Becerra*; the cooptation of another's speech license in *Hurley* (and a misattribution concern); certain types of speech content triggering rights of reply in *Tornillo* and *Pacific Gas*—what unites these cases is a broader, weaker, yet still present harm to the freedom of expressive association. That is: to the freedom to contribute one's expression to messages and ends of one's choosing; to avoid whatever taint one may feel exists when that freedom is used toward another's end (the state's or a private party's), via state action. This is also the common thread

80 There is an interesting connection between the expressive association theory I am discussing here and understandings of complicity. But when we are thinking about a grounding theory for compelled speech claims (and compelled subsidies of speech claims), we must limit our complicity understanding to the expressive setting. For example, someone providing folding chairs for weddings, who doesn't want to provide such chairs for a same-sex wedding, might still have a complicity-type argument—and that might sound in free exercise of religion terms (or would, at least as a prima facie claim, subject to weighing against state interest, if *Smith* were overruled)—but would not have an expressive association claim. For some thoughts about complicity claims in the First Amendment setting, see Greene, *supra* note 25, at 1483 n.33 (discussing Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897 (2015), and Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727 (2015)).

uniting the *Abood v. Detroit Board of Education*[81] line of cases involving compelled subsidies for the speech of another private actor. And it helps explain why there is a presumptive violation of the right of expressive association that is overridden when the state compels subsidies for its own speech (*Johanns v. Livestock Marketing Association*[82]): the state speaks for its citizens, and thus state speech is properly in the name of the citizens.[83]

(3) Consider this: A gay male couple walks into a bakery and asks for a custom-made wedding cake; there is no discussion of whether the couple wants any written message on the cake. The baker says no, because although he will provide various products to gay men and lesbians, his religious scruples against same-sex marriage prevent him from making the cake this couple wants. And this: A religious Christian walks into a bakery and asks for a Bible-shaped cake with biblical verses condemning homosexuality. The baker says no, because although he will bake a Bible-shaped cake, he doesn't want to be party to spreading the anti-gay message. The state deems the first baker to have discriminated on the basis of sexual orientation, but deems the second baker not to have discriminated on the basis of religion. Does this differential outcome reflect anti-religious bias on behalf of the state?

Justice Kennedy's majority opinion in *Cakeshop* deems the differential treatment described here part of the evidence revealing anti-religion animus on the part of the state.[84] His grounds for so concluding, however, although plausible, are not what ultimately interest me here, in part because in a similar future case, the state could rectify Kennedy's concerns. Justice Gorsuch (joined by Justice Alito) and Justice Kagan (joined by Justice Breyer) wrote concurrences that engaged directly in attempting to answer the question I posed in the above paragraph. Kagan echoed the argument advanced by Craig and Mullins, and by Colorado:[85] on the facts presented, Phillips rejected not a specific message, but the very idea of a custom-made cake for a same-sex wedding celebration. The state could reasonably deem this to be discrimination on the basis of sexual orientation, a protected class under state law. On the facts presented, the bakers in the other case (where William Jack tried three times to get his anti-gay-marriage message baked into a cake) rejected those specific messages, and did not engage in discrimination on the basis of religion (also a protected class under the state law). The state permits businesses to say no because they don't want to create a specific message;

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81 431 U.S. 209, 232–37 (1977). I refer to the part of *Abood* that by a 9-0 vote invalidated compulsory union fees in lieu of dues when supporting ideological union speech not connected to collective bargaining.

82 544 U.S. 550, 562–67 (2005).

83 For an elaboration of this "not in my name" idea, see Greene, *supra* note 25.

84 Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1730–31 (2018).

85 *Id.* at 1732–34 (Kagan, J., concurring).

that is not a protected class. On this logic, if Craig and Mullins had asked for a cake saying "God Blesses Same-Sex Marriage," Phillips could plausibly have rejected that because he didn't want to help spread that message, and not because of discrimination on the basis of sexual orientation. And if William Jack had walked into a bakery and asked not for a written message but for a cake for (say) his child's religious communion, and had been rejected because the baker has religious (or secular) scruples against communion, that would constitute discrimination on the basis of religion.

All of this seems pretty straightforward. Not that proving discriminatory purpose is easy; sometimes it is, sometimes it isn't, and different kinds of evidence make cases easier or harder. But one may plausibly conclude that Phillips' cake denial was based on sexual orientation and that the William Jack bakers' denials were based on message-dislike and not on religion. Justice Gorsuch's concurrence doesn't exactly challenge this. He doesn't say those two conclusions are implausible. What he says is that the relevant Colorado state actors *reasoned differently* in the two settings, differently in a way that betrays religious animus. Here is the relevant language from Gorsuch:

> [All of the] bakers knew their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually intended to refuse service because of a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.[86]

Gorsuch then argues:

> In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. . . . Yet, in Mr. Phillips's case, the Commission

86 *Id.* at 1735–36 (Gorsuch, J., concurring).

> dismissed this very same argument as resting on a "distinction without a difference." . . . It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class.[87]

Justice Kagan's response challenges Justice Gorsuch's claim that Phillips was refusing to sell a cake celebrating same-sex marriage. Rather, she argues, he was refusing to sell a custom-made wedding cake to a same-sex couple that he would have sold to an opposite-sex couple.[88] On the other hand, the William Jack bakers would not have sold the cake with the anti-same-sex marriage language to anyone. This is a powerful response, and perhaps adequate to beat Gorsuch at his game. But perhaps not. Because underlying Gorsuch's reasoning is an acceptance of Phillips' argument that a custom-made wedding cake for a same-sex marriage expresses celebration of that marriage *with or without specific celebrating words on the cake*. To some extent this smuggles in an answer to a key question in the compelled speech debate in this case. But let's take Phillips' side of the debate on that question (as I have done above): his custom wedding cake making is always expressive, and at least is always associated with the wedding celebration, even if it's not proper to say the cakes endorse the weddings in question or that we can attribute support for such weddings to Phillips. We might then agree with Gorsuch that Colorado has treated the two cases differently in terms of reasoning from knowledge to intent for Phillips but not for the William Jack bakers.

But, contrary to Justice Gorsuch's key next step in his argument, such differential reasoning does not necessarily reflect religious animus. It all depends on what we make of a state actor's taking a kind of judicial notice of these social facts: gay and lesbian people get same-sex married, straight people do not. (I'm sure we could find some examples, but they must be small in number and are not what the same-sex marriage debate is about.) Thus, denying a cake for a same-sex wedding celebration that one would bake for an opposite-sex wedding celebration is treating a gay or lesbian couple differently from how one would treat a straight couple. (Here, I have to acknowledge that sometimes a gay man marries a woman, and sometimes a lesbian marries a man, and sometimes a gay man marries a lesbian, but again usually opposite-sex couples are straight, sexually speaking.) The gap between knowing the cake is for two gay men and intending to treat the two gay men differently from how one would treat a straight man and a straight woman is vanishingly thin. Generally, the state does not have to prove a more

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87 *Id.* at 1736.

88 *Id.* at 1733 n.* (Kagan, J., concurring).

specific intent to prevail in an anti-discrimination law case (i.e., it does not have to show that the covered person or business had the intention to discriminate on the basis of sexual orientation, as a kind of meta-intention). In the William Jack cases, the bakers are on much more solid ground in saying they would not sell that message to anyone, religious or not, and even though they know Jack himself wants the message out of deep religious faith, there is a clear gap between that knowledge and any plausible conclusion of religious discriminatory intent.