Fordham Law Review

Volume 88 | Issue 6 Article 17

2020

The Cost of Free Speech: Resolving the Wedding Vendor Divide

Victoria Cappucci
Fordham University School of Law

THE COST OF FREE SPEECH: RESOLVING THE WEDDING VENDOR DIVIDE

*Victoria Cappucci**

As marriage equality becomes fully realized in the United States, business proprietors increasingly refuse to service same-sex weddings on religious grounds. However, at the same time, state laws protect same-sex couples from discrimination in places open to the public. Such competing values have resulted in a line of "wedding vendor" cases. As the cases continue to proliferate, this Note examines when, and to what extent, the otherwise equally important values of free expression and equality should trump one another.

This Note analyzes First Amendment compelled speech claims within the line of wedding vendor cases: specifically, whether wedding goods and services are covered by the Free Speech Clause and, if so, what level of scrutiny a court should employ to determine the constitutionality of an antidiscrimination law. This Note demonstrates that patchiness within the compelled speech doctrine and a lack of clear U.S. Supreme Court guidance after Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission *have resulted in a "split" approach to resolving these issues. This Note ultimately argues that if the vendors' goods and services rise to the level of sufficiently expressive conduct, then a court should apply intermediate scrutiny to an antidiscrimination law incidentally burdening that conduct. In the alternative, this Note provides a legislative solution to mitigate the tension between religious liberty and equality.*

* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2016, Fordham College at Rose Hill. I would like to thank Professor Martin S. Flaherty and the *Fordham Law Review* editors and staff for their wisdom and encouragement. I would also like to thank my loving family and friends for their unwavering support.

INTRODUCTION

> [F]ew persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.
>
> —Justice Anthony Kennedy[1]

1. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

Americans care equally about religious liberty and civic equality.[2] Yet, they are ambivalent as to when the former should trump the latter.[3] That indecision is mirrored in the law, further aggravating the social conflict.[4] For example, courts are hamstrung when tasked with balancing religious liberty and marriage equality. Is it possible to resolve these competing values or are they trapped in a zero-sum contest?

Barronnelle Stutzman, a wedding vendor, provides a timely illustration. Ms. Stutzman is an elderly woman who owns a small flower shop in Washington State.[5] She lived a quiet life until the Washington attorney general sued her in 2013 for discriminating against Robert Ingersoll and Curt Freed, a same-sex couple.[6] Ms. Stutzman declined to provide her floral arrangements for Mr. Ingersoll and Mr. Freed's wedding because of her religious beliefs.[7] At the same time, Mr. Freed and Mr. Ingersoll had a freestanding right to be free from discrimination under state law.[8] The conflict between the parties continues—Ms. Stutzman has appealed the case to the U.S. Supreme Court.[9]

The litigation concerning Ms. Stutzman, Mr. Freed, and Mr. Ingersoll is representative of a larger line of "wedding vendor cases."[10] Such conflicts are not going away[11] because the religious liberty arguments pose perplexing legal questions. Parties like Ms. Stutzman plead their cases on free speech rather than free exercise grounds, arguing their goods and services are

2. *See* JOHN CORVINO ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 1 (2017); *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RES. CTR. (Sept. 28, 2016), https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/ [https://perma.cc/6DEY-8JVF].

3. *See* CORVINO ET AL., *supra* note 2 ("Isn't everyone in favor of religious liberty, and everyone against discrimination? Well, yes and yes, sort of."); Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 58 (2018).

4. *See* Laycock, *supra* note 3, at 58–60.

5. *Broad Support for Floral Artist's Freedom as Case Heads Back to US Supreme Court*, ALLIANCE DEFENDING FREEDOM (Oct. 16, 2019), https://www.adflegal.org/detailspages/press-release-details/broad-support-for-floral-artist-s-freedom-as-case-heads-back-to-us-supreme-court [https://perma.cc/2BGD-G66K]; *see also* Alliance Defending Freedom, *Meet Barronelle Stutzman—ADF Case Story*, YOUTUBE (Nov. 9, 2018), https://www.youtube.com/watch?v=44jgKXnkJhU [https://perma.cc/5J3H-6AWA].

6. *See* Alliance Defending Freedom, *supra* note 5.

7. *See supra* note 5 and accompanying text.

8. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1212–13 (Wash. 2019), *petition for cert. filed* (U.S. Sept. 11, 2019) (No. 19-333).

9. Petition for Writ of Certiorari at 4, Arlene's Flowers, Inc. v. Washington, No. 19-333 (U.S. Sept. 11, 2019); *see* Barronelle Stutzman, Opinion, *Barronelle Stutzman: Your Religious Liberty Is in Danger if I Lose Mine in a Same-Sex Wedding Court Case*, FOX NEWS (Sept. 28, 2019), https://www.foxnews.com/opinion/barronelle-stutzman-religious-liberty-supreme-court [https://perma.cc/L6RN-62VK].

10. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (wedding cakes); Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) (wedding videography); 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019) (customized wedding websites); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019) (wedding invitations); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) (wedding venue); *see also* Laycock, *supra* note 3, at 58.

11. Laycock, *supra* note 3, at 53.

proxies for and expressions of their speech and should be protected as such.[12] The outcome of these cases therefore depends on whether and to what degree a reviewing court is willing to treat business activity as expressive speech.[13]

This Note analyzes two overarching issues integral to the line of wedding vendor cases. First, whether commercial goods and services provided by wedding vendors are indeed "expressive" under the First Amendment. Second, if so, what is the appropriate level of scrutiny to balance the equities on either side? The answers to these questions ultimately determine the winner between two competing values: antidiscrimination and religious liberty.

Part I provides the cultural and legal backdrop framing the speech issues this Note examines. It explains how Supreme Court precedent leveled First Amendment free exercise claims. Consequently, parties who conceptually seek to freely exercise their religion must couch their claims in terms of free speech under the compelled speech doctrine. Part II analyzes apposite cases that conflict on whether wedding services and goods are speech under the First Amendment and, if so, which level of scrutiny courts should apply to review the challenged law. Part III suggests that when wedding proprietors' goods and services satisfy the "inherently expressive test," courts should then apply intermediate scrutiny to determine whether the challenged law passes constitutional muster. Arguably, that two-part suggestion poses two hurdles for the paradigmatic religious vendor. Accordingly, Part III recommends a separate legislative solution to support the free exercise of religion.

I. THE RISE OF MARRIAGE EQUALITY AND THE FALL OF FREE EXERCISE: A FIRST AMENDMENT FREE SPEECH PUZZLE

The wedding vendor cases are the product of two phenomena—progress for LGBTQIA+[14] rights and concomitant restraint placed on the First Amendment right to freely exercise religion. Part I.A suggests that *Obergefell v. Hodges*[15] launched the uptick in wedding vendor litigation by aggravating cultural tensions between proponents of marriage equality and those with religious objections to same-sex marriage. Part I.B examines case law scrutinizing neutral laws of general applicability[16] that, as applied, burden First Amendment liberties such as religion and speech. In doing so,

12. *See infra* Part II.

13. *See infra* Part II.

14. This acronym stands for lesbian, gay, bisexual, transgender, queer or questioning, intersex, and ally or asexual. The plus sign indicates that the acronym is nonexhaustive. Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/9AX2-UVHF].

15. 135 S. Ct. 2584 (2015).

16. A neutral law of general applicability is one that "appears to be about a non-rights-implicating matter of public health, safety, and the like," rather than one suggesting that "the state is up to some nefarious purpose." Abner S. Greene, Barnette *and* Masterpiece Cakeshop*: Some Unanswered Questions*, 13 FIU L. REV. 667, 672 (2019). In other words, the law does not target a particular group, impose specific conduct, or aim to regulate a protected right like religion.

Part I.B points out that the wedding vendors discussed in Part II have every incentive to plead their cases as compelled speech claims, instead of free exercise challenges, because the former are given greater constitutional latitude than the latter. Part I.C couples the analyses in Parts I.A and I.B using *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[17] to (1) highlight the issues raised in the wedding vendor cases, (2) note how the Supreme Court ultimately dodged answering them, and (3) explain why courts are invoking different modes of analysis in the case's aftermath.

A. Marriage Equality and Religious Objectors: A Cultural and Legal Dispute

The Supreme Court established the right to same-sex marriage in 2015.[18] In *Obergefell*, the Court ruled that marriage is a fundamental right and applies equally to opposite-sex and same-sex couples.[19] Accordingly, *Obergefell* obligated all fifty states to legalize same-sex marriage. In practice, the case overturned same-sex marriage bans in thirteen states and vindicated same-sex marriages in the remaining thirty-seven.[20] Then President Barack Obama declared the ruling a "victory for America."[21] In short, *Obergefell* ushered in a new wave for LGBTQIA+ progress—marriage equality.

However, "[i]t's as true in culture as it is in physics: [f]or any action, there is an equal and opposite reaction."[22] After *Obergefell*, cultural objections to same-sex marriage increased, in part out of concern for safeguarding traditional beliefs concerning marriage and family life.[23] Those cultural objections have taken root in the growing line of wedding vendor cases.[24] Accordingly, *Obergefell* heightened the friction between two rights: same-sex marriage on one side and liberty to object vis-à-vis religious expression on the other.

Being a more or less well-oiled machine, the Supreme Court immediately harnessed that friction within the context of constitutional rights. In a pointed

17. 138 S. Ct. 1719 (2018).

18. *See Obergefell*, 135 S. Ct. at 2604–05.

19. *Id.* ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

20. Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR (June 26, 2015, 10:05 AM), https://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages [https://perma.cc/G26X-GBBZ].

21. *Id.*

22. Emma Green, *America Moved On from Its Gay-Rights Movement—and Left a Legal Mess Behind*, ATLANTIC (Aug. 17, 2019), https://www.theatlantic.com/politics/archive/2019/08/lgbtq-rights-america-arent-resolved/596287/ [https://perma.cc/V8AT-VD95].

23. *See* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 154 (2017) ("As the breadth of LGBT equality measures expanded, social and religious conservatives began to sound the alarm about what that expansion meant for those who morally object to same-sex sexual conduct and relationships."); *see also* Green, *supra* note 22 ("[P]ublic support for people refusing to serve LGBTQ people when it violates their religious beliefs has crept up steadily: [a]lmost a third of Americans . . . *say this should be legal*, compared with 16 percent . . . in 2014.").

24. *See supra* note 10 (collecting recent wedding vendor cases).

dissent, Chief Justice John Roberts highlighted the legal implications of the majority opinion in *Obergefell*.[25] Chief Justice Roberts discussed how the ruling would constrain First Amendment rights to free exercise and speech.[26] He also warned that "hard questions" would come to the Court after *Obergefell*, "when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage."[27] In sum, *Obergefell* set the stage for a reflection of growing cultural tensions in the law—marriage equality and the ability to realize that right versus religious liberty to object under the First Amendment.

B. Neutral Laws of General Applicability and the First Amendment: An Idiosyncratic Development

Although the legal tension raised in Part I.A implicates the First Amendment right to free exercise,[28] religious objectors in the wedding vendor cases instead rely on a free speech claim to bring their cases to court.[29] Considering a free exercise claim both intuitively and conceptually fits the bill, why the First Amendment quirk?

1. The Not so Free Right to Exercise Religion: *Employment Division v. Smith* and Religious Freedom Restoration Acts

In *Employment Division v. Smith*,[30] the Supreme Court leveled the First Amendment right to free exercise.[31] In that case, members of the Native American Church challenged Oregon's criminal ban on peyote, claiming the law interfered with their religious practices.[32] The Court held that the Oregon law, though it incidentally interfered with the right to free exercise, was nevertheless constitutional.[33] *Smith* set the precedent that when a law is

25. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2624–26 (2015) (Roberts, C.J., dissenting).

26. *Id.* at 2625 ("Today's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith . . . spelled out in the [First Amendment].").

27. *Id.*

28. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). As detailed, the First Amendment also contains anti-establishment, free press, and free association protections. However, this Note will only address the protections granted under the Free Exercise and Free Speech Clauses.

29. *See infra* Parts I.C, II (discussing the wedding vendors' compelled speech claims).

30. 494 U.S. 872 (1990).

31. Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103, 105 (Douglas Laycock et al. eds., 2008) (noting that *Smith* "leveled the 'free exercise' of religion by making it subordinate to any governmental objective so long as it was nominally rational and evenhanded").

32. *Smith*, 494 U.S. at 878.

33. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

neutral and of general applicability—a law that regulates something other than religion or a religious group yet, as applied, incidentally interferes with a religious practice—a reviewing court ought to apply rational basis scrutiny.[34] In practice, *Smith* makes a free exercise claim unavailable to aggrieved parties when a law incidentally burdens their religion because the standard of review applied to the law is deferential.[35] Pertinent to this Note, the antidiscrimination laws challenged by the wedding vendors in Part II are neutral laws of general applicability and, accordingly, *Smith*'s rational basis is the standard in play.

In *Smith*, the Court exercised judicial restraint because it applied a law-favoring, deferential level of scrutiny to give effect to the state's policy decision.[36] The legal process school articulates that different branches of government have different kinds of "institutional competence."[37] When a nascent public policy issue surfaces, the best-positioned branch to resolve the problem should, indeed, promulgate its solution.[38] In the context of "complex social problems," the legislative branch is best suited to enact a solution.[39] Legislators can engage with and scrutinize the problem with a holistic eye, whereas a judge can rule on the social issue only on a case-by-case basis.[40] When a legislator does aim to rectify a social ill, the procedure legitimizes the measure,[41] and a reviewing court thus may be inclined to defer to legislators to advance social policy.[42] That said, the *Smith* Court upheld Oregon's statute banning peyote because it was concerned about the state's legitimate interest in banning narcotics.[43]

---

34. When a law conflicts with a constitutionally protected right, a court will use various "levels of scrutiny" to determine whether the law is unconstitutional. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 564–68 (5th ed. 2015) (discussing the origin, significance, and application of the levels of scrutiny). The review boils down to two steps. First, the court determines the appropriate level of scrutiny, for example, more deferential or demanding, which depends on whether the law indirectly or directly burdens a constitutional right. *Id.* at 565. Second, the court applies that standard to "scrutinize" (1) the interest the law serves and (2) how the law, in practice, achieves that interest. *Id.* at 565–67. If the law satisfies the two prongs of the second step under the applicable standard, it is constitutional. *Id.* at 568.

35. *See supra* notes 33–34 and accompanying text. However, when a law targets a particular religion, religious group, or practice—in other words, the law is *not* facially neutral and of general applicability—the law is subject to strict scrutiny, a more demanding standard of review. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); *infra* note 48 and accompanying text (discussing strict scrutiny).

36. *See Smith*, 494 U.S. at 884–86. For discussion of rational basis as a less demanding level of scrutiny, see Greene, *supra* note 16, at 667 n.3.

37. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, lx (1994).

38. *See id.* at lx.

39. *See id.*

40. *Id.*

41. *Id.* at liii.

42. *Id.*

43. *See* Emp't Div. v. Smith, 494 U.S. 872, 884–86 (1990).

Nevertheless, *Smith* is a highly controversial opinion.[44] After the Supreme Court handed down *Smith*, Congress, by a unanimous House and 97-3 Senate vote, passed the Religious Freedom Restoration Act of 1993[45] (RFRA), which "prohibits the government from burdening religious exercise unless it meets a high level of legal scrutiny."[46] Organizations across the political spectrum championed the RFRA as reversing *Smith* to protect Americans of all faiths.[47] In practice, the RFRA "overturned" *Smith* by changing the scrutiny analysis from rational basis to strict scrutiny, the most exacting standard of review.[48] Accordingly, the RFRA appeared poised to make it substantially harder for the government to incidentally interfere with the right to free exercise across the board.

However, shortly after its enactment, the Supreme Court held that applying the RFRA to state action went beyond Congress's power and that it was unconstitutional as applied to states.[49] Therefore, while the RFRA's application to a federal action stands,[50] the Court left its holding in *Smith* intact at the state level.[51]

In response, twenty-one states have adopted their own religious freedom acts ("state RFRAs"),[52] which are essentially identical to the RFRA.[53] A variety of believers, such as Sikhs, Apache, Muslims, and Jews have successfully invoked the RFRA to overcome government-sanctioned barriers to their religious practices.[54] However, while state RFRAs gained traction in

---

44. *See* Dennis P. Hollinger, *Religious Freedom, Civil Rights, and Sexuality: A Christian Ethics Perspective*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 56, 58–59 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) ("[*Smith*] effectively asserts that a person can believe anything, but cannot necessarily live it out. In other words, religious beliefs should be protected, but not the actions stemming from those beliefs, for they are perceived to encroach on civil rights in a pluralistic society." (footnote omitted)); *see also* Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 121 (2018).

45. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.).

46. Travis Weber, *State Religious Freedom Restoration Acts (RFRAs): What Are They and Why Are They Needed?*, FAM. RES. COUNCIL, https://www.frc.org/issuebrief/state-religious-freedom-restoration-acts-rfras-what-are-they-and-why-are-they-needed [https://perma.cc/2DH6-QKM6] (last visited Apr. 12, 2020).

47. CORVINO ET AL., *supra* note 2, at 16.

48. When a court applies strict scrutiny, it is often fatal to the challenged law because burdens on constitutional rights must overcome a high bar. *See, e.g.*, *id.* at 38–39.

49. City of Boerne v. Flores, 521 U.S. 507, 534–36 (1997).

50. *See id.* at 536.

51. *Id.*

52. This figure is current as of 2016. *See generally* STATE RELIGIOUS FREEDOM RESTORATION ACTS: A COMPILATION OF ENACTED AND RECENTLY PROPOSED LEGISLATION (William H. Manz ed., 2016); *see also* Weber, *supra* note 46.

53. *Religious Freedom Restoration Act Information Central*, BECKET L., https://www.becketlaw.org/research-central/rfra-info-central/ [https://perma.cc/LKK4-WARV] (last visited Apr. 12, 2020) (noting that a successful RFRA claim must satisfy three requirements: (1) the complaining party has "a sincere belief that is being substantially burdened" and (2) the government does not have a compelling interest that interferes with the belief or, if it does, (3) the measure substantially burdening the religious belief is not the least restrictive means).

54. *See* CORVINO ET AL., *supra* note 2, at 17.

the 1990s–2000s, they have received severe negative press suggesting that they target same-sex marriage.[55] Following this federalism tug-of-war, a free exercise claim is "unavailable" to a burdened party in a state that has not enacted its own religious freedom act because a law incidentally burdening religion will receive deference. In popular media, religious freedom acts today stand as a cultural flashpoint.[56]

2. Free Speech and the Compelled Speech Doctrine: An Overview

With a federal free exercise claim a dead end, an aggrieved party has every incentive to couch their First Amendment claim within free speech, a "classic trump."[57] The touchstone of free speech is personal autonomy, which is a fundamental right.[58] This fundamental right is multifaceted.[59] The right to speak equally covers the right to refrain from speaking.[60] The right to refrain from speaking, in part, prevents the harms of unwanted expression, association, endorsement, and attribution to promote personal autonomy.[61]

The compelled speech doctrine, a subset of free speech jurisprudence, explicitly protects the right to refrain from speaking.[62] As reflected in the

55. *Id.* at 17–18 (discussing the strong opposition of national sports leagues, musicians, and business leaders to Indiana's proposed religious freedom act in 2015 as a product of political timing in the wake of marriage equality).

56. *Id.* at 19; *see In the News: What RFRA Is Really About*, ALLIANCE DEFENDING FREEDOM, https://adflegal.org/detailspages/faith-and-justice-details/what-rfra-is-really-about [https://perma.cc/7YFV-5E4T] (last visited Apr. 12, 2020).

57. Greene, *supra* note 44, at 36. However, not all words, creative forms, or modes of expression fall within "Free Speech Clause territory." Greene, *supra* note 16, at 677 (discussing whether expression is covered by the Free Speech Clause, i.e., whether it is sufficient to bring the First Amendment into play). For further discussion on the difference between speech, its corollaries, and what falls into the Free Speech Clause's ambit, see Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech*," 116 MICH. L. REV. 667, 686–93 (2018) ("'[S]peech' refers to a phenomenon in the world . . . . The phrase 'the freedom of speech' is a term of art, one that does not track people's [colloquial] understanding of the word 'speech.' . . . [I]t excludes some forms of 'speech' (insider trading, etc.) and it includes some nonspeech (music, abstract art, flag burning, etc.)."). *See also* Caroline Mala Corbin, *Speech or Conduct?: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 270 (2015) ("A very expansive category of [expressive conduct] also risks diluting potential protection for that category.").

58. STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 37 (2008) ("[F]ree speech is an inherent right which is rooted in human dignity and autonomy.").

59. *See id.* (explaining that free speech "give[s] rise to other fundamental rights, including personal security, privacy, *reputation*, citizenship, and equality" (emphasis added)).

60. Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1480 (2018).

61. *See id.* at 1494 ("Connecting or associating me with unwanted messages is a harm to my ability to *construct my self* in part through my expressive acts. It affects both how the world sees me and how I see myself." (emphasis added)).

62. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (invalidating a New Hampshire law making it a misdemeanor to obscure the state motto "Live Free or Die" on noncommercial license plates). "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.*; *see also, e.g.*, Nat'l. Inst. Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376–78 (2018) (holding that a state law requiring health clinics to post notices about low-cost and free abortions compels speech); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)

seminal case *West Virginia State Board of Education v. Barnette*,[63] the compelled speech doctrine aims to restrict the government from foisting unwanted messages, ideologies, beliefs, or statements onto people.[64] The compelled speech doctrine, in part, prevents the harm of connecting to, associating with, or otherwise attributing to a person a particular idea to which that person otherwise would not ascribe but for the threat of legal sanctions.[65] Thus, the compelled speech doctrine gives people the right to choose which messages are, and are not, "made in their name."[66]

Barnette and its progeny stand for the proposition that when the object of a law is to impose speech, the measure is subject to strict scrutiny.[67] The reason being that a facial mandate of speech effectively "alters the content of the speech."[68] When a law is on the books to function "as a content-based [speech] regulation,"[69] it is inherently pernicious[70] and a demanding level of scrutiny is thus warranted.

However, when the purpose of a law is to oblige something other than speech, yet as applied it incidentally burdens speech,[71] the standard of review is less clear.[72] Part of the confusion, and relevant to the wedding vendor cases, stems from the question of whether the contested good, service, or activity is "expressive" enough to bring a free speech analysis into play.[73] To sort out those queries in the wedding vendor cases detailed in Part II, courts analogize to one of two compelled speech cases: *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*[74] or *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[75]

(invalidating a state law mandating students to salute the flag and state the pledge of allegiance).

63. 319 U.S. 624 (1943).

64. *Id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

65. Greene, *supra* note 16, at 683.

66. *See* Greene, *supra* note 60, at 1478 (discussing the freedom of disassociation).

67. *See* Greene, *supra* note 16, at 672.

68. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988) (holding state-mandated sponsorship disclosures unconstitutional).

69. *Id.* (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding a state law requiring newspapers to provide political candidates a "right of reply" unconstitutional)).

70. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (discussing the crucial nature of free dissemination of ideas).

71. *See supra* note 57 and accompanying text (discussing whether activity is sufficiently expressive to warrant a free speech analysis); *see also infra* Part III.

72. As in the free exercise realm, the Supreme Court also distinguishes between laws that facially compel speech and those that are neutral and of general applicability. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980) (collecting cases). However, as this section explains, the Supreme Court's precedent guiding the level of scrutiny analysis for facially neutral laws, within the context of a free speech claim, is murky.

73. *See supra* note 57 and accompanying text.

74. 515 U.S. 557 (1995).

75. 547 U.S. 47 (2006).

In *Hurley*, the Supreme Court held a "peculiar"[76] application of a state antidiscrimination law[77] was unconstitutional under the compelled speech doctrine.[78] Here, St. Patrick's Day parade organizers refused to allow GLIB, an Irish, gay affinity group in Boston, to participate in the parade as a sponsor.[79] The Court reasoned that an application of the challenged law in this context would foist a message onto the parade that the council had "clearly decided to exclude."[80] Further, the Court stated that the law would require the "speakers to *modify the content* of their expression,"[81] violating "the general rule of speaker's autonomy."[82] The Court found the law unconstitutionally compelled the organizers' expression even though it was facially neutral.[83]

Although the antidiscrimination law burdened expression incidentally, the Court arguably treated the law as if it facially compelled expression.[84] *Hurley* does not explicitly engage in a level of scrutiny analysis.[85] Yet, the case proposes that when an application of an otherwise neutral law treats "speech itself to be the public accommodation,"[86] a more exacting standard of review like that deployed in *Barnette* should apply.[87]

The Court likely protected the organizers' speech so vigorously for two reasons. First, the Court was concerned about such a broad application[88] of a public accommodations law, which traditionally covers inns, theaters, and other similar places open to the public.[89] It discussed at length that a parade is of such an "expressive character"[90] that treating the parade itself like a

76. *Hurley*, 515 U.S. at 572.

77. The plaintiffs challenged a public accommodations law that prohibited discrimination on the basis of sexual orientation. *See* MASS. GEN. LAWS ch. 272, § 98 (2020). A public accommodations law is a state measure aiming to regulate places open to the public, like an inn, theater, or restaurant. *See* BALL, *supra* note 23, at 200. Thus, a public accommodations law is a neutral law of general applicability. *Id.*

78. *Hurley*, 515 U.S. at 581.

79. *Id.* at 561.

80. *Id.* at 574.

81. *Id.* at 578 (emphasis added).

82. *Id.*

83. *Id.* ("On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations . . . they will not be turned away.").

84. *See supra* notes 69–72 and accompanying text.

85. *See* Greene, *supra* note 16, at 675 ("*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.").

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

87. *See supra* note 67 and accompanying text.

88. *See* BALL, *supra* note 23, at 200 (noting that a parade is not a public accommodation in the traditional sense and so applying an antidiscrimination law in that context is arguably a reach).

89. *Id.* ("The controversy in *Hurley* initially arose because of the broad reach of the state's public accommodation law as interpreted by the state courts. It can be argued that private parades should not be included within the scope of civil rights statutes.").

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

public accommodation was improper.[91] The Court explained the organizers did not wish to exclude members of GLIB from *attending* the parade; rather, they wanted to exclude GLIB as a "parade unit carrying its own banner."[92] The distinction is subtle but important. The Court seemed to imply that if the organizers did not allow GLIB members to attend the parade *at all*, unlike other members of the Boston public, they would violate the antidiscrimination law.[93] However, the organizers could exclude GLIB from the live, expressive activity occurring within the parade itself, i.e., the parade proper.[94] The Court deemed the state's application of the antidiscrimination law in this context illegitimate because it regulated the parade proper instead of regulating the public's access to the parade.[95] Second, the Court engaged in a brief, yet telling, discussion describing a parade as a quintessential mode of expression protected by the First Amendment.[96] The Court compared a parade to a "protest march"[97] and its organizers to an archetypical political activist "who takes to the street corner to express his views."[98] Compelling the organizers to express GLIB's message would be equally unconstitutional.[99] Therefore, the parade organizers won the case, despite the antidiscrimination law being facially valid.[100]

In *FAIR*,[101] the Supreme Court held that the Solomon Amendment—a federal law that required law schools to host military recruiters on campus—did not compel the schools' speech.[102] Congress passed the Solomon Amendment in direct response to schools restricting the military's access to on-campus recruiting because of the schools' disagreement with the military's official "Don't Ask, Don't Tell" policy.[103] Although the Solomon Amendment did not facially regulate the schools' speech, the case presented a strong argument that it did as applied because the schools would have refused hosting the recruiters but for the superseding law. A "stepped-up"[104]

91. *Id.* at 572 ("[T]he Massachusetts law has been applied in a peculiar way."); *see* Greene, *supra* note 16, at 677 n.47 (discussing more strategic and intuitive ways Massachusetts could have held the organizers liable).

92. *Hurley*, 515 U.S. at 572.

93. *See id.* at 578.

94. *Id.* ("When the law is 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.").

95. *Id.* at 573.

96. *See id.* at 577–79.

97. *Id.* at 577.

98. *Id.* at 579.

99. *Id.*; *see* BALL, *supra* note 23, at 200 ("[The Court] determined that it was reasonable to believe that members of the public would perceive GLIB's participation in the parade as resulting from the council's *support for*, *or approval of*, the gay group's message." (emphasis added)).

100. *Hurley*, 515 U.S. at 579.

101. *FAIR*, 547 U.S. 47 (2006).

102. *Id.* at 51. The Solomon Amendment required schools to "offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access" in order to receive federal funding. *Id.* at 55.

103. *Id.* at 55.

104. *See* Greene, *supra* note 16, at 673.

review could have been applied in light of *Hurley*. However, the Court rejected that notion.

Instead, the Court reasoned that, as a threshold matter, the schools' "expressive" activity did not rise to the level of constitutional speech or expression.[105] The Court ruled that hosting military recruiters does not compel literal "speech."[106] Although school officials communicated with the recruiters via email, the Court refused to treat administrative emails as First Amendment protected speech.[107] Further, the Court stated the government can limit "speech" when it facilitates conduct that the government has the authority to regulate.[108] The Court found that the incidental compelled speech elements of the case in *FAIR* were a "far cry" from *Barnette* and its progeny.[109]

Next, the Court addressed *Hurley*'s implications when a law incidentally imposes on expression. The Court acknowledged that sufficiently expressive conduct could warrant First Amendment protection under the compelled speech doctrine.[110] At that point in its opinion, the Court could have deferred to precedent, *Hurley*, and found that the Solomon Amendment compelled the schools to convey an unwanted message.

Instead, the Court declined to treat the schools' activity as expressive at all.[111] The Court borrowed from the "symbolic speech" lines of cases to test whether the schools' implicated activity was expressive enough to bring free speech in play.[112] Relying on the seminal cases *United States v. O'Brien*[113] and *Texas v. Johnson*,[114] which involved draft-card and flag burning respectively, the Court defined quintessential "symbolic speech."[115] The Court ruled that when conduct is "inherently expressive,"[116] meaning the conduct conveys an "overwhelmingly apparent"[117] message, it is entitled to First Amendment protections.[118]

---

105. *FAIR*, 547 U.S. at 65.

106. *Id.*

107. *Id.* at 62 (reasoning that protecting such emails under the First Amendment would trivialize the freedom protected in *Barnette* and its progeny).

108. *Id.* "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.*

109. *Id.*

110. *Id.* at 63 ("Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message.").

111. *Id.* at 65.

112. *See id.* ("Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection.").

113. 391 U.S. 367 (1968).

114. 491 U.S. 397 (1989).

115. *FAIR*, 547 U.S. at 66.

116. *Id.*

117. *Id.* (quoting *Johnson*, 491 U.S. at 406). In determining whether a message is "overwhelmingly apparent," a court should consider "the context in which it occurred." *Johnson*, 491 U.S. at 407.

118. *FAIR*, 547 U.S. at 66.

Applying those principles to the facts in *FAIR*, the Court concluded that the Solomon Amendment did not violate the First Amendment because the schools' conduct was not sufficiently expressive.[119] The Court reasoned that schools' decision to host the military or not did not send the clear message that the schools agreed or disagreed with the "Don't Ask, Don't Tell" policy.[120] The Court rejected the schools' argument that, because the schools intended to express a message through their conduct, the Court should protect that conduct as First Amendment expression.[121] The Court reasoned that an intent to express does not warrant free speech protection; rather, a clear message must follow the intention, which the schools lacked.[122] The Court resolved the case on the threshold question of whether the activity was speech or otherwise expressive conduct but did not engage in a level of scrutiny analysis.[123]

The compelled speech doctrine has two implications when a law incidentally burdens speech, expression, or expressive conduct. First, the case law provides a guidepost to determine when a form of expression is sufficient to fall within the First Amendment's coverage.[124] Second, the case law suggests two tiers of scrutiny may be applicable when a law incidentally interferes with expressive conduct—*Hurley* may suggest an exacting standard of review,[125] whereas *FAIR* may suggest something more deferential,[126] like the intermediate scrutiny employed in *O'Brien* and *Johnson*. This Note suggests that the distinction between the cases is the nature of the governments' interest. In *FAIR*, the Solomon Amendment was linked to the government's ability to raise a military, an arguably strong

---

119. *Id.*

120. *Id.*

> An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

Id.

121. *Id.* at 66–67.

122. *Id.* (noting that *O'Brien* states that an intent to express a message does not itself necessitate a free speech analysis); *see* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct *intends* thereby to express an idea." (emphasis added)).

123. If the schools' activity did satisfy the inherently expressive test of expressive conduct, the Court would have applied intermediate scrutiny under *O'Brien. O'Brien*, 391 U.S. at 377. Intermediate scrutiny is a less demanding standard than strict scrutiny. *See* Greene, *supra* note 16, at 672. The Court applies a more deferential standard because the government has a "freer hand" in restricting "expressive conduct"; it involves speech and nonspeech elements, the latter of which are not explicitly protected under the First Amendment. Texas v. Johnson, 491 U.S. 397, 406 (1989).

124. *Compare FAIR*, 547 U.S. at 65–67 (applying expressive conduct case law), *with* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 577–79 (1995) (discussing pure, classic expression).

125. *See supra* note 86 and accompanying text.

126. *See Johnson*, 491 U.S. at 407. "[W]e have limited the applicability of *O'Brien*'s *relatively lenient standard* to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'" *Id.* (emphasis added) (quoting *O'Brien*, 391 U.S. at 377).

interest.[127] However in *Hurley*, the broad reach of the public accommodations law colored, and thus weakened, the government's interest in preventing discrimination.[128]

The issues of when conduct is sufficiently expressive to fall into the First Amendment's coverage and the applicable standard of review foreground the highly contested line of wedding vendor cases.

C. Masterpiece Cakeshop—*Free Exercise Is Born Again Under Compelled Speech*

As religious objection met the realization of marriage equality, the line of compelled speech claims from wedding vendors began to proliferate.[129] Those cases proposed several perplexing First Amendment questions. First, are wedding goods and services expressive? Are they *so* expressive as to invoke the First Amendment? If the wedding vendor's various activities are sufficiently expressive under the First Amendment, would holding the vendors in violation of antidiscrimination laws when they refuse service for same-sex weddings compel their speech? If yes, which standard of review would apply to the antidiscrimination laws, given that they are facially neutral public accommodations laws? When the Supreme Court granted certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[130] the Court seemed primed to answer these questions.[131]

The facts in *Masterpiece Cakeshop* were representative of the broader line of wedding vendor cases.[132] Here, Jack Phillips owned and operated Masterpiece Cakeshop, a bakery in Colorado.[133] Charlie Craig and Dave Mullins, a gay couple, visited the bakery to place an order for their wedding cake.[134] Mr. Phillips refused the request on religious grounds.[135] Subsequently, Mr. Craig and Mr. Mullins filed a complaint with the Colorado Civil Rights Commission, the reviewing body tasked to review charges of antidiscrimination, against Mr. Phillips and his bakery.[136] Mr. Craig and Mr.

127. *See supra* note 102 (discussing the Solomon Amendment).

128. *See supra* notes 88–91 (discussing the broad, "peculiar" application of the antidiscrimination law to the parade).

129. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (involving a wedding photographer who refused services for a lesbian couple's wedding); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) (involving wedding venue owners who refused to host a lesbian couple's wedding); Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017) (involving a bakery owner who refused to take a wedding cake request from a lesbian couple), *review denied*, 363 Or. 224 (2018), *vacated*, 139 S. Ct. 2713 (2019).

130. 138 S. Ct. 1719 (2018).

131. *See id.* at 1723. ("The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment . . . .").

132. *See supra* note 129 and accompanying text.

133. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

134. *Id.*

135. *Id.*

136. *Id.* at 1723.

Mullins claimed Mr. Phillips violated the Colorado Anti-discrimination Act (CADA), which prohibits discrimination in places of public accommodation and lists "sexual orientation" as a protected category.[137] After a lengthy appeals process, the case made its way to the Supreme Court. The issue of whether a wedding cake is sufficiently expressive to trigger a compelled speech analysis took up the most "briefing space"[138] on appeal.[139]

Though the issues outlined above were ripe for review, the Court "found itself an exit ramp."[140] Instead of deciding the case on the merits, the Court held the record made by the Colorado Civil Rights Commission was infected with religious animus in violation of the Free Exercise Clause, reversing the case for Mr. Phillips.[141] The Court took issue with three instances of religious hostility—two sets of statements made by members of the Colorado Civil Rights Commission[142] and the commission's different treatment of Mr. Phillips as compared to other bakers, who the Commission held could refuse to bake cakes on conscience grounds.[143] The Court concluded that "cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance."[144] In short, *Masterpiece Cakeshop* stands for the proposition that

137. *Id.* at 1725.

138. *See* Greene, *supra* note 16, at 667.

139. Mr. Phillips argued the Free Speech Clause should protect his cake production because the cakes were a form of artistic expression that reflected his personal celebration of a marriage. Brief for Petitioners at 12–14, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). Mr. Phillips concluded that the CADA mandated the content of his expression and, relying on *Riley*, would fail under strict scrutiny. *Id.* at 19; *see supra* notes 68–69 and accompanying text (discussing *Riley*). In contrast, the government argued intermediate scrutiny should apply, at most, because the CADA regulates Mr. Phillips's discriminatory conduct, posing an incidental burden on his "expression." Brief for Respondent Colorado Civil Rights Commission at 17–18, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

140. Greene, *supra* note 44, at 122.

141. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 ("When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.").

142. The first two involved specific statements made by members of the commission. The Court described the first: "Phillips can believe 'what he wants to believe' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* at 1729. In the second instance the commissioner stated: "[R]eligion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . we can list hundreds of situations . . . . [I]t is one of the most despicable pieces of rhetoric . . . ." *Id.*

143. *Id.* at 1730. The Court noted that in prior cases, the Colorado Civil Rights Commission held that bakers did not violate the CADA when they refused to create cakes that conveyed disapproval of same-sex marriage, a conscience-based objection inversely analogous to that of Mr. Phillips. *Id*. However, in those cases, the Colorado Civil Rights Commission reasoned the bakers did not discriminate against the customer because the bakers would still provide other goods, like birthday cakes and cookies, to the customer. *Id.* Yet, the Court found the Colorado Civil Rights Commission did not apply that favorable rationale to Mr. Phillips. *Id.* Instead, the commission applied a new rule—Mr. Phillips's refusal was an act of discrimination and not an exercise of religious objection because the requested cake would carry Mr. Craig and Mr. Mullins's message. *Id.*

144. *Id.* at 1732.

a reviewing body, there, the Colorado Civil Rights Commission, must impartially decide cases implicating religious liberty.[145]

Notably, however, Justice Clarence Thomas went on to analyze the free speech aspect of the case in his dissenting opinion.[146] First, Justice Thomas ruled Mr. Phillips' cake making was sufficiently expressive conduct to bring the First Amendment into play because wedding cakes are inherently symbolic.[147] Then, Justice Thomas analogized the case to *Hurley* by comparing the symbolism of wedding cakes to that of parades, finding a demanding level of scrutiny applies to the CADA.[148] Justice Thomas did not decide whether the CADA would satisfy strict scrutiny.[149] However, Justice Thomas advised that an individual's adherence to a minority view is a strong reason to give the individual even greater protection.[150] He specifically noted that Mr. Phillips was in the minority post-*Obergefell*.[151] Justice Thomas's analysis is important because lower courts have relied on it to resolve wedding vendors' free speech claims by treating the vendors' goods or services as speech and then fatally apply strict scrutiny to the antidiscrimination law.[152]

Nevertheless, *Masterpiece Cakeshop* could have helped resolve the tension between religious liberty and marriage equality but frankly did very little to offer clear, precedential guidance.[153] As detailed in Part II, the wedding vendor cases continue to arise. Without Supreme Court guidance,[154] the lower courts are employing different modes of analysis and are coming to opposite conclusions despite analogous facts. In light of the

145. *Id.*

146. *Id*. at 1742–47 (Thomas, J., concurring).

147. *Id.* at 1742–43.

148. *Id.* at 1744.

149. *Id.* at 1746.

150. Justice Thomas's reasoning echoes that of the "famous footnote" four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See* CHEMERINSKY, *supra* note 34, at 565 (noting that footnote four advises courts to apply varying levels of review depending on the constitutional assertion). "[A] 'more searching judicial inquiry' is appropriate when it is . . . a law that discriminates against a 'discrete and insular minority.'" *Id.* (quoting *Carolene Prods.*, 304 U.S. at 152 n.4).

151. *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring) (noting that courts should not deploy the First Amendment to criticize views and should apply the First Amendment to protect different views); *see supra* Part I.A (discussing *Obergefell* and its cultural implications).

152. *See infra* Part II.A.

153. *See* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 750 (2019) ("*Masterpiece Cakeshop* is a narrow decision. The case turns on rather unique facts and does little to resolve conflicts between our anti-discrimination laws, on the one hand, and our commitment to religious freedom, on the other. But the narrowness of the case's holding is deceptive. In fact, *Masterpiece Cakeshop* reflects very broad cultural and political trends that drive those conflicts and shape their resolution . . . .").

154. *But see supra* note 146 (discussing Justice Thomas's concurring opinion). Part II suggests some courts are taking up Justice Thomas's analysis by first treating goods and services as speech and then applying strict scrutiny to the antidiscrimination law.

petition for certiorari docketed for *State v. Arlene's Flowers Inc.*,[155] the "dodge"[156] made in *Masterpiece Cakeshop* "won't work for long."[157]

II. TWO COMPETING PARADIGMS: PURE SPEECH AND STRICT SCRUTINY VERSUS SUFFICIENTLY UNEXPRESSIVE BUSINESS ACTIVITY

Masterpiece Cakeshop highlights two crucial but unresolved First Amendment issues in the line of wedding vendor cases. First, is business activity that arguably has expressive elements sufficiently expressive to fall within the Free Speech Clause? Second, if so, how should a presiding court review a facially neutral antidiscrimination law that, as applied, incidentally burdens vendors' expression? The first question is a threshold inquiry and a crucial analytical step for a presiding court. The second question guides courts in balancing the equities of antidiscrimination and religious liberty vis-à-vis expression. Part II.A provides two cases where the courts find vendors' activities to be speech and then apply strict scrutiny. In those cases, the antidiscrimination laws did not pass constitutional muster. Part II.B provides a third case, representative of a split from those cases discussed in Part II.A, where the court more closely scrutinized the vendor's activity and did not find it to be "speech" at all. Accordingly, the court did not reach the second balancing portion of the inquiry.

A. Compelled "Pure" Speech and Strict Scrutiny

This section examines two cases decided after *Masterpiece Cakeshop*, which represent one approach courts take to resolve a compelled speech claim in the wedding vendor cases. First, the courts have treated the vendors' services as pure speech, not expressive conduct or unexpressive business activity. Then, tracking Justice Thomas's concurring opinion in *Masterpiece Cakeshop*, they have applied strict scrutiny to the challenged antidiscrimination law.[158] This two-step analysis has yielded one paradigmatic side in the wedding vendor divide.[159]

1. *Telescope Media Group v. Lucero*

In *Telescope Media Group v. Lucero*,[160] the Eighth Circuit held that wedding video producers have a right to provide their services to opposite-sex couples only.[161] Here, Angel and Carl Larsen, who own Telescope Media Group ("Telescope"), a for-profit Minnesota corporation, sought to

155. 441 P.3d 1203 (Wash. 2019), *petition for cert. filed* (U.S. Sept. 11, 2019) (No. 19-333).

156. Greene, *supra* note 44, at 122.

157. *Id.*

158. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1742–46 (2018) (Thomas, J., concurring); *supra* note 146 (discussing Justice Thomas's expressive speech analysis).

159. *See supra* Part II.B (examining the second paradigm).

160. 936 F.3d 740 (8th Cir. 2019).

161. *Id.* at 754.

enjoin the government from enforcing pertinent provisions of the Minnesota Human Rights Act[162] (MHRA) against them. The Larsens challenged the MHRA provisions that prohibit discrimination on the basis of sexual orientation[163] because they wanted to begin producing wedding videos but for opposite-sex couples only.[164] As devout Christians, the Larsens characterized their faith as requiring them to carry God's message in all they do[165] and they intended to promote Christian ideals[166] in the wake of marriage equality.[167] The Larsens conceded the videos would initially be inspired by their clients' ideas, but their own creativity and editorial decisions produced the final message.[168] In short, the Larsens argued the MHRA laws would compel them to speak favorably for same-sex weddings when they could not in good conscience.[169]

Although the MHRA is a facially neutral public accommodations law, the court found that it was unconstitutional as applied to the Larsens in two steps. First, the court ruled the Larsens' wedding videos were pure speech[170] covered by the First Amendment.[171] To support that ruling, the court reasoned that the wedding videos would be sufficiently expressive to bring the First Amendment into play because the Larsens wished to shape public discourse about marriage through the videos.[172] The fact that the Larsens' videos were not "feature films"[173] was inconsequential.[174] The court rejected the government's argument that the videos would be commercial conduct

162. MINN. STAT. §§ 363A.11(1)(a)(1), 363A.17 (2020).

163. *Id.* Section 363A.11 of the MHRA prohibits discrimination on the basis of sexual orientation in places open to the public: "It is an unfair discriminatory practice: (1) to deny any person the full and equal enjoyment of [goods and services] . . . of a place of public accommodation because of . . . sexual orientation." *Id.* § 363A.11. Section 363A.17 of the MHRA equally prohibits sexual orientation discrimination in business settings: "It is an unfair discriminatory practice for a person engaged in a trade or business . . . to intentionally refuse to do business with . . . [a person because of their] sexual orientation." *Id.* § 363A.17.

164. *Telescope Media Grp.*, 936 F.3d at 750.

165. Appellants' Opening Brief at 8, *Telescope Media Grp.*, 936 F.3d 740 (No. 17-3352).

166. *Id.* at 9.

167. *See id.* at 8 ("The Larsens witnessed the cultural redefinition of marriage with concern. They have seen the debate and want to take part in that public dialogue. The Larsens want to tell stories through their films of marriages between one man and one woman that magnify God's design and purpose for marriage.").

168. *Id.* at 24.

169. *Id.*

170. Pure speech is distinct from expressive conduct or symbolic speech. *See supra* notes 122–24 and accompanying text (noting that the First Amendment protects literal speech more vigorously than expressive conduct or speech).

171. *Telescope Media Grp.*, 936 F.3d at 750 ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First [Amendment]." (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952))).

172. *Id.* at 751.

173. *Id.*

174. In contrast, the dissenting opinion took issue with the majority's treatment of the wedding videos as First Amendment protected films, rather than services offered to the public. *Id.* at 776 (Kelly, J., dissenting). In support, the dissent distinguished the Larsens' services from those of filmmakers whose films are conventionally thought of as First Amendment protected speech. *Id.* at 775 ("[The Larsens'] counsel compared them to 'Steven Spielberg' . . . . But Steven Spielberg is not a public accommodation . . . .").

falling outside the First Amendment's coverage.[175] Accordingly, in rejecting the government's argument and ruling for the Larsens, the court reasoned that if the Minnesota government applied the MHRA to Telescope to require the company to provide film services equally to same-sex and opposite-sex couples, then it would be compelling the Larsens' speech.[176]

Next, the court reviewed the MHRA under strict scrutiny, creating an exception for the Larsens' business activity.[177] The court reasoned that "[l]aws that compel speech" warrant strict scrutiny, meaning the MHRA would have to serve a compelling state interest and be narrowly tailored to that interest.[178] The court relied heavily on *Hurley* to apply strict scrutiny,[179] instead of another level of review, as suggested in *FAIR*.[180] The court noted, "the [Supreme] Court drew the line exactly where the Larsens ask us to here: to prevent the government from requiring their speech to serve as a public accommodation for others."[181] In appealing to *Hurley*, the court found the MHRA "regulate[d] speech itself," going "too far."[182] Therefore, it concluded that the MHRA did not pass constitutional muster because "as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently,"[183] and so the MHRA must yield to the First

175. *Id.* at 752 (majority opinion) ("To be sure, producing a video requires several actions that, individually, might be mere conduct: positioning a camera, setting up microphones, and clicking and dragging files on a computer screen. But what matters most . . . is that these activities come together to produce . . . 'medi[a] for the communication of ideas.'" (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952))). *Compare id.*, *with* Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M 2013) (ruling that wedding photographs were products effectuated by an "ordinary public accommodation" and constituted business conduct falling outside the First Amendment's coverage).

176. *Telescope Media Grp.*, 936 F.3d at 752 (noting that the MHRA "compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage").

177. *Id.* at 759–60.

178. *Id.* at 754 (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)). Though the court principally relied on *Hurley* for that position, the court also cited to the line of cases in which the courts applied strict scrutiny to challenged laws that facially compelled or regulated speech. *See id.* at 753 (discussing content-based speech regulations). Note, however, the Supreme Court draws lines between the facial and incidental compulsion of speech, the former triggering strict scrutiny and the latter not necessarily so. *See supra* note 72 and accompanying text.

179. *Telescope Media Grp.*, 936 F.3d at 754. In contrast, the dissenting opinion argued that intermediate scrutiny should apply to the case for two reasons. *Id.* at 776 (Kelly, J., dissenting). First, the MHRA does not facially regulate speech. *Id.* Second, the MHRA, as applied, interferes with expressive conduct, which is subject to intermediate scrutiny under *O'Brien*: "[A] regulation of conduct does not become a regulation of content . . . . Laws with merely incidental effects on expression are subject to intermediate scrutiny." *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968)).

180. *Id.* at 758 (majority opinion) ("The facts of the case, as pleaded by the Larsens, are much closer to *Hurley* than to . . . *F.A.I.R.*").

181. *Id.* at 755.

182. *Id.* at 758. The court seems to suggest that, under *Hurley*, when a facially neutral law, as applied, compels speech ex post, it is on par with a law that regulates speech ex ante. *See supra* note 178 and accompanying text. This Note addresses the blending of compelled speech and regulation of speech in the section below.

183. *Telescope Media Grp.*, 936 F.3d at 755.

Amendment. The Eighth Circuit thus held the MHRA was unconstitutional as applied to the Larsens because it could not survive strict scrutiny.[184]

2. *Brush & Nib Studio, LC v. City of Phoenix*

In *Brush & Nib, LC v. City of Phoenix*,[185] the Arizona Supreme Court, relying in part on the analytical framework set forth in *Telescope Media Group*, held that wedding invitation designers have a right to provide their customized services to opposite-sex couples only.[186] Here, plaintiffs Breanna Koski and Joanna Duka, who own Brush & Nib Studio, LC ("Brush & Nib"), sought to enjoin the Phoenix government from enforcing provisions of the Phoenix City Code (PCC),[187] which would prevent Brush & Nib from establishing a same-sex couple "refusal policy."[188] Ms. Duka and Ms. Koski challenged the PCC provisions that prohibited discrimination on the basis of sexual orientation in public accommodations.[189] They argued that, as Christian artists, they "must honor God"[190] using their talents. Accordingly, Ms. Duka and Ms. Koski would only accept requests that they believed conveyed messages in line with their religious convictions.[191] Ms. Duka and Ms. Koski also argued that the customized invitations expressed *their views*; while they initially collaborate with a client to form the basis of the invitation, the final product relays their own vision.[192] Accordingly, Ms. Duka and Ms. Koski claimed that applying the PCC to their business would compel their speech by requiring them to alter their message that marriage is between a man and a woman.[193]

The court held that the relevant portions of the PCC unconstitutionally compelled Ms. Duka and Ms. Koski's speech in two steps.[194] First, the court found the Free Speech Clause sufficiently covered Ms. Duka and Ms. Koski's customized invitations as "pure speech."[195] The court reasoned that state and federal precedent have treated "written and spoken words" and "original artwork" as speech.[196] Because the custom wedding invitations "contain[ed]

184. *Id.* at 758.
185. 448 P.3d 890 (Ariz. 2019).
186. *Id.* at 909–10.
187. PHX., ARIZ., CITY CODE § 18-4(B)(2)–(3) (2019).
188. *Brush & Nib Studio*, 448 P.3d at 899. Ms. Duka and Ms. Koski sought to (1) refuse requests for same-sex weddings and (2) publish a statement of their policy to that effect. *Id.* However, only the first request is pertinent to this Note because it involves an analysis of whether Ms. Duka and Ms. Koski's goods are protected speech. Published statements online presumably are speech.
189. PHX., ARIZ., CITY CODE § 18-4(B)(2)–(3) ("No person shall, directly or indirectly, refuse, withhold from, or deny to any person . . . accommodations . . . because of . . . sexual orientation . . . .").
190. Appellants Opening Brief at 1, *Brush & Nib Studio*, 448 P.3d 890 (No. 1 CA-CV 16-0602), 2017 WL 1113222, at *1.
191. *Id.* at *6.
192. *Id.* at *7–8.
193. *Id.* at *9.
194. *Brush & Nib Studio*, 448 P.3d at 916.
195. *Id.* at 908.
196. *Id.* at 905–07 (collecting cases).

[Ms. Duka and Ms. Koski's] hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork," the invitations themselves were "pure speech."[197] Further, the court rejected the government's argument that the invitations were analogous to the unexpressive conduct in *FAIR*[198] because of Ms. Duka and Ms. Koski's intimate connection with and artistic control over the invitations.[199] The court concluded the first part of its analysis by stating that the invitations were neither flat logistical blocks of text nor fungible goods but, rather, were "designed to express a celebratory message about each wedding."[200] Accordingly, the court ruled the invitations functioned as Ms. Duka and Ms. Koski's speech[201] and that to apply the PCC to their business would effectively compel their speech.

In the next portion of the opinion, the court invoked *Telescope Media Group* to apply strict scrutiny to the PCC.[202] The court relied on *Telescope Media Group*'s application of *Hurley*,[203] ruling the PCC "must"[204] satisfy strict scrutiny because the city's application of the law "declare[d] Plaintiffs'

197. *Id.* at 908.

198. In rejecting the analogy to *FAIR*, the court stated:

> This case bears no resemblance to *FAIR*. Here, Plaintiffs' custom wedding invitations, and the creation of those invitations, constitute pure speech . . . . In contrast, *FAIR* was not "intimately connected" with the empty interview rooms on their campuses, nor was it compelled to create emails containing words, phrases, and artwork celebrating the military's presence on campus.

Id. at 909. However, the dissent aligned with the government's argument and, notably, the line of reasoning adopted in *Elane Photography, LLC v. Willock*, 309 P.3d 53, 65 (N.M. 2013). *See Brush & Nib Studio*, 448 P.3d at 932 (Bales, J., dissenting) ("[W]edding invitations may be expressive, [but] the operation of a business catering to the public is not.").

199. *Brush & Nib Studio*, 448 P.3d at 908.

200. *Id.*

201. *Id.* In contrast, the dissenting opinion seems to suggest that the invitations could not be Ms. Duka and Ms. Koski's "pure speech" because any celebratory message is effectively intercepted and conveyed by the engaged couple when they send the invitations: "[T]he expression of a wedding invitation, as 'perceived by spectators as part of the whole' is that of the marrying couple." *Id.* at 933 (Bales, J., dissenting) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 577 (1995)).

202. However, the opinion takes *Telescope Media Group*'s scrutiny analysis one step further. The court conflates the compelled speech doctrine with speech regulation case law:

> [W]e must first decide what level of scrutiny applies to the [PCC]. This requires us to examine whether the [PCC] is a *content-neutral* or *content-based* regulation of speech . . . . When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law.

Id. at 912–13 (majority opinion) (emphasis added). Instead of appealing to *Hurley*'s suggestion that a facially neutral law should be subject to strict scrutiny and moving on, the court leveled the compelled speech doctrine by treating laws that facially compel speech and incidentally burden speech as one in the same. However, the Supreme Court has instructed otherwise. *See supra* Part II.B. The dissenting opinion highlighted this flaw, taking issue with the majority's treatment of the PCC as a measure that functions to regulate speech. The opinion notes that the PCC facially regulates discrimination, not speech, an important distinction to determine the appropriate level of scrutiny. *Brush & Nib Studio*, 448 P.3d at 934 (Bales, J., dissenting).

203. *See Brush & Nib Studio*, 448 P.3d at 913–14 (discussing *Hurley* as "instructive" and the scrutiny analysis in *Telescope Media Group* as within the same line of reasoning).

204. *Id.* at 914.

'speech itself to be the public accommodation.'"[205] The court concluded that the measure failed under strict scrutiny because it neither served a compelling interest nor was it narrowly tailored.[206] Accordingly, the court held for Ms. Duka and Ms. Koski, excepting their business activity from the PCC.

Telescope Media Group and *Brush & Nib Studio* stand for two main propositions. First, the cases set the precedent that wedding vendors' goods and services are speech, though the opinions execute their speech analyses differently. Second, the cases rule that strict scrutiny is the appropriate standard of review for determining whether antidiscrimination laws, though facially neutral towards speech, violate the First Amendment. Together, the cases represent one side of the division in the wedding vendor line of cases.

B. Neither Speech nor Conduct as Speech: State v. Arlene's Flowers, Inc.

Standing on the other side of the wedding vendor dividing line is *State v. Arlene's Flowers, Inc.*[207] In contrast with *Telescope Media Group* and *Brush & Nib Studio*, in *Arlene's Flowers*, the Washington State Supreme Court decided Ms. Stutzman's compelled speech claim at the threshold. The court held the sale of floral wedding arrangements was not speech.[208] Ms. Stutzman owns Arlene's Flowers, a small flower shop in Washington, where she designs floral arrangements for customers with three other floral designers.[209] She is an active member of her church and sincerely believes "marriage can exist only between one man and one woman."[210] When Robert Ingersoll, a Washington resident and repeat customer of Arlene's Flowers, spoke with Ms. Stutzman at her store to request floral arrangements for his wedding to Curt Freed, Ms. Stutzman denied Mr. Ingersoll's request on religious grounds.[211] Mr. Ingersoll left the interaction feeling dejected.[212] Ms. Stutzman then implemented an unofficial policy of rejecting requests for same-sex weddings.[213] After the Washington State attorney general learned about that interaction, the state government commenced suit against Ms.

---

205. *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572–73 (1995)).

206. Regarding a compelling interest, the court cites to *Telescope Media Group v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019), stating that even if the government argues that the PCC serves the compelling interest of eradicating discrimination, it is not sufficiently compelling when it captures speech. *Brush & Nib Studio*, 448 P.3d at 915. Regarding the law being narrowly tailored, the court reasoned that "because the purpose of the [PCC] is to regulate conduct, not speech, regulating Plaintiffs' speech is not narrowly tailored to accomplish this goal." *Id.*

207. 441 P.3d 1203 (Wash. 2019), *petition for cert. filed* (U.S. Sept. 11, 2019) (No. 19-333).

208. *Id.* at 1225.

209. *Id.* at 1211.

210. *Id.*

211. *Id*. Notably, Mr. Ingersoll and Ms. Stutzman did not discuss logistics of the wedding, such as the type of flowers or floral arrangements he sought or whether the store would deliver the arrangements to the wedding location. Accordingly, Ms. Stutzman's blanket rejection occurred before she knew how personally involved she would be in the event.

212. *Id.*

213. *Id.* at 1212.

Stutzman pursuant to the Washington Law Against Discrimination[214] (WLAD), a public accommodations law. Ms. Stutzman asserted that applying the antidiscrimination statute to her would "impermissibly"[215] compel her to speak in favor of same-sex marriage, in violation of her First Amendment right to free speech.[216] She contended her floral arrangements are speech under the First Amendment because the arrangements express her unique artistic ability.[217]

However, Ms. Stutzman did not convince the court of her argument for two reasons. First, the court ruled that neither the creation of floral arrangements nor the floral arrangements themselves are literal speech covered by the First Amendment.[218] Then, the court invited the possibility that the floral arrangements could be expressive "conduct as speech"[219] covered by the First Amendment. However, the court ruled that Ms. Stutzman's conduct did not satisfy the requisite conduct-as-speech standard.[220]

To determine whether Ms. Stutzman's conduct was speech (i.e., expressive conduct), the court applied the "inherently expressive test," invoked in *FAIR*.[221] The court stated two conditions must be satisfied for conduct to be sufficiently expressive to implicate the First Amendment: "[(1)] [a]n *intent* to convey a particularized message was present, and [(2)] in the surrounding circumstances the likelihood was great that the message would be understood by *those who viewed it*."[222] The court explained that to pass the second prong,[223] strong intention and personal involvement are not enough; rather, the conduct must be "clearly expressive, in and of itself, without further explanation."[224]

In determining whether Ms. Stutzman satisfied the second prong, the court appealed to *FAIR* and distinguished the presented facts from those in *Hurley*.[225] As in *FAIR*,[226] the court reasoned one of several messages could

214. WASH. REV. CODE § 49.60.215 (2020) ("It shall be an unfair practice for any person . . . to commit an act which directly or indirectly results in any distinction, restriction, or discrimination . . . or the refusing or withholding from any person the . . . patronage . . . in any place of public [accommodation] . . . [on the basis of] sexual orientation . . . .").

215. *Arlene's Flowers*, 441 P.3d at 1224.

216. *Id.*

217. *Id.* at 1224–25.

218. *Id.* at 1225 ("We agree [with the State] that the regulated activity at issue in this case—Stutzman's sale of wedding floral arrangements—is not 'speech' in a literal sense and is thus properly characterized as conduct.").

219. *Id.* (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

220. *Id.*

221. *Id.*; *see supra* notes 112–18 and accompanying text (discussing the inherently expressive test).

222. *Arlene's Flowers*, 441 P.3d at 1225 (alteration in original) (emphasis added) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

223. Although the opinion does not explicitly say so, Ms. Stutzman arguably satisfied the first prong of the test. *Id.*

224. *Id.* at 1227 (collecting cases).

225. *Id.* at 1226.

226. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006).

be implicated by Ms. Stutzman's refusal policy.[227] Thus, a reasonable observer could not conclude that Ms. Stutzman rejected Mr. Ingersoll's business because it implicated her views against same-sex marriage. The court then addressed *Hurley*'s implications for expressive conduct: "*Hurley* is therefore unavailing to Stutzman: her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws."[228] It did not find Ms. Stutzman's business conduct on par with the inherent expressiveness of a parade.[229] The court concluded that Ms. Stutzman's conduct was not inherently expressive and failed to implicate the Free Speech Clause.[230] Therefore, Ms. Stutzman was ultimately held liable under the WLAD.[231]

In response, Ms. Stutzman has filed a petition for certiorari to the Supreme Court.[232] Ms. Stutzman urges the Court to rule that her floral arrangements are covered under the First Amendment.[233] In support, she continues to argue that her floral arrangements constitute "artistic expression," invoking *Hurley* to support the proposition that the First Amendment grants protections beyond the written or spoken word.[234] In the alternative, Ms. Stutzman contends that the Washington Supreme Court erred in its application of the "inherently expressive" test because the floral arrangements are expressive in and of themselves; the court should not have focused on whether her refusal sent a particular message.[235]

Ms. Stutzman concludes that the WLAD unconstitutionally compels her speech because the law fails under strict scrutiny. Directly citing to *Telescope Media Group*, she argues strict scrutiny applies to the WLAD because it functions to regulate her speech content.[236] Also relying on *Telescope Media Group*, she insists the WLAD fails under strict scrutiny

---

227. *Arlene's Flowers*, 441 P.3d at 1226. ("[A]n outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.").

228. *Id.*

229. *Id.* at 1226–28.

230. *Id.* at 1228. Because the Free Speech Clause was not implicated, the court did not need to engage in a scrutiny analysis.

231. *Id.* at 1237. Ms. Stutzman also asserted state and federal constitutional violations of her free exercise and associational rights. However, the Washington Supreme Court also dismissed those claims:

> [T]he WLAD may be enforced against Stutzman because it does not infringe any constitutional protection. As applied in this case, the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious free exercise under either the [Washington or U.S. Constitutions] because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations.

Id.

232. Petition for Writ of Certiorari, *supra* note 9.

233. *Id.* at 7.

234. *Id.* at 27–30.

235. *Id.* at 29 ("[Stutzman's] claim is that her custom wedding art is itself expressive, not simply that the act of declining to create it is expressive.").

236. *Id.* at 32–33.

because the law neither serves a compelling interest nor is narrowly tailored.[237]

The arguments Ms. Stutzman briefed in her petition for certiorari track the analysis set forth in *Telescope Media Group* and *Brush & Nib Studio*. The Washington government continues to argue her business conduct should not be protected by the First Amendment.[238] Thus, the First Amendment issues of (1) whether wedding goods and services are "speech" and (2) if so, which level of scrutiny should apply to a neutral law incidentally burdening that speech are once again posed at the Supreme Court level.

III. ADJUDICATORY AND LEGISLATIVE SOLUTIONS TO THE WEDDING VENDOR CASES

As the speech and scrutiny questions implicated by the wedding vendor cases remain ripe for review, this Part suggests that a presiding court should resolve the disparities in wedding vendor case precedent as follows. Part III.A.1 suggests that a presiding court should apply the "inherently expressive test"[239] employed in *Arlene's Flowers* to resolve the threshold issue of whether a given vendor's service is covered by the First Amendment. Part III.A.2 suggests that if a wedding vendor's business activity passes the inherently expressive test, the court should apply intermediate scrutiny to the challenged law.

However, because Parts III.A.1 and III.A.2 pose two hurdles to a party aggrieved on religious grounds, Part III.B suggests a legislative alternative for those who feel religiously burdened when providing services for same-sex weddings. It first suggests that the wedding vendors' religious interests are best vindicated through free exercise claims. However, with *Smith* still applicable at the state level,[240] aggrieved parties could turn to their state legislators to propose a religious freedom act[241] or small business exception to public accommodations laws.

---

237. *Id.* at 33–34 ("Relying on this Court's free-speech cases like *Hurley*, the Eighth Circuit held that 'regulating speech because it is [allegedly] discriminatory or offensive is not a compelling state interest, however hurtful the speech may be.' . . . Besides the absence of a compelling interest, the State also fails strict scrutiny because it can pursue its goals by narrower means without infringing Barronelle's First Amendment rights." (alteration in original) (quoting Telescope Media Grp. v. Lucero, 936 F.3d 740, 755 (8th Cir. 2019))).

238. Without explicitly conceding that the floral arrangements are covered under the First Amendment, the government has replied that Ms. Stutzman's flowers might be expressive but the WLAD does not regulate that expression. State's Brief in Opposition at 20, Arlene's Flowers, Inc. v. Washington, No. 19-333 (U.S. Sept. 12, 2019). Rather, the government argues, the WLAD regulates Ms. Stutzman's act of refusing service for a same-sex wedding, which seems to suggest the government is dodging the speech question to focus the Supreme Court on what the WLAD regulates in practice. *See id.* The government contends the WLAD does not direct Ms. Stutzman as to how she should create her floral arrangements but, rather, regulates her discriminatory business decisions. *Id.*

239. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019), *petition for cert. filed* (U.S. Sept. 11, 2019) (No. 19-333).

240. *See supra* Part I.B.1 (explaining that *Smith* renders a federal First Amendment free exercise claim a dead end).

241. *See supra* Part I.B.1 (discussing federal and state RFRAs).

A. A Two-Part Conciliatory Adjudicative Framework: The Inherently Expressive Test and Intermediate Scrutiny

This section proposes that courts should adopt the inherently expressive test promulgated under *Arlene's Flowers*[242] to resolve the threshold speech inquiry in the wedding vendor cases. If the test is satisfied, this section then proposes courts should apply intermediate scrutiny to the challenged antidiscrimination law.

1. The Inherently Expressive Test Is the Appropriate Standard to Determine Whether Wedding Goods and Services Are Speech

The inherently expressive test aims to sort out whether a vendor's business activity is sufficiently expressive to warrant First Amendment protection.[243] Expressive conduct will warrant constitutional protection if two requirements are met: (1) there was intent to convey a particularized message and (2) in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it.[244]

In analyzing the second prong of the inherently expressive test, a reviewing court should consider two primary factors. The first factor, as elaborated *Arlene's Flowers*,[245] is whether a reasonable person would perceive a particular message when a vendor provides or refuses service or, rather, one of many. That factor has direct support under Supreme Court precedent.[246] A second factor is whether a reasonable person receiving or viewing the vendor's good or service would understand the message to be that of the vendor or, rather, the married couple.[247] This factor is arguably more dispositive than the first. The compelled speech cases prevent, in part, the harms of unwanted association, attribution, and endorsement,[248] so linking the message back to the vendor is crucial if it is to be treated as his or her speech. Thus, if a reasonable person perceives a particular message as flowing from the vendor, then the vendor's good or service is arguably expressive conduct under the Free Speech Clause.

In practice, the inherently expressive test will serve as a tool to separate meritorious speech claims from those that would dilute the meaning of

242. *Arlene's Flowers*, 441 P.3d at 1225–28.

243. *See supra* note 122 and accompanying text.

244. *Arlene's Flowers*, 441 P.3d at 1225 (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)). It is likely that the wedding vendors would satisfy the first requirement because they tend to plead their cases with conviction and particularity. However, satisfaction of the second prong would hinge on whether the final product is susceptible to varied interpretations (with *FAIR*'s line of reasoning as a guidepost) or is so expressive that the end user needs no additional explanation (with *Hurley*'s line of reasoning as a guidepost).

245. *Id.* at 1226.

246. *See* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (quoting Texas v. Johnson, 491 U.S. 397, 406 (1989)).

247. For support of this proposition, see *supra* note 201 (discussing attribution in the wedding vendor cases). *See also* CORVINO ET AL., *supra* note 2, at 89.

248. *See* Greene, *supra* note 60, at 1494.

speech.[249] The test is appropriate to determine the threshold "speech" issue in the wedding vendor cases from both fairness and precedential perspectives. This section will detail three specific reasons to that effect.

First, the test acknowledges the goods and services for what they are—products of the wedding vendors' commercial conduct that also have expressive elements.[250] Treating the goods and services as "pure speech," as in *Telescope Media Group* and *Brush & Nib Studio*, or as completely unexpressive business conduct[251] is too far afield from that reality. These cases are perplexing because the vendors are in creative lines of business.[252] From a fairness perspective, the test balances two competing interests—the wedding vendors' potential speech liberties and the government's interest in regulating commercial conduct. The test is reasonable because it reflects both the interests at stake and the reality that the vendors' activities are not clear-cut.

Second, the inherently expressive test is a pragmatic standard that courts can apply. While the courts will decide on a case-by-case basis which activities rise to the level of expressive conduct as speech, a clear standard will create more consistency among similarly situated vendors. The test provides a clear guidepost, which removes the temptation to outright rule,[253] or to weave together various speech cases[254] to conclude that products are "pure speech." If courts were to uniformly apply the inherently expressive test, parties could better regulate their conduct ex ante instead of speculating how a given court might rule after the fact.

Third, the test provides an analytical check to determine which speech claims should properly pass through the courts. *O'Brien* instructs that not all conduct is sufficiently expressive to bring the First Amendment into play—speech is not synonymous with "intent" or "creativity" because speech must send a message.[255] Ultimately, reliance on *Arlene's Flowers* is more

249. *See* Corbin, *supra* note 57, at 370 (noting that to treat anything colloquially understood as speech or expression would dilute the right to freedom of speech).

250. *See supra* notes 218–19; *see also* Greene, *supra* note 16, at 678 ("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. 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.").

251. *See, e.g.*, *supra* notes 198, 218, 238 and accompanying text (discussing that the Phoenix, New Mexico, and Washington State governments have frequently argued the wedding vendors' activities are nonexpressive business conduct).

252. *See* Greene, *supra* note at 16, at 678.

253. *See supra* note 171.

254. *See supra* note 196.

255. *See supra* note 122.

faithful to free speech case law[256] and the right itself[257] than reliance on *Telescope Media Group* and *Brush & Nib Studio*. The former scrutinizes the message received, whereas the latter two draw artificial speech lines.[258] The test centers on an inquiry into whether the withheld service evokes a particular message flowing from the proprietor, not whether the service has blanket expressiveness or creativity. The Supreme Court has drawn "speech" lines in the past, illustrated by *O'Brien*, ultimately, to preserve the right altogether.[259]

2. If Wedding Goods or Services Pass the Inherently Expressive Test, the Courts Should Apply Intermediate Scrutiny

If a good or service were to pass the inherently expressive test, intermediate scrutiny should apply[260] for three reasons. First, the test aims to sort out which conduct is sufficiently imbued with speech elements to be covered by the First Amendment. When speech and nonspeech elements fuse into the same course of conduct, *O'Brien* and its progeny are guiding precedent.[261]

Second, an alternative to intermediate scrutiny could be strict scrutiny, as suggested by *Telescope Media Group* and *Brush & Nib Studio*, which primarily invoked *Hurley*.[262] However, appealing to *O'Brien* and its progeny better aligns with the structure of the wedding vendor cases given their blending of speech and nonspeech elements.[263] Further, the analogy to *Hurley* does not wash. *Hurley* involved a "peculiar" application of an antidiscrimination law.[264] In the wedding vendor cases, public

256. As discussed in *FAIR*, the inherently expressive test concerns whether a reasonable person observing the activity would think the activity is expressing a particular message when taken in context, not whether the activity has expressive elements. Freedom of speech and expression protects a message actually conveyed, not an intention to convey a message. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66–67 (2006); *see supra* note 122.

257. *See supra* Part I.B (discussing the right to free speech).

258. *See supra* notes 253–54 and accompanying text.

259. *See* Corbin, *supra* note 57, at 270.

260. For expert support on this suggestion, see *id.* at 281 (observing that in the line of wedding vendor cases, the antidiscrimination laws compel "expressive conduct, and therefore would be subject to the intermediate scrutiny of *O'Brien* rather than the strict scrutiny of *Barnette* and *Wooley*"). *See also* Greene, *supra* note 16, at 676 ("If an iteration of *Cakeshop* returns to the Court, the Court similarly should apply *O'Brien* as true intermediate scrutiny.").

261. *See supra* note 124.

262. *See supra* note 85.

263. *See supra* note 123; *see also* Corbin, *supra* note 57, at 281. Additionally, the Eighth Circuit's and the Arizona Supreme Court's treatments of the antidiscrimination laws as content-based regulations to later invoke cases applying strict scrutiny is arguably askew. *See supra* notes 178, 202, 203. Within the compelled speech cases, the Supreme Court distinguishes between facial and incidental speech burdens whereas those courts have blurred that distinction to apply a demanding standard of review. *See supra* note 72. Thus, their strict scrutiny discussions are less persuasive from a precedential perspective.

264. *See supra* note 88.

accommodations laws are conventional—their activities are unlike parades because they are registered businesses open to the public.[265]

Third, given the liberties at stake, intermediate scrutiny more adequately weighs the interests on both sides instead of closing the case from the outset.[266] An antidiscrimination law will pass intermediate scrutiny if (1) it furthers "an important or substantial governmental interest," (2) is enacted "unrelated to the suppression of free expression," and (3) the "incidental restriction [it poses] on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[267] The three-pronged intermediate scrutiny test is designed to leave room for a duly enacted law that advances a clear social purpose. The very language of the test accounts for important governmental purposes, recognizes that the purpose may come into conflict with another important right, and allows a judge to resolve the competing interests on a case-by-case basis. Strict scrutiny, on the other hand, is often fatal in practice to a challenged law.[268] Intermediate scrutiny aligns with the idea that when a complex social issue is implicated, though the Court has the power to analyze a constitutional question, it should consider the legislator's choice to advance a particular policy.[269] In the wedding vendor cases, that means a policy choice favoring marriage equality over the ability to speak freely in opposition. Thus, applying intermediate scrutiny would strike a balance between rational basis and strict scrutiny in weighing the merits on either side of the wedding vendor dispute.

B. A Legislative Alternative: State RFRAs and Small Business Carve-Outs

With the approach laid out above, pleading a free speech claim may seem like a high bar to clear for the paradigmatic religious vendor because the vendor must first satisfy the inherently expressive test and then defeat the government against the backdrop of intermediate scrutiny. This section offers an alternative legislative solution, which could bear fruit more readily than bringing a free speech claim to court, especially given that the line of wedding vendor cases might not be an exact fit for vindication of free speech to begin with.[270]

---

265. Even if proprietors enter the wedding business as a mode of expressing their beliefs, as discussed above, an intention to express a message or to engage in creative activities is not enough to bring activity into the free speech ambit.

266. Strict scrutiny is conventionally rights-favoring and, as indicated in *Hurley*, is a frequent dead end for the government. Rational basis is conventionally government-leaning and, as indicated in *Smith*, is a frequent dead end for the individual.

267. United States v. O'Brien, 391 U.S. 367, 377 (1968). Arguably, an antidiscrimination law will satisfy the first prong because eradicating discrimination is a compelling interest and unrelated to regulating speech. Conceivably, an antidiscrimination law could fail under the third prong.

268. *See supra* note 48.

269. *See supra* note 39 and accompanying text.

270. *See* Greene, *supra* note 44, at 121 ("Phillips refused to bake the cake for Craig and Mullins not because he was an artist but because he was a Christian. A freedom of religion frame would have set the issues in the terms in which the litigants actually experienced them . . . .").

Affected individuals could rally their municipal or state legislators to propose a religious freedom act or an exemption to a public accommodations law. This alternative is a modest[271] and democratic one. The public votes for legislators, whereas judges are frequently appointed by executive officials.[272] Yet, judges effectively make policy decisions about religious liberty and antidiscrimination with the stroke of a pen when deciding whether to hold for a wedding vendor.[273] If a community is unsatisfied with their elected officials' policy choices, it can vote them out of office. Judges, on the other hand, are often tenured.[274] When inhabitants of a judicial district are dissatisfied with the outcome of a highly contested wedding vendor case, they do not have the same recourse as they would if the decision were made through legislative channels.

State and local legislators are best suited to make policy decisions about difficult social issues as a function of their law-making role.[275] When a complex social issue implicates constitutional rights on one side and the advancement of antidiscrimination measures on the other, legislators' institutional competence positions them to discern the appropriate balance.[276] A legislator has an eye to resolve such complex issues holistically, whereas a judge must decide ad hoc.[277] Further, constituents generally have more faith in local officials than in federal officials to adequately represent them.[278] Presumably, then, if constituents lobbied local officials to enact a form of legislation, subsequent legislative inaction could reflect a policy choice to bolster marriage equality in light of contemporary values of LGBTQIA+ progress.[279] Conversely, if a state or municipality were to enact

271. The Court could overrule *Smith* to change the standard of review for a free exercise claim. However, this section assumes the validity of *Smith* and suggests a local legislative solution as a more modest step than overruling Supreme Court precedent.

272. Federal judges are nominated by the president and confirmed by the Senate and hold office for life. State judges may be elected, but they may also be appointed for a term of years or for life. *Comparing Federal & State Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts [https://perma.cc/4SEP-WZ4N] (last visited Apr. 12, 2020).

273. *See supra* note 20 and accompanying text (noting that *Obergefell* overturned a swath of state laws on the ground).

274. *See supra* note 272.

275. *See* Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 368 (2009) (noting that a legislator "prioritize[s] constituent preferences" for "salient" policies). Further, elected officials have readily responded to infringements on religious liberty upon the judicial branch handing down a controversial ruling. *See supra* Part I.A.1 (discussing the RFRA as Congress's response to the Court's ruling in *Smith*).

276. *See supra* notes 37–42.

277. *See supra* notes 37–42.

278. PEW RESEARCH CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 18 (2018), https://www.people-press.org/wp-content/uploads/sites/4/2018/04/4-26-2018-Democracy-release-1.pdf [https://perma.cc/CMQ5-NBQN].

279. *See State Legislative Policymaking in an Age of Political Polarization*, NAT'L CONF. ST. LEGISLATURES (Feb. 2018), http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Partisanship_030818.pdf [https://perma.cc/QS9J-VQJJ] ("Policymaking is the process of making laws. . . . The converse of policymaking is gridlock: the inability of

specific legislation for religious liberty, an aggrieved party would be vindicated through a more intuitive[280] and democratically legitimate channel.

A legislative solution on the state level could take the form of a religious freedom act that simply mirrors the RFRA.[281] Though they may have fallen out of favor due to the political climate in 2015,[282] legislators should not treat them with hostility. The RFRA has protected the rights of inmates, government employees, and churchgoers.[283] When placed in context with its purpose, and out of politics, a state RFRA can similarly do much good in promoting the free exercise of all religions.

Within the religious vendor context, a state RFRA would thus require vendors to show that a public accommodations law substantially burdens their religion.[284] If the vendor adequately pleaded that burden, the reviewing court would apply strict scrutiny to the challenged law.[285] Though strict scrutiny might seem draconian for antidiscrimination laws,[286] a religious freedom act modeled after the RFRA spreads the burden between the religious vendor and the government: the vendor must show that the challenged law infringed on a central religious practice or belief.[287] Arguably, that pleading requirement would cut through trivial religious exercise claims.

If a state RFRA is too much of an overhaul, a small business carve-out within a public accommodations statute could suffice. That exemption would be narrow, mainly covering proprietors who are personally involved in daily business production.[288] The "exemption" could be capped for businesses of no more than roughly five employees.[289] That number aims to cover vendors who would have no choice but to engage with the particular project to which he or she objects.

An ex ante legislative solution to the wedding vendor divide provides a procedurally legitimate resolution of conflicting values of religious liberty and marriage equality. Instead of an ex post case-by-case judicial solution, a legislative one would reflect a democratic policy choice to either give religious liberty greater latitude *or not*, as marriage equality is fully realized.

---

legislators . . . to reach an agreement or pass a law . . . ."); *see also* Eskridge & Frickey, *supra* note 37, at lxxix (discussing government inaction as a rejection of a particular policy end).

280. *See supra* note 270 and accompanying text.

281. *See supra* notes 45–46 and accompanying text (describing the RFRA).

282. *See supra* note 55.

283. *See supra* note 54.

284. *See supra* note 53 and accompanying text (discussing the requirements for a successful RFRA claim).

285. *See supra* note 46 and accompanying text.

286. *See supra* note 266.

287. *See supra* note 53.

288. For further discussion of small business exceptions and attempts to legislate them, see Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 648–655 (2015).

289. This section suggests five employees, considering the wedding vendors discussed in this Note generally run their businesses as one- or two-person operations. The exemption would not cover a larger business because, arguably, an objector could pass the project along to another employee.

CONCLUSION

The wedding vendor cases reflect broader social values that deeply affect Americans—religion and equality. Given how divisive those values are when pitted against one another, clear judicial guidance on how to balance the First Amendment issues at stake is necessary. In the meantime, an alternative, up-front legislative resolution might be prudent.