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Masterpiece Cakeshop: A Formula for Legislative Accommodations of Religion

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MASTERPIECE CAKESHOP: A FORMULA FOR LEGISLATIVE ACCOMMODATIONS OF RELIGION

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I. INTRODUCTION

With the Supreme Court's recognition of same-sex marriage in *Obergefell v. Hodges*[1] in 2015, wedding vendors with religious objections were placed in a predicament—violate their religious beliefs by participating in same-sex weddings or face potential legal consequences

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1. 135 S. Ct. 2584, 2605 (2015).

for refusing. Several wedding vendors including bakers,[2] florists,[3] photographers,[4] venue owners,[5] and others[6] were taken to court when they refused to serve same-sex weddings on religious grounds.[7] The vendors

2. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); *See also* Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051, 1051 (Or. Ct. App. 2017), *rev'd.*, 139 S. Ct. 2713 (2019) (vacating and remanding to the Court of Appeals of Oregon to be considered in light of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*); Steven Mayer, *The state wants its cake in second major legal action against Tastries Bakery*, BAKERSFIELD CALIFORNIAN (Oct. 25, 2018), https://www.bakersfield.com/news/the-state-wants-its-cake-in-second-major-legal-action/article_019e7900-d8a1-11e8-a082-772b8114b114.html [https://perma.cc/R8ZN-5TVF] (providing timeline of events for the legal action against a Bakersfield, California bakery).

3. *See* State v. Arlene's Flowers, Inc., 193 Wash.2d 469 (Wash. 2019) (reaffirming previous decision after remand from United States Supreme Court), *petition for cert. filed*, (U.S. Sept. 11, 2019) (No. 19-333); Arlene's Flowers, Inc. v. Wash., 138 S. Ct. 2671 (2018) (vacating and remanding to the Supreme Court of Washington to be considered in light of *Masterpiece Cakeshop, Ltd. v Colo. Civil Rights Comm'n*).

4. *See* Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090 (D. Minn. 2017) (granting same-sex couple's motion to dismiss), *aff'd in part, rev'd in part*, Telescope Media Grp. v. Lucero, 936 F.3d, 740, 762 (8th Cir. 2019) (reversing the district court's dismissal and allowing the videographer's case to proceed as a hybrid claim of freedom of speech and free exercise of religion); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (holding that freedom of speech and free exercise of religion did not allow photography business to discriminate against same-sex couple), *cert. denied*, Elane Photography, LLC v. Willock, 572 U.S. 1046 (2014); Amy Lynn Photography Studio, LLC v. City of Madison, NO. 2017-CV-000555 (Wis. Cir. Ct. Aug. 23, 2017) (granting declaratory judgment that photography studio does not fall within the definition of a place of public accommodation in the State of Wisconsin's and the City of Madison's anti-discrimination statutes).

5. *See* Knapp v. City of Coeur D'Alene, 172 F. Supp. 3d 1118 (D. Idaho 2016) (dismissing, in part, for lack of standing on wedding venue owner's pre-enforcement complaint that anti-discrimination statute violates Free Exercise Clause); Matter of Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016) (affirming State Division of Human Rights determination that venue owners had violated the Human Rights Law); Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Iowa Dist. Ct. Apr. 3, 2014) (dismissing gallery owners' verified petition that complaint by same-sex couple chilled their freedom of speech to express their religious beliefs against same-sex marriage on their venue's website); *See also* Wathen v. Walder Vacuflo, Inc., No. 2011-SP-2488, No. 2011-SP-2489 (Ill. Human Rights Comm'n. Mar. 22, 2016) (requiring bed and breakfast owner to facilitate same-sex marriage or civil union ceremonies when opposite-sex ceremonies were allowed); Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (N.J. Div. of Civil Rights Oct. 22, 2012) (finding Methodist Association violated anti-discrimination statute when it denied a same-sex couple use of its property for their civil union ceremony); Ros Krasny, *Lesbian brides win settlement from Vermont inn*, REUTERS (Aug. 24, 2012), https://www.reuters.com/article/uk-usa-lesbians-vermont/lesbian-brides-win-settlement-from-vermont-inn-idUSLNE87N00I20120824?feedType=RSS [https://perma.cc/ZK3W-HRBG] (Inn owners settled with same-sex couple and Vermont Human Rights Commission and had to pay $30,000 in damages).

6. *See* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 895–96, 926 (Ariz. 2019) (holding that the City of Phoenix's ordinance as applied to the plaintiff's creation of custom wedding invitations violated article 2, section 6 of the Arizona Constitution and Arizona's Free Exercise of Religion Act).

7. *See* Alexandra McPhee, *Religious Liberty and the "Wedding Vendor" Cases*, CTR. FOR RELIGIOUS LIBERTY AT FAM. RES. COUNCIL (Nov. 2018), https://downloads.frc.org/EF/EF16L23.pdf [https://perma.cc/39XD-4RYS].

claimed protection by the Free Exercise Clause.[8] The first of these cases to make it to the United States Supreme Court was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* where a Colorado baker refused to make a custom wedding cake for a same-sex wedding.[9] The baker's free exercise claims had been denied by both the Colorado Civil Rights Commission and the Colorado Court of Appeals, and religious wedding vendors across the country prayed the Supreme Court would accommodate their religious beliefs.[10]

On the other side of the issue were same-sex couples who had just had their right to marry recognized across the country. Now they faced the indignity of being refused service. Anti-discrimination laws like the one in Colorado that protected from discrimination based on sexual orientation were meant to protect this dignity, but many believed the laws also infringed on the religious beliefs of others.[11] These two competing interests—sexual orientation and religious beliefs—represented the core identities of the parties.[12] This created a particularly heated public debate. Both sides viewed *Masterpiece Cakeshop* as the opportunity to settle the issue and protect their rights.

When the Supreme Court released its opinion in the case, neither side got what they wanted. The Court issued a narrow opinion avoiding the overall issue of whether the Free Exercise Clause allowed religious accommodations to anti-discrimination laws by finding animus toward the baker by members of the Colorado Civil Rights Commission.[13] With the question still unanswered, the attention of both sides turned to other potential cases that might solve the issue.

In this paper, I will argue that while the Court's holding in *Masterpiece Cakeshop* was narrow, it actually suggests a much broader solution than the Court was able to provide—legislative accommodations rooted in tolerance that protect the dignity of same-sex couples and respect sincere religious beliefs. Part I will review the history of

8. U.S. CONST. amend I.

9. 138 S. Ct. 1719, 1720 (2018).

10. *Id.* at 1725–26.

11. Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601(2)(a) (West 2017).

12. Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139, 162 (arguing for heightened scrutiny for both sexual orientation discrimination and free exercise of religion as both are "an essential component of personhood"); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014) [hereinafter *Culture Wars*]; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 212–27 (2010) [hereinafter *Claims Have in Common*]; William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416–30 (1997).

13. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

legislative accommodations of religion and show how there are more examples of legislative accommodations than judicial accommodations. Part II will dissect the decision in *Masterpiece Cakeshop* and show how the Court used dicta to provide a formula for legislative accommodations. Part III will discuss how legislative accommodations are more appropriate than judicial accommodations. Part IV will analyze different approaches to accommodations that have been enacted or proposed. Finally, Part V will show how current and future issues can be solved by legislative accommodations. This paper will contend that legislative accommodations that respect both sides are the best way to balance these interests.

II. HISTORICAL EXAMPLES OF LEGISLATIVE ACCOMMODATIONS OF RELIGION

When a law has the unintended consequence of requiring a person to act or refrain from acting in a way that is contrary to his religious beliefs, the legislature may choose to allow an accommodation for that belief. However, accommodations are not always given nor required.

Recognizing the need to protect the role of religion in a person's life, the people ratified the First Amendment which begins, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[14] This ensured that laws directly affecting a person's religion are not allowed. However, it did not define what should be accommodated under laws that indirectly affect a person's religion. Both legislatures and courts have struggled with where exactly to draw the line to determine what gets accommodated. This section will look at some of the early debates and accommodations in American history. It will review the Supreme Court's treatment of claims under the Free Exercise Clause. And it will examine the Religious Freedom Restoration Act's general approach to religious accommodations.

A. Religious Accommodations in Early American History

The question of whether accommodations can or should be made for religious objections to laws has been asked since colonial times. Many prominent leaders during the colonial period, including Roger Williams, William Cotton, William Penn, and John Leland, had opinions on when accommodations were appropriate. In practice, many of the colonies enacted specific legislative accommodations of religion between the late-

14. U.S. CONST. amend I.

1600s and the late-1700s. These accommodations involved religious assessments, military conscription, and the requirement of oaths. The first judicial accommodation of religion did not come until 1813.

In the mid-1600s, Roger Williams, the founder of the Rhode Island colony, debated the issue of religious accommodations with John Cotton. A staunch supporter of the freedom of conscience, Williams believed that government did not have authority over a person's religious practice. Cotton argued that denying the government the authority to regulate religious conduct would undermine the authority of the government in secular areas.[15] The point of their disagreement centered on the difficulty of distinguishing between religious practice and secular conduct, as the two are often somewhat blended. To provide a religious believer the ability to disobey laws that were contrary to his religious belief is to dismantle the structure of an ordered society by allowing the disobedience of any secular laws that blended with religious action. There must be a balance between accommodations and maintaining the rule of law.

Attempting to identify what type of laws should receive religious accommodations, William Penn, the founder of Pennsylvania, argued that accommodations must "preserve[] the Nation in Peace, Trade, and Commerce . . . ." Penn would not provide accommodations to "those excellent Laws, that tend to Sober, Just and Industrious Living."[16] While this distinction shows that Penn believed there are times that accommodations are necessary and there are times when accommodations are inappropriate, it is still far from certain which accommodations would be allowed or which laws would be eligible for accommodations.

A century later, John Leland, leader of the Virginia Baptists during the Revolutionary Era, believed that laws were to be obeyed. "[B]ut when a man is a peacable subject of the state, he should be protected in worshipping the Deity according to the dictates of his own conscience."[17] Leland's distinction that accommodations should be allowed when a man is a peaceable subject of the state did not provide much more clarity.

15. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1447 (1990) (citing THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 18 (1986)). *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991) (defining and applying the four decades of theory on religious freedom penned by Roger Williams to modern debate).

16. McConnell, *supra* note 15, at 1447–48 (quoting William Penn, *The Great Case of Liberty of Conscience*, 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 457 (London 1726)).

17. *Id.* at 1448 (quoting John Leland, *The Yankee Spy*, THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (G. W. Wood ed., 1845)).

Colonial leaders had difficulty articulating a theory about exactly when religious accommodations should be granted. They recognized that accommodations to laws hindered the order of their society but believed that free exercise of religion required obedience to God above all else. This difficulty persists today as the question of where to draw the line is still being debated.

Despite the difficulty articulating a precise theory, the colonies did enact legislative accommodations for religious assessments, military conscription, and requirements of oaths proving that legislative accommodations of religion are an available option. Prior to the Revolutionary War, many of the colonies had established religions and required religious assessments, a form of a tax, to support the established church. Between the late-1600s and mid-1700s, Massachusetts, Connecticut, New Hampshire, and Virginia passed different forms of legislative accommodations allowing those who opposed the established church to refrain from paying the assessments.[18] Some only accommodated certain denominations and others required the objector to pay the assessment to the church of their choice instead.[19]

While the accommodation for religious assessments focused on a clearly religious issue, the next two categories of accommodations were secular in nature. The issue of mandatory military conscription encroached on the beliefs of Quakers, Mennonites, and other minority sects against bearing arms. Maryland, North Carolina, and Rhode Island passed legislative accommodations before 1700 that exempted those with religious beliefs opposing military service from the requirement.[20] Pennsylvania, which did not have a militia until 1755, avoided the issue of religious accommodations by making their militia voluntary.[21] In the mid-1700s, New York, Massachusetts, and Virginia created an accommodation for those who were religiously opposed to military conscription but required the objector to pay a fee or send a substitute. New Hampshire's law specifically accommodated Quakers.[22] When the Revolutionary War broke out, the Continental Congress passed a

18. *Id*. at 1469.

19. Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 883 (1995); McConnell, *supra* note 15, at 1469.

20. McConnell, *supra* note 15, at 1468. *See also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1807–08 (2006) [hereinafter *Regulatory Exemptions of Religious Behavior*] (discussing the religious accommodation in Rhode Island's military conscription law enacted in 1673).

21. McConnell, *supra* note 15, at 1468.

22. *Id.*

resolution accommodating those with religious objections to fighting from having to obey the requirement for military service and urged them "to contribute liberally . . . and to do all other services to their oppressed Country, which they can consistently with their religious principles."[23]

The third category of religious accommodations involved the oath requirement. Oaths were the primary method used to ensure integrity and honesty in colonial courts and other aspects of society. Quakers and other groups had sincere religious objections to swearing oaths that hindered their ability to take part in the court system. Between 1669 and the 1780s, nearly all of the colonies passed legislative accommodations to the oath requirement substituting some other form of pledge or affirmation instead.[24]

The first case of a judicial accommodation of religion came from a New York state court in 1813 and provided what we know today as the priest-penitent privilege.[25] In *People v. Phillips*, Daniel Phillips knowingly received stolen goods and confessed this sin to his priest, Father Kohlmann. Kohlmann advised Phillips to return the goods and offered to deliver the goods to the rightful owner. Kohlmann was subpoenaed to identify the guilty party before a grand jury. Kohlmann declared that revealing the details of a confession would make him "a traitor to my church, to my sacred ministry and to my God" with the result being "eternal damnation."[26]

The court ruled that Kohlmann could not be required to break the confidentiality of the confessional. To do so would be to "annihilate" this sacrament of the Catholic religion.[27] The court stated that everyone would agree that it would be unacceptable to do something similar to the

23. *Id.* at 1468–69 (quoting Resolution of July 18, 1775, 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 187, 189 (W. Ford ed. 1905)).

24. *Regulatory Exemptions of Religious Behavior*, *supra* note 20, at 1804–05; McConnell, *supra* note 15, at 1767–68. *See also* David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 266–267 (2005) (discussing early state constitutional provisions in Maryland and South Carolina exempting certain religions from swearing testimonial oaths).

25. Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 1 (2004) (providing an in-depth analysis of the importance and the impact of this case on current debate about free exercise accommodations); McConnell, *supra* note 15, at 1410–12 (citing W. Sampson, THE CATHOLIC QUESTION IN AMERICA 8–9 (1813); *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199–209 (1955)).

26. Walsh, *supra* note 25, at 20–21; McConnell, *supra* note 15, at 1410–11 (quoting W. Sampson, CATHOLIC QUESTION IN AMERICA 8–9 (1813)).

27. McConnell, *supra* note 15, at 1504 (quoting *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 207 (1955)).

Protestant religion, and to maintain neutrality among beliefs, the court must extend the same protection to Catholics.[28]

Four years later, another New York court distinguished the *Phillips* case from a case involving a Protestant confession because enforcing the subpoena did not violate tenets of that religion. In response, the New York state legislature passed a legislative accommodation protecting the confidentiality of a confession for all denominations.[29]

B. The Supreme Court's Treatment of Free Exercise Claims for Accommodation

1. The Pre-*Sherbert* Era

The first time the Supreme Court dealt with the issue of religious accommodations under the Free Exercise Clause was in 1879. In *Reynolds v. United States*, a Mormon man claimed that a federal law prohibiting polygamy in United States territories violated his religious requirement of having multiple wives.[30] In a unanimous decision, the Supreme Court denied the Free Exercise claim.[31]

In *Reynolds*, the Court recognized a distinction between regulating opinion and actions—Congress had power to regulate certain actions but was powerless over opinion.[32] The Free Exercise Clause of the First Amendment was widely accepted as protective of religious opinion.[33] However, the Court feared extending that protection to actions would "make the professed doctrines of religious belief superior to the law of the land" and would make effectual government non-existent.[34]

28. *Id.* at 1504–05. *See also* Walsh, *supra* note 25, at 37–38 (providing another description of Mayor Clinton's unanimous decision in the case).

29. McConnell, *supra* note 15, at 1505–06 (citing People v. Phillips (N.Y. Ct. Gen. Sess. 1813) (unpublished) (reprinted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 209 (1955))).

30. 98 U.S. 145, 161–62 (1879).

31. *Id.* at 167.

32. *Id.* at 164. *See also id.* at 162–64. After a historical review of James Madison's "Memorial and Remonstrance," Thomas Jefferson's bill for "Establishing Religious Freedom" in the Virginia House of Delegates prior to the passage of the Bill of Rights, and Jefferson's letter to the Danbury Baptist Association in response to the adoption of the First Amendment, the Court declared, "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the [First A]mendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

33. *Id.* at 164.

34. *Id.* at 166–67.

In 1940, the Supreme Court applied the Free Exercise Clause to the states in *Cantwell v. Connecticut*.[35] The defendant, a Jehovah's Witness, was convicted of violating a state ordinance prohibiting the solicitation of anything of value for a religious, charitable, or philanthropic cause without a license. In order to obtain a license, the statute required the person to prove to the secretary of the public welfare council that their cause was "a religious one or is a bona fide object of charity or philanthropy."[36] The Court held that the state placing general limits on solicitation without granting religious accommodations would not violate the Free Exercise Clause, but requiring a license given at the discretion of a state official to disseminate religious views was unconstitutional. This judgment decision by the state could result in targeted censorship of religious views: the possibility of which violated the protections of the First and Fourteenth Amendments.[37]

The Court reiterated the dual nature of the Free Exercise Clause—the freedom to believe and the freedom to act. "The first is absolute but, in the nature of things, the second cannot be."[38] While the Court in *Cantwell* recognized the freedom to act on religious beliefs had limits, it found that the state had overreached those limits in requiring a license to solicit religious materials. Over the next five years, the Court repeatedly struck down licenses and taxes directed at solicitation of religious material.[39]

2. The *Sherbert* Test—Compelling Government Interest

In the 1963 case *Sherbert v. Verner*, a Seventh-day Adventist lost her job when she could not work on Saturdays, the Sabbath according to her religious beliefs. She was unable to find other work due to this limitation. Her unemployment compensation benefits were denied because she

35. 310 U.S. 296, 303 (1940).

36. *Id.* at 301–02.

37. *Id.* at 305–07.

38. *Id.* at 303–04; *Id.* at 304 n.4 (citing *Reynolds*, 98 U.S. at 145); *See* Davis v. Beason, 133 U.S. 333 (1890) (upholding an Idaho Territory law forbidding those who practice or advocate bigamy or polygamy from registering to vote).

39. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down a license tax applied to Jehovah's Witness soliciting and distributing literature door-to-door); Follett v. Town of McCormick, 321 U.S. 573 (1944) (declaring the city's occupational tax on book salesman was invalid as applied to a Jehovah's Witness minister who made his living solely on the religious books he sold door-to-door). *Contra* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding child labor laws prohibiting children from selling merchandise on the street when the child is used for street preaching and solicitation of religious materials).

refused to accept jobs that required she work on Saturdays.[40] She sued alleging that the state's denial of unemployment benefits prohibited her free exercise of religion in violation of the First Amendment's Free Exercise Clause and the Fourteenth Amendment.[41]

In ruling for the plaintiff, the Supreme Court held that laws restricting the exercise of religion must pass strict scrutiny to be valid.[42] This test, known as the *Sherbert* Test, required that if the person has a claim involving a sincerely held religious belief and if the government's action imposes any burden on the free exercise of the plaintiff's religion, the government must show that there is a compelling government interest justifying the infringement and that the government has pursued that interest using the least-restrictive and least-burdensome means.[43] This required the plaintiff to show their exercise of religion was hindered by the government then shifted the burden to the government to show the existence of a compelling state interest.[44] The Court pointed out that areas of compelling state interests are historically those that "posed some substantial threat to public safety, peace or order."[45]

Even though strict scrutiny was required for laws to overcome the Free Exercise Clause under *Sherbert*, the only laws that were struck down after that decision were those involving unemployment benefits[46] and compulsory school attendance of fourteen and fifteen-year olds.[47] When challenged on free exercise grounds, the Court upheld Sunday closing

40. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

41. *Id.* at 401. *See also* Cantwell, 310 U.S. at 303 (incorporating the First Amendment).

42. *Sherbert*, 374 U.S. at 406.

43. *Id.* at 402–03, 406–07.

44. *Id.* at 407.

45. *Id.* at 403 (citing Reynolds v. United States, 98 U.S. 145, 145 (1879); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (protecting public health and safety through mandatory smallpox violations); Prince v. Massachusetts, 321 U.S. 158 (1944) (promoting public safety by prohibiting children from selling merchandise on the street); Cleveland v. United States, 329 U.S. 14 (1946) (protecting women from transportation across state lines for an immoral purpose included polygamy)).

46. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989) (allowing appellant who was a Christian but not a member of any religious sect to be eligible for unemployment compensation when he turned down a job requiring him to work on Sundays); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (allowing a Seventh-Day Adventist who was discharged for misconduct for refusing to work on Saturdays to receive unemployment compensation); Thomas v. Review Bd. Of Ind. Emp't. Sec. Div., 450 U.S. 707 (1981) (allowing a Jehovah's Witness to receive unemployment compensation when he quit his job after being transferred to a unit building tank turrets because his religious beliefs would not allow him to build armaments for war).

47. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (permitting Amish families who opposed high school education of their children as contrary to their religious beliefs to have an exemption to Wisconsin's compulsory education laws which required children to attend school until age sixteen).

laws,[48] laws restricting *conscientious objectors* to those who object to all war,[49] the obligation to pay taxes,[50] IRS requirements of racial nondiscrimination policies for tax-exempt status,[51] military dress code forbidding yarmulke on duty,[52] the requirement of listing social security numbers to apply for welfare benefits,[53] and the ability of the government to build a road and harvest timber in a national park that contained ancient Indian burial grounds.[54] Even under strict scrutiny, the Court was very unwilling to provide judicial accommodations for religion.

3. *Employment Division v. Smith*'s Current Case Law

In 1990, the Supreme Court decided *Employment Division v. Smith*.[55] This case involved two members of the Native American Church who were fired from their jobs for ingesting peyote, a Schedule I controlled substance, as part of a religious ceremony. When the men filed for unemployment compensation, their claims were denied because their jobs were terminated for "misconduct." They filed suit claiming a violation of the Free Exercise Clause.[56]

In the opinion, the Court discussed their past reluctance to recognize free exercise claims for accommodation and classified the claims they did recognize as "hybrid" claims which combined the free exercise of religion with some other recognized right.[57] The Supreme Court abandoned the

48. *See* Braunfeld v. Brown, 366 U.S. 599 (1961) (denying facial and as-applied challenges to the Sunday closing laws by an Orthodox Jews who practiced Saturday Sabbath and claimed the forced closure on Sundays caused them to economic disadvantages due to their religious beliefs).

49. *See* Gillette v. United States, 401 U.S. 437 (1971) (holding that separate petitioners, one a Catholic and one a Humanist, did not qualify for a religious accommodation from the military draft as *conscientious objectors* as they only objected to the Vietnam War and not all wars as the law required).

50. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990) (requiring religious groups to pay sales tax on the goods and literature they sold); Tony and Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290 (1985) (requiring religious foundation to pay minimum wage); United States v. Lee, 45 U.S. 252 (1982) (requiring Amish to pay Social Security taxes).

51. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (removing tax-exempt status from religious private university for racial discrimination in admissions).

52. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

53. *See* Bowen v. Roy, 476 U.S. 693 (1986) (holding that the requirement of listing a social security number to obtain welfare benefits did not violate the Native American's religious belief that using his daughter's social security number on the application would "rob her soul").

54. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

55. Emp't. Div. v. Smith, 494 U.S. 872, 872 (1990).

56. *Id.* at 874.

57. *Id.* at 881–82 (classifying *Cantwell v. Connecticut*, *Murdock v. Pennsylvania*, and *Follett v. McCormick* as hybrids of free exercise and freedom of speech and press and classifying *Pierce v. Society of Sisters* and *Wisconsin v. Yoder* as hybrids of free exercise and right of parents to dictate the upbringing of their children).

Sherbert Test and its requirement of a compelling government interest and declared that any effect on the free exercise of religion by neutral, generally applicable laws does not violate the Free Exercise Clause.[58] Under this analysis, the Court denied the free exercise claim as Oregon's prohibition of peyote was neutral and generally applicable.[59] The Court reasoned that requiring the political process to create any desired accommodations to generally applicable laws is favored over allowing individuals or judges to create exemptions of their own volition.[60]

In 1993, the Court applied *Smith* and unanimously struck down a municipal ordinance that outlawed ritualistic animal sacrifices in *Church of Lukumi Babalu Aye v. City of Hialeah*.[61] The City of Hialeah, Florida, had become concerned when members of the Santeria religion, who practice ritualistic animal sacrifices as part of their faith, announced the establishment of a church in the city.[62] The city council held emergency public meetings and adopted resolutions articulating the council's commitment to protecting the public from "any and all religious groups which are inconsistent with public morals, peace or safety."[63] After consultation regarding the city's authority to adopt animal cruelty measures, the council crafted and adopted ordinances written to specifically prohibit the Santeria animal sacrifices.[64]

The Supreme Court found that, while neutral on its face, the ordinance was not neutral in application. The ordinance was written with the motivation and effect of prohibiting the religious exercise of the church.[65] It was both too broad as it regulated more than was needed to satisfy the city's interest in protecting public health, and it was also too narrow because it only regulated the practices of the Santeria religion while leaving similar public health issues unregulated. [66] The ordinance fell well below the standard for general applicability as it targeted the specific practices of the church.[67] Because the ordinance was neither neutral nor generally applicable, it was subject to strict scrutiny. The

58. *Id.* at 878–80, 889.
59. *Id.* at 890.
60. *Id.*
61. 508 U.S. 520, 527 (1993).
62. *Id.* at 525–26.
63. *Id.* at 526.
64. *Id.* at 527–28.
65. *Id.* at 545.
66. *Id.* at 543–45.
67. *Id.* at 543–46.

Court determined that targeting a religion is not a compelling government interest and, even if it was, the ordinances were not narrowly tailored.[68]

Currently, under *Smith* and *Lukumi*, the Free Exercise Clause does not protect religious practices that are affected by neutral, generally applicable laws.[69] However, laws that target religious belief or practices must meet strict scrutiny which requires the government prove that the law is necessary to achieve a compelling government interest and that the law is narrowly tailored to achieve that interest.[70] This is the baseline protection of the free exercise of religion under the First Amendment. Legislatures may adopt religious accommodation laws that provide stricter standards for the protection of religious practices. That is just what Congress did in response to *Smith*.

C. The Religious Freedom Restoration Act's General Religious Accommodation

To provide a general religious accommodation, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 with the purpose to "restore the compelling interest test as set forth in *Sherbert v. Verner*" as *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise."[71] RFRA provides that any law affecting the free exercise of religion must meet strict scrutiny regardless of whether it is neutral and generally applicable.[72] This requirement applied to all branches and levels of government—federal, state, and local.[73] Congress recognized that neutral laws have the ability to burden free exercise of religion just as much as laws that target religious exercise.[74] RFRA was introduced to provide stronger protections and greater accommodations for the exercise of religion. It received overwhelming support and passed nearly unanimously.[75]

In 1997, the Supreme Court severely limited the effect of RFRA. In *City of Boerne v. Flores*, the Court held that Congress had exceeded its enforcement power in § 5 of the Fourteenth Amendment when it enacted RFRA.[76] Section 5 of the Fourteenth Amendment gives Congress the

68. *Id.* at 546–47.
69. Emp't. Div. v. Smith, 494 U.S. 872, 878–80, 889 (1990).
70. *Lukumi*, 508 U.S. at 546–47.
71. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-104, 107 Stat. 1488 (1993).
72. *Id.* at 1488–89.
73. *Id.* at 1489.
74. *Id.* at 1488.
75. H.R. 1308, 103rd Cong. (1993–1994).
76. 521 U.S. 507, 511, 536 (1997).

authority to enforce the rights granted by that amendment against infringement by the states and local governments.[77] The Court deemed this enforcement power to be "remedial."[78] This remedial enforcement allowed Congress to enact laws that protected rights guaranteed by the Fourteenth Amendment such as the Free Exercise Clause. However, the enforcement power did not give Congress the ability to redefine or broaden Constitutional rights.[79] The Court found that RFRA attempted to broaden the protections of the Free Exercise Clause as defined in *Smith* which was outside the scope of Congress' power.[80] This decision in *Boerne* made RFRA only applicable to the federal government reinstating the *Smith* rule for state and local cases. As of 2015, 21 states have adopted their own version of RFRA which provides similar protections at the state and local level of government.[81]

The most well-known case to use RFRA to uphold a free exercise claim was *Burwell v. Hobby Lobby Stores, Inc.*[82] In 2014, the owners of three closely-held corporations challenged a United States Department of Health and Human Services (HHS) mandate issued after enactment of the Patient Protection and Affordable Care Act (ACA) that required corporations to provide health insurance that included all FDA-approved contraceptive methods.[83] The petitioners argued that the requirement violated their sincerely held religious beliefs regarding the beginning of human life as four of the required contraceptives prevented the development of an already fertilized egg. The Supreme Court held that while the government had a compelling interest in ensuring adequate

77. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

78. Boerne, 521 U.S. at 519 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

79. *Id.* at 519.

80. *Id.* at 511, 536.

81. Kathleen A. Brady, *Law and Religion in an Increasingly Polarized America: The Disappearance of Religion from Debates about Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1095 (2017) (citing *Culture Wars*, *supra* note 12, at 845 & n. 26); *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/33ZS-XBBJ] (listing the states that have passed statutes similar to the federal RFRA: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia); *see also Federal & State RFRA Map*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/EB79-3FP6] (noting that in addition to these, nine states have provisions in their state constitutions requiring strict scrutiny for free exercise claims: Maine, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, West Virginia, Wisconsin).

82. 134 S. Ct. 2751 (2014).

83. *Id.* at 2762.

health care, the numerous exemptions and alternatives offered to other groups showed that the requirement in this case was not the least-restrictive means of achieving that interest.[84] The *Hobby Lobby* case is illustrative of how legislative accommodations can provide stronger protections for those claiming the law has infringed on the free exercise of religion.

III. MASTERPIECE CAKESHOP'S FORMULA FOR LEGISLATIVE ACCOMMODATIONS

A. The Narrow Holding in Masterpiece Cakeshop

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a same-sex couple entered a bakery to order a cake for their upcoming wedding. The owner of the bakery, Jack Phillips, refused to design them a custom cake for their wedding. He offered to sell them other cakes or goods but does not bake cakes for same-sex weddings due to his religious beliefs opposing same-sex marriage.[85]

The couple filed a complaint under the Colorado Anti-Discrimination Act (CADA) with the Colorado Civil Rights Commission claiming discrimination by Phillips.[86] CADA provides, "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to any individual or a group, because of . . . sexual orientation, . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[87] Phillips claimed that requiring him to design and bake a cake for a same-sex wedding would violate his First Amendment freedom of speech as an artist and violate his free exercise of religion.[88] Colorado does not have a state version of the RFRA which would subject CADA to strict scrutiny.[89] Because the federal Religious Freedom Restoration Act was held not to apply to the states in *City of Boerne*[90] and Colorado does not have its own version, CADA is subject to the rational basis standard set forth in *Smith*.

84. *Id.* at 2781–82.
85. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).
86. *Id.* at 1725.
87. Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601(2)(a) (West 2019).
88. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.
89. *See supra* note 81 (listing the states that have statutes or constitutional provisions requiring strict scrutiny for free exercise claims).
90. City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997).

The Commission rejected the baker's Constitutional claims and ruled for the couple. They found that, under *Employment Division v. Smith*, CADA was a "valid and neutral law of general applicability" that did not violate the Free Exercise Clause.[91] The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples," to conduct staff trainings on the requirements of CADA and to complete quarterly reports for two years indicating any time a customer was denied service.[92] Phillips appealed to the Colorado Court of Appeals which affirmed the ruling.[93] The Colorado Supreme Court denied to hear the case.[94]

When the United States Supreme Court granted certiorari, Phillips's strongest argument seemed to be based on the freedom of speech or a "hybrid claim" between freedom of speech and free exercise. Indeed, much of the briefing and oral argument in favor of Phillips revolved around whether baking a custom wedding cake was an expression or speech.[95] Under *Smith*, it would be difficult for Phillips to overcome this neutral and generally applicable law on strictly a free exercise claim.

The case was expected to have major ramifications. If the Court decided in favor of the couple, it would limit the freedom of speech and free exercise of religion and compel a person to act in opposition to their religious beliefs. If the Court decided in favor of the baker, it would limit the effect of anti-discrimination laws, allow numerous other types of business owners to discriminate, and demean the dignity of same-sex couples throughout the country.[96] Either way, both sides viewed the final result to be a potential winner-take-all scenario.

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91. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

92. *Id.*

93. *Id.* at 1726–27.

94. *Id.* at 1727.

95. *See* Brief for Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No 16-111); Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No 16-111) [hereinafter Brief for the United States] (declining to even make the free exercise argument in the brief); Transcript of Oral Argument, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No 16-111) [hereinafter Transcript of Oral Argument].

96. *See* Julie Moreau, *Analysis: Masterpiece Cakeshop case could have 'tremendous implications'*, NBC NEWS (Dec. 6, 2017), https://www.nbcnews.com/feature/nbc-out/analysis-masterpiece-cakeshop-case-could-have-tremendous-implications-n826951 [https://perma.cc/Q945-HPNZ]; Henry Gass, *Religious liberty or right to discriminate? High court to hear arguments in wedding cake case*, CHRISTIAN SCI. MONITOR (Dec. 4, 2017), https://www.csmonitor.com/USA/Justice/2017/1204/Religious-liberty-or-right-to-discriminate-High-court-to-hear-arguments-in-wedding-cake-case [https://perma.cc/EB7Q-E9YE].

Instead of answering the question of whether CADA required Phillips to create the custom cake in opposition to his religious beliefs, the Supreme Court reversed the decision of the Colorado Court of Appeals because it found that commissioners on the Colorado Civil Rights Commission had exhibited animosity toward the baker's religion.[97] The Court pointed out other cases where the commission rejected discrimination claims when bakers refused to make cakes that opposed same-sex persons or marriages.[98] The Court also pointed to what it interpreted to be outright animus toward Phillips's religious beliefs by the commissioners during public hearings.[99] One commissioner claimed that religion had been used to justify slavery and the holocaust and that religion is "one of the most despicable pieces of rhetoric that people can use."[100]

The Court cited the Free Exercise Clause's protection from "subtle departures from neutrality"[101] and relied on its decision in *Church of Lukumi Babalu Aye v. City of Hialeah* to find that the commission was not neutral in adjudicating the baker's religious claim.[102]

While Phillips technically won as the ruling against him was reversed, the narrow animosity finding was the Court's way of avoiding a winner-take-all decision that forced the losing side to suffer "undue disrespect" or be subject to "indignities."[103]

B. The Broader Formula for Legislative Accommodations in Masterpiece Cakeshop

Although the Court's holding in *Masterpiece Cakeshop* was narrow, the opinion can be read as a plea for legislative accommodations. By not deciding the big issue in the case, the Court avoided declaring one side the big winner and the other side the big loser and left open the opportunity for the issue to be decided through the legislative process in a way that satisfied both parties.

The Court began its analysis by recognizing the importance of protecting the civil rights of same-sex couples as well as the views and

97. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

98. *Id.* at 1728 (citing Jack v. Gateaux, Ltd., Colo. Civ. Rights Div. Charge No. P20140071X, "Determination" (Mar. 24, 2015); Jack v. Le Bakery Sensual, Inc., Colo. Civ. Rights Div. Charge No. P20140070X, "Determination" (Mar. 24, 2015); Jack v. Azucar Bakery, Colo. Civ. Rights Div. Charge No. P20140069X, "Determination" (Mar. 24, 2015)).

99. *Id.* at 1729.

100. *Id.* (quoting Transcript of Oral Argument p. 11–12).

101. *Id.* (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993)).

102. *Id.* at 1732.

103. *Id.*

("in some instances") expression of those who have religious objections to same-sex marriage.[104] It recognized the "general rule" that religious objections do not overcome neutral and generally applicable public accommodations laws[105] but also assumed that it would be a denial of free exercise protections to compel a member of the clergy who opposes same-sex marriage to perform the wedding ceremony for a same-sex couple.[106] The Court then came to the difficulty behind the issue in the case. "Yet if that exception were not confined, then a long list of persons who provide goods and services for gay marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws."[107]

After discussing the finding of animosity toward Phillips, the Court closed the opinion with a formula for how this issue should be resolved in the future. It stated, "[T]hese disputes must be resolved [1] with tolerance, [2] without undue disrespect to sincere religious beliefs, and [3] without subjecting gay persons to indignities when they seek goods and services in an open market."[108] The following sections will contend that the best method of balancing the rights of same-sex couples and religious objectors would be through legislative accommodations that incorporate these three principles.

IV. THE ADVANTAGES OF LEGISLATIVE ACCOMMODATIONS OVER JUDICIAL ACCOMMODATIONS

Historically, the Court has been reluctant to grant religious accommodations under the Free Exercise Clause, especially when the accommodations infringed on someone else's rights or liberties.[109] Justice Scalia's analysis of the Court's free exercise jurisprudence in *Smith*

104. *Id.* at 1727.

105. *Id.* (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.8 (1968) (per curiam) (noting that defendant's beliefs that the law requiring the restaurant to serve African Americans "contravene[d] the will of God" and violated his free exercise of religion were patently frivolous); Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); *see also* Emp't. Div. v. Smith, 494 U.S. 872, 879 (1990) ("[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)).

106. Masterpiece Cakeshop, 138 S. Ct. at 1727.

107. *Id.*

108. *Id.* at 1732.

109. *See supra* Section I.B (discussing the Supreme Court's treatment of free exercise claims).

pointed out the consistency with which the Court denied religious accommodations.[110] He noted the only times the Court has upheld claims for religious accommodations were for unemployment compensation where the government had already instituted secular accommodations[111] or hybrid claims that combined freedom of speech, association, or press with the freedom of religion.[112] In holding that neutral and generally applicable laws would ordinarily survive free exercise claims, *Smith* recognized that the main avenue for religious accommodations would be through legislation.[113] In fact, a 1992 study conducted by James Ryan concluded that state and federal statutes contained an estimated 2,000 religious accommodations.[114] While this is a rough ballpark number, it shows the more influential role of legislative accommodations when compared to the minimal number of judicial accommodations of religion.

This is not to say that judicial accommodations of religion are not appropriate in certain situations. That is the role of judicial review. However, the distinct line drawing and balancing required to resolve these disputes would better be accomplished by the legislature. The constitutional principle of separation of powers favors legislative accommodations of religion in two ways. First, Congress's Constitutional authority to create law makes legislative accommodations of religion more legitimate than judicial accommodations. Second, the legislative process makes Congress more competent than the courts to create religious accommodations.

A. The Greater Legitimacy of Legislative Accommodations

It is elementary that the idea of separation of powers is one of the hallmarks of the American form of government. While separation of powers is not specifically enumerated in the Constitution, the structure of that foundational document illustrates the belief of James Madison that, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be

110. Emp't Div. v. Smith, 494 U.S. 872, 878–85 (1990).

111. *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

112. *Id.* at 881–82; *supra* note 57 and accompanying text. *See also* Telescope Media Grp. v. Lucero, 936 F.3d, 740, 762 (8th Cir. 2019) (reversing dismissal and allowing wedding videographer's case to proceed as hybrid speech and religion claim).

113. *See Smith*, 494 U.S. at 890 (citing the Arizona, Colorado, and New Mexico laws that had granted accommodations for sacramental peyote use).

114. *Culture Wars*, *supra* note 12, at 844–45 (2014) (citing James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992)).

pronounced the very definition of tyranny."[115] Madison concluded, "[T]he preservation of liberty requires that the three great departments of power should be separate and distinct."[116] This is why the Constitution vests all legislative powers only in Congress[117] and judicial power only in the courts.[118]

Congress is the people's branch. The 435 Representatives in the House and 100 Senators are elected directly by the people and are accountable to the people for re-election at the end of their term. The actions of these members of Congress is believed to represent the will of the people.

The legislative process is intentionally designed to make sure only the best and most popular bills become law, thus giving the law legitimacy. The bicameral structure of Congress requires the bill to pass two separate chambers—the House of Representatives and the Senate. Public debate occurs in the hearings of committees of both the House and the Senate as well as on the floor of both chambers. There are numerous places in each chamber where a bill could be defeated. The relatively few bills that make it through and receive a majority vote in both chambers are then presented to the President for his approval or veto before becoming law. This laborious process of bicameral approval and presentment give laws legitimacy.[119] It is true that this process makes it difficult to pass bills without using much political will, especially in the polarized political environment of our day, but that does not mean that it is impossible.[120] The result of this legislative process rarely satisfies everyone, but it allows those who disagree with the new law to take

115. THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). *See also* Diarmuid F. O'Scannlain, *Lecture: Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 35–36 (2015) (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document they drafted in Philadelphia in the summer of 1787.")).

116. THE FEDERALIST No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961).

117. U.S. CONST. art. I, § 1.

118. *Id.* at art. III, § 1.

119. *See* O'Scannlain, *supra* note 115, at 37.

120. *See* Kelsey Dallas, *What does it take to craft compromise legislation on religious freedom and LGBT rights? In Boise, policymakers search for an answer*, DESERET NEWS (Feb. 22, 2019), https://www.deseretnews.com/article/900057139/what-does-it-take-to-craft-compromise-legislation-on-religious-freedom-and-lgbt-rights-heres-what-we-learned-in-boise.html [https://perma.cc/B55R-4JYL]; *Sen. Hill: No Add the Words Legislation This Session*, IDAHO NEWS (Feb. 21, 2019), https://idahonews.com/news/local/sen-hill-no-add-the-words-legislation-this-session [https://perma.cc/2F8W-LM7H] (providing Idaho Senator Brent Hill's full statement on compromise legislation and responses from local groups).

confidence in the fairness of the system and gives them the opportunity to change the law in the future.[121]

The Supreme Court was not designed to specialize in making law. It was designed to decide "cases" and "controversies"[122] and exercise judicial review to ensure laws are not "repugnant to the Constitution."[123] It is true that by way of judicial review the Court recognizes exceptions not previously in the law or voids portions of the law thereby creating new law.[124] As discussed already, this is true even in free exercise jurisprudence.[125] This paper is not arguing that the Court *cannot* make law, although there may be a place for that argument elsewhere. This paper is arguing that the legislative branch is the better option.[126] The Supreme Court is not the best forum to create religious exemptions in these disputes as its structure does not provide the legitimacy that comes from the legislative branch.

The Supreme Court is filled with nine justices who are appointed for life-long terms. These justices are not accountable to anyone for their decisions. They do not have to answer to the people nor listen to public opinion as they are not elected. This insulation is good when justices are meant to fairly and neutrally decide cases and controversies or even strike down laws that violate the Constitution. There is no outside pressure. This insulation is bad when justices significantly alter public policy and make law. It removes the people as the source of power and allows for the tyranny Madison described.[127] Under the Constitution, there is no legitimacy in our laws when our lawmakers are not accountable to the people.

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121. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

122. U.S. CONST. art. III, § 2, cl. 1.

123. Marbury v. Madison, 5 U.S. 137, 180 (1803).

124. McConnell, *supra* note 15, at 1444–45, 1509–10 (1990) (arguing that the ability of courts to create exemptions and accommodations stems from their power of judicial review. Once the court is granted the authority to review the constitutionality of the laws passed by the legislature, the court has the authority to determine whether Constitutional protections such as the Free Exercise Clause require an accommodation to that law in order for the law to be valid.)

125. *See supra* notes 35–47 and accompanying text (discussing cases where free exercise claims were granted by the Court).

126. *Compare* Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S. FLA. L. REV. 389, 391 (2010) (noting that Emp't Div. v. Smith has largely removed religious accommodations from the judicial sphere), *with* Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 59 (2018) [hereinafter *Wedding-Vendor Cases*] (recognizing that legislators are unwilling or unable to create accommodations for politically unpopular religions such as Muslims or even "conservative Christians in blue states").

127. *See* THE FEDERALIST NO. 47, *supra* note 115, at 298.

B. The Greater Competency of Legislative Accommodations

The legislative process is designed to make sure the bills competently solve the issues they are designed to remedy. House and Senate committees hold public hearings and invite testimony from experts to educate the members on the issue and potential ways to solve it. Members may offer amendments to a bill to reflect technical knowledge or public opinion gained during both formal and informal political debate. Congress is given wide latitude to review any information, statistic, or circumstance when fashioning the bill, and it will often use the input given to precisely define the provisions of the new law giving the public a clear understanding of the new law's requirements. This attention to detail and ability to incorporate input from a myriad of perspectives provides competence to the law.

The restriction of the Supreme Court to decide cases and controversies reduces the Court's competence when it decides to make laws. When a law is made, Congress starts with a clean slate and fashions the law to remedy the situation adding different provisions to ensure the law solves any problems created by the right or restriction and addresses everyone's concerns. On the other hand, the Court is a "blunt instrument" that is limited to the current set of facts before it.[128] It does not have the same freedom to create law with precision. It must create the law around the current set of facts and wait for another case to fill in any gaps. The doctrine of stare decisis also theoretically limits the options available to the Court by requiring the Court to follow or rationalize the new law with its prior decisions, even though in practice the Court has occasionally ignored this duty.[129] These restrictions to cases and controversies lower the competence of judge-made law.

In *Masterpiece Cakeshop*, the Supreme Court would have been limited to deciding whether a baker was allowed to decline to bake a custom wedding cake for a same-sex marriage. If it wanted to broaden the accommodation, the Court might have been able to decide whether wedding vendors were able to decline to provide services for same-sex

128. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

129. *Compare* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1018–19 (2003) (citing Dickerson v. United States, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'")) *with* Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067, 1072 (2008) (pointing out that the recent Supreme Court trend of "*underruling*," ruling against recent precedent without acknowledging that it was overruling the precedent or rationalizing the change in doctrine, is undermining the practical effect of stare decisis).

marriages. However without another case presenting a different set of facts, the Court would not have been able to adequately define which wedding vendors the accommodation applied to or any restrictions on what kind of services were covered by the accommodation. Further, the Court would be limited in the protections it could provide for same-sex couples to the facts of the case. To create further precision in the accommodation, the Court would have to wait for another case with the proper set of facts. The legislative branch is far more competent in creating religious accommodations.

V. MODERN PROPOSALS AND EXAMPLES OF LEGISLATIVE ACCOMMODATIONS

A. Possible Legislative Accommodations that Satisfy Masterpiece Cakeshop*'s Formula*

Legislative accommodations of religion are nothing new. As we have seen, they have been used since before the Revolution and roughly 2,000 are in effect today.[130] In implementing *Masterpiece Cakeshop*'s formula for solving this issue, what accommodations should be given and what lines should be drawn to ensure tolerance and respect for both sides? This section will examine three proposed approaches.

1. Religious Liberty Professors' Approach to Accommodations

Professors Thomas C. Berg, Robin Fretwell Wilson, and others have worked together to draft a proposed religious accommodation in the realm of same-sex marriage. It reads:

> No individual, no religious corporation, association or organization, and no nonprofit organization owned, controlled or operated by a bona fide religious corporation shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual, corporation, association or

130. *See supra* Sections I.A and I.C and note 114 with accompanying text.

> organization to violate their sincerely held religious beliefs, provided that
>
> > (a) a refusal to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage shall not be protected under this section where (i) a party to the marriage is unable to obtain any similar services, accommodations, advantages, facilities, goods, or privileges elsewhere and (ii) such inability to obtain similar services, accommodations, advantages, facilities, goods, or privileges elsewhere constitutes a substantial hardship; and
> >
> > (b) no government official may refuse to solemnize a marriage if another government official is not available and willing to do so.[131]

This "marriage conscience protection" was drafted before the Supreme Court recognized same-sex marriage and was advocated to be included when a state recognized same-sex marriage.[132] These professors recognized that legalizing same-sex marriage without providing for religious accommodations would create widespread and unnecessary conflict.[133] This decade-old argument seems prophetic now that we have seen cases like *Masterpiece Cakeshop* filter through the courts.

Professor Berg argues that this accommodation should extend beyond churches to any religious organization whether it be an "educational institution, society, charity, or fraternal organization," to any individual in the scope of employment by these religious organizations, and to situations "beyond the marriage ceremony."[134] He also argues that these religious accommodations should extend to the commercial sphere in a limited context. He notes how small businesses embody the beliefs

131. Letter from Thomas C. Berg, Professor of Law, Univ. of St. Thomas Sch. of Law, et al., to John Baldacci, Governor, Maine., at 9 (Oct. 5, 2009) [hereinafter Letter from Berg to Governor Baldacci], http://mirrorofjustice.blogs.com/files/wilson-et-al-to-governor-maine-100509.pdf [https://perma.cc/5GL9-A9P5]. *See also Claims Have in Common*, *supra* note 12; Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307, 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010).

132. Letter from Berg to Governor Baldacci, *supra* note 131, at 8; Thomas C. Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009) [hereinafter *Memos/Letters*], https://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html [https://perma.cc/4HQR-ERFB].

133. Letter from Berg to Governor Baldacci, *supra* note 131, at 2 (citing DOUGLAS LAYCOCK ET AL., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds., Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage) (parenthetical in original citation)).

134. *Claims Have in Common*, *supra* note 12, at 227.

and identity of their owners and how not accommodating the small landlord or wedding photographer is akin to asking these small business owners to segment their identity and leave their religion out of their business.[135]

Professor Douglas Laycock, who supports the type of religious accommodation drafted by Professor Berg and others above,[136] would limit the accommodations to the context of the wedding, marriage, or sexual relationship. He would only accommodate small businesses where the owner is providing the services personally and only if another vendor is available.[137]

As provisions (a) and (b) show, the accommodations have limits. If the same-sex couple is unable to receive the goods or services from a willing provider, the accommodation does not apply, and the religious objector is required to provide the goods or services. It is provisions such as these that help prevent any potential harmful effects that "subject[] gay persons to indignities when they seek goods and services in an open market."[138] Professor Berg argues that the two ways to minimize harmful effects are notice and alternative providers.[139] Providing notice of a business's religious objections before service is requested limits the harm to the person's dignity that comes from a surprise refusal of service. Some might argue that refusal via prior notice could cause the same injury that refusal in-person causes. This may be true, but if religious objections and harm to the dignity of the religious adherent are to be taken seriously in the commercial context, religious accommodations would require the person to find out about the objections at some point. Receiving notice early is better than being refused service in person.[140] Requiring alternative providers be available also reduces the harm to the person's dignity because it ensures that they are still able to receive the goods or services.[141] Notice and alternative providers are appropriate limits to religious accommodations.

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135. *Id.* at 227–28.

136. *See Memos/Letters*, *supra* note 132; Letter from Douglas Laycock, Professor of Law, Univ. of Mich. Law Sch., to John Baldacci, Governor, Maine, at 1 (April 30, 2009), https://mirrorofjustice.blogs.com/files/maineexemptionsbaldacci1.doc [https://perma.cc/8DPG-BGSC].

137. *Wedding-Vendor Cases*, *supra* note 126, at 63.

138. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

139. Thomas C. Berg, *A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1369 (2016) [hereinafter *Accommodating Religious Nonprofits*] (arguing for religious accommodations in the context of providing contraception).

140. *Id.* at 1369–71 (2016); *See also* Laycock, *Wedding-Vendor Cases*, *supra* note 126, at 63–64.

141. *Accommodating Religious Nonprofits*, *supra* note 139, at 1371.

2. Professor Brownstein's "Religious Discrimination" Approach to Religious Accommodations

Professor Alan Brownstein has offered a different model for approaching whether to provide a religious accommodation. He refers to it as the religious discrimination model. This approach would provide a religious accommodation to situations involving same-sex marriage if a comparable accommodation would be allowed if the situation involved differences in religion.[142]

For example, under Professor Brownstein's approach, a religious school or other educational organization that is permitted to discriminate on the basis of religion for admission would similarly be allowed to refuse admission to an LGBT individual. However, a religious hospital who would not be able to refuse to treat someone of another religion would not be allowed to refuse to treat someone based on their sexual orientation.[143]

In the commercial context, Professor Brownstein uses the example of how a hotel turning away its honeymoon suite to a Jewish or Muslim couple would be deemed unacceptable. So to, then, must it be unacceptable for a hotel to refuse to rent its honeymoon suite to a same-sex couple.[144] When it comes to same-sex weddings, the "religious discrimination" approach would ask "whether we would protect the same class of proprietors from being required to assist in or promote the solemnization or celebration or any religious life cycle event."[145] Professor Brownstein offers the example of a florist and admits the potential of a local florist refusing to serve him because of his Jewish beliefs is "an unpalatable prospect."[146]

In the implementation of those accommodations deemed valid under his "religious discrimination" approach, Professor Brownstein argues that the government should assume the responsibility of compiling information about who has religious objections. He sees this as the way of limiting dignitary harm to same-sex couples.[147] He also places the burden on the government to provide alternatives for healthcare that is denied due to a religious objection from the employer.[148] In this aspect, Professor Brownstein accurately predicted the factual result of *Burwell v. Hobby Lobby* which granted a religious accommodation to closely-held,

142. Brownstein, *supra* note 126, at 422.
143. *Id.* at 425–26.
144. *Id.* at 429.
145. *Id.* at 431.
146. *Id.*
147. *Id.* at 436.
148. *Id.*

for-profit corporations who objected to the contraceptive mandate in the Affordable Care Act.[149]

Professor Brownstein's "religious discrimination" approach is more of a theory model behind religious objections rather than a concrete approach. He even describes it as a model and recognizes that it does not provide all the answers.[150] However, it does provide us with a way for those who can only see the debate from their side to gain a different perspective by rephrasing the issue.[151]

3. The Government's Approach in its *Masterpiece Cakeshop* amicus brief

Interestingly, the United States submitted an amicus brief in *Masterpiece Cakeshop* and the Solicitor General participated in oral argument in support of religious accommodations for the baker.[152] Understanding that this approach for religious accommodations was made within the limited scope of a case before the Supreme Court, we may still pull out principles to help us in forming legislative accommodations.

Like most arguments favoring the baker in this case, the government's argument focused on the religious objection to the compelled expression of celebrating the same-sex wedding.[153] At oral argument, the Solicitor General offered the analogy of compelling the religious baker to create a custom wedding cake for a same-sex marriage to compelling an African-American sculptor to create a cross for a Ku Klux Klan service.[154] The government's preferred test proposed that only activities that compel "[1] expression and [2] participation in an expressive event" should be subject to heightened scrutiny.[155] This accommodation applies only to those who satisfy both elements. This test eliminates certain wedding vendors such as venues, transportation services, and lodging.[156] The government argued that the baker in this case satisfied both elements as he created a custom wedding cake which can be likened "to a sculptural centerpiece" that symbolizes the celebration of

149. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014).
150. Brownstein, *supra* note 126, at 423.
151. *Id.* at 423–24.
152. Brief for the United States, *supra* note 95.
153. *Id.* at 14.
154. Transcript of Oral Argument, *supra* note 95, at 26–27.
155. Brief for the United States, *supra* note 95, at 14.
156. *Id.* at 21–22.

the wedding, and the cake's central role in the celebration is likened to the artist participating in the event.[157]

Because this was a legal argument designed to persuade the Supreme Court, it mirrors the "hybrid claim" analysis in *Smith*.[158] In this case, the government is arguing for a hybrid between freedom of religion and freedom of speech.

The principle of not compelling someone to "speak" and participate in an event they are opposed to provides, at minimum, a baseline for creating religious accommodations.[159]

B. Modern Examples of Legislative Accommodations for Religion

There are several modern examples of legislative accommodations for religion that relate to same-sex marriage and LGBT. These examples show how the legislature was able to bring both sides together to create a solution that worked for everyone. No one was able to get everything they wanted, but both sides were protected from significantly losing. These examples include the Utah Compromise, Rowan County Clerk Kim Davis, and accommodations in North Carolina, Georgia, and Mississippi.

1. Utah Compromise

The Utah Compromise is the name given to a pair of bills passed by the State of Utah in 2015 just a few months prior to the Supreme Court's recognition of same-sex marriage in *Obergefell*.[160] This bipartisan effort passed both LGBT and religious freedom protections. Some of the specific accommodations include protections for LGBT individuals from housing and employment discrimination while allowing employers to determine reasonable dress standards and designate sex-specific facilities.[161] It also allows religious and small employers to use religious principles in hiring. The compromise protects equally the freedom of speech for both groups in the workplace.[162] It allows religious organizations who own housing facilities to give preference to those of

157. *Id.* at 24–27, 29.

158. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990). *See also supra* notes 57, 95, and 112 and accompanying text.

159. Transcript of Oral Argument, *supra* note 95, at 45–46.

160. *See* Antidiscrimination and Religious Freedom Amendments, 2015 Utah Laws 68–82; Protections for Religious Expression and Beliefs about Marriage, Family, or Sexuality, 2015 Utah Laws 214–18.

161. Antidiscrimination and Religious Freedom Amendments, 2015 Utah Laws 68–82.

162. *Id.*

their own faith and for small landlords to use their personal preference in choosing tenants.[163]

Some of the biggest aspects of the Utah Compromise are the recognition of same-sex marriage and the corresponding protection for those who advocate for traditional marriage.[164] Under this law, religious officials cannot be compelled to perform weddings against their religious beliefs. Religious organizations cannot be forced to use their facilities for weddings that are contrary to their faith and cannot lose their tax-exempt status for refusing to participate in such weddings.[165] Individuals who speak their views on marriage, family, and sexuality outside of professional settings cannot lose their professional license.[166]

While this type of bargaining for same-sex recognition is no longer available now that the Supreme Court has recognized same-sex marriage as a fundamental right, the concept of bringing both sides together to find a compromise is still viable. This is exactly what the Court called for in *Masterpiece Cakeshop*—"[T]hese disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[167] Legislatures can still pass laws that define when someone with religious objections to participating in a same-sex wedding may be exempt from complying with generally-applicable anti-discrimination laws and that also ensure same-sex couples have the ability to receive services in the open market.

2. Rowan County Clerk Kim Davis

Besides *Masterpiece Cakeshop*, the most widely recognized instance of a same-sex couple being denied service for their wedding involves Kim Davis, the county clerk in Rowan County, Kentucky. This case is a prime example of how an accommodation by the legislature calmed an intense battle in the courts. In the end, both sides claimed victory.[168]

Upon learning of the Supreme Court's recognition of same-sex marriage in *Obergefell*, Davis refused to issue any marriage licenses from

163. *Id.*

164. Protections for Religious Expression and Beliefs about Marriage, Family, or Sexuality, 2015 Utah Laws 214–218.

165. *Id.*

166. *Id.*

167. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

168. *See* Corky Siemaszko, *Kentucky Clerk Kim Davis, Who Refused to Issue Marriage Licenses to Gays, Seeks to End Case*, NBC NEWS (June 21, 2016), https://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-who-refused-issue-marriage-licenses-gays-n596476 [https://perma.cc/KW2M-ZAE2].

her office citing her religious beliefs against same-sex marriage.[169] Marriage licenses in Kentucky included an authorization statement of the county clerk recognizing the couple on the license is authorized to marry.[170] Davis believed this authorization statement combined with her name as county clerk on the form served as an endorsement of same-sex marriage.[171] When a lawsuit arose, the district court denied Davis' free exercise claim and issued an injunction against her requiring her to issue marriage licenses.[172] Despite the injunction, Davis continued to refuse to issue marriage licenses. The district court judge held Davis in contempt and placed her in jail.[173]

In response, the Kentucky General Assembly amended the requirements of the marriage license. The license no longer needed to contain the name of the county clerk and could be signed by a deputy-clerk.[174] Since the new legislation resolved Davis's objections, the Sixth Circuit dismissed the appeal as being moot and ordered the district court to vacate the injunction.[175] Kim Davis and all other Kentucky county clerks received an accommodation from the Kentucky legislature as they no longer had to personally authorize same-sex marriages, and same-sex couples in Rowan County and across the state were assured they could obtain a marriage license at their local county clerk's office. A simple adjustment to the law by the legislature created an amicable conclusion to a passionate court battle.

3. North Carolina's Accommodations

Just weeks before the Supreme Court recognized same-sex marriage in *Obergefell*, the North Carolina legislature passed a law over the governor's veto that provided for accommodations for magistrates to recuse themselves from performing all marriages and assistant or deputy registrar of deeds to recuse themselves from issuing all marriage certificates.[176] The text does not mention the registrar of deeds which implies the accommodation only applies to assistants and deputies. The law also provided for the Administrative Office of the Courts to ensure

169. Miller v. Davis, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015).
170. *Id.* at 931.
171. *Id.* at 932.
172. *Id.* at 944.
173. *See* Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/X8UA-NAAU].
174. *See* 2016 Ky. Acts 132.
175. Miller v. Davis, 667 F. App'x 537, 538 (6th Cir. 2016).
176. *See* 2015 N.C. Sess. Laws 75, § 1(a)–(b).

that all jurisdictions had access to a magistrate willing to perform marriages.[177] This compromise gave government employees with religious objections to same-sex marriage an accommodation while ensuring same-sex couples the ability to receive marriage licenses and to solemnize their marriage.

4. One-sided Religious Protections in Response to *Obergefell*

Several state legislatures passed religious protections as a result of the Court's decision in *Obergefell*. Legislatures in Georgia and Mississippi passed bills to protect those who had religious beliefs that opposed same-sex marriage but did not provide much protection for same-sex couples.

Georgia's legislature passed "An Act to Protect Religious Freedoms." The bill would have provided significant protections for those who had religious objections to same-sex marriage including members of the clergy and faith-based organizations.[178] It also served as a state Religious Freedom Restoration Act that would have required the compelling government interest test for a burden by the state on a person's exercise of religion.[179] After Coca-Cola, Disney, the NFL, and other major corporations threatened a boycott of the state, Georgia Governor Nathan Deal vetoed the bill.[180]

Georgia's religious freedom bill likely would have been more accepted if it had listed provisions that specifically protected same-sex couples. Because it only offered specific protections to religious objectors, it became extremely unpopular and was vetoed.

Mississippi passed the "Protecting Freedom of Conscience from Government Discrimination Act" in 2016.[181] This law recognized the sincerely held religious belief of traditional marriage.[182] It also prevented the state from discriminating against religious organizations who make certain decisions due to the organizations' belief in traditional marriage.[183] Among other things, the law prevented the state from discriminating

177. *Id.* at § 1(c).

178. *See* Free Exercise Protection Act, Ga. Gen. Assemb., H.B. 757, 2015–2016 Gen. Assemb., Reg. Sess., §§ 2, 4 (Ga. 2016).

179. *Id.* at § 6.

180. *See* Ralph Ellis & Emanuella Grinberg, *Georgia Gov. Nathan Deal to Veto 'Religious Liberty' Bill*, CNN (Mar. 28, 2016, 5:46PM) https://www.cnn.com/2016/03/28/us/georgia-north-carolina-lgbt-bills/index.html [https://perma.cc/ZB6X-UU82].

181. *See* Protecting Freedom of Conscience from Government Discrimination Act, Miss. Leg., H.B. 1523, 2016 Miss. Leg., Reg. Sess. (Miss. 2016).

182. *See id.* at § 2.

183. *See id.* at § 3(1).

against persons or organizations who use their belief in traditional marriage to decline to place foster children with same-sex couples, or to provide services for same-sex weddings, or in the case of state employees to recuse themselves from authorizing or licensing same-sex marriages.[184] Like Georgia's law, this Mississippi law did not offer any specific protections for the dignity of same-sex couples.

Those opposed to this new law filed suit claiming that it violated the Establishment Clause because section two endorsed a specific religious belief and violated the Equal Protection Clause because it provided stronger protections for those who believed in traditional marriage than those who believed in same-sex marriage. The district court granted a preliminary injunction against the law,[185] but the Fifth Circuit dismissed the case for lack of standing.[186]

These laws in Georgia and Mississippi faced much opposition and did little to resolve the overall dispute. Had these laws been closer to Utah's laws which provided protections for both sides, they would have had wider support and satisfied *Masterpiece Cakeshop*'s formula for finding a balance between same-sex rights and religious rights.

When it comes to existing religious accommodations, there are some that have provided a good balance of protections for both same-sex couples and religious objectors, and there are others that have provided lopsided protections. Those that are balanced have been accepted while those that are lopsided have faced significant political pressure and legal challenges. To truly solve the dispute, they "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[187]

VI. THE APPLICATION OF LEGISLATIVE ACCOMMODATIONS TO CURRENT AND FUTURE ISSUES

The legislature, whether state or federal, has broad power to accommodate religion. However, we have seen that when a legislature goes too far in protecting religious objectors without also expressing tolerance and protecting the dignity of LGBT individuals, the situation is not resolved and usually escalates. *Masterpiece Cakeshop*'s formula has proven to be needed.

184. *See id.* at § 3.
185. Barber v. Bryant, 193 F. Supp. 3d 677, 724 (S.D. Miss. 2016).
186. Barber v. Bryant, 860 F.3d 345, 358 (5th Cir. 2017).
187. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

This article has shown how three different proposals—from the religious liberty professors, Professor Brownstein, and the government—uniquely satisfy the formula of resolving these disputes "with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[188]

Moving forward, how can we use this these proposals and the formula from *Masterpiece Cakeshop* to resolve this dispute? There are three main categories that are currently still being debated: wedding vendors, adoption agencies, and government officials.

A. Wedding Vendors

The most current issue is the one unanswered by *Masterpiece Cakeshop*—whether wedding vendors, or any particular type of wedding vendor, are able to refuse to serve a same-sex wedding. *Masterpiece Cakeshop*'s formula implies that there should be at least some compromise by both sides. The religious liberty professor's approach would accommodate wedding vendors as long as there are other vendors available to provide those services without substantial hardship. Professor Brownstein's "religious discrimination" model is unclear but does allow for both sides to see from the other's perspective. The government's approach would exempt only those whose goods or services are considered expressive and providing that good or service would require them to participate in the expressive event.

Assuming that all of these vendors are small business owners, bakers who create custom wedding cakes should receive an accommodation under any of these approaches. Wedding photographers would also receive accommodations as their photography is expressive and requires them to participate in the event. A florist would also fall into this category.

Whether other vendors such as limousine companies, party supply companies, and non-religious venues received an accommodation would depend on which approach is used. These vendors are not typically considered to provide expressive services. Therefore, they would not likely receive an accommodation under the government's approach. They would also not likely be able to refuse service based on religion, failing Professor Brownstein's approach. However, under the religious liberty professor's model accommodation, these services would likely be included.

188. *Id.*

Masterpiece Cakeshop has shown us that to resolve these bitter disputes there needs to be respect for sincere religious beliefs and the dignity of same-sex couples. The current case law and the structure and inflexibility of the courts make it difficult to create judicial accommodations. It is time for the legislature to step up and resolve these disputes with religious accommodations designed to protect both the wedding vendors and the same-sex couples. How the legislature draws that line will likely rely on its political makeup and which approach to accommodations it uses, but it is certain that some sort of compromise is needed.

B. Judges, Magistrates, and Other Government Officials

Judges, magistrates, and other government officials involved in the recognition of marriage are another group who face a challenge between their faith and their role in performing same-sex marriages.[189]

County clerks have already been discussed. Kentucky was able to provide an accommodation for Kim Davis,[190] and North Carolina passed an accommodation that allowed assistant and deputy register of deeds to recuse themselves from processing marriage licenses.[191] However, there are clerks in other states who have not received religious accommodations. Linda Summers, a deputy clerk from Indiana, was fired when she refused to process a same-sex marriage license. Her civil rights lawsuit was dismissed, finding that she was not dismissed for her religious beliefs but for failing to do her job.[192] There is nothing more needed than political will to enact meaningful religious accommodations for county clerks that also protect same-sex couples.

Judges and magistrates have a harder argument to make for religious accommodations. Several states have issued advisory opinions stating the requirement of judges to perform same-sex marriages. Three days after the Supreme Court recognized same-sex marriage, the Nebraska Judicial Ethics Committee issued an advisory opinion stating that a judge who performs traditional marriages will not be allowed to refuse to perform

189. *See also* Christopher T. Holinger, Note, *When Fundamental Rights Collide, Will We Tolerate Dissent? Why a Judge Who Declines to Solemnize a Same-Sex Wedding Should Not Be Punished*, 29 REGENT U. L. REV. 365, 365 (2016–2017).

190. *See* 2016 Ky. Acts 132; *supra* note 174 and accompanying text.

191. *See* 2015 N.C. Sess. Laws 75.

192. Summers v. Whitis, No. 4:15-cv-00093, 2016 WL 7242483, at *7–8 (S.D. Ind. Dec. 15, 2016).

same-sex marriages.[193] While performing marriages is an "extrajudicial activity," the ethics committee decided that a refusal to perform a same-sex wedding even for religious objections would "undermine the judge's independence, integrity, and impartiality."[194] The Supreme Court of Ohio Board of Professional Conduct issued an advisory opinion stating that judges may not refuse to perform same-sex marriages but also went a step farther by stating that any judge who stops performing any marriage to avoid having to perform same-sex marriages has also manifested bias.[195] The Wisconsin Judicial Conduct Advisory Committee also issued an advisory opinion stating that a judge who performs any marriages may not refuse to perform same-sex marriages.[196] While these opinions are nonbinding, they show the intricacies of providing religious accommodations for judges.

There have been a few cases of judges facing discipline for refusing to perform same-sex marriages. One case involved Judge Ruth Neely of Wyoming who, in response to a reporter's question regarding her enthusiasm for performing same-sex marriages, stated that she would not be able to perform same-sex marriages due to her religious beliefs. She was never asked to perform a same-sex marriage.[197] The Wyoming Supreme Court, applying strict scrutiny, found that promoting the integrity of the judiciary was a compelling interest[198] and disciplining her with a public censure is the least restrictive method of upholding judicial integrity.[199] The dissent viewed the case as one imposing a religious test on judges.[200] They claim the majority's compelling interest in protecting the integrity of the judiciary is overbroad and unfounded on the facts of the case.[201] The dissent also points to the judicial rules which allow reassignment of cases to avoid partiality as a less burdensome method of promoting judicial integrity in this situation.[202]

193. Neb. Jud. Ethics Comm., Formal Op. 15-1, 2 (2015), https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1_0.pdf [https://perma.cc/FNH4-XT23].

194. *Id.* at 2.

195. *See* Ohio Bd. Of Prof'l Conduct, Formal Op. 2015-1, 7 (2015), https://www.ohioadvop.org/wp-content/uploads/2017/04/Op_15-001.pdf [https://perma.cc/6SDE-9QAT].

196. Wis. Jud. Conduct Advisory Comm., Formal Op. No. 15-1, 4–5 (2015), https://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878 [https://perma.cc/W56C-R2YH].

197. Neely v. Wyo. Comm'n on Jud. Conduct & Ethics, 390 P.3d 728, 734 (Wyo. 2017).

198. *Id.* at 736.

199. *Id.* at 753.

200. *Id.* at 753–54 (Kautz, J., dissenting).

201. *Id.* at 767 (Kautz J., dissenting).

202. *Id.*

Another case involved Judge Vance D. Day of Oregon who instructed his staff to search the local judicial database to determine if the couples requesting to be married were same-sex. If they were, Judge Day instructed his staff to politely inform the couple that the judge was unavailable at the requested time as he was religiously opposed to same-sex marriage.[203] The Commission on Judicial Fitness and Disability charged Judge Day with manifesting bias or prejudice in his judicial duties and failure to perform judicial duties along with eleven other counts for unrelated incidents.[204] The Oregon Supreme Court held that Judge Day's screening process manifested prejudice in the performance of his judicial duties,[205] but declined to consider Judge Day's constitutional defense. The court noted that the findings on the other counts justified the sanction and the answer to the unsettled constitutional question would not change the outcome.[206]

The third case involved Magistrate Sandra Myrick of North Carolina who requested a religious accommodation after federal district courts overruled North Carolina law and required same-sex marriage be treated the same as opposite-sex marriages.[207] Judicial administrators in North Carolina distributed memos requiring judges, clerks, and magistrates to perform same-sex marriages or face discipline.[208] Her supervisors, believing the directives from judicial administrators left them no ability to accommodate, accepted Magistrate Myrick's resignation.[209] She filed a claim with the Equal Employment Opportunity Commission. The Administrative Law Judge held that the state discriminated against her under Title VII of the Civil Rights Act of 1964 for not accommodating her religious belief.[210]

While the advisory opinions and disciplinary decisions do not favor accommodations for judges and magistrates, the North Carolina law that accommodated assistant and deputy register of deeds also allows magistrates to recuse themselves from performing all marriages and provides a willing magistrate should a jurisdiction not have one

203. In re Day, 413 P.3d 907, 921–22 (Or. 2018), *cert. denied*, 139 S. Ct. 324 (2018).

204. *Id.* at 922.

205. *Id.* at 949–53.

206. *Id.* at 953–54.

207. Myrick v. Warren, No. 16-EEOC-0001, at *5 (Mar. 8, 2017) https://s3.amazonaws.com/becketnewsite/Myrick-v.-Warren-et.-al.-16-EEOC-0001.pdf [https://perma.cc/TSG6-GL64] (predating the Supreme Courts recognition of same-sex marriage in *Obergefell*).

208. *Id.* at *8.

209. *Id.* at *9.

210. *Id.* at *10, 24.

available.[211] This law, passed after Magistrate Sandra Myrick requested her accommodation, proves that judges and magistrates can receive accommodations too.

While judges should be allowed to refuse to perform marriages, judges should not be able to recuse themselves from all family court proceedings involving same-sex couples. This is what Judge W. Mitchell Nance of Kentucky did.[212] As a result, Judge Nance was charged with judicial misconduct and submitted his resignation. He was found guilty of misconduct and issued a public reprimand which was the only sanction available due to his retirement.[213] This conduct does not protect the dignity of same-sex couples nor the impartiality of the judiciary and should not be accommodated.

C. Adoption Agencies

Judge Nance's case proves that once the disputes around same-sex weddings are resolved, the next issue will center on the family and begin with religious adoption agencies. The issue with religious adoption agencies declining to place children with same-sex couples is that many of these agencies receive government funding or are reliant on government contracts to operate as part of the state adoption and foster programs.

There are cases out of Michigan[214] and Pennsylvania[215] where religiously-affiliated adoption agencies are at risk of having to close

211. 2015 N.C. Sess. Laws 75.

212. Commonwealth of Kentucky Judicial Conduct Commission, Findings of Fact, Conclusions of Law and Final Order, *In re* Hon. W. Mitchell Nance, at 3 (Dec. 19, 2017), https://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/FindingsFactsNance.pdf [https://perma.cc/3GX3-TLWR].

213. *Id.* at 5.

214. *See* Dumont v. Lyon, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (denying adoption agency's motion to dismiss and allowing same-sex couples to proceed with establishment clause and equal protection clause claims against the state for using religiously-based adoption agencies who do not place children with same-sex couples to proceed). *Compare*, *Dumont v. Lyon*, BECKET (Sep. 9, 2019), https://www.becketlaw.org/case/dumont-v-lyon/ [https://perma.cc/S6PC-EHRH] (providing the religious adoption agency's position), *with Dumont v. Lyon*, ACLU (March 22, 2019), https://www.aclu.org/cases/dumont-v-lyon [https://perma.cc/A244-MDK7] (providing the same-sex couples' position).

215. *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (denying religiously-based adoption agency's motion for injunction after the City of Philadelphia closed the agency's intake for the agency's practice of their religious belief), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert granted*, No. 19-123 (Feb. 24, 2020). *Compare Sharonell Fulton, et al. v. City of Philadelphia*, BECKET (Feb. 2, 2019), https://www.becketlaw.org/case/sharonell-fulton-et-al-v-city-philadelphia/ [https://perma.cc/FLU4-BUKV] (providing the religious adoption agency's position), *with Fulton v.*

because they choose to practice their religious beliefs. Religious organizations should not be disqualified from assisting the government in providing services because of their religious beliefs. Such disqualifications would amount to a religious test for public service. Their assistance to the government in providing adoption services to their local communities should not alter whether or not they should be accommodated for their religious beliefs.

Adoption agencies can be seen like a wedding vendor. Legislatures can do a similar analysis to determine whether to provide accommodations. The religious liberty professor's approach would not cover adoption agencies as its current form is tailored toward the wedding scenario. However, it could be tailored to fit same-sex family situations and provide the same kind of protections for same-sex couples and religious organizations.

Professor Brownstein directly addresses the issue of refusing to place children with same-sex couples. He concludes that accommodating religious adoption agencies would be acceptable. He argues that religious agencies are often chosen by birth parents to place children in homes of like faith. This allowable refusal based on religion would permit similar refusals for same-sex couples provided there are other adoption agencies able to assist the same-sex couple.[216]

Using the government approach, adoption agencies can be viewed as expressing approval that families are well qualified to care for the children they are adopting and the adoption process is a very expressive event. Religious adoption agencies can also be likened to the wedding vendors that provide a standard "off-the-shelf" product which would remove them from receiving accommodations. However, the uniqueness and value that we place on children would make the act of finding the child the best home available an expressive act and the adoption an expressive event. Under this approach, religious adoption agencies would receive an accommodation.

Accommodations for religious adoption agencies that receive government funds would have Establishment Clause and other statutory issues to deal with, but those issues are the subject of another article.

City of Philadelphia, ACLU (June 10, 2019), https://www.aclu.org/cases/fulton-v-city-philadelphia [https://perma.cc/ 632R-HWJH] (providing the same-sex couples' position).

216. Brownstein, *supra* note 126, at 426–27.

VII. CONCLUSION

While *Masterpiece Cakeshop* did not provide the winner-take-all legal solution to the issue of same-sex rights versus religious beliefs that was anticipated, it did provide a formula to resolve the dispute in a way that worked for both sides. Legislative accommodations are better suited than judicial accommodations. Several proposals for legislative accommodations have been made, and several examples of legislative accommodations have already been enacted. These show that legislative accommodations that respect both sides have the ability to provide the best solution to our current and future issues regarding free exercise of religion and same-sex marriage.