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Extending the Roberts Court's Affirmation of Individual expressive Rights to the First Amendment Claim in Masterpiece Cakeshop

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EXTENDING THE ROBERTS COURT'S AFFIRMATION OF INDIVIDUAL EXPRESSIVE RIGHTS TO THE FIRST AMENDMENT CLAIM IN *MASTERPIECE CAKESHOP*

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In one of the most anticipated decisions of the 2017–18 Supreme Court Term, the Court was asked to decide whether a Colorado baker's First Amendment rights must yield to a generally applicable state law prohibiting discrimination in places of public accommodation.[1] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* arose from a baker's refusal to create a wedding cake for a same-sex couple who were planning to wed legally in Massachusetts and host a reception afterwards in Denver.[2] Jack Phillips, the owner of Masterpiece Cakeshop, is a devout Christian who holds a sincere belief that "God's intention for marriage . . . is that it is and should be the union of one man and one woman."[3] As a result of this firmly held conviction, Phillips will not use his baking and decorating talents to create wedding cakes for same-sex couples; but he will make and sell other types of cakes and baked goods to gay and lesbian individuals and couples.[4] As such, Phillips informed Charlie Craig and David Mullins of this limitation when they entered his shop in the summer of 2012 and inquired about a cake for their upcoming wedding.[5] Thereafter, Craig and Mullins filed a claim with the Colorado Civil Rights Commission alleging that Phillips discriminated against them on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.[6] The Commission and the Colorado Court of Appeals ruled in favor of the couple,[7] and Phillips was ordered to provide custom wedding cakes to same-sex couples, comprehensive training on the public accommodations act to his staff, as well as fulfill other remedial measures.[8]

To Phillips, the creation of a custom wedding cake is an expressive endeavor intended to celebrate the couple and their union.[9] Phillips argued that the Commission's order, which compelled him to exercise his artistic talents to express a message with which he

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[1] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1723–24 (2018).

[2] *Id.* at 1724.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1723.

[7] *Id.*

[8] *Id.* at 1726.

[9] *Id.* at 1728.

disagreed, violated his free speech right.[10] The Court noted that Phillips' dilemma was particularly understandable given the fact that, at the time, Colorado did not recognize the validity of same-sex marriage,[11] and allowed some storekeepers to decline to create specific messages they considered offensive.[12] In the end, this case presented the Justices with the question of whether Colorado's use of its public accommodation law to compel Phillips to engage in expressive pursuits that conflicted with his religious beliefs violated the First Amendment.[13]

Instead of addressing the question head on, the Justices resolved the case by examining the manner in which the Commission treated Phillips' religious objection.[14] The Court ruled that the Commission violated the free exercise clause of the First Amendment by showing "elements of a clear and impermissible hostility" toward Phillips' religious viewpoint.[15] Phillips, the Court said, was entitled to a "neutral and respectful consideration" of his objections,[16] but instead was confronted by commissioners who, during formal public hearings, "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or the commercial domain."[17] In addition, the Court noted the disparate treatment between the Phillips case and the cases of other bakers who refused to create cakes with language and images disapproving same-sex marriage on religious grounds.[18] In these cases, the Colorado Civil Rights Division found no violation of the State's anti-discrimination law because "each bakery was willing to sell other products . . . depicting Christian themes [] to the prospective customers."[19] Here, the Court said, "the Commission dismissed Phillips' willingness to sell [other cakes and baked goods]" to Craig and Mullen.[20] Moreover, the Commission ruled against Phillips based on the theory that any message conveyed by the wedding cake would be attributed

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[10] *Id.* at 1726.

[11] *Id.* at 1728.

[12] *Id.*

[13] *Id.* at 1726–27.

[14] *Id.* at 1732.

[15] *Id.* at 1729.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1730–31.

[19] *Id.* at 1730.

[20] *Id.*

to the couple and not the baker.[21] This same line of reasoning, however, was not extended to the bakers who refused to adorn a cake with symbolism and text disapproving of same-sex unions.[22] Based on these findings, the Court reversed the lower court's judgment and effectively ruled for Phillips.[23]

The Court noted that *Masterpiece Cakeshop* presented difficult questions as to the "proper reconciliation" of two foundational Constitutional principles—equal rights, as expressed in the "rights and dignity of gay persons who are, or wish to be, married but [] face discrimination when they seek goods or services," against the "right of all persons to exercise fundamental freedoms under the First Amendment."[24] While the Court recognized Phillips' free speech claim, it left undecided whether his conduct was protected expression.[25] The Court indicated that it "must await further elaboration in the courts" to determine the issue of protected expression.[26] Further elaboration by the Supreme Court was set to occur in the 2018–19 Term with the case *State v. Arlene's Flowers*.[27] *Arlene's Flowers* involved a similar factual pattern as the *Masterpiece Cakeshop* case, but, instead of a wedding cake, the owner of Arlene's, Barronelle Stutzman, refused to create floral arrangements for a same-sex wedding ceremony.[28] Like Phillips, Stutzman contended that her floral arrangements constituted protected speech because they involved "artistic decisions."[29] The Washington Supreme Court addressed that contention and ruled that the arrangements did not meet the constitutional standard for expressive conduct.[30] After handing down *Masterpiece Cakeshop* in June, the Supreme Court vacated and remanded *Arlene's Flowers*, requesting the Washington court to reexamine its ruling in light of the *Masterpiece Cakeshop* decision.[31]

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 1732.

[24] *Id.* at 1723.

[25] *Id.* at 1732.

[26] *Id.*

[27] 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).

[28] *Id.* at 549.

[29] *Id.* at 556.

[30] *Id.* at 557.

[31] Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018).

Given the Court's action in *Arlene's Flowers*, it remains unclear exactly how the Supreme Court would have ruled on the central question in *Masterpiece Cakeshop* without a finding of religious hostility by the Colorado Civil Rights Commission. That said, it is clear that this issue will most likely return to the Court as similar cases have begun to bubble up around the country in state courts.[32] At the same time, those cases will confront the strong record of support for individual free speech interests that the Roberts Court has developed,[33] especially in cases like *Masterpiece Cakeshop,* where collective interests reflected through regulatory law conflict with individual expressive rights.[34] This paper examines those competing interests in light of the Court's active First Amendment jurisprudence and argues that the expansive view of the First Amendment, crafted largely by the conservative majority, is reshaping the analysis of free speech rights in a manner that largely accommodates Phillips' claim against the Colorado Commission. The result would strike down the mandate requiring the baker to provide custom wedding cakes to same-sex couples as violative of Phillips' First Amendment right to freedom of expression.

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[32] *See* Amy Howe, *Masterpiece Cakeshop Question Returns to the Supreme Court*, SCOTUSBLOG (Oct. 22, 2018, 12:59 PM), https://www.scotusblog.com/2018/10/masterpiece-cakeshop-question-returns-to-the-supreme-court/; Nathan Heffel, *The 3 Court Cases That Could Pick Up Where Masterpiece Cakeshop Left Off*, COLO. PUB. RADIO (June 6, 2018), http://www.cpr.org/news/story/the-3-court-cases-that-could-pick-up-where-masterpiece-cakeshop-left-off; Brennan Suen, *Masterpiece Cakeshop Was Just the Beginning*, MEDIA MATTERS FOR AM. (June 5, 2018, 1:32 PM), https://www.mediamatters.org/blog/2018/06/05/Masterpiece-Cakeshop-was-just-the-beginning-ADF-is-pushing-several-other-license-to-discri/220381.

[33] *See, e.g.*, Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553, 554 (2017); Joel M. Gora, *In the Business of Free Speech: The Roberts Court and Citizens United*, *in* BUSINESS AND THE ROBERTS COURT 227, 255–56 (Jonathan H. Adler ed., 2016); Amelia Thomson-DeVeaux, *Chief Justice Roberts is Reshaping the First Amendment*, FIVETHIRTYEIGHT (Mar. 20, 2018, 5:58 AM), https://fivethirtyeight.com/features/chief-justice-roberts-is-reshaping-the-first-amendment/.

[34] *See, e.g.*, Sorrel v. IMS Health, Inc., 564 U.S. 552, 580 (2011) (holding that a state statute that prohibited the marketing of prescriber information violated the First Amendment); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (overturning Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) as inconsistent with standard First Amendment principles); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018) (holding that a license notice likely violates the First Amendment).

I. THE ROBERTS COURT AND FREEDOM OF SPEECH

When Chief Justice Roberts was appointed to the Court,[35] he inherited a body of free speech precedent built largely on the concept of an "ideas" marketplace.[36] Under this concept, ideas naturally collide and foster debate[37] that challenges traditional ways of thinking and encourages new attitudes, which are wiser than those generated in an environment where speech is restricted.[38] While the debate this process produces has become highly valued for the collective benefits it bestows on society,[39] it is fueled by a limitless supply of individual viewpoints and expressive activity.[40] The fortification of that supply, through the preservation of an individual's right to fully and freely participate in the public debate, is vastly important to the Roberts Court and largely serves as the lens through which the Court analyzes First Amendment claims.[41] This lens has allowed the Court to significantly expand the free speech rights of individuals, especially in areas such as campaign finance[42] and mandatory agency fees,[43] where precedent has been read to limit that right. In these areas, the Court has overturned key precedential cases that favored collective interests over the freedom of the individual.[44] According to Chief Justice Roberts, the central purpose of the First Amendment is to afford individuals protection against the majority's will, as reflected in a law.[45] While this protection is essential to democracy and the achievement of many other important ends, all of these interests are undermined whenever the state "prevents individuals from saying what they think . . . or compels them to voice ideas with which they disagree."[46] For the

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[35] Roberts was appointed in September 2005. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 18, 2019).

[36] *See, e.g.*, Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL'Y 21, 24–26 (2012).

[37] *Id.* at 26.

[38] *Id.* at 29–30.

[39] *Id.* at 30.

[40] *Id.* at 27, 30.

[41] *See infra* text accompanying notes 42–49.

[42] *See* Citizens United v. FEC, 558 U.S. 310 (2010).

[43] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[44] *Citizens United*, 558 U.S. at 365 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)); *Janus*, 138 S. Ct. at 2486 (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[45] McCutcheon v. FEC, 572 U.S. 185, 205–06 (2014) (plurality opinion).

[46] *Janus*, 138 S. Ct. at 2464.

Roberts Court, individual free speech rights are the foundation upon which First Amendment law is built.[47] These rights serve as the linchpin of free speech protection and exist regardless of how useful the particular expression is to the democratic process,[48] or whether the individual is a lone pamphleteer, or some entity that "spends 'substantial amounts of money in order to communicate . . . ideas through sophisticated' means."[49]

The approach to First Amendment jurisprudence embraced by the Roberts Court calls to mind the Court's reasoning in *Cohen v. California*, a case involving a man who was criminally convicted for wearing a jacket that visibly displayed the words "Fuck the Draft."[50] In *Cohen*, the State argued Cohen's arrest and subsequent conviction for disturbing the peace was justified to "protect sensitive [viewers] from [an] otherwise unavoidable exposure to [Cohen's] crude form of protest."[51] In its ruling, the Court rejected the State's argument, contending that the State had "no right to cleanse public debate" to accommodate the "most squeamish among us."[52] The opinion signaled that public discussion will include distasteful views that may well sow discord among individuals.[53] Disagreement, and even offensive utterances, the Court said, are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[54] According to the Court, the First Amendment was designed to perpetuate the achievement of these values by the restraints it

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[47] *See, e.g.*, *id.* at 2463 (ruling that "[c]ompelling individuals to mouth support for views they find objectionable violates" a foundational First Amendment principle); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (arguing that a disclosure notice requirement for clinics that provide family planning and pregnancy related services unconstitutionally compels individuals to speak a particular message); *McCutcheon*, 572 U.S. at 206 (plurality opinion) (holding that "[t]he whole point of the First Amendment is to afford individuals protection against infringements."). *See also* Sorrell v. IMS, 564 U.S. 552, 580 (2011) (recognizing that an individual's right to speak is implicated when government regulates the commercial use of medical information by data miners and pharmaceutical manufacturers).

[48] *McCutcheon*, 572 U.S. at 206 (plurality opinion).

[49] *Id.* at 203 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985)).

[50] 403 U.S. 15, 16 (1971).

[51] *Id.* at 21.

[52] *Id.* at 25.

[53] *See id.* at 24–25.

[54] *Id.*

places on governmental interference in the arena of public discussion.[55] These restraints, the Court said, place the "decision as to what views shall be voiced largely into the hands of each of us."[56] Because the Court recognized the right of individuals to decide the form, content, and emotive intent of their expression, Cohen's use of the four-letter expletive was protected even though others found its use immoral.[57] The Court stated that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[58]

The First Amendment doctrine applied in *Cohen* was largely developed by liberals who wanted to expand free speech protection for unpopular individuals and groups.[59] Cases brought against governmental attempts to restrict union picketing,[60] anti-Vietnam War protests by students,[61] flag-burning,[62] and Nazi protests[63] helped to "establish free speech as an essential protection for people with minority opinions who were in danger of being silenced by the majority."[64] While this doctrine was developed decades prior to Roberts' tenure, a study prepared for the New York Times found his Court is now using the doctrine to champion conservative speech at a far greater rate than

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[55] *Id.* at 24.

[56] *Id.*

[57] *See id.* at 24, 26.

[58] *Id.* at 24.

[59] Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html.

[60] Thornhill v. Alabama, 310 U.S. 88 (1940) (holding the Constitutionally protected freedoms of speech and of the press guaranteed the liberty to disseminate information concerning a labor dispute, overcoming the insufficiently serious or imminent dangers of breach of the peace or injury to a business interest which the State sought to protect).

[61] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students' wearing of black armbands were "closely akin to pure speech" and therefore entitled to protection under the First Amendment).

[62] Texas v. Johnson, 491 U.S. 397 (1989) (holding that the flag burning constituted symbolic political expression, and was, therefore, constitutionally protected).

[63] Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (holding that the Illinois courts' refusal to allow a stay of injunction against a planned Nazi demonstration effectively imposed a restraint on free speech), *aff'd in part on remand*, 373 N.E.2d 21 (Ill. 1978).

[64] Thomson-DeVeaux, *supra* note 33.

liberal speech.[65] From 2005 to 2018, sixty-nine percent of the conservative speech cases heard by the Roberts Court received a favorable ruling, compared to a win rate of twenty-one percent for cases involving liberal speech.[66] This gap is striking when compared to other Courts, beginning with the Warren Court in 1953. Even the Burger Court,[67] which had the second largest gap between rulings on conservative versus liberal speech cases, produced a liberal speech win rate of forty-seven percent—more than double the current Court's—and a conservative success rate of seventy percent, just one point higher than the current Court's.[68] These findings compared favorably to the percent of conservative speech cases accepted for review by the Roberts Court.[69] Of all the free speech petitions accepted by the current Court, sixty-five percent involved the suppression of conservative expression.[70] By comparison, the next highest rate of acceptance for conservative speech cases was that of the Rehnquist Court at forty-seven percent.[71]

Armed with this traditional individual rights approach, the Roberts Court has stuck down restraints on the creation of videos depicting animal cruelty;[72] the sale of violent video games to minors;[73]

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[65] Liptak, *supra* note 59; *see also* Lee Epstein et al., *6+ Decades of Freedom of Expression in the U.S. Supreme Court* 1, 1 (June 30, 2018), http://epstein.wustl.edu/research/FreedomOfExpression.pdf.

[66] Liptak, *supra* note 59.

[67] The Burger Court succeeded the Warren Court in 1969 and lasted through 1986. See Epstein et al., *supra* note 65, at 3 for a table of Chief Justice Terms.

[68] See Figure 7a of *id.* at 13 for win rates.

[69] *Id.* at 9.

[70] *Id.* at 9–10.

[71] *Id.* at 10.

[72] *See* United States v. Stevens, 559 U.S. 460 (2010) (holding that 18 U.S.C. § 48 limiting video depictions of extreme animal cruelty is substantially overbroad and therefore invalid under the First Amendment).

[73] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (holding that video games qualify for First Amendment protection).

falsely claiming the Medal of Honor award;[74] access to social networking sites by sex offenders;[75] hateful protests at military funerals;[76] and corporate spending limits in candidate elections.[77] In doing so, the Court has declined to consider the value of the expression at issue against its societal costs.[78] In a particularly gut-wrenching free speech case involving the Westboro Baptist Church, an organization known for picketing military funerals with antigay placards,[79] Chief Justice Roberts recognized both the extreme distress speech can inflict on others and the shackles the First Amendment places on government action against such speech. "Speech," Roberts wrote, "is power. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain."[80] But even in light of great agony, Roberts continued, the First Amendment does not allow us to respond by punishing the speaker.[81] "As a Nation," he said, "we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[82]

By siding with speech interests in these high-profile rulings involving hateful expression, the Roberts Court has earned a reputation for dramatically expanding the reach of the First Amendment[83] through an approach that, according to Professor Burt Neuborne,[84]

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[74] *See* United States v. Alvarez, 567 U.S. 709 (2012) (holding that the Stolen Valor Act constituted a content-based restriction on free speech in violation of the First Amendment).

[75] *See* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (holding that a North Carolina statute prohibiting sex offenders from accessing social networking websites violated the First Amendment).

[76] *See* Snyder v. Phelps, 562 U.S. 443 (2011) (holding that hurtful speech on public issues, such as picketers protesting near a funeral military service, is protected under the First Amendment).

[77] *See* Citizens United v. FEC, 558 U.S. 310 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment).

[78] United States v. Stevens, 559 U.S. 460, 470 (2010).

[79] *Snyder*, 562 U.S. at 448.

[80] *Id.* at 460–61.

[81] *Id.* at 461.

[82] *Id.*

[83] *See* Laurence Tribe, *Free Speech and the Roberts Court: Uncertain Protections*, WASH. POST: VOLOKH CONSPIRACY (June 3, 2014, 8:46 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/03/free-speech-and-the-roberts-court-uncertain-protections/?noredirect=on&utm_term=.fb9f46fadb32.

[84] Professor of Civil Liberties at New York University School of Law, founding Legal Director of Brennan Center for Justice, and National Legal Director of the ACLU from

seeks to "get the government out of the business of meddling with speech."[85] With an apparent aim of expanding the supply of ideas and voices in the marketplace, the Court is reshaping the First Amendment in ways that some worry will end up "creating a doctrine that simply doesn't cohere." [86] Others, however, praise the Court for its commitment to free speech principles in tough cases[87] involving the types of unpopular and distasteful speech that require the most First Amendment protection.[88] "On [this] score," Floyd Abrams said, "no prior Supreme Court has been [more] protective."[89]

The Roberts Court's protective stance toward repugnant messages and ideas rests on the idea that the Constitution forecloses any attempt to restrict speech simply on the basis that the expression lacks societal value.[90] This line of thinking was most notable in a case involving the criminalization of the commercial creation, sale, or possession of depictions of animal cruelty in which a "living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[91] In *United States v. Stevens*, the government argued that such depictions of animal cruelty should be treated as a new category of unprotected speech.[92] The Roberts Court firmly rejected the idea. "[A]s a general matter," the Court said, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[93] The fact that the government was arguing for a "free floating test" extending First Amendment protection "to categories of speech that survive an ad hoc balancing of

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1981–86. *Burt Neuborne*, NYU L.: FAC., http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20165 (last visited Nov. 18, 2019).

[85] Thomson-DeVeaux, *supra* note 33.

[86] Tribe, *supra* note 83.

[87] Michael W. McConnell, *A Free Speech Year at the Court: A Survey of the Supreme Court's 2010 Decisions*, FIRST THINGS (Oct. 2011), https://www.firstthings.com/article/2011/10/a-free-speech-year-at-the-court.

[88] Tribe, *supra* note 83.

[89] *Id.* (Floyd Abrams is a nationally recognized attorney who has litigated countless First Amendment cases, including high profile cases before the Supreme Court. *Floyd Abrams*, CAHILL GORDAN & REINDEL LLP, https://www.cahill.com/professionals/floyd-abrams (last visited Nov. 18, 2019)).

[90] United States v. Stevens, 559 U.S. 460, 470 (2010).

[91] *Id.* at 464–65 (quoting 18 U.S.C. § 48(c)(1)).

[92] *Id.* at 469.

[93] *Id.* at 468 (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)) (internal quotes omitted).

[their] relative social costs and benefits" was "startling and dangerous."[94] "The First Amendment itself," the Court said, "reflects a judgment by the American people that the benefits of its restriction on government outweigh the costs" and prohibits any attempts to "revise that judgment simply on the basis that some speech is not worth it."[95]

II. INDIVIDUAL RIGHTS AND REGULATORY POLICY

The Roberts Court has extended its speech-protective stance to economic regulatory policy aimed at corporate, professional, and commercial speech.[96] The Court most notably started down this path with its 2010 ruling in *Citizens United v. FEC*.[97] In that ruling, the Court effectively prohibited the suppression of free speech rights based on a speaker's wealth, or the correlation between the public's support for an idea and the amount of money used to express it.[98] The *Citizens United* ruling, which allows corporations to spend unlimited amounts of money on elections, reiterated a key holding in *First National Bank of Boston v. Bellotti*[99]—that "political speech does not lose its First Amendment protection 'simply because its source is a corporation.'"[100] Following the *Citizens United* decision, the Court focused its individual rights argument on regulatory policies which inhibit or compel an organization's expressive activities.[101] The Court's approach strengthened the free speech rights of corporations and other business entities while broadening what it deemed content-based restrictions to include subject, topic, and speaker-based regulations.[102] The Court has also extended a heightened scrutiny review to regulations that burden speech in pursuit of collective policy aims.[103]

Members of the Court employed this approach (as well as longstanding constitutional principles that prohibit the restriction of offensive speech) to strike down a clause in federal trademark law

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[94] *Id.* at 470.

[95] *Id.*

[96] *See infra* text accompanying notes 97–195.

[97] 558 U.S. 310 (2010).

[98] *Id.* at 351.

[99] 435 U.S. 765 (1978).

[100] *Citizens United*, 558 U.S. at 342 (quoting *Bellotti*, 435 U.S. at 784).

[101] *See infra* text accompanying notes 104–67.

[102] *See infra* text accompanying notes 104–67.

[103] *See infra* text accompanying notes 104–67.

that prohibited the registration of marks that disparage members of a racial or ethnic group.[104] That case, *Matal v. Tam,* is significant in part because the government has long maintained greater power to regulate expression connected to business and commercial activities.[105] The inherent profit motive in commercial information has largely prevented it from receiving the same degree of First Amendment protection afforded to non-commercial speech.[106] Preceding courts have partly based this standard on the idea that profit-driven speech is hardier than other classes of non-commercial speech.[107] Since commercial speakers are economically motived to engage in speech, they are deemed more able to withstand regulatory restrictions than other speakers.[108] Consequently, past courts gave the government more leeway in regulating commercial speech.[109] In doing so, restrictions on commercial speech were subjected to a lower degree of judicial scrutiny than restrictions on political speech.[110] This lower degree of scrutiny was easier for the government to surmount than the strict scrutiny that courts apply to content-based regulations of non-commercial speech.[111]

Eight members of the Court, writing in two separate opinions, largely circumvented the lower scrutiny rationale by concluding the restriction at issue in *Matal* constituted viewpoint discrimination even though the government applied the clause equally to marks arrayed on both sides of every possible issue.[112] In a concurring opinion, Justice Kennedy wrote that "discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious

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[104] Matal v. Tam, 137 S. Ct. 1744 (2017). At issue in *Matal v. Tam* was the denial of an application for federal trademark registration of a dance-rock band's name, "The Slants." *Id.* at 1751. While the Patent and Trademark Office found that the word "slants" is a derogatory term for person of Asian descent, the band's members wanted to use the slur as the name of their group in an attempt to reclaim the word and drain it of its denigrating force. *Id.*

[105] *See, e.g.*, Whitmore, *supra* note 36, at 39–45.

[106] *Id.* at 39.

[107] *Id.*

[108] *Id.*

[109] *See id.* at 40–45.

[110] *See id.* at 41.

[111] *Id.* at 47.

[112] Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (plurality opinion); *id.* at 1766 (Kennedy, J., concurring).

concern in commercial context."[113] He explained that irrespective of whether the expression at issue in the case was categorized as commercial speech, the statute's viewpoint-based discrimination invoked heightened scrutiny.[114] A plurality of justices, which included the Chief Justice, appeared to agree. The plurality explained that the disparagement clause, which "denies registration to any mark that is offensive to a substantial percentage of the members of any group," discriminates on the basis of viewpoint.[115] "Giving offense," the plurality said, "is a viewpoint."[116] Echoing language that evoked *Cohen v. California*,[117] the plurality said that the government does not have a legitimate interest in preventing offensive speech because such an intention

> . . . strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.[118]

While the plurality expressed dissatisfaction with the government's attempt to cleanse the commercial marketplace of any expression likely to offend,[119] it stopped short of resolving the dispute between the parties of whether trademarks are commercial speech, and thus reviewable under the more relaxed scrutiny standard outlined in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[120] Instead, the plurality argued that the disparagement clause was far too broad to "withstand even *Central Hudson* review," which holds that the restriction must be narrowly drawn to further a substantial government interest.[121] In *Matal*, the government analogized disparaging trademarks to discriminatory conduct.[122] Since such conduct has an adverse effect on commerce, the government argued that the clause was needed to protect the orderly flow of commerce.[123] The plurality

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[113] *Id.* at 1767 (Kennedy, J., concurring).

[114] *Id.*

[115] *Id.* at 1763 (plurality opinion).

[116] *Id.*

[117] 403 U.S. 15, 24–25 (1971).

[118] *Matal*, 137 S. Ct. at 1764 (plurality opinion).

[119] *Id.* at 1765.

[120] *Id.* at 1764 (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–65 (1980)).

[121] *Id.*

[122] *Id.*

[123] *Id.*

found the government's attempt to drive out discriminatory trademarks far too expansive as the clause targeted any mark disparaging a person, group, or institution.[124] The plurality labeled the disparagement clause of the Trademark Act a "happy-talk clause" and warned that free speech would be endangered if a commercial label permitted "suppression of any speech that may lead to political or social 'volatility.'"[125]

The Roberts Court continued to elevate the level of scrutiny economic-based policies receive by expanding the definition of content-based to take into consideration the purpose for which the information was being used.[126] This allowed the Court in *Sorrell v. IMS Health* to protect a drug company's ability to use pharmaceutical prescriber data for marketing purposes.[127] At issue in *Sorrell* was a state restriction on the sale, disclosure, and use of pharmaceutical prescription records for marketing purposes.[128] The regulation, which was intended to protect medical privacy and the integrity of the doctor-patient relationship, targeted records that identified the prescriber.[129] Prior to the enactment of the law, pharmacies sold these records to data companies, which in turn developed reports on the prescribing practices of doctors and then sold that information to pharmaceutical manufacturers for use in their marketing efforts.[130]

While pharmaceutical manufacturers were prohibited from using the data for marketing purposes, the information could be provided to other entities for use in a variety of contexts such as medical research, law enforcement and compliance efforts, care management, and prescription drug educational programs.[131] The Court concluded that the statute was content-based because it disfavored information used for marketing purposes, and therefore held it was also speaker-based because it disfavored pharmaceutical manufacturers and marketers.[132] Laws that impose a direct burden on speech, the Court ruled, require heightened scrutiny even in cases involving commercial or

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[124] *Id.* at 1764–65.

[125] *Id.* at 1765.

[126] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 563–65 (2011).

[127] *Id.* at 557.

[128] *Id.*

[129] *Id.* at 572.

[130] *Id.* at 557–58.

[131] *Id.* at 559–60.

[132] *Id.* at 563–64.

economically motivated speech.[133] The Court reasoned that these speakers were prohibited from conveying information in their possession[134] because that information would be used for commercial purposes.[135] The Court noted that the speech at issue in *Sorrell* was no different than a "great deal of vital expression" that results from an economic motivation.[136] Ultimately, the Court struck down the regulation under a more relaxed standard of review[137] while the dissent upheld the statute under a similar level of review.[138] While the Court did not define its interpretation of "heightened" scrutiny, its movement away from a strict two-tiered system (which reserves full First Amendment protection for political, social, and other noncommercial expression, and less protection for speech in the marketplace for goods and services) is viewed by some as a marked expansion of First Amendment protection for commercial speech.[139]

In its extension of heightened First Amendment scrutiny into the professional arena, the Court took special aim at regulations that compelled individuals to convey messages with which they disagreed.[140] The first case involved a disclosure regulation requiring California's crisis pregnancy centers to post a government-scripted notice, that informed clients of state-sponsored free or low-cost health and abortion services.[141] The notice also provided the contact information for the state-run facilities.[142] The Ninth Circuit ruled for the government after applying an intermediate level of scrutiny to the compelled disclosure

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[133] *Id.* at 566.

[134] *Id.* at 568.

[135] *Id.* at 562.

[136] *Id.* at 567.

[137] *Id.* at 571–72.

[138] *Id.* at 601. (Breyer, J., dissenting).

[139] *See* Rich Samp, *Supreme Court's 'Sorrell v. IMS Health' Ruling Gains Traction in the Federal Appeals Courts*, FORBES (Jan. 21, 2016, 9:00 AM), https://www.forbes.com/sites/wlf/2016/01/21/supreme-courts-sorrell-v-ims-health-ruling-gains-traction-in-the-federal-appeals-courts/#50f5b8817f59.

[140] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[141] *Becerra*, 138 S. Ct. at 2368.

[142] *Id.* at 2368, 2371.

notice, given its determination that the speech at issue was "professional speech."[143] The Roberts Court countered that professional speech is not a separate category of expression that can be subjected to a diminished scope of First Amendment protection.[144] The Court, it said, has afforded less protection to professional speech in only two regulatory circumstances: 1) the mandated disclosure of factual, noncontroversial information in the context of commercial speech; and 2) professional conduct restrictions that incidentally burden speech,[145] such as requiring physicians to obtain informed consent before performing an abortion.[146] The Court said that neither of these types of regulations were at issue in *Becerra*.[147] Outside of these two contexts, the Court explained, precedents have applied strict scrutiny to content-based laws that regulate professional speech.[148] In the opinion, the Court stressed that because professionals and government disagree on many topics, the government's desire "to suppress unpopular ideas or information" does not wane when it is regulating professional speech.[149] Government policies that restrict the content of professional speech pose the same inherent dangers to the free functioning of the marketplace of ideas as regulations on nonprofessional speech.[150] Moreover, professional speech as a category is hard to define with precision and could be read to cover a wide array of individuals, making it ripe for selective restrictions on expression.[151]

In the end, the Court found that it did not need to apply strict scrutiny because the compelled notice requirement could not withstand an intermediate scrutiny review as the requirement was "wildly underinclusive."[152] California asserted that its interest was to provide low-income women with information about the state-supported service; but the notice requirement did not apply to all health providers that

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[143] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 834 (9th Cir. 2016) (holding that the notice is subject to intermediate scrutiny), *rev'd sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[144] *Becerra*, 138 S. Ct. at 2371–72.

[145] *Id.* at 2372.

[146] *Id.* at 2373.

[147] *Id.* at 2372.

[148] *Id.* at 2374.

[149] *See id.* at 2374–75 (quoting Turner Broad. Sys., Inc. v. FEC, 512 U.S. 622, 641 (1994)).

[150] *Id.*

[151] *Id.* at 2375.

[152] *Id.* (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 802 (2011)).

offer family planning or pregnancy-related services to low-income women.[153]

In a similar but even more controversial vein, the Court applied "exacting" scrutiny to a challenge involving mandatory support of collective bargaining efforts by public-sector employees.[154] In *Janus v. AFSCME*, a state employee declined to join the union and strongly objected to the union's espoused positions in collective bargaining and related activities.[155] Focusing on the employee's free speech right, the Court found the required fee payment to the union particularly onerous because it forced individuals to "mouth support for views they find objectionable."[156] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning,"[157] the Court said. Here, government employees were compelled to support a private expressive organization whose speech activities covered important public matters such as the state's budget problems and issues related to education, child welfare, healthcare, and minority rights.[158] The Court used this reasoning to reconsider and overrule *Abood v. Detroit Board of Education*,[159] a case that found collective bargaining activities less violative of free speech rights than other more direct political activities in which the union engaged.[160] The Court applied exacting scrutiny to the issues raised in *Abood* and ruled that the interests for upholding a mandatory fee on non-union employees were unfounded.[161] In *Abood*, the State asserted that the agency fee arrangement was necessary to maintain "labor peace" and to prevent

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[153] *Id.* at 2375–76.

[154] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464–65 (2018).

[155] *Id.* at 2461.

[156] *Id.* at 2463–64.

[157] *Id.* at 2464.

[158] *Id.* at 2474–75.

[159] 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2448.

[160] *See id.* at 235–36 (noting the difficulty in "drawing lines between collective-bargaining, *for which contributions may be compelled*, and ideological activities unrelated to collective bargaining, for which compulsion is prohibited.") (emphasis added).

[161] In *Janus*, the Court explained that exacting scrutiny is a less demanding test than strict scrutiny. *Janus*, 138 S. Ct. at 2465. Under exacting scrutiny, the regulation must "serve a compelling state interest that cannot be achieved through means significantly less restrictive" of First Amendment freedoms. *Id.* (quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 310 (2012)). Under strict scrutiny, the government also must show that the regulation serves a compelling interest and the regulation is narrowly tailored to achieve the interest. When applying strict scrutiny, a court may strike down a regulation if there are less speech-restrictive alternatives available that would achieve the interest essentially as well

"free riding" by nonmembers of the union.[162] The *Janus* Court found that while labor peace is a compelling state interest, it has been achieved in unions where nonmembers are not required to pay an agency fee.[163] "It is now undeniable," the Court said, "that 'labor peace' can be achieved 'through means significantly less restrictive of [First Amendment rights]' than the assessment of agency fees."[164] As for free riding, the Court ruled that avoiding free riders is not a compelling interest.[165] As a result, the holding in *Abood* was declared unconstitutional.[166] With the precedential decision overruled, the Court held that the extraction of agency fees from nonconsenting public-sector employees violates the First Amendment and that *Abood* erred in concluding otherwise.[167]

III. THE COLLECTIVE INTEREST APPROACH

In these three professional and commercial speech cases, the Court's liberal wing took issue with the application of a heightened standard of review to regulatory programs.[168] In *Sorrell*, the dissent noted that the Court had never used the categories of content-based or speaker-based to justify greater scrutiny of regulatory activities that affect commercial speech.[169] Regulatory programs, the dissent explained, commonly draw distinctions based on content and the class of the entities regulated.[170] For this reason, a more lenient and deferential approach was applied to ordinary commercial or regulatory legislation that affected speech in less direct ways.[171] To apply a strict First Amendment analysis as a matter of course to ordinary economic programs is unprecedented, the dissenters explained, and threatens to

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as the speech restriction. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

[162] *Janus*, 138 S. Ct. at 2466 (quoting *Abood*, 431 U.S. at 224).

[163] *Id.* at 2465–66.

[164] *Id.* at 2466 (quoting Harris v. Quinn, 573 U.S. 616, 648–49 (2014)).

[165] *Id.*

[166] *Id.* at 2486.

[167] *Id.*

[168] *Id.* at 2491–92 (Kagan, J., dissenting); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting); Sorrell v. IMS Health, Inc., 564 U.S. 552, 587–88 (2011) (Breyer, J., dissenting).

[169] *Sorrell*, 564 U.S. at 588 (2011) (Breyer, J., dissenting). Justice Sotomayor joined the majority opinion. Justices Ginsburg and Kagan joined the dissent.

[170] *Id.* at 589.

[171] *Id.* at 584.

open a "Pandora's Box" of litigation against regulatory practices that "only incidentally affect a commercial message."[172]

This argument was echoed in the dissent in *National Institute of Family & Life Advocates v. Becerra*.[173] The four dissenters warned that the Court's constitutional approach "threatens to create serious problems" due to the central role speech plays in human behavior and the regulation of that behavior.[174] While the Court recognized two exceptions to its broad-based First Amendment analysis,[175] the dissent noted that many ordinary disclosure laws fall outside those exceptions and that, if taken literally, "every disclosure law could be considered content-based, for virtually every disclosure law requires individuals to speak a particular message."[176] This approach, the dissent noted, could "radically change prior law" by threatening the constitutionality of laws that protect consumers and govern the securities industry.[177] This threat was made more acute, the dissent said, by the 2015 decision *Reed v. Town of Gilbert*, where the Court expanded the definition of content-based to include topic or subject-based distinctions in addition to the traditionally defined viewpoint-based discrimination.[178] According to the dissent in *Becerra*, the majority's broad content-based test creates an unpredictable First Amendment standard that courts may use to strike down health and safety warnings as well as other routine economic and social legislation long thought to raise little constitutional concern.[179]

The alarm raised in *Becerra* was largely replicated in a four-member dissent that was written by Justice Elena Kagan in *Janus v. AFSCME*.[180] In the dissent, Kagan accused the Court of "weaponizing" the First Amendment in order to "pick the winning side in what

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[172] *Id.* at 602.

[173] 138 S. Ct. 2361 (2018).

[174] *Id.* at 2380 (Breyer, J., dissenting). Justices Ginsburg, Kagan, and Sotomayor joined the dissent.

[175] *See id.* (stating that the majority: (1) excepts laws that "require professionals to disclose factual, noncontroversial information in their commercial speech, provided that the disclosure relates to the services that the regulated entities provide[,]" and (2) "excepts laws that regulate professional conduct and only incidentally burden speech.").

[176] *Id.* (citation omitted).

[177] *Id.*

[178] 135 S. Ct. 2218, 2227 (2015).

[179] *Becerra*, 138 S. Ct. at 2381 (Breyer, J., dissenting).

[180] 138 S. Ct. 2448 (2018).

should be . . . an energetic policy debate."[181] Kagan noted that a healthy debate over workplace governance had ensued for decades, resulting in splits among state and local governments (and their constituents) on the value of public-sector unions.[182] By stepping into this debate and using the First Amendment as a "sword" against a workaday policy,[183] Kagan charged the majority with undermining the democratic process.[184] The First Amendment, she said, was not meant to be used in such an aggressive manner against commonplace regulations that implicate speech activities.[185] Since almost all economic and regulatory policy involves speech, she warned that the Court's approach will allow judges to interfere in democratically constructed policy for a long time to come.[186] The majority's approach, she said, "runs long" and allows the Justices at every stop to override the will of the people.[187]

In many ways, the gulf between the Roberts Court's conservative majority and liberal minority stems from the lens through which they view the First Amendment and its primary role in a democratic system. In adjudicating challenges to economic and regulatory problems, the liberals contend that collective speech matters because it forms the public's opinion which influences elected representatives and prompts government action.[188] The First Amendment, they argue, facilitates and protects this expressive activity so that economic and regulatory policy reflects the very thoughts, views, ideas, sentiments, and choices of the citizens engaged in democratic governance.[189] The majority's application of heightened scrutiny to ordinary social and economic legislation dilutes these goals[190] and prevents the American people, acting through their state and local officials, from making important choices about regulatory policy.[191] Instead, they contend that strict scrutiny should be reserved for factual situations where it is

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[181] *Id.* at 2501 (Kagan, J., dissenting).

[182] *Id.*

[183] *Id.*

[184] *Id.* at 2502.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] McCutcheon v. FEC, 572 U.S. 185, 236–37 (2014) (Breyer, J., dissenting).

[189] *Id.* at 238. *See also Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

[190] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2382–83 (2018) (Breyer, J., dissenting).

[191] *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

"realistically possible" that "[g]overnment may effectively drive certain ideas or viewpoints from the marketplace."[192] While the Roberts Court recognizes the First Amendment serves important collective interests, it contends that those interests are undermined and the marketplace inhibited from reflecting the true sentiments of the American people when individuals are not allowed to express their beliefs, or are compelled to voice ideas with which they disagree.[193] Moreover, Roberts has pointed to the fact that laws, which are viewed as reflecting the collective interest, include legislation that restricts or compels speech.[194] The First Amendment, he argued, affords individuals protection against such laws regardless of whether government is reflecting collective speech through its legislative endeavor.[195]

IV. APPLICATION TO MASTERPIECE CAKESHOP

Masterpiece Cakeshop challenges both concepts of First Amendment law. Here, Phillips violated Colorado's public accommodations law.[196] The law regulates the conduct of shopkeepers and other businesses by requiring them to provide equal access to gay persons in acquiring the same goods and services as offered to other members of the public.[197] In short, the law is an economic and regulatory policy that reflects the collective interest in equal treatment—but when applied to Phillips, it required him to use his expressive talents to create custom wedding cakes for same-sex couples. When Phillips creates a custom wedding cake, he reportedly works closely with the couple, "discuss[ing] their preferences, [] personalities, and [] details of their wedding to ensure that [the] cake reflects the couple who ordered it."[198] To that end, he sketches out the design on paper, chooses a color scheme, creates the frosting and decorations, bakes, sculpts, and delivers the cake to the wedding.[199] To Phillips, a custom

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[192] Reed v. Gilbert, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring) (internal citations omitted). Justices Ginsburg and Breyer joined the concurrence.

[193] *See Janus*, 138 S. Ct. at 2463–64; *Becerra*, 138 S. Ct. at 2374–75.

[194] *McCutcheon*, 572 U.S. at 205–06 (plurality opinion). The plurality included Justices Roberts, Scalia, Kennedy and Alito. Justice Thomas wrote a concurrence. Justices Breyer, Ginsburg, Sotomayor and Kagan dissented.

[195] *Id.* at 206.

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

[197] *Id.* at 1725.

[198] *Id.* at 1742–43 (Thomas, J., concurring).

[199] *Id.* at 1742.

wedding cake is inherently expressive—it communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated."[200] Viewed in this context, the State's order conflicted with Phillips' religious belief that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman," and forced him to express a message contrary to that belief through his custom cakes.[201]

While the Roberts Court has not decided a case factually similar to *Masterpiece Cakeshop*, it has extended First Amendment protection to a variety of economic and regulatory activities to include the creation and sale of videos depicting animal cruelty;[202] registration of trademarks;[203] marketing of prescriber information;[204] compelled disclosure of low-cost health services;[205] and mandatory payment of union dues.[206] In doing so, the Court affirmed the value of individual expression stemming from the economic marketplace, noted the vital role such speech plays in public debate, and highlighted the burden that regulations place on it.[207] Viewing *Masterpiece Cakeshop* from this vantage point, it seems safe to conclude that the Court would seriously consider Phillips' First Amendment claim. To determine whether Phillips' cake designing and baking activities constitute protected speech, the Court would need to examine whether Phillips intended to convey a particular message with his custom design, and whether the likelihood is great that those who view it will understand the message.[208] Given the exceptional care Phillips takes with his custom wedding cakes, it is fairly clear that he intends to construct an aesthetic message through the design. Whether the Roberts Court will find that, in the context of a wedding, the likelihood is great that those who view the cake will understand its expressive message remains an open question.[209] In the opinion, the Court noted that the

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[200] *Id.* at 1743.

[201] *Id.* at 1724 (majority opinion).

[202] United States v. Stevens, 559 U.S. 460 (2010).

[203] Matal v. Tam, 137 S. Ct. 1744 (2017).

[204] Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).

[205] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[206] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[207] *See supra* text accompanying notes 96–167.

[208] *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (discussing the criteria for which nonverbal activity may become protected expression).

[209] *See* Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47 (2006) (considering whether the hosting of military recruiters by law schools was expressive conduct). The

free speech aspect of the case is especially challenging because a likelihood exists that a "few [people] who have seen a beautiful wedding cake might" view its creation as an exercise of protected speech.[210]

The Court's observation is notable given that a unanimous Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* recognized the role the audience plays in the construction of aesthetic messages.[211] There, the Court ruled that the South Boston Allied War Veterans Council was "speaking" when it approved the groups that could participate in their parade.[212] The speech act rested on the idea that the Council made some sort of collective point because each parade unit chosen was "understood to contribute something to a common theme."[213] This collective point was not just conveyed among the marchers, but it was also communicated to the spectators, who assigned their own meaning to the parade.[214] In this regard, "the parade's overall message . . . [arose] from the individual presentations along the way" and how these expressive presentations were collectively "perceived by spectators."[215] The viewers, then, provided the meaning and message of the Council's speech through their own insights and imagination.[216] "Since every participating unit affect[ed] the message conveyed," and therefore the message received, the Court reasoned that the state court's mandated inclusion of the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") among the parade participants altered the Council's expressive content.[217]

The *Hurley* Court also pointed out that a "succinctly articulable message is not a condition" for First Amendment protection[218] and that the message excluded from the parade was "not difficult to

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Court ruled that the legislation, which tied federal funding to equal access to campus facilities by military recruiters, regulated conduct—not speech. *Id.* at 65–66.

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

[211] 515 U.S. 557 (1995).

[212] *Id.* at 574–75.

[213] *Id.* at 576.

[214] *Id.* at 568.

[215] *Id.* at 577.

[216] RANDALL P. BEZANSON, TOO MUCH FREE SPEECH 139 (2012).

[217] *Hurley*, 515 U.S. at 572–73.

[218] *Id.* at 569.

identify."[219] According to the Court, a unit marching behind a GLIB banner "would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual[;]"[220] while also suggesting that the Council agrees that GLIB "have as much claim to unqualified social acceptance" as the other parade participants.[221] The Court noted that the parade's organizers may object to these facts and beliefs "or have some other reason for wishing to keep GLIB's message out of the parade."[222] This argument was embraced by Justices Thomas and Gorsuch in a separate concurrence in *Masterpiece Cakeshop*.[223] Forcing Phillips to make custom wedding cakes for same-sex marriages, Thomas wrote, requires him to bear witness to facts and suggestions with which he disagrees.[224] First, such a mandate would force him to acknowledge that same-sex marriage ceremonies are in fact weddings.[225] Second, it would suggest that Phillips espouses the idea that same-sex weddings should be celebrated.[226] Thomas noted that Phillips believes his faith forbids both of these messages.[227]

While Justices Thomas and Gorsuch argued that the custom wedding cake at issue constituted an expressive act,[228] Justice Gorsuch, in a separate concurrence joined by Justice Alito, expressed concern with how the Commission differentiated between cakes with and without words when it came to granting First Amendment protection.[229] The argument in the latter concurrence harkens back to a four-member dissent in *Christian Legal Society v. Martinez*, written by Justice Alito.[230] At issue was a law school's nondiscrimination policy which allowed student organizations to limit membership to individuals who agreed with the group's secular viewpoint, but prohibited religious groups from excluding members who did not share their convictions.[231]

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[219] *Id.* at 574.

[220] *Id.*

[221] *Id.*

[222] *Id.* 574–75.

[223] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring).

[224] *Id.* at 1744.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* at 1743–44.

[229] *See id.* at 1738 (Gorsuch, J., concurring).

[230] 561 U.S. 661 (2010).

[231] *Id.* at 711.

The Christian Legal Society held the viewpoint that sexual conduct outside of a marriage between a man and a woman was improper.[232] By singling out one category of expressive association for disfavored treatment, the dissent found that the law school engaged in viewpoint discrimination.[233] Gorsuch expressed a similar argument in *Masterpiece Cakeshop*, arguing that the Commission failed to apply the law in a neutral manner.[234] In a case involving William Jack, who attempted to purchase cakes with messages that disapproved of same-sex marriage on religious grounds, the Commission allowed the bakers to deny creating the cakes because the cakes Jack sought were offensive to their moral convictions.[235] The bakers also said that they would provide religious persons with cakes expressing other ideas.[236] While Phillips made a similar argument,[237] the Commission presumed that Phillips intended to discriminate against a protected class.[238] Justice Gorsuch argued that the Commission must either require actual proof of intent to discriminate (as in Jack's case) or presume intent from the knowing refusal of service to someone in a protected class (as in Phillips' case).[239] "[T]he Commission could have chosen either course," Gorsuch wrote.[240] "But the one thing it can't do is apply a more generous legal test to secular objections than religious ones."[241]

In its opinion, the Colorado Court of Appeals viewed the law differently and rejected Phillips' free speech argument.[242] The court concluded that the "act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it."[243] The court reasoned that to the extent the public infers a message celebrating same-sex marriage from the cake, the

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[232] *Id.* at 727.

[233] *Id.* at 724.

[234] *Masterpiece Cakeshop*, 138 S. Ct. at 1736 (Gorsuch, J., concurring).

[235] *Id.* at 1735.

[236] *Id.*

[237] *Id.* at 1735–36.

[238] *Id.* at 1736.

[239] *Id.* at 1737.

[240] *Id.*

[241] *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 580 U.S. 520, 543–44 (1993)).

[242] Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *rev'd sub nom. Masterpiece Cakeshop*, 138 S. Ct. at 1719 (2018).

[243] *Id.* at 286.

"message is more likely to be attributed to the customer than to Masterpiece."[244] The court pointed out that because the Cakeshop charges it customers for baked goods, a reasonable observer would conclude that the bakery is merely conducting its business in accordance with the state's public accommodations law.[245] In this way, the Colorado court said *Masterpiece Cakeshop* differs from *Hurley*, where given the expressive nature of a parade, "spectators [are more] likely [to] attribute each marcher's message to the parade['s] organizers."[246]

The question of whether Phillips' cake designing and baking activities would be perceived by reasonable observers as signaling support for same-sex marriage is certainly arguable, but not inconceivable, given the increasing involvement of the business community in the realm of public debate. Corporations, associations, and businesses from the powerful to the mom-and-pop have openly taken stances on divisive social issues such as gun violence, capital punishment, political ideology, and LGBT rights.[247] Dick's Sporting Goods made headlines when the company's CEO, Edward W. Stack, announced after the school shooting in Parkland, Florida, that the retailer would no longer sell assault weapons, high-capacity magazines, or guns to customers under the age of twenty-one.[248] Stack also implored elected officials to enact common sense gun reform and outlined several specific measures Congress needed to enact.[249] The tragedy in Parkland also prompted a number of companies to cut ties with the National Rifle Association.[250] For instance, Delta and United Airlines, several national car rental companies, security companies, and the insurer MetLife all stopped offering discounts and other promotions to NRA members.[251] The First National Bank of Omaha discontinued offering

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[244] *Id.*

[245] *Id.* at 287.

[246] *Id.*

[247] *See infra* text accompanying notes 248–66.

[248] Jena McGregor, *Dick's Sporting Goods Took a Stand on Gun Sales — and Made a Big Statement*, WASH. POST (Mar. 6, 2018, 1:04 PM), https://www.washingtonpost.com/news/on-leadership/wp/2018/03/06/dicks-sporting-goods-took-a-stand-on-gun-sales-and-made-a-big-statement/.

[249] *Id.*

[250] Nathan Bomey, *NRA Fallout: See the List of Companies That Cut Discounts for NRA Members After Parkland, Florida School Shooting*, USA TODAY (Feb. 26, 2018, 7:34 PM), https://usat.ly/2oz1P9n.

[251] *Id.*

its NRA-branded Visa credit card to customers.[252] Pharmaceutical giant Pfizer refused to sell drugs used in lethal injections to state prisons.[253] Chipotle terminated its sponsorship of a Boy Scout Jamboree because the organization's stance on gay scout leaders conflicted with the company's anti-discrimination policy.[254] Stephanie Wilkinson, owner of the Red Hen (a tiny farm-to-table eatery in rural Virginia), asked President Trump's Press Secretary, Sarah Huckabee Sanders, to leave the restaurant after her staff indicated they wanted her to do so.[255] Wilkinson based her decision on Sanders' public defense of an "inhumane and unethical" White House administration.[256] "[T]he restaurant," she said in a Washington Post interview, "has certain standards that I feel it has to uphold."[257] For Wilkinson, this feels like the right moment in the nation's history for people to take uncomfortable actions to uphold their morals.[258]

For some in the business community, upholding the company's morals has translated into openly opposing limitations on the equal rights of gay, lesbian, bisexual, and transgender people. Multinational and national corporations and associations from Apple and Disney to the NFL and NBA have threatened to move resources, jobs, and money-making events from states that pass discriminatory measures.[259] In Indiana, the state's passage of the Religious Freedom Restoration Act resulted in a loss of more than $60 million in future convention

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[252] *Id.*

[253] Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html (The company said it makes products to "enhance and save lives" and "strongly objects" to the use of its products in lethal injections.").

[254] Brady Mccombs, *Chipotle Pulls Sponsorship of Utah Boy Scout Event*, ASSOCIATED PRESS (Mar. 19, 2013), https://news.yahoo.com/chipotle-pulls-sponsorship-utah-boy-200321442.html.

[255] Avi Selk & Sarah Murray, *The Owner of the Red Hen Explains Why She Asked Sarah Huckabee Sanders to Leave*, WASH. POST (June 25, 2018, 5:24 PM), https://www.washingtonpost.com/news/local/wp/2018/06/23/why-a-small-town-restaurant-owner-asked-sarah-huckabee-sanders-to-leave-and-would-do-it-again/.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] Jon Schuppe, *Corporate Boycotts Become Key Weapon in Gay Rights Fight*, NBC NEWS (Mar. 26, 2016, 7:54 AM), https://www.nbcnews.com/news/us-news/corporate-boycotts-become-key-weapon-gay-rights-fight-n545721.

business to the city of Indianapolis.[260] The Act, which was viewed by supporters as a way to protect individuals and businesses with a religious objection to same-sex weddings,[261] prompted travel bans from cities and states along with statements denouncing the measure from corporations, sports organizations, universities, and the like.[262] The economic pressure exerted on the State prompted the legislature to amend the Act shortly thereafter with language that prohibited the denial of service based on sexual orientation and gender identity.[263] Indiana, however, is not alone. In 2016, North Carolina made headlines when its general assembly not only overturned a Charlotte city ordinance that banned discrimination against LGBT people, but also barred every city in the state from passing nondiscrimination regulations.[264] The statute set off a fierce nationwide backlash that included boycotts by businesses, sports leagues, and musicians.[265] Charlotte alone lost nearly $285 million and 1,300 jobs in addition to the cancelation of the 2017 NBA All-Star Game, which was set to be hosted in the city.[266]

As more businesses take stands on public issues, it raises the probability that a reasonable observer would infer that Phillips supports same-sex marriage by his involvement in the wedding reception. Moreover, the decisions discussed here suggest that the Court is developing a track record of acknowledging the speech interests at stake in commercial activities regulated by economic policy. This acknowledgement underscores the free speech interests of the individual and the impact regulatory policy has on their freedom to say what they think or to refrain from voicing ideas with which they disagree.[267] *Masterpiece Cakeshop* fits into this body of law. Here, Phillips' con-

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[260] Andrew Bender, *Indiana's Religious Freedom Act Cost Indianapolis $60 Million in Lost Revenue*, FORBES (Jan. 31, 2016, 2:28 PM), https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#68dccc452e2a.

[261] *Id.*

[262] Robert King, *The RFRA Backlash in Indiana*, INDYSTAR.COM (Apr. 2, 2015, 11:38 AM), https://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/.

[263] Bender, *supra* note 260.

[264] David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/.

[265] *Id.*

[266] *Id.*

[267] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018).

servative religious viewpoint is being altered to provide anti-discrimination protection for same-sex couples. Viewed through the lens of the Roberts Court's decisions, the Commission's order will most likely be subjected to a form of strict scrutiny–albeit heightened, exacting or strict–given that it "draws distinctions based on the message [Phillips] conveys."[268] The fact that the speech occurs in the commercial realm or constitutes professional speech will not subject it to a lower level of First Amendment scrutiny.[269] The Court has ruled that laws that impose a direct burden on speech require heightened scrutiny even in cases involving commercial[270] or professional speech.[271] Only laws that mandate disclosure of factual noncontroversial information in the context of commercial speech or professional conduct regulations that incidentally burden speech are subject to a diminished scope of First Amendment protection.[272] The fact that the expressive idea at issue may be demeaning or disparaging to a particular group will also not save it from heightened scrutiny—it will only make the case against its regulation stronger by implicating the bedrock principle prohibiting the restriction of speech on the grounds that it offends[273] as well as the Court's ruling that "giving offense is viewpoint."[274] The same rings true for the fact that the regulation does not prevent the idea from entering the marketplace, but only compels adherence to a counter narrative in the marketplace of goods and services.[275] The Court has explained that forced speech is "always demeaning" because it forces "free and independent individuals to endorse ideas they find objectionable."[276]

V. CONCLUSION

In the end, *Masterpiece Cakeshop* is perfectly positioned for the Roberts Court and the conflicting approaches to First Amendment

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[268] Reed v. Gilbert, 135 S. Ct. 2218, 2227 (2015) (citing Sorrell v. IMS Health, Inc., 564 U.S. 552, 566 (2011)).

[269] *See Janus*, 138 S. Ct. at 2464–65.

[270] *Sorrell*, 564 U.S. at 566.

[271] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

[272] *Id.* at 2372.

[273] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

[274] *Id.* at 1763.

[275] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018).

[276] *Id.*

analysis between the conservative and liberal wings. Given the conservative majority, it stands to reason that an individual rights approach will win out over the call from the liberal minority for a First Amendment doctrine that leaves economic and regulatory laws which reflect the collective interest standing.[277] That said, the Court lost one of its most speech-protective justices when Justice Anthony Kennedy stepped down at the end of the 2017–18 Term.[278] Justice Brett Kavanaugh took his seat.[279] Commentators argue that Kavanaugh's "opinions are consistent with the Court's strong protection of free speech rights" and make it very likely that Kennedy's free speech legacy will survive.[280] According to Professor Timothy Zick, Kavanaugh's record on free speech cases demonstrates a strong support for the speech rights of corporations.[281] In this area, Kavanaugh has authored opinions on campaign finance[282] and telecommunication regulation.[283] In the area of campaign finance, he wrote that the First Amendment protects the "right of citizens to band together[,] . . . pool their resources," and spend unlimited amounts of money "to express their views about policy issues and candidates for public office"[284]—a stance in line with the Court's *Citizens United* ruling.[285]

On the telecommunications front, Kavanaugh likened an Internet service company's right to control the speed and availability of the data it distributes to the editorial freedom of media companies.[286] In

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[277] *See, e.g.*, Reed v. Gilbert, 135 S. Ct. 2218, 2238 (Kagan, J., concurring).

[278] Jonathan H. Adler, *Judge Kavanaugh and Justice Kennedy's Free Speech Legacy*, REASON (July 11, 2018, 10:43 PM), https://reason.com/2018/07/11/judge-kavanaugh-and-justice-kennedys-fre/.

[279] *Id.*

[280] *Id.*; Ken White, *You'll Hate This Post on Brett Kavanaugh and Free Speech*, POPEHAT (July 10, 2018), https://www.popehat.com/2018/07/10/youll-hate-this-post-on-brett-kavanaugh-and-free-speech/.

[281] Timothy Zick, *Judge Kavanaugh and Freedom of Expression*, SCOTUSBLOG (Aug. 7, 2018, 3:49 PM), https://www.scotusblog.com/2018/08/judge-kavanaugh-and-freedom-of-expression/.

[282] *See, e.g.*, Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009); Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011); Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d. 150 (D.D.C. 2010).

[283] *See, e.g.*, United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Comcast Cable Commc'ns, LLC v. FCC, 717 F.3d 982 (D.C. Cir. 2013) (Kavanaugh, J., concurring); Cablevision Sys. Corp. v. FCC, 597 F.3d. 1306 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).

[284] *Emily's List*, 581 F.3d at 4.

[285] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[286] *United States Telecom*, 855 F.3d at 430 (Kavanaugh, J., dissenting).

dissent, he argued that the FCC's net neutrality rule violates the First Amendment because it restricts the editorial discretion of Internet service providers.[287] Kavanaugh wrote:

> Absent a showing of market power[,] . . . the Government may not tell Internet service providers how to exercise their editorial discretion about what content to carry or favor any more than the Government can tell Amazon or Politics & Prose what books to promote; or tell The Washington Post or the Drudge Report what columns to carry; or tell ESPN or the NFL Network what games to show.[288]

Given his posture on regulatory law in the campaign finance and telecommunications areas, one commentator wrote that Kavanaugh would likely be viewed as an advocate for using the First Amendment as a "weapon" to strike down economic and regulatory policy.[289]

It may not be long before we find out exactly how Justice Kavanaugh will rule on a case similar to *Masterpiece Cakeshop*. In October 2018, the Court was asked to review a case involving an Oregon couple's refusal to make a custom wedding cake for a same-sex couple.[290] The owners of Sweetcakes by Melissa contend that the application of the State's public accommodation statute to their custom wedding cake service compels them to express a celebratory message of same-sex marriage with which they disagree.[291] Given the lens through which the Robert's Court views free speech claims, the body of First Amendment precedent the Court has developed, and the five-member conservative majority, it is highly likely that Sweetcakes by Melissa (or some other factually similar case) will confront a Court that is poised to carve out a free speech exception in public accommodation laws for individuals engaged in expressive commercial activities that contend the law forces them to convey a recognizable aesthetic message with which they disagree.

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[287] *Id.* at 429.

[288] *Id.* at 435.

[289] White, *supra* note 280.

[290] Howe, *supra* note 32.

[291] Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051, 1069 (Or. Ct. App. 2017), *vacated*, 139 S. Ct. 2713 (2019) (remanding to the Oregon Court of Appeals for further consideration in light of the *Masterpiece Cakeshop* decision).