

YOU HAVE THE RIGHT TO SPEAK BY REMAINING SILENT: WHY A STATE SANCTION TO CREATE A WEDDING CAKE IS COMPELLED SPEECH

INTRODUCTION

The preeminent function of the First Amendment is to ensure “that a speaker has the autonomy to choose the content of his own message.”¹ Often overlooked is the underlying purpose of protecting a speaker’s right to express what he or she believes. Guaranteeing freedom of speech is not only important to preserve self-expression—it is also critical to the continuance of self-government.² If the “free and robust” public discourse paramount to maintaining liberty is stifled, “we the people” cease to exist.³ Thus, preserving speech on public matters and issues is “at the heart of the First Amendment’s protection” and “entitled to special protection.”⁴

Same-sex marriage is one of the most prevalent topics in public debate today.⁵ Much of the collective discourse on same-sex marriage involves its legality.⁶ The cases analyzing the legality of same-sex marriage are not the only lawsuits that garner national attention; there also exists a subset of same-sex marriage cases concerning the First Amendment rights of potential wedding vendors.⁷ These controversies examine whether wedding vendors, regardless of their personal beliefs on same-sex marriage, must use their artistic skills and talents to serve

¹ Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).

² Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

³ See Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 791 (1988) (stating that government-directed speech based on good intentions does not advance healthy discussion).

⁴ Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (first quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985); and then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

⁵ David Masci, *A Contentious Debate: Same-Sex Marriage in the U.S.*, PEW F. (Jul. 9, 2009), <http://www.pewforum.org/2009/07/09/a-contentious-debate-same-sex-marriage-in-the-us/> (“In recent years, the debate over same-sex marriage has grown from an issue that occasionally arose in a few states to a nationwide controversy.”).

⁶ See *id.* (“[I]n the last five years, the debate over gay marriage has been heard in the halls of the U.S. Congress, at the White House, in dozens of state legislatures and courtrooms, and in the rhetoric of election campaigns at both the national state and levels.”).

⁷ See, e.g., Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 44 (Colo. App. Aug. 13, 2015) (analyzing the ability of a cake artist to refrain from creating a cake for same-sex wedding ceremony); Elane Photography, LLC v. Willock, 309 P.3d 53, 58–59 (N.M. 2013) (involving a photographer who objected on First Amendment speech and free exercise grounds to provide services for a same-sex commitment ceremony).

homosexual couples who are planning a wedding. Wedding vendors such as photographers, florists, and bakers have been at the center of this litigation in recent years.⁸ Because the Supreme Court constitutionalized same-sex marriage across all fifty states in *Obergefell v. Hodges*,⁹ the number of cases involving First Amendment disputes between wedding vendors and homosexual couples will certainly increase.¹⁰

*Craig v. Masterpiece Cakeshop, Inc.*¹¹ is a recent case concerning such a dispute. Jack Phillips, a devout Christian for approximately thirty-five years, owns and operates a local bakery in Colorado.¹² Phillips considers creating decorative cakes an art and a form of creative expression.¹³ He also believes “he can honor God through his artistic talents” by creating these decorative cakes.¹⁴ Phillips’s bakery creates and sells a variety of baked goods, including wedding cakes.¹⁵ In 2012, a homosexual couple, Charlie Craig and David Mullins, visited the bakery in order to procure Phillips’s services in creating a wedding cake for their impending marriage ceremony.¹⁶

Citing religious beliefs, Phillips declined to create a wedding cake for the couple.¹⁷ Phillips did not, however, refuse to sell other baked items to the couple: “I’ll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same-sex weddings.”¹⁸ Without further discussion, the couple immediately left the bakery.¹⁹ The couple then filed an administrative complaint against Phillips based on Colorado’s public accommodation law,²⁰ claiming that they had been

⁸ Kendra LaCour, Comment, *License to Discriminate: How A Washington Florist Is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation*, 38 SEATTLE U. L. REV. 107, 109–12 (2014).

⁹ 135 S. Ct. 2584, 2607–08 (2015).

¹⁰ James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 980–81 (2011) (“[T]he expanded scope of public accommodation laws makes conflict with First Amendment rights of free speech a virtual certainty.”).

¹¹ No. CR 2013-0008 (Colo. Civil Rights Comm’n Dec. 6, 2013) [hereinafter Initial ALJ Decision], <http://www.adfmedia.org/files/MasterpieceDecision.pdf>, *aff’d*, No. CR 2013-0008 (Colo. Civil Rights Comm’n May 30, 2014) [hereinafter Final Agency Order], <http://www.adfmedia.org/files/MasterpieceFinalAgencyOrder.pdf>, *aff’d*, 2015 COA 115 (Colo. App. Aug. 13, 2015) [hereinafter Court of Appeals Decision].

¹² Court of Appeals Decision, *supra* note 11, ¶ 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* ¶¶ 3, 30.

¹⁶ *Id.* ¶ 3.

¹⁷ *Id.*

¹⁸ Initial ALJ decision, *supra* note 11, at *2.

¹⁹ Court of Appeals Decision, *supra* note 11, ¶ 3.

²⁰ COLO. REV. STAT. 24-34-601(2)(a) (LexisNexis, LEXIS through 2015 Reg. Sess.) (“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse,

discriminated against in the marketplace because of their sexual orientation.²¹ A Colorado Administrative Law Judge (“ALJ”) agreed.²² One of the arguments Phillips set forth was that preparing “a cake for a same-sex wedding is equivalent to forcing [him] to ‘speak’ in favor of same-sex weddings—something [he is] unwilling to do.”²³ While the ALJ recognized that creating a wedding cake required “considerable skill and artistry,” the judge declared that the “finished product” did not constitute protected speech under the First Amendment.²⁴ Thus, the ALJ dismissed Phillips’s Free Speech Clause argument in favor of the public accommodation statute. Colorado subsequently sanctioned Phillips for his noncompliance with the statute, requiring him to provide “comprehensive staff training” on the relevant public accommodation law, “quarterly compliance reports,” and documentation of future patrons denied service.²⁵ Phillips subsequently filed an appeal to the Colorado Civil Rights Commission²⁶ that ultimately failed.²⁷ He also appealed his case to the Colorado Court of Appeals, which affirmed the decision of the Colorado Administrative Court, and has petitioned the Supreme Court of Colorado for writ of certiorari.²⁸

Regardless of one’s personal views concerning same-sex marriage, it is important to recognize this case as a glaring example of an encroachment on the freedom of speech. This Note examines the legal hazards in treating a case involving an individual’s refusal to create a wedding cake for a same-sex ceremony as a public accommodation issue rather than a free speech issue. While this Note uses *Masterpiece Cakeshop* as a template to illustrate the danger in dismissing the free speech argument in this situation, this Note is not intended to serve as a case note on *Masterpiece Cakeshop*. Part One of this Note examines the rich history of the celebratory wedding cake, reviews the expressive activities that the Court has traditionally held to be protected speech

withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .”).

²¹ Court of Appeals Decision, *supra* note 11, ¶ 6.

²² Initial ALJ decision, *supra* note 11, at *12.

²³ *Id.* at *7.

²⁴ *Id.* at *7–8.

²⁵ Final Agency Order, *supra* note 11, at *2.

²⁶ Notice of Appeal and Petition for Review by Colorado Civil Rights Commission, *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civil Rights Comm’n Jan. 3, 2014), <http://www.adfmedia.org/files/MasterpieceAppeal.pdf>.

²⁷ Final Agency Order, *supra* note 11, at *1.

²⁸ Court of Appeals Decision, *supra* note 11, ¶ 112; Petition for Writ of Certiorari to the Colorado Court of Appeals at 19, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115 (Colo. App. Oct. 23, 2015), <http://www.adfmedia.org/files/MasterpieceCertPetitionCO.pdf>.

under the First Amendment, and demonstrates why a wedding cake should be considered protected speech. Part Two evaluates First Amendment jurisprudence concerning the compelled speech doctrine and illustrates why construing a public accommodation statute to force a culinary artist to create a cake for a same-sex wedding ceremony is compelled speech. Concluding, this Note proposes that using a free speech analysis in evaluating a case concerning a baker declining to create a wedding cake for a same-sex marriage is the constitutionally sound approach that should be utilized by courts that will face this issue in the future.

I. A WEDDING CAKE AS SPEECH

A. *Tradition of the Wedding Cake*

In order to demonstrate that creating and providing a wedding cake to a couple is communicative, it is first necessary to properly understand the tradition of the wedding cake and its historical significance in wedding celebrations. Considering the talent, skill, and time it takes to create a celebratory cake, coupled with the art form's rich background, it is no surprise that many cake bakers consider themselves to be "artists."²⁹ While it is unknown exactly when cake making and decorating first began, it is thought that the practice dates back to as early as 1175 B.C.³⁰ Today, decorated cakes are used to celebrate numerous occasions, such as "weddings, christenings, engagements, anniversaries, birthdays and Christmas."³¹

Among these forms of cake, the wedding cake has perhaps the most meaningful history. During Roman times, a wedding tradition known as "crowning the bride" emerged.³² Following a wedding, small fruitcakes consisting of "rich fruit, nuts and tiny honey cakes . . . would be crumbled over the bride's head" in hopes that she would be abundantly blessed.³³ The cakes were used as symbols to invoke goodwill from the Roman gods for the bride.³⁴ The ingredients of the cake were significant because the foods used to carry out the tradition were historically offered as sacrifices to the gods.³⁵ Thus, even during Roman times, wedding cakes had a greater purpose than mere consumption: they served as an

²⁹ *A Little About Us*, CHARM CITY CAKES, <http://www.charmcitycakes.com/about-us> (last visited Feb. 27, 2016); *About the Cake Artist*, THE CAKE ARTIST, <http://www.thecakeartistnyc.com/about.php> (last visited Feb. 27, 2016).

³⁰ THE ESSENTIAL GUIDE TO CAKE DECORATING 8 (Jane Price ed., 2006).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

integral part of the wedding celebration.³⁶ Eventually, “crowning the bride” was brought to Britain and the wedding tradition continued in various forms as a local custom until approximately 200 years ago.³⁷

Over hundreds of years, wedding cakes evolved with the advancement of culinary art.³⁸ It became a common Western tradition to stack surplus wedding cakes, which at the time were individually served sticky buns coated with almond paste, in order to build a pile of cakes symbolizing prosperity for the couple.³⁹ The cake stack, however, was not merely an exhibition. The newlyweds were expected to participate in the tradition by sharing a kiss over the pile of wedding cakes, once again representing the hope for future blessings.⁴⁰ The cake-stacking tradition serves as the origin of the modern-day three-tiered wedding cake.⁴¹

As confectionary technique progressed, cakes became more grandiose—naturally, this style affected wedding cakes.⁴² At the outset of the tiered cake tradition, only the upper class could afford such an ornate design to celebrate a wedding.⁴³ The celebratory wedding cake continued to develop, and a “three-tiered round cake became traditional, representing the three rings—the engagement, wedding and eternity rings.”⁴⁴ The custom eventually extended to the middle class, thus becoming an even more common symbol at weddings.⁴⁵

Today, the wedding cake has become one of the most notable aspects of the wedding celebration, because the ceremonial cutting of the cake represents “the first task that bride and groom perform jointly as husband and wife.”⁴⁶ After this custom takes place, the newlywed couple feeds the wedding cake to one another to symbolize mutual commitment.⁴⁷ But it is not the cake-cutting ceremony alone that

³⁶ See *id.* (asserting that the “crowning the bride” tradition was a part of local custom for nearly 2,000 years and was viewed as a means to bless the bride’s fertility).

³⁷ *Id.* (“Some [wedding cakes] would be crumbled over the bride, some squeezed through her wedding ring, some eaten by guests and some thrown to the poor folk outside the feast.”).

³⁸ See *id.* (acknowledging that new culinary techniques were used to create extravagant cakes).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 8–9.

⁴² See *id.* at 9 (discussing how new advances and techniques in baking and presentation affected the size, shape, and types of decorations used in creating weddings cakes).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (using three-tiered cakes because of style, even if the additional dessert was unnecessary).

⁴⁶ SANDRA CHORON & HARRY CHORON, PLANET WEDDING: A NUPTIAL-PEDIA 76 (2010).

⁴⁷ *Id.*

highlights the importance of the wedding cake—the cake itself is “an important and integral part of the wedding along with the wedding dress and the bride’s bouquet.”⁴⁸ In reference to creating wedding cakes for couples, Buddy Valastro, celebrity baker and star of television’s *Cake Boss*,⁴⁹ describes the significance of the symbol:

The cake is the backdrop of the reception and the focal point of hundreds of pictures, so we take great effort to make each confection as exceptional as the event. Weddings are such a special thing . . . and like any wedding professional will tell you, details are the most important thing.⁵⁰

Valastro considers the consultation with his customers the best part of creating a wedding cake.⁵¹ He recognizes that meeting with a person “face to face” makes it easier for him to “get a feel for what the customer would like.”⁵² This fact is significant because it illustrates that Valastro believes that the design of the wedding cake is a personal and individualized representation of the ceremony.⁵³ Recognizing the weight and importance the bride usually places on the wedding cake, the celebrity baker notes: “It is my job to reassure the bride that we will design the cake of her dreams. After all, it’s not just a cake—it’s a moment!”⁵⁴ Thus, one of the most notable bakers in the country identifies the wedding cake as a symbol of celebration for newlyweds rather than a meaningless food item served only for the enjoyment of guests. The wedding cake is more than a generic food item—it is a meticulously crafted piece of art that requires much skill and talent to produce.

B. Traditionally Protected Speech

It has long been understood that the First Amendment protection of speech extends beyond mere words.⁵⁵ Historically, the Court has demonstrated “a profound commitment to protecting communication of ideas,” deeming “pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word” as protected speech under the

⁴⁸ MICH TURNER, WEDDING CAKES 11 (Alison Bolus ed., 2009).

⁴⁹ *About Carlo’s Bakery*, CARLO’S BAKE SHOP, <http://bakeshop.carlosbakery.com/about-carlos-bakery/> (last visited Feb. 27, 2016) (listing the wedding magazines in which the artist and his cakes have been featured).

⁵⁰ Buddy Valastro, *Secrets from the Cake Boss*, HUFFINGTON POST: HUFFPOST WEDDINGS (Oct. 11, 2011, 3:30 AM), http://www.huffingtonpost.com/buddy-valastro/secrets-from-the-cake-boss_b_1004185.html.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* (explaining that he meets with the bride to assure her that the wedding cake will fulfill her dreams).

⁵⁴ *Id.*

⁵⁵ *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”).

Constitution.⁵⁶ But these delineated methods of communication are not the only forms of speech protected by the First Amendment. The Court broadly views speech as “the expression of an idea.”⁵⁷

This broad understanding of speech, however, does not permit one to designate every action that he perceives or intends as communication as protected speech.⁵⁸ In *United States v. O'Brien*, the Court rejected the proposition that “all modes of ‘communication of ideas by conduct’” are categorically protected speech under the First Amendment.⁵⁹ The Court stated: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁶⁰ On the other hand, the Court has also “acknowledged that [some] conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]’”⁶¹ There is a tension between these two assertions. While not every action committed with the purpose to communicate is speech, some actions are considered speech. The issue, then, is determining what methods used to express an idea invoke the protection of the Free Speech Clause.

In *Texas v. Johnson*, the Court addressed this legal tension.⁶² In determining what kinds of conduct would constitute protected speech under the First Amendment, the Court analyzed “whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”⁶³ Thus, in order for one’s activity to be considered protected speech, a person must have the intent to communicate a message, and it must be likely that the particular message will be understood.⁶⁴ While some expressive activities are easily identified as protected speech under this evaluative approach, other symbols or expressive activities that constitute protected speech may not be as obvious. “[F]orm[s] of quiet persuasion” such as the “inculcation of traditional values, instruction of the young, and community service” are activities that could potentially

⁵⁶ *Kaplan v. California*, 413 U.S. 115, 119–20 (1973).

⁵⁷ *Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the *expression of an idea* simply because society finds the idea itself offensive or disagreeable.” (emphasis added)).

⁵⁸ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

⁶² *Id.*

⁶³ *Id.* (alteration in original) (quoting *Spence*, 418 U.S. at 410–11).

⁶⁴ *Id.*

be categorized as protected speech.⁶⁵ Thus, an expressive activity need not be garish in order to be protected under the First Amendment.⁶⁶

Concerning art, the Court takes a different approach in assessing its protection under the Free Speech Clause. Art is a form of expression that the First Amendment unreservedly protects: “It goes without saying that artistic expression lies within this First Amendment protection.”⁶⁷ Thus, the factors that the Court typically applies in evaluating whether conduct falls under the protection of the Free Speech Clause are automatically assumed to exist in the assessment of artistic expression.⁶⁸ Art is a particularly unique mode of communication because it can be used to express and influence multiple aspects of life.⁶⁹ For example, the purpose of political speech is limited to “affect[ing] the public policies and character of the society in which we live.”⁷⁰ Art speech, on the other hand, may delve into several issues, such as topics in the political, religious, and economic realms,⁷¹ by utilizing an atypical delivery of the message being expressed.⁷² Additionally, art is not limited to the tangible; it is used to communicate “extra-ordinary dimensions” of life through the creative “flow of sensory, emotional or intuitional data.”⁷³ Thus, art speech is a remarkable category of protected speech because it can be used to comment on both the rational and intuitive facets of the human psyche.⁷⁴

The Court has also paid special attention to the significance of symbolism as protected speech. In *West Virginia State Board of Education v. Barnette*, the Court underscored the communicative nature

⁶⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

⁶⁶ *See id.* (indicating the difficulty in determining protected expressive conduct because of the wide range of activities that qualify for protection).

⁶⁷ *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting).

⁶⁸ Gottry, *supra* note 10, at 971 (“[S]ome modes of expression, such as the arts, are presumed to be expressive—and therefore deserving of protection—without debate.”).

⁶⁹ Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 9 (2007) (“[A]rt offers unique perspectives on human existence, especially nonrational, non-cognitive or non-discursive elements. We are accustomed to thinking of the human being as a rational actor, and there is much of human life that comports with this ideal. For example, law and economics theory is modeled around the ideal of man as rational actor. In free speech theory, the political speech model is essentially built around this ideal. Art, of course, can speak to this rational aspect of life, as it can to political or religious concerns as well.”).

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 9.

⁷² *See id.* at 11 (observing that art “is imagination made manifest” and often “out of the ordinary”).

⁷³ *Id.* at 9.

⁷⁴ *See id.* (noticing that art can reach various aspects of rational human life, including religious and political concerns).

of symbols.⁷⁵ In analyzing the act of saluting the American flag, the Court stated: “Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”⁷⁶ Thus, symbolism is categorically labeled as speech because associating one’s self with a symbol constitutes an affirmation of the message the symbol communicates.⁷⁷ Key to this analysis is not only the Court’s affirmation of symbolism as speech, but also its acknowledgment and subsequent treatment of the interplay between personal offense and freedom of speech.⁷⁸ The Court recognized the intimate nature of symbols by declaring how divisive they can be and implicitly rejecting the notion that allegedly objectionable speech is unprotected: “A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.”⁷⁹

Thus, the protection of speech is not contingent on how productive or edifying the message is.⁸⁰ In fact, the Court purports a principal function of the Free Speech Clause to be the exact opposite of cultivating harmony among the public:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.⁸¹

Clearly, the First Amendment does not protect a person’s right to be unoffended—it protects a person’s right to offend.⁸² Allegedly offensive “speech cannot be restricted simply because it is upsetting or arouses contempt.”⁸³

C. Analyzing a Wedding Cake as Speech

The most frustrating legal aspect of the *Masterpiece Cakeshop* case is the Colorado ALJ’s dismissal of the notion that creating a wedding

⁷⁵ 319 U.S. 624, 632–33 (1943).

⁷⁶ *Id.* at 632.

⁷⁷ *See id.* (asserting that certain religious or political symbols are associated with particular gestures of affirmation).

⁷⁸ *See id.* at 632–33 (observing that an objection to compelled speech was an established principle to the framers of the Bill of Rights).

⁷⁹ *Id.*

⁸⁰ *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting that the First Amendment protects even the expression of offensive or disagreeable ideas).

⁸¹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

⁸² *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (noting that even outrageous speech deserves protection under the First Amendment).

⁸³ *Id.*

cake is protected speech. The ALJ began the free speech analysis by asserting the First Amendment guarantee to the right to freedom of speech.⁸⁴ The judge recognized that “free speech applies not only to words, but also to other mediums of expression, such as art, music, and expressive conduct.”⁸⁵ The ALJ then acknowledged the “considerable skill and artistry” involved in creating a wedding cake, but definitively claimed that “the finished product does not necessarily qualify as ‘speech.’”⁸⁶

As illustrated above, however, making a celebratory wedding cake is a creative expression deserving of First Amendment protection. In order for a wedding cake to invoke First Amendment speech protection, it would have to satisfy the elements introduced in *Johnson*.⁸⁷ The evaluative method in *Johnson* is key to deciphering whether expressive conduct is in fact protected speech. The first element of this evaluative method, the intent to communicate, is easily satisfied. As Phillips purported in *Masterpiece Cakeshop*, creating a decorative cake is a form of creative expression.⁸⁸ The maker of the wedding cake most certainly intends to produce a symbol celebrating and thus affirming the union of a newlywed couple. Creating a wedding cake is an art form used to represent the collective identity of a couple and has become a critical part of the wedding aesthetic. The second element of the *Johnson* method, the likelihood of the message being understood by its receiver, is also satisfied. Cake making, specifically the creation of wedding cakes, has a significant history in the pastry arts. Historically, the wedding cake has communicated the significance of marriage by symbolizing and celebrating a new union.⁸⁹ Symbolism, as the Court acknowledged in *Barnette*, is “a primitive but effective way of communicating ideas.”⁹⁰ A wedding cake is commonly understood as a celebratory symbol of a marriage.⁹¹ Thus, a wedding cake amounts to protected speech because it is an intentional expression of an idea that is understood by those who view it.

⁸⁴ Initial ALJ Decision, *supra* note 11, at *6–7.

⁸⁵ *Id.* at *7.

⁸⁶ *Id.*

⁸⁷ See *supra* text accompanying notes 63–64 (detailing the *Johnson* elements—that protected speech must be intended to communicate a message and that the message will be understood by others).

⁸⁸ Initial ALJ decision, *supra* note 11, at *3 (“Phillips believes that decorating cakes is a form of art and creative expression . . .”).

⁸⁹ See *supra* Part I.A.

⁹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

⁹¹ See *supra* text accompanying notes 38–45.

A wedding cake is a highly personalized symbol that both represents and celebrates the unity of a newlywed couple.⁹² The “considerable skill and artistry”⁹³ a baker puts into the creation of a wedding cake is evidence that the finished product is more than a food item. It is a piece of edible artwork that serves as a centerpiece for wedding celebrations, undeniably symbolizing the couple’s commitment to one another.⁹⁴ The creation of such an artwork is in effect an affirmation of the message it represents. This is why future courts that face an issue similar to the one in *Masterpiece Cakeshop* must recognize a wedding cake as protected speech under the First Amendment.

II. A WEDDING CAKE AS COMPELLED SPEECH

A. *Compelled Speech Doctrine*

The principal rule of protection under the Free Speech Clause is that a speaker has the right to choose the ideas and opinions he posits.⁹⁵ Tantamount to this liberty is the ability to choose what not to say:

The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak . . . when others wish him to be quiet. There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.⁹⁶

Thus, the government cannot force silence on a particular topic of public discourse any more than it can force citizens “to modify the content of their expression.”⁹⁷ While there is a practical difference between compelled speech and compelled silence, “the difference is without constitutional significance” for the purposes of the First Amendment.⁹⁸ Mandating speech by way of expression or silence is a violation of freedom of speech because it ultimately alters an individual’s message.⁹⁹

In *West Virginia State Board of Education v. Barnette*, the Court famously established the principle of the right to “speak” by remaining

⁹² See *supra* text accompanying notes 46–48.

⁹³ Initial ALJ decision, *supra* note 11, at *7.

⁹⁴ See *supra* text accompanying notes 46–50.

⁹⁵ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

⁹⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

⁹⁷ See *Hurley*, 515 U.S. at 578 (holding that laws which require an individual to change the content of his expression violate that individual’s expressive autonomy).

⁹⁸ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

⁹⁹ See *id.* at 795, 798 (holding a content-based regulation unconstitutional because it compelled speech by altering the content of an individual’s speech without sufficient justification or narrow-tailoring).

silent.¹⁰⁰ In *Barnette*, the West Virginia Board of Education enforced a West Virginia statute requiring public school students to salute the American flag and recite the Pledge of Allegiance.¹⁰¹ If students did not comply with the statute, the school considered it insubordination and worthy of expulsion.¹⁰² If expelled, a student would only obtain re-admission through compliance.¹⁰³ One may argue that the students were not technically compelled to salute the flag or recite the pledge because the government did not literally force them to execute the salute or speak the words. The Court implicitly dismissed this rationalization by asserting: “Here . . . we are dealing with a compulsion of students to declare a belief.”¹⁰⁴ Thus, “[i]f there are sanctions for noncompliance with [a] statute, an impermissible compulsion will be found .”¹⁰⁵

The Court’s analysis in this case is notable for its two-step process in evaluating whether the government is compelling speech. The Court first analyzed the actions the state statute required the students to perform, asserting that saluting a flag and reciting a pledge was “no doubt . . . a form of utterance.”¹⁰⁶ Thus, the established method for determining whether a law unconstitutionally compels speech requires the Court to first analyze “whether a law has the effect of eliciting some sort of expression.”¹⁰⁷ As noted above in Part I.B, the Court in *Barnette* emphasized the significance of symbolism as a mode of communication.¹⁰⁸ With this understanding in mind, the Court found the actions required by the statute to be an obvious form of communication.¹⁰⁹

Next, the Court analyzed the fundamental effect of the compulsory salute and recitation, asserting that these actions are essentially an “affirmation of a belief and an attitude of mind.”¹¹⁰ The Court determined that forcing students to participate in nationalist speech is contrary to the First Amendment, “which guards the individual’s right to speak his own mind.”¹¹¹ In overruling *Minersville School District v. Gobitis*, which held that it was *not* a violation of the First Amendment to

¹⁰⁰ 319 U.S. 624, 642 (1943).

¹⁰¹ *Id.* at 626, 628 n.2.

¹⁰² *Id.* at 629.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 631.

¹⁰⁵ Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1526 (2012).

¹⁰⁶ *Barnette*, 319 U.S. at 632.

¹⁰⁷ Nabet, *supra* note 105, at 1526.

¹⁰⁸ See *supra* text accompanying notes 75–79.

¹⁰⁹ *Barnette*, 319 U.S. at 630–32.

¹¹⁰ *Id.* at 633.

¹¹¹ *Id.* at 634.

require participation in the “ceremony” of the Pledge of Allegiance in order to be admitted into public school,¹¹² the Court rejected its previous assertion that securing “national security” by compelling “national unity” was constitutional.¹¹³ The Court denounced the argument that, in the name of promoting national security, it was constitutional to compel a child to recite a patriotic pledge.¹¹⁴ This analysis is important because the Court highlighted the hazards of government-compelled speech by revealing its history in other societies:¹¹⁵ limited methods to cultivate unity through compelled speech are enacted but fail,¹¹⁶ public discontent grows as the state’s pressure and methods to attain unity through compelled speech are increased,¹¹⁷ and the dissenters of these initiatives are exterminated.¹¹⁸ The Court recognized that outlining such a tyrannical chain of events in analyzing a case concerning something as seemingly trivial as a West Virginia statute compelling students to salute and pledge was “trite but necessary.”¹¹⁹ The Court underscored that the First Amendment “was designed to avoid these ends by avoiding these beginnings.”¹²⁰ Thus, the second step in analyzing compelled speech is determining “whether the expression amounts to a ‘declaration’ or ‘affirmation’ of belief.”¹²¹

Decades after deciding *Barnette*, the Court handled a similar case involving a New Hampshire statute requiring citizens to display the state motto on their license plates.¹²² In *Wooley v. Maynard*, noncompliance with this state statute resulted in a criminal sanction.¹²³ The Court began its analysis “with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain

¹¹² 310 U.S. 586, 599–600 (1940).

¹¹³ *Barnette*, 319 U.S. at 640, 643.

¹¹⁴ *See id.* (holding that national security, even though a legitimate end, could not be achieved through the violation of the First Amendment by compelling speech).

¹¹⁵ *See id.* at 641 (“Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.”).

¹¹⁶ *Id.* at 640 (“As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.”).

¹¹⁷ *Id.* at 641 (“As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”).

¹¹⁸ *Id.* (“Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.”).

¹¹⁹ *Id.* at 640–41.

¹²⁰ *Id.*

¹²¹ Nabet, *supra* note 105, at 1526.

¹²² *Wooley v. Maynard*, 430 U.S. 705, 706–07 (1977).

¹²³ *Id.* at 708.

from speaking at all.”¹²⁴ Analogizing the facts in *Wooley* to *Barnette*, the Court concluded that a motto on a license plate was in fact a form of expression, and that forcing citizens to display the motto was an affirmation of the message the motto communicated.¹²⁵ While the Court recognized that fostering state pride was an “acceptable” endeavor, it was adamant not to forsake the Free Speech Clause in order to accomplish such a goal.¹²⁶ The Court asserted that a state’s desire “to disseminate an ideology” does not “outweigh an individual’s First Amendment right to avoid becoming the courier for such [a] message.”¹²⁷ Thus, in *Wooley*, the Court reaffirmed the principle that a person has the right to choose what not to say.¹²⁸

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, the Court notably asserted that the purpose behind a public accommodation law is irrelevant in determining its constitutionality:

The very idea that a . . . speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct . . . it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.¹²⁹

Thus, regardless of the seemingly noble motivation to “produce a society free of . . . biases,” the government cannot force an individual to speak or adhere to an ideology.¹³⁰

B. A Wedding Cake as Compelled Speech Analysis

As demonstrated by the holdings of the prevailing cases concerning compelled speech, the Court abhors government-coerced expression of an idea. In *Masterpiece Cakeshop*, the Colorado ALJ construed a public accommodation law to compel a baker to create wedding cakes for same-sex marriage ceremonies contrary to his religious beliefs.¹³¹ At the outset of this analysis, it is important to note why the sanctions imposed on Phillips constitute a state-enforced compulsion to speak. In *Barnette*, the

¹²⁴ *Id.* at 714.

¹²⁵ *Id.* at 715 (“Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”).

¹²⁶ *Id.* at 717.

¹²⁷ *Id.*

¹²⁸ *See id.* (holding that the state could not force individuals to display the state motto on license plates).

¹²⁹ 515 U.S. 557, 579 (1995) (citations omitted).

¹³⁰ *Id.* at 578–79.

¹³¹ Initial ALJ Decision, *supra* note 11, at *3–4, *6.

Court implicitly recognized that punishing students for refusing to salute a flag or say a pledge essentially compelled the students to speak.¹³² This is because punishment acts as a motivator in altering behavior.¹³³ The parallel is obvious: punishing an individual for refusing to advance a message is a means to ultimately alter her beliefs. The First Amendment guards the speaker from this government intrusion.¹³⁴ Accordingly, sanctions imposed on Phillips for noncompliance with a public accommodation law¹³⁵ that unlawfully requires him to speak are unconstitutional. While the punishment does not literally force Phillips to create a wedding cake, which is a form of communication,¹³⁶ in effect, it forces him to speak by significantly altering his intended message. Once again, choosing not to speak is a form of communication.¹³⁷

In declining to create a wedding cake for a same-sex marriage ceremony,¹³⁸ Phillips was exercising a fundamental liberty guaranteed him under the First Amendment—the right to choose what not to say. Forcing him to create wedding cakes for same-sex marriage ceremonies is a violation of the Free Speech Clause because it compels Phillips to use his skills and talents to create a piece of art to celebrate, and thus speak in favor of, a marriage. In *Barnette*, the Court set forth a two-step process to evaluate alleged government-compelled speech such as the misconstrued public accommodation law in *Masterpiece Cakeshop*. The first step, which requires determining whether the law in question elicits an actual form of expression,¹³⁹ has already been satisfied by previous analysis: creating a wedding cake is a form of protected speech under the First Amendment and a statute issuing sanctions to create a wedding cake thus elicits speech.¹⁴⁰

The second step outlined in *Barnette* is to determine whether the forced expression amounts to an affirmation of belief.¹⁴¹ The Court in *Barnette* found that compelling students to perform actions such as saluting and pledging essentially forced the individuals to affirm nationalism.¹⁴² Just as the statute in *Barnette* required the students to

¹³² See *supra* text accompanying notes 102–05.

¹³³ See Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 343 (2013) (discussing the enforcement of legal norms traditionally done through punishment).

¹³⁴ See *supra* Part II.A.

¹³⁵ See Final Agency Order, *supra* note 11, at *2 (listing the remedial measures Masterpiece Cakeshop “shall take” in light of the Commission’s findings).

¹³⁶ See *supra* Part I.C.

¹³⁷ See *supra* text accompanying notes 96–99.

¹³⁸ Court of Appeals Decision, *supra* note 11, ¶ 3.

¹³⁹ Nabet, *supra* note 105, at 1526.

¹⁴⁰ See *supra* Part I.C; *supra* text accompanying notes 104–05.

¹⁴¹ Nabet, *supra* note 105, at 1526.

¹⁴² See *supra* text accompanying notes 110–21.

affirm an ideology with which they did not agree, the state court's application of the Colorado public accommodation law requires Phillips to accede to a political and religious viewpoint with which he does not agree. Compelling Phillips to create a wedding cake for a same-sex marriage ceremony is essentially forcing him to affirm a belief that he does not support. Thus, the second step of the *Barnette* method is satisfied. While the creation of a wedding cake is not necessarily as blatant as the salute or pledge in *Barnette*, the Court in *Roberts v. United States Jaycees* noted that expressive "form[s] of quiet persuasion" are just as protected as modes of communication that are easily identified as speech.¹⁴³ A wedding cake is perhaps a subtler form of communication, but it is an expression of an idea nonetheless. Coercing an individual to utilize his talents and skills to create a symbol commonly used to celebrate an occasion is essentially forcing him to celebrate the occasion. This is a violation of the principal protection of the First Amendment.¹⁴⁴ In order to preserve self-government, the individual must have the liberty to choose his or her own message.¹⁴⁵

At first glance, a law aimed at fostering harmony amongst the public appears socially and culturally productive.¹⁴⁶ In *Hurley*, however, the Court fervently asserted that the Free Speech Clause prevents the government from interfering with speech for the sake of advancing a favored viewpoint.¹⁴⁷ Thus, the purpose of a public accommodation law, no matter how noble, is irrelevant in determining its legal standing.¹⁴⁸ In *Masterpiece Cakeshop*, the Colorado public accommodation law operated to prevent discrimination based on sexual orientation in the marketplace.¹⁴⁹ On the surface, this ambitious statute seems noble.¹⁵⁰ While the language of a statute itself may not be alarming, the court's *interpretation* of the law can have a detrimental effect on freedom of speech. The problem with statutes like the one in *Masterpiece Cakeshop*

¹⁴³ 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

¹⁴⁴ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) (holding that requiring an individual to alter expressive conduct in the context of a parade violated speaker autonomy that is protected by the First Amendment).

¹⁴⁵ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

¹⁴⁶ See Initial ALJ Decision, *supra* note 11, at *4 (noting that anti-discrimination laws protect against the cost to society and the hurt caused by discrimination).

¹⁴⁷ *Hurley*, 515 U.S. at 579 (stating that the First Amendment "has no more certain antithesis" than speech restrictions that promote a point of view acceptable to some or all people).

¹⁴⁸ See *id.* (noting that a public accommodation law does not justify the government requiring an individual to promote one idea over another, regardless of how enlightened the government's purpose may be).

¹⁴⁹ Initial ALJ Decision, *supra* note 11, at *4.

¹⁵⁰ *Id.* ("It is a discriminatory practice . . . to refuse [service] . . . because of . . . sexual orientation . . .").

is their imminent encroachment on the First Amendment. Essentially, by upholding the statute, the state court held a public accommodation law in higher regard than the First Amendment.

CONCLUSION

In *Masterpiece Cakeshop*, an artist was forced to speak on a topic of public discourse against his will—a clear example of compelled speech. A homosexual couple approached Phillips, a cake artist, in order to procure a wedding cake for a same-sex marriage celebration. In order to provide the couple with a wedding cake for the celebratory event, Phillips would have to utilize his creative and artistic abilities to create, thereby expressing and affirming, a symbol contrary to his religious beliefs. As evidenced by the analysis in this Note, making a wedding cake is a protected form of speech under the Constitution, and forcing a speaker to create a wedding cake by issuing sanctions against him is to compel speech on a public topic.

Public accommodation laws are based on the common-law principle that, without good reason, innkeepers could not refuse service to an individual.¹⁵¹ The rationale is that even though certain businesses are for profit, they still function partially as a public service, which cannot be withheld from public access.¹⁵² In recent history, this narrow principle has strayed far from its original purpose in recent history, trampling on the First Amendment rights of business owners who engage in inherently expressive commerce.¹⁵³ As evidenced by *Masterpiece Cakeshop*, holding public accommodation statutes in higher regard than the First Amendment inflicts massive damage on free speech rights by forcing artists to express and affirm an ideology with which they disagree or suffer civil sanctions.

In order to protect the right to freedom of speech for all, it is critical that future courts dismiss the public accommodation law argument when presented with a case similar to *Masterpiece Cakeshop*. Because of the Supreme Court's pronouncement in *Obergefell v. Hodges* legalizing same-sex marriage, lawsuits involving wedding cake artists exercising their First Amendment rights are sure to follow.¹⁵⁴ The Free Speech analysis is not only the constitutionally sound approach to these cases,

¹⁵¹ *Hurley*, 515 U.S. at 571.

¹⁵² Nabet, *supra* note 105, at 1516.

¹⁵³ *See id.* at 1517 (describing a case in which a photographer was liable for violating public accommodation laws when she refused to photograph a same-sex wedding).

¹⁵⁴ *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting) (predicting that questions will soon come before the Court involving the conflict between the rights of religious individuals and the new right to same-sex marriage).

but also the prudent choice.¹⁵⁵ In reference to a factually similar case involving the tension between a public accommodation law and an artist's freedom of speech, one scholar states the following:

This Court can rule in favor of [the individual charged with discrimination] on First Amendment freedom of expression grounds, and such a ruling would not block the enforcement of antidiscrimination law when it comes to discriminatory denials of service by caterers, hotels that rent out space for weddings, limousine service operators, and the like

. . . .
This case can therefore be resolved entirely based on the First Amendment freedom from compelled speech.¹⁵⁶

Thus, it is not even necessary to wade into the notoriously murky waters of public accommodation law in order to resolve cases like *Masterpiece Cakeshop*, which involve a creative and artistic expression of an idea. Public accommodation laws can still serve their purpose by preventing discrimination. These statutes cannot, however, override First Amendment protections offered to owners of inherently expressive businesses. The fact that some courts continue to approach cases similar to *Masterpiece Cakeshop* with a public accommodation analysis is evidence of either a misconception of the compelled speech doctrine or favoritism of a particular viewpoint. Whatever the reason for utilizing this method of analysis, it is harmful to First Amendment jurisprudence. Proponents of public accommodations laws must recognize that the statutes can operate in their intended capacity and coexist with the Free Speech Clause:¹⁵⁷ the two legal spheres can and should be reconciled. The First Amendment, however, must be given prominence because free speech protections are at stake.

A common critique of utilizing the free speech argument in cases like *Masterpiece Cakeshop* is that to do so would undermine the "historical purpose of public accommodations laws," which is "to stamp out invidious racial discrimination."¹⁵⁸ The contention is that if courts allow one business owner to employ the Free Speech Clause in order to withhold service from a same-sex couple planning a wedding celebration, such a holding would, in effect, allow another business owner to lawfully

¹⁵⁵ See Eugene Volokh, *Amicus Curiae Brief: Elane Photography, LLC v. Willock*, 8 N.Y.U. J.L. & LIBERTY 116, 119–20 (2013) (explaining the importance of examining the free speech aspect of compelled services, such as photography).

¹⁵⁶ *Id.* at 120.

¹⁵⁷ See *id.* (recognizing the distinction between services that should be protected under the First Amendment because they are expressive and services that should be curtailed by anti-discrimination laws).

¹⁵⁸ Recent Case, *New Mexico Supreme Court Holds that Application of Public Accommodations Law to Wedding Photography Company Does Not Violate First Amendment Speech Protections*: Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), 127 HARV. L. REV. 1485, 1488 (2014).

discriminate based on race by purporting that performing a service for an individual of a certain race would communicate a message of tolerance with which the owner disagrees.¹⁵⁹ While this hypothetical is worthy of consideration, scholars have noted that courts have “failed to consider a series of countervailing hypotheticals.”¹⁶⁰ For example, must a freelance writer “who brings her services under public accommodations laws . . . be compelled to write a release for Westboro Baptist Church because refusing to do so would be discrimination on the basis of religion?”¹⁶¹ Also, must a similarly situated liberal freelance writer be compelled to write a release for a conservative political action committee?¹⁶² The “logical consequence” of holdings like *Masterpiece Cakeshop* compels business owners to forgo their First Amendment rights in situations such as these.¹⁶³ This type of compelled speech is precisely what the First Amendment is designed to protect against.

Thus, the most prudent way to manage the tension between the Free Speech Clause and public accommodation laws designed to eliminate discrimination is to extend First Amendment protection “only to people who are being compelled to engage in expression.”¹⁶⁴ Artists such as “photographers, writers, singers, actors, painters, and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject.”¹⁶⁵ Inherently non-expressive businesses, such as hotels and transportation operators, should not be granted First Amendment privileges in protesting public accommodation laws because these services do not communicate an idea.¹⁶⁶ “[C]reators of expression,” however, should be allowed to exercise their “First Amendment right to choose which expression they want to create.”¹⁶⁷

Regardless of one’s point of view on same-sex marriage, it is necessary to recognize that cases like *Masterpiece Cakeshop* have a profound effect on the speech rights of all individuals. While supporters of same-sex marriage may be tempted to champion the result of the *Masterpiece Cakeshop* holding, it is vital that the real issue of this case be recognized. Both “the people” and the courts must understand that the heart of the issue in *Masterpiece Cakeshop* is not about same-sex marriage. Such a politically, culturally, and emotionally charged topic

¹⁵⁹ *Id.* at 1489.

¹⁶⁰ *Id.* at 1489–90.

¹⁶¹ *Id.* at 1490.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Volokh, *supra* note 155, at 133.

¹⁶⁵ *Id.* at 120.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 118.

often clouds ordinarily sound minds. The heart of the issue in *Masterpiece Cakeshop*, as well as its approaching legal successors, is the individual's right to choose what he desires to say or not say. A speaker must be allowed to affirm or challenge the topics of public discourse—this is the essence of self-government.

The primary function of the First Amendment is to protect the individual's expressive autonomy. This protection, however, is not limited to the messages the individual actively posits. The protection of the First Amendment extends to choosing to remain silent, which includes protecting a baker's desire to remain silent on a public issue, such as same-sex marriage.

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