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2018 Joseph Smith Lecture

The Broader Implications of *Masterpiece Cakeshop*

My focus today is *Masterpiece Cakeshop*, the case of the wedding-cake baker who refused to make a cake for a same-sex wedding, and the larger issue that *Masterpiece* illustrates—the rights of wedding vendors who conscientiously object to assisting with same-sex weddings, or more broadly, the right of merchants to refuse to participate in events that violate their conscience.

The sponsors of this lecture asked me for a title before the Court decided the case. And thus my coy title—what the Supreme Court did. That would let me assess any possible outcome. You all know that the Court ruled for the conscientiously objecting baker, and you may know that the decision has been widely described as a very narrow ruling on odd facts. I think in fact that the opinion has much broader implications than have been recognized.

Let me make my own position clear at the outset. Since same-sex marriage first became a prominent public issue in 2004, I have advocated for marriage equality with religious exemptions—full legal equality for same-sex marriages, with exemptions that protect religious organizations from having to celebrate or recognize those marriages, and exemptions for very small for-profit businesses from having to assist with the wedding or its celebrations, so long as other providers of the same goods or services are readily available. The solution to this conflict is to protect the rights of each side—the right of both same-sex couples and conscientious objectors to live their own lives by their own deepest values and in accord with their deeply felt identity. As I have explained elsewhere, they make fundamentally similar claims on the larger society. Government should not interfere with sexual orientation, and it should not interfere with the exercise of religion, without the most compelling reasons.

The *Masterpiece* opinion does not go so far, but it is consistent with that view. The

Court set the right tone, speaking in Justice Kennedy's sometimes florid prose of the necessity to respect the rights and dignity of both sides.

For any deeper analysis of *Masterpiece* to be comprehensible, I have to begin in 1990, with *Employment Division v. Smith*. *Smith* changed the law of free exercise in important ways, but 28 years later, the meaning of that change is still unsettled. Mr. Smith attended a worship service of the Native American Church, where the central ritual is the consumption of peyote, in a highly structured ceremony under the supervision of a peyotero.

Hallucinogenic drugs have been used for religious purposes throughout human history and all around the world. Peyote is a naturally occurring hallucinogen. You consume peyote by eating the bud of a cactus plant; it is tough and hard to chew, and it generally makes you throw up before it makes you high. So there has never been much recreational market for peyote. But American Indians were using it for religious purposes when the earliest Spanish explorers arrived, and they still are. The Native American Church teaches total avoidance of all other drugs, including alcohol, and is generally viewed as a positive influence in the lives of its members. Religious use of peyote by American Indians has long been exempt from the federal drug laws, and after the Court's decision, Congress protected it from state regulation as well.

Smith was fired when his supervisor learned about the peyote service. He applied for unemployment compensation. The Supreme Court had repeatedly held that workers were entitled to unemployment compensation when they lost their jobs for religious reasons—for refusing to work on the Sabbath, or for refusing to make weapons. The relevant legal rule came from two leading cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Sherbert* and *Yoder* held that government could not burden a religious practice unless that burden was necessary to serve a compelling government interest. So, to mention an actual example, government could refuse to exempt people who conscientiously objected to paying taxes. But there was no such compelling interest in withholding unemployment compensation from workers with religious practices that conflicted with their employers' demands.

In *Smith*, the state claimed a compelling interest in a no-exceptions drug-enforcement policy. Smith replied that the tightly controlled religious use of peyote was not dangerous, so that the state's interest was nowhere near compelling. That is how the case was argued, but the Supreme Court did not resolve that disagreement.

Instead, and without being asked, Justice Scalia said the state didn't have to show a compelling interest at all. If the law was neutral and generally applicable—a phrase he never defined—it could be applied even to the central ritual of a worship service. The opinion appears to say that if the law is neutral and generally applicable, the state doesn't have to have any reason at all for refusing religious exemptions. It can just say no. *Smith* was 5-4, the work of four conservatives plus Justice Stevens.

The rhetorical tone of the opinion was hostile to religious exemptions. Lower courts initially said that pretty much every law was neutral and generally applicable—even a zoning law that said "no churches." The city had a reason for excluding churches that was not just hostility to churches, so according to the court of appeals, the law was neutral and generally applicable.

But *Sherbert* and *Yoder* were *not* overruled. Scalia had only five votes, and it's a reasonable inference that one of those five said he wouldn't vote to overrule anything. So *Sherbert* and *Yoder* were distinguished, and given new explanations.

Yoder held that Wisconsin could not require the Amish to send their children to high school. Scalia claimed that *Yoder* was based on a hybrid of free exercise and the parents' right to control their children's education. This hybrid-rights theory seemed to contemplate that if you combined a failed parental-rights claim with a failed free-exercise claim, the two failed claims somehow add up to a successful hybrid claim. That never made any sense, and almost nothing has come of the hybrid-rights theory.

The more important reinterpretation was what Scalia said about *Sherbert v. Verner*, the first of the unemployment-compensation cases. He said that the law in *Sherbert* was not neutral and generally applicable, because the state accepted "at least some" reasons for refusing available work. You don't forfeit unemployment compensation if you decline a job far beneath your skill level, or 200 miles from your home. You don't have to work in a strip club or a massage parlor. There weren't many

acceptable reasons for refusing work and demanding a government check instead, but there were "some." Because the state accepted some secular reasons for refusing work, it had to also accept religious reasons. Mrs. Sherbert was still constitutionally entitled to her unemployment compensation, even after *Smith*.

The implications of that reasoning were initially concealed by the opinion's harsh rhetoric. But think about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are. Exceptions grease the wheels for legislation; legislators exempt their friends and contributors, and they exempt interest groups that might be strong enough to block passage of the bill. There were no exceptions in the law banning peyote, but such across-the-board total prohibitions are fairly unusual. *Smith* says that if a law that burdens religion is not neutral, or not generally applicable, it still has to be justified by a compelling government interest. And its discussion of *Sherbert v. Verner* implies that not many laws are neutral and generally applicable.

The Court returned to the issue in 1993, in *Church of the Lukumi Babalu Aye v. City of Hialeah*. Santeria is a Cuban religion that combines elements of Catholicism with elements of Yoruba religion from West Africa. Its central ritual is the sacrifice of small animals, mostly chickens and goats. There were an estimated 50,000 Santerians in South Florida, mostly practicing in secret.

When the Church of the Lukumi proposed to take the faith public, Hialeah passed four ordinances to prohibit animal sacrifice. They were drafted to ban Santeria without affecting any of the other myriad reasons why humans kill animals. It was a crime to *unnecessarily* kill an animal *in a ritual or ceremony not for the primary purpose of food consumption*. The city said this was neutral and generally applicable; no one could sacrifice an animal. The church didn't get a single vote in the lower courts.

The Supreme Court reversed, 9-0. These ordinances were not neutral, they were not generally applicable, and the Court said they didn't come close. The Court discussed neutrality in one section of the opinion, and general applicability in another. It still didn't define either term. It discussed neutrality in terms of

discrimination "because of" religion, but no such language appeared in the section on general applicability. Instead, it applied what amounts to a standard.

The city said that animal sacrifice undermined government interests in public health and in protecting animals. But the ordinances failed to regulate other activities that undermined those same interests, to the same or greater extent. And not just other killings of animals, the most obvious analogy. The city's health officer admitted that the garbage dumpsters of restaurants were a bigger health hazard than the carcasses of sacrificed animals. But one was banned and the other was not. So the ban on sacrifice was *not* generally applicable.

It was an element of the offense that killing the animal be unnecessary, and the city said that religious killings were unnecessary. Of course they are unnecessary only if the religion is false, which is clearly what the city believed. But no American government gets to decide which religions are true and which are false. The Supreme Court didn't say that. It made a different point of broader potential application: that when the city said that secular killings were necessary but religious killings were not, it "devalued" the religious reasons for killing animals, "judging them to be of lesser import" than the permitted secular reasons.

So once again, if you take the Court's reasoning seriously, many laws will fail the test of general applicability; many laws that burden religion will require compelling justifications. Any time the government prohibits a religious practice but exempts some analogous secular practice that undermines the alleged government interest, it decides that the secular practice is more important, more valuable, more something that makes it more deserving of exemption. Government devalues the religious practice as compared to the secular practice.

But on its facts, *Lukumi* was an extreme case; these ordinances were clearly enacted to suppress one religious practice. Government lawyers argue that every law is neutral and generally applicable except a few rare laws as extreme as the ordinances in *Lukumi*. And a few lower courts have agreed.

But more courts have concluded that even one or a few secular exceptions, if they undermine the interest the law is alleged to protect, show that the law is not generally

applicable. So Newark had a rule that police officers must be clean shaven, with a medical exception for officers with skin conditions that make it difficult to shave. That was it; only one relevant exception. But the court of appeals said that Newark had to also exempt Muslim officers religiously obligated to grow a beard. Newark had made a value judgment that medical needs are more important than religious needs, and that value judgment is what *Smith* and *Lukumi* forbid. The *Newark* opinion in the Third Circuit was written by a judge you may have heard of, Samuel Alito. There are nine or so similar decisions in courts around the country. EXAMPLES?

Which at last brings me back to *Masterpiece Cakeshop*. *Masterpiece* is one of a handful of cases where conservative Christians in the wedding business refuse to assist with a same-sex wedding and get sued under a state public-accommodations law. These vendors understand marriage as an inherently religious relationship, and therefore they understand weddings as inherently religious events. Their job is to make their part of the wedding the best and most memorable it can be; they understand themselves to be promoting and celebrating the wedding and the marriage. Some of them have happily served long-time gay customers, but they say that they cannot do the wedding. To them, it is a religious event that is religiously prohibited. It is a sacrilege, and they cannot participate.

These cases have mostly been litigated under state-law protections for religious liberty. They have all been in blue or purple states, because those are the only states with state-wide gay-rights laws. And the religious claimants all lost—a photographer in New Mexico, a baker in Oregon, a florist in Washington.

Masterpiece arose in Colorado, which has no statute protecting religious practices from the state and no state supreme court decision interpreting the free exercise clause of the state constitution. So federal claims played a larger role. The *Masterpiece* baker, Jack Phillips, claimed that his cakes were works of art protected by the Free Speech Clause. And if you look at the pictures of his cakes, that claim is not crazy. But it has no logical stopping point. If cake decorating is speech, lots of businesses may involve elements of speech.

At the oral argument, his lawyer was pressed to draw a line, and she had no

coherent theory. She came close to saying that wedding cakes were uniquely speech, and that nothing else would be covered by her proposed rule, but she couldn't explain why.

Phillips also had a federal free exercise claim. But for that, he had to show that the Colorado law was not neutral, or not generally applicable. His lawyers obviously doubted whether he could show that; they gave much more attention to the free speech claim.

No one sympathetic to the state and the same-sex couple took the free exercise theory seriously. A prominent law professor on a list serve, which I am not permitted to cite, said that the Court would reject the free speech theory and then dispose of the free exercise theory in a paragraph. This widespread disdain for the free exercise claim resulted from the rhetoric of *Employment Division v. Smith* still dominating close textual analysis of *Smith* and *Lukumi*.

Tom Berg is my frequent collaborator at St. Thomas University in Minnesota. He and I filed an amicus brief devoted solely to free exercise. We argued for an exemption only for small businesses and only for events directly related to the wedding; this focus on the religious context would lead to a much narrower exemption than the free speech theory, which would have protected simple bigots as well as those with sincere religious objections.

The Colorado public accommodations law had no explicit secular exceptions. But we said that it had been enforced in discriminatory ways that created an *implicit* secular exception, and this secular exception meant that the law was not generally applicable. The Court did not say that, but it relied on much of the same evidence to say something that led to nearly the same place. It said that the law was not neutral, because Colorado's enforcement pattern showed hostility to religion.

One of the Civil Rights Commissioners had made hostile statements on the record, blaming religious liberty for slavery and the Holocaust and calling Jack Phillips's religious commitments "despicable". Views of that sort are very widespread, but public officials have now been warned not to talk about them. So those facts may not recur.

The other evidence is more important. A Christian activist named William Jack went to three different bakers, requesting cakes with scriptural quotations hostile to same-sex marriage. Some of the messages were offensive. Each baker refused to make his cake, he charged them with religious discrimination, and the Civil Rights Commission dismissed the charges.

The same Colorado law that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of any religious practice or belief. So the Colorado courts had to explain why the *Masterpiece* baker violated the statute and the other bakers didn't. And in the course of doing that, the Colorado Court of Appeals said some deeply inconsistent things.

Most fundamentally, it said that refusing to make a cake closely associated with same-sex couples discriminated on the basis of sexual orientation, but that refusing to make a cake closely associated with conservative Christians did *not* discriminate on the basis of religion.

For the protected bakers, the court assumed that the message would be the bakers' message and not the customers'; the protected bakers could lawfully object to "the offensive nature of the requested message." *Id.* at 20a n.8. For Jack Phillips, the court said that a wedding cake would send no message, but if it did send one, it would be the customer's message, not the baker's. *Id.* at 30a.

The protected bakers' willingness to produce cakes with other "Christian themes" for other Christian customers was treated as exonerating. Pet. App. 20a n.8. Petitioner's willingness to produce other cakes and baked goods for same-sex couples was treated as irrelevant. *Id.* at 19a.

For Jack Phillips, the fact that he would merely be complying with the law meant that he would send no message. *Id.* at 30a-31a. For the other bakers, this argument went unmentioned.

The court also said that in the cases it distinguished, the customer wanted objectionable words or symbols on the cake, and that in Jack Phillips's discussion with the same-sex couple that sued him, he did not learn what they wanted on their cake. *Id.* at 28a, 35a. This argument has been picked up very widely on the same-sex

couples' side of thedebate; some even claim there is consensus that the baker could not be required to write any explicit message on a cake. There is no such consensus, and this argument is deeply disingenuous.

In the actual transaction, Phillips could surely assume that the couple wanted *some* words or symbols on the cake, and an essential part of his task was to help them choose those words and symbols. J.A. 161. In any event, the very purpose of a wedding cake is to celebrate the wedding and the marriage, with or without an inscription. As the Colorado court said, the couple asked Phillips to "design and create a cake to celebrate their same-sex wedding."[1]

And under the rest of the Colorado court's reasoning, the case would have come out the same way even if the conversation had lasted longer and the couple had said they wanted two men in tuxedos, "David ♥ Charlie," a rainbow, or any other more explicit message. The court's logic would still have said that it would be the customer's message, not petitioner's; that Phillipps would merely be doing what the law required; and that refusing to produce a message so associated with same-sex couples discriminated on the basis of sexual orientation. I do not believe for a minute that the Civil Rights Commission or the Colorado Court of Appeals would rule any differently in a case where the couple requested an explicit message.

Most fundamentally, I don't believe it because if refusing a cake with an explicit message is protected, then the conscientiously objecting bakers win. They just need to know enough law to keep the conversation going until the explicit message is chosen or revealed. Protection for explicit messages would not be much help to florists or wedding photographers, but it would largely solve the problem for bakers. And the gay-rights side of this debate will not settle for that.

Even if the Colorado court's alleged distinctions were more persuasive, and even if they succeeded in placing the two sets of bakers in different doctrinal categories under state law, that would not change the bottom line. The conscience of bakers who support same-sex marriage, or refuse to oppose same-sex marriage, is protected. The

[1] Craig v. Masterpiece Cakeshop, 370 P.3d 272, 276 (Colo. App. 2015).

conscience of bakers who object to same-sex marriage is not protected.

This discrimination is like the ordinance in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), where racial epithets were illegal, but "racist," "bigot," and a vast range of other offensive epithets were permitted. State law placed the two sets of epithets in different doctrinal categories, and the correlation between epithets hurled and speakers regulated was imperfect. But these distinctions could not save a regime that effectively "license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392. It is no more defensible for Colorado to allow one side to follow the dictates of conscience while requiring the other side to submit its conscience to the demands of any customer who walks in the door.

The Supreme Court did not invoke *R.A.V.,* and it did not rely on all the evidence I have outlined. But it relied on important parts of it. It noted the inconsistency about whether any message would be the baker's message or the customer's message, and the inconsistency about the baker's willingness to provide other goods and services to the protected class. And it focused on the Colorado court's statement that the protected bakers could refuse to provide the "offensive" message that William Jack had requested. "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness."

Much of the commentary has treated the Court's decision as confined to an odd set of facts, and as avoiding the underlying question of whether religious wedding vendors can be required to assist with same-sex weddings. But these facts are readily reproducible. Wedding vendors seeking exemptions can send testers like William Jack to request an offensively conservative religious version of the same goods or services. And we can confidently expect state enforcement officials to react just as they did in Colorado, protecting the conscience of the vendors they agree with. If liberal business people don't have to provide conservative religious goods or services that *they* find offensive, then the *Masterpiece* opinion says that conservative believers don't have to do same-sex weddings that violate their conscience.

This means that the Supreme Court has gone much further than is generally

recognized towards protecting wedding vendors. And it has taken a substantial step towards the protective understanding of *Employment Division v. Smith*—that even one or a few secular exceptions make a law not neutral, or not generally applicable. If the law is not neutral, or not generally applicable, religious conscientious objectors are entitled to an exemption unless there is a compelling government interest in requiring them to comply. And the state's willingness to grant secular exemptions seriously undermines any claim to a compelling interest in enforcing the law without exceptions.

But this requirement to treat claims consistently will be powerful only if the courts take it seriously. States will try to manipulate their rules to justify unequal treatment of objectors they agree with and those they don't. In *Masterpiece*, four Justices accetped such a manipulation. Justice Kagan's concurrence and Justice Ginsburg's dissent both argued that the state's discrimination could have been justified on the ground that the protected bakers would not sell an anti-gay cake to anybody, but Phillips would sell wedding cakes to opposite-sex couples.

But as Justice Gorsuch's concurrence explained, this reaches the preordained result by manipulating the level of generality. It treats the "anti-gay" cake as having a distinctive message, but the pro-gay cake, the cake for the same-sex wedding, as merely generic. But if the anti-gay cake is a unique product because of its message, then the category is not cakes, or wedding cakes, but cakes with a particular message. And often, a cake for a same-sex wedding will have some indication, even if symbolic, indicating approval of the marriage—two brides, the couple's names, a rainbow—and that is a cake that Phillips would not sell to anybody. Even without such symbols, the cake still sends a celebratory message.

We come back to the same basic contradiction. The Colorado courts, and the liberal Justices, treat Jack Phillips as making decision about the customer, but the protected bakers as making a decision about the message.

Colorado, and at least some gay activists in Colorado, remain determined to get Jack Phillips. He reports that his store has been vandalized and that he has received death threats and countless hateful phone calls and e-mails. And he has received

repeated requests for cakes the purported customer knows he will not make. Cakes honoring Satan have been a popular request.

One such test order came on the day the Supreme Court granted cert. It would not have served the tester's purpose to order a wedding cake, because to avoid further penalties, Phillips was no longer making wedding cakes for anybody. He gave up 40% of his business and 40% of his income, and laid off most of his employees, to follow his conscience. And the person ordering knew all that. She is a lawyer who reports on her website that she "takes great pride" in suing businesses that discriminate against the LGBT community. So she asked for a cake that was blue on the outside, and pink on the inside, and she said it was to celebrate her gender transition. Phillips said he could not make that cake. She filed a complaint with the Civil Rights Commission, which is why we know her identity. And three weeks after the Supreme Court's opinion, the Commission's director found probable cause to believe there had been a violation.

This new case is a step beyond the Supreme Court's decision in one way that seems important to me: it does not involve a wedding. It is not a religious context. I think that Phillips should still be protected, but for me, it is a somewhat harder case. It may be no harder for the Court, because the Court's opinion in *Masterpiece* made nothing of the fact that Phillips understands a wedding to be a religious context.

The gender transition cake is still a demand that Phillips commit his talents to celebrating something deeply at odds with his religious faith. And his claim of conscience is still narrowly focused on a particular celebration. Narrow focus goes to the argument about compelling government interest. An exemption for merchants who refused to serve gays or transgender persons at all, or in a wide range of transactions, would inflict much more harm on the LGBT community. It would threaten frequent denials of service instead of very occasional denials in a few religiously sensitive situations. An exemption for celebrating gender transitions would not threaten widespread refusals of goods or services to transgender persons. I do not think that the state's interest in this narrowly focused claim is compelling.

And enforcement of the Colorado law is still discriminatory. Colorado has not abandoned or repudiated the position it took in the William Jack cases. It is apparently still the state's position that secular bakers with views the state agrees with do not have to make cakes they find offensive, but conservative religious bakers do have to make cakes they find offensive. So the law is still not generally applicable in my view; it is still administered with hostility to religion and so is not neutral in the Court's view. Either way, the compelling interest test still applies.

If the Colorado courts enter another order against Jack Phillips, there will be another cert petition. Justice Kennedy will no longer be there; probably Justice Kavanaugh will be. With Kennedy's retirement, there is no one left from the Court that decided *Employment Division v. Smith*. There has been a generational transition in the conservative legal movement.

The modern conservative legal movement began in reaction to what it perceived as the activism of the Warren Court. It emphasized deference to the political branches, and that was the theme of the *Smith* opinion. Scalia wasn't hostile to religion; he was hostile to the judicial balancing of interests inherent in the compelling government interest test. Better that small religions be disadvantaged, he said, than that judges balance the believer's interest in every religious practice against the government's interest in regulating that practice.

Scalia plainly envisioned that the victims of his decision would be small religions and idiosyncratic practices. He did not foresee that our largest religions—his religion—would need the protections of religious liberty for moral teachings of great importance to them.

Both of these things have changed. Today's conservative judges are as activist as the Warren Court ever was. Decades in the judicial majority can lead you to believe that judicial activism is a good thing. And in the highly visible culture war cases, the victimized religions today are conservative Christians--Catholics and evangelicals most frequently. The Court's conservatives have vigorously enforced the federal Religious Freedom Restoration Act, most notably in the contraception cases. And if *Masterpiece* returns to the Court in the carefully contrived case of the gender

transition cake, the conservatives are likely to see persecution of Jack Phillips—a concerted effort to force him to surrender his faith or his business. They will want to protect him with a clear rule that states cannot misinterpret or evade.

Some religious conservatives look forward to *Smith* being overruled. And that could happen. But *Masterpiece* points the way to what I think is more likely: the Court will build up the protective parts of *Smith*, the requirement that laws burdening religion be neutral and generally applicable. Any secular exception that undermines the interest offered to justify regulation of religion will show both that the law is not generally applicable, *and* that it serves no compelling interest. Such an exception may be written into the law, or it may emerge as a matter of interpretation. It may be labeled as an exception, or as a gap in coverage, or as a claim that one side simply didn't violate the law and the other side did.

Masterpiece gets most of the way there. Its emphasis on the state's hostility to Phillips's faith did it the hard way; it means that those working to minimize the holding can still read it as a motive case. But that hostility was inferred from the objectively unequal treatment of Phillips and the other bakers. It is a very short step to make that focus on objectively unequal treatment even more explicit, and to make objectively unequal treatment dispositive, whether or not the factfinder draws an inference of actual hostility. Colorado may soon provide the opportunity.

This would lead to much better protection for religious liberty. And that would be a good thing not just for religious wedding vendors, but for a broad range of cases. Do not assume that this battle over legal doctrine is only about abortion, contraception, and same-sex weddings. The culture war cases grow out of deep moral disagreement about matters relating to sex, and they get all the headlines, but they are not the typical cases.

The typical case about religious exemptions in the lower courts involves Sabbath observance, grooming rules, Amish buggies, unnecessary autopsies, churches feeding the homeless, or some other random conflict between pervasive regulation and diverse religious practices. They mostly involve the small religious minorities that Justice Scalia thought he was disadvantaging in *Smith*.

And then there is Mary Stinemetz, the Kansas woman who died for her faith, in America, in the twenty-first century. She was a Jehovah's Witness, so she could not accept a blood transfusion, and she needed a liver transplant. Bloodless liver transplants were available in Omaha, and they were actually cheaper than any transplant hospital in Kansas. But Kansas Medicaid had a rule: we don't pay for out-of-state medical care. She sued under the state constitution, and she eventually won, but by then it was too late. Her condition had deteriorated to the point that she was no longer medically eligible for a transplant. She died soon thereafter.

Religious liberty reduces human suffering. And it reduces social conflict. It is one of America's great contributions to the world. We should not let it slip away, either in legal wrangling or in a bitter culture war. And the Supreme Court's opinion in Masterpiece is an important step toward restoring federal constitutional protection for religious liberty.

Let me now return to the big picture. Forcing sincere believers to violate what they understand to be God's will imposes serious distress. It disrupts the most important relationship in their lives—a relationship with an omnipotent Being who controls their fate. And in many cases, including all the wedding-vendor cases, they can avoid that disruption only by giving up their occupation. Permanent surrender of conscience, or permanent surrender of occupation. That is not a choice we should impose on religious minorities. Imposing that permanent choice imposes far greater harm on the conscientious objector than the one time distress of being referred elsewhere imposes on the same-sex couple.

In a society without religious exemptions, an important avenue of compromise is eliminated. If the choice is no law at all or a law with no exceptions, there will be greater opposition to any law at all. There will never be gay-rights laws in red states unless those laws include religious exemptions. Utah has shown what can be accomplished legislatively when we once agree to protect the interests of both sides.

Too many people on both sides repeat the Puritans' mistake: liberty for me but not for thee. Too many religious conservatives want to regulate other people's sex lives, and too many defenders of gay rights and reproductive freedom want to force conscientious objectors to assist with abortions, contraception, and same-sex weddings.

Sexual minorities and religious minorities ought to tolerate each other better. They actually make parallel claims on the larger society.

First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation. Sexual orientation is that fundamental, and for some Americans, religious faith is that fundamental.

Second, no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. For most people, each of these things is experienced as involuntary, beyond individual control.

Third, both religious and sexual minorities face the argument that their conduct is separable from any claim of protected legal rights, and thus subject to regulation with few limits. Courts refused to distinguish sexual orientation from sexual conduct, because both were essential to personal identity, and it was wholly unreasonable to expect gays and lesbians to be celibate all their lives. It is equally unreasonable to demand that believers refrain from acting on their understanding of God's will.

Fourth, both same-sex couples and religious dissenters seek to live out their identities in public. Same-sex couples want to participate in the social institution of civil marriage and live as couples in public as well as in private. Religious believers likewise seek to follow their faith not just in worship services, but also in the charitable works of their religious organizations, in their daily lives, and in their occupations and professions.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues—a loving human relationship for one side, and obedience to a loving God for the other—is condemned by many as a grave evil. One side sees bigotry; the other sees sin. Because each side is widely viewed as evil, each is at risk of intolerant and burdensome regulation. And that is a standard part of the usual justifications for active judicial protection.

The solution to such deep-seated moral disagreements is to protect the liberty of both sides. We need strong gay-rights laws with strong religious exemptions. *Masterpiece Cakeshop* points the way. It speaks respectfully of the equality and dignity of both sides.