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Contemplating *Masterpiece Cakeshop*

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Abstract

Next term, in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court will consider whether a baker's religious objection to same-sex marriage justifies his violation of Colorado's public accommodation law in refusing to bake a cake for a same-sex wedding. At the centerpiece of* Masterpiece Cakeshop *is a clash between the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause or, more precisely, the principles of equality in commercial life as grounded in Colorado's public accommodation law. In exploring the purpose inherent in regulating private conduct through public accommodation laws, this Essay suggests that the reconciliation of these seemingly irreconcilable interests is rooted in their common intrinsic value: maintaining the social order. Ultimately,* Masterpiece Cakeshop *provides an opportunity for the Court to reclaim the grounding principles inherent in public accommodation laws that recognize the civic duty in "serving the public" and hold that free exercise must bow to equal protection when necessary to maintain the social order.*

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I. Introduction

On the two-year anniversary of its historic same-sex marriage decision, which extended the fundamental right to marry to same-sex couples,[1] the Supreme Court announced it would hear a case that takes center stage in an ongoing battle between religious liberty and LGBT rights.[2] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[3] Jack Phillips, a self-described "cake artist," appeals a Colorado decision[4] finding him liable for sexual orientation discrimination under the Colorado Anti-Discrimination Act[5] ("CADA") for refusing to bake a wedding cake for a same-sex couple.[6] Phillips invoked the First Amendment in arguing that the State's application of CADA to his case, essentially compelling him to bake a wedding cake for a same-sex wedding in contradiction of his deeply-held religious beliefs, violated his free speech and free exercise rights.[7] The Colorado

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1. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
2. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 2722428 (June 26, 2017) (granting certiorari).
3. *Id.*
4. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).
5. COLO. REV. STAT. § 24-34-601 (2012).
6. *See Craig*, 370 P.3d at 279 ("We conclude that the act of same-sex marriage is closely correlated to [plaintiffs'] sexual orientation, and therefore, the ALJ did not err when he found Masterpiece's refusal to create a wedding cake for [plaintiffs] was 'because of' their sexual orientation, in violation of the CADA.").
7. *Id.* at 284–288.

Court of Appeals rejected his claim, holding that his compliance with CADA "merely require[d] that [he] not discriminate against potential customers . . . and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections."[8]

At the heart of *Masterpiece Cakeshop* is a question implicating the collision of the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause or, more precisely, the principles of equality in commercial life as grounded in Colorado's public accommodation law. As such, the Court will be forced to reconcile the competing values and legal tests embedded in these constitutional rights. The question the Court will consider next term juxtaposes the individual rights of the claimants with the individual rights of the shop owner:

> Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.[9]

While this case requires the Court to resolve more precise First Amendment questions concerning compelled speech and artistic expression, this essay attempts to disentangle the broader legal issues at the centerpiece of cases like *Masterpiece Cakeshop* that pit religious exercise against LGBT rights. In doing so, one thing is clear: the Court's decision in *Masterpiece Cakeshop* will provide important insight into its predisposition toward future free exercise cases that pose an even closer question because they are strengthened by the presence of robust religious freedom laws.

Indeed, *Masterpiece Cakeshop* provides an easier case for LGBT rights to triumph over the free exercise rights of business owners than other cases percolating their way up through the

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8. *Id.* at 286.

9. Petition for Writ of Certiori, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111 2017 WL 2722428 (July 22, 2016), http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf.

federal courts. While CADA strengthens the same-sex couple's claim by expressly prohibiting discrimination based on sexual orientation, many state and local public accommodation laws do not include sexual orientation under their protective umbrella, and the Equal Protection Clause does not afford heightened protection to individuals claiming sexual orientation discrimination.[10] Conversely, since Colorado lacks a state Religious Freedom Restoration Act ("RFRA"), Phillips could not invoke *Hobby Lobby*[11] to support his argument that strict scrutiny judicial review is the appropriate standard to apply to his free exercise claim, even if, contrary to his position, CADA is a neutral law of general applicability.

Hypothetically, had Colorado lacked CADA's express protection for sexual orientation and also had a state RFRA mandating strict judicial scrutiny of free exercise challenges, Phillips' claim would be much stronger. The confluence of the presence of these realities in other cases seems to forecast a legal landscape that secures religious liberties at the sacrifice of civil rights.

This essay proceeds in two parts. First, it recognizes the values inherent in regulating private conduct through public accommodation laws. It argues that since the Fourteenth Amendment was never intended to *prohibit* private discrimination,[12] it should not now be used to *permit* it. Second, it examines the important justification for governmental restriction of free exercise: when such restriction is in the interest of the social

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10. *See* Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1047 (2016) (explaining how LGBT-protective non-discrimination laws are diminishing due to the proliferation of state preemption laws that prohibit municipalities from passing non-discrimination ordinances that exceed the state's existing coverage).

11. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 22 (2014). Although Hobby Lobby involved the federal RFRA, it sets the precedent for businesses, invoking state RFRA laws, to refuse services to LGBT patrons based on religious beliefs.

12. *See* The Civil Rights Cases, 109 U.S. 3, 4 (1883) (holding that Congress had no "direct and primary" authority under Section 5 of the Fourteenth Amendment to enact legislation regulating private race discrimination).

order.[13] Ultimately, the essay suggests that the reconciliation of the seemingly irreconcilable clash between the guarantees of free exercise and equal protection is rooted in their common intrinsic value: maintaining the social order. *Masterpiece Cakeshop* provides an opportunity for the Court to reclaim the grounding principles inherent in public accommodation laws that recognize the civic duty in "serving the public" and hold that free exercise must bow to equal protection when necessary to maintain the social order.

II. The Law of Public Accommodation and the Wedding Cake Conundrum

The law of public accommodation finds its roots in early English common law. Joseph Singer's *No Right to Exclude: Public Accommodations and Private Property* outlines the evolution of the theory of public accommodation law.[14] Dating back to sixteenth century England, where early case law required innkeepers to admit guests if the inn was not already full, the concept of what we now understand as public accommodation law was based on the premise that "one that has made [a] profession of a public employment is bound to the utmost extent of that employment to serve the public."[15] Famous English Judge Lord Holt described the common-law duty to serve the public without discrimination as an absolute responsibility bound inextricably in the "profession of a trade which is for the public good."[16]

Without using the term "public accommodation," Lord Holt seemed to imply that individuals serving in "public employment" had a duty to serve the public without discrimination.[17] A subsequent English case defined "public employment" as one "in which the owner has held himself out as ready to serve the public

13. *See* Reynolds v. United States, 98 U.S. 145 (1878) (holding that a criminal polygamy law comported with the First Amendment because it punished conduct, not beliefs).
14. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303–1411 (1996).
15. *Id.* at 1305 (citing White's Case, 2 Dyer 343 (1586)).
16. *Id*.
17. *Id.*

by exercising his trade."[18] According to Singer, the principle that an innkeeper who "induce[s] people to think that he is a common innkeeper . . . is bound as such to receive those who offer themselves" emanates from the appearance of being open to the public.[19] In essence, the businessman that held himself out to serve the public was thus obligated to serve the public.[20]

The contractual principles supporting the duty to serve the public indiscriminately made their way into American jurisprudence during the antebellum period.[21] As Singer recalls, several prominent American legal scholars reiterated the "holding out theory," requiring innkeepers and carriers of goods to serve the public if they held themselves out to serve the public.[22]

Today, places of public accommodation "are those intrinsically hybrid entities that are private as against the state yet simultaneously open to the public."[23] While it is now customary for Congress to prohibit private discrimination in places of public accommodation, such was not always the case. Well over a century ago, the Supreme Court struck down portions of the Civil Rights Act of 1875 and held that Congress did not have the express power under the Fourteenth Amendment to prohibit private discrimination.[24] The Court limited the reach of the Fourteenth Amendment to state action only and held that Congress had no "direct and primary" authority under Section 5 of the Fourteenth Amendment to prohibit race discrimination by private actors.[25]

Seventy years later, in *Heart of Atlanta Motel v. United States*,[26] the Court held that Congress possessed ample power

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18. *Id.* (citing Gisbourn v. Hurst, 91 Eng. Rep. 220 (K.B. 1710)).
19. *Id.* at 1311 (citing FREDERICK CHARLES MONCREIFF, THE LIABILITY OF INNKEEPERS (1874)).
20. *Id.*
21. *Id*.
22. *Id.* (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (1832); THEOPHILUS PARSON, LAW OF CONTRACTS (1853); FRANCIS HILLARD, THE LAW OF TORTS (1859)).
23. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1592 (2001).
24. The Civil Rights Cases, 109 U.S. 3, 4 (1883).
25. *Id.* at 20.
26. 379 U.S. 241 (1964).

under the Commerce Clause to enact the Civil Rights Act of 1964, prohibiting private discrimination in places of public accommodation.[27] The Court recognized that innate in the Commerce Clause power is the power to regulate not just interstate but also intrastate commerce that has a substantial effect on interstate commerce and defined public accommodations as establishments with "operations [that] affect commerce."[28] Thus, private discrimination in public accommodations could be prohibited under Congress's broad Commerce Clause powers.[29] Since *Heart of Atlanta*, Congress has invoked its Commerce Clause powers in enacting laws that regulate private conduct in places of public accommodation.[30]

Admittedly, *Masterpiece Cakeshop* involves state law, and the power of states to regulate their citizens' private conduct is much broader than the scope of congressional authority limited by the enumerated powers doctrine.[31] States enjoy general police powers, which the federal government does not.[32] Nevertheless, *Heart of Atlanta* firmly established that private discrimination is not outside the reach of even Congress's limited and expressly defined power to regulate.[33]

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27. *Id.* at 245–46.
28. *Id.*
29. *Id.* at 276–77.
30. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277–80 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977, which regulates private lands, as a valid exercise of Congress' Commerce Clause powers); Perez v. United States, 402 U.S. 146, 155 (1971) (upholding the Consumer Credit Protection Act, which criminalizes private conduct, as a valid exercise of Congress' Commerce Clause powers); Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964) (upholding Congress' power to prohibit race discrimination in small, private restaurants as a valid exercise of its Commerce Clause powers).
31. *See* United States. v. Lopez, 514 U.S. 549, 566, 603 (1995) (holding that the Gun-Free School Zones Act of 1990 was unconstitutional because it did not have a substantial effect on interstate commerce).
32. *See id.* (discussing the constitutional limitations of the federal government's legislative authority).
33. *See Heart of Atlanta*, 379 U.S. at 261–262 (upholding the relevant provisions of Title II of the Civil Rights Act of 1875 because they are limited to "enterprises having a direct and substantial relation to the interstate flow of goods and people").

The link between discrimination in public accommodations and commerce is well-documented. Indeed, studies document the negative economic effects of LGBT discrimination in places of public accommodation,[34] and the daily headlines report anecdotal evidence of consumer boycotts and canceled concerts or sporting events in protest of states' anti-LBGT policies.[35]

Considering the early roots of public accommodation laws and the well-recognized link between discrimination against patrons and negative economic effects, the Commerce Clause and state police powers are the appropriate sources of governmental authority to regulate private discrimination in public accommodations.

In addition to its limited scope to regulate private conduct, the Fourteenth Amendment has provided little protection to LGBT persons from official government discrimination.[36] Although the LBGT community rejoiced after *Obergefell*, that case and previous ones striking laws targeting the LGBT community have not provided heightened protection for LGBT members as a class under the Equal Protection Clause. Instead, *Obergefell* secured the liberty interests inherent in the right to marry as protected by substantive due process.[37] The unfortunate reality of the Court's measured decision is that same-sex couples can get married in the morning, lose their jobs in the afternoon, and be evicted from their apartments all on the same day. Because the Constitution's Equal Protection Clause provides scant anti-discrimination protection for LGBT persons, state and local anti-discrimination laws are critical for protecting LGBT civil rights—by prohibiting both public and

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34. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 293 (Colo. App. 2105) (citing MICH. DEP'T OF CIVIL RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION 74–90 (2013), http://perma.cc/Q6UL-L3JR) (discussing the negative economic effects of anti-gay, lesbian, bisexual, and transgender discrimination in places of public accommodation).

35. *See* Day, *supra* note 10, at 1063 (discussing the trend of LGBT-inclusive businesses boycotting states with overly-expansive religious freedom laws).

36. *See id.* at 1029–1031 (examining the evolution of legal protections for the LGBT community).

37. *See* Obergefell v. Hodges, 135 S.Ct. 2584, 2598 (2015) (holding that the fundamental right to marry includes the right to same-sex marriage).

private discrimination.

The Supreme Court has not wavered from its early interpretation that enforcement of rights under the Fourteenth Amendment requires state action. In *Masterpiece Cakeshop*, Phillips relies on the First Amendment Free Exercise Clause, as applied to the states through the Fourteenth Amendment, to escape the anti-discrimination dictates of CADA.[38] In essence, Phillips argues that Colorado's application of CADA to him is the "state action" required for invocation of the Fourteenth Amendment. As such, judicial enforcement of CADA violates his free exercise rights guaranteed under the First and Fourteenth Amendments and Colorado or the court should excuse compliance and legitimize his private discrimination of patrons based on sexual orientation. This argument fails for two reasons.

First, CADA does not target, implicate, or encroach on religious exercise. Only laws that "target the religious for 'special disabilities' based on their 'religious status'" implicate the Free Exercise Clause.[39] This is not a case that "imposes a penalty on the free exercise of religion" by "denying a generally available benefit solely on account of religious identity."[40] In its most recent Free Exercise case, the Supreme Court said that a religious school could not be prevented from "compet[ing] with secular organizations for a grant" solely because it was church affiliated.[41] If religious affiliation does not justify the exclusion from a secular benefit, it cannot also justify the exclusion from compliance with a secular obligation. This manipulation of the law, by which Phillips is attempting to avail himself, is the ultimate "having your cake

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38. *See* Petition for Writ of Certiori, *supra* note 9 (arguing that the State of Colorado's application of CADA to him, requiring him to bake a cake for a same-sex couple, violates his First Amendment right to freely exercise his religion without government intrusion).

39. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2019 (2017); *see also* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990) (PAREN),*overturned due to legislative action*, 42 U.S.C. § 2000(b)(b) (1993) (holding that the State of Oregon could deny unemployment benefits to an individual terminated from employment for using peyote, even though such use was part of a religious ritual).

40. McDaniel v. Paty, 435 U. S. 618, 628 (1978) (plurality opinion) (quoting Wisconsin v. Yoder, 406 U. S. 205, 215 (1972)).

41. *Trinity Lutheran Church of Columbia*, 137 S.Ct. at 2015.

and eating it too" contradiction.

Second, a court-sanctioned "pass" allowing Phillips to violate CADA by refusing to serve same-sex couples might open the floodgates, allowing all business owners to invoke religious freedom as a pretext to discriminate against LGBT patrons in public accommodations. The carving out of exceptions in LGBT-protective public accommodation laws or the legitimization of such discrimination through application of robust state RFRA laws may constitute state action that violates the Federal Equal Protection Clause or a state equivalent. It is well-settled that states cannot discriminate against a class of individuals based on animus alone, even under a more liberal rational basis review.[42] Government-sanctioned conduct that makes an entire class "unequal to everyone else" is never a legitimate government purpose.[43]

The Colorado Court of Appeals correctly determined that CADA is a neutral law of general applicability subject to rational basis judicial review. In contrast, Phillips argues that the application of CADA is replete with individualized exceptions; therefore, rejection of his religious objection targets religion and requires application of strict scrutiny. Phillips erroneously equates his blanket refusal to bake all wedding cakes for same-sex couples based on their status with refusal to bake a specific cake for an individual because of its odious message. This argument conflates what he asserts here – the right to deny a service to an entire group of patrons based on their membership in a particular class, which violates CADA—with the right to refuse to bake a cake with a morally reprehensible message, which is permissible.[44] Just weeks ago, the Supreme Court reaffirmed that there is no Free Exercise

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42. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a Colorado constitutional amendment prohibiting any government entity or court to extend anti-discrimination protections based on sexual orientation violated the Equal Protection Clause).

43. *Id.*

44. *See, e.g.,* Stropnicky v. Nathanson, 19 M.D.L.R. 39 (1997) (holding that an attorney's blanket refusal to represent a potential client because he was male violated Massachusetts public accommodation law, whereas attorneys may exercise discretion, consistent with ethical rules, in refusing to represent a potential client, as long as the decision is not predicated on a wholesale refusal to serve an entire class of individuals).

concern when "the laws in question have been neutral and generally applicable without regard to religion."[45] CADA does not single out Phillips or any business owner for disfavored treatment based on religion.

Since the Court's interpretation of the Fourteenth Amendment is that it was never intended to *prohibit* private discrimination, it should not now be used to *permit* it. Ultimately, the Supreme Court should reaffirm its longstanding precedent that the Fourteenth Amendment is neither a shield nor a sword when private conduct is at issue.

III. Free Exercise of Religion and the Social Order

Jack Phillips' assertion of religious freedom as a justification for refusing to bake a cake for same-sex partners Charlie Craig and David Mullins is a prime illustration of the palpable backlash felt across the nation to the *Obergefell* decision and other emerging legal protections for the LGBT community. Opponents of marriage equality are increasingly asserting their own religious beliefs to justify discrimination against LGBT members in public accommodations and other public arenas.[46] The invocation of the First Amendment's Free Exercise Clause and both the federal RFRA and state mini-RFRAs pits free exercise against equal protection, creating a dynamic that could lead to government-sanctioned discrimination which, in the aggregate, could result in the systematic unequal treatment of LGBT individuals.[47]

In fact, three years ago, the Court denied certiorari in *Elane Photography v. Willock*,[48] a case with a similar fact pattern to *Masterpiece Cakeshop*. When a New Mexico photography company refused to photograph a patron's same-sex commitment ceremony in the name of religious freedom, the patron sued, claiming that Elane Photography violated the New Mexico Human Rights Law's

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45. *Trinity Lutheran Church of Columbia, Inc.*, 137 S.Ct. at 2015.

46. *See* Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DePaul L. Rev. 907, 919–923 (2016) (describing the efforts of conservative lawmakers to pit religion against LGBT rights, including the proliferation of robust religious freedom laws).

47. *See id.* at 926–927 (describing anecdotal evidence of businesses increasingly denying service to same-sex couples in the name of religious freedom).

48. 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014).

prohibition against sexual orientation discrimination.[49] Ultimately, the patron's civil liberties prevailed, trumping the business owners' invocation of the First Amendment.[50]

Elane Photography spelled the start of a new era—an era in which the LGBT community would find itself unfairly pitted against an increasingly-conservative religious community. The tension caused by such a division grew as a slew of similar cases arose and left many throughout the country in further dissension over the issue of LGBT civil rights vis-à-vis businesses' religious beliefs and practices.[51]

Although New Mexico did not have a state RFRA on the books at the time, the conflict in *Elane Photography* foreshadowed the potential real-life impact of an overly-protective state RFRA that compelled strict scrutiny judicial review over laws that purportedly violate an individual's religious freedom. With all of the cards stacked in favor of religious freedom and no express anti-discrimination protections for same-sex patrons, a court considering the same case under an overly-expansive mini-RFRA may very well have found in favor of Elane Photography.

But longstanding First Amendment principles open the door to governmental restriction of free exercise when a religious practice is against the social order. Indeed, as early as the late 1800s, in its first Free Exercise case, the Supreme Court discussed the government's interest in preserving the social order.[52] In upholding an anti-polygamy statute that allegedly violated the Mormon duty to practice polygamy, the Court distinguished between religious belief and religious practices and opined that government could restrict "actions which were in violation of social

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49. *Id.* at 59.

50. *Id.* at 77 (holding that New Mexico's enforcement of its human rights law, which compelled a photographer to photograph a same-sex wedding, did not violate the First Amendment).

51. *See, e.g.*, State of Washington v. Arlene's Flowers, Inc., No. 13-2-00871-5 2015 WL 720213, at *3 (Wash. Super. Ct. Feb. 18, 2015) (holding that a flower shop owner discriminated against patrons on the basis of sexual orientation in violation of State law when she refused to provide flowers for their same-sex wedding).

52. *See* Reynolds v. United States, 98 U.S. 145 (1878) (upholding a criminal polygamy law that punished conduct, rather than belief, that was "in violation of social duties or subversive of good order").

duties or subversive [of] good order."[53] This principle was reaffirmed over a century later when the Court dismissed a free exercise challenge to the state's denial of unemployment compensation benefits to persons who ingested peyote in violation of the state's criminal laws.[54] Although peyote use was part of the Native American Church's religious ceremonies, the Court rejected the argument that a religious motivation could excuse conduct proscribed by a valid criminal law which did not specifically target the religious practice.[55]

Like the *Reynold*s Court a century before, the *Smith* Court recognized that the exercise of religion involves not only belief and profession but "the performance of (or abstention from) physical acts."[56] While religious beliefs are beyond the reach of government regulation, actions are not. In *Masterpiece Cakeshop*, where Phillips claims a religious motivation excuses his compliance with the anti-discrimination mandates of CADA, the values inherent in enforcing public accommodation laws and restricting religiously-motivated discrimination go hand in hand. A governmental sanction of private discrimination *is* against the social order.

Finally, most scholars and jurists attempting to reconcile this clash between religious exercise and equal protection have focused their analysis on the strength of the Fourteenth Amendment, levels of judicial scrutiny, and the fundamental rights inherent in the First Amendment.[57] While Phillips' First Amendment claims in

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53. *Id.* at 164.

54. *See* Employment Division v. Smith, 494 U.S. 872, 890 (1990) (reaffirming Congress' power to regulate criminal conduct that affects interstate commerce and is "subversive of good order").

55. *Id.*

56. *Id.* at 872.

57. *See, e.g.,* Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1 (2015) (examining the competing interests inherent in the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016) (arguing that state anti-discrimination laws should trump state RFRAs and opining that anti-discrimination laws do not compel speech in violation of the First Amendment); M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards a More Progressive Equal Protection Rights Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 439 (2010) (examining the immutability component of the suspect class

Masterpiece Cakeshop do not receive heightened scrutiny pursuant to a state RFRA, the courts will continue to encounter cases that confront the intersection between free exercise and equal protection. Many of those future claims will be strengthened by the power of the RFRA's strict scrutiny mandate behind them. In our article, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, we propose an alternative analytical framework that links private discrimination in public accommodations to the Commerce Clause.[58]

When Jack Phillips and other business owners successfully invoke religious freedom laws as a justification for refusing to serve LGBT customers, the government is essentially acquiescing to discrimination. As the Colorado Court of Appeals acknowledged, public accommodation laws "prevent[] the economic and social balkanization prevalent when businesses decide to serve only their own 'kind,'" and ensures the uninhibited flow of intra- and interstate commerce.[59]

One of the reasons the Framers discarded the Articles of Confederation and designed a whole new constitutional framework was to empower a strong federal government to regulate interstate commerce.[60] The adverse economic effects caused by private discrimination in public accommodations are measurable.[61] Moreover, state approval of this type of discrimination has substantial, negative effects on interstate commerce and encroaches on federal powers to regulate interstate commerce. Indeed, states that acquiesce to discrimination by enabling religious objections like Jack Phillips' will suffer economic losses as people and businesses flee

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analysis and arguing that it should be abandoned for purposes of equal protection doctrine and its impact on the LGBT community).

58. *See* Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015 (2016).

59. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 293 (Colo. App. 2105).

60. *See* Hughes v. Oklahoma, 441 U.S. 322, 325–326 (1979) (stating that "[t]o regulate Commerce . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention").

61. *See Masterpiece Cakeshop*, 370 P.3d at 293 (citing MICH. DEP'T OF CIVIL RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION 74–90 (Jan. 28, 2013), http://perma.cc/Q6UL-L3JR (detailing the negative economic effects of anti-gay, lesbian, bisexual, and transgender discrimination in places of public accommodation)).

to more LGBT-friendly environments,[62] resulting in economic barriers or creating commercial balkanization.[63] Ultimately, state-sanctioned private discrimination in public accommodations will affect interstate commerce, which raises potential Dormant Commerce Clause concerns.

Admittedly, the doctrinal fit may not be as seamless as the traditional doctrinal analysis, and federal courts may be reluctant to apply the Dormant Commerce Clause to constitutional challenges like the one at issue in *Masterpiece Cakeshop*. But this proposed framework removes the issue from the Fourteenth Amendment and the battle between religion and equality. Instead, it reframes the issue, focusing on state laws that are used to excuse compliance with anti-discrimination mandates and exclude LGBT individuals from equality in commercial life. A robust national economy supported by the free flow of people and goods in interstate commerce is a strong rationale for judicial application of

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62. Big businesses such as Walmart, Target, and Apple have recently threatened to boycott states adopting robust religious freedom laws that would shield businesses from public accommodation laws if they withheld goods or services from same-sex couples. *See generally* Tim Evans, *Angie's List Canceling Eastside Expansion over RFRA*, INDYSTAR (Apr. 2, 2015, 11:38 AM), http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/ (last visited July 19, 2017) (on file with the Washington and Lee Law Review); Jeremy Stoppelman, *An Open Letter to States Considering Imposing Discrimination Laws*, YELP (Mar. 26, 2015, 5:52 PM), http://officialblog.yelp.com/2015/03/an-open-letter-to-states-considering-imposing-discrimination-laws.html (last visited July 19, 2017) (on file with the Washington and Lee Law Review) Claire Zillman, *Salesforce Boycotts Indiana over Fear of LGBT Discrimination*, FORTUNE (Mar. 26, 2015, 4:51 PM), http://fortune.com/2015/03/26/salesforce-indiana-same-sex-law/ (last visited July 19, 2107) (on file with the Washington and Lee Law Review). Other mega-corporations like American Airlines, Facebook, Nike, General Mills, Google, The Dow Chemical Company, and Levi Strauss have expressed their support for the proposed Equality Act of 2015, which would prohibit discrimination on the bases of sexual orientation and gender identity. Tom Huddleston, Jr., *Google Joins Chorus of Companies Backing LGBT Bill*, FORTUNE (July 28, 2015, 5:00 PM), http://fortune.com/2015/07/28/google-equality-act-lgbt/ (last visited July 19, 2017) (on file with the Washington and Lee Law Review).

63. *See* C&A Carbone, Inc .v. Town of Clarkstown, New York, 511 U.S. 383, 390 (1994) (stating that the Commerce Clause is intended to prevent "economic protectionism: and insure the free movement of goods between state borders, prohibiting "laws that would excite . . . jealousies and retaliatory measures" among the states).

the Dormant Commerce Clause to these types of claims.[64] Ultimately, sensible-minded Americans might be more amenable to recognizing that the free flow of people and commercial activity in interstate commerce is more supportive of our national interests than a cultural war about traditional family values.[65]

IV. Conclusion

Masterpiece Cakeshop is the first of what will likely be a litany of cases that force the Court to confront the thorny intersection between religious exercise and public accommodation laws. While the precise question before the Court in *Masterpiece Cakeshop* involves a multi-layered analysis of First Amendment doctrine, the larger context reveals an ongoing battle between the assertion of business owners' free exercise rights and the rights of LGBT patrons to indiscriminate service in places of public accommodation, strengthened by the existence of state and local laws that prohibit discrimination on the basis of sexual orientation.

Future cases that pose this conflict will likely require the Court to reconcile this clash of liberty interests while struggling with the application of a RFRA's strict scrutiny mandate to free exercise challenges. The resolution of these competing interests will be undoubtedly arduous. But where these two interests seem at odds and perhaps irreconcilable, the Court should examine a shared value.

In their embryonic stage, American public accommodation laws were born out of the "holding out" theory. That theory suggests that where a business owner holds herself out to the public as open for business, she should serve the public indiscriminately. The evidence supporting the link between discrimination in places of public accommodation and negative

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64. *See id*. (same).

65. *See* Lawrence v. Texas, 539 U.S. 558, 589–90 (2003) (Scalia, J., dissenting); Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (referring to the motivation behind Colorado's amendment 2 as a "Kulturkampf").

economic effects is substantial.[66]

Against this backdrop, the Court has been resolute in holding that the Fourteenth Amendment does not give Congress power to regulate private conduct. In circumventing this limitation, Congress and the states have enacted laws regulating private conduct in public accommodations under their Commerce and state police powers, respectively. Here, Phillips mistakenly argues that Colorado's application of CADA to him, forcing him to bake a cake for a same-sex couple in violation of his free exercise rights, is the "state action" required for invocation of the Fourteenth Amendment. Any holding that legitimizes this argument would amount to government-sanctioned private discrimination. Certainly, if the Fourteenth Amendment cannot be used to *prohibit* private discrimination, it should not now be used to *permit* it.

Ultimately, the reconciliation of what at first glance appears to be irreconcilable liberty interests can be achieved by unearthing their mutual purpose. Common to both the regulation of private discrimination through public accommodation laws and the governmental restriction of free exercise in favor of equality in commerce is an important, if not vital, public purpose: maintenance of the social order.[67] Since judicial approval of Phillips' refusal to serve a same-sex couple would essentially make the government complicit in a form of private discrimination, and a government sanction of private discrimination *is* against the social order, the Court must affirm the Colorado Court of Appeals' decision. This holding would set the precedent for more robust religious freedom cases that are armed with a RFRA and reaffirm the longstanding principle that free exercise must bow to equal protection when necessary to maintain the social order.

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66. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 293 (Colo. App. 2105) (citing MICH. DEP'T OF CIVIL RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION 74–90 (Jan. 28, 2013), http://perma.cc/Q6UL-L3JR (detailing the negative economic effects of anti-gay, lesbian, bisexual, and transgender discrimination in places of public accommodation)).

67. *See* Reynolds v. United States, 98 U.S. 145, 154 (1878) (explaining that a criminal polygamy law, which restricted a religious practice, was necessary to maintain the social order).