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## ARTICLE

# MAKE LAW, NOT WAR: SOLVING THE FAITH/EQUALITY CRISIS

*Anton Sorkin*<sup>†</sup>

“For, happily, the Government of the United States, which gives *to bigotry no sanction, to persecution no assistance*, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.”

George Washington<sup>1</sup>

### ABSTRACT

Within the last few years, there have been a number of cases moving through streams of state litigation involving small business owners who open their businesses to the public and get in trouble for refusing to serve members of the LGBT community. In all of these instances, the issue that the employees are contesting is that their refusal to provide some specific service is disconnected from the customer’s sexual orientation, but is, instead, linked to the seeming endorsement of the activity for which the service is provided (e.g., a wedding cake goes towards endorsing the marriage). Courts, for the most part, have ignored this distinction and treated refusals to provide a requested service as a per se rejection of that person’s identity because the activity is considered to be “inextricably” connected with that person’s dignity (e.g., marriage for homosexuality).

This Article argues that this “non-distinction approach” is really a legal fiction (something counter to known facts), which advances the interest of the court in using antidiscrimination laws for the sake of socially engineering an atmosphere that protects the LGBT-community from

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1. George Washington, *Letter to the Hebrew Congregation in Newport, Rhode Island*, in THE PAPERS OF GEORGE WASHINGTON 6:825 (Aug. 21, 1790) (W.W. Abbot et al. ed. 1987) (emphasis added).

dignitary harm. While an important process, the pursuit has incorrectly conflated the forms of discrimination (i.e., identity vs. conduct) thereby disarming the potential for First Amendment defenses to shine light on the conflict.

My solution is simple. Courts should replace the legal fiction (i.e., the non-distinction approach) with a rebuttable presumption. They can still assume that the discriminatory intent is the type that should be covered under antidiscrimination laws, but also should provide an opportunity for religious claimants to rebut that presumption by: (1) showing a sincerely held belief; (2) showing that the requested service is part of those expressive acts protected by the First Amendment; and (3) showing that readily alternative means exist for acquiring the sought after services.

## I. INTRODUCTION

In the last few years, the American culture has seen a raging war between two rival communities in their effort for increased recognition in the legal market.<sup>2</sup> On one side, the religious liberty community realized a major victory in the 2014 case *Burwell v. Hobby Lobby*, when the Supreme Court fortified the protections granted under the federal Religious Freedom Restoration Act by enshrining traditional, high-level protection for religious claimants lost after *Employment Division v. Smith*.<sup>3</sup> On the other side, the LGBT-community gained a decisive victory in 2015, when the Supreme Court legalized same-sex marriage across all fifty states.<sup>4</sup> Despite each having gained important legal victories, both communities find themselves at an impasse, progressively in search of what religious liberty expert Douglas Laycock calls a “total win.”<sup>5</sup>

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2. Richard Garnett, *Wrongful Discrimination?*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 70 (Timothy S. Shah et al eds., 2016); see also SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICT (Douglas Laycock et al eds., 2008).

3. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014); *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

4. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); see also Linda C. McClain, *Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE, *supra* note 2, at 95–108 (previewing relevant US Supreme Court jurisprudence leading up to *Obergefell*).

5. Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE, *supra* note 2, at 182 (noting that Douglas Laycock believes a mutual compromise has not been reached because both parties are “intransigent” and want a “total win”). As noted by Professor Robin F. Wilson: “History shows that compromise facilitates social progress” and

While both communities have found success in the courts, they remain facing many challenges. On one hand, the LGBT-community continues fighting to be recognized in their persons and in their lifestyles; to leave behind those times in the aftermath of the Second World War where the law and social conventions challenged the very notion that “gays and lesbians had a just claim to dignity.”<sup>6</sup> From the 1990s until very recently, the United States saw a clash of political and ideological battles waging between the so-called religious right and the LGBT-community over the extension of rights for gay couples.<sup>7</sup> As a shadow of things to come, in March of 1993,

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[o]nly compromise will yield significant protections for religious objectors *and* significant protections for the LGBT community against discrimination.” Robin F. Wilson, *The Politics of Accommodation*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE, *supra* note 2, at 133, 136. Two sources in particular illustrate the intransigence noted by Douglas Laycock. See Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 931 (2015) (the “biblical support” used in favor of segregation has been “revived by businesses seeking to deny services to LGBT customers . . . .”); Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, WAKE FOREST UNIV. LEGAL STUDIES PAPER NO. 2748565, at 4 (2016) (“campaign for the continued second-class citizenship of gay Americans under the banner of religious liberty is gaining vengeful steam”), available at [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2748565](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2748565). Douglas Laycock offers the advice for both sides that to insist on a total victory for only your side is bad for liberty. Jaime Margolis, *Freedom of Religion vs. Sexual Freedom—A Conflict Between Liberties?* B.U. SCH. OF L. (Feb. 18, 2015), <http://www.bu.edu/law/2015/02/18/freedom-of-religion-vs-sexual-freedom-a-conflict-between-liberties/>; see also John McCormack, *UVA Law Prof Who Supports Gay Marriage Explains Why He Supports Indiana's Religious Freedom Law*, WEEKEND STANDARD (Mar. 29, 2015), <http://www.weeklystandard.com/uva-law-prof-who-supports-gay-marriage-explains-why-he-supports-indianas-religious-freedom-law/article/902928> (Laycock notes that “[m]ost of the activists in this fight, on both sides, want liberty and justice only for their side . . . to crush the other side”); Doug Mainwaring, *Same-Sex Marriage: We're Playing Chess, Not Checkers*, PUBLIC DISCOURSE (Mar. 20, 2013), <http://www.thepublicdiscourse.com/2013/03/9622/> (“national discussion of same-sex marriage treats the issue like a game of checkers, where opponents can quickly gain each other's pieces without much forethought about the consequences”).

6. *Obergefell*, 135 S. Ct at 2596. This history has been thoroughly outlined by William Eskridge—serving as a reminder of our collective failure to treat the gay community equally. See generally WILLIAM N. ESKRIDGE, JR., *GAY LAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

7. Donald P. Haider, *Two Steps Forward, One Step Back*, in AFTER MARRIAGE EQUALITY 42 (Carolos A. Ball ed., 2016). Very recently in fact, the Texas Supreme Court reversed a prior ruling and set a date in March for oral argument on the issue of whether same-sex spousal benefits should be provided for municipal employees. Associated Press, *Texas Court Hearing Case to Limit Gay Marriage Legalization*, FORTUNE (Jan. 21, 2017), <http://fortune.com/2017/01/21/gay-marriage-legalization-texas/>.

the Hawaii Supreme Court issued a ruling where it questioned the constitutionality of denying same-sex couples the right to marry.<sup>8</sup> That same year, in November, President Bill Clinton signed into law the “Religious Freedom Restoration Act” (RFRA) that extended robust protection for the free exercise of religion in response to the Supreme Court ruling in *Employment Division v. Smith*.<sup>9</sup> Today, RFRA is considered to be among the major impediments to LGBT-equality.<sup>10</sup> On the other side, decisions like *Romer v. Evans* (1996), *Lawrence v. Texas* (2003), and *United States v. Windsor* (2013) have become landmark cases helping advance the “lived equality” goals of modern advocates for the LGBT-community.<sup>11</sup>

With same-sex marriage finally legalized and the United States having overcome its sultry practices of criminalizing homosexuality,<sup>12</sup> much work still remains in ensuring that the LGBT-community is protected from widespread bullying and discrimination,<sup>13</sup> which impairs their ability to

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8. See CARLOS A. BALL, *Introduction, in AFTER MARRIAGE EQUALITY* 2–3 (2016) (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

9. *City of Boerne v. Flores*, 521 U.S. 507, 512–13 (1997).

10. See HAIDER, *supra* note 7, at 46–48.

11. See Clifford Rosky, *Still Not Equal, in AFTER MARRIAGE EQUALITY* 74 (Carlos A. Ball ed., 2016) (“measured by reference to ‘equality of outcomes and community well-being’”).

12. William N. Eskridge, in his comprehensive recitation of the history of legal regulations involving the LGBT-community, writes of laws throughout history against homosexual conduct and the potential for police brutality as a response to things like, e.g., “dancing with someone of the same-sex, cross-dressing, propositioning another adult homosexual, possessing a homophile publication, writing about homosexuality without disapproval, displaying pictures” or having actual sexual intercourse, a felony in all but one state, that often times came with it “possible indefinite incarceration as a sexual psychopath.” ESKRIDGE, *supra* note 6, at 98.

13. See BALL, *supra* note 8, at 6 (“It is a grave mistake to believe that the favorable resolution of the marriage equality questions somehow represent the end of the struggle for LGBT equality in this country.”). A recent report from the Human Rights Watch demonstrates this fact when it outlines on-going trends showing how the modern school system remains a hostile environment for LGBT-students. Ryan Thoreson, “*Like Walking Through a Hailstorm: Discrimination Against LGBT Youth in US Schools*”, HUM. RTS. WATCH (Dec. 7, 2016), <https://www.hrw.org/report/2016/12/07/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools>. On top of this, the LGBT-community remains in wait for statewide protection against sexual orientation discrimination in housing, hiring, and public accommodations. Wilson, *supra* note 5, at 133, 149; HAIDER, *supra* note 7, at 50–51 (provides Table illustrating states that passed employment antidiscrimination laws in relation to when those states reached marriage equality); *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN (interactive map), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps); see also ROSKY, *supra* note 11, at 75 (“[a] freedom to marry . . . doesn't mean nearly as much when you're unemployed, homeless, uninsured, or imprisoned”).

enjoy the fruits of their “new” citizenship.<sup>14</sup> On the other side, religious liberty has also faced a number of recent challenges, particularly in the context of public accommodation laws where the conscience of Christians collides with service requests made by gay-couples in anticipation of wedding ceremonies. Richard Samuelson, writing in *Mosaic Magazine*, notes this much when he writes that personal identity in the context of the gay-rights movement “has resulted in a legal battle in which the radioactive charge of ‘discrimination,’ borrowed from the civil-rights movement of the 1960s, is wielded as a weapon to isolate, impugn, and penalize dissenting views held by Americans of faith and informing the conduct of their religious lives.”<sup>15</sup>

The material below discusses this conflict in great detail while attempting to pry open the spaces for distinguishing the type of discrimination as a society we are rightfully mindful to eradicate, and the type that falls within the protections of the First Amendment. It attempts to find common ground toward establishing limiting principles in order to restore a rightful relationship between two warring communities in an effort to restore a

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14. As noted by Professor Clifford Rosky, now that the battle over marriage has been won, the shift will be towards a comprehensive effort towards passing antidiscrimination laws—particularly among “red states.” ROSKY, *supra* note 11, at 79; *see also* HAIDER, *supra* note 7, at 54 (early advocate for marriage equality in Massachusetts envisioned their work to be an effort to ensure everyone across the state can go “cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression”). I say “new” given the second-class citizenship status placed on the LGBT-community akin to the second-class citizenship faced by the black community that placed them in a position of “walled-off inferiority.” Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 427 (1960). Eskridge notes that he believes this “second-class” status remained as of 1999, when things like laws against marriage and sodomy remained that have now been lifted. *See* ESKRIDGE, *supra* note 6, at 139; *see also* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meaning*, 97 *V.A. L. REV.* 1267, 1308 (2011) (“[I]aws banning same-sex marriage also appear to brand citizens as second-class”). For example, in 1962, Frank Kameny led a movement soliciting then Attorney General Robert Kennedy for the gay community to be granted equal citizenship beginning with the fight against employment discrimination. *See* ESKRIDGE, *supra* note 6, at 125. Eskridge writes that by 1981, the gay right movement had won many important victories that “partially dismantled the apartheid of the closet, whereby gay people were formally excluded from citizenship and left to a sociopolitical state of nature.” *Id.* at 139.

15. Richard Samuelson, “*Who’s Afraid of Religious Liberty?*,” *MOSAIC* (Aug. 1, 2016), <https://mosaicmagazine.com/essay/2016/08/whos-afraid-of-religious-liberty/>. Perhaps no academic has been more strident than Wake Forest Professor Shannon Gilreath, who writes that distinguishing anti-gay discrimination with anti-black discrimination is merely a “convenient smoke screen enabling bigots to mask their true animus.” Gilreath, *supra* note 5, at 9.

much-needed balance in our society. Section II discusses the broader purposes of antidiscrimination laws and the various themes interwoven throughout this Article. Section III discusses the important cases that have yielded courts applying the non-distinction approach in conflicts between the religious and LGBT-community. Section IV delves into the history and use of legal fictions of the type being used in cases found in the antecedent Section. Section V discusses the non-distinction approach introduced in Section III, then responds to some of the arguments used by courts to conflate the forms of discrimination and offers a three-part analysis to replace the current approach that allows for religious claimants to offer First Amendment defenses toward accommodation.

## II. ANTIDISCRIMINATION LAW & SOCIAL ENGINEERING

Antidiscrimination laws, in particular those exemplified in response to invidious discrimination against the African-American community, at their basis, have the policy of social transformation.<sup>16</sup> These policies reflect “evolving conceptions of equality tracing back” to the Declaration of Independence that announced that “all men are created equal” by virtue of an immutable Creator.<sup>17</sup> As a result, antidiscrimination laws seek to move a culture towards equality, if not through an organic process of independent decision-making, then through a form of social engineering or social

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16. See Robert C. Post, *The Logic of American Antidiscrimination Law*, in PREJUDICIAL APPEARANCES 20 (2001) (“Antidiscrimination law understands itself as transformative, as fundamentally altering existing social arrangements”); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 627 (2015) (“they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination”); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 179, 191 (2015) (“a fundamental purpose of antidiscrimination law . . . is to change norms”); see also ROSKY, *supra* note 11, at 77 (“antidiscrimination laws . . . signal the public inclusion of LGBT people within the community itself”). Koppelman writes: “Antidiscrimination law is an intervention that aims at systemic effect in society, dismantling longstanding structures of dominance and subordination.” Koppelman, *supra*, at 639. According to Robert C. Post, American antidiscrimination law is driven by a logic “that expresses the essential principles of post-World War II American liberalism . . . stress[ing] both the inherent dignity of each individual and the need for a rational and efficient economy.” Robert C. Post, *The Logic of American Antidiscrimination Law*, in PREJUDICIAL APPEARANCES 1 (2001).

17. Brief of Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amici Curiae, in Support of Appellants, State of Washington v. Arlene’s Flowers; Ingersoll and Freed v. Arlene’s Flowers, No. 91615-2, at 11 [hereinafter “Legal Scholar’s Brief”], available at <https://www.courts.wa.gov/content/Briefs/A08/916152%20Amici%20-%20Legal%20Scholars.pdf>; see also Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 642 (2016) (“assessments of bigotry . . . change as society changes”).

reconstruction.<sup>18</sup> As stated by Joseph Singer, antidiscrimination laws ensure that despised groups enjoy equal “access to the world of the market without regard to invidious discrimination.”<sup>19</sup> As a consequence of this thinking, the question posed by ACLU legal counsel, Louise Melling, is illustrative of the grand narrative of this Article: “Why grant accommodations for religious objectors in today’s anti-discrimination laws when similar calls were rejected in the context of civil rights?”<sup>20</sup>

### A. *The Koppelman Balance*

Andrew Koppelman helpfully outlines the role that antidiscrimination laws play as tools for social engineering.<sup>21</sup> He writes that such laws serve a transformative function in society—by not only changing the structure through state action,<sup>22</sup> but also changing the conscience of bigotry.<sup>23</sup> While focusing primarily on the role antidiscrimination laws played in eliminating racism, Koppelman lays out the principles equally applicable for ridding so-called bigotry against the LGBT-community, noting that “we cannot do

18. See Koppelman, *supra* note 16, at 651.

19. Singer, *supra* note 5, at 939.

20. Melling, *supra* note 16, at 183. Melling characteristically comes down on the side of rejecting any form of accommodation, which remains consistent with the ACLU’s approach to the issue. *Id.* at 185.

21. Koppelman’s own approach to reconciling the “refusal to serve the LGBT-community” dilemma involves a right for the religious business owners stating their concerns ahead of time to avoid the dignitary harm that comes (particularly) from a face-to-face refusal. Koppelman, *supra* note 16, at 628, 646–47; Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1128 (2016).

22. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* 7 (1996) (“[T]his project of cultural transformation is one in which the state is appropriately enlisted where it can be helpful.”); Koppelman, *supra* note 16, at 620 (“Gay rights advocates have misconceived the tort of discrimination as a particularized injury to the person, rather than the artifact of social engineering that it really is.”).

23. Koppelman notes that from the standpoint of racism, transformation must be made in not only the condition of blacks, but also the consciousness of whites. KOPPELMAN, *supra* note 22, at 2. Martin Luther King made similar utterances, poignantly appealing to the conscience of the nation to see the disease of racism:

Like a boil that can never be cured as long as it is covered up but must be opened with all its pus-flowing ugliness to the natural medicines of air and light, injustice must likewise be exposed, with all of the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.

Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE* 295 (1986).



justice to [traditionally oppressed] groups unless we change our very patterns of cultural expression and unconscious thinking.”<sup>24</sup>

However, Koppelman also mentions competing traditional and liberal concerns that he goes on to address in the pursuit of social equality.<sup>25</sup> Being mindful that the “scope is limited . . . by the very magnitude of the evil it seeks to combat,” Koppelman warns that without a proper understanding of the goals and the corresponding level of danger,<sup>26</sup> antidiscrimination laws used toward social change will fail to strike a proper balance.<sup>27</sup> Most importantly, Koppelman notes that antidiscrimination laws should not always trump other values, echoing the words of Edmund Burke, who said that “it is better that the whole should be imperfect . . . than that, while some parts are provided for with great exactness, others might be totally neglected, or perhaps materially injured, by the over-care of a favourite [sic] member.”<sup>28</sup> While in some instances an established orthodoxy may be imposed; in other areas, religious claimants should be provided opportunity to appeal to the devices of argumentation and convince decision-makers to rule in their favor.<sup>29</sup>

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24. KOPPELMAN, *supra* note 22, at 7. “[T]he ultimate goal of antidiscrimination law is to eliminate not merely racial inequality but racism itself.” *Id.* at 9.

25. *Id.* at 3.

26. Where “the evil is local or of a modest scale, then measures to remedy it may be correspondingly confined;” however, where the “evil is broad and pervasive, then the effort to end it must be a correspondingly broad and ambitious project.” *Id.* at 13.

27. *Id.* at 11.

28. KOPPELMAN, *supra* note 22, at 109.

29. *Id.* at 113; *see also* *Brief for Petitioners*, *Boy Scouts of America v. Dale*, 2000 WL 228616, at 47 (2000) (“It is our belief that controversial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not as the subject of government-imposed orthodoxy.”). As Koppelman notes, one of the paradoxes of his antidiscrimination laws as social transformation project is that it “requires both intellectual conformity and intellectual courage, and these requirements work at cross-purposes.” KOPPELMAN, *supra* note 22, at 113. Later on, he cites to Rawls in claiming that a liberal state, in some instances, is entitled to take “steps to strengthen the virtues of toleration and mutual trust, say by discouraging various kinds of religious and racial discrimination (in ways consistent with liberty of conscience and freedom of speech).” *Id.* at 196. Antidiscrimination principles allows us to return to the “original position” and move forward unencumbered by prejudices. *See* Robert C. Post, *The Logic of American Antidiscrimination Law*, in *PREJUDICIAL APPEARANCES* 16, 19 (2001) (antidiscrimination laws spring “from the noble liberal impulse to protect persons from the indignities of prejudicial mistreatment”). The contribution from Maggie Gallagher however is important in wrestling with the dangers of equality as opposed to an emphasis on liberty:

Liberty arguments lead to pluralism, which requires us to tolerate those with whom we disagree and affirm their core rights. Equality arguments lead to the expansion of state power to repress and marginalize anti-equality bigots. The

### B. Dignitary, Harm & Stigmatization

Another thread that runs throughout this Article and relates closely to the discussion of social transformation is the underlying focus on ridding stigma<sup>30</sup> and dignitary harm—including harms to children,<sup>31</sup> harms from pressure to conform with heteronormative stereotypes based on fears of discrimination,<sup>32</sup> and the humiliation of being denied service in places open to the public.<sup>33</sup> In Koppelman’s iteration of the “stigma theory,” he outlines leading thinkers on the subject in an effort to show the dignitary harm associated with discrimination is one meant to disenfranchise the individual from full-participation in society.<sup>34</sup> As a result, a “society devoted to the idea

fusion of liberty and equality rights in the gay rights debates represents the biggest intellectual and conceptual challenge to finding a path to pluralism. Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 Nw. J. L. & Soc. Pol’y 260, 270 (2010). Samuel Gregg makes the observation that egalitarianism tends to destroy the distinctiveness of religion and reduce it to “inoffensive banalities”—rendered ineffectual to speak truth and to teach virtue. Samuel Gregg, *Tocqueville and Democracy’s Fall in America*, PUBLIC DISCOURSE (Jan, 19, 2017), <http://www.thepublicdiscourse.com/2017/01/18147/>; see also Kurt Vonnegut, *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7 (2014) (“The Year was 2081, and everybody was finally equal. They weren’t only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else.”).

30. “One goal of antidiscrimination protection of gay people is cultural transformation: to stigmatize stigma, and make the prejudicial that had been pervasive in society into something that citizens instinctively reject.” Koppelman, *supra* note 16, at 649.

31. See *Obergefell*, 135 S. Ct. at 2600–01 (stating that the “marriage laws at issue thus harm and humiliate the children of same-sex couples”).

32. Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497, 1534 (2015).

33. Singer, *supra* note 5, at 940–41 (stating that the “question is whether a storeowner has a right, in a free and democratic society, to treat a customer like a pariah”). As the Supreme Court said, “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.” *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). Koppelman and others have also done well to illustrate the consequential harm that comes with being refused service independent of an intent to discriminate. KOPPELMAN, *supra* note 22, at 57–114; Koppelman, *supra* note 16, at 644–53; Ball, *supra* note 17, at 649–50 (pointing out that Justice Kennedy in *Obergefell* did not tie harm and stigma to intent or state of mind for those who voted to defend traditional marriage, instead focusing “exclusively on the consequences”).

34. See KOPPELMAN, *supra* note 22, at 58–59; Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) (“the essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect”); see also STEVEN B. SMITH, HEGEL’S CRITIQUE OF LIBERALISM:

of equal citizenship . . . will repudiate those inequalities that impose the stigma of caste.”<sup>35</sup>

As it relates to the treatment of blacks, Justice Warren echoed this principle in the context of school segregation when he said that to “separate them from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>36</sup> Likewise, Justice Kennedy in *Obergefell* noted that to deny the same-sex couple an equal right to marry is to “impose stigma and injury of the kind prohibited by our basic charter.”<sup>37</sup> With this in mind, it makes sense why legal intervention provides a benefit for those being harmed filtered through a lens of creating a more just culture.<sup>38</sup> As Steven B. Smith writes in reflection on Hegel’s Theory of Rights, the desire for recognition by those around us is “the standard by which to judge the adequacy of our political institutions and the quality of our civic life.”<sup>39</sup>

Further, Koppelman connects history as a basis for placing the stigma theory central to antidiscrimination norms, namely the eradication of “badges and incident of slavery”<sup>40</sup> or “to eradicate the last vestiges and incidents of a society half slave and half free.”<sup>41</sup> Recall that in the aftermath

RIGHTS IN CONTEXT 117 (1989) (“For the desire for recognition is a desire unlike others. It is a socially mediated desire insofar as the enjoyment of respect depends upon gaining the approbation of others.”) Also illustrative is Koppelman’s cite to Paul Brest, who writes:

A second and independent rationale for the antidiscrimination principle is the prevention of the harms which may result from race-dependent decisions. Often, the most obvious harm is the denial of the opportunity to secure a desired benefit — a job, a night’s lodging at a motel, a vote. But this does not completely describe the consequences of race-dependent decision making. Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.

Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

35. KOPPELMAN, *supra* note 22, at 59.

36. *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954) (emphasis added).

37. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

38. See ANDREW KOPPELMAN, *A RIGHT TO DISCRIMINATE?* 107 (2009).

39. SMITH, *supra* note 34, at 117. We can envision the role of antidiscrimination laws similar to how Hegel saw the role of the political order in seeking to rectify the “inadequacies of nature.” *Id.* at 115.

40. Cf. Singer, *supra* note 5, at 933, 941 (noting that a Mississippi statute to this day allows businesses to choose their customers “at will”).

41. SMITH, *supra* note 34, at 63 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440, 441 n.78 (1968)).

of the Civil War, so-called Black Codes aimed to restore the black community to their place of servitude.<sup>42</sup> These racist counter-measures required increasing efforts by courts, legislators (particularly antidiscrimination laws), and social movements to undo in order for the society to shed itself of its depravity. Corresponding with concerns that many states have failed to pass adequate laws to protect the LGBT community,<sup>43</sup> Professor Joseph W. Singer describes the comparable absence of remedy at common law in New York against race-based discrimination at retail stores in the absence of civil rights statutes.<sup>44</sup> As noted by other writers, progress was slow—as of 1949, only eighteen states took the added measure of enacting public accommodations statutes to protect the black community from invidious discrimination—demanding for a social movement to expedite the process of equality.<sup>45</sup> On top of this, Michael J. Klarman notes how “opinion polls in the 1950s revealed that over 90 percent of whites, even outside the South, opposed interracial marriage.”<sup>46</sup> By the passing of the Civil Rights Act of 1964, only one black child in one hundred attended mixed race schools in the South.<sup>47</sup> A social movement was necessary because, in the words of Martin Luther King, “freedom is never voluntarily given by the oppressor;” it is not in its nature.<sup>48</sup>

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42. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1350, 1352 (1996) (“[When] the Black Codes were passed, they were understood by everyone as attempts to deny freedom and equality rather than to promote them”); KOPPELMAN, *supra* note 22, at 13–14 (“Black Codes . . . [were] an attempt to restore slavery to the greatest extent consistent with formal emancipation”).

43. See Courtney, *supra* note 32, at 1500–01.

44. See Singer, *supra* note 42, 1290–91; *Romer v. Evans*, 517 U.S. 620, 627–28 (1996) (“The common-law rules, however, proved insufficient in many instances . . . . In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes.”). Joseph Singer describe these insufficiencies as follows:

The presumption, in other words, is that businesses, as property owners, have the right to exclude non-owners unless that right is limited by statute. Businesses similarly have the right to refuse to contract with anyone with whom they do not wish to deal unless required to do so by express statutory command. This presumption appears to be the law in every jurisdiction in the United States except the State of New Jersey.

Singer, *supra* note 42, at 1290; see also Courtney, *supra* note 32, at 1504–12 (discussing the common law duty to serve).

45. Courtney, *supra* note 32, at 1512–13; see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 363 (2004) (noting that without “broad social currents” like the civil right movement, courts would have accomplished even less in ending segregation).

46. KLARMAN, *supra* note 45, at 321.

47. *Id.* at 362.

48. MARTIN LUTHER KING, *supra* note 23, at 292.

These sentiments certainly make the present struggle of the LGBT-community in similar need for widespread antidiscrimination laws. Koppelman notes that among the earliest victories for the gay rights movement was when some of the major institutions in America “embraced the view that discrimination against gay people is, in at least some respects, analogous to racism.”<sup>49</sup> Today, taking on the lessons of history, the ACLU’s Deputy Legal Director, in comparing historical race-based discrimination with today’s perceived sexual orientation discrimination, said that we cannot “remedy discrimination and historical exclusion if we sanction such indignities.”<sup>50</sup>

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49. KOPPELMAN, *supra* note 38, at 45; *see also* DAVID E. BERNSTEIN, YOU CANT’ SAY THAT! 11 (2003) (“[F]rom the late 1970s until the early 1990s courts abandoned civil liberties in favor of antidiscrimination principles with stunning blitheness”); *Forum v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004), *rev’d and remanded sub nom.* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (“In the 1970s law schools began expanding [there discrimination] policies to prohibit discrimination based on sexual orientation”). Examples of this transformation can be seen, for example, in 1978 when Yale Law School included sexual orientation as part of their general policy against discrimination. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 166 (D. Conn. 2005), *rev’d sub nom.* *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007). Further, in response to this trend “the American Association of Law Schools . . . voted unanimously in 1990 to include sexual orientation as a protected category.” *Forum v. Rumsfeld*, 390 F.3d at 224-25. Eskridge writes that since 1981, “an increasing number of states and cities ha[d] adopted laws affirmatively protecting gay people against private discrimination and violence.” ESKRIDGE, *supra* note 6, at 139.

50. Louise Melling, *Will We Sanction Discrimination?: Can “Heterosexuals Only” be Among the Signs of Today?*, 60 UCLA L. Rev. Discourse 248, 253 (2013). What David Bernstein said about the ACLU a decade ago remains true today: “[T]he ACLU has become increasingly reluctant to defend civil liberties at the expense of antidiscrimination laws.” BERNSTEIN, *supra* note 49, at 153. For example, in the cases discussed in PART II, the ACLU has continuously refused to defend the religious liberty position. *See, e.g.*, Walter Olson, *Why is the ACLU on the Wrong Side of the Wedding Photographer Case?*, CATO INST. (Nov. 22, 2013) (Louise Melling said “the equal treatment of gay couples is more important than the free speech rights of commercial photographers”), <https://www.cato.org/blog/why-aclu-wrong-side-wedding-photographer-case>; News Release, *ACLU Seeks Remedies for Gay Couple Discriminated Against Florist*, ACLU (Apr. 10, 2013) (ACLU attorney Michael Scott said: “when a business serves the general public, the business owner’s religious beliefs may not be used to justify discrimination”), <https://www.aclu-wa.org/news/aclu-seeks-remedies-gay-couple-discriminated-against-florist>. Louise Melling summarizes the ACLU’s position on which civil liberties issues it will defend well when she says that “Free exercise to religion gives us a right to our beliefs, but it doesn’t give us the right to harm others, doesn’t give us the right to impose our views on others, it doesn’t give us the right to discriminate.” Cheryl Wetzstein, *Civil rights groups blast religious liberty acts*, WASHINGTON TIMES (Mar. 17, 2015), <http://www.washingtontimes.com/news/2015/mar/17/aclu-blasts-religious-liberty-acts-as-licenses-to-/>. Despite all this, and many more examples can be provided (especially in controversies over “reproductive rights”), the ACLU maintains that religious liberty is a fundamental right and that they are a “national leader in the struggle for religious freedom.”

With this background mind, Koppelman's shift into the "Group-Disadvantage Theory" brings full circle the discussion of harm and the need for antidiscrimination laws. From the perspective of the victim, no remedy is available to end the condition of so-called invidious discrimination in the past against African-Americans and now against gays<sup>51</sup> without imposing norms by social and legal decisions.<sup>52</sup> By aligning the present-day discrimination against the LGBT-community with the race-based discrimination of the past, society is able to impose wholesale restrictions on religious claimants—having become the heirs of the racists of old.<sup>53</sup> That is the approach from one side of the debate.

### C. Status/Conduct Distinction

The central theme of this Article is a focus on status/conduct distinctions in an effort to find room where First Amendment defenses can be invoked without losing the LGBT-community in the process. While some continue to operate under the assumption that the LGBT-community faces that same type of historic, religious-based animosity on the basis of status not conduct without clarification,<sup>54</sup> others have offered helpful justifications. Professor Kenji Yoshino, for example, while recognizing a difference in the stated forms of discrimination between status and conduct, argues that the modern form is merely a sub-species of the same historic species of bigotry currently rooted in a form of "covering," forcing homosexual identity to comply with norms of heteronormativity.<sup>55</sup> Picking up on this argument,

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*Religious Liberty*, ACLU, <https://www.aclu.org/issues/religious-liberty>; *The ACLU and Freedom of Religion and Belief*, ACLU, [https://www.aclu.org/other/aclu-and-freedom-religion-and-belief#\\_ednref1](https://www.aclu.org/other/aclu-and-freedom-religion-and-belief#_ednref1).

51. Cf. Owen Fiss, *Groups and the Equality Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 128 n.67 (1977) ("[I]f we are told that today a period of perpetual subordination is about to begin for another group, we should be as concerned with the status of that group as we are with the blacks.").

52. KOPPELMAN, *supra* note 22, at 78.

53. See William N. Eskridge, *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 664–705 (2011) (traces religious use of the Bible to condemn blacks and homosexuals).

54. See, e.g., Melling, *supra* note 50, at 253 (2013) ("When it turns away a lesbian or gay couple, the inn that advertises as a destination-wedding site, or the bridal shop that opens its doors to the public, in effect posts a 'Heterosexuals Only' sign in its window.").

55. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 21–22 (2006). Taking the shift from outright bans on gay expression to the "don't ask, don't tell" that excludes on the basis of homosexual self-identity, Yoshino writes:

This shift thus appears to represent progress for gays—no longer will they be excluded for their status, but only for their self-identification or conduct. Yet

Professor Douglas Nejaime offers a defense for moving the debate away from a focus on same-sex marriage and into the arena of antidiscrimination laws with an emphasis on relational identity in considering “limited religious exemptions.”<sup>56</sup>

Professor Michael Dorf further points out that arguments for and against making a conduct/status distinction is merely an opportunistic tool given the shifting application of its use since *Bowers*, where gay right advocates argued that even if the state could criminalize certain conduct, it could not do so based on sexual orientation identity.<sup>57</sup> On the other side, those who stood against expanding gay rights often refused to make the distinction often made today by casting all same-sex identity in the lens of deviant conduct.<sup>58</sup>

On the other hand, many have argued that the type of discrimination faced by gay couples in the cases outlined in Section III does not amount to the same invidious discrimination faced by the black community of old. These cases have made efforts to properly distinguish the forms of discrimination by engaging in explanatory line drawing for the sake of protecting competing liberal values. While I deal with this extensively throughout the Article, one individual is worth mentioning at this point is Nathan A. Berkeley, who, while working for the U.S. Department of Homeland Security as a policy analyst, provided an approach that shines a much needed light on the debate. He begins dealing with this controversy

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this shift has not improved the material or dignitary conditions of gays in the military, as homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status.

Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 778 (2002). Another example of this comes from Texas, where Big Earl's Bait House and Country Store refused to serve a gay couple, not because they were gay, but because they failed to conform to a pre-assigned norm for manliness. Courtney, *supra* note 32, at 1498–99. The author compares the motivation of Big Earl with the artistic services discussed throughout this article. *Id.* at 1518. I make the distinction in Section V.

56. Douglas Nejaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1236–37 (2012).

57. Dorf, *supra* note 14, at 1313.

58. *Id.* (“[O]pponents of gay rights denied that the conduct/status distinction had normative force.”); Eskridge, *supra* note 53, at 685–705. In one sense, the difficult issue is whether both sides can come to a compromise as to what degree a person’s conduct makes up that person’s very identity. Where Christians do not consider that marriage or intercourse defines an individual having the luxury of enjoying these benefits without threat of government reprisal, the LGBT community has not and may very well consider those rights the very fabric of their being.

by first asking whether legitimate civil rights are, in fact, being violated, versus only the perception being driven by calculated references to the civil-rights movement in an effort to gain the moral high ground.<sup>59</sup> In his analysis, he is keen to distinguish areas of constitutional violations (whether due process or equal protection) where the state is rightfully responsible to step in (i.e., those linked to targeted invidious discrimination against “discrete, immutable attributes”) versus those ideological disagreements on human sexuality,<sup>60</sup> which requires the state to remain neutral.<sup>61</sup> He argues that when the state brings charges against defendants in an effort to uphold its antidiscrimination laws, they are in essence asking the courts to violate the stated principles in *Planned Parenthood v. Casey* and *Lawrence v. Texas*—that it is the role of the courts to “define the liberty of all, not to mandate [its] own moral code.”<sup>62</sup> With this in mind, Berkeley frames the issue fundamentally differently from Louise Melling by asking this: “Why should the majority be permitted to ‘use the power of the State’ via public accommodation laws, nondiscrimination laws, or other applications of due process or equal protection principles, to *enforce* the moral view that same-sex sexual conduct must be accepted?”<sup>63</sup>

Between Melling’s framing of the issue and the one offered by Berkeley, we have, what seems to be, an irreconcilable conflict. While creating much needed change for the black and LGBT-community by rightfully ridding invidious discrimination in various fields, antidiscrimination laws have also

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59. Nathan A. Berkeley, *Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism*, 50 GONZ. L. REV. 1, 3–5 (2014–2015).

60. *Id.* at 14–15. Berkeley notes that “refusing to affirm sexual expressions and associated relational forms, or forms of gender identity that may reduce human maleness and femaleness to matters of individual autonomy, are not *prima facie* offenses against human dignity and may be rooted in genuine religious convictions.” *Id.* at 15; *see also* Garnett, *supra* note 2, at 81 (“Discrimination is wrong when it denies or is intended to deny the equal dignity of every person . . . [S]ometimes discrimination does this and sometimes it doesn’t.”).

61. *See* Berkeley, *supra* note 59, at 17 (“[W]hen government includes the behavior dimension of sexual orientation in its efforts to enforce nondiscrimination laws, it is misguided.”).

62. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). “The [Supreme] Court made abundantly clear that neither state nor federal criminal law might be used to express majoritarian views on human sexuality and related sexual relationships and lifestyles . . . .” Berkeley, *supra* note 59, at 21. As Garnett prudently advises, “[C]ourts, officials, and governments should acknowledge and accept their limited competence and prerogative to resolve authoritatively these disagreements.” Garnett, *supra* note 2, at 84.

63. Berkeley, *supra* note 59, at 22.



come with great perils to our social structure.<sup>64</sup> While I fully acknowledge that religious claimants, at times, must “be required to sacrifice for the public good,” that burden must remain “no greater than is necessary for achievement of that good and may not be imposed disproportionately on the religious.”<sup>65</sup> Whatever the decision a business makes in the context of refusing to serve the LGBT-community, laws imposing penalties will only compound the likely reputational cost that comes with objecting.<sup>66</sup>

As a final note, it is also important for those appealing to the right to exclude gays (regardless of intent) to know that from a historical standpoint, their claims are largely rooted in an “artifact of the Jim Crow era,” and not in a proper common law understanding of a duty to serve the public.<sup>67</sup> While this is not reason for capitulating, it is something that academics will use in the wider debate. While this Article does not go far enough in creating a rubric to instigate such changes to help my gay neighbor, I fully support those agencies that do and hope in the future to lend my support as a Christian.<sup>68</sup> For now, we turn to the relevant cases where the refusal of service issues takes center stage.

### III. THE NON-DISTINCTION APPROACH

A number of important controversies have surfaced in the last five years that help illustrate the conflict between the religious and gay communities.

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64. See generally BERNSTEIN, *supra* note 49 (laying a foundation of forced equality principles pursuant largely to the Fourteenth Amendment and the dangers it created for civil liberties).

65. Michael W. McConnell, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 47 (1989).

66. Wilson, *supra* note 5, at 167. Richard Epstein likewise “favors allowing religious business owners or actors to act using their own discretion and to absorb the reputational stigma that may come from refusing services based on religious beliefs.” Mimi Teixeira, *Richard Epstein on conflict between anti-discrimination laws and religious freedom*, ACTON INST. (July 25, 2016), <http://blog.acton.org/archives/88222-richard-epstein-on-conflict-between-anti-discrimination-laws-and-religious-freedom.html>.

67. See James M. Donovan, *Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples*, 49 LOY. L.A. L. REV. 39, 51–60 (2016) (“asserted right to exclude . . . emerged only as a proxy for slavery so as to maintain domination over African Americans after the . . . Civil War”); Singer, *supra* note 42, at 1294 (“narrow range of businesses with duties to serve the public under both current common law and the 1964 federal statute do not reflect the common law as it has existed from time immemorial”).

68. William Eskridge wisely notes (while I disagree with his model for this) that religion bears a role in “both confronting discriminatory policies endorsed by religions and accommodating the faithful where possible.” Eskridge, *supra* note 53, at 664.

In these opinions, one finds the application of the “non-distinction” approach where courts conflate the difference between invidious discrimination and refusals to serve the LGBT-community based solely on considering the service to be an endorsement of an underlying conduct deemed sinful.

#### A. *Elane Photography*

Among the first legal opinions that tackles the issue of public accommodations refusing to serve certain members of the LGBT-community comes from New Mexico, where the state’s highest court examined an alleged violation of the New Mexico Human Rights Act (“NMHRA”) by the owner of Elane Photography, who refused to photograph a commitment ceremony between a lesbian couple. The owner of Elane Photography argued that compliance would convey a message of endorsement in violation of her religious beliefs against gay marriage.<sup>69</sup> The court applied the non-distinction approach by equating the owner’s refusal to photograph the lesbian couple’s commitment ceremony on par with a hypothetical refusal to photograph an interracial couple.<sup>70</sup>

In justifying this approach, the court built on the difficulty of distinguishing between status and conduct since the conduct at issue is “so closely correlated with sexual orientation” that it would severely undermine the purpose of the law.<sup>71</sup> The court cited in support the Supreme Court’s decision in *CLS v. Martinez*, which likewise “rejected similar attempts distinguish between a protected status and conduct closely correlated with that status.”<sup>72</sup> In short, the conflation between status and conduct was the

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69. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58–59, 61 (N.M. 2013). The language of the Human Rights Act reads broadly to proscribed any discrimination whether or not it was done “directly or indirectly.” N.M. STAT. ANN. § 28-1-7(F) (2008). “Elane Photography argues that it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings.” *Elane Photography*, 309 P.3d at 61. To Elane, in the process of creating and editing the photos, she was creating a “positive story about each wedding . . . and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage.” *Id.* at 63.

70. *Elane Photography*, 309 P.3d at 59.

71. *Id.* at 61.

72. *Id.* (citing *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)). In *CLS*, the Court referred to *Lawrence v. Texas*, regarding the criminalization of sodomy as an example of conduct closely correlated with being homosexual, and to *Bray v. Alexandria Women’s Health*, providing an illustration where “a tax on wearing yarmulkes is a tax on Jews.” *Christian Legal Society*, 561 U.S. at 689 (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003);

product of what the court understood to be an inextricable relationship between a person's public commitment to another person of the same-sex and that person's identity as a homosexual.<sup>73</sup>

As a corollary to this non-distinction approach, any free speech defenses are colored by the underlying conflation and are, therefore, non-viable. The court, in this case, rejected a compelled speech argument despite conceding that photography may very well involve an artistic service—even conveying the client's own personal message—but this was irrelevant since the plaintiff in *Elane Photography* chose her line of business.<sup>74</sup> If she wanted to escape liability under the NMHRA, she could have ceased offering her services to the public at large.<sup>75</sup> As long as she remained open to the public, she had to serve all<sup>76</sup> customers.

### B. *Arlene's Flowers*

A second case goes much deeper into understanding the mindset or intent factor of business owner's refusal to serve.

This case involves Barronelle Stutzman, who (along with her husband) owned and operated *Arlene's Flowers*—a closely-held, for-profit corporation.<sup>77</sup> Mrs. Stutzman's work revolved around creating floral arrangement for special occasions, including weddings.<sup>78</sup> She considered this an artistic service,<sup>79</sup> representing her unique talents and creativity.<sup>80</sup> She

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)). These reliance verses will be dealt with in Section V.

73. *Elane Photography*, 309 P.3d at 62.

74. *Id.* at 66.

75. *Id.* at 67.

76. By "all" the court means all those within a protected category, i.e. "race, sex, sexual orientation, or other protected classification." *Id.* at 72. The opinion for example said that an Africa-American does not have to offer service to members of the KKK because group membership is not a protected category—the reverse is not true since race is part of a protected category. *Id.*

77. *State v. Arlene's Flowers, Inc.*, 2015 WL 720213, at \*3 (Wash. Super. 2015) [hereinafter *Arlene's Flowers*].

78. *Id.*

79. See Barronelle Stutzman, *I'm a florist, but I refused to do flowers for my gay friend's wedding*, WASHINGTON POST (May 12, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/128/im-a-florist-but-i-refused-to-do-flowers-for-my-gay-friends-wedding/> [hereinafter *Stutzman WAPO*].

80. Brief of Appellants at 7, *State of Washington v. Arlene's Flowers*, (No. 91615-2), 2015 WL 720213, at \*1 (Wash. Super. 2015) [hereinafter *Brief of Appellants*]; see also Motion for Leave to File Brief and Brief for the Cato Institute as Amicus Curiae in Support of Appellants, at 5–7, *State of Washington v. Arlene's Flowers*, (No. 91615-2), 2015 WL 720213, at \*1 (Wash. Super. 2015) (offering evidence how florists engage in artistic services).

had never expressed nor harbored animus toward the gay couple bringing this suit against her (Ingersoll and Freed, collectively: “Plaintiffs”), nor any other members of the LGBTQ+ community.<sup>81</sup> Mrs. Stutzman has served the Plaintiffs “on nearly 30 previous occasions and referred them [elsewhere] for only one event due to her sincere religious beliefs.”<sup>82</sup>

As a Christian, Mrs. Stutzman believes that endorsing or participating<sup>83</sup> in a same-sex wedding goes against the clear teaching of Scripture and she believes that lending her artistic talents to such a celebration would amount to an act of endorsement.<sup>84</sup> While she felt “terrible” that she could not share in the Plaintiff’s joy of being married, for her, it was never about the sexual orientation of the individual, but about the message she felt she was being asked to convey.<sup>85</sup> As the Superior Court acknowledged, Mrs. Stutzman was simply following the teachings of the Southern Baptist Convention that balances the need to uphold a traditional view on marriage while retaining a loving attitude towards those who struggle with same-sex attraction.<sup>86</sup> Mrs. Stutzman offered the names of other florists who she knew would do a good job, which cost the Plaintiff’s \$7.91 in out-of-pocket expenses.<sup>87</sup>

After Mrs. Stutzman refused to provide her services, and after she refused to comply with a statement ensuring that her conduct at issue would not be repeated, this lawsuit was filed.<sup>88</sup> The State of Washington

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81. Brief of Appellants, *supra* note 80, at 9, 32.

82. *Id.* at 2; see also *Arlene’s Flowers*, 2015 WL 720213, at \*3 (“Stutzman had served [the plaintiff] approximately 20 times or more and that he had spent in the range of \$4,500 at Arlene’s Flowers.”).

83. *Arlene’s Flowers*, 2015 WL 720213, at \*3.

84. *Id.* The Superior Court acknowledged that Mrs. Stutzman “draws a distinction between the provision of raw materials . . . and the provision of flower arrangements that she has herself arranged [for the wedding].” *Id.*

85. Stutzman *WAPO*, *supra* note 79.

86. *Arlene’s Flowers*, 2015 WL 720213, at \*3. Any forms of “gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions” toward the LGBT community is explicitly condemned. *Id.* at 3 n.7. This sentiment is echoed throughout the Christian community. See, e.g., Nick Roen, *Homophobia Has No Place in the Church*, *DESIRING GOD* (Mar. 29, 2016), <http://www.desiringgod.org/articles/homophobia-has-no-place-in-the-church> (noting the fear that homophobia is all too common inside the church and urges Christians to operate in love. RUSSELL MOORE, *ONWARD: ENGAGING THE CULTURE WITHOUT LOSING THE GOSPEL* 182–83 (2015) (calling on Christians to love and serve gay and lesbian neighbors and to reject those voices that try to intimidate them).

87. *Stutzman WAPO*, *supra* note 79; *Arlene’s Flowers*, 2015 WL 720213, at \*4.

88. Lornet Turnbull, *State’s Case Against Florist Fires Up Gay-Marriage Critics*, *SEATTLE TIMES* (Apr. 17, 2013), <http://www.seattletimes.com/seattle-news/statersquos-case-against-florist-fires-up-gay-marriage-critics/>. The Attorney General did seek, prior to the lawsuit, for Mrs. Stutzman to “sign an Assurance of Discontinuance . . . , stipulating that the conduct at issue here occurred and would not be repeated.” *Arlene’s Flowers*, 2015 WL 720213, at \*5.

heard about the conflict through the media and the Plaintiffs only joined the fray nine days after the State filed its lawsuit.<sup>89</sup> The challenge asserted that Mrs. Stutzman violated the Consumer Protection Act (“CPA”) by engaging in “unfair or deceptive act or practice”<sup>90</sup> and the Washington Law Against Discrimination (“WLAD”) in refusing to accommodate the Plaintiffs’ request. Both statutes were read liberally per instruction of the state legislature. The former required a lesser showing if the attorney general brings charges and the latter allowed for a violation to occur if the discrimination was either direct *or* indirect.<sup>91</sup>

In relation to the issue of conflating conduct and identity, Mrs. Stutzman argued for the Court to make a distinction between the conduct of the Plaintiffs in being married and their identity as homosexual.<sup>92</sup> However, the Court rejected this attempt by citing to the Supreme Court and asserting that “the extent to which religious motivation may provide an affirmative defense . . . is irrelevant under both the CPA and WLAD.”<sup>93</sup> Looking to *Bob Jones v. United States*, the Superior Court asserted the Supreme Court “has long held that discrimination based on conduct associated with a protected characteristic constitutes discrimination on the basis of that characteristic.”<sup>94</sup> Mrs. Stutzman’s refusal to “do the flowers” on the basis of

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89. Brief of Appellants, *supra* note 80, at 13-14; *Arlene’s Flowers*, 2015 WL 720213, at \*5.

90. *Arlene’s Flowers*, 2015 WL 720213, at \*5 (case brought by the Attorney General).

91. *Id.* The relevant language from the statute prohibited discrimination as follows:

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination . . . or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation . . . .

RCW § 49.60.215(1) (West 2011). Interestingly, Mrs. Stutzman tried to argue that the lawsuit was moot and that its momentum was largely due to a misunderstanding. *Arlene’s Flowers*, 2015 WL 720213, at \*9. According to Mrs. Stutzman, had she known that all the Plaintiffs wanted was raw materials, instead of flower arrangements, for the wedding, she of gladly complied. *Id.* The Court was not persuaded. *Id.* at \*13.

92. *Arlene’s Flowers*, 2015 WL 720213, at \*13.

93. *Id.*

94. *Id.* at \*15 (citing *Bob Jones University v. United States*, 461 U.S. 574, 605 (1983)). The court also cited *Christian Legal Society*, 561 U.S. at 689 (2010) as another instance where the Supreme Court refused to distinguish between status and conduct in the context of a university student group rejecting gay members. *Arlene’s Flowers*, 2015 WL 720213, at \*16. The Court asserted that there existed no authority for the “proposition that substantial compliance with discrimination laws excuses any individual act of discrimination.” *Id.* (citing *Elane Photography*, 309 P.3d at 62 (N.M. 2013)).

her religious opposition to same sex marriage, was for the Court—as a matter of law—a refusal based on the sexual orientation of the couple.<sup>95</sup> This conflation was made easy given that the language of the WLAD explicitly disallowed making “any distinction, restriction, or discrimination” based on a protected class.<sup>96</sup>

On the free speech issue in response to the non-distinction approach, the Court refused to acknowledge that any persuasive authority existed to justify an exemption from the state’s antidiscrimination provision.<sup>97</sup> The justification was clear. Since the Supreme Court forbids racial discrimination in employment, and since the Court in *Rumsfeld v. FAIR* made clear that the “abridgment of freedom of speech” cannot be made a reason to disallow the illegality of certain conduct simply because that conduct was “initiated, evidenced, or carried out by means of language,” Mrs. Stutzman’s appeal to the Frist Amendment was untenable.<sup>98</sup>

The Washington Supreme Court unanimously affirmed the court of appeals, continuing to base its decision largely on the non-distinction approach on the constitutional issue.<sup>99</sup> The Court noted that numerous courts have rejected the status/conduct distinction, pointing out that the decision in *Obergefell* made clear that “the denial of marriage equality to same-sex couples [was] itself [akin] to discrimination.”<sup>100</sup> On the question of compelled speech, the Court refused to acknowledge that Mrs. Stutzman,

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95. *Arlene’s Flowers*, 2015 WL 720213, at \*15.

96. *Id.* at \*15 n.18 (citing RCW 49.60.215(1) (West 2011)). As a matter of what appears to be pure formalism, the Court determined that since Mrs. Stutzman admitted to the underlying “conduct that constitutes a violation of the statute,” and since the Court refused to make any distinctions proposed by Mrs. Stutzman in order to assert First Amendment defense, nothing remained to remove her conduct from the statutes intended purpose. *Arlene’s Flowers*, 2015 WL 720213, at \*16. It seemed that even if the Court allowed an inquiry framed in terms of making the necessary distinction between conduct and identity, the language of the statute in disallowing *indirect* discriminatory results would still require the same outcome. *Id.* at \*18.

97. *Id.* at \*20 (citing *Elane Photography*, 309 P. 3d at 72)).

98. *Id.* (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). The Court likewise struck down a freedom of association defense by citing Supreme Court precedent that removes “[i]nvidious private discrimination” from constitutional protection. *Arlene’s Flowers*, 2015 WL 720213, at \*22 (quoting *Hishon v. King & Spalding*, 467 U.S. 69 (1984)).

99. *State of Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 553, 568 (Wash. 2017). The court agreed that if the state statute violated constitutional rights, the latter would prevail. *Id.* at 556.

100. *Id.* at 553.

by providing flowers for the wedding, bore the markings of an “inherent[] expressi[on]” that viewers would understand without further explanation.<sup>101</sup>

C. *Sweetcakes by Melissa*

The same non-distinction approach was present when the Commissioner of the Oregon Bureau of Labor and Industries (“BOLI”), Brad Avakian, upheld a \$135,000 fine on the Klein Family for refusing to sell a cake to a lesbian couple.<sup>102</sup> The facts are largely the same as in the previous two cases. Here, the gay couple, anticipating a same-sex ceremony, sought out the services of the Klein Family to make a wedding cake.<sup>103</sup> After the Kleins discovered that the cake was intended for a same-sex ceremony, they declined to complete the request, citing to their religious convictions.<sup>104</sup> Afterward, a complaint was filed with the Oregon Department of Justice, where the Kleins were accused of calling the gay couple an “abomination[] unto the lord” and allegedly claiming that the couple’s money was “not equal.”<sup>105</sup> Several months later, a complaint was filed with BOLI alleging that Sweetcakes by Melissa had discriminated against the couple on the basis of their sexual orientation.

The violation itself involved not simply the refusal to sell, but also a communicated intent to discriminate in the future based on sexual orientation.<sup>106</sup> As the Commissioner found, the interviews and the note left

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101. *Id.* at 557. As the court pointed out: “The decision to either provide or reuse to provide flowers for a wedding does not inherently express a message about that wedding.” *Id.*

102. Melissa Elaine Klein, 34 BOLI 102 (2015), 2015 WL 4868796, at \*23, *available at* <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf> [hereinafter BOLI FINAL ORDER].

103. *Id.* at \*3.

104. *Id.* When the Kleins refused to complete the order, only one of the lesbians was present. During this exchange, the record indicates that the Kleins had cited to Leviticus 18:22 (i.e., “you shall not lie with a male as one lies with a female; it is an abomination”) among the reasons why they could not comply with the request. *Id.* Upon hearing this, one of the lesbians felt that the denial of service signified that she was a “creature not created by God, not created with a soul” and that she was “unworthy of holy love . . . [and] not worthy of life.” *Id.* at \*4.

105. Melissa Elaine Klein, 34 BOLI 102 (2015), 2015 WL 4868796, at \*6.

106. *Id.* at \*16. The statute made it an unlawful practice to “publish, circulate, issue or display . . . any communication, notice, advertisement or sign” that signified any intent to discriminate against any person based on their sexual orientation. *Id.* at \*14 (citing ORS § 659A.409 (West 2016)). Note that the Commissioner struck down a constitutional challenge to ORS § 659A.409 as a speech code, alleging that it only applies “to the business of a place of public accommodation” and not to an individual’s “personal opinion, political commentary, or other privileged communication.” *Id.* at \*18. Whether this means that no public

outside the Sweetcakes business constituted a “clear intent to discriminate in the future just as they had done [in the past].”<sup>107</sup> Further, looking to the antidiscrimination public accommodation laws, the Commissioner, developing the laws origins as an effort to rid the public of racial discrimination, framed this “case . . . not [being] about a wedding cake or a marriage . . . [but] about a business’s refusal to serve someone because of their sexual orientation.”<sup>108</sup> The Commissioner went on by stating that the forum has already denied any distinction between denying service on the basis of sexual orientation and on the basis of not wishing to participate in a same-sex wedding.<sup>109</sup> Furthermore, the Commissioner went on to indict the Kleins for their “clear and direct statement” that the lesbian couple “lacked an identity worthy of being recognized . . . [an act that] devalues the humanity of us all.”<sup>110</sup> The Kleins were fined \$135,000—not to punish them, but to make the lesbian couple whole.<sup>111</sup> This case is currently on appeal to the Oregon Supreme Court.<sup>112</sup>

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accommodation can ever convey an expressive service thus enjoying the protections of the First Amendment is uncertain.

107. *Id.* at \*16.

108. Melissa Elaine Klein, 34 BOLI 102 (2015), 2015 WL 4868796, at \*19.

109. *Id.* The reason provided in the Appendix quotes the same sections from *CLS v. Martinez* and *Elane Photography*, refusing to make any distinctions and stating that a marriage ceremony is inextricably connected to a person’s sexual orientation. *Id.* at \*52.

110. *Id.* at \*19.

111. Melissa Elaine Klein, 34 BOLI 102 (2015), 2015 WL 4868796, at \*23-4. The Commissioner seemed to have arrived at these figures based on the “extent and severity” of the emotional suffering exhibited by the lesbian couple. *Id.* at \*23. Despite the better judgment of Judge Kethledge, to me, this case is based on “ridiculous” arguments. See *Bennett v. State Farm Mut. Auto. Ins. Co.*, 731 F.3d 584, 584 (6th Cir. 2013). As Andrew Koppelman rightly pointed out, “the Oregon Labor Commissioner’s finding of liability and the extraordinarily large damage award were crafted with no evident awareness that there was *any* free speech issue” and shows how local decision makers can abuse their position. Koppelman, *supra* note 21, at 1155–56, 1159. Perhaps the Oregon Commissioner could be among the rare examples sought out by Peter J. Smith of those judges drive entirely by ignorance. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1481 (2007). With Brad Avakian’s record and affiliation with gay rights advocacy groups during the case deliberation, it perhaps time for him to heed the advice of Judge Posner and admit that his decision was politically driven. *Id.* at 1482 n.233 (“Posner . . . has argued that that judges should stop deluding themselves into believing that they do not act politically . . .”); Kelsey Harkness, *Emails Raise Questions of Bias in Case Against Bakers Who Denied Services for Same-Sex Wedding*, Daily Signal (June 1, 2015), <http://dailysignal.com/2015/06/01/emails-raise-questions-of-bias-in-case-against-bakers-who-denied-service-for-same-sex-wedding/>; Adam Andrzejewski, *Brad Avakian’s Political Hacking of the Oregon Bureau of Labor and Industry*, FORBES (Oct. 24, 2016), <http://www.forbes.com/sites/adamandrzejewski/2016/10/24/brad-avakians-political-hacking-of-the-oregon-bureau-of-labor-and-industry/#150366f11935>; see also Richard A.



#### D. Masterpiece Bakery

In another similar case, this one out of Colorado, the state court of appeals upheld the Colorado Civil Rights Commission ruling in favor of a gay couple who was denied their request for Masterpiece Cakeshop to “design and create a [wedding] cake to celebrate their same-sex wedding.”<sup>113</sup> According to the Administrative Law Judge (ALJ), the owner, Jack C. Phillips, could not comply with this request because he believed that “decorating cakes is a form of art . . . and that he would displease God by [acquiescing].”<sup>114</sup> The couple filed charges of discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (“CADA”).<sup>115</sup> The ALJ found in favor of the couple, and ordered a “cease and desist” requiring Masterpiece to take remedial measures to ensure compliance with the CADA and to file quarterly reports for two years indicating what measures were taken in compliance and if any other patrons were denied service.<sup>116</sup> Interestingly, this decision came even after the ALJ acknowledged that creating a wedding cake required “considerable skill and artistry;” however, the “finished product” did not constitute protected speech under the First Amendment.<sup>117</sup>

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Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) (“By pulling the wool over the public’s eyes, the pretense of certitude and neutrality may strengthen the political position of the courts in our society, and maybe that is a good thing—or maybe not.”).

112. Maxine Bernstein, *Owners of Sweet Cakes file appeal with Oregon Supreme Court*, THE OREGONIAN (March 2, 2018), [http://www.oregonlive.com/portland/index.ssf/2018/03/owners\\_of\\_sweet\\_cakes\\_file\\_app.html](http://www.oregonlive.com/portland/index.ssf/2018/03/owners_of_sweet_cakes_file_app.html). The Oregon Court of Appeals tracked closely the common language used for the non-distinction approach. See *Klein v. Oregon Bureau of Labor & Indus.*, 289 Or. App. 507, 523, 410 P.3d 1051, 1063 (2017) (“The Kleins refused to make a wedding cake for the complainants precisely and expressly *because of* the relationship between sexual orientation and the conduct at issue (a wedding). And, where a close relationship between status and conduct exists, the Supreme Court has repeatedly rejected the type of distinction urged by the Kleins.”).

113. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015).

114. *Id.* at 277.

115. *Id.* The law was read broadly to prohibit any “direct[] or indirect[]” discrimination in the public accommodation setting. See COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014).

116. *Masterpiece Cakeshop*, 370 P.3d at 277.

117. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008, at \*7-8 (Colo. Civil Rights Comm’n Dec. 6, 2013), <http://www.adfmedia.org/files/MasterpieceDecision.pdf>, *aff’d*, No. CR 2013-0008 (Colo. Civil Rights Comm’n May 30, 2014), <http://www.adfmedia.org/files/MasterpieceFinalAgencyOrder.pdf>, *aff’d*, 2015 COA 115 (Colo. App. Aug. 13, 2015).

The Colorado Court of Appeals affirmed the order of the ALJ—and, in doing so, applied the non-distinction approach adopted in the prior three cases. The court correctly pointed out that the issue with designing the cake for Jack Phillips was an issue with the celebratory message conveyed in baking a wedding cake for a same-sex couple.<sup>118</sup> It was never about the individual's sexual orientation, and in fact, Jack Phillips readily agreed to sell them any other bakery product.<sup>119</sup> In response, the Court of Appeals, like the previous three decisions, cited the same language from *Martinez*, *Lawrence*, and *Bob Jones*—as well as citing to the recent same-sex marriage decision in *Obergefell* for the proposition that the “Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation.”<sup>120</sup> In essence, certain same-sex conduct is so “closely correlated” with the underlying sexual orientation status that to deny one is to deny the other.<sup>121</sup> This was based on the fact that “the act of same-sex marriage constitutes such conduct because it is ‘engaged in exclusively or predominately’ by gays, lesbians, and bisexuals.”<sup>122</sup>

Finally, the Court also dismissed the compelled speech<sup>123</sup> argument, contending (like the Supreme Court in *Arlene's Flowers*) that the public would not associate the selling of goods with an endorsement of same-sex marriage.<sup>124</sup> While this may be true, it is more likely a failure to acknowledge the broader culture<sup>125</sup> and the ability of certain acts to be

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118. *Masterpiece Cakeshop*, 370 P.3d at 280.

119. *Id.*

120. *Id.* at 280–281 (citing in support *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2016)).

121. *Id.* at 281.

122. *Id.* The Court made this leap by allowing the presumption from *Bray*, which declared that: although opposition to voluntary abortion does not equate to a discrimination against woman, “[s]ome activities may be such an *irrational object of disfavor* that, if they are targeted, and if they also happen to be engaged in exclusively or predominately by a particular class of people, an intent to disfavor that class can readily be presumed.” *Id.* at 282 (citing *Bray*, 506 U.S. at 270) (emphasis added). The court offers the example that a “tax on wearing yarmulkes is a tax on Jews.” *Bray*, 506 U.S. at 270. Under this logic, it is hard to explain how opposition to abortion does not “discriminate” against women since women are clearly the particular class who engages “exclusively or predominately” in that conduct. What seems to be happening is that the court is willing to recognize an ideological agenda when it comes to opposing abortion (instead of it being solely based on sexism), but refuses to extend this logic in instances involving the LGBT-community.

123. *See id.* at 288 (“order requiring Masterpiece not to discriminate against potential customers because of their sexual orientation does not force it to engage in compelled expressive conduct”).

124. *Id.* at 287.

125. Clashes involving the LGBT and religious community have become widely publicized. *See, e.g.*, Ahiza Garcia, *Georgia, N.C. and beyond: What you need to know about*

imbued with expressive association.<sup>126</sup> Justice Thurgood Marshall explained this well when he illustrated that the act of sleeping and sitting—although typically non-expressive—can become a “novel mode of communication” if done in a given context.<sup>127</sup> In the current American culture, the freedom of association has provided a vehicle for public figures like Bruce Springsteen,<sup>128</sup> Bryan Adams,<sup>129</sup> Tracy Morgan,<sup>130</sup> and others<sup>131</sup> to stand together against perceived discrimination toward the LGBTQ+ community.<sup>132</sup> On the other hand, small businesses that refused to cater

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*the clash over 'anti-gay' bills*, CNN MONEY (Mar. 26, 2016), <http://money.cnn.com/2016/03/26/news/anti-lgbt-bills-north-carolina-georgia/>; Zack Ford, *Indiana And South Dakota Kick Off Backlash Against LGBT Rights*, THINK PROGRESS (Jan. 28, 2016), <http://thinkprogress.org/lgbt/2016/01/28/3743668/indiana-south-dakota-discrimination-bills/>.

126. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304-05 (1984) (Marshall, J., dissenting).

127. *Id.* at 306; *Brown v. Louisiana*, 383 U.S. 131, 139 (1966). Cf. Caroline Mala Corbin, *Speech of Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 265-74 (2015) (discusses that context can create expressive meaning); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1556 (2001) (under a message-based approach, with the backdrop of “loud, continuous, and insistent demands to discuss and take sides on gay-rights claims, a steadfast refusal to talk at all about the issue is hardly neutral.”).

128. Ben Sisario, *Bruce Springsteen Cancels North Carolina Concert Over Bias Law*, N.Y. TIMES (Apr. 8, 2016), [http://www.nytimes.com/2016/04/09/business/media/bruce-springsteen-cancels-a-north-carolina-concert-over-anti-gay-law.html?\\_r=0](http://www.nytimes.com/2016/04/09/business/media/bruce-springsteen-cancels-a-north-carolina-concert-over-anti-gay-law.html?_r=0).

129. Nigel M. Smith, *Bryan Adams Cancels Mississippi Tour Date in Protest Over Anti-LGBT Law*, GUARDIAN (Apr. 11, 2016), <http://www.theguardian.com/music/2016/apr/11/bryan-adams-cancels-mississippi-tour-date-protest-of-anti-lgbt-law>.

130. Brittany Spanos, *Tracy Morgan Cancels Mississippi Performance Over Religious Accommodations Act*, ROLLING STONES (Apr. 19, 2016), <http://www.rollingstone.com/culture/news/tracy-morgan-cancels-mississippi-performance-20160419>.

131. Daniel Nussbaum, *30 Hollywood Power Players Join George Boycott Over Religious Freedom Bill*, BREITBART (Mar. 24, 2016), <http://www.breitbart.com/big-hollywood/2016/03/24/lee-daniels-anne-hathaway-rob-reiner-and-more-join-georgia-boycott-over-religious-freedom-bill/>.

132. Recently the National Basketball Association (NBA) decided to move the All-Star game from Charlotte in protest to the State’s bathroom laws deemed discriminatory towards the transgendered public. Scott Cacciola, *N.B.A. to Move All-Star Game From North Carolina*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/sports/basketball/nba-all-star-game-moves-charlotte-transgender-bathroom-law.html>.

same-sex weddings are often associated with the message of the “religious right,”<sup>133</sup> and branded as being “bigots”<sup>134</sup> for their alleged discrimination.

For those reasons, the dissenting members in the case were correct in wanting to grant the appeal to determine whether the CADA required Jack Phillips to violate his rights under the First Amendment—an issue shortly to be decided by the U.S. Supreme Court.<sup>135</sup>

### E. Outliers

Interestingly, the Colorado Court of Appeals did admit that a wedding cake could have a particularized message sufficient to trigger First

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133. See Leslie Dorrough Smith, *Beyond Religious Right and Secular Left Rhetoric: The Road to Compromise*, J. OF CHURCH & STATE 57.4, at 801–03 (2015).

134. See, e.g., Ball, *supra* note 17; Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J. L. & SOC. POL’Y 260, 267–69 (2010); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (holding opposing views can be “based on decent and honorable religious or philosophical premises”). As rightly noted by Professor Carol A. Ball of Rutgers, it is false to label unequivocally “all business owners who refuse on religious grounds to provide goods and services to same-sex couples [as bigots],” especially if that owner (like Barronelle Stutzman) is otherwise willing to serve the gay couple in a different context (i.e. request). Ball, *supra* note 17, at 644. In the Oral Argument before the Supreme Court, the lawyer for the Petitioner advocating to legalize same-sex marriage failed to answer the question as to whether everyone who held to traditional views on marriage intended to “demean gay people” as the Michigan law holding to traditional marriage allegedly did. The exchange is memorable for its probing qualities—if not for the Plaintiff’s famous “times can blind” response likely lifted from Justice Kennedy’s *Lawrence v. Texas* majority. See Transcript of Oral Argument at 8–17, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14–556), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_15gm.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_15gm.pdf); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”); see also *Obergefell*, 135 S. Ct. at 2623 (Robert, J., dissenting) (“[T]o blind yourself to history is both prideful and unwise.”). Again, from Professor Ball: “In theory, it is possible to defend a traditional understanding of marriage without making moral judgments regarding characteristics, attributes, and values of same-sex relationships.” Ball, *supra* note 17, at 654. I suspect that for many Christians, rejecting homosexual conduct is inextricably connected with moral judgment—not as to the actor, however, but certainly as to the act—this much Professor Ball acknowledged throughout her article. See *id.* at 655, 660; see also Matthew J. Franck, *Introduction to RELIGIOUS FREEDOM AND GAY RIGHTS* 1–6 (Timothy S. Shah, Thomas F. Farr, Jack Friedman eds. 2016) (discussing the conception of sexual ethics as part of Christian humanism).

135. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, No. 15SC738, 2016 WL 1645027, at \*1 (Colo. Apr. 25, 2016). The significance of the Supreme Court’s pending decision cannot be overstated in the wider ramifications it has on related faith/equality issues. See generally Anton Sorkin, *A Starch Reality* 7(1) OXFORD J. OF L. & RELIGION (2018).

Amendment speech protections.<sup>136</sup> An example of this took place the year before *Masterpiece Cakeshop* when the Colorado Department of Regulatory Agencies upheld the right of baker to refuse to design a cake that contained content disparaging same-sex marriage.<sup>137</sup> This case involved a customer who requested that Azucar Bakery (specifically, the Pastry Chef Lindsay Jones) design two cakes, one depicting a gay couple holding hands with a red “X” marked over the image and the other including various Bible verses about God’s hate for sin and forgiveness of sinners.<sup>138</sup> The Bakery refused to comply because it viewed the “verses as discriminatory” and maintaining that all requests deemed “offensive” or “hateful” would be refused, regardless of religion.<sup>139</sup>

The decision turned on a four-element test for discriminatory denial of equal treatment, the customer having met the first three,<sup>140</sup> but failed the fourth, which stated that “the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.”<sup>141</sup> The Colorado Department acknowledged that the Respondent’s denial was based on the explicit message that the customer wished to include and the seller’s concern that the message was discriminatory.<sup>142</sup> While the customer alleged that he was treated differently than non-Christians, the Department found no evidence supporting this conclusion.<sup>143</sup> In short, the Department asserted that as long as the Bakery refuses all similar requests without reference to the customer’s status (i.e., protected class),<sup>144</sup> it is not violating the state’s antidiscrimination laws. Lest we consider this an aberration, the

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136. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015).

137. *Jack v. Azucar Bakery*, Charge No. P20140069X (Colo. Civil Rights Div. Mar. 24, 2015) [hereinafter “Azucar Bakery”], available at <http://www.adfmedia.org/files/AzucarDecision.pdf>. The Azucar Bakery decision was marked to be “[o]n behalf of the Colorado Civil Rights Division,” which was the same agency that ruled against Masterpiece Bakery. *Id.* at 5; *Masterpiece Cakeshop*, 370 P.3d at 276.

138. *Azucar Bakery*, *supra* note 137, at 2. Among the verses include: “God hates sin,” “Homosexuality is a detestable sin,” and “While we were yet sinners Christ died for us.” *Id.*

139. *Id.* at 1-2.

140. Namely: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent. *Id.* at 3-4.

141. *Id.* at 4.

142. *Id.*

143. *Id.*

144. The Department noted that “[u]nlawful discrimination” is primarily based on a person’s “asserted protected group or status.” *Id.* at 2. Further, the stated reason for denying a request is a rebuttable presumption—evidence of pretext may be offered to show denial was solely on the basis of that persons protected status. *Id.*

Colorado Commission ruled likewise in two other cases brought by the same charging party.<sup>145</sup>

In another outlier, the Kentucky Circuit Court reversed the decision adopted by the Lexington-Fayette Urban County Human Rights Commission (“Commission”), which held that Hands On Original (“HOO”) discriminated against the Gay and Lesbian Services Organization (“GLSO”) in violation of the “Fairness Ordinance” when it refused to print the official t-shirt for GLSO’s 2012 Pride Festival.<sup>146</sup> As part of HOO’s policy, any service that went to “endorse positions that conflict with the convictions of the ownership” would be refused.<sup>147</sup> Based on this policy, HOO has denied at least thirteen orders over the past several years, believing the designs to be “offensive contrary to their Christian beliefs or otherwise inappropriate.”<sup>148</sup>

The Circuit Court found that in forcing HOO to print the shirts, the Commissioner, as an agent of the government, compelled the printing company to speak a message that it was constitutionally protected from speaking.<sup>149</sup> Where GLSO and the Commissioner intended to frame the issue that HOO denied the request based on the sexual orientation of GLSO’s members,<sup>150</sup> the Court found that the real issue rests on the message

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145. See *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), available at <http://www.adfmedia.org/files/GateauxDecision.pdf>; *Jack v. Le Bakery Sensual*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), available at <http://www.adfmedia.org/files/LeBakerySensualDecision.pdf>.

146. *Hands On Originals, Inc. v. Lexington-Fayette Urban County Human Rights Comm’n*, Civil Action No. 14-CI-04474, at 2 (Circuit Court Third Division, April 27, 2015), available at <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf>.

147. *Id.* at 3. The understood endorsement in this case would be “that people should take pride in sexual relationships or sexual activity outside of a marriage between a man and a woman.” *Id.* at 6.

148. *Id.* at 3.

149. *Id.* at 9.

150. *Lexington-Fayette County Human Rights Commission v. Hands On Originals, Inc.*, HRC No. 03-12-3135 at 12, 16 (Oct. 6, 2014), available at <http://www.adfmedia.org/files/HOOrecommendation.pdf>. The confusion was whether HOO refused to print the t-shirt because it didn’t want to advocate pride in “being homosexual” or because it didn’t want to advocate pride in “sexual activity outside of a marriage between one man and one woman.” *Id.* at 12; *Hands on Originals*, No. 14-CI-04474, at 9. The distinction between rejecting the same-sex marriage versus the practice of sex outside of marriage is significant because it allows Christian businesses to separate themselves from opposing conduct “exclusively or predominantly” engaged in by a protected class, which most courts find problematic, even in cases where the Christian owners win. See, e.g., *Lexington Fayette Urban Cty. Human Rights Comm’n v. Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381, at \*7 (Ky. Ct. App. May 12, 2017).

that GLSO intended to inscribe on the shirts, which went against HOO's sincerely held Christian beliefs.<sup>151</sup> Where the Commissioner rejected a claim that the Fairness Ordinance violates HOO's First Amendment guarantees, the Circuit Court, by avoiding the non-distinction approach, was able to clearly differentiate the absence of evidence of sexual orientation discrimination based on status and see that the real issue is centered around the compelled message and forced association elements in violation of Supreme Court precedent.<sup>152</sup> If the Commissioner wants to infringe on these First Amendment protections, it must offer a compelling reason to do so.<sup>153</sup>

While these cases illustrate the opposing approaches in relatively similar fact scenarios, this Article turns next to arguing that the non-distinction approach is a legal fiction used to advance the interest of the court toward some societal norm.

#### IV. LEGAL FICTIONS

Defining the concept of legal fictions is difficult for many reasons.<sup>154</sup> Among those being that the classic formulation does not provide a consensus approach<sup>155</sup> and the so-called "new legal fiction" is surrounded by a seeming obliviousness of its use<sup>156</sup> or is at least marked by a profound

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151. *Hands on Originals*, No. 14-CI-04474 at 10. The Court emphasized that the sexual orientation of GLSO's representatives who contacted HOO was never disclosed and that the real issue was what the actual group endorsed through the Pride Festival. *Id.*

152. *Id.* at 10-13.

153. *Id.* at 15. The Kentucky Court of Appeals affirmed this decision, connecting the rejection to print t-shirts celebrating a certain choice of lifestyle, amounts to "viewpoint or message censorship," which the fairness ordinance allows. *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381, at \*7 (Ky. Ct. App. May 12, 2017). In a more recent decision, the Superior Court of California sided with a couple's refusal to create a wedding cake to be used in celebration of a same sex marriage. *See Department of Fair Employment and Housing v. Cathy's Creations*, No. BCV-17-102855 (Cal. Super. Ct., Feb. 05, 2018), *available at* <https://assets.documentcloud.org/documents/4368433/Tastries-Ruling.pdf>. The Court's holding rested on a refusal to pin the State's interest in ensuring a freely accessible marketplace above the First Amendment: "A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct." *Id.* at \*1, \*4.

154. Douglas Lind, *The Pragmatic Value of Legal Fictions*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 83, 85 (2015); LON FULLER, *LEGAL FICTIONS* 5 (1967).

155. *See* Smith, *supra* note 111, at 1465.

156. *See id.* at 1472 ("Sometimes judges rely on new legal fictions simply because they believe them to be true."). With "new legal fictions . . . there generally is no recognition of the

lack of transparency.<sup>157</sup> Other problems, more closely aligned with the nature of the non-distinction approach, is the use of fictions as an instrument for a judge to push for their own normative choices in fashioning legal rules.<sup>158</sup> In these instances, it makes sense why a judge would want to avoid the appearance of using legal fictions instead of established precedent.<sup>159</sup>

One of the more likely reasons why judges may turn to using legal fictions in the cases above is the fear, expressed by the ACLU in *Arlene's Flowers*, involving a breakdown of antidiscrimination laws as a result of accommodating religious claimants.<sup>160</sup> This tracks close to what Professor J. Smith refers to as the “legitimizing function,” where the abandonment of fictions could have “de-legitimizing consequences.”<sup>161</sup> This Section will build on the various forms of fictions throughout history while arguing the non-distinction approach falls comfortably among these uses; in particular, the three forms discussed in Section B.

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fact that the premise is false, although the assertions need not consciously be intended to deceive.” *Id.* at 1470.

157. Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 19 (2010) (“[E]ither they are not acknowledged to be false or . . . they are not in fact demonstrably false.”); Smith, *supra* note 111, at 1440 (a classic formulation of fictions did not intend to deceive while new legal fictions involve a lack of candor).

158. See Smith, *supra* note 111, at 1441.

159. See JOHN BAKER, *THE LAW'S TWO BODIES* 33, 35, 37 (2001) (stating that the “essence of a fiction that it leaves no explicit evidence of its existence”) [hereinafter “TWO BODIES”]. “[J]udges have actually held it a positive virtue to change the law by stealth.” *Id.* at 37; see also Jeremiah Smith, *Surviving Fictions*, 27 YALE L. J. 147, 148–49 (1917) (stating that the “second reason for the use of fiction . . . to conceal the fact that the judges, by their decisions, are making or changing the substantive law.”); HENRY SUMNER MAINE, *ANCIENT LAW* 25 (Montagu ed., 1986) (defines legal fictions “to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration[s] . . .”); Smith, *supra* note 111, at 1437 (stating that “judges routinely relied on legal fictions to mask the effects of legal change.”).

160. *Brief of Respondents Ingersoll and Freed in Answer to Amicus Curiae Briefs*, State of Washington v. Arlene's Flowers No. 91615-2, at 12 (2016) (stating that there is “no limiting principle that would prevent the kind of exemption sought here from swallowing the rule”), available at <https://www.courts.wa.gov/content/Briefs/A08/916152%20Resp.%20Answer%20to%20Amicus.pdf>.

161. Smith, *supra* note 111, at 1478. The purpose behind using fictions in this way is to “produce legal rules with positive expressive value[s].” *Id.* at 1478 (emphasis added). Ironically, while judges refuse to acknowledge the artistic expression in the above-mentioned services, at the same time, they are using legal fictions as an instrument to advance their own expressive positive values as part of the social transformation motif. See *id.* at 1480 (“If nothing else, judges’ factual assumptions often reflect their aspirations for society and the law.”).



### A. History

In attempting to define legal fictions, the starting point would have to be in describing them as statements made in contrast with known or discoverable facts.<sup>162</sup> Throughout history, famed jurists and common law lawyers invoked and renounced legal fictions for a multiplicity of reasons. Eminent jurist Lon Fuller has described their use as a source of shame to the law, while—at the same time—an indispensable part of its development.<sup>163</sup> Sir Henry Maine echoed these sentiments, writing that the use of fictions had a great purpose during the “infancy of society” to overcome the rigidity of the law—but as society and law progressed, their usefulness decreased.<sup>164</sup> Others have gone so far as to claim that “at bottom all law is reduced to a series of fictions heaped upon another in successive layers.”<sup>165</sup> Those who support their use wisely point to those benefits that allow for judges to make legal assumptions for the purpose of advancing justice when the law may otherwise inflict some injury.<sup>166</sup>

This idea of creating positive change despite the need for a little sleight of hand is a constant theme in the succeeding sections. While this Article takes no categorical positions on the use of fictions, it does suggest its present usage involving the cases in Section II to be ill advised. Before we get there, it will be helpful to briefly trace the use of these “pampered children of the law”<sup>167</sup> throughout history to supplement any attempts at a definition.

#### 1. Roman Law

The concept of legal fictions is an ancient instrument going back to the days of the Roman Empire.<sup>168</sup> During this time, fictions were used as forms of pleadings, signifying a hurdle insurmountable for the defense.<sup>169</sup> One

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162. *Id.* at 1437.

163. Fuller, *supra* note 154, at 2.

164. MAINE, *supra* note 159, at 25. He notes in the context of the early “fiction of adoption” that it would have been difficult to imagine “how society would ever have escaped from its swaddling-clothes, and taken its first step towards civilization.” *Id.* at 26. “I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order.” *Id.* at 26.

165. PIERRE DE TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 387 (1922).

166. Sidney T. Miller, *The Reasons for Some Legal Fictions*, 8 MICHIGAN L. REV. 623 (1910).

167. *Legal Fictions*, SPECTATOR, Aug. 1888, page 11, available at <http://archive.spectator.co.uk/article/25th-august-1888/11/legal-fictions>.

168. See Clifford Ando, *Fact, Fiction, and Social Reality in Roman Law*, in LEGAL FICTIONS IN THEORY AND PRACTICE 295–323 (2015); Knauer, *supra* note 157, at 2 (used by a praetor “in order to extend a right of action beyond its intended scope.”).

169. See MAINE, *supra* note 159, at 24–25.

common example included asserting that one is a Roman citizen to gain an advantage in court, when one was really a foreigner.<sup>170</sup>

Another less prosaic example involved a practice at the cult of Jupiter where procedural shortcuts existed allowing items ordinarily made sacred (therefore property of the gods) to undergo “desacralization” by the mere language of written fictions.<sup>171</sup> This type of fiction created by authoritarian pronouncements can be seen in the writings of Livy when he describes the aftermath of a failed battle of Lake Trasimene during the Second Punic War.<sup>172</sup> In an effort to appease the gods, Rome instated a sacrifice involving “an offering of all the young of animals to be born in spring.”<sup>173</sup> The language, indicative of the type of fictions decreed by will, read: “Do you will and so order that these things be done in the manner following? . . . Let him who shall make a sacrifice do so at such time and by such rite as shall seem good to him; in what manner soever he does it, let it be accounted duly done.”<sup>174</sup>

While many of the fictions in Roman law possessed a quality of authoritative pronouncements contradicting known realities, others according to Sir Henry Main were used for the purpose of granting

170. See Simon Stern, *Legal Fictions and Exclusionary Rules*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 158 (2015).

171. Ando, *supra* note 168, at 307. Items received as “gi[ft], donation or dedication” were able to circumvent the requirement by the mere language in the clause (“*let it be profane*”) after it was used or sold *as if* it underwent the requisite desacralization. *Id.* This power to create new legal facts through an authorities’ utterance in classical antiquity was evidenced by a number of recitations in Arthur Darby Nock’s chapter on Roman religion. *Id.* at 307–08; Arthur Darby Nock, *A Feature of Roman Religion*, in *ROMAN RELIGION* 84–96 (Ando ed., 2003).

172. Patrick Hunt, *Battle of Trasimene*, *ENCYCLOPEDIA BRITANNICA* (Dec. 17, 2015), <https://www.britannica.com/topic/Battle-of-Trasimene>.

173. Nock, *supra* note 171, at 84.

174. TITUS LIVIUS (Livy), *HISTORY OF ROME* 22.10.1-3 (Foster, ed. 1919), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0152%3Abook%3D22%3Achapter%3D10> (emphasis added) [hereinafter Livy]. Livy goes on:

If the animal which he ought to sacrifice dies, let it be deemed unconsecrated and let no guilt attach to him; if any shall hurt it or slay it unawares, let it be no sin; if any shall steal it, let no guilt attach to the People nor to him from whom it shall have been stolen; if he shall sacrifice unwittingly on a black day, let the sacrifice be deemed to have been duly made; by night or by day, if slave or freeman perform the sacrifice, let it be deemed to have been duly made; if sacrifice shall be performed before the senate and the People shall have ordered it to be performed, let the People be absolved therefrom and free of obligation.

22 LIVY, *HISTORY OF ROME* 10.5-7 (Foster, ed. 1919), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0152%3Abook%3D22%3Achapter%3D10#note4>.

jurisdiction.<sup>175</sup> These latter uses provides a natural shift into the common law where, for example, Courts like the Queen’s Bench and Exchequer “contrived to usurp the jurisdiction of the Common Pleas” by asserting that the “defendant was in custody of the king’s marshal, or that the plaintiff was the king’s debtor.”<sup>176</sup>

## 2. Common Law

At common law, the use of legal fictions became much more prevalent—some would even say a more “brutal”<sup>177</sup> practice—allowing for existing developments to give way to novel purposes.<sup>178</sup> An important process called “exploratory fictions” became an instrument that allowed for common law judges to grope around the law for useful principles—a practice often recognized as the very “spirit of the common law.”<sup>179</sup> Through this process, various procedural advantages were developed,<sup>180</sup> opportunities for cases to be heard by jury were created,<sup>181</sup> as well as establishing increasingly

175. MAINE, *supra* note 159, at 25. Maine explains the jurisdiction use:

Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen when in truth he was a foreigner.

*Id.* at 24–25.

176. *Id.*; Miller, *supra* note 166, at 628–29.

177. JOHN CHIPMAN GRAY, *NATURE AND SOURCES OF THE LAW* 31–32 (1921).

178. Michael Lobban, *Legal Fictions before the Age of Reform*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 199–201 (2015).

179. Maksymilian Del Mar, *Legal Fictions and Legal Change in the Common Law Tradition*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 235 (2015). William Blackstone, for example, noted the use of fictions can be highly beneficial as an end. See 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 43 (Lewis ed., 1897) (“[I]ts proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law”); Knauer, *supra* note 157, at 14 (quoting Blackstone in applauding the use of fictions as an end, but not the means). Roscoe Pound described how fictions served a process of molding the law without legislative action and meeting the immediate needs of parties as they arise. Roscoe Pound, *Sources, Forms, Modes of Growth*, in 3 *JURISPRUDENCE* 465 (West Publishing Co. 1959).

180. One example was the creation of an action called *indebitatus assumpsit*, which allowed for the Plaintiff to assert, without a showing of evidence, that a promise had been made to repay (“being so indebted, he undertook”) a debt by virtue of the debt’s existence. Lobban, *supra* note 178, at 202; J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 343, 347–48 (2002); DANIEL R. COQUILLETTE, *ANGLO-AMERICAN LEGAL HERITAGE* 157 (2004).

181. One example was fictitiously using the action of *assumpsit* to “raise questions on a feigned issue or wager” that would then be submitted to a jury for determination. Lobban, *supra* note 178, at 203 (stating that the “device was used by courts (notably the Chancery) to allow disputed matters to be tried by jury at the assizes.”).

convenient ways to transfer property—often times done with the purpose of avoiding tax liability.<sup>182</sup>

Among the most famous fictions included creating false or highly exaggerated scenarios in order to satisfy conditions in the writ called *trespass vi et armis*, which required that the wrong be committed “with force and arms” (*vi et armis*).<sup>183</sup> One example—the case of *Rattlesdene v Grunestone* (1317)—included a sale of wine where the buyer asserted that the seller had opened the wine—using the appropriate pleading language (“with force and arms drew”)—prior to delivery and replaced a substantial part of its content with salt water.<sup>184</sup> In reality, this was probably a

182. See BAKER, *supra* note 180, at 242–43 (stating that the “incidents which most needed avoidance . . . arose when a tenant died and the fee descended to his heir. . . [therefore t]he essence of most feudal tax-dodges was . . . to ensure that land did not descend to an heir.”); COQUILLETTE, *supra* note 180, at 108–10 (lists taxes that were imposed on landowners and attempts to reduce costs through tax evasion); Lobban, *supra* note 178, at 203–04 (discusses the evolution of the use of the statute *De Donis* to transfer real property). Famous reforms took place by King Edward I (reigned from 1272–1307) that shut down some of these loopholes discovered by lawyers that deprived lords of certain fees when property was, e.g. transferred to ecclesiastical bodies (“*mortmain*”) or through subinfeudation (process of dividing or returning land to new or prior tenants having the effect of greatly reducing dues). See THEODORE F.T. PUCKETT, A CONCISE HISTORY OF THE COMMON LAW 30–31 (1956); COQUILLETTE, *supra* note 180, at 107–10; BAKER, *supra* note 180, at 242.

183. TWO BODIES *supra* note 159, at 41; COQUILLETTE, *supra* note 180, at 156. Injured parties at the start had to fit their claims into existing writs that had to be bought from the Chancery (King’s secretariat) and had to encapsulate the action being brought—otherwise the other party would not be forced to respond. COQUILLETTE, *supra* note 180, at 149–51; JOHN H. LANGBEIN, HISTORY OF THE COMMON LAW 89 (2009) (“fixed forms for fixed purposes”); see also TWO BODIES, *supra* note 159, at 53 (“plaintiff whose case did not fit an existing writ might use the nearest writ and hope no one would object”); Peter Handfod, *Intentional Negligence: A Contradiction in Terms*, 32 SYDNEY L. REV. 29, 34 (2010) (“[T]he need to plead the standard writ formulae in order to persuade the common law courts to take jurisdiction caused pleaders, and perhaps the courts, to indulge in legal fictions. . .”). Eventually, a number of innovations allowed for a more progressive approach to using writs. King Edward I’s Statute of Westminster II (1285) allowed for clerks to draft new (*ad hoc*) writs for the purpose of justice. See COQUILLETTE, *supra* note 180, at 151 (“[L]et a writ be made by those learned in the law so that for the future it shall not befall that the court fail in doing justice . . .”). However, its usefulness, in the context of trespass writs, was questionable. See BAKER, *supra* note 180, at 62 (“It was nearly seventy years after 1285 before the abandonment of the *vi et armis* requirement in practice, and the fictions resorted to in the interim would have been unnecessary and absurd if the statute had already authorized the change.”). In the 1350s, perhaps occasioned by challenges created by the Black Plague, a new writ (*trespass on the case*) removed the *vie et armis* language. See BAKER, *supra* note 180, at 61–64.

184. BAKER, *supra* note 180, at 341 (2002); DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 44 (2001). Innovations like these allowed for something like the

fraudulent transaction or, as David Ibbetson suggests, a shipping accident.<sup>185</sup> Because no one had to swear an affidavit to the underlying facts, clerks were able to issue the necessary writ despite the evidence of “force” being thin or non-existent.<sup>186</sup> Reflecting on the writings of Sir Henry Maine, Michael Lobban writes: “fictions allowed the law to develop, while disguising the fact that it was changing. They maintained a sense of stability in law, at the same time that the law moulded [sic] itself to the needs of its community.”<sup>187</sup> This idea was explained well by Maksymillian Del Mar who wrote that “[l]egal fictions . . . are created in the coal-face of legal change, which serves two masters: the conservative pressure of the system and the call of the injured pleading for a remedy.”<sup>188</sup> If anything was clear, it is that jurists wanted the evolution of the law to bear the imprimatur of yesterday’s foundation.

### 3. Bentham’s Warning

Perhaps no one<sup>189</sup> was a bigger enemy of legal fictions than Jeremy Bentham (1748-1832), who compared fictions-to-justice with swindling-to-trade;<sup>190</sup> compared their usefulness-to-justice with poison-to-sustenance;<sup>191</sup> and, called them the “basest sort of lying.”<sup>192</sup> In other places, he wrote that “the pestilential breath of Fiction poisons the sense of every instrument it

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action of trespass *vi et armis* to give rise to general actions for torts, contracts, and recovering property. See Lobban, *supra* note 178, at 200.

185. See IBBETSON, *supra* note 184, at 44. “Similar writs alleging the forcible extraction and adulteration of wine, all looking suspiciously like shipping accidents, are found throughout the fourteenth century.” *Id.* at 44–45.

186. BAKER, *supra* note 159, at 41.

187. Lobban, *supra* note 178, at 200.

188. Del Mar, *supra* note 179, at 228.

189. According to Del Mar, “the bulk of literature [on fictions] is negative in tone,” noting that fictions are not necessary in mature legal systems. Del Mar, *supra* note 179, at 239.

190. 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 283 (Bowring’s edition, 1843); but see Michael Quinn, *Fuller on Legal Fictions: A Benthamic Perspective*, in LEGAL FICTIONS IN THEORY AND PRACTICE 56–57 (2015) (arguing that Bentham while critical of fictions did not reject them *per se*). As Michael Quinn outlines, Bentham was most bitter with a type of “theoretical fiction” which he simply called fallacies—e.g. natural law, social contract—which he considered to be dangerous when “swallowed whole by the mass of the people, since lawyers and politicians use them *as if* they were true.” Quinn, *supra*, at 65, 67 (emphasis added). If none of that is convincing, then there is always Bentham himself who admitted that “there was once a time, perhaps, when [fictions] had their use.” 1 BENTHAM, *supra*, at 268.

191. 6 BENTHAM, *supra* note 190, at 582.

192. *Id.*

comes near”<sup>193</sup> and “in English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.”<sup>194</sup>

While Bentham’s protestations are certainly characteristic of his ornate writing, his warnings of the danger of legal fictions are well noted.<sup>195</sup> Looking to Bentham, Michael Quinn offers this stark analysis: “[t]he powerful know that to determine the terms of discussion is to rule. The point of legal fictions . . . is to divert attention and sow confusion, and thereby to stifle investigation.”<sup>196</sup> While in fictions it may be that the audience is being deceived through the act of counterfactual-assertions—perhaps driven toward a utilitarian purpose that ostensibly serves the public good—a danger remains when judges, driven by the whims of partisan alignment and expediency, fail to acknowledge that the tool of deceiving others may often become a tool of self-deception.<sup>197</sup> A failure to examine these fictions and the underlying evidence that contradict leads to error in the development of the law and the harm that comes when deception is weaponized by one groups to rule over another.<sup>198</sup>

These warnings should bring us pause when considering the utility of the non-distinction approach in its current sweep. While other uses for fictions

193. *Id.* at vol. 1, p. 235.

194. *Id.* at vol. 5, p. 92.

195. Maine had this to say about Bentham’s revulsion of fictions: “We must . . . not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law.” MAINE, *supra* note 159, at 26.

196. Quinn, *supra* note 190, at 67.

197. *Id.* at 68.

198. *Id.* “Fictions which become embedded in our mental furniture prevent salient questions from occurring to us, so that we think under the direction of an unconscious self-denying ordinance.” *Id.*; see also Smith, *supra* note 159, at 153 (fictions “tend to prevent investigation as to the fundamental principle underlying a rule of law and to retard the framing of a statement of the rule in strictly accurate terms.”). Remarking on the acceptance of historical fictions *uncritically*, Pierre Olivier writes:

It stands to reason that if a rule is accepted in vague and half-formulated form, the uncertainty surrounding it will sooner or later give rise to problems of application and eventually to costly litigation. Similarly, if the principle underlying a legal rule is neglected and represented by a fiction, the future development of the rule will remain in a morass of uncertainty. True development of the law is only possible by developing and extending its fundamental principles. In the absence of a clear insight into the principles underlying a legal rule, its application and extension cannot proceed in a rational and intelligent manner.

PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE 136 (Aubert eds. 1975).

exist,<sup>199</sup> there are three particular sub-species that embrace the type of reasoning offered by the courts in Section III.

### B. *Non-Distinction as Legal Fiction*

As noted above, the general approach to legal fictions is to understand them as useful statements or assumptions made in contradiction to known facts. A further definition that underlies the approaches below is the idea that fictions are useful because they allow the alteration of the law while still

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199. While legal fictions have been shown to provide a number of useful procedural mechanisms throughout history (discussed above), they have also been used couch abstract ideas in an effort to help us better understand the world. Christoph Kletzer, *Kelsen on Vaihinger*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 24 (2015). For example, a fiction can be used to assume that a thing existed that in fact had not (“metaphysical fictions”) or to explain, justify, or make sense of the law (“explanatory fictions”). Lobban, *supra* note 178, at 204. A more interesting use involves assuming a historical lineage of a practice that had simply become fixed (“historical fictions”). *Id.*; see also FULLER, *supra* note 154, at 56 (“[S]ome few may perhaps be intended as apologies for rules of law that have existed from the beginning of our legal system.”). Bentham remarks that the historical fiction was a “willful falsehood, having for its object the stealing [of] legislative power.” 1 BENTHAM, *supra* note 190, at 243. Among its other uses—as pointed out by Hans Kelsen—is that legal fictions provide an expedient way to subsume a case under an existing norm, which would otherwise not capture it—that is “to treat the case *as if* it fell under the legal norm.” Hans Kelsen, *On the Theory of Juridic Fictions. With Special Consideration of Vaihinger’s Philosophy of the As-If*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 14 (Christoph Kletzer trans. 2015). In this vein, Hans Vaihinger describes their use as a process towards “cognition of the actual world” by means of a “fabrication, a contradiction, a sleight of hand, a detour and passage of thought.” *Id.* at 4, 7 (“[I]t lies within the nature of fictions to entangle us in contradictions.”). A helpful analogy offered by Kelsen to understand fictions, especially why they can be characterized as detours, is a rock climber who purposely has to climb down in order to avoid some obstacle standing in the way of his final destination. *Id.* at 5. While the final destination is the “object of cognition,” the understanding of some particular legal order, the climb down as analogy for legal fiction connotes the idea of having to consciously assume something in contradiction to this final object in order to finally reach it. *Id.* Vaihinger writes:

By its very own doing thought leads us onto certain pseudo-concepts just as seeing leads us into unavoidable optical illusions. As soon as we recognise this optical semblance as being necessary, as soon as we consciously accept the fictions created by it . . . and also see through them we can bear the ensuring logical contradictions as necessary products of our thought and reach the insight that they are the necessary consequences of the inner mechanism of the thinking organ itself.

*Id.* at 7. Said more succinctly, the idea behind legal fictions is to “seemingly fashion legal truths out of factual falsehoods.” Lind, *supra* note 154, at 84. This latter usage will be discussed in much greater detail next to show how the non-distinction approach is a legal fiction.

retaining traces of a former system.<sup>200</sup> While it is difficult to judge what is the underlying motive for using the non-distinction approach to form new legal rules,<sup>201</sup> below are three approaches that explain the type of legal fiction that has been embraced.

### 1. Lon Fuller: False Statements of Utility

The first is the classical definition provided by Lon Fuller when he describes a fiction to be “either (1) a statement propounded with a complete or partial consciousness of its falsity, *or* (2) a false statement recognized as having utility.”<sup>202</sup>

Following the reasoning from *Vaihinger*, Fuller considered that the quality of fictions is not by virtue of their truth or conformity with reality—an incoherent standard since by definition fictions contradict reality—but in their *utility* for “simplifying and organizing data, and in converting new experiences into familiar terms.”<sup>203</sup> This utility,<sup>204</sup> central to Fuller’s own understanding of fictions, is connected with a conscious<sup>205</sup> effort to improve the law.<sup>206</sup> Fuller writes that while fictions are not meant to deceive,<sup>207</sup> they do provide the means for changing the rule of law by judges taking on a legislative function in “acting under the influence of some half-articulate philosophy of law” that seems to them to be justified in light of prior formulas.<sup>208</sup> While cognizant of the inadequacies of using fictions, judges do so nonetheless for lack of alternatives for expressing the same idea or

200. See Smith, *supra* note 159, at 149–50. The “purpose (and virtue) of the legal fiction was to ease the impact (and lessen the appearance) of legal change . . .” Smith, *supra* note 111, at 1470. Further, where the classical use was a device used for “softening,” new legal fictions are “instrumental in *justifying* doctrine, whether received or newly established.” *Id.*

201. Peter J. Smith notes that “new legal fictions [like their classical use] are sometimes a device that judges deploy to mask the fact that they are arrogating to themselves the power to make normative choices, and thus to make law itself.” Smith, *supra* note 111, at 1469.

202. FULLER, *supra* note 154, at 9 (emphasis added); Smith, *supra* note 111, at 1466 (“Fuller provided the most comprehensive treatment of the phenomenon . . .”).

203. Quinn, *supra* note 190, at 56 (citation omitted).

204. Fuller admits that *Vaihinger*’s philosophy bears a close similarity with American pragmatism. FULLER, *supra* note 154, at 96.

205. Fuller is keen on the idea that “[a] fiction becomes wholly safe *only* when it is used with a complete consciousness of its falsity.” *Id.* at 10 (emphasis added). A fiction may be “an expedient, but *consciously false*, assumption.” *Id.* at 7, 9 (citation omitted).

206. Lind, *supra* note 154, at 85; see also FULLER, *supra* note 154, at 9–10 (“A fiction taken seriously . . . becomes dangerous and loses its utility.”).

207. While certainly possible for fictions to be implicated by a process of deceit, Fuller writes that its original use was not intended to serve this function. FULLER, *supra* note 154, at 7, 57 (“[I]t is . . . difficult to see how the supposed deceit could actually succeed.”).

208. *Id.* He goes on, “[fictions] may, perhaps, be held accountable as accomplice in a process of deception, but not as principal.” *Id.*



developing a similar doctrine.<sup>209</sup> Interpreting the implicit suggestions of Vaihinger, Fuller writes that our minds undergo a process of reducing reality into something we are more familiar with or converting new experiences into familiar terms.<sup>210</sup>

Maybe more interestingly is not how the process works, but why it works. The question posed by Vaihinger is instructive for our general discussion on the non-distinction approach: “How does it come about that with consciously false ideas we are yet able to reach conclusions that are right?”<sup>211</sup> Fuller, in discussing motives for fictions,<sup>212</sup> argues that fictions are often implemented as devices to escape existing laws or “vague principle of jurisprudence or morals.”<sup>213</sup> If the right under the First Amendment stands to apply to sellers of goods in the public arena, then judges must necessarily remove the protection of the First Amendment in order to realign the present cases with fact patterns formerly rejected (i.e., racial invidious discrimination).

Among the useful analogies offered by Fuller is the one comparing legal fictions to scaffolds supporting “new developments in thought,” noting that once the building is complete, the scaffolds are removed so long as the falsity of the claim is readily acknowledged.<sup>214</sup> This allows the “defects” of

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209. *Id.* at 8, 10. “A judge may find himself forced to employ a fiction because of his inability to state his result in nonfictitious terms.” *Id.* at 64. Furthermore, “the fiction is often but a cruder outcropping of a process of *intellectual adaptation* which goes on constantly without attracting attention.” *Id.* at 66 (emphasis added). This statement corresponds closely with the pragmatic realignment approach—especially, within the premise of adapting new rules into old categories with minimal disturbance. *Infra*. Section IV.A.iii.

210. FULLER, *supra* note 154, at 106.

211. *Id.* at 103.

212. Fuller notes that although discovering the motives for fictions is important, the process is certainly difficult and leads us into a “conjectural field.” *Id.* at 8. He writes that “[o]ne can scarcely conceive of a more complex and speculative problem than that of human motives.” *Id.* at 49; *see also* Kenneth Campbell, *Fuller on Legal Fictions*, 2 LAW AND PHILOSOPHY 339, 346–47 (1983) (“Reference to motivations . . . tends to be rather more ambiguous between conscious reasons and the unconscious desires and beliefs that lead to performance of that action.”).

213. FULLER, *supra* note 154, at 53. The example Fuller provides for escaping “existing rules” is the introduction of the attractive nuisance doctrine that would otherwise not apply given the existing laws that says “no duty [of care to] . . . trespassers.” *Id.* at 53, 66–68.

214. Quinn, *supra* note 190, at 67. This metaphor was coined by John Chipman Gray. Knauer, *supra* note 157, at 11. Bentham thinks that removing this scaffold should be immediate once his own model is available, noting it to be “a disgrace to the architect that rubbish and scaffolding should continue in any part to deform the building.” Quinn, *supra* note 190, at 67. I tend to agree that the fiction of non-distinction, although meriting some utility in unique factual circumstances that lead to the correct legal conclusion, should be immediately removed when another approach based on a more sophisticated examination of

existing laws on speech and religion—as rightly applied to protecting a right of refusal for expressive acts—to give way to a traditional interest of ridding invidious discrimination by the process of applying the non-distinction approach. As Fuller writes, “[T]he fiction is the cement that is always at hand to plaster together the weak spots in our intellectual structure.”<sup>215</sup> This approach allows the judge a sense of emotional conservatism, a self-deception that the existing rules do in fact determine the case and that no-real innovation has taken place.<sup>216</sup>

This idea is further elaborated when we look to the pragmatic approach (below). For now, it is worth noting how well this connects to Fuller’s discussion of linguistics<sup>217</sup> and the use of terms like “discrimination” to apply to the cases in Section III. The non-distinction approach has the benefit of, not only aligning the scaffold with an *old* and rejected tradition that allowed for race-based discrimination, but also allowing for the same consequences to apply to a novel act (i.e., refusing an artistic request based on fears of endorsing sinful behavior) in a way that produces the same normative consequences.<sup>218</sup> This is further elaborated in our second approach.

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the facts can be applied. As Jeremiah Smith writes, while the scaffolding serves a function while the building is in construction, after it is complete, it serves only to obscure it. Smith, *supra* note 159, at 155.

215. FULLER, *supra* note 154, at 52.

216. *Id.* at 58; *see also* Smith, *supra* note 159, at 150 (The fiction is “frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration at the hands of the judges.”).

217. “The fiction is further a phenomenon of language in the sense that the question whether a given statement is a fiction is always, when examined critically, a question of the proprieties of language.” FULLER, *supra* note 154, at 11. To the question of whether all fictions should be rejected, Fuller writes that this approach is inadvisable given how much fictions have become “the growing pains of the language of the law.” *Id.* at 22. His answer is one of moderation: some fictions should be rejected, others retained. *Id.*

218. Borrowing from Fuller’s discussion on legal relations that are “*accurately described* and *actually enforced*” (e.g., the way the law talks about a husband and a wife) as distinct from fictions—in the context of a legal relationship between the act of refusing a certain request from same-sex couples and the requisite intent for invidious discrimination, the non-distinction approach is “inadequate and misleading.” *See id.* at 33. While courts seemingly imply that the legal relation between a seller and a buyer in the above-mentioned cases is one of discriminatory intent in violation of the state’s antidiscrimination laws, this is simply an inaccurate description which leads to a false application of law (or at least what the law intended to protect).

## 2. Maksymilian Del Mar: Suspension of Operative Facts

Maksymilian Del Mar talks about a second way of using fictions that relates back to the non-distinction approach.<sup>219</sup> This approach involves suspending one or more of the operative facts required for an “associated normative consequence” when proof is absent or proof of the opposite is available.<sup>220</sup> An abstract example of this is offered by Peter Birks that goes like this. A normative consequence “X” can be achieved so long as four (hypothetical) elements are met: A, B, C, and D.<sup>221</sup> However, judicial determination over time may allow the same results (i.e., X) if the claimants can show any *two* of the elements—say A and D or A, D, and Z.<sup>222</sup> So, despite future claimants still being able to reach the same normative consequence by showing all four elements (i.e., A, B, C, and D), a new method has been developed over time that allows for a showing of only two elements to reach the same normative consequences *as if* all four elements had been met.<sup>223</sup>

This approach is akin to the idea mentioned in the context of the common law where fictions allowed the law to grope its way towards a principle.<sup>224</sup> Unlike Fuller’s approach, this one does not require a “consciousness of falsity” and really relates to those instances where issues exist with finding available proof.<sup>225</sup> Unlike Bentham, Del Mar sees the benefits of fictions and believes that if used wisely, over time, they can provide to courts a dynamic resource to “balance flexibility and responsiveness with stability and predictability.”<sup>226</sup> Like Fuller’s scaffold that supports the development of thought over time (as evidence in common law), Del Mar offers an analogy to building blocks that possess the quality of being shaped or removed in an effort to create a more stable structure.<sup>227</sup> Unlike the views of Maine or Pound that dismissed the need for fictions in a

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219. Del Mar, *supra* note 179.

220. *Id.* at 226, 229–30.

221. *Id.* at 235.

222. *Id.*

223. *Id.* (citing Peter Birks, *Fictions ancient and modern*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORÉ* 86 (MacCormick and Birks eds., 1986). Baker writes,

The essence of the classic English fiction is that proof of a certain fact asserted in a lawsuit was completely dispensed with by the simple expedient of denying any means of disputing it. The false allegation in such cases was of some fact which had once been required [is] . . . no longer regarded as material.

TWO BODIES, *supra* note 159, at 41.

224. Del Mar, *supra* note 179, at 235.

225. *Id.* at 226.

226. *Id.* at 227.

227. *Id.*

developed system,<sup>228</sup> Del Mar considers their benefits as tools for suspending certain operative facts “already [attached to] existing rule’s normative consequences.”<sup>229</sup>

As this relates to the non-distinction approach, claimants today bringing a claim of discrimination on the basis of sexual orientation (identity) are able to couch their language in the historical prohibition on invidious discrimination *per se* (e.g., racism) without having to prove that the actions themselves have anything to do with the customer’s identity.<sup>230</sup> While a sign on the door of a business saying “No Blacks Allowed” was evidence of *per se* discrimination since the owner would not even entertain the order; today, the refusal of any request that is “inextricable connected” with the customer’s identity becomes a *per se* violation on the basis of identity. All this despite the pleadings before the court. Notably, in the outlier cases such as *Hands On Original*, the court refused to adopt the non-distinction approach because the judge refused to assign the wrongful act of invidious discrimination to a simple act of refusal without further evidence (i.e., A, B, C, and D).

Notwithstanding the benefits of using fictions, the danger of prematurely<sup>231</sup> suspending operative facts is expressed well by John Baker when he—mindful of the changing character of legal fictions—wrote that the use of fictions might at first “slip into practice without challenge, and if repeated often enough could become so rooted that a future challenge would be unlikely to succeed.”<sup>232</sup> With further repetition, the practice will be introduced into more contentious issues, “*provided that they were seen to*

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228. Maine considered fictions to be among the three ways that the law could be changed—the other two being equity and legislation. MAINE, *supra* note 159, at 24. Roscoe Pound similarly found that fictions were useful in developing the law in legal history, but like Maine, believed fictions were “clumsy device[s] . . . not suited to later times and developed systems,” in fact acting to “retard growth and clog development.” Pound, *supra* note 179, at 465–66.

229. Del Mar, *supra* note 179, at 241.

230. As Baker notes, “The object of fictions is that they allow the operation of the law to change while avoiding any outward alteration in the rules.” TWO BODIES, *supra* note 159, at 35. This idea is further connected with the minimal disturbance approach taken by Douglas Lind discussed in Section IV.B.iii and what Daniel R. Coquillette noted in his excellent book on Anglo-American Legal Heritage, he writes: “Fictions permit useful incremental reform, when wide scale reform is too threatening.” COQUILLETTE, *supra* note 180, at 283.

231. Del Mar, *supra* note 179, at 237 (“[W]e need to see that it is only after a period of time that it becomes (or might become) clear that a certain operative act can be dispensed . . .”).

232. *Id.* (quoting TWO BODIES, *supra* note 159, at 54). This is reminiscent of what Roscoe Pound called the “dogmatic fictions” that are worked out as a means for providing a rational explanation for existing precepts. Pound, *supra* note 179, at 455, 460.

have a just objective.”<sup>233</sup> Importantly, Del Mar sees that his approach as a study of “common law epistemology” (i.e., the process of how we come to know or understand the law) is something resolutely pragmatic.<sup>234</sup> This idea of pragmatism is where we turn to next.

### 3. Douglas Lind: Pragmatism of Re-Alignment

The third and final approach discussed here under the rubric of legal fictions in relation to the non-distinction approach is the idea of using fictions as a pragmatic tool to bring current facts in re-alignment with traditional norms—to make use of fictions in solving *new* problems.<sup>235</sup> This idea—alongside those mentioned above—was also introduced by Fuller when he described the *motive of convenience*, which involves the changing or adapting of the law through devices that appear to uphold a traditional way of thinking.<sup>236</sup> The idea connecting fictions with utility was also hinted on by Del Mar in the above section and will now be discussed in more detail looking to the writings of William James<sup>237</sup> and Douglas Lind.<sup>238</sup>

Specific to our discussion surrounding the common law, David Ibbetson has a helpful starting point in understanding the idea of “pragmatic incrementalism [as] the spirit of change in the common law.”<sup>239</sup> He writes,

Legal change occurs through filling in gaps between rules in the way that seems most convenient or most just at the time; through twisting existing rules, or rediscovering old ones, to give the impression that a change in the law is no more than the application of the law that was already in place; through reformulating claims into a different conceptual category, normally one less encumbered by restrictive rules; through inventing new rules that get tacked onto the existing ones; . . . through injecting shifting ideas of fairness and justice; and, very

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233. TWO BODIES, *supra* note 159, at 54 (emphasis added).

234. Del Mar, *supra* note 179, at 238.

235. See FULLER, *supra* note 154, at 94 (“[F]iction is generally the product of the law’s struggles with *new* problems”).

236. See *id.* at 59–70 (allowing for “assimilating that which is unfamiliar to that which is already known”). Quoting Savigny: “When a new juridical form arises it is joined directly on to an old and existing institution and in this way the certainty and development of the old is procured for the new.” *Id.* at 59 (citation omitted). While the judge may use nonfictitious language, he uses a fiction with an intent to bring a preferred legal “reform within the linguistic cover of existing law” in order to “avoid discommoding current notions.” *Id.* at 62.

237. WILLIAM JAMES, PRAGMATISM (2003).

238. Lind, *supra* note 154.

239. Del Mar, *supra* note 179, at 244.

occasionally, through adopting wholesale procrustean theoretical frameworks into which the exiting law can be squeezed.<sup>240</sup>

Lind takes to the optimism of Del Mar in seeing that the use of fictions can be a useful tool for advancing the law.<sup>241</sup> He proposes that they be understood as “*true* legal propositions asserted with conscious recognition that they are inconsistent . . . with true propositions asserted within some other linguistic system (or elsewhere within law).”<sup>242</sup> If used correctly, legal fictions<sup>243</sup> will inflict no damage and allow for the development of a better system of rules.<sup>244</sup> If used incorrectly, legal fictions can have the effect of “upsett[ing] settled meanings or truths, work injustice, or mask underlying processes of legal reasoning.”<sup>245</sup>

Taking to the writings of William James, Lind discusses the idea of truth—being suspended from absoluteness—can be used as a practical means toward some problem or purpose.<sup>246</sup> That truth is an instrument for carving out those things suitable to our preference—guided by our conception of reality—in an every changing world of experience.<sup>247</sup> Looking to a stock of new information, William James argues that “we are all extreme conservatives” for we all seek to realign our new gained

240. DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATION 294 (1999).

241. Lind, *supra* note 154, at 84. Lind writes that legal fictions treated as conscious false assumptions is regrettable since this creates “logical confusion, renders fictions unnecessarily confounding, and compromises the integrity of law and judicial decision-making.” *Id.* Sidney T. Miler likewise shares in their optimism, writing: “legal fictions, which required the play of some fancy in their beginning, have fallen not only into disuse but also into disfavor. Many of them, however, have done good work in the past, and some are doing it now.” Miller, *supra* note 166, at 623.

242. Lind, *supra* note 154, at 84. This is reminiscent of Baker’s discussion of the rule of law as distinct from fictions since developing legal systems imply the use of certain concepts for certain legal purposes that no one believes are actually true. See TWO BODIES, *supra* note 159, at 44–45.

243. Lind calls them a “form of creative lawmaking, a phenomenon of legal (primarily judicial) technique employed to resolve trouble in the legal environment.” Lind, *supra* note 154, at 84.

244. *Id.*

245. *Id.*

246. *Id.* at 88–90; see also JAMES, *supra* note 237, at 97 (“The true . . . is only the expedient in the way of our thinking.”). Lind writes that “the truth of a proposition depends on its ‘consequences to someone engaged on a real problem for some purpose.’” Lind, *supra* note 154, at 90 (quoting F.C.S. SCHILLER, HUMANISM: PHILOSOPHICAL ESSAYS 59 (1903)).

247. *Id.* at 90–91.

information with old trains of thought.<sup>248</sup> Our commitment to the old ways often meets the demands for radical modification when we meet new facts tending to contradict our traditional notions.<sup>249</sup> If the old cannot survive and a blanket change of opinion is not an option, we seek to graft the new facts within our existing systems with minimum disturbance—the new experiences allowed to refine our previous belief.<sup>250</sup> We try to fit new wine into old wineskins—“gear[ing] the new idea into a workable notion that reconciles satisfactorily the new truth and the old stock.”<sup>251</sup>

From there, Lind applies this same thinking to legal fictions as a tool within a specific system used in an effort to assimilate new information to a traditional approach.<sup>252</sup> His ultimate goal in applying this method is to get away from the thinking that legal fictions are legal falsehoods and to see their propositions—in light of the specific legal system—as, in fact, true.<sup>253</sup> Under this model, statements like “a corporation is a person” must be

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248. JAMES, *supra* note 237, at 26; *see also* FULLER, *supra* note 154, at 82 (defining “intellectual conservatism” as “the fiction that makes a new legal conclusion ‘thinkable’ by converting it into familiar terms”). As noted above, Fuller also argues that implicit in the discussion of *Vaihinger* is the process of converting new experiences into familiar terms. *See also* FULLER, *supra* note 154, at 106 n.21. “*Vaihinger*’s fundamental theses it that our minds do not merely reflect reality, but alter it and ‘work it over’ to suit our needs.” *Id.* at 115; *see also* Lind, *supra* note 154, at 91 (“*Loyalty* to the older truths is the first principle in this process; most often it wins out.”).

249. JAMES, *supra* note 237, at 26.

250. *Id.*; Lind, *supra* note 154, at 92. “The truths we fashion from experience and reflection accordingly are ‘effective in just the degree in which [they have] been worked into a system—a comprehensive and orderly arrangement.” *Id.* (quoting JOHN DEWEY, *ESSAYS IN EXPERIMENT LOGIC* 54 (1916)).

251. Lind, *supra* note 154, at 91. “[The new idea] preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty, but conceiving that in ways as familiar as the case leaves possible . . . New truth is always a go-between, a smoother-over of transitions. It marries old opinion to new fact as ever to show a minimum of jolt, a maximum of continuity.” JAMES, *supra* note 237, at 27. As Baker notes, fictions may correspond to our experiences that “it is more convenient, more fitting, and perhaps more comforting, to preserve the traditional forms over the centuries while modifying—sometimes drastically changing—their operation.” TWO BODIES, *supra* note 159, at 48. Speaking on the human tendency to convert sad events into happy ones, Tourtoulon writes that the “lawmaker sometimes tries . . . to efface unfortunate realities as far as possible and to evoke the shades of fortunate realities *which have not been achieved.*” TOURTOULON, *supra* note 165, at 386 (emphasis added).

252. Lind, *supra* note 154, at 91.

253. *Id.* at 93. “By the pragmatist understanding, an utterance in the form of a legal fiction, such as ‘A corporation is a person’, must be investigated for meaning and evaluated for truth strictly *within law.*” *Id.* In this sense, the non-distinction approach is still a legal fiction, but now a *true* proposition if seen strictly within the law (subject to the interpretation of reliance verses discussed in Section V.A.).

investigated for meaning and/or evaluated for truth strictly *within law*.<sup>254</sup> In this sense, the non-distinction approach is still a legal fiction, but now a *true* proposition if seen strictly within the law—subject now to attack based on, *inter alia*, reliance verses and proper distinctions (discussed in Section V) that make up the legal construction of this proverbial scaffold.

Considering the re-alignment approach in the context of the above-mentioned cases. Courts are taking new facts, stripping the claimant's contextual reliance on the First Amendment where the Constitution would otherwise protect them, and re-aligning the present debate on sexual orientation in the framework of race-based antidiscrimination laws. This is arguably done not based on the merit of the non-distinction approach, but as Lind described, to create minimum disturbance and maximum continuity. Seeing the vitriolic outcry, the emotional toll on same-sex claimants, and the negative popular press surrounding these businesses that refuse to serve gay couples, this shift is understandable. Tourtoulon summarizes these sentiments well when he writes that while “the fiction is a subtle instrument of juridical technic, it is also clearly the expression of a desire inherent in human nature, the desire to efface unpleasant realities and evoke imaginary good fortune.”<sup>255</sup> The past struggles of the gay community are real and the desire to retain their present momentum is important. *But at what cost?*

a. A problem of overflow

Even if we grant the re-alignment approach as a just theory, and that the falsity of legal propositions in everyday life does not affect the “proposition's truth value within law,”<sup>256</sup> decisions made by the court cannot be hermetically sealed off from popular opinion. The press is treating those opinions *as if* they were true, thus introducing a second-level conflation (first being the non-distinction approach) between truth within the law—and, now, truths in the public square (despite meaning and truth being found strictly *within the law*).<sup>257</sup> Lind himself points out that legal

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254. *Id.*

255. TOURTOULON, *supra* note 165, at 386.

256. Lind, *supra* note 154, at 93.

257. Fuller writes that economist's use of the term “economic animal” has utility if used to develop laws of economics, but if used to develop foundations in ethics would be disastrous. FULLER, *supra* note 154, at 107. Fuller writes: “For certain purposes it is useful to exclude the field of morality from that of law. But again, the separation must be regarded as provisional only. It must not be taken for a permanent reality.” *Id.*



fictions have value to the extent they “work no havoc on any general stock of beliefs outside law.”<sup>258</sup>

While there is some benefit in using legal fictions that yield only “harmless inconsistency while working some functional utility or effectiveness within law,”<sup>259</sup> the non-distinction approach has caused great economic and emotional harm to individuals like Melissa Klein, Barronelle Stutzman, and Jack Phillips, thanks to the rhetoric of re-aligning their identities with Jim Crow racists. This is why it is important to stress the “gulf between reality and fiction”—keeping a close eye on the two and the consequences of conflating one into the other.<sup>260</sup> The court’s use of legal fictions as a pragmatic tool by the process of employing the non-distinction approach is among those nefarious uses mentioned by Lind that tends to be a tool for distorting the settled application of the First Amendment, while seemingly masking the underlying processes of legal reasoning behind a veil of political expediency as an effort to protect the dignity of the LGBT community. We turn next to challenging some of the foundations of the scaffold developed through the non-distinction approach and suggest a subtle shift in our legal thinking that allows for religious claimants to assert first amendment defenses while preserving antidiscrimination laws in their proper context.

## V. BETWEEN SANCTION AND PERSECUTION

Where the common law used the instrument of fictions to develop a system better fitted to the claimants specific requests, I have argued that the non-distinction approach today advances the purpose of protecting the dignity of the LGBT community while insuring the survival of antidiscrimination laws as a tool for social transformation.<sup>261</sup> By realigning

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258. Lind, *supra* note 154, at 94. Jurist Matthew Hale notes that “though fictions be a shew of something that is not . . . they are but expedients without injuring anybody to bring men to their rights.” MATTHEW HALE AND WILLIAM FLEETWOOD, HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION 24 (Prichard and Yale eds., 1993); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 43 (Lewis ed., 1897) (“no fiction shall extend to work an injury”).

259. *Id.*; *see also* TWO BODIES, *supra* note 159, at 54 (“[T]here was a maxim that legal fictions ought not to hurt anyone.”).

260. *See* HANS VAHINGER, THE PHILOSOPHY OF AS IF 105–06 (Ogden trans., 1935).

261. For those concerned with the treatment and dignity of the LGBT community understandably would like to use fictions to ensure that the fortunes of the law fall in favor of the LGBT claimants. Tourtoulon writes: “While the fiction is a subtle instrument of juridical technique, it is also clearly the expression of a desire inherent in human nature, the desire to efface unpleasant realities and evoke imaginary good fortune.” TOURTOULON, *supra* note 165, at 386.

the present debate with the post-Civil War era attempts to oppress the African American community, the law has developed a strong normative case for a sweeping application of antidiscrimination laws notwithstanding First Amendment defenses.

However, this is not the only way that the law can approach the joint interest of protecting dignity and ensuring that antidiscrimination laws are not upended. There is another, a more adequate approach,<sup>262</sup> to ensure a balance between giving to bigotry no sanction and to persecution no assistance. This approach looks first to some of the foundational pieces of the non-distinction approach (i.e., reliance verses and non-distinction) in an effort to challenge their application in certain cases. Next, it argues for a three-part framework that converts the conclusory nature of the non-distinction approach into an opportunity for rebuttal.

#### A. *Casting a Wider Framework*

The means to resolve this problem begins with an honest assessment of the major cases relied on by state courts to drive the application for the non-distinction approach and the realization that a distinction does in fact exist. To use an expression from J.H. Baker, we need the “veil to be lifted, or dropped”<sup>263</sup> in an effort to advance the proper use of legal language so that the proper normative consequences apply.

##### 1. *Reliance Verses*

While tracing the origin of the non-distinction approach can only yield a tentative conclusion,<sup>264</sup> the cases listed above continue to return to essentially the same proof-texts from the Supreme Court that allegedly “rejected . . . attempts to distinguish between a protected status and conduct closely correlated with that status.”<sup>265</sup> Courts have generally focused exclusively on the same four cases, using essentially the same boilerplate

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262. “[T]he fiction is always ready to give way to a more ‘adequate’ explanation.” FULLER, *supra* note 154, at 71.

263. TWO BODIES, *supra* note 159, at 42.

264. *Cf. id.* at 35 (stating that the “precise origin of a fictional device is . . . almost always beyond recovery”).

265. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013). The Superior Court in *Arlene’s Flowers* uses the language of a long held tradition from the U.S. Supreme Court, “that discrimination based on conduct associated with a protected characteristic constitutes discrimination on the basis of that characteristic.” *Arlene’s Flowers*, 2015 WL 720213, at \*15 (Wash. Super. 2015) (internal citations omitted).

citations, without much further discussion as to the appropriateness of application.<sup>266</sup>

For example, courts looked to *Bob Jones University* in support, citing parenthetically that the Supreme Court held that “discrimination on the basis of racial affiliation and association is a form of racial discrimination.”<sup>267</sup> Given Bob Jones’ racist history of excluding black students until 1971,<sup>268</sup> hardly anyone is still questioning the underlying motive of the school in targeting black students on the basis of identity. The fact that Bob Jones has since apologized for what it called “racially hurtful” policies is indicative of a failure acknowledged by most.<sup>269</sup> Developing legal precedent through imputation of bad-faith motivation from attenuated analogies is precisely what undergirds the utility of legal fictions.

Similarly, *Lawrence v. Texas*<sup>270</sup> does little to advance a sound approach to justifying a non-distinction approach. While the Court in *Lawrence* was right to strike down the *conduct*-based regulation on same-sex sodomy upheld in *Bowers*,<sup>271</sup> any relevant cross-application would require the shift from the commission of certain acts to a state mandated endorsement of those, now decriminalized, acts.<sup>272</sup> This step moves us beyond *Lawrence*,<sup>273</sup> which, while emphasizing the liberty of thought, belief, and expression on

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266. See, e.g., *Elane Photography*, 309 P.3d at 61–62; *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280–81 (Colo. App. 2015); *Arlene’s Flowers*, 2015 WL 720213, at \*15 (Wash. Super. 2015).

267. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

268. *Id.* at 580.

269. *Statement about Race at BJU*, BOB JONES UNIV. (2008), available at <http://www.bju.edu/about/what-we-believe/race-statement.php>.

270. The language lifted from *Lawrence* is, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

271. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1985) (The Court was unwilling to announce “a fundamental right to engage in homosexual sodomy.”), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

272. *Lawrence*, 539 U.S. at 571 (“The issue is whether the majority may use the power of the State to enforce these views on the whole society.”).

273. Although proving a way for the conflation, as pointed out by Professor Nejaime:

In linking sexual-orientation-based identity to sexual orientation-based liberty (status to conduct), Kennedy connected the more ephemeral sexual relationship between the petitioners to more permanent same-sex relationships, thereby suggesting the way in which relationships are linked to the actualization of identity.

Nejaime, *supra* note 56, at 1216.

par with intimate conduct,<sup>274</sup> stressed that historical voices condemning homosexual conduct does not mean that “the majority may use the power of the State to enforce these views on the whole society through operation of the *criminal law*.”<sup>275</sup> Using *Lawrence* to prop up a new theory on non-distinction, at best, is to retroactively insert an answer into the opinion to a question that was never raised. At worst, it would support the idea that a majority *may* enforce its own moral code on the tiny number of business owners who consider compliance to be sinful.<sup>276</sup>

The same is true for using *Christian Legal Society v. Martinez*, typically cited to support the non-distinction approach based on the language meant to be applied only in that context. For example, the court in *Arlene’s Flowers* cites *Martinez* with the parenthetical that reads: “University student group’s claim that it did not prohibit gay members, only those who engaged in or supported same-sex intimacy rejected because prior decisions ‘have declined to distinguish between status and conduct *in this context*.’”<sup>277</sup> This statement is instructive since whether the group refused to allow gay members based on identity or conduct is irrelevant since the school’s all-comers policy never required that distinction. As the Court noted, Hastings interprets the all-comers policy to require that student groups “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.”<sup>278</sup> The Court, in discussing the potential for making a distinction for excluding certain students from the all-comers policy, noted the “daunting labor” required of Hastings to determine whether a student organization is discriminating based on identity or belief.<sup>279</sup> As a remedy for these concerns, neither the Court, nor Hastings interpreted the non-discrimination policy to conflate conduct and belief discrimination. Instead, to help the school police its policy without having to decipher intent based on status or belief, the Court deferred to the school’s own interpretation that *either* would be barred *in*

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274. *Lawrence*, 539 U.S. at 562.

275. *Id.* at 571 (emphasis added).

276. *See id.*

277. *Arlene’s Flowers*, No. 13-2-00871-5, 2015 WL 720213, at \*15 (Wash. Super. Feb 18, 2015) (emphasis added).

278. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 671 (2010). In rejecting the Christian Legal Societies request for exemption, Hastings reiterated this point by saying that “CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation.” *Id.* at 673.

279. *Id.* at 688. As the Court stated in its discussion over viewpoint neutrality, “[t]he Law School’s policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior.” *Id.* at 696.

*this context*.<sup>280</sup> This context is one based on the reasonableness of withholding certain benefits and not based on prohibiting certain actions by force of law that carries a higher burden of proof typically associated for non-compliance.<sup>281</sup>

The final case is *Bray v. Alexandria*, where Justice Scalia wrote that “[a] tax on wearing yarmulkes is a tax on Jews.”<sup>282</sup> While certainly possible,<sup>283</sup> this statement is not necessarily true and should not be used as a *per se* basis for concluding that a restriction on conduct “serves to disrespect and subordinate”<sup>284</sup> the individual. The Supreme Court acknowledged in *Goldman v. Weinberger* that a policy on visible religious articles of clothing in the military is a reasonable requirement meant to ensure uniformity.<sup>285</sup> The Court even noted that for petitioners like Mr. Goldman who wanted to wear a yarmulke to express his faith, military life and its regulations may not be suitable.<sup>286</sup>

While the cases certainly invoke the appropriateness of distinguishing between status and belief, they do nothing to construct a doctrine that allows for conclusive conflation of the two. Proper distinctions must be made in certain instances, which is where we turn to next—picking up where we left off in *Bray*.

## 2. Proper Distinction

The Court in *Bray* laid out the principles for making the type of distinction being argued in this Article. Justice Scalia, writing for the majority, made these keen observations, worth quoting in full:

Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be *presumed*. But opposition to voluntary abortion cannot possibly be considered

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280. *Id.* at 688–89.

281. *Id.* at 682–83 (“Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.”).

282. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993). Case otherwise had nothing to do with Judaism, but with buffer zones around abortion clinics. *Id.* at 266.

283. The case *City of Hialeah* is instructive. There, the Supreme Court struck down a law that intentionally targeted a group of followers who conducted ritualized slaughters. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[I]t is only conduct motivated by religious conviction that bears the weight of the governmental restrictions.”).

284. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

285. *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986).

286. *Id.* at 509.

such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.<sup>287</sup>

These same sentiments were expressed by Justice Kennedy (who joined the majority in *Bray*) when he wrote in *Obergefell* that opposing same-sex marriage can be “based on decent and honorable religious or philosophical premises.”<sup>288</sup> Premises that in fact represent a comprehensive history defining the teleology behind marriage as an institution between one man and one woman inextricably connected with childbearing.<sup>289</sup> The historical

287. *Bray*, 506 U.S. at 270 (emphasis added).

288. *Obergefell*, 135 S. Ct. at 2602. This statement in application seems in direct tension with Justice Kennedy’s other statement where he states that the “disability on gays and lesbians” created by marriage laws that prohibit same-sex marriage and the corresponding benefits “serves to disrespect and subordinate them.” *Id.* at 2604. As applied, by invoking the non-distinction approach, courts are disqualifying any notions of “decent and honorable” premises in objecting to serving a same-sex wedding by attaching the corresponding stigma with shopkeepers who refused to serve blacks. I hardly doubt anyone today will accept that “honorable and decent” premises exist to discriminate against blacks. Cf. Timothy J. Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 FIU L. REV. 85, 86–87 (2015) (“The promise that people of faith may ‘advocate’ and ‘teach’ their beliefs about marriage gives scant assurance that they can in fact act on those beliefs.”) The dissenters in *Obergefell* also expressed these concerns. For example, Justice Robert notes that the majority “suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views on marriage,” while conspicuously failing to affirm the right to act (or exercise) on those beliefs. *Obergefell*, 135 S. Ct. at 2625 (Robert, J., dissenting). Justice Alito offered this prescient warning:

Perhaps recognizing how its reasoning may be used, the majority attempts . . . to reassure those who oppose same-sex marriage that their rights of conscience will be protected . . . . We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

*Id.* at 2642–43 (Alito, J., dissenting).

289. See, e.g. SHERIF GIRGIS ET AL., WHAT IS MARRIAGE 49–50 (2012) (noting a 2,400-year philosophical tradition “distinguish[ing] friendships . . . from those special relationships that extend two people’s union along the bodily dimension of their being and that are uniquely apt for, and enriched by, reproduction and childbearing”); JOHN WITTE JR., FROM SACRAMENT TO CONTRACT 17 (2012) (“The Western tradition inherited from ancient Greece and Rome

teaching of Christianity attests to this long-held view that marriage as union between one man and one woman is a part of its core teachings on sexual ethics and remains an inseparable part of Christian humanism.<sup>290</sup> The Supreme Court had largely agreed with this definition up until *Obergefell*, including statements from Justice Brennan and Justice Kennedy, who acknowledged that marriage is a “basic civil right[] . . . fundamental to our very existence and *survival*”<sup>291</sup> and that states may have “other reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group.”<sup>292</sup> To conflate an opposition to same-sex marriage as a standard definition for bigotry is simply to ignore the historical epistemology on marriage and to arbitrarily consign certain viewpoints to extinction.

As an illustration of this point: an amicus brief was filed in the Washington State Supreme Court in favor of Arlene’s Flowers—signed by nearly thirty of today’s leading First Amendment scholars on both sides of the marriage debate.<sup>293</sup> What this brief argues against is what this Article has described as the court’s non-distinction approach. Namely, a proper distinction must be made between Mrs. Stutzman’s religious objection in celebrating a same-sex marriage and her particular *non-objection* to serving same-sex customers.<sup>294</sup> By failing to make this distinction, the brief argues that the Washington Superior Court, in ruling against Mrs. Stutzman, undervalued her “constitutional rights by misinterpreting her religious convictions as offensive and invidious.”<sup>295</sup> While the brief points out instances of discriminatory practices based on secondary justifications (i.e., refusing entrance to black customers for fears of being robbed)—without which antidiscrimination laws could not survive—it distinguishes the facts in *Arlene’s Flowers* because the justification offered by Mrs. Stutzman for her refusal was unrelated to the couples sexual orientation.<sup>296</sup> While it is possible that Mrs. Stutzman and others will use some pretense as a cover for

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the idea that marriage is a union of a single man and single woman who unite for the purposes of mutual love and friendship and mutual procreation and nurture of children.”).

290. Matthew J. Franck, *Introduction*, in RELIGIOUS FREEDOM AND GAY RIGHTS 5–6 (Timothy S. Shah et al, eds. 2016).

291. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

292. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003).

293. Legal Scholar’s Brief, *supra* note 17.

294. *Id.* at 3.

295. *Id.* at 4.

296. *Id.* at 6. As the brief points out from the record, Arlene’s Flowers has sold “thousands of dollars worth of arranged flowers [to one of the Appellees] without reservation, over a nine-year period, with full knowledge that [he] is gay and that many of the arrangements were intended for his same-sex partner.” *Id.* at 3.

bigotry, the court cannot simply assume that into the record, but, instead, must delve deeper into the sincerity of the claim.<sup>297</sup>

Notably, the amicus brief cites *Lawrence* as an example of when “courts . . . treated an articulated objection to *conduct* as equivalent to animus against *persons* who characteristically engage in such conduct.”<sup>298</sup> Although it may be *plausible* in certain instances to make this type of conflation (i.e., non-distinction approach), the brief warned—citing the “decent and honorable” language from Justice Kennedy in describing opposition to same-sex marriage<sup>299</sup>—that “judges should be cautious about inferring that disapproval of *conduct* is a manifestation of animus against *persons*.”<sup>300</sup> As it applies to Mrs. Stutzman, the brief concludes that making this inference is “utterly implausible.”<sup>301</sup> Having done so, the conflation (or non-distinction) infected the court’s determination of “*prima facie* liability” and its “dismissive treatment of [Mrs. Stutzman’s] constitutional defenses.”<sup>302</sup>

This was the correct approach and one that I attempt to incorporate in the next Section by advocating a shift from fictions to rebuttable presumptions—being mindful of the need to preserve antidiscrimination laws.

### B. From Fictions to Presumptions

The use of fictions today is still evident,<sup>303</sup> but oftentimes difficult to distinguish between presumptions<sup>304</sup> since the two are traditionally

297. *Id.* at 6.

298. *Id.* at 7.

299. The brief notes that the language from Justice Kennedy “strongly counsels against conflating a sincere religious objection to promoting same-sex marriage with an imaginary and uncharitably ascribed discriminatory refusal to serve individuals [based on] their sexual orientation.” *Id.* at 20. The same can be said about those who unreservedly serve the LGBT-community, as Koppelman points out: “[W]henver someone refuses to discriminate against gays, that person is often perceived as making a statement of approval of homosexual conduct.” KOPPELMAN, *supra* note 38, at 37.

300. Legal Scholar’s Brief, *supra* note 17, at 8.

301. *Id.* at 8, 9 (“Stutzman’s religious objection is to *same-sex marriage*, regardless of the sexual orientation of the parties to the marriage, not to serving *individuals* based on their sexual orientation.”).

302. *Id.* at 10.

303. See Lind, *supra* note 154, at 95 (providing a nineteenth century example where John Marshall created a fiction of “vessel personification” that “grew to become the preeminent American theory of the ship”); Del Mar, *supra* note 179, 246–48 providing a twentieth century example from the House of Lords involving a fiction that “allowed the law to adapt and remain responsive to the claims of plaintiffs in personal injury litigation”); TWO BODIES, *supra* note 159, at 36 (“fictions are by no means extinct”); FULLER, *supra* note 154, at 93 (We



considered as a type of assumption.<sup>305</sup> This makes a normative shift from one to the other much easier and much more appropriate, especially “where the operative fact is probable.”<sup>306</sup> This conceptual nearness (especially with conclusive presumptions)<sup>307</sup> provides an opportunity for fixing the non-distinction approach by making a relatively small cognitive transition that still allows for antidiscrimination laws to retain their purpose, while also allowing for First Amendment defenses.

In comparing a fiction with a presumption, Vaihinger defines the former as a statement where its opposite is already certain, while the latter is a temporary hold until the opposite is established.<sup>308</sup> Fuller describes fictions

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know that the fiction is being used in contemporary law. . . . [Judges] will probably continue to use [fictions] in the future.”); Smith, *supra* note 159, at 147 (“[T]he law is not only encumbered by old fictions, but is in danger of having new ones foisted upon it.”).

304. This closeness is exemplified in examples such as the concept of “constructive notice” where the court would assume that the party had *actual* notice (despite no actual evidence) by a showing that the party was in a position where he should have known, but for some fault of his own did not. See Lobban, *supra* note 101, at 219. Another example in premise liability called the “attractive nuisance” doctrine assumes a landowner invited children onto his property and hold him liable for any harm by virtue of the outcome being foreseeable. *Id.* n.109. Like the common law examples listed above, the doctrine of “attractive nuisance” is part of the tapestry in “exploratory fiction” that allowed common law judges to “feel their way incrementally towards some new legal principle or theory.” K. Scott Hamilton. *Prologomenon to myth and fiction in legal reasoning, common law adjudication and critical legal studies*, 35 WAYNE L. REV. 1449 (1989).

305. Raymundo Gama, *Presumptions and Fictions: A Collingwoodian Approach*, in LEGAL FICTIONS IN THEORY AND PRACTICE 348 (2015). Baker notes the fashion of calling “irrebuttable presumptions” as “living and healthy examples of the fiction.” TWO BODIES, *supra* note 159, at 38.

306. See Del Mar, *supra* note 179, at 232–33. Fuller writes that between employing fictions, presumptions, or estoppels, “[w]hich device will be employed depends upon which is most expedient.” FULLER, *supra* note 154, at 75.

307. Taking Fuller’s definition, like fictions, conclusive presumptions are generally applied when the opposite is known to be true. FULLER, *supra* note 154, at 41. He offers the example in the context of a grantee presumed to have accepted a gift despite the individual having no knowledge of the gift and could not have accepted it. *Id.* Fuller writes that conclusive presumptions “attach[] to any given possibility a degree of certain to which it normally has no right.” *Id.* at 42 (quoting TOURTOULON, *supra* note 165, at 398). In this way, it can be compared to when courts assume that a denial of request is tantamount to a denial of the individual’s identity, thereby creating a conclusive presumption without an offer for rebuttal. If the difference is not clear, the advantage gained is that transitioning will be easier from legal fictions, to conclusive then rebuttable presumptions.

308. See Kelsen, *supra* note 95, at 10–11. One can imagine this in an instance where a man is in the country when his wife conceives a child from an adulterous relationship and everyone knows it. A legal fiction would treat this man *as if* he was the father, attaching all the legal norms and duties that would normally attach if the child was conceived in wedlock.

as an assumption “known to be false” while “a presumption (whether conclusive or rebuttable) assumes something that may possibly be true.”<sup>309</sup> Particularly with rebuttable presumptions, this assumption can also be something that is *probably* true.<sup>310</sup> To say this another way, a legal fiction can be read as a “necessary deviation from reality” while a presumption is a “contingent conformity with truth.”<sup>311</sup> When courts employ the non-distinction approach, they are consciously affirming the non-existence of some reality instead of seeing it as a potential truth. For example, when courts refuse to delve into the difference between status and conduct by simply conflating the two based on some doctrine of “inextricable connectivity,” what the court is saying is not that we are assuming that no difference exists, but for the purpose of the law, no difference *actually* exists—contrary to reality. The language, for example, by the judge in *Sweetcakes by Melissa* is clear that he believed that the case was not about a wedding cake, but about a business’s refusal to serve someone because of their sexual orientation—despite the fact that the Klein family, like Barronelle Stutzman and Jack Phillips, plead that their refusal had nothing to do with the individual’s sexual orientation.

Whatever the distinctions are, it is best to suspend the legal fiction and/or a conclusive presumption approach and adopt an approach based on a rebuttal presumption.<sup>312</sup> Del Mar sets this up well when he differentiates between legal fictions as suspensions of operative facts and presumptions as considerations of the likelihood of an operative fact being present, allowing for its introduction, *but afterwards* shifting the burden to the opposing

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While Kelsen has qualms about the reality of this analogy offered by Vaihinger, he does agree that “[a] fiction . . . would only emerge if one identified this legal notion of a ‘father’ with the *natural object* of the male *progenitor* who bears the same name.” *Id.* at 11.

309. FULLER, *supra* note 154, at 40.

310. *Id.* Fuller notes that the difference between a rebuttable presumption and conclusive ones may in some cases be a matter of degree—admitting further that the “mental process involved in the invention of the ordinary fiction is at least a close relation to that involved in the establishment of a presumption, and suggests the possibility that there may be a primitive, undifferentiated form of thought that includes both.” *Id.* at 42, 48; *see also* Smith, *supra* note 159, at 155 (offers conclusive presumptions as examples of surviving fictions). This supports that the mental step required for transitioning between a fiction to a rebuttable presumption is not so dramatic.

311. Gama, *supra* note 305, at 348.

312. One helpful conceptual definition is that a presumption “sometimes describes a statement about the usual connection between two facts, according to which the assertion of the existence of one of these facts entitles one to presume the existence of another fact.” Gama, *supra* note 305, at 355. In our case, judges can assume that rejecting a request by a minority group may very well be the product of bigotry, but not always as evidenced in the Hands on Original and Azucar Bakery cases.

party for an opportunity to rebut.<sup>313</sup> This approach is reinforced by Nicholas Rescher's "cognitive presumptions" definition that says presumptions are created for filling the gaps in our information "until there is evidence to the contrary."<sup>314</sup>

Looking to the facts in the above-mentioned cases and our operative fact being that a distinction in fact does exist, a conceptual shift from fictions to presumptions would allow for the court to assume the non-distinction approach *so long* as the opposing parties are given an opportunity to rebut this presumption.

### C. *Rebuttable Presumption Model*

Whatever the advantages of my rebuttable presumption approach, the transition would at least provide the legal community explanatory evidence as to how the court made its decision. Where fictions are often disguised in legal language and undetectable intent, presumptions have the advantage of being explicit in their use—allowing parties to understand the principles being applied and what behavior is expected of them for compliance.<sup>315</sup> This rebuttal will require a three-step burden of proof, focusing on: sincerity, expressive acts, and readily available alternative.<sup>316</sup>

#### 1. Sincerity

Generally for judges, the veracity of a claimant's belief cannot be challenged.<sup>317</sup> The Supreme Court in *United States v. Ballard* quoting a

313. Del Mar, *supra* note 179, at 226. He also acknowledges the possibility to simply refuse to accept proof on the issue so as to make it a conclusive presumption. *Id.*

314. Gama, *supra* note 305, at 358; *see also* Edna Ullman-Margalit, *On Presumption*, 80 J. OF PHIL. 143, 151 (1983) ("[I]t may turn out that the very point of some presumption rules . . . [is to provide] the agent with a baseline for action which is to be abandoned just in case some counter indication is more or less thrust upon him.").

315. *See* TWO BODIES, *supra* note 159, at 49 (stating that the "use of words such as 'presume' . . . is an open indication of how the speaker is using words and extending principles"); *cf.* 15 Williston on Contracts § 44:12 (4th ed.) ("[I]t is better to state the law in terms of reality if for no other reason than to prevent confusion."). By replacing the non-distinction approach with the shifting burden analysis described above, courts will take a "step toward a sensible reconciliation of the laws and policies promoting both antidiscrimination and religious and expressive freedom." Legal Scholar's Brief, *supra* note 17, at 15.

316. Recall that Del Mar's approach "is one closely related to the ways in which a court manages or adapt to difficulties of proof." Del Mar, *supra* note 179, at 237. This methodology should reduce these concerns given the jurisprudence behind sincerity and the already available proof for what is and is not an expressive act.

317. Anna Su, *Judging Religious Sincerity*, 3(1) OXFORD J. LAW & RELIGION 28, 31 (2016). The Internal Revenue Service has noted in its manual that it "can't consider the content or

decision form 1872 noted that the “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”<sup>318</sup> Of course, this notion was not new in the 1940s—or the 1870s. The idea of disallowing judges to question the truthfulness of religious dogma was stated by James Madison when he wrote that allowing for this

implies either that the Civil Magistrate is a competent judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rules in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.<sup>319</sup>

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source of a [lawful] doctrine alleged to constitute a particular religion.” Internal Revenue Serv., Internal Revenue Manual, Part 4.76.6 (Oct. 24, 2014), [https://www.irs.gov/irm/part4/irm\\_04-076-006.html#d0e698](https://www.irs.gov/irm/part4/irm_04-076-006.html#d0e698); see also Tracey, *supra* note 288, at 111 (“[T]he IRS must give deference to what the organization calls religious.”).

318. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)) (internal quotations omitted). The Court went on to write:

[w]ith man’s relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

*Id.* at 87 (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)); see also James Madison, *Memorial and Remonstrance Against Religious Assessments*, in WRITINGS (Library of Congress 1999) (“Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate”); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (“[T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”).

319. Madison, *supra* note 318, at 32. Commenting on disestablishment of religion as a means to protecting the basic principles of separation of church and state, Jefferson wrote that disestablishment prohibited government “from intermeddling with religious institutions, their doctrines, discipline, or exercises” and from “the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them is an act of discipline. Every religious society has a right to determine for itself the time for these exercises, & the objects proper for them, according to their own peculiar tenets.” Thomas Jefferson, *Letter to Rev. Samuel Miller* [1808], in WRITINGS 1186–87 (Library of Congress 1984). See generally JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 60 (4th ed. 2016).

These sentiments go further back to John Locke who circumscribed the jurisdiction of the state to those things unrelated to salvation—noting that “the care of souls is not committed to the civil magistrate.”<sup>320</sup>

The Supreme Court has reaffirmed this ideal again and again in subsequent cases. It has stated that the door of the Free Exercise Clause stands tightly closed to: government regulation of religious beliefs,<sup>321</sup> punishment of doctrines the government finds false,<sup>322</sup> question the centrality of a particular belief,<sup>323</sup> nor condition a benefit on violating a religious tenet.<sup>324</sup> Richard Garnett says this plainly: “[P]ublic officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs.”<sup>325</sup> The Tenth Circuit summarized these principles well in its *Hobby Lobby* decision when it wrote that the claimants had “drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable.”<sup>326</sup> This does not mean that judges cannot hold orthodox

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320. Su, *supra* note 317, at 31. See also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 368 (2002); JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 218 (Shapiro ed. 2003).

321. *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

322. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (“[G]overnment may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status.”) (internal citations omitted); see also *Sherbert*, 374 U.S. at 406 (“[T]o condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”); *Thomas v. Review Bd. Of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be accepted, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion.”); accord *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778–79 (2014).

323. *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *Smith*, 374 U.S. at 886–87. The Court has also “reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.” *Frazee v. Ill. Dept. of Emp’t Sec.*, 489 U.S. 829, 834 (1989).

324. *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981).

325. Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 848 (2009)

326. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d at 1114, 1141 (2013), accord *Thomas*, 450 U.S. at 715.

beliefs, but it does mean that in the arena of judicial decision-making, judges are to refrain from deciding questions relating to orthodoxy.<sup>327</sup>

However, courts are given some latitude to distinguish a sincerely held religious belief with a sham purpose or pretext in an effort to obtain the benefit of law.<sup>328</sup> Looking again to the Tenth Circuit, the court, in examining a claim under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), summarized this discretion well when it wrote that sincerity requires determining whether a claimant “is seeking to perpetrate a fraud on the court” or “whether he actually holds the beliefs he claims to hold.”<sup>329</sup> In extreme cases, a court can also refuse to acknowledge a “claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.”<sup>330</sup> With the cases mentioned above, I would even promote the introduction of extrinsic evidence (e.g. statements, publications) to show invidious intent—an approach used with the so-called Muslim travel ban issued by President Trump.

## 2. Expressive act

The second step in this analysis requires that the public accommodation is one that engages in expressive acts protecting by the First Amendment.<sup>331</sup> Those who argue for exemptions for the florists, bakers, and photographers base their thinking by showing how these businesses engage in artistic services.<sup>332</sup>

For example, in the *Elane Photography*, leading First Amendment scholars Eugene Volokh and Dale Carpenter filed an amicus brief where

327. Cf. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (“Government must keep out of internal problems of religious bodies when those problems concern religious understandings.”).

328. *Su*, *supra* note 317, at 32; *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (“[P]rison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic.”); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (stating that the “threshold question of sincerity” is whether a belief is “truly held”); *Burwell*, 134 S. Ct. at 2774 n.28 (“[A] corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”).

329. *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014); *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015).

330. *Thomas*, 450 U.S. at 715; *see also* *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 830 (D. Neb. 2016) (holding that FSMism [i.e., Flying Spaghetti Monster] is beyond the protection of RLUIPA); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (stating that the eating cat food was not a religious belief entitled to constitutional protection).

331. *See* *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting) (“[A]rtistic expression lies within this First Amendment protection.”).

332. *See* *Haley Holik, You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake Is Compelled Speech*, 28 REGENT U. L. REV. 299 (2016).

they argued that photography is fully protected by the First Amendment, regardless if the service is being offered for money.<sup>333</sup> They argued that while neither political nor scientific speech is present, the right enjoyed by *Elane Photography* is still protected as a “special case of the broader proposition that visual expression is as protected as verbal expression.”<sup>334</sup> They base their arguments largely on Supreme Court precedent in *Wooley v. Maynard*, where a license plate slogan that read “Live Free or Die” was successfully challenged on a claim that forcing the plaintiff to display it on their car breached a long-standing prohibition on government compelled speech that states an individual is protected from being compelled to become a “courier for [the government’s] message.”<sup>335</sup> Based largely on this precedent,<sup>336</sup> if photography is an expressive act protected by the First Amendment, then the doctrine set-out in *Wooley* protects *Elane Photography*<sup>337</sup> from being forced to comply with the request to photograph a wedding or display such photos on the company’s website.<sup>338</sup>

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333. Cato Institute Amicus Brief in Support of the Appellants, at 8, *Elane Photography v. Willock* (N.M. 2014), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/Elane-Photog-filed-brief.pdf>.

334. *Id.*

335. *Id.* at 6 (citing *Wooley v. Maynard*, 430 U.S. 714, 717 (1977)) “The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.” *Wooley*, 430 U.S. at 715.

336. The Brief also relied on a Supreme Court case out of West Virginia involving a high school requirement to salute the American flag—deciding likewise that to force the student to do so amounted to compelled speech. *See West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). The compelled speech idea was also emphasized in *Hurley v. GLIB* when the Supreme Court wrote that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 16 (1986) (plurality opinion)); *see also Pacific Gas*, 475 U.S. at 11 (“[A]ll speech inherently involves choices of what to say and what to leave unsaid”); Cato Institute Amicus Brief in Support of the Appellants, at 12, *Elane Photography v. Willock* (N.M. 2014), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/Elane-Photog-filed-brief.pdf>. (stating that the “compelling the creation of speech (including for money) interferes with the ‘individual freedom of mind’ at least as much as compelling the dissemination of speech does”).

337. *See* Cato Institute Amicus Brief in Support of the Appellants, at 11-12, *Elane Photography v. Willock* (N.M. 2014), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/Elane-Photog-filed-brief.pdf>. (stating that the “requiring someone to create speech is even more of an imposition . . . than is requiring the person to simply engage in ‘the passive act of carrying the state motto on a license plate’”).

338. *Id.* at 9.

Similarly, in *Arlene's Flowers*, a number of amicus briefs argued that the refusal to create a floral arrangement for a same-sex wedding is also protected under the compelled speech doctrine. The Cato Institute, a libertarian think-tank, offered an extensive dive into the expressive significance of floral design—pointing out the existence of a number of schools of floristry art around the world, as well as various cases that recognized the various art forms protected under the First Amendment.<sup>339</sup> The Becket Fund, a premier First Amendment non-profit, also emphasized the communicative message of Mrs. Stutzman's services, noting that in creating a flower arrangement, the "florist must integrate her understanding of the couple with her own artistic style, and create a theme that carries through all parts of the wedding[.]"<sup>340</sup>

Others have likewise argued, in support of *Masterpiece Bakery*, that baking a cake is a communicative act protected by the First Amendment.<sup>341</sup>

a. Non-application of certain cases

On the other hand, under this prong, cases like the Tennessean man who put-up a sign stating "No Gays Allowed,"<sup>342</sup> the Norwegian hairstylist who refused to serve a woman wearing hijab,<sup>343</sup> or the Social Security Administration employee who claimed watching a short video on LGBT diversity would amount to endorsing "an abomination,"<sup>344</sup> would lose

339. See *Cato Institute Amicus Brief in Support of the Appellants*, at 5–10, *Arlene's Flowers v. Ingersoll* (Wash. 2016), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/arlene-flowe-cover.pdf>.

340. *Beckett Fund Amicus Brief in Support of the Appellants*, at 8, *Arlene's Flowers v. Ingersoll* (Wash. 2016), available at <https://www.courts.wa.gov/content/Briefs/A08/916152%20Amicus%20-%20The%20Becket%20Fund.pdf>.

341. See Holik, *supra* note 332, at 302–05 ("Over hundreds of years, wedding cakes evolved with the advancement of culinary art.").

342. *Tennessee hardware store puts up 'No Gays Allowed' sign*, USA TODAY (July 1, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/01/tennessee-hardware-store-no-gays-allowed-sign/29552615/>. The man later replaced the sign with: "We reserve the right to refuse service to anyone who would violate our rights of freedom of speech & freedom of religion." *Id.*

343. *Norwegian hairdresser could be jailed for refusing salon entry to woman with hijab*, RT NEWS (Sept. 5, 2016), <https://www.rt.com/viral/358353-norwegian-hairdresser-hijab-jail/>. The woman later commented on Facebook: "Lawful? Maybe not. But we still have freedom of speech?" *Id.*

344. Ben Guarino, *'I'm not going to certify sin': Social Security worker refuses to watch LGBT training video*, WASHINGTON POST (Sept. 14, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/14/im-not-going-to-certify-sin-social-security-worker-refuses-to-watch-lgbt-training-video/>. The man "cited his right under the Constitution to religious freedom in support of his refusal." *Id.*



despite making similar defenses. The Supreme Court in *O'Brien* was right when it refused to “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.”<sup>345</sup> Providing this layer of stratification<sup>346</sup> will further emphasize the distinct nature of artistic services versus those individuals who behave in discriminatory fashion like those instances surrounding the Fair Housing Act of 1968<sup>347</sup> and Bob Jones University.

Two recent examples of individuals who fall outside the protection of this approach are worth noting. Both instances involve the type of discriminatory practices rightfully targeted by antidiscrimination laws and both instances create troubling ramifications for other religious liberty issues.

The first is the case out of Illinois where the owners of the TimberCreek Bed & Breakfast refused to host any and all “same-sex civil unions” and “same-sex weddings.”<sup>348</sup> In a series of email exchanges with the gay couple, one of the business owners, James Walder (“Respondent”), made it explicit that he believed that “homosexuality is wrong and unnatural based on what the Bible says” and would under no circumstances host a same-sex marriage.<sup>349</sup> In response, one of the couples, Todd Wathen (“Petitioner”), told Mr. Walder that the State of Illinois in passing the Illinois Human Rights Act made it illegal to discriminate against people on the basis of their sexual orientation and that, as a business, they need to comply with the law

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

346. Professor Wilson provides helpful content on this point, noting that “objector’s claim weakens when it extends to services routinely provided by commercial entities, such as renting a banquet hall . . . [and] when less direct actions are at stake” in respects to providing a commercial service. *See* Wilson, *supra* note 5, at 160.

347. Prior to the passage of the Act, “religious white landlords” considered leasing their premises to blacks a violation of the tenets of their faith on race mixing. *See* Eskridge, *supra* note 53, at 677 (“Act required landlords leasing more than three units to refrain from race discrimination”).

348. *Wathen v. Walder Vacuflor, Inc.*, Charge No. 2011SP2489 (Illinois Human Rights Commission Sept. 15, 2015), *available at* <http://www.paxtonrecord.net/sites/all/files/pdf/2015/09/17/Wathen-liability-determination.pdf>; *see also* Vikki Ortiz Healy, *Ruling sides with same-sex couple turned away by bed-and-breakfast*, CHICAGO TRIB. (Sept. 17, 2015) (discussion on background and ruling by the Illinois’ Human Rights Commission), <http://www.chicagotribune.com/news/local/politics/ct-lgbt-business-services-decision-met-20150917-story.html>.

349. *Wathen*, *supra* note 348, at 5. The Commission would later call this “discriminatory animosity.” *Id.* at 18.

and “keep their opinions to there [sic] self.”<sup>350</sup> In its discussion, the Commission made two noteworthy points.

First, the Respondent tried to argue that the First Amendment protects their right of refusal because the expressive act involved in same-sex unions is transferred (i.e., “conduit” theory) onto the hosts.<sup>351</sup> The argument made is that to open the Respondent’s venue to host same-sex ceremonies is tantamount to the compelled speech instances prohibited under the First Amendment.<sup>352</sup> The host in providing the venue is implicitly endorsing the message that “two individuals in love can enter into a relationship that mimics marriage in contravention to certain passage in the Bible.”<sup>353</sup> The Commissioner based its rejection of this argument on the fact that the newly acquired state rights for same-sex unions (under the “Religious Freedom Protection and Civil Union Act”) coupled with the Human Rights Act is what mandates the Respondent to treat all-comers alike and the Respondent had not alleged that it is against their religion to treat individuals equally.<sup>354</sup>

Second, the Commissioner also noted that the Respondent would likely fail in showing a substantial burden under Illinois’ Religious Freedom Restoration Act (“RFRA”) since their presence may not be required and they in either case allow for same-sex guests to rent out a rooms without inquiring into their sexual orientation.<sup>355</sup> While the Commissioner is treading dangerously close to the line of appropriate inquiry under RFRA’s sincerity prong—arguable too far by connecting inconsistent application of belief<sup>356</sup> as evidence of insincerity—its general approach in being skeptical that a substantial burden can be met is likely correct since Respondent’s “participation” in the same-sex wedding goes only so far as providing a venue and related services.<sup>357</sup> The Commissioner is also right to reject the “conduit” theory if for no other reason than for the troubling cross-application it has for other religious liberty issues (discussed below).

The second case comes out of Idaho where owners of the wedding venue (Hitching Post) refused to allow a same-sex wedding to take place on their property. While this case provides little to the discussion above, one thing is

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350. *Id.* at 6.

351. *Id.* at 24.

352. *Id.*

353. *Id.* (citing Respondent’s reply brief at 19).

354. *Wathen, supra* note 348 at 25.

355. *See id.* at 22–23 (stating that the “in both cases all that Respondent would be required to do is to provide a space for its same-sex guests to conduct an activity”).

356. *See Thomas*, 450 U.S. at 714 (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).

357. *See Wathen, supra* note 348, at 25.

important to note is that the Hitching Post won their case in settling with the city because it “reorganized as a religious corporation.”<sup>358</sup> Perhaps changing the status of one’s business is a prudent first option instead of dragging on a lawsuit or simply shutting down for good.<sup>359</sup>

b. Advantage of non-application

Escaping litigations in instances where the issue involves no artistic services is the prudent route. Avoiding litigation allows individuals to save time, money, and face before the court of public opinion. Adding to this is the benefit of avoiding setting bad precedent (even if you win) that may allow lawyers to argue that opening a venue for certain events is tantamount to an endorsement. This creates troubling precedent in two important religious liberty issues: Equal Access and Graduation Prayer.

The earliest significant equal access case was decided by the Supreme Court in *Windmar v. Vincent* (1981),<sup>360</sup> codified in its application to public high schools by the Equal Access Act of 1984,<sup>361</sup> and subsequently

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358. Jake Thomas, *Hitching Post lawsuit settled by city of Coeur d’Alene*, INLANDER (May 3, 2016), <http://www.inlander.com/Bloglander/archives/2016/05/03/hitching-post-lawsuit-settled-by-city-of-coeur-dalene>; see also Scott Maben, *Coeur d’Alene wedding chapel suit ends in \$1,000 judgment*, SPOKESMAN-REVIEW (May 3, 2016), <http://www.spokesman.com/stories/2016/may/03/coeur-dalene-wedding-chapel-suit-ends-in-1000-judg/>.

359. See Kelsey Harkness, *Fearing Another Lawsuit, Christian Business Owners Stopped Hosting All Weddings, Now Their Business Is Dead*, DAILY SIGNAL (June 19, 2015), <http://dailysignal.com/2015/06/19/fearing-another-lawsuit-christian-business-owners-stopped-hosting-all-weddings-now-their-business-is-dead/>. This much was suggested by Joseph Singer who said that “we must define the parts of social life where we allow owners to exclude based on religion.” Singer, *supra* note 5, at 940. Another option as some have already done be to file “pre-enforcement challenges” challenging existing state laws that would interfere with a person’s right to refuse requests towards same-sex weddings. See *Brush & Nib Studio v. City of Phoenix*, Case No. CV2016-052251 (Sup. Ct. Maricopa, May 12, 2016), available at <http://www.adfmedia.org/files/BrushNibComplaint.pdf>; *303 Creative LLC v. Lenis*, Case No. 1:16-cv-02372 (D.C. Colorado, Sept. 20, 2016), <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/303-creative-v.-elenis/303-creative-v-elenis---complaint.pdf?sfvrsn=4>.

360. *Widmar v. Vincent*, 454 U.S. 263 (1981) (concluded that the University of Missouri could not deny equal access to a religious student group); W. COLE DURHAM, *LAW AND RELIGION* 524 (2010). “In early [lower court] cases, this equal access argument achieved mixed results but largely losses.” Timothy J. Tracey, *The Demise of Equal Access and A Return to the Early-American Understanding of Student Rights*, 43 U. MEM. L. REV. 557, 565 (2013).

361. 20 U.S.C. §§ 4071–4074; see also David Brown, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to a University’s Student-Organization Forum*, 116 PENN ST. L. REV. 163, 190–93 (2011) (“Congress passed the

reinforced by a number of decisions spanning two decades.<sup>362</sup> The equal access doctrine stands for the proposition that—unless it can meet the highest level of scrutiny<sup>363</sup>—a public school that creates a limited public forum cannot discriminate in the use of that forum based on a student group’s desire to use it to engage in religious worship and discussion.<sup>364</sup> While a detailed discussion of equal access will not be the focus of this Article, my concern is that if courts accept the logic that hosting a same-sex marriage is synonymous with endorsing the underlying act, then in equal access cases, parties seeking a strict separation of church and state will argue that the same is true in violation of the Establishment Clause when public schools provide open forums for religious activities.<sup>365</sup> This fear is exacerbated further given the Supreme Court decision in *Martinez*, which upheld “all-comers” policies that allow universities to withhold benefits if a

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[Equal Access] Act because courts were ignoring and misconstruing the Supreme Court’s holding in *Widmar*”). The Act applies the doctrine set up in *Widmar* to public high schools—stating that it is

unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a). Applying the logic from *Widmar*, Justice O’Connor wrote that the message of the Equal Access Act “is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.” *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990) (O’Connor, J., concurring).

362. See *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

363. See *Widmar*, 454 U.S. at 270 (“University must . . . satisfy the standard of review appropriate to content-based exclusions”); *Good News Club*, 533 U.S. at 106–07 (“restriction must not discriminate against speech on the basis of viewpoint . . . and the restriction must be ‘reasonable in light of the purpose served by the forum’”) (internal citations removed).

364. See generally Tracey, *supra* note 360, at 564–72 (outlines the history of the equal access); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 180–88 (2016) (“The principal logic of these cases is that religious students and other parties must be given equal access to facilitates, forum, and even funds that the public school makes available to similarly situated nonreligious parties.”).

365. This line of argumentation based on the fears of violating the Establishment Clause has been consistently used and disposed of by the Court. See, e.g. *Lamb’s Chapel*, 598 U.S. at 395; Mark W. Cordes, *Schools, Worship, and the First Amendment*, 48 SUFFOLK U. L. REV. 9, 22 (2015). However, the Court in *Good News Club* acknowledged valid forms of arguments attach based on the Establishment Clause. See *Good News Club*, 533 U.S. at 120; see also (acknowledging tension between Establishment Clause and Free Clause).

student organization conditions leadership on the basis of status or belief.<sup>366</sup> According to some scholars, *Martinez* has killed off equal access at universities.<sup>367</sup> The language of Justice Stevens is indicative of this conclusion when he wrote in *Martinez* that schools “need not subsidize [religious groups], give them its official imprimatur, or grant them equal access to law school facilities.”<sup>368</sup> Justice Alito in his dissent expressed his concerns that the majority has created a new “principle: no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.”<sup>369</sup>

Similarly, the Second Circuit in *Bronx Household of Faith* moved away from what appeared to be a straightforward application of the equal access doctrine—deciding instead that excluding religious worship services does not violate the Free Speech Clause or the Free Exercise Clause.<sup>370</sup> The Circuit went so far as to strongly suggest that including worship services might even be a violation of the Establishment Clause based on an endorsement of religion.<sup>371</sup>

This same concern emerges also in the context of graduation prayer—already in a precarious position.<sup>372</sup> If claimants win under the theory that accommodating certain events amounts to endorsing those events, then the question of having private student prayers during a school facilitated graduation ceremony will likely trigger Establishment Clause challenges.

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366. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

367. Tracey, *supra* note 360, at 559.

368. *Martinez*, 561 U.S. at 703 (Stevens, J., concurring).

369. *Id.* at 706 (Alito, J., dissenting).

370. Cordes, *supra* note 365, at 12.

371. *Bronx Household of Faith v. Board of Educ.*, 650 F.3d 30, 40–44 (2011); DANIEL O. CONKLE, *RELIGION, LAW, AND THE CONSTITUTION* 86 n. 45 (2016) (stating that the “court found that the exclusion was justified by the school board’s reasonable fear of violating the Establishment Clause”); *see also* Cordes, *supra* note 365, at 28–33 (discussing the decision in depth). Nothing short of a heckler’s veto mentioned in *Good News Club* subject to the perceptions of “the youngest members of the audience” based on a coercion analysis, this would allow for a *de facto* endorsement of religion striking down whatever remains of equal access. *Good News Club*, 533 U.S. at 119.

372. *See* Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional?*, 9 *BYU J. PUB. L.* 291, 291 (1995) (stating that the “[a]fter *Lee*, numerous observers concluded that the Court had outlawed any form of prayer at public school graduations”); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 *WM. & MARY L. REV.* 771, 810 (2001) (noting that few school policies are likely to survive after *Santa Fe* given how most are rooted in a historical purpose of having a prayer at graduation). I argue that a balance is still available so long as the prayer is genuinely student-initiated and the school removes itself from the process. *See* Anton Sorkin, *Graduation Ceremonies: A Prayer for Balancing Sponsorship & Censorship*, 41 *SIU L. J.* 345 (2017).

The result will likely be synonymous with circuit court decisions that consider prayer during a graduation a form of an endorsement of religion by virtue of the school providing a venue and related services.<sup>373</sup>

The next Section returns to our three-part framework for rebuttable presumptions, moving into the final step.

### 3. Readily Available Alternatives

This language is imported from forum analysis cases (although the principles can be traced further back)<sup>374</sup> involving proscribed acts of content-based discrimination and appropriate time, place, and manner restrictions on speech. Underlying this Section is the ideal of political independence described by Richard Dworkin as a “right that no one suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not.”<sup>375</sup> While the Section argues that goods must be equally available, it does not argue that it is the role of the state to ensure that the burden of collecting those goods remains equal for all people. Sometimes people will need to drive slightly further so that others can enjoy their First Amendment privileges, e.g., a peaceful assembly may require a detour.

When considering between destroying a person’s livelihood and protecting people from systematic discrimination, the goal should be to place the victim as close as possible to the place he would have been had the discrimination not occurred, but, at the same time, being mindful of the scale of corresponding action necessary to remedy the magnitude of

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373. See, e.g., *A.M. ex rel. McKay v. Taconic Hills Cent. Sch. Dist.*, 510 F. App’x 3, 8 (2d Cir. 2013); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 454 (9th Cir. 1994), *cert. granted, judgment vacated*, 515 U.S. 1154 (1995). In another interesting case, the court while dealing with a religiously-theme musical selection for graduation, concluded that the “requirement that all musical selections be secular was a reasonable action taken to avoid confrontation with the Establishment Clause.” *Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009). Looking to the “legitimate pedagogical purpose” for suppressing student speech, the Tenth Circuit has even allowed censoring religious expressions of faith based on a desire to avoid confrontation. See *Corder v. Lewis Palmer Sch. Dist. No. 48*, 566 F.3d 1219, 1228–29 (10th Cir. 2009). The Court—considering whether requiring a valedictorian to apologize prior to receiving her diploma after sharing her faith without school permission—noted that the “School District is entitled to review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment” and that “the School District’s unwritten policy of reviewing valedictory speeches prior to the graduation ceremony was reasonably related to pedagogical concerns.” *Id.* at 1230.

374. See Courtney, *supra* note 32, at 1504–06 (discussing the logic of the “economic theory” at common law that warranted public accommodations to serve based on concerns of virtual monopolies).

375. RONALD DWORGIN, *A MATTER OF PRINCIPLE* 364 (1985).

harm.<sup>376</sup> The Supreme Court, mindful that an absolute right to speak does not exist in every conceivable location,<sup>377</sup> details a number of elements that could reasonably be included as part of this third-prong of the rebuttable presumption analysis. Where time, place, and manner restrictions are imposed, courts are required to consider as part of their analysis whether alternative forums for the expression is available.<sup>378</sup> If courts determine that the restriction aims to prevent completely the dissemination of certain forms of expression<sup>379</sup> or if the remaining modes of communication are inadequate,<sup>380</sup> the restriction will need to pass the highest level of scrutiny without the option to “justify a content-based prohibition by showing that speakers have alternative means of expression.”<sup>381</sup>

Taking on this language, we can apply the principles in instances when a same-sex couple faces minimal hardship in finding their services elsewhere. Even if a party argues that a forum possesses some level of convenience or advantage, courts are still able to consider why those “same advantages cannot be obtained through other means.”<sup>382</sup> As Justice Stevens noted, “Although the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry . . . this solicitude has practical boundaries.”<sup>383</sup>

While this prong may present some unique factual circumstances,<sup>384</sup> for the cases above, the same-sex couples have had no trouble finding other

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376. This Article bases this conclusion largely on the writings of Koppelman and his reading of Ronald Dworkin. See KOPPELMAN, *supra* note 22, at 13, 25.

377. See, e.g., *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953).

378. See, e.g., *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

379. See, e.g., *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *United States v. Grace*, 461 U.S. 171, 177 (1983).

380. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)

381. *Consol. Edison* 447 U.S. at 541 n.10 (internal citations omitted).

382. *Taxpayers for Vincent*, 466 U.S. at 812. Note the Court’s language: “[N]othing in the findings indicates that the posting of political posters on public property is a *uniquely valuable* or important mode of communication, or that . . . [the] ability to communicate *effectively* is threatened by ever-increasing restrictions on expression.” *Id.* (emphasis mine).

383. *Id.* at 812 n.30 (internal citations omitted).

384. For example, in a case dealing with the use of a municipal facility to put on a controversial musical, the Court in discussing alternatives noted that other facilities may not have “the seating capacity, acoustical features, stage equipment, and electrical service that the

sellers (limited impact) who were more than willing to accommodate their requests (at times for free). This last step, in requiring alternatives, has been incorporated into “model statutes” by leading scholars using the language of “substantial hardship” in their attempts to balance the rights of LGBT-members and religious business owners.<sup>385</sup>

## VI. CONCLUSION

This Article argues that this “non-distinction approach” is really a legal fiction (something counter to known facts), which advances the interest of the courts in using antidiscrimination laws for socially engineering an atmosphere that protects the LGBT-community from dignitary harms. While an important process, the pursuit has been done by incorrectly conflating the forms of discrimination (i.e., identity vs. conduct) thereby disarming the potential for First Amendment defenses to shine light on the conflict.

My solution is simple. Courts should replace the legal fiction (i.e., non-distinction approach) with a rebuttable presumption. They can still assume that the discriminatory intent is the type that is rightfully invidious, but courts should provide an opportunity for religious claimants to rebut that presumption by: (1) showing a sincerely held belief; (2) showing that the requested service is part of those expressive acts protected by the First Amendment; and, (3) showing that readily available alternative means exist for acquiring the sought after services.

Coincidentally, the concurring judge in *Elane Photography* sets us on the right path despite the outcome of the case:

At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others . . . That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do,

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show required.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975). In another dealing with restrictions on posting signs on public property, the dissent argued that “there is no showing that [the] . . . alternatives would serve appellees’ needs nearly as well as would the posting of signs on public property.” *Taxpayer for Vincent*, 466 U.S. at 820 (Brennan, J., dissenting).

385. See Letter from Edward McGlynn Gaffney, Jr., Thomas C. Berg, Carl H. Esbeck, Richard Garnett, & Robin Fretwell Wilson to Hawaii State Sen. Rosalyn H. Baker (Oct. 17, 2013), available at <http://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13-1.pdf>.



illuminates this country, setting it apart from the discord that afflicts much of the rest of the world.<sup>386</sup>

While we may not all agree on the definition of marriage, it is certainly in the price of citizenship that we tolerate the views of others and engage them in meaningful debate without retreating behind walls of rhetorical denigration. A common compromise must come through the furnace of bipartisan communication,<sup>387</sup> where both sides adopt a policy of finding a solution that, in the words of George Washington, “gives to bigotry no sanction, to persecution no assistance.”

As “exhilarating as it might be simply to crush one’s opposition while the political momentum happens to be on one’s side,” we are entering a time when national unity seems desperately in need and “a course of uncompromising intransigence operates to aggravate rather than calm cultural conflicts.”<sup>388</sup> “If courts consider only the imperatives of antidiscrimination law, and are oblivious of the free speech issues, the consequences for speech are likely to be pretty bad.”<sup>389</sup> But through this process, *we*, as a society, may lose more than we gain in our efforts to dictate the orthodox views on matters of sexual ethics. A core value of free speech and the unspoken medicinal value it provides is that it tends to induce a sort of “open collision of moral views” leading to an “open clash between earnestly held ideals and opinions about the nature and basis of a good life.”<sup>390</sup> While this Article provides a fairly narrow window into the ongoing struggles between religion and gay culture, it allows us sufficient landscape to begin considering the direction we want to take and the good life that awaits us in a more perfect union.

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386. *Elane Photography LLC v. Willock*, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring).

387. See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 277 (2016) (stating that “the constitutional process must seek to involve all voices and values in the community”).

388. Legal Scholar’s Brief, *supra* note 17, at 13.

389. Koppelman, *supra* note 21, at 1143.

390. *Id.* at 1152. “If we are going to have transparency, if we are to escape the solitary confinement of our own minds, then we are going to have to learn to live with moral confrontation.” *Id.* at 1154.