

## DIFFERENT ENOUGH: THE CASE FOR MAKING SEXUAL ORIENTATION A FEDERALLY PROTECTED CLASS

The Bill of Rights is codified in the U.S. Constitution's first ten amendments, and guarantees certain inalienable and fundamental rights to Americans. The Fourteenth Amendment applies the Bill of Rights to state governments and guarantees that no one will be denied "equal protection of the laws" in any state.<sup>1</sup> Embedded in the Bill of Rights is the First Amendment's explicit guarantee that "Congress shall make no law . . . which abridges the freedom of speech."<sup>2</sup> Freedom of speech, in turn, remains contentious due to the questions of what qualifies as speech. Conduct is not speech but can sometimes be quite expressive, and that expressive conduct cannot be compelled or silenced by the government.<sup>3</sup>

Simultaneously, Congress has the power under the United States Constitution to enact provisions that limit certain aspects of speech, including expressive conduct.<sup>4</sup> Understandably, First Amendment protection of expressive conduct clashes with certain laws meant to protect members of certain groups. Regulations such as Title IX of the Education Amendments of 1972 and the Fair Housing Act of 1988 regulate individual conduct in prohibiting discrimination against female students and protected classes in housing.<sup>5</sup> Federally protected classes under the Fair Housing Act and its progeny are limited to a sprinkling of narrow categories: sex, race, class, religion, national origin, familial status, disability, and age.<sup>6</sup> Notably absent from that list of categories is sexual orientation, a politically contentious class that has seen some significant advancements in existing equal protection jurisprudence.

Throughout America's long history of barring rights to some people that were freely granted to others, same-sex individuals have always struggled for basic humanity. In 1996, the United States Supreme Court struck down a proposed amendment to Colorado's constitution that would have prohibited same-sex individuals from obtaining any protection against discrimination because the amendment violated the Fourteenth Amendment's Equal Protection Clause.<sup>7</sup> Another victory came for same-sex individuals in 2003, when the Supreme Court held that same-sex couples could not be

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1. U.S. CONST. amend. XIV. *See generally* Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).

2. U.S. CONST. amend. I.

3. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

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

5. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012). *See also* Fair Housing Act, 42 U.S.C. § 3604 (2012).

6. *See, e.g.*, 42 U.S.C. § 3604(b) (2012).

7. *See* Romer v. Evans, 517 U.S. 620 (1996).

criminally convicted for engaging in same-sex intimacy.<sup>8</sup> Most recently, in 2015, the Supreme Court stated that same-sex couples have a fundamental right to marriage.<sup>9</sup> The current tides surging in favor of gay and lesbian rights seem to indicate that there might be another protected class coming down the pipeline, another current of humanity for a marginalized group of Americans.

While sexual orientation is not a protected class under federal law, Colorado opted to include sexual orientation as a protected class within its anti-discrimination laws.<sup>10</sup> In 2014, Colorado enacted C.R.S. § 24-34-601, which prohibits discrimination based on “disability, race, creed, color, sex, sexual orientation, marital status, or ancestry” in places of public accommodation.<sup>11</sup> Under this law, a place of public accommodation is defined as “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.”<sup>12</sup> It was under this law that Masterpiece Cakeshop (Masterpiece)—a Littleton bakery specializing in wedding cakes—was brought before the Colorado Civil Rights Commission for refusing to create a wedding cake celebrating a same-sex union between two potential customers.<sup>13</sup>

When complainants Charlie Craig and David Mullins sought a wedding cake from Masterpiece, same-sex marriage was not legal in Colorado.<sup>14</sup> Craig and Mullins were told that Masterpiece did not make wedding cakes for same-sex marriages due to the Christian beliefs of the owner, Jack Phillips, about same-sex marriages not comporting with religious scripture.<sup>15</sup> Both Craig and Mullins filed a complaint with the Colorado Civil Rights Commission, and the administrative law judge determined that Masterpiece had violated Colorado’s public accommodations law.<sup>16</sup> The Colorado Court of Appeals Division I affirmed, reasoning that the conduct Masterpiece engaged in—baking and decorating cakes—was not expressive, and even if it was, the government’s interest in protecting lesbian, gay, and bisexual individuals from discrimination did not touch that expressive component.<sup>17</sup> Rather, Colorado’s public accommodation law and its ensuing administrative order to the bakery regarding its service policies targeted the act of selling goods to lesbian, gay, and bisexual individuals, instead of mandating support for same-sex marriages.<sup>18</sup>

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8. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. See *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

10. COLO. REV. STAT. § 24-34-601 (2016).

11. *Id.* at § 601(2)(a).

12. *Id.* at § 601(1).

13. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 278–80 (2015).

14. *Id.* at 276.

15. *Id.*

16. *Id.* at 277–80.

17. *Id.* at 293–95.

18. *Id.* at 291.

The Colorado Court of Appeals invoked intriguing ideas about viewpoints that are ancillary to discrimination. Of note, the Colorado Court of Appeals stated that same-sex marriage “is closely correlated with sexual orientation,” and thus can be equated with “discrimination on the basis of sexual orientation.”<sup>19</sup> Essentially, only lesbians, gays, or bisexual individuals are going to marry others of the same sex, so refusing someone a wedding cake on that ground equals discriminating against him or her due to his or her orientation. The problem becomes where to draw this line between viewpoint discrimination and earnest, constitutional anti-discrimination law.

Whether at the federal or local level, the government cannot mandate a viewpoint on a specific subject.<sup>20</sup> Unless the government is regulating funding for one of its programs, the government is limited in regulating the content of speech, particularly regarding viewpoint.<sup>21</sup> The rationale given is that America does not want the government controlling its citizens’ thoughts.<sup>22</sup> However, problems arise when a situation like *Masterpiece* necessitates some regulation to inhere basic human dignity in a group that is frequently and violently discriminated against.

Violence against lesbian, gay, and bisexual individuals because of their sexuality is well-documented. Nearly 20% of all bias-related incidents reported to the FBI in 2014 were due to sexuality.<sup>23</sup> Among lesbian, gay, and bisexual individuals between fifteen and twenty-four years of age, 42.8% of those individuals “seriously considered” suicide as compared to heterosexual youth, of whom just 14.8% youth seriously considered suicide.<sup>24</sup> These statistics are particularly poignant when juxtaposed with bias-related incidents against someone due to her sexuality. Even if specific discrimination does not result in a bias-related attack that is reportable or reported to law enforcement, the impact of this discrimination against lesbian, gay, and bisexual youth is reflected in those high suicide rates.

Much as the legal profession might wish that it exists in a pleasant vacuum over the rest of America’s citizenry, law has a tangible impact on humanity. Colorado felt that impact warranted elevating sexual orientation as a protected class. It is troubling that the United States disagrees, urging that this law should not apply to *Masterpiece* in oral argument because there is no legal history warranting the elevation of sexual orientation to

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19. *Id.* at 282.

20. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998).

21. *Id.*

22. *See W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

23. *Latest Hate Crime Statistics Available*, FBI.GOV (Nov. 16, 2015), <https://www.fbi.gov/news/stories/latest-hate-crime-statistics-available> (last visited Feb. 19, 2018).

24. *Suicidal Behavior Among Lesbian, Gay, and Bisexual Youth: 2016 Youth*, AM. ASS’N SUICIDOLOGY, <http://www.suicidology.org/Portals/14/Re-Formatted%20LGB%20Youth%202016%20Fact%20Sheet.pdf?ver=2016-11-16-105952-633> (last visited Mar. 20, 2018).

the same status accorded race under equal protection law.<sup>25</sup> The United States is correct in this regard; there is no existing case law that treats sexual orientation as an innate characteristic that warrants protected status under federal law.<sup>26</sup> But precedent cannot be made without someone first lowering that gavel. Sexual orientation must become a protected class to not only comport with America's fundamental values of equality and liberty but also to mitigate the tangible harms such discrimination has caused lesbian, gay, and bisexual individuals.<sup>27</sup>

There are a couple major concerns with the suggested approach of raising sexual orientation to a protected class. The first major concern is that treating sexual orientation like race will mandate a viewpoint for bakers like Phillips of Masterpiece. In other words, Phillips will be required to make a wedding cake for Craig and Mullins regardless of his personal, sincerely-held religious views.<sup>28</sup> Essentially, the government will have the power to mandate a viewpoint for its citizens to take on prominent political issues.

The second major concern regarding this approach to sexual orientation is that it will allow the government to compel speech.<sup>29</sup> Phillips would not only have to make Craig and Mullins a general wedding cake but he would also be required to make them a cake stating his support for their union.<sup>30</sup> If the government endorses a viewpoint as warranting protection under the Fourteenth Amendment then it can require people to express that viewpoint in their speech and condemn those who express opposition to that viewpoint.

Both the above concerns, while valid, are without merit. Viewpoint discrimination is fundamentally disallowed in American jurisprudence, but mandating that a bakery serve lesbian, gay, and bisexual customers in the same way it serves heterosexual customers does not clash with this legal dogma. One does not have to support same-sex marriages in order to serve same-sex individuals with a wedding cake as she serves heterosexual individuals with wedding cakes. Opposition to same-sex marriage can be expressed in other ways without discriminating against same-sex individuals in one's public business, such as website announcements stating that compliance with local law does not reflect the business's opinion or that of its owners. This also eliminates the concern that the government can compel speech. The government is not compelling speech in requiring that

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25. Transcript of Oral Argument at 33, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S.Ct. 2290 (2017) (No. 16-111), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-111\\_onjq.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_onjq.pdf).

26. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 574–75 (1995).

27. See *AM. ASS'N SUICIDOLOGY*, *supra* note 24.

28. Transcript of Oral Argument at 104–05, *Masterpiece Cakeshop*, 137 S.Ct. 2290 (2017) (No. 16-111), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-111\\_onjq.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_onjq.pdf).

29. See *id.*

30. *Id.*

people who operate businesses in places of public accommodation serve lesbian, gay, and bisexual people as they serve heterosexuals. Rather, the government is regulating commercial speech by ensuring that those who operate businesses in places of public accommodation cannot turn someone away because of an innate characteristic.

As with race, sex, national origin, and the color of one's skin, sexual orientation is an innate characteristic. A person cannot change whether she is interested in men or women, no more than she can change her sex. It is unjust to permit corporations and their owners, like *Masterpiece*, to refuse service to someone because she likes women. This is the antithesis of America's fundamental belief that all humans are created equal and, therefore, entitled to equal treatment under the laws.<sup>31</sup>

Because sexual orientation is not yet a protected class under federal law, it is permissible under federal law to discriminate against someone because of her sexuality. While it is not laudable to refuse to hire someone because she is gay or grant her a loft in a brand new downtown high rise due to her sexuality, it is acceptable under current federal law. Colorado has decided that sexual orientation is entitled the same protections granted to sex, race, national origin, and religion. Yet, Colorado's public accommodations law is now up for grabs in the United States Supreme Court.

To uphold the law, and to ensure that lesbian, gay, and bisexual individuals are accorded the same dignity freely afforded their heterosexual counterparts, the Supreme Court must make sexual orientation a protected class. Making sexual orientation a protected class will ensure that Colorado's public accommodation law survives this current challenge against it. Likewise, this increase in status will prevent the sort of discrimination that actively harms lesbian, gay, and bisexual individuals, such as employment and housing discrimination. Contrary to what *Masterpiece* and the United States asserted in their oral arguments before the United States Supreme Court, individuals who disagree with the view that lesbian, gay, or bisexual individuals are equal to heterosexual people or entitled to marital access would remain free to disagree. They would simply not be allowed to refuse to make or sell a cake to a gay couple because of that couple's homosexuality. Ultimately, America's legal profession needs to realize that, regardless of precedent, the discrimination perpetuated by *Masterpiece* in Colorado is authorizing different, unequal treatment for lesbian, gay, and bisexual people. The tangible harms caused by this discrimination warrant protecting sexual orientation the same way America protects women against sexism or racial minorities against racism. It is time America started living up to its self-purported ideals of equality and liberty.

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31. U.S. CONST., amend. XIV.

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