

Religious Liberty Versus Rights of Others

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INTRODUCTION

In assessing the scope of religious rights versus other people's rights there is one important attribute of religion that is frequently unrealized or forgotten. And that is the ubiquity of religion. For example, unlike speech which can only be expressed verbally, symbolically, or in print; religion can be manifested in an almost unlimited number of ways.

Let me illustrate with a couple of actual cases. The first, *Bowen v. Roy*, involved the father of a newly born child who believed that her soul would be destroyed if she were assigned a social security number, or if he were required to use it.

² Surely, this is in the category of who would have believed it if it hadn't happened. One could just as easily believe that his soul could be destroyed if his military or tax records were kept in computers, in green file cabinets, or for that matter on paper. It's even more plausible to believe that some religion could teach that paying taxes is sinful or that the Lord commands one to steal for the good of the church. After all, belief in the Ten Commandments is not a necessary predicate to a religion counting as a religion.

Well, *Bowen v. Roy*, in a manner of speaking (excuse the expression), split the baby. It held that a person's religion could not control how the government runs its operations.³ Thus, the government could assign Little Bird of the Snow (Roy's baby) a social security number, but it could not require Roy to use it in his dealings with the government, thereby violating Roy's religious objections.⁴

I think that this is a good template to begin analysis. To be sure, from Roy's perspective, just allowing him to not use the social security number will not save Little Bird of the Snow's soul. But that is the way it is when one lives in an ordered society. Of course, from the government's perspective, there is inconvenience involved in trying to process his claims without the benefit of a social security number.⁵ Nevertheless, the Court thought that this was a reasonable accommodation to be made towards religion.

Lyng v. Northwest Indian Cemetery Protective Ass'n, on the other hand, rejected such an accommodation.⁶ There, members of the Native American Church believed that if the Government built a road, *on land that the Government owned*, the land in the form that the Native Americans held sacred would be destroyed.⁷ Of course, the strong form of that argument cannot prevail. For example, if the Federal Government wanted to build a new wing onto the White House and somebody said: "You cannot do that, I worship the White House just the way it is," the Government would prevail.

² See *Bowen v. Roy*, 476 U.S. 693, 696 (1986).

³ *Id.* at 699-700.

⁴ See *id.* at 700-03, 706-09.

⁵ See *id.* 709-11.

⁶ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453, 458 (1988).

⁷ See *id.* at 442-43.

But the *Lyng* plaintiffs argued for a less absolute right than that. They argued that, given the strength of their religious claim and the Government's lack of any real necessity to build the road, their claim should prevail.⁸ The Court, in my view quite correctly, rejected that claim. It took the position that the Government's right to develop its own land was absolute, and that there was no requirement that the Court balance the religious value of the land to non-owners against the government/owner's rights to use the land as it saw fit.⁹

I. MULTI-FACETED ANTI-RELIGIOUS INTEREST

Another issue that makes religion cases tough and one reason that we are here is that, in addition to the usual government interests, there is the concern that some person or entity would like to engage in the same practice as a religious person or entity but cannot because it has no religious reason for doing so. For example, in *Hobby Lobby*,¹⁰ though not mentioned in the opinion, it is entirely possible that one of Hobby Lobby's competitors, say Michael's would like to be relieved of some of its insurance requirements. Obviously, if Michael's has to pay for its employee's contraceptive health care and Hobby Lobby does not, to some extent, that puts Hobby Lobby at a competitive advantage.¹¹ Yet the Court did not even seem concerned enough to discuss the point.

The Court has not always been so oblivious. For example, in *United States v. Lee*, the Court, albeit somewhat opaquely, recognized the competitive advantage that exempting an Amish employer from paying his employee's social security taxes would give that employer vis-a-vis others who were forced to pay social security taxes.¹² The question in each case should be if the religious exemption is given, what impact would that have on similar people who would like a similar exemption, but do not have a religious claim to back it up.

One thing seems certain, the government should not adopt policies which might encourage somebody to adopt (or pretend to adopt) a religion that might give them a secular benefit. *Lee* was a good example of that and *Hobby Lobby* may or may not have been, depending on the dollar savings Hobby Lobby enjoyed by virtue of its reduced contraceptive insurance payments.

One case in which this problem was minimal was *Wisconsin v. Yoder*.¹³ There the Court held that Amish children were entitled to a religious exemption from Wisconsin's compulsory education law.¹⁴ Of course, it is possible that somewhere in Wisconsin, some farmer might say: "Gee, I wish my 14-year-old could stay home

⁸ *See id.* at 444–45.

⁹ *Id.* at 453, 457–58.

¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹¹ *See id.* at 2785 (holding that the application of the contraceptive mandate to closely held corporations, like Hobby Lobby, violated the Religious Freedom Restoration Act).

¹² *See United States v. Lee*, 455 U.S. 252, 261 (1982).

¹³ 406 U.S. 205 (1972).

¹⁴ *Id.* at 234.

from school and help out on the farm, I think that I will become Amish and make that happen.” Although that is a theoretical possibility, I think that the likelihood of that happening in large enough numbers that we should worry about it is extremely small. So, at least on that issue, I think that *Yoder* was correctly decided.

Well, how would the defendant in *Employment Division v. Smith*¹⁵ have fared under this test? I think that the answer depends on how broadly or narrowly one defines Smith’s claim. If one defines his claim as the right to use illegal drugs,¹⁶ there are many people out there who want that right. Consequently, recognition of the right could well encourage people to join churches that champion the right to use illegal drugs, such as marijuana.¹⁷

On the other hand, if Smith’s claim is defined more narrowly (i.e. the right to use a particularly bitter and ill-tasting drug under highly controlled circumstances), the number of adherents would be considerably less. In my view, this is the correct way to analyze the case.¹⁸ I simply cannot imagine a large number of people who are not already religious adherents who would want to go out in a deserted field, far from civilization, bring their non-ingesting family with them, and be cared for until they sobered up. So, on that issue, I think that Smith should have won.

Ironically, I do believe that the Court reached the correct result in *Smith*, albeit for the wrong reasons. Whatever one might think of the unemployment compensation cases, at least those workers had no religious reason that precluded their working when they were hired.¹⁹ Smith and Black, on the other hand, knew from the day that they were hired that their religion precluded them from being drug free, a criterion for the job of drug rehabilitation counselor for which they were hired.²⁰ It is as if an Orthodox Jew or Muslim applied for a job in a sausage tasting factory and was fired for not tasting sausage. Surely such a person would not be entitled to unemployment compensation.

A. Harm to Those Who Would Be Helped but for a Religious Exemption

This brings us to the issue of harm caused to intended beneficiaries of a statute who may be denied that benefit because of a claimed religious right, basically the reason for this conference. Since we are in Kentucky, let’s begin with the case of Kim Davis, a municipal clerk who refused to issue marriage licenses to homosexual couples after *Obergefell*.²¹ Unlike some other cases of discrimination against one

¹⁵ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

¹⁶ *See id.* at 874–76.

¹⁷ *See Town v. State ex rel. Reno*, 377 So. 2d 648, 649, 651 (Fla. 1979) (finding a compelling governmental interest in restricting marijuana usage).

¹⁸ *See Arnold H. Loewy, Rethinking Free Exercise of Religion After Smith and Boerne: Charting a Middle Course*, 68 *MISS. L.J.* 105, 146 (1998).

¹⁹ *See Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 137–38 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 710 (1981); *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963).

²⁰ *See Smith*, 494 U.S. at 874.

²¹ *See Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015), *appeal dismissed, case remanded*, 667 F. App’x 537 (6th Cir. 2016); *see also Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

with a protected characteristic such as race, religion, gender, or sexual orientation, in this case, it is imperative that the Clerk's office issue a marriage license because the constitutional right cannot be accomplished without one.²² Thus, it is critical that Ms. Davis or one of her underlings issue the marriage license.

But she contends that the God she worships forbids her sanctioning such marriages.²³ Of course, the short, and were it not for the presence of a reasonable alternative, complete answer is that if she can't be true to both the commands of God (her creator) and Caesar (her employer), she must resign her position with Caesar so that she can be true to her idea of the Lord's commands. Obviously, we cannot allow her to follow God's commands and thereby deny others the rights assured them by the United States Constitution.

Fortunately for Ms. Davis, there was an alternative. The court order did not require Ms. Davis to personally issue the marriage licenses, only that somebody in her office do so.²⁴ Of course Ms. Davis claimed that she couldn't order anyone else in her office to disobey God's Commandments.²⁵ Fortunately, she did not have to. The court did it for her.²⁶ Thus, Ms. Davis was able to keep both her job and her duty to God as she saw it, and at the same time, the same sex couples seeking a marriage license were able to obtain one.

Of course, not all cases are as easily resolved as this one. If they were, there would be no need for this conference. Take for example what happened in the 1960s when the Supreme Court ordered all restaurants to be integrated.²⁷ Suppose that John and Mary Jones run a literal Mom and Pop burger restaurant, which they name LBB, which stands for Lexington's Best Burgers. Suppose further that they sincerely believe that God commands separation of the races. In accordance therewith, LBB refuses to serve African Americans except at the drive through window. The restaurant is ultimately sued under the Federal Civil Rights Act²⁸ and interjects the Free Exercise Clause²⁹ in defense.

Suppose the discriminated against customer, Ida Mae Johnson, claims that she is denied service exclusively because of the color of her skin. The Joneses claim first that she can still get an LBB burger if she uses the drive-in window. Additionally, they claim that she can get a burger at a sit-down restaurant if she goes to the local McDonald's or Wendy's. To which Ms. Johnson says: "That is not good enough. I want one of Lexington's Best Burgers and I want to sit down when I eat it. The law entitles me to that much."

Well, how should the Court decide this case? Although the Supreme Court has no exact precedent on point, it did hold in the *Bob Jones* case that an educational

²² *Miller*, 123 F. Supp. 3d at 935.

²³ *Id.* at 932.

²⁴ *See id.* at 932, 944.

²⁵ *Id.* at 932.

²⁶ *See id.* at 944.

²⁷ *See Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964).

²⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 and in scattered sections of 42 U.S.C. (2012)).

²⁹ U.S. CONST. amend. I.

institution's religious principles that includes racial discrimination did not entitle it to both free exercise of religion and a tax exemption.³⁰ I believe that the law for the real Bob Jones University also ought to be the law for the hypothetical John and Mary Jones.

If the free exercise claim were to prevail, both forms of victims previously discussed would be affected. Obviously, Ms. Johnson is hurt even if, by objective measurement, McDonald's and Wendy's hamburgers were just as good. The law says that she is entitled to be served at LBB if that is where she wants to eat. Furthermore, assuming that Lexington is like most communities that once practiced segregation, giving LBB a religious exemption would discriminate against McDonald's and Wendy's. Even in more modern times, it is possible that most of the white population would prefer to eat at a segregated restaurant.³¹ Thus, at least some of McDonald's and Wendy's customers might have chosen to eat at LBB, not because they liked the food better, but because it is the only place they could eat their burgers in what they considered segregated splendor.

The same scenario can occur in property management. Suppose that Joe works for a property management company. Suppose further, he believes that God commands that only heterosexual married couples should live together. Then suppose that Bill and Megan, an unmarried couple, living together, apply to rent one of the twenty-five apartments that he manages. Joe tells them that, as a God-fearing man, he will not show or rent them an apartment, but that there are three other property managers in town that are not so God-fearing and they may be able to rent from one of them. He then tells the same thing to Mark and David, a married same-sex couple.

How should the law suits against Joe be decided? Well, unlike LBB, Joe is not gaining a competitive advantage vis-a-vis the other property managers. They are only too happy to take the business that he doesn't want. But, the discrimination against Bill, Megan, Mark, and David is palpable: apartments are not fungible. Indeed, they are less fungible than hamburgers. Joe may have a beautiful fourteenth-floor apartment overlooking a river that the other property managers do not. So, how do Joe's rights measure up to those of his disappointed tenants?

It seems to me that Joe should lose. A property manager is very nearly analogous to a public utility: there is simply no room for discrimination.³² Interestingly, many states carve out an exemption for small landlords, i.e. those who live in one unit of a four unit or smaller complex.³³ I think that this sort of legislative compromise is entirely appropriate. What stands out in such an exemption is the essential

³⁰ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

³¹ *See, e.g., Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 789 (Ky. 2004), *as modified* (Nov. 23, 2004) (showing that segregation in Lexington is so endemic that it still preserves in modern times).

³² *See, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276-77, 280, 284 (Alaska 1994), *cert. denied*, 513 U.S. 979 (1994).

³³ *See, e.g., ALA. CODE* § 24-8-7 (2018); *DEL. CODE ANN.* tit. 6, § 4607(e) (West 2017); *GA. CODE ANN.* § 8-3-202(b)(1) (West 2017).

irrelevance of religion. That is, a person who wants to choose to live with “his own kind” is free to do so whether his reasons are religious, racial, or a shared interest in sports. If a state does not have such an exemption, the free exercise question is surely closer. It is one thing to tell a commercial landlord that if he cannot serve God without unlawful discrimination he needs to find another line of work. It is quite something else to tell a man who lives in one of a small number of units that he cannot choose who his neighbors will be.³⁴

II. RECENT AND PENDING CASES

Let’s now turn to a recent case, *Hobby Lobby*,³⁵ and a pending case, *Masterpiece Cake Shop*.³⁶ First, *Hobby Lobby*. To begin with, *Hobby Lobby* was not a free exercise case, it was a RFRA case.³⁷ The difference is significant. Unless the Court were prepared to undo Justice Scalia’s handiwork in *Smith*,³⁸ *Hobby Lobby* would have no chance of winning on free exercise grounds. This is because every entity lacking a religion-based claim would have to pay for its employees’ contraceptive health care. And, under *Smith*, so long as religious entities are not required to do anything because of their religiosity, adhering to religiously neutral laws does not violate their free exercise of religion.³⁹

But, RFRA is a different story. Although constitutionally inapplicable to state cases,⁴⁰ RFRA does apply to Federal statutes like the Affordable Care Act (also known as Obamacare).⁴¹ Under RFRA, the Government cannot substantially interfere with a religious practice unless it has a compelling interest to do so and acts in the least restrictive manner possible.⁴²

So, there are three potential issues in *Hobby Lobby*: (1) Is there a substantial burden on religion? (2) Does the government have a compelling interest? And (3) If so, was that compelling interest met by the least restrictive means?⁴³ Interestingly, in measuring the burden on religion, the Court employed the penalty for not making the payments rather than the cost of the payments themselves.⁴⁴ Unsurprisingly, this greatly increased the

³⁴ For an illustration of the problem, see, for example, *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996).

³⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

³⁶ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017).

³⁷ *Hobby Lobby*, 134 S. Ct. at 2766; *see also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 5 U.S.C. § 504 and in scattered sections of 42 U.S.C. (2012)).

³⁸ *See Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

³⁹ *See id.* at 879.

⁴⁰ *See City of Boerne v. Flores*, 521 U.S. 507, 533–36 (1997).

⁴¹ *See, e.g., Hobby Lobby*, 134 S. Ct. at 2762, 2766.

⁴² *City of Boerne*, 521 U.S. at 529.

⁴³ *See Hobby Lobby*, 134 S. Ct. at 2766.

⁴⁴ *See id.* at 2775–77.

cost.⁴⁵ But that is like measuring the cost in *Lee* on the penalty for not paying Social Security rather than the cost of the Social Security payments themselves.⁴⁶

In my view, the cost of making a payment should never count as a substantial burden on religion, regardless of what one thinks God has to say about the morality of the expenditure after payment. Certainly, that seemed to be the Court's view in *Lee*,⁴⁷ and I am aware of no case, pre- or post-*Smith*, where a deific command to not pay certain taxes was ever deemed to be a substantial burden. Indeed, in *Hobby Lobby*, the Court seemed to agree that that was true of taxes, but that insurance payments were somehow different.⁴⁸ It certainly was never clear to me how they were different or by what logic they were thought to be.

Interestingly, the one part of the test that Hobby Lobby might have won, the Court presumed against them and that was compelling government interest.⁴⁹ Given the number of exceptions already on the books and the amount of contraception care that Hobby Lobby was already paying, one could argue that the government's interest in covering the remaining types of contraception was not compelling.⁵⁰ Nevertheless, so it could get to the least restrictive means test, the Court assumed a compelling government interest.⁵¹

Frankly, on that part of its opinion, the Court went off the rails in a way unlike anything that I can ever recalling seeing. The Court said:

The most straightforward way of doing this [—providing contraceptive care not provided by Hobby Lobby—] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections.⁵²

No matter how many times I read that statement, I just can't believe that the Court actually said it, but it did. By that reasoning, a corporation owned by individuals with serious religious beliefs opposed to a particular expenditure would never have to pay for contraceptives because there would always be another way to finance it, i.e. somebody else's taxes. That cannot be the law, and indeed it is not, outside of this very narrow area of insurance payments. Now, the Court will most likely artificially distinguish tax cases, which would not have been necessary had it not so thoroughly messed up *Hobby Lobby*.

⁴⁵ See *id.* at 2775–76, 2779.

⁴⁶ See *United States v. Lee*, 455 U.S. 252, 259–61 (1982).

⁴⁷ See *id.* at 258–61.

⁴⁸ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783–84 (2014).

⁴⁹ *Id.* at 2779–80.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² *Id.* at 2780.

The final case that I want to discuss is this term's *Masterpiece Cake Shop* case.⁵³ In this case, a same sex couple, Charlie Craig and David Mullins asked Jack Phillips, the owner of Masterpiece Cake Shop, to bake them a wedding cake.⁵⁴ He refused on the ground of his religiously-motivated opposition to same-sex weddings.⁵⁵ The Supreme Court has agreed to hear two issues in the case: (1) whether the Free Exercise Clause protects Mr. Phillips right to not bake the cake, and (2) whether the Free Speech Clause protects Mr. Phillips from having to make an artistic creation contrary to a position (opposition to same-sex marriage) that he wants to take.⁵⁶

I think that unless *Smith* is overruled or distinguished in a totally artificial way, Phillips and Masterpiece have to lose their free exercise claim. To the extent that there is a difference between the practice of Smith and Phillips, it actually favors protecting Smith. Smith did not hurt anybody by his peyote use in a lonely field surrounded by non-smoking family members.⁵⁷ Phillips, on the other hand, harmed Charlie and Dave by refusing to bake them a cake for the most significant day of their lives.

I concede that Phillips's case is not as clear cut as that of Kim Davis. Her refusal to issue a marriage license totally precluded the marriage of people in her county.⁵⁸ Charlie and Dave could find somebody else to bake their cake and they could have a wonderful wedding and live happily ever after.

Nevertheless, unless *Smith* is overruled, there is no way that Phillips can win on free exercise grounds. And, of course, unlike *Hobby Lobby*, this case is not muddied by RFRA because the Federal Statute does not apply to the states⁵⁹ and Colorado does not have its own RFRA.⁶⁰ Rather, Colorado believes that all of its public bakers must be open to all.

Although one can never be sure, I think it is unlikely that *Smith* will be overruled. For one thing, I think that respect for Scalia, especially from the conservative bloc, makes overruling unlikely. Second, given last term's *Trinity Church* case, which exalted neutrality to new heights in the context of the Establishment Clause,⁶¹ I think that the Court is unlikely to go against neutrality in the context of free exercise.

This does not necessarily mean that Phillips and Masterpiece will lose. They do have a legitimate free speech claim. My best guess is (and I say that with no sense of certitude) is that the Court may say that this question is not ripe for adjudication.

⁵³ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

⁵⁴ *Craig*, 370 P.3d at 276.

⁵⁵ *Id.*

⁵⁶ See Petition for Writ of Certiorari at i, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. July 22, 2016).

⁵⁷ See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁵⁸ See *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015).

⁵⁹ See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁶⁰ *Masterpiece Cakeshop*, 370 P.3d at 289 n.12.

⁶¹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

That is because Craig and Mullins never said what they wanted on their cake.⁶² It is plausible that they would have been happy with a plain cake with no writings or figurines or that they would have put the writings and/or figurines on themselves, if that is so, Phillips's free speech claim would be much weaker. My guess is that the Court will prefer a more complete record of what was going to go on the cake before resolving the free speech claim. But like I said, I could be wrong on this one.

CONCLUSION

Finally, one question that has hovered over these cases, especially *Hobby Lobby*, is whether corporations should have free exercise of religion rights. Although I think that they were badly misused in *Hobby Lobby*, I do think that corporations should have such rights. I certainly think that the Court was correct to have heard Crown K kosher Supermarket's challenge to the Sunday Closing Laws back in the sixties.⁶³

Let me give an example where I think a corporation should win. Suppose a particular community passed an ordinance requiring all fast food restaurants to be open on Sunday. Suppose further that Chick-fil-A's owners pretty much share the religious views of Hobby Lobby's owners and refuse to open on Sunday. Finally, suppose that Chick-fil-A's owners are prosecuted for not opening. Given the balance of equities, I think that Chick-fil-A's owners should win their case. I realize that such a result would require a tweaking of *Smith*,⁶⁴ but, frankly, it is a relatively minor tweaking, akin to allowing ceremonial wine at a religious function,⁶⁵ which I would support.

So, with that, I will sit down and thank the organizers of this symposium for the opportunity to express some views on this very important subject.⁶⁶

⁶² *Masterpiece Cakeshop*, 370 P.3d at 276.

⁶³ See *Gallagher v. Crown Kosh Super Mkt. of Mass., Inc.*, 366 U.S. 617, 618–19 (1961).

⁶⁴ See *supra* note 39 and accompanying text.

⁶⁵ See Arnold H. Loewy, *Rejecting Both Smith and RFRA*, 44 TEX. TECH L. REV. 231, 232–33 (2011).

⁶⁶ Subsequent to the writing of this article, the Supreme Court decided the *Masterpiece Cakeshop* in favor of the baker and against the same-sexed couple. The Court's rationale relied heavily on the fact that the marriage of Craig and Mullins was neither constitutionally protected nor lawful in Colorado at the time that the celebratory cake was ordered. Therefore, the Court thought that *Masterpiece's* claim outweighed the claim of the same-sexed couple. The decision, somewhat like my proposed solution of finding against *Masterpiece* on ripeness grounds has the effect of being good for this case and this case only because when the next case arises, same sex marriages will not only be lawful, but constitutionally protected.