

BUSINESS OWNERS' RELIGIOUS OBJECTIONS TO SAME-SEX MARRIAGE: THE AMERICAN VERSUS EUROPEAN PERSPECTIVE

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When the Supreme Court of the United States (SCOTUS) decided the *Obergefell v. Hodges*¹ case and opened marriage to same-sex couples across the United States, the LGBT rights movement could, after years of effort, celebrate a huge legal victory.² However, only fairy tales end with “happily ever after,” so new problems appeared soon, arising especially from the tension between LGBT rights and religious freedom. Thus, SCOTUS in the post-*Obergefell* era had to deal with controversial issues concerning service providers’ religious objections to same-sex marriage. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,³ a baker refused to make a wedding cake for a same-sex couple since he opposed same-sex marriage due to his Christian faith. Later in *Fulton v. City of Philadelphia*,⁴ the City of Philadelphia terminated a contract with a religious foster care agency that refused to provide service to married same-sex couples. SCOTUS decided both cases on narrow, fact-specific

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1. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

2. For a detailed description of the road that led to recognition of same-sex marriage in the USA, see generally WILLIAM N. ESKRIDGE & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* (2020).

3. *Masterpiece Cakeshop v. Colorado Civ. Rts. Comm’n*, 584 U.S. ___, 138 S.Ct. 1719 (2018).

4. *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S.Ct. 1868 (2021).

grounds and mostly avoided the core questions regarding the clash between religious rights and antidiscrimination protection of same-sex couples.

In early 2022, SCOTUS took up *303 Creative LLC v. Elenis*,⁵ a new case concerning a religious web designer who does not want to design websites for same-sex weddings. This gives SCOTUS an opportunity to revisit issues that first appeared in *Masterpiece Cakeshop*. Before SCOTUS hears the new case, it might be beneficial for lawyers to look around because foreign courts have dealt with similar cases as well. In particular, *Masterpiece Cakeshop* has its counterpart in the *Lee v. Ashers Baking Company*⁶ judgment delivered by the Supreme Court of the United Kingdom which, unlike SCOTUS, did not shy away from addressing the substance of the problem.

This Article focuses on the *Masterpiece Cakeshop* and *Ashers Baking Company* cases, involving bakers whose religious objections to same-sex marriage led them to refuse to sell cakes to gay customers.⁷ The Article discusses several common ideas appearing in these cases,⁸ mainly the need to distinguish between the message and the messenger when applying antidiscrimination law and the role of fundamental rights in the assessment. Based on this analysis, the Article then suggests general steps for courts to follow when dealing with similar issues in the future.

I. WHAT HAPPENED?

Masterpiece Cakeshop is a well-known American case that has been widely discussed in the media and academia.⁹ In a nutshell, a devout Christian, Jack Phillips, who makes artistic cakes and owns the Masterpiece Cakeshop bakery, refused to create a wedding cake for a same-sex couple. The Colorado Civil Rights Commission later sanctioned

5. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 2022 WL 515867 (mem.) (U.S. Feb. 22, 2022) (No. 21-476).

6. *Lee v. Ashers Baking Company Ltd.*, [2018] UKSC 49 (UK).

7. Parts of this article have previously been published in Czech as Lenka Křičková, *Dorty a Diskriminace - Příklady Strětu Svobody a Rovnosti v Zahraniční Judikatuře*, in *PRÁVO NA ROVNÉ ZACHÁZENÍ: DESET LET ANTIDISKRIMINAČNÍHO ZÁKONA 211–223* (Martin Šmíd ed., 2020).

8. For a more comprehensive comparative analysis of these cases, see René Reyes, *Masterpiece Cakeshop and Ashers Baking Company: A Comparative Analysis of Constitutional Confections*, 16 *STAN. J. CIV. RTS. CIV. LIB.* 113–46 (2020); Rex Ahdar & Jessica Giles, *The Supreme Courts' Icing on the Trans-Atlantic Cakes*, 9 *OX. J.L. RELIGION* 212–28 (2020).

9. See, e.g., Mark Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 *HARV. J.L. PUB. POL'Y* 711–50 (2019); David N. Saperstein, *Masterpiece Cakeshop: Impact on the Search for Common Ground*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 479–98* (William N. Eskridge & Robin Fretwell Wilson eds., 2019).

Phillips for sexual orientation discrimination. Eventually, SCOTUS concluded that the Commission violated the Free Exercise Clause of the First Amendment by showing impermissible hostility towards the religious beliefs of Phillips who was entitled to a neutral and respectful consideration of his claims.

The British *Ashers Baking Company* case may be less familiar to American audiences. The McArthurs, married spouses, are Christians who own Ashers Baking Company, a family-run bakery in Northern Ireland. They sell, among other things, cakes with a graphic design of the customer's choice. Gareth Lee is a gay man who volunteers for the LGBT organization QueerSpace. In 2014, he was invited to a party and decided to bring a cake from Ashers Baking Company with him. As efforts to legalize same-sex marriage in Northern Ireland took place at the time, he ordered a cake with a picture of the cartoon characters Bert and Ernie, the QueerSpace logo and a sign saying "support gay marriage." The McArthurs initially accepted the order, but ultimately cancelled it because of their religious objection to same-sex marriage.

Lee obtained the cake elsewhere but felt discriminated by the McArthurs and sued them. Both the County Court in Northern Ireland¹⁰ and the Court of Appeal in Northern Ireland¹¹ classified the McArthurs' conduct as discrimination. The McArthurs challenged the decisions in the Supreme Court of the United Kingdom (UKSC), which faced the question whether the McArthurs discriminated against Lee and if so, what role their fundamental rights played in the case.

In its reasoning, the UKSC first addressed possible sexual orientation discrimination. Direct discrimination under the applicable law means treating a person less favorably than others based on a protected characteristic such as sexual orientation. However, the UKSC opined that the McArthurs did not refuse to serve Lee because of his sexual orientation, but because of the sign on the cake, of which they disapproved. They would not have baked the same cake for any other customer regardless of sexual orientation. Moreover, the reason for the refusal was not indissociable from sexual orientation. On the contrary, anyone can support same-sex marriage. For similar reasons, the UKSC also dismissed the associative discrimination claim, as the McArthurs did not take Lee's relationship to the gay community into account in any way, but objected merely to the cake he requested. Thus, the UKSC found no discrimination on the grounds of sexual orientation.

10. Lee v. Ashers Baking Company Ltd., [2015] NI Cty 2 (N. Ir.).

11. Lee v. Ashers Baking Company Ltd., [2016] NICA 39 (N. Ir.).

The UKSC then considered possible discrimination on the basis of political opinion, which belongs among prohibited grounds of discrimination in Northern Ireland. The UKSC held that support for same-sex marriage undoubtedly constituted a political opinion and its holders were therefore protected by antidiscrimination law. The UKSC pointed out that the idea of distinguishing whether the McArthurs refused Lee's order because of his political opinion or because of the message on the cake could apply in this situation as well. Nevertheless, the UKSC acknowledged that in this scenario, political opinion may be indissociable from a particular customer (i.e. if a baker refuses to make a cake with a sign expressing a particular political opinion, the customers holding this opinion will not be served). Since the McArthurs' conduct seen from this perspective might theoretically amount to discrimination based on political opinion, the UKSC went on to assess the role of the McArthurs' fundamental rights, namely their freedom of religion and freedom of expression protected under Articles 9 and 10 of the European Convention on Human Rights.¹²

The UKSC held that freedom of religion included the freedom not to manifest one's religion. Similarly, freedom of expression allows an individual to choose whether to express an opinion or not. Therefore, the McArthurs could not be compelled to produce the cake if they deeply disagreed with the message it conveyed. And it is irrelevant whether third parties would have understood the sign on the cake to mean that the McArthurs themselves supported same-sex marriage. The state would interfere with the McArthurs fundamental rights if it forced them to make the cake Lee wanted. Such interference would have to be sufficiently justified, which the UKSC did not find in the case at hand. Thus, the UKSC reversed the lower courts' judgments because discrimination did not occur.¹³

Lee appealed to the European Court of Human Rights¹⁴ that had a chance to review the UKSC's decision and examine whether individual rights guaranteed by the European Convention on Human Rights had been breached. But the European Court of Human Rights has recently found the complaint inadmissible because Lee had not explicitly invoked his Convention rights in the previous proceedings and had thus failed to meet

12. A human rights catalogue binding within the Council of Europe, which is an international organization of most European states.

13. [2018] UKSC 49.

14. An international court that interprets the European Convention on Human Rights.

the conditions for admissibility by not exhausting domestic remedies first.¹⁵

II. WHAT ARE THE TAKEAWAYS?

The biggest difference between the American and the British cases, which makes any comparison more difficult, is that only the *Ashers Baking Company* judgment deals directly with the core issue of religious objections to same-sex marriage. In this respect, the *Masterpiece Cakeshop* decision appears timid, as SCOTUS did not find the will or courage to address the merits of the case. This minimalist approach, which can rightly be criticized,¹⁶ seems striking considering that SCOTUS itself, knowing the question presented, chose to hear this particular case by granting a writ of certiorari. On the other hand, the decision can also be interpreted as a good example of judicial self-restraint. Having found the grounds for reversing the challenged decision, SCOTUS did not disclose how it would have viewed the case had the original proceedings not been tainted by procedural defects. Especially with the divide between conservative and liberal justices, which at the time often led to a 5-4 vote in controversial cases, it becomes easier to understand the willingness of justices on both sides to agree on the lowest common denominator in order to avoid another ideological clash.¹⁷

The UKSC's judgment is much more revealing, but it is not perfect either. The unanimous decision penned by Lady Hale appears straightforward and clearly reasoned at first sight. On closer examination, however, it has some weaknesses that will be mentioned below. Moreover, the European Court of Human Rights in the end chose a similarly cautious approach as SCOTUS and dodged the bullet of answering the substantive questions by holding the complaint inadmissible. Although the European Court of Human Rights regularly employs the principle of subsidiarity and requires that the domestic remedies be exhausted first, its strict and arguably formalistic decision in *Lee v. United Kingdom* still caused some disappointment.¹⁸

15. *Lee v. United Kingdom*, Eur. Ct. H.R. (2022) no. 18860/19.

16. See Richard A. Epstein, *Symposium: The Worst Form of Judicial Minimalism—Masterpiece Cakeshop Deserved a Full Vindication for its Claims of Religious Liberty and Free Speech*, SCOTUSBLOG (June 4, 2018), <https://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech/>.

17. In doing so, however, the liberal justices missed the opportunity to form a majority and address the underlying questions, while Justice Kennedy was still available as the possible swing vote in favor of LGBT rights.

18. See Natalie Alkiviadou, *A Missed Opportunity for LGBTQ Rights*, VERFASSUNGSBLOG

Despite the different approaches of SCOTUS and the UKSC, both opinions include interesting ideas that might help courts deciding similar cases in the future. The next part elaborates on a couple of important common themes that emerged from the two cases.

A. *Message v. Messenger*

Regarding discrimination, the UKSC came up with a powerful idea that it should be distinguished whether the bakers refused to fulfill the order because of the sign on the cake or because of the customer's personal characteristic which constitutes a prohibited discriminatory ground.¹⁹ Only the latter situation could amount to discrimination. In other words, when thinking about possible sexual orientation discrimination, the question is if the bakers would have made the same cake for a customer who is not gay. If so, they would have treated customers unequally on the grounds of sexual orientation and thus committed direct discrimination. The same thought process applies to discrimination based on political opinion. The SCOTUS justices touched upon this point, too, when they considered how the Colorado Civil Rights Commission treated other cases resembling Phillips'. Around the time the Commission sanctioned Phillips, it did not find discrimination in three similar cases in which other bakers did not serve William Jack who ordered cakes with images and text conveying disapproval of same-sex marriage. The majority opinion interpreted this different treatment as a sign of the Commission's hostility towards Phillips' religion. On the contrary, dissenting Justice Ginsburg as well as concurring Justice Kagan thought these cases might have been justifiably distinguished because Phillips refused to create a wedding cake for the same-sex couple due to their sexual orientation, while the other bakers did not serve the customer because of the particular design of the cake he ordered.

Thus, both the American and the British decisions involve some emphasis on the difference between objecting to a message (the cake) and to a messenger (the customer). This idea is entirely logical and consistent with the primary purpose of prohibiting discrimination, i.e. to protect individuals from being treated less favorably because of personal characteristics that they typically cannot choose or change (e.g. race,

(2022), <https://verfassungsblog.de/a-missed-opportunity-for-lgbtq-rights/>; Tom Lowenthal, *Lee v. UK: Exhausting Domestic Remedies*, OXFORD HUMAN RIGHTS HUB (2022), <https://ohrh.law.ox.ac.uk/lee-v-uk-exhausting-domestic-remedies/>.

19. See also Eugenio Velasco Ibarra, *Lee v. Ashers Baking Company Ltd.: The Inapplicability of Discrimination Law to an Illusory Conflict of Rights*, 83 MOD. L. REV. 190–201 (2020).

gender, and sexual orientation). But the cases also show how complicated it might become to apply this principle in practice.

In *Ashers Baking Company*, the lower courts' decisions illustrate the difficulties well. First, the trial court compared the situation of a gay man demanding a cake to promote same-sex marriage with that of a straight man demanding a cake to promote conventional marriage. With this choice of comparator, it makes sense that the trial court found less favorable treatment based on sexual orientation because only one of the customers in question would have been served. Second, the appellate court reasoned that same-sex marriage is so closely tied to the LGBT community that refusing to bake a cake supporting it actually means treating people less favorably due to their sexual orientation.

In *Masterpiece Cakeshop*, the justices did not agree whether the situations of Phillips and the other bakers could be distinguished. Justice Kagan and Justice Gorsuch, in their concurring opinions, closely examined this issue.²⁰ Justice Kagan argued that Phillips refused to serve the same-sex couple based on their sexual orientation because he would have made a wedding cake for an opposite-sex couple. Justice Gorsuch thought the cake was the problem, not the customers' sexual orientation. He argued that Phillips did not refuse to bake any cake, but a cake for a same-sex wedding, which he would sell to nobody regardless of their sexual orientation. This dispute between Justice Gorsuch and Justice Kagan shows that the solution changes depending on how broadly or specifically the cake in question is defined (whether it is just a cake, a wedding cake, or a cake for a same-sex wedding) and what exactly the cake in a particular case is supposed to look like.

To sum up, the idea that business owners can refuse certain orders due to their content but not due to the customer's personal protected characteristics (such as sexual orientation) attracted the attention of both courts, with the UKSC making it the foundation of its reasoning. Simply put, this means business owners should generally be able to choose what services to provide, but not to whom. Clearly, it is sometimes hard to define the message and the messenger under the specific facts and recognize which one caused the religious objection or whether they are inextricably linked. Nevertheless, the principle still seems very helpful when deciding if discrimination could possibly occur or not.

20. See also John Corvino, "The Kind of Cake, Not the Kind of Customer": *Masterpiece, Sexual-Orientation Discrimination, and the Metaphysics of Cakes*, 46 PHIL. TOPICS 1–19 (2018).

B. Bakers' Fundamental Rights

Even if bakers treat customers less favorably on the basis of a protected personal characteristic, the bakers' fundamental rights might stand in the way of classifying their conduct as discrimination. The first fundamental right that comes to mind is probably freedom of religion. Maybe surprisingly, however, freedom of speech proved to be equally or more important in the analyzed cases.

SCOTUS did not directly address the possibility of exempting the baker from the obligation to serve the same-sex couple in *Masterpiece Cakeshop*, so it did not have to choose between applying the Free Exercise Clause or the Free Speech Clause of the First Amendment. Since SCOTUS expressly mentioned the general rule that religious objections cannot justify discriminating against people with a protected characteristic, it would seem that the religious freedom argument by itself would have failed. Indeed, this argument had not been expected to succeed by the experts before the *Masterpiece Cakeshop* decision was issued,²¹ nor was it a central claim in the petitioner's brief which focused a little more on the free speech aspect.²² Specifically, the petitioner relied on the compelled speech doctrine and argued he could not be forced to create a custom artistic wedding cake if it conflicted with his beliefs. Although the majority opinion does not provide any clear guidance on this issue, Justice Thomas discussed it in more detail in his concurring opinion where he explained why the prohibition of compelled speech should apply and how it should lead to strict scrutiny of the state's actions. Additionally, SCOTUS chose to focus exclusively on the issue of compelled speech in the new *303 Creative LLC v. Elenis* case that it is about to hear.

The UKSC relied on both freedom of religion and freedom of expression. Possibly inspired by American jurisprudence, the UKSC applied the compelled speech doctrine to these rights and reasoned that nobody should be forced into an expression (religious or not) they deeply disagree with.²³ In the European context, this approach is rather novel, so the UKSC could not rely on extensive previous case law.²⁴ It is also

21. See Movsesian, *supra* note 9, at 719–20.

22. See Brief for Petitioners, *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 138 S.Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762.

23. For the pros and cons of the compelled speech doctrine application in this case, see Jacob Rowbottom, *Cakes, Gay Marriage and the Right against Compelled Speech*, U.K. CONST. L. ASS'N (2018), <https://ukconstitutionallaw.org/2018/10/16/jacob-rowbottom-cakes-gay-marriage-and-the-right-against-compelled-speech/>.

24. To support its conclusion, the UKSC cites, inter alia, case law of the European Court of

questionable how well the compelled speech doctrine fits with the religious aspect of the case. Surely, freedom of religion includes a choice to hold or not to hold religious beliefs as well as to practice or not to practice a religion in public. But the UKSC did not explain how these rights would be affected in the case at hand. After all, the McArthurs were not compelled to engage in any religious act, since baking a cake could hardly be considered an exercise of faith. If anything, they were compelled to communicate a particular message. Therefore, it seems logical to focus primarily on the freedom of expression in this situation.

Furthermore, the UKSC did not require the message on the cake to be attributed to the McArthurs. An outside observer would probably understand that the sign on the cake expresses an opinion of the customer, not the bakers.²⁵ No one forced the McArthurs to endorse same-sex marriage. According to the UKSC, the mere process of baking the cake interfered with the McArthurs' fundamental rights. Unfortunately, the UKSC did not explain why it opted for this, rather strict, solution. Moreover, the UKSC did not consider if the McArthurs would actually have to make the cake themselves. First, the image on the cake was only supposed to be a copy of the customer's design, so the bakers' personal input would have been minimal. Second, the McArthurs employed 65 people (not all Christians) some of whom could have made the cake without any religious objections. Indeed, requiring some degree of personal contribution (e.g. in case of an artistic custom-made cake or a hand-written message) might limit the exemptions based on prohibition of compelled speech in a desirable way.

Ultimately, the fundamental rights argumentation led the UKSC to allow the bakers' religious objection to prevail over the protection of same-sex couples. SCOTUS did not expressly rule this option out either. Allowing such an exemption from antidiscrimination law creates a challenge of keeping it restrictive enough to make sure that the business owners will not abuse it to normalize discrimination. Unfortunately, the courts identified the conflicting values at stake but did not attempt to balance them.

Last but not least, an aspect both courts almost completely ignored in their reasoning is the relationship between legal entities and fundamental rights. The decisions focus mainly on the bakers as

Human Rights, but the cited judgment addresses only freedom of religion, not compelled speech. In particular, the case concerns Members of Parliament who were forced to take their oath of office referencing the Gospels. *See* Buscarini, et al. v. San Marino, Eur. Ct. H.R. (1999) No. 24645/94.

25. For example, if a mother buys her child a cake that says "Happy Birthday," even the child will understand that the wish on the cake is not from the baker.

individuals, but the cases concern also Masterpiece Cakeshop and Ashers Baking Company. The UKSC only stated that punishing Ashers Baking Company for discrimination would impact the McArthurs as well and interfere with their fundamental rights.²⁶ However, that does not resolve the issue whether companies have the same fundamental rights as individual bakers, even rights as personal as freedom of religion. Previous case law suggests that they might, at least to some extent.²⁷ But then the question arises as to who determines the religious or other beliefs of a legal entity. In case of a small family business, it is tempting to identify the beliefs of the legal entity with those of its owner, but in a case of a large company such a solution would be difficult to imagine. In the future, therefore, courts will need to decide how to attribute fundamental rights to legal entities (or to which ones) when considering possible exemptions from antidiscrimination law.

III. WHAT NOW?

Although it might not be about cakes next time, problems with business owners' religious objections to same-sex marriage will likely not disappear²⁸ and, unless the legislature brings a comprehensive solution, courts will have to deal with it again. Of course, the outcome will depend on the applicable law and the unique facts of the given cases. Nevertheless, the *Masterpiece Cakeshop* and *Ashers Baking Company* decisions can at least provide the courts with some inspiration on how to proceed. Several general steps might help the courts structure their thinking about similar issues in the future.

First, discrimination can only occur when a person is treated less favorably on prohibited discriminatory grounds (like sexual orientation). Thus, courts need to distinguish whether the business owner refuses to fulfill the order because of the product the customer seeks or because of the customer's sexual orientation. In other words, would the business owner accept the exact same order from a customer who is not gay? If so, the business owner might commit discrimination.

Things may get more complicated when the business owner objects to the product which is, however, closely linked with the customer's sexual orientation. This can happen in the wedding context—for example,

26. See also Ibarra, *supra* note 19, at 200.

27. See *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

28. For examples of similar cases in Europe, see Romanița Elena Iordache, *Matters of Individual Conscience or Non-Discriminatory Access to Public Services and Goods?: Denial of Access to Public Goods and Services under the Colours of Religious Ethos*, EUR. EQUAL. L. REV. 30, 31 (2019).

probably only a same-sex couple will request a wedding cake with figures of two grooms on it. In that case, sexual orientation remains the reason behind the unequal treatment and courts should view it as possible discrimination. Depending on how strong the link between the product and the customer's sexual orientation is, the discrimination can be either direct if the two factors are inseparable, or at least indirect if the two factors are likely to coincide in vast majority of cases.

Second, courts also need to consider the business owners' fundamental rights, namely their freedom of religion and freedom of expression. If possible, it seems best to employ both in a complementary manner, but the prohibition of compelled speech might play an especially important role here. Additionally, courts should clarify under what circumstances (if at all) companies enjoy these rights.²⁹

Third, the hardest task is to weigh the fundamental rights at stake against antidiscrimination law protecting same-sex couples. The balancing exercise will vary in different countries, be it for instance an appropriate level of scrutiny in the United States or a proportionality test in Europe, but the factors to consider remain the same. In particular, the business owners' fundamental rights should prevail if an outside observer could mistakenly attribute the message (which they so strongly disagree with) to them instead of the customer. Strong arguments favoring business owners also exist when their personal contribution is necessary. That can happen for example if they are asked to be directly involved in the wedding by being present³⁰ or to create a custom-made artistic product using their unique skills. However, exemptions should only be granted if the business owners cannot delegate the task to one of their employees or subcontract it.³¹

On the contrary, the argument that the same-sex couple can be served elsewhere lacks persuasiveness because it underestimates that, besides the economic consequences, discrimination also involves dignitary harm.³² Moreover, research shows that discrimination causes a lot of practical

29. There might even be some differences depending on the size of the company. For example, Professor Laycock suggests that religious exemptions in the wedding context should not be granted to "large and impersonal businesses," but only to "very small businesses, where the owner is likely to be personally involved in providing any services." Douglas Laycock, *Liberty and Justice for All*, in ESKRIDGE & WILSON, *supra* note 9, at 24, 29.

30. See also Kent Greenawalt, *Mutual Tolerance and Sensible Exemptions*, in ESKRIDGE & WILSON, *supra* note 9, at 102, 107–09.

31. See Robin Fretwell Wilson, *Bathrooms and Bakers: How Sharing the Public Square Is the Key to a Truce in the Culture Wars*, in ESKRIDGE & WILSON, *supra* note 9, at 419–20; Mariëtta D. C. van der Tol, *Conscience and Cakes: Reaffirming the Distinction Between Institutional Duties and Individual Rights*, 9 OXF. J. L. RELIGION 372 (2020).

32. See Laycock, *supra* note 29, at 29–30.

burdens to same-sex couples getting married even if they eventually find a place where their order is accepted.³³

Overall, the suggested framework would enable courts in individual cases to allow for sufficiently narrow religious exemptions. It preserves the general principle that customers must have equal access to goods and services offered to public, but at the same time creates space to take the exceptional circumstances regarding religious business owners into account. Thus, needs of both sides (i.e. religious business owners and LGBT people) can be accommodated.

As Justice Kennedy noted in the *Masterpiece Cakeshop* majority opinion: “[T]hese disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”³⁴ Finding the right balance is not easy. Hopefully, this Article helps by discussing what lessons courts on both sides of the Atlantic can learn from the *Masterpiece Cakeshop* and *Ashers Baking Company* cases.

33. See Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGIS. STUD. 75 (2021).

34. *Masterpiece Cakeshop*, 138 S.Ct. at 1732.