AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Religion

**Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, \_\_\_ U.S. \_\_\_** (2018)

*Jack Phillips, the owner of Masterpiece Cakeshop, refused to make a wedding cake for Charlie Craig and Dave Mullins because he opposed same-sex weddings on religious grounds. Craig and Mullins then filed a complaint against Phillips, claiming that his refusal to provide a wedding cake violated that Colorado Anti-Discrimination Act (CADA). The crucial provision of that law forbade persons “to refuse . . . to any individual . . . because of . . . sexual orientation . . . the full and equal enjoyment of goods (and) services.” Phillips claimed that requiring him to bake a cake that celebrated a same-sex wedding violated both his free exercise and free speech rights under the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. The Civil Rights Commission found that Phillips had violated CADA. That finding was sustained by an administrative law judge and Colorado state courts. Phillips appealed to the Supreme Court of the United States.*

*In addition to his original free speech and free exercise claims, Phillips claimed that the Colorado Civil Rights Commission had violated religious neutrality when deciding his case. He pointed out that the Commission failed to sanction three bakers who had refused to bake a wedding cake for William Jack, who requested the cake be decorated with Biblical verses and anti-gay phrases from the Bible. The Commission insisted that the bakers had a right to refuse because they found the message offensive, whereas all Phillips was asked to do was produce a wedding cake with no particular decorations. Phillips claimed that commission was favoring pro-gay bakers for religious reasons.*

*The Supreme Court by a 7-2 vote ruled that the Colorado Civil Rights Commission engaged violated religious neutrality when sanctioning Masterpiece Cakeshop. Justice Anthony Kennedy pointed to what he believed were anti-religious assertions made by commissioners during the hearing and emphasized that the commission had no right to make a religious judgment that some messages are more offensive than others. Consider first Kennedy’s claim that the commissioners make remarks that reflected bias toward religion. How do you interpret the remarks? Suppose a member of the commission had praised the role of religion in combatting discrimination. Would that have demonstrated a lack of religious neutrality? Kennedy claims that the Civil Rights Commission failed to articulate an adequate distinction between the Craig/Mullins and Jack cases. Why does he reach this conclusion? Do the more liberal members of the court make a compelling case that an adequate distinction existed (while disagreeing among themselves whether Colorado made that distinction)? Is the case that Justice Gorsuch makes that no distinction exists more compelling? Was Justice Thomas right that the court should have addressed the free speech issue and was he correct in his assessment of that issue? Why do you think the court decided the case on fairly narrow grounds?*

Justice [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. . . . At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. . . . Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

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The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

. . . . On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. . . . Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

 “I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”

To describe a man's faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

. . . . Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

. . . [O]n at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” featured “language and images [the baker] deemed hateful,” or displayed a message the baker “deemed as discriminatory.

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The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies,” to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

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A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,”  it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

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In *Church of Lukumi Babalu Aye* the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion.  Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. . . .

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”  In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave “every appearance” of adjudicating Phillips' religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. . . .

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Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.”  I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. . . .

The Court partly relies on the “disparate consideration of Phillips' case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.”  . . . What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti–Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation and creed.  The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation.  The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990)*,* this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise *Smith* remains controversial in many quarters. But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.

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The facts show that the two cases (Jack and Phillips] share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from “the offensive nature of the requested message.”  Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a “distinction without a difference.” It concluded instead that an “intent to disfavor” a protected class of persons should be “readily ... presumed” from the knowing failure to serve someone who belongs to that class.  In its judgment, Mr. Phillips's intentions were “inextricably tied to the sexual orientation of the parties involved” and essentially “irrational.”

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The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. . . . [I]it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of “irrational” or “offensive ... message” that the bakers in the first case refused to endorse.  . . . [N]o bureaucratic judgment condemning a sincerely held religious belief as “irrational” or “offensive” will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the “proudest boast of our free speech jurisprudence” that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. . . .

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To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. . . . Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. Like “an emblem or flag,” a cake for a same-sex wedding is a symbol that serves as “a short cut from mind to mind,” signifying approval of a specific “system, idea, [or] institution.” . . .

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. . . . Suggesting that this case is only about “wedding cakes”—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. . . . The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there,

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There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. . . . It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just*a cap.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring in part and concurring in the judgment.

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. . . . This Court has long held that “the Constitution looks beyond written or spoken words as mediums of expression,” and that “[s]ymbolism is a primitive but effective way of communicating ideas.”  . . . To determine whether conduct is sufficiently expressive, the Court asks whether it was “intended to be communicative” and, “in context, would reasonably be understood by the viewer to be communicative.”  But a “ ‘particularized message’ ” is not required, or else the freedom of speech “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”

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The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. . . . Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. . . . .Phillips is an active participant in the wedding celebration. . . . To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” App. 162.

Wedding cakes do, in fact, communicate this message. . . . If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. . . . The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, or flying a plain red flag. By forcing Phillips to create custom wedding cakes for same-sex weddings, Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are “weddings” and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],” or to “affir [m] ... a belief with which [he] disagrees.”

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The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. . . .  The Colorado Court of Appeals also noted that Masterpiece is a “for-profit bakery” that “charges its customers.”  But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. . . .

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Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien,* that test does not apply unless the government would have punished the conduct regardless of its expressive component. . . . Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage.

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States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” . . . If the only reason a public-accommodations law regulates speech is “to produce a society free of ... biases” against the protected groups, that purpose is “decidedly fatal” to the law's constitutionality, “for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.” . . .

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In *Obergefell v. Hodges* (2015), I warned that the Court's decision would “inevitabl [y] ... come into conflict” with religious liberty, “as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples.”  This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.”  If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ie684cb9d67f911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

There is much in the Court's opinion with which I agree. “[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” . . . I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. . . .

. . . . [T]the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied.

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Nor was the Colorado Court of Appeals' “difference in treatment of these two instances ... based on the government's own assessment of offensiveness.” *Ante,* at ––––. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal “to design a special cake with words or images ... might be different from a refusal to sell any cake at all.”  The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. . . .

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. . . .

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