Finding the Balance
By Martricia O’Donnell McLaughlin, Esq.

But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.

Thomas Jefferson

The Constitution guarantees freedom of religion

Tourists braving the often-searing heat of a Philadelphia summer to experience the history and solemnity of Independence Hall frequently realize the enormity of the political experiment in government that became the United States Constitution and the Bill of Rights. The suggestion proffered by many, including Justice Oliver Wendell Holmes, that these governing documents are transformative and alive reverberates as tourists emerge from the preserved chambers to the vivid and colorful display of life in modern Philadelphia.

The First Amendment to the U.S. Constitution established the legal basis for “freedom of religion” as it states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...” Thus, the First Amendment defines religious freedom to include separate but complementary protections: the right to religious belief and expression and a granting to both government and religion (or non-belief systems) freedom from undue influence of one by the other.

This inherently volatile grant of freedom is often cited as a reflection of the United States as a paragon state of religious tolerance: As President Obama stated in defense of an Islamic Center construction project close to Ground Zero in Manhattan in 2010: “This is America. And our commitment to religious freedom must be unshakeable. The principle that people of all faiths are welcome in this country and that they will not be treated differently by their government is essential to who we are.”

The history of religious intolerance

The history taught to U.S. school children and the contemporary self-identification of the culture by politicians and others affirms the view that the United States has lived up to its ideal status as a haven of religious tolerance and freedom. Consider, for example, the values pronounced by President George Washington at a Newport, Rhode Island, synagogue (and ritually restated each August):

“All possess alike liberty of conscience and immunity of citizenship. ... For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens.”

The aspiration that America would stand, unique in the world, as a religiously tolerant and peaceful state has been challenged in practice from early settlement until the current time. The colonial view of Native Americans as “heathens” and the subsequent bitter and often violent clashes to convert tribes to “Christianity” is an obvious, early example. But, European conflicts crossed the ocean along with new

“Continued on page 2"
settlers. Colonial discourse was filled with ideological battles among various Christian Protestant sects. Religious dissenters arriving in New England operated as a theocracy with dissenters, such as Anne Hutchinson, banished for voicing religious views. Quakers and other non-Puritans, also suffered persecution, not to mention the barbarity seen in the notorious Salem Witch Trials and the brutal repression of African-American religious practice among the enslaved.

Even after the colonies established independence from Britain, the law embraced such provisions as limiting those eligible for public office to Christians (Massachusetts); requiring Catholics to renounce papal authority before holding office or banning them from such office (New York, until 1806); specifically banning Jews from holding public office (Maryland); mandating officials declare religious oaths (Delaware); and establishing state-supported churches (Massachusetts and South Carolina). Persecution of Jehovah's Witnesses caused migration of these believers across the country.

Anti-Catholic and anti-Mormon feeling led to violence on more than one occasion and in more than one location, not singularly on a scale such as the Bible Riots in Philadelphia in 1844 in which Catholic property was destroyed and at least 20 people perished.

In presidential campaigns, from John F. Kennedy's famous speech asserting loyalty to the state rather than the church in his official capacity, to Bernie Sanders' affirmation of his Jewish identity in 2016, religious belief of our leaders has been legitimized as an area of inquiry.

The complexity of guarantees

No God is mentioned substantively in the Constitution, which also permits officials “to swear or affirm” oaths of office.

President James Madison, deemed the “Father of the Constitution,” wrote in an essay titled “Memorial and Remonstrance Against Religious Assessments”:

the Religion then of every man must be left to the conviction and conscience of every...man to exercise it as these may dictate. This right is in its nature an inalienable right.” He further argued that state involvement in any religion is a threat to rather than security for any religion.

But it was, perhaps, the words of Thomas Jefferson that most presaged the tangled web of law and legislation that would arise when the rights of free expression of religion collide with other protected constitutional rights. Jefferson stated, perhaps too blithely: “But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.”

The conflict between religious freedom and civil rights

History has demonstrated that, Jefferson’s confidence notwithstanding, there are indeed occasions when citizens confront situations in which the “free exercise” of the religion of one does, in fact, compromise the enjoyment of another of guaranteed civil rights and liberties.

In the 20th century, facially neutral laws were used to restrict or punish certain religious groups seen as having practices that challenged the predominant religious practices of the larger community. Catholics seeking their own schools were targeted by an Oregon law requiring all children to attend public schools. That law was struck down by the Supreme Court in Pierce vs. Society of Sisters, 268 U.S. 510 (1925). In West Virginia State Board of Education v. Barnette, 319 US 624 (1943) a law requiring children to salute the flag or face expulsion from public school, a practice with conflicted with the religious practice of Jehovah's Witnesses, was struck down on free speech grounds.

Continued on page 3
Since 1990, disputes involving the balancing of religious freedom against the curtailment of civil rights have continued to occupy the U.S. Supreme Court. Increasingly, decisions involving such balancing are argued to be weapons of social engineering by participants in culture wars which increasingly involve the civil liberties of women and LGBTQ citizens, among others. Responses to these cases include legislation on the state and federal levels as well as increased litigation by advocates on the left and the right.

In 1990, the U.S. Supreme Court decided the case of Employment Division v. Smith, 494 US 872 (1990). The court upheld denial of unemployment benefits to two American Indians who were fired from a drug rehabilitation program because they incorporated the use of sacramental peyote into their care plan. Peyote was proscribed by the state of Oregon as a controlled substance of which possession was a felony. Justice Scalia wrote the opinion of the court, holding that the Free Exercise clause permits the state to prohibit sacramental peyote use and to deny unemployment benefits in the case. Scalia stated that, although a state would be prohibiting the free exercise in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied ... for non-religious reasons. (citations omitted at 872.)

The court went on to characterize the criminal law as a “neutral and generally applicable” law. The analysis distinguished the Smith case from previous decisions, which it characterized as involving the Free Exercise clause in conjunction with other constitutional protections. The case was deemed distinguishable from the line of cases that had developed in which the claim for religious exemptions was analyzed by balancing the compelling state interest against the individual burden to religious practice.

Interestingly, the majority identified the possibility, negatively perceived, that a contrary ruling would create an “extraordinary right” of an individual to ignore generally applicable laws not supported by “compelling governmental interests” based on religious belief. Further, the opinion indicated that it would not be desirable to “emesh judges in an impermissible inquiry into the centrality of particular beliefs or practices or beliefs.” Indeed, Scalia foresaw a floodgate, stating that using a religious exemption in conflict of a valid law “would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind.” The court concluded that while it was constitutionally permissible to exempt sacramental peyote from drug laws, there was no constitutional requirement that such exemption was required.

Legislative response

The Smith case released a storm of reaction that united both the left and the right in the U.S. Congress. In 1993, largely as a response to that decision, the Religious Freedom Restoration Act (RFRA) passed nearly unanimously. President Clinton signed the bill into law. Subsequently, a significant number of states enacted their own state laws.

The RFRA prohibits the government from restricting an individual’s religious practice unless there is a compelling state interest justifying such a restriction. The act also provided individuals with a right to sue the government for violations of the RFRA. In 1997, the U.S. Supreme Court ruled that the RFRA could not be applied to state governments. As a result, at least the legislature of at least 21 states, including Pennsylvania (71 Pa. C.S.A. §2403 et. seq.) State judiciaries have also addressed the question, and state constitutional amendment efforts followed. Many state legislatures became very active in enacting state RFRA laws stronger for religion in the hope that such efforts, which could be used to defeat...
Finding the Balance
Continued from page 3

same-sex marriage as the marriage equality cases, journeyed through the courts.1

While the RFNA was introduced with Democratic legislators Schumer and Kennedy leading on the issues, many argue that the federal law and state laws that followed have been critical tools to promote conservative religious agendas such as the denial of civil rights to LGBTQ citizens. Nonetheless, many who support religious exemptions against compliance with civil rights laws are dissatisfied with the RFRA, claiming it leaves religious practice vulnerable to attack.

In the sphere of public discourse, a strong narrative has taken hold that citizens of faith are in fact the victims of discrimination as are their institutions, properties and practices. Much litigation has occurred questioning zoning laws and, increasingly, requirements that citizens of faith preserve the equality granted to all under constitutional law in secular life. The contrasting dialogue points to the first amendment and the RFRA being used to target populations, such as gay and lesbian couples, transgender individuals and women seeking birth control and abortion. Cases involving the denial of pediatric care to a child of a same-sex marriage, lifesaving treatment to a transgender individual or access to public accommodation to a gay person have been challenged.

In May 2018, Democrats in the senate introduced the “Do No Harm” bill, which is an amendment to the RFRA and is claimed to be retuning that act to its initial intention. Sen. Maize Hirono of Hawaii stated, “While our country was founded on the value of religious liberty, that freedom cannot come at the expense of others’ civil rights.” A similar bill had been introduced in the House in 2016 and 2017, which would amend the law to specify that the RFRA cannot counteract civil rights laws, employment law, protections against child abuse or access to health care. It is believed that a change in the composition of the House and Senate is needed for the Do No Harm provisions to be made into law.

The balance in the courts

The recent case of Masterpiece Cake might be keeping the needle of change where it was before the litigation, as the case was decided on narrow grounds, which circumvented the question of what the appropriate balance is between the right to enjoy free exercise of religion and the right of LGBTQ citizens to enjoy commerce in the community free from discrimination based on their sexual orientation or marital status.

However, the Supreme Court has travelled a great distance from its decision in the sacramental peyote case (Smith) in 1990. Specifically, in Burwell v. Hobby Lobby Stores Inc. 134 S. Ct. 2751, the Supreme Court greatly expanded the right of free exercise by extending that right to privately held corporations in a decision granting an exemption from the Affordable Health Care Act based on religious belief claims. The majority opinion gave a broad interpretation to free exercise based on the RFRA.

An equally important but less widely known case is Holt v Hobbs, 135 S. Ct. 853 (2015) which used the RFRA and its sister act, the Religious Freedom Land Use and Institutionalized persons Act (42 U.S.C. §§ 2000-cc to cc-5 (2012)) to address the concerns of Muslim prisoners on the issue of institutional rules regarding facial hair. The court made clear its recognition of both these statutes as redressing the restrictive ruling in the Smith case, above. The court stated that these statutes would be interpreted as Congress intended “to the maximum extent permitted by the statutes and the Constitution.” Some scholars have seen this decision as a full retreat from Smith, which gives great and subjective deference to the person claiming infringement of religious freedom.

What lies ahead

In the Stutzman case decided in the final week of the U.S. Supreme Court session of 2017-18, the court puzzled many by treating the Masterpiece decision as though it contained a metric for balancing individual rights against free exercise of religion in a case involving a florist refusing to serve her pre-

Finding the Balance
Continued from page 4

existing customers at their gay wedding based on her personal belief system. In addition, the case of Trump v Hawaii, the actions of the court suggest that the “principles of religious freedom and tolerance on which this nation was founded” might be at a watershed moment wherein the balance of freedoms is being reconsidered.

Conclusion

The LGBTQ community faces significant challenges despite the achievement of marriage equality and the many advances of LGBTQ individuals in the arts, politics, academia, law and business, as well as increased acceptance and respect in families and communities. Some predict that religious freedom will be used as a sword to create limitations of LGBTQ individuals in experiencing equal rights under law. A new age of “separate and unequal rights” targeting the LGBTQ community based on religious freedom claims is feared.

This brief analysis of the history of the conflict between civil rights and freedom of religion demonstrates that engagement on the issue is critical. Participation by LGBTQ persons of faith in their faith communities can alter the dialogue as well as the perceptions held by faith communities. Activism on the community and state level specifically on RFRA and related legislation is crucial. Advocacy on the federal level to support the Do No Harm amendments is an available and important path to ensuing equal rights under the law for the LGBTQ community in a religiously tolerant world.

Thomas Jefferson brilliantly observed that another’s faith or lack thereof would “neither pick his pocket nor break his leg.” Neither is the gender identity, sexual orientation or marital status capable of harming others. A balance can be achieved in which all enjoy the constitutional guarantees on which the United States is built.

Martricia O’Donnell McLaughlin has practiced law in Northampton and surrounding counties since 1979 in the general practice firm of McLaughlin and Glazer. Currently, Martricia concentrates her legal practice in criminal law and appellate advocacy. She is also a certified mediator concentrating in family and elder issues.
The ramifications of the Supreme Court’s decision in Masterpiece have yet to be determined. Some defenders of the baker who refused to bake a cake for a wedding between two men have read the decision as a wholesale right to refuse services to LGBTQ individuals based upon sexual orientation. Said defenders assert their alleged right to religious freedom as a mask permitting discrimination. Most scholars have read the decision as being limited to its facts and addressing only the issue of the outward hostility of the Colorado Commission towards the baker and his objections to baking the cake.

Within days, if not hours, of the decision, a Tennessee hardware store placed a sign reading “NO GAYS ALLOWED” in its window. This same store had a similar sign in its window in 2015. Apparently the sign was taken down at some point after the Colorado Commission pursued the baker for violating the non-discrimination laws. It was, however, replaced with a sign that read “We reserve the right to refuse service to anyone who would violate our rights of freedom of speech and freedom of religion.” In relation to the recent change in signage by the hardware store owner (and even the interim signage), it is clear that the Supreme Court did not reach the issues related to the intersection of freedom of speech/expression, freedom of religion and the right to be free from discrimination. So, the hardware store owner’s claim to victory on this front is misplaced.

What is concerning is that the door has been left open to discrimination because the Supreme Court failed to reconcile the line between LGBTQ discrimination and religious freedom and expression. In that respect, Justice Ginsburg’s dissent is telling as she would have swiftly closed that door – “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.” She went on to say, “The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins’ case presented…[w]hat matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”

Let’s be clear – the Supreme Court ruling in Masterpiece was not a complete loss for the LGBTQ community, but it certainly was not even close to a win. The door to discriminate remains open for now, and with the make-up of the Court, it may remain open for a long time to come. As I’ve heard multiple times and it still rings true, this isn’t about a cake – just as it wasn’t about a soda counter during the Jim Crow era. It’s about civil rights. Our community must remain vigilant and present. To do otherwise is giving up, which is something we cannot afford to do.


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Masterpiece Cakeshop: A Piece of Civility, With More to Come

By Mária Zulick Nucci

“The most dangerous food is wedding cake.”
– James Thurber

In Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 584 U.S. ___, No. 16-111 (June 4, 2018), the United States Supreme Court held that the Colorado Civil Rights Commission did not exercise necessary neutrality in evaluating a baker’s claim that requiring him, under the state’s Anti-Discrimination Act, to provide wedding cakes for gay couples violated his First Amendment free exercise right. The case does not resolve the issue of balancing free exercise and LGBT rights, but provides several points for LGBT advocates in addressing this issue. Justice Anthony Kennedy wrote the Opinion of the Court, joined by Chief Justice Roberts and Justices Breyer, Alito, Kagan and Gorsuch. Justice Kennedy authored several opinions upholding gay rights, so that his June 27, 2018, announcement of his retirement is critical to future Supreme Court decisions affecting LGBT persons.

Charlie Craig and Dave Mullins approached Jack Phillips, owner and operator of Masterpiece Cakeshop to order a cake for their wedding. Colorado did not then recognize same-sex marriage; the couple planned to wed in Massachusetts, which did, and have their celebration at home in Colorado. Phillips declined, stating that he would provide them with other goods, but did not make wedding cakes for same-sex weddings. They filed an administrative complaint under Colorado’s Anti-Discrimination Act (CADA), Colo.Rev. Stat. §24-34-601(2)(a) (2017). The Civil Rights Division investigated and found that Phillips had refused wedding cakes to about six other gay couples and cupcakes to a lesbian couple who wanted to celebrate their commitment ceremony. The matter was referred to an administrative law judge, who entertained cross-motions for summary judgment, where the material facts were not disputed. The ALJ rejected Phillips’ argument that applying CADA would violate his First Amendment free speech right by requiring him to use his artistic talents to create something conveying a message with which he disagreed. The ALJ also rejected his argument that it would violate his First Amendment free exercise right, where he was “a devout Christian” who believed that God intended marriage to be between one man and one woman.

Slip op. at 3, citing the record. Relying on Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990), the ALJ found CADA to be a valid, neutral law of general applicability so that invoking it did not violate the Free Exercise Clause.

Phillips appealed to the Colorado Civil Rights Commission, which ordered him to cease and desist discriminating against same-sex couples and established various remedial measures. The Colorado Court of Appeals affirmed. After the Colorado Supreme Court declined further appeal, he appealed to the U.S. Supreme Court, posing this question: does compelling him, under Colorado’s public accommodations law, to create expression that violates his sincerely held religious belief about marriage, violate the Free Speech or Free Exercise Clause?

Continued on page 8
Masterpiece Cakeshop
Continued from page 7

Justice Kennedy began by noting society’s “recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” Slip op. at 9. However, religious and philosophical objections to gay marriage are protected views and, “in some instances,” protected forms of expression. This protection did not necessarily apply to business owners and others in society regarding public accommodations. Here, the issue was not a refusal to serve gay customers in general, or even to provide other goods and services for a gay wedding, but the use of artistic skills to create an expressive statement as a wedding endorsement.

The court noted the state of the law in 2012, when the dispute arose. Colorado did not recognize gay marriage, and the Supreme Court had not yet decided United States v. Windsor, 570 U.S. 744 (2013) or Obergefell v. Hodges, 576 U.S. ____ (2015). The court also noted that, at the same time the present matter was in the state administrative and judicial process, Colorado’s Civil Rights Commission endorsed giving bakers latitude to refuse to make specific messages that they deemed offensive on cakes. Slip op. at 11-12, citing the Jack cases,” where William Jack, who identified as Christian, brought complaints against three bakeries that refused to make cakes with anti-gay images and messages.

However, the court found the determinative factor to be that, in the administrative proceedings, Phillips was denied “the neutral and respectful consideration of his claims.” Id. at 12. Several times during the public hearings, commissioners stated “that religious beliefs cannot legitimately be carried into the public sphere or commercial domain,” with one Commissioner stating that Phillips can “believe what he wants,” but not act on it while doing business in Colorado. Id. at 12-13. At a later public hearing, another Commissioner stated that religious freedom has frequently been cited to justify discrimination, citing slavery and the holocaust.

The court focused on this commissioner’s statement, “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.” Id. at 13, quoting the hearing transcript. No other commissioner objected, nor were these comments addressed by the state courts or in the Supreme Court briefs. This created doubt whether Phillips was treated fairly and impartially, as with the different treatment the Civil Rights Division accorded to the bakers in the Jack cases, where the division found for the bakers.

Interestingly, the court cited Church of Lukumi Babalu Aye Inc. v. Hialeah, 508 U.S. 520 (1993), sometimes referred to as the animal sacrifice case, for the principle that government must be neutral toward religion, not acting with hostility nor passing judgment or presupposing a belief or practice as illegitimate. Slip op. at 7. Here, the court stated that the issues before it were “difficult to resolve”; Colorado could have evaluated its interest against Phillips’ belief with neutrality. The commissioners’ various critical comments indicated to the contrary, inconsistent with free exercise requirements, so that the Court of Appeals’ affirmation was reversed. Id. at 17-18. (Of note, Colorado does not have a religious freedom restoration act, as does the United States and several states, which, although their terms differ, generally seek to reinstate the strict-scrutiny standard for free-exercise claims set forth in Sherbert v. Verner, 374 U.S. 398 (1963), where the state, after a showing that its action was a substantial burden on free exercise, had to show a compelling state interest and narrow tailoring of its action or least restrictive means to achieve it. That standard was removed in Employment Division v. Smith, and Congress followed with the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. One might wonder if such a state law would have changed the result, in the state courts or at the Supreme Court.)

The court concluded that disputes like the one before it “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.” Slip op. at 18.

Concurring, Justice Kagan, joined by Justice Breyer, observed that, in the Jack cases, the bakers did not refuse to make the disputed cakes because of Jack’s religion, but because they would not have made cakes with offensive messages for any customer. Slip op. at 2. Also concurring, Justice Gorsuch, with Justice Alito, compared Masterpiece Cakeshop and the Jack cases in more detail, noting that Jack was in a protected class under CADA, which prohibits discrimination “because of creed” but also noting that the bakers there would not have provided the requested goods and services to anyone. Slip op. at 4.

Justice Thomas, joined by Justice Gorsuch, concurred in part and concurred in the judgment. He found that Phillips

Continued on page 9
Masterpiece Cakeshop
Continued from page 8

“rightly prevail[ed] on his free exercise claim,” slip op. at 1, although the court did not rule on the merits of that claim. He addressed the free speech claim and discussed the process of ordering a wedding cake and these cakes’ history and significance. Id. at 5-8. They criticized the Court of Appeals’ opinion that wedding cakes are not expressive speech and reviewed the court’s precedents rejecting compelled speech. Regarding Phillips’ operation as a business, they noted that, among other practices based on his faith, not profit, he refused to make cakes with homophobic messages. Id. at 10. Citing Obergefell and Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000), Justice Thomas stated that, as societal and legal attitudes toward marriage change, those with opposing views might have increased need for protection under First Amendment jurisprudence. Id. at 14.

Justices Ginsburg and Sotomayor dissented. Although agreeing with much of the court’s opinion, they read its conclusion as meaning that Craig and Mullins, the gay couple, should ultimately lose. They also stated that the comments of some commissioners did not rise to the level the court previously found to infringe free exercise. Slip op. at 3. The justices also compared in detail the case before them with the Jack cases, maintaining that, unlike those cases, Craig and Mullins did not request a message on their cake; they just wanted a wedding cake. Again, by contrast, the Jack bakers would not have made the cakes requested there for any customer. Id. at 3-5. Significantly, the justices noted, the administrative and judicial proceedings were at several layers, with all finding a CADA violation, but the court based decision on comments by one or two commissioners. “[S]ensible application” of that law, where Phillips refused to sell a wedding cake to any gay couple, would warrant affirmance of the Court of Appeals’ judgment. Id. at 8.

Masterpiece Cakeshop could be read as a 7–2 decision in favor of neutrality in addressing free exercise claims, and, by inference or extension, particularly cases involving significant, divisive or social issues. For that reason, it might also be read as a decision saved for the proverbial another day ruling on the merits. It should not be read as a clear ruling against LGBT rights simply because the court remanded, finding that a claimed constitutional right was not treated with necessary neutrality; this is especially so where a ruling on the merits for Phillips and his business might have been anticipated from a conservative court. See, e.g., http://thesis.honors.olemiss.edu/1036/3/Price%20Thesis.pdf; http://www.scotusblog.com/2017/12/argument-analysis-conservative-majority-leaning-toward-ruling-colorado-baker/. More importantly for analytical purposes, one must recall, as noted, that Justice Kennedy wrote four key prior opinions upholding gay rights: Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor; and Obergefell v. Hodges. See https://www.theatlantic.com/politics/archive/2015/06/anthony-kennedys-long-history-of-protecting-gay-rights/440172/. This history also supports a view that the decision should not be viewed as anti-LGBT.

The decision has already been applied: on June 25, 2018, the court granted certiorari in Arlene’s Flowers Inc. v. Washington, No. 17-108, vacated the judgment of the Washington Supreme Court and remanded for reconsideration in light of Masterpiece Cakeshop. In Arlene’s Flowers, the proprietor knew that two customers were gay and in a relationship and sold them flowers many times for various events and purposes. They regarded her as “their florist.” State of Washington v. Arlene’s Flowers Inc., No. 91615-2 (en banc, filed Feb. 16, 2017), slip op. at 3, quoting the record. However, she refused to handle the floral arrangements for their wedding. The case arose under Washington’s Consumer Protection Act and Law Against Discrimination, and the issues are:

(1) whether the creation and sale of custom floral arrangements to celebrate a wedding ceremony is artistic expression, and, if so, whether compelling their creation violates the free speech clause; and

(2) whether the compelled creation and sale of custom floral arrangements to celebrate a wedding and attendance of that wedding against one’s religious beliefs violates the free exercise clause. http://www.scotusblog.com/case-files/cases/arlenes-flowers-inc-v-washington/.

Masterpiece Cakeshop clearly does not, and could not, resolve the issue of the balance of LGBT rights and free exercise. As the court noted, such claims could arise in many factual scenarios, each requiring careful, neutral consideration. However, it does provide some guidance, and raise some issues for consideration.

First, the court’s emphasis on the commissioners’ conduct indicates the potential, practical importance of civility in addressing and litigating disputes in this area. For advocacy

Continued on page 10
purposes, this suggests a value in civility for LGBT advocates and supporters, not only those in official positions like the commissioners, in both legal and societal venues: advocate based on the law and changing societal norms, without characterizing those with different, even opposing, views as claiming “a right to discriminate” or “a right to hate,” as one sometimes hears in media coverage and commentary. The better approach would be to make the legal case, including policy and societal issues, that, in a given case, action contrary to LGBT interests violates prohibitions against illegal or invidious discrimination, not simply general “discrimination,” and to adapt the court’s statement that these issues “must be resolved with tolerance, without undue disrespect” to any party.

Next, the discussion in the various Masterpiece Cakeshop opinions regarding Christian faith or beliefs requires consideration. Christianity is clearly a diverse faith, with many denominations and differing opinions among congregations and believers within them. It thus should not be seen collectively as only, or mainly, the evangelical, conservative or fundamentalist expression, which is often at issue in LGBT rights and other “culture wars” cases. Indeed, in Masterpiece Cakeshop, the General Synod of the United Church of Christ and the Central Conference of American Rabbis, both with other Christian entities, filed amicus briefs in support of the Civil Rights Commission, as did the Tanenbaum Center for Interreligious Understanding. The CEO of the Family Equality Council, an advocacy organization, is the Reverend Stan J. Sloan, an Episcopal priest. Clergy and other religious entities, including Christian ones, have otherwise engaged in pro-LGBT advocacy and activities. See https://www.pabar.org/public/committees/GLB01/pubs/OpenCourt%20Summer%202015.pdf. With the retirement of Justice Kennedy during a conservative administration, the LGBT community would benefit from further reaching out to and strengthening ties with these of their allies, who tend not to receive the media coverage, hence public awareness, given to their opponents.

Further legal activity, perhaps a Masterpiece Cakeshop II, is likely foreseeable, and with continuing involvement by persons and entities on both sides: in Arlene’s Flowers, there were 12 amici briefs; 95 were filed in Masterpiece Cakeshop. Whether one agrees with James Thurber’s opinion of wedding cake, we may expect second helpings, as well as more flowers and other amenities, particularly in a changing court. ■

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Getting to Know One of Our Members: Mathew C. Mecoli

Mathew C. Mecoli

Mathew C. Mecoli is a recent law school graduate of Drexel University and the co-chair of the SOGI Committee of the ABA’s Section of Civil Rights and Social Justice.

Can you tell our readers about your background, education and employment as an attorney?
I grew up in South Jersey and attended high school at St. Joe’s Prep before I got an academic scholarship to attend the University of Alabama (Roll Tide!). I recently graduated from Drexel Law.

Where do you live and work? How do you feel about it?
I currently live right in the heart of Philadelphia, and I love it. Being able to watch the growth and prosperity that Philly has seen in recent years has been great, as is having such an LGBT-friendly mayor in Jim Kenney.

What made you join the PBA GLBT Rights Committee? Does it dovetail with other professional or volunteer efforts or ventures?
I joined the committee my 1L year shortly after being elected the 3rd Circuit Governor of the ABA’s Law Student Division. I’ve been actively involved in LGBT rights advocacy in the ABA, and the work of the GLBT Rights Committee of the PBA often dovetails with the work I do there.

Can you give me an example?
Recently, I spearheaded the committee’s efforts to pass an ABA resolution endorsing an interpretation of Title VII of the Civil Rights Act that includes sexual orientation and gender identity within the meaning of “sex” for the purposes of employment protections. We successfully passed that resolution, and are working on a similar one for SOGI protections in healthcare settings. We also have active projects on the state of trans law, LGBTQ youth, and LGBTQ issues in immigration.

Being a member of the bar at multiple levels allows you to have the maximum impact. It empowers you. I always draw inspiration from the work that the GLBT Rights Committee does, and I’d love to find ways to connect local, state, and national bar efforts more in the future both by collaborating on projects of import to the LGBT community and by interacting more as members of the LGBT community.

On a lighter note, what’s your favorite vacation spot?
As a Jersey boy through and through, I have to say the Jersey Shore.

Do you have a favorite book and why do you love it?
Anything by Hemingway or most science fiction — Hemingway because of how well he captures the world and science fiction because of how well it lets you escape from it.

Do you have a favorite TV show?
My favorite TV show at the moment has to be HBO’s Westworld. Everything from the acting to the score to the cinematography to the writing of that show is absolutely superb. Most TV shows turn your brain off, but this one makes you think.

What about a favorite movie?
Anything by Christopher Nolan, maybe “Interstellar.” Or possibly “Arrival.” I’m pretty fickle with my favorite movie.

What’s one thing that we don’t know about you?
I have a black belt.

Do you have a favorite band or type of music?
Lately I’ve been enjoying Portugal, The Man and Dua Lipa and rediscovering the wonders of Maxine Sullivan.

Do you have any pet peeves?
People who abruptly stop walking right in front of you. Drivers who whip out in front of you and then drive 10 miles below the speed limit are also in this category.

Matthew, thanks for introducing yourself to us. Congratulations on your recent graduation! Good luck with your career. We wish you great happiness and satisfaction.