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## A FIXED STAR IN SHIFTING SKIES: *BARNETTE* AND CIVIL RIGHTS LAW

Leslie Kendrick\*

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court invoked one of its own precedents for an idea that at first glance seems mundane: “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.”<sup>1</sup>

The Court’s language and sentiment draw from Justice Jackson’s famous words on compelled speech in *West Virginia State Board of Education v. Barnette*:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>2</sup>

The *Barnette* Court offered this neutrality principle as the reason that a school board could not compel schoolchildren to say the Pledge of Allegiance, a reversal of the Court’s holding on the same issue from only three years before.<sup>3</sup> The *Barnette* Court treated its neutrality principle as both bedrock constitutional law and an absolute. The *Barnette* neutrality maxim has received criticism, however, for being both mistaken and overly broad and robust. On the first count, some have suggested that the liberal ideal of state neutrality reflected in *Barnette* is incoherent: a state committed to neutrality is committed to neutrality as a value, which is at odds with entire idea of the

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<sup>1</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>2</sup> *Barnette*, 319 U.S. at 642. By way of noting a possible exception, in a footnote following this sentence, the Court observed that those in military service, including those drafted into it, “are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.” *Id.* at 642 n.19.

<sup>3</sup> *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (upholding mandatory Pledge of Allegiance).

state being neutral.<sup>4</sup> On the second, there is great disagreement about the scope of the maxim and its robustness within its scope.<sup>5</sup> Some have expressed doubt that a prohibition on compelled speech is a required, or even desirable, feature of a right of freedom of speech.<sup>6</sup> Others have suggested that the prescription of state neutrality inherent in *Barnette* is too broad or too strong.<sup>7</sup>

Even as some criticize *Barnette*, its scope continues to expand. *Masterpiece* contains no fewer than three new deployments of *Barnette*. One is a central claim in the litigation, that cake baking is speech and therefore protected by the *Barnette* principle from interference by the government.<sup>8</sup> One is the Supreme Court's deployment of *Barnette* in its disposition of the case, which suggested that the Colorado courts violated *Barnette* in how they handled the complaint in *Masterpiece*. One is an argument made by some of petitioner's amici but not explicitly embraced by the Court, which implies that *Barnette* means that civil rights law is constitutionally suspect. All of these neutrality arguments will arise again. All pit the First Amendment against other long-standing legal principles.

## I.

The first deployment of *Barnette* in *Masterpiece* was part of the First Amendment speech claims at the center of the litigation in the lower courts. The petitioner-baker argued that making wedding cakes constituted "speech" under the First Amendment and that therefore being required under Colorado civil rights law to make a wedding cake for a same-sex couple constituted compelled speech in violation of the constitution. The baker claimed that his being required to make a cake for the couple's wedding was akin to

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<sup>4</sup> See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005).

<sup>5</sup> On the importance of considering the scope of First Amendment rules, see, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

<sup>6</sup> Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

<sup>7</sup> For example, government entities argue that the First Amendment's existing neutrality principle does not recognize the non-invidious reasons that states and municipalities might have to treat different content differently. This view is on display, for instance, in litigation regarding local signage ordinances. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It is also in play in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), where the city contended that it had to exempt labor picketing from a buffer zone around schools to comply with the requirements of the National Labor Relations Act. The Supreme Court, meanwhile, concluded that the labor exemption made the ordinance impermissibly non-neutral. *Id.* Some Supreme Court Justices have suggested that the application of the neutrality principle should be more flexible. See, e.g., *Reed*, 135 S. Ct. 2218 (with Justices Kagan and Breyer endorsing a balancing test); *United States v. Alvarez*, 567 U.S. 709 (2012) (same); *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (with Justice Stevens noting issues on "both sides of the constitutional calculus"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 431 (1992) (Stevens, J., concurring) (with Stevens proposing a five-factor "constitutional calculus" to replace the current approach).

<sup>8</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

schoolchildren in West Virginia being required to say the Pledge of Allegiance.

Throughout the course of the litigation, both parties and commentators assumed that the free-speech issue would determine the outcome, but in oral argument it became clear that the petitioner's claim that he had suffered religious discrimination preoccupied several of the Justices. The Court's opinion ultimately hinged on freedom of religion, not freedom of speech. The Court determined that the Colorado Civil Rights Commission exhibited religious animus toward the baker in disposing of the case.<sup>9</sup> The Court did, however, address the speech question briefly, in order to urge caution:

The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.<sup>10</sup>

The Court then turned away from the speech question, because it found the religious animus issue clearer. Nevertheless, the Court's dictum suggests that the speech question will return to the Supreme Court, as it already has in lower courts.

Much has been written, and will continue to be written, about whether commercial services open to the public should count as "speech" for purposes of freedom of speech.<sup>11</sup> This is not my major theme here, except to observe that, if such activities and their regulation by standard public accommodations laws did implicate the First Amendment, then litigation in the civil rights era would have looked very different. At the time, litigants who could have claimed their activities were speech did not do so, because

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<sup>9</sup> *Id.* at 1736–37, 1740.

<sup>10</sup> *Id.* at 1723.

<sup>11</sup> See Erica Goldberg, "Good Orthodoxy" and the Legacy of *Barnette*, 13 *FIU L. REV.* 639 (2019); Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 *FIU L. REV.* 667 (2019).

the claim at the time seemed so incredibly far-fetched. Now, litigants argue that their activities are inherently “speech” for purposes of freedom of speech or that, as the Court suggests, their activities are sometimes “speech,” such as when there is writing on a cake or a discussion about cake design.<sup>12</sup> To start down this road is to reconfigure what has been considered a purely commercial realm subject to civil rights laws into a hodge-podge where some commercial actors can claim immunity to the extent that they can characterize their activities as speech. This is an extraordinary step. It is consistent with other current efforts to utilize the First Amendment to deregulate the commercial sphere, and it also undermines a core settlement of the civil rights era. The duty of Ollie’s Barbeque to serve African-Americans does not, and should not, turn on whether the restaurant is serving precooked food or catering a customized lunch.<sup>13</sup> The duty of Heart of Atlanta Motel to serve African-Americans does not, and should not, turn on whether the hotel is being asked to rent a room to a traveler or to host a wedding.<sup>14</sup> The duty of a baker to serve customers regardless of sexual orientation does not, and should not, turn on whether there is writing on the cake.

## II.

While the Supreme Court declined to decide the *Barnette* issue that dominated the litigation, Justice Kennedy’s majority opinion deployed *Barnette* another way. In reversing the Colorado disposition of the case, the Supreme Court held that the Colorado Civil Rights Commission had exhibited animus toward Phillips’s religious beliefs. In finding animus, the Court relied partly on a perceived difference between Colorado’s treatment of the same sex couple’s complaint against Phillips and its treatment of three other complaints made by an individual named William Jack, who had unsuccessfully asked various bakers to prepare cakes featuring anti-gay Bible verses or an image of a same-sex couple with a red line through it. The Colorado Civil Rights Commission had found a civil rights violation in the same sex couple’s case but not in Jack’s cases, and the Supreme Court took issue with how the Colorado Civil Rights Commission and the Court of Appeals of Colorado had explained the difference between these cases. The

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<sup>12</sup> During oral argument, Justice Sotomayor asked the plaintiff’s attorney whether the compelled speech argument would apply to a cake bought off the shelf. The attorney conceded that “under [his] theory, [the plaintiff] would need to sell that cake because he’s already created that cake with the message that he intended for it,” indicating that the plaintiff believed that line determining when a cake may be speech is not even as clear as writing on the cake. Transcript of Oral Argument at 8–9, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>13</sup> *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964).

<sup>14</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964).

Colorado Civil Rights Commission had found a civil rights violation in the former but not the latter. On appeal in the same-sex couple's case, the Court of Appeals of Colorado, in a footnote, summarized and approved the Civil Rights Commission's determinations:

The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. Importantly, there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes. Conversely, Masterpiece admits that its decision to refuse Craig's and Mullins' requested wedding cake was because of its opposition to same-sex marriage which, based on Supreme Court precedent, we conclude is tantamount to discrimination on the basis of sexual orientation.<sup>15</sup>

It was this language that prompted the Supreme Court to deploy *Barnette*. According to the Supreme Court, this statement by the Court of Appeals was tantamount to the state of Colorado deciding for itself what was offensive.<sup>16</sup> In the Court's words, "The Colorado court's attempt to account for the difference in treatment [between the Jack cases and the Craig and Mullins case] elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."<sup>17</sup> In the Supreme Court's view, this bolstered its finding of animus.<sup>18</sup>

More could be said about this holding as a matter of animus doctrine, but more important for present purposes is that seven Justices thought this an appropriate occasion to invoke the "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>19</sup> In the Supreme Court's view, the Colorado Court of Appeals judged Jack's proposed cakes to be offensive, in violation of the *Barnette* maxim of state neutrality.

Purely as a matter of interpretation, this seems implausible. The Court of Appeals noted that the Civil Rights Commission found that "the bakeries did not refuse [Jack's] request because of his creed, but rather because of the

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<sup>15</sup> Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. App. 2015).

<sup>16</sup> *Id.*

<sup>17</sup> *Masterpiece*, 138 S. Ct. at 1731.

<sup>18</sup> *Id.* (stating that the Colorado court failed to "answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.").

<sup>19</sup> *Barnette*, 319 U.S. at 642.

offensive nature of the requested message.”<sup>20</sup> The bakers were the parties said to have found Jack’s proposals offensive and to have acted on that basis. The Civil Rights Commission opinions cited by the Court of Appeals footnote make this clear: for example, one reads, “Respondent [baker] . . . avers that the cake order . . . was denied because the cakes included what was deemed to contain ‘offensive’ or ‘derogatory’ messages and imagery.”<sup>21</sup> The Civil Rights Commission made factual findings about the bakers’ reasons for denying service, and the Court of Appeals in turn recounted the sequence of events. The quoted passage does not say that the Civil Rights Commission or the Court of Appeals themselves judged the messages offensive. At most, one might argue that the Court of Appeals impliedly endorsed this finding by referring to the “offensive nature” of Jack’s requests. But this is a strained interpretation. In context, the court is reporting the bakers’ reasons, not adopting those reasons itself.<sup>22</sup>

As a legal matter, this interpretation is far the superior one. Civil rights enforcement demands that decision-making bodies sometimes make findings about the grounds for denials of service, and this can include offensiveness. Anti-discrimination laws prohibit places of public accommodation from refusing service on the basis of a protected status—in Colorado, “sexual orientation, religion, disability, race, creed, color, sex, age, national origin or ancestry.”<sup>23</sup> Other refusals of service are permissible, so long as they do not violate other law. A baker can refuse a patron who is not wearing shoes or a shirt, who is unruly or threatening, or who requests a design that is offensive, if these actions do not also implicate a protected status. Because some denials of service are permissible and some are not, decision-making bodies will regularly have to determine the reasons behind denial of service when assessing claims under anti-discrimination laws.

That is precisely what occurred in *Masterpiece* and the *Jack* cases. In *Masterpiece*, Phillips argued, among other things, that he did not engage in proscribed discrimination: he merely refused service because he found the message of the proposed cake offensive. But the Colorado courts held that, because Phillips would have provided the exact same product—a wedding cake—to an opposite-sex couple, his denial of that product to a same-sex couple constituted impermissible discrimination. Meanwhile, Jack argued that he was denied service not because his cakes were offensive, but because of his religious beliefs. The Colorado courts, however, found that the bakers refused to make the cakes because they found them offensive, and they would

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<sup>20</sup> *Craig*, 370 P.3d at 282 n.8.

<sup>21</sup> *Id.* (citing *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div., Mar. 24, 2015)).

<sup>22</sup> *See id.*

<sup>23</sup> COLO. REV. STAT. § 24-34-601(2)(a) (2018).

have refused anyone who asked for those cakes. In both instances, the Colorado Civil Rights Commission had to distinguish between prohibited discrimination (based on the identity of the customer) and a permissible denial of service (based on the offensiveness of the design).

Whether or not one agrees about the ultimate disposition of the cases,<sup>24</sup> the Supreme Court's contention in *Masterpiece* cannot be correct: it cannot be that by assessing whether a commercial actor denied service because of an offensive message, the state is itself adjudicating offensiveness. Otherwise, the regular enforcement of civil rights laws would be impermissible under *Barnette*. The Court's position would suggest that any time the state finds a reason for a denial of service, that reason must be imputed to the state. Thus, if a court found that a baker denied service because a customer was not wearing a shirt, the state would be taken to oppose shirtlessness, and the question would become whether shirtlessness is the kind of thing upon which the state can have a view. Similarly, if a Christian bookstore refused a customer request to order other religious materials, on the ground that the store was focused only on Christian works, a civil rights division assessment that this was a permissible denial of service would look, on the Court's view, like an unconstitutional religious endorsement.<sup>25</sup> This is to confuse the reasons of private actors for the position of the state.

The majority's stance has implications far beyond civil rights law. The state enforces many laws that permit private individuals to do things that the state itself could not do. Public accommodations' ability to deny service on the basis of offensiveness is only one example. A private homeowner can deny access to real property for virtually unlimited reasons, including racism, sexism, religious discrimination, and many other bases on which the state is not permitted to act. The state, by enforcing trespass law, does not thereby acquire the motives or reasons of the homeowner. To say otherwise is to overwrite state action doctrine.

Of course, some cases have challenged the line between public and private. In *Shelley v. Kramer*, the Supreme Court unanimously concluded that Missouri's enforcement of racially restrictive covenants constituted state action in violation of the Equal Protection Clause.<sup>26</sup> In the white primary cases,<sup>27</sup> the Supreme Court ultimately concluded that the discriminatory practices of a private political party violated Equal Protection because the

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<sup>24</sup> For further analysis, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018).

<sup>25</sup> I thank Liz Sepper for the example.

<sup>26</sup> 334 U.S. 1, 20–21 (1948).

<sup>27</sup> *Smith v. Allwright*, 321 U.S. 649 (1944); *Grove v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932).



party acted under a delegation of power from the state.<sup>28</sup> The line between private and public action is not always clean, and none of this is to take a position on where the line ought to be. Descriptively speaking, however, placing the actions of Colorado in *Masterpiece* in the same category as *Shelley* and the white primary cases would make *Masterpiece* a highly exceptional and momentous decision. It seems unlikely that the Supreme Court would take such a step in passing.

The existence of civil rights laws makes it incumbent upon the state to differentiate between permissible denials of service and impermissible discrimination. That is what Colorado was doing here. If courts' conclusions about the reasons of private actors were imputed to the state, enforcement of civil rights law would be impossible.

### III.

There is a final *Barnette* issue lurking in *Masterpiece*, not expressly endorsed by the opinion but presented to the Court in the litigation. Some advocates and interested groups were willing to make a larger claim, not just that the Colorado Anti-Discrimination Act (CADA) was invalid in its application to Phillips but that all civil rights laws are suspect. For example, amicus Christian Legal Society (CLS) argued that the state of Colorado had no compelling interest in its civil rights law, because (1) Craig and Mullins were not economically harmed by the refusal of service (because other bakeries were willing to provide them cakes—indeed, they received one for free) and (2) purely dignitary harm is not a compelling reason to enforce anti-discrimination laws.<sup>29</sup>

On this view, anti-discrimination laws such as CADA protect against two types of harms: (1) the economic harm that occurs when an individual is denied access to the marketplace by virtue of discrimination and (2) the dignitary harm involved in being denied service on the same terms as other individuals. On CLS's argument, Craig and Mullins suffered no economic harm because other bakers were willing to serve them when Phillips was not. Meanwhile, according to CLS, dignitary harm is not a legitimate basis on which to regulate. According to CLS:

The argument from dignitary harm to individuals is, at bottom, an argument that petitioner's religious practice must be suppressed because it offends the customer turned away. That argument is at odds with the whole First Amendment

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<sup>28</sup> See *Allwright*, 321 U.S. at 663–64; *Nixon*, 286 U.S. at 89.

<sup>29</sup> See Brief of Amicus Christian Legal Society at 30–32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

tradition. It is settled that offensiveness is not a compelling interest that can justify suppressing speech.<sup>30</sup>

According to CLS, the harm involved is that the customer who turned away will be offended by the denial of service. Thus, protecting against dignitary harm is tantamount to protecting customers from being offended. Protecting people from offense is not a compelling state interest, and thus protecting individuals and groups from the dignitary harm of discrimination is not a legitimate basis for enforcing civil rights law.

This view of the harms of discrimination has far-reaching implications. It would seem to argue that any application of anti-discrimination law to religious businesses denying service to gays and lesbians would be unconstitutional, so long as they can find similar services elsewhere in the market. Moreover, religious businesses such as Piggie Park would also seem to enjoy immunity from civil rights laws compelling service for African-Americans.<sup>31</sup> So long as other businesses were willing to serve them, African-American customers, like same-sex couples, would have no claim against religious owners refusing service. This goes far beyond a finding of animus in a particular case to the conclusion that anti-discrimination laws are generally unenforceable, so long as some businesses are willing to provide service.

Nor do the implications stop there. CLS argues that dignitary harms cannot serve as a compelling interest—and that, therefore, CADA fails strict scrutiny. But the upshot of the argument extends further. Not only is “offensiveness” not a *compelling* state interest in free speech law, but it is generally an *illegitimate* ground for speech regulation. As *Barnette* says, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>32</sup> The Court has affirmed many times since *Barnette* that laws regulating speech on the basis of offensiveness trigger strict scrutiny and generally will not survive.<sup>33</sup> The implication here is that civil rights laws—to the extent that they seek to protect patrons against the dignitary harm of being denied service on the basis of race, gender, religion, sexual orientation, and so forth—are unconstitutional under *Barnette*.

This view has cropped up before, notably in Supreme Court litigation in which CLS took the position that a University civil rights provision

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<sup>30</sup> *Id.* at 31.

<sup>31</sup> *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 403 n.5 (1968) (per curiam) (summarily rejecting a First Amendment challenge to a civil rights law).

<sup>32</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>33</sup> *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Boos v. Barry*, 485 U.S. 312 (1988); *Cohen v. California*, 403 U.S. 15 (1971).

prohibiting discrimination by student organizations on the basis of race, gender, religion, sexual orientation, and so forth would have amounted to impermissible viewpoint discrimination on the part of the University.<sup>34</sup> This view, if adopted by the Supreme Court, would mean that civil rights laws are themselves a First Amendment violation.

One set of conceptual mistakes behind this position involves the harms of discrimination. Its conception of economic harm ignores the harms that go along with inferior treatment in the market.<sup>35</sup> It suggests that, so long as the putative consumer can find some willing sellers, the consumer cannot assert a market-related harm. This ignores the long history of market discrimination that compelled African-Americans in the Jim Crow South to share information about which businesses would serve them.<sup>36</sup> It also ignores the fact that various forms of market discrimination in the Jim Crow South did not involve outright denial of service. On this view, Rosa Parks did not suffer an economic harm by having to sit at the back of the bus or enter a restaurant by the back door.

At the same time, the CLS position reduces dignitary harm entirely to mere offense. The non-economic harms of discrimination can come in many guises, and though they may be offensive, that is not all they are.<sup>37</sup> The Jim Crow regime was offensive to those subject to it, but reducing its harms to offensiveness ignores the grave wrong of the expression of state-sanctioned racism. Purportedly equal citizens receiving unequal treatment in public businesses and other public places is not simply, or even primarily, a matter of offense.

Another conceptual error concerns the First Amendment: it is a failure to distinguish speech from conduct or, more precisely, to distinguish laws directed at expression from laws directed at non-expressive harms. In suggesting that civil rights laws impermissibly regulate based on “offensiveness,” CLS’s argument suggests that these laws regulate speech, rather than conduct—that is, the provision of service. The Supreme Court has roundly rejected this view in several contexts. It rejected it without comment in a case where litigants argued that Title VII’s prohibition of sexual

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<sup>34</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 668–69 (2010).

<sup>35</sup> See, e.g., Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129 (2015); Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 211 (2015).

<sup>36</sup> See, e.g., Jacinda Townsend, *How the Green Book Helped African-American Tourists Navigate a Segregated Nation*, SMITHSONIAN MAG. (Apr. 2016), <https://www.smithsonianmag.com/smithsonian-institution/history-green-book-african-american-travelers-180958506/>.

<sup>37</sup> There is an extensive literature on the wrongs of discrimination, which includes much more thorough explications of dignitary harm than that offered here. See, e.g., DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008); Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE (forthcoming 2019).

harassment in the workplace violated the First Amendment.<sup>38</sup> It rejected it in the context of hate crime legislation, which a defendant cast as simply penalizing him based on “viewpoint.”<sup>39</sup> It rejected it when law schools objected to admitting military recruiters on free-speech grounds: there, the Court concluded that there was no free-speech claim at all, because the law at issue compelled conduct rather than speech.<sup>40</sup>

Moreover, this must be true in order to prevent the freedom of speech from devouring the entire legal code. Public nudity laws take the view that public nudity is offensive to most people.<sup>41</sup> Murder laws take the position that murder is bad and protect all persons from the dignitary harm of being murdered. Child neglect laws take the position that child neglect is bad and protect children from the dignitary harm of neglect. Tort law takes the position that tortiously injuring another is bad and protects all persons from the dignitary harm of being tortiously injured. Most of these laws have other justifications as well, but constitutional jurisprudence has never suggested that their expressive function is illegitimate. CLS’s position would suggest that it is.

CLS puts its arguments in terms of compelling interest: it argues that protection against dignitary harms is not a compelling interest that would overcome the First Amendment interests of the baker. But the logical implication of the position is that civil rights protections violate the First Amendment. Nothing about Justice Jackson’s view in *Barnette* compels this position. Nothing about Justice Jackson’s view would support this position: *Barnette*, in all its 75 years, has never been taken to suggest that civil rights laws are unconstitutional. But its applications continue to evolve, as its three manifestations in one recent case illustrate.

#### IV. CONCLUSION

*Masterpiece* highlights the encroachment of *Barnette*’s neutrality principle into new areas. The litigation suggested that commercial enterprises that can plausibly describe themselves as involving speech should have immunity from general regulations. The Supreme Court majority held that a court’s assessment that a business discriminated on the basis of offensiveness violated *Barnette*. And petitioners’ amicus suggested that civil rights laws themselves are unconstitutional violations of a neutrality principle. None of

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<sup>38</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>39</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>40</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006).

<sup>41</sup> *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (upholding public nudity law as applied to nude dancing establishment).

these positions was contemplated by *Barnette* itself, and none is compelled by its holding. However fixed *Barnette*'s star, the skies around it have shifted.