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REVISITING *MASTERPIECE CAKESHOP*—FREE SPEECH AND THE FIRST AMENDMENT: CAN POLITICAL CORRECTNESS BE COMPELLED?

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The First Amendment is being attacked from the "left" and the "right." In previous articles, I have explored an erosion of the interchange of diverse ideas on college campuses due to the political correctness movement[1] *and the stifling of political discourse by a President, who labels official criticism as fake news.*[2] *This Article continues to explore the political correctness movement and its dampening effect on the marketplace of ideas. This Article will discuss a twenty-first-century concept spawned by this movement—microaggression. The concept of microaggression has had a "boomerang" effect on speech.*[3] *Originally, political correctness was an attempt to enhance the marketplace of ideas and provide a diversity of viewpoints. Instead, it has polarized the left and the right, each entrenched in its own form of intolerance. In 2015, the Supreme Court legalized same-sex marriage.*[4] *Perhaps, as a result of that decision, LGBTQ rights have*

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1. *See generally* Terri R. Day & Danielle Weatherby, *Speech Narcissism*, 70 FLA. L. REV. 839 (2018).

2. *See generally* Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump's Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311 (2019); President Donald Trump, Remarks at the Conservative Political Action Conference in Oxon Hill, Maryland (Feb. 27, 2017) (transcript available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-conservative-political-action-conference) ("I want you all to know that we are fighting the fake news. It's fake—phony, fake . . . . A few days ago, I called the fake news 'the enemy of the people'—and they are. They are the enemy of the people.").

3. Boomerang effect is defined as "[a] strong counter-reaction when there is a deliberate attempt to change an attitude (resulting in a strengthening or adoption of the attitude that the marketer was attempting to change)." *Overview: Boomerang Effect*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095518984 (last visited Nov. 18, 2019).

4. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

become a flashpoint for political correctness. The controversy of this decision continues, pitting the "left" against the "right," with both groups invoking the First Amendment. The latest clash concerns anti-LGBTQ discrimination in public accommodations versus religious adherents' First Amendment rights to refuse their services in facilitation of same-sex marriages.[5] *This Article will discuss an example of political correctness from the "left" perspective—a New York City ordinance that extends the definition of harassment under public accommodation discrimination to the use of pronouns.*[6] *The Trump administration has countered this expansion of political correctness from the "left" by invoking freedom of conscience and religion, furthering a "conservative" agenda to push back on expanding LGBTQ rights and support of same-sex marriage. In a guidance memo issued by the Department of Justice, the Attorney General instructs all executive departments and agencies "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming."*[7] *This Article questions whether religious objectors, who refuse to provide their services in facilitating a same-sex marriage, are discriminating on the basis of sexual orientation or refusing to adopt a politically correct, albeit legal, view of marriage. If the latter, then, compelling political correctness can have a boomerang effect, creating more LGBTQ discrimination. Given this administration's strong support for religious freedom and two new conservative justices on the Supreme Court, a legislative religious exemption in public accommodation laws may be safer for LGBTQ rights than risking a Supreme Court ruling constitutionally enshrining a religious right to discriminate.*

I. INTRODUCTION

In 2015, the Supreme Court legalized same-sex marriage.[8] In response to the concern of the dissenting justices regarding the opinion's

5. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

6. *See* N.Y.C., N.Y., LOCAL LAW NO. 85 (2005); N.Y.C., N.Y., LOCAL LAW NO. 3 (2002); *see also* N.Y.C., N.Y., ADMIN CODE § 8-130 (Supp. 2018).

7. Memorandum from Jeff Sessions, Att'y Gen., to all Executive Departments and Agencies on Federal Law Protections for Religious Liberty 1 (Oct. 6, 2017) (accessible at https://www.justice.gov/opa/press-release/file/1001891/download) [hereinafter Memorandum from Jeff Sessions].

8. *Obergefell*, 135 S. Ct. at 2607-08.

effect on religious liberty,[9] Justice Kennedy provided a caveat in his majority opinion, stating:

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[10]

As states began to legalize same-sex marriages, post-*Obergefell*, and perhaps to "test" Justice Kennedy's caveat, several cases have wound their way through state and federal courts challenging application of state public accommodation laws to persons and businesses that refuse to provide services for same-sex marriages based on religious liberty or free speech rights.[11] The most notable case is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[12] Jack Phillips, owner of Masterpiece Cakeshop, refused to provide a same-sex couple a custom-made cake for their wedding reception.[13] The couple filed a complaint with the Colorado Civil Rights Commission, alleging that they were denied services in a place of public accommodation in violation of the Colorado Anti-Discrimination Act ("CADA"), which prohibits discrimination based on sexual orientation.[14] After the Civil Rights Commission and the Colorado courts ruled against Mr. Phillips's First Amendment claims, Mr. Phillips

9. *Id.* at 2625 (Roberts, C.J., dissenting) (opining that the Court's decision "creates serious questions about religious liberty"); *id.* at 2642-43 (Alito, J., dissenting) (forecasting that those who continue to oppose same sex marriage based on their rights of conscience will be "labeled as bigots . . . by governments, employers, and schools," if they express their views in public).

10. *Id.* at 2607.

11. *See, e.g.*, Elane Photography, LLC v. Willcock, 309 P.3d 53, 58-61 (N.M. 2013), *cert. denied* 572 U.S. 1046 (2014) (denying petition for writ of certiorari to address whether taking wedding pictures constitutes expressive conduct protected under the First Amendment Free Speech Clause); Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051, 1056, 1058-59 (Or. App. 2017), *vacated and remanded by* 139 S. Ct. 2713 (2019) (seeking review on Free Speech and Free Exercise claims of bakery owners fined under Oregon's public accommodation law for refusal to make a custom-made wedding cake for a same-sex ceremony); Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 549-51 (Wash. 2017), *vacated and remanded by* 138 S. Ct. 2671 (2018) (seeking review on Free Speech and Free Exercise claims of a florist fined under Washington's public accommodation laws for refusal to create custom-made floral arrangements for a same-sex ceremony).

12. 138 S. Ct. 1719 (2018).

13. *Id.* at 1723-24.

14. *Id.* at 1723, 1725.

petitioned the Supreme Court.[15] There, he raised both a Free Speech and a Free Exercise claim.[16]

Mr. Phillips claimed that requiring him to bake a custom-made wedding cake violated his First Amendment Free Speech rights by "compelling him to exercise his artistic talents to express a message with which he disagreed."[17] Further, Mr. Phillips expressed his sincerely held religious beliefs that same-sex marriages are wrong; therefore, requiring him to custom-make a wedding cake for same-sex weddings violated his Free Exercise rights.[18] The Supreme Court did not decide the Free Speech claim; instead, the Court ruled in favor of Mr. Phillips based on the specific facts of his case.[19] The Court noted that the holding in Mr. Phillips's case would not influence "the outcome of some future controversy involving facts similar to these."[20]

In the public hearings before the Civil Rights Commission to adjudicate the claim that Mr. Phillips violated CADA, commissioners were hostile towards Mr. Phillips's religious beliefs condemning same-sex marriage.[21] One of the Commissioners said the following:

> 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.[22]

Based on the hostility the commissioners showed toward Mr. Phillips's religious beliefs, the Court concluded that "these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips's case."[23]

This case does not foreshadow how the Court would decide future cases when public accommodation laws, prohibiting discrimination based on sexual orientation, clash with religious beliefs against same-sex

15. *Id.* at 1726-27.

16. *Id.* at 1727.

17. *Id.* at 1726.

18. *Id.* at 1725-26.

19. *Id.* at 1724 (finding that the Colorado Civil Rights Commission reacted to Mr. Phillips's religious objections with hostility; therefore, the Commission failed to maintain the neutrality toward religion which the Free Exercise Clause requires).

20. *Id.*

21. *Id.* at 1729 ("One commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs and 'if he decides to,' he cannot do 'business in the state.'").

22. *Id.*

23. *Id.* at 1730.

marriage. However, Justice Alito predicted, in his *Obergefell* dissent, that those who continue to oppose same-sex marriage based on their rights of conscience will be "labeled as bigots."[24] Judging from the Colorado Commissioners' statements, Justice Alito's prediction proved true in Mr. Phillips's case.[25]

While *Obergefell* secured the right to marry for same-sex couples, the Court declined to expand anti-discrimination protection to members of the LGBTQ community under equal protection analysis.[26] Fortunately, many state and local governments have provided such protection in their public accommodation laws, making it unlawful for businesses to discriminate on the basis of sexual orientation.[27] Having lost the fight over same-sex marriage, these local and state public accommodation laws have become the next frontier of the battle for conservatives.[28] Mr. Phillips is one of many small business owners, who have taken up arms in this battle between LGBTQ anti-discrimination protection and freedom of conscience.[29] As in all legal battles, one side wins and the other loses—"to the victor belong the spoils"[30]—meaning a win on the merits of Mr. Phillips's claims could lead to a slippery slope with no brakes!

Fortunately, the *Masterpiece Cakeshop* decision was limited to the facts of that case and was not a "winner-take-all" result. But, given President Trump's newly-appointed Supreme Court justices and his policies broadening "conscience protections," as promised to his religious

24. Obergefell v. Hodges, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

25. *See* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J. L. & PUB. POL'Y. 711, 713, 719 (2019) (theorizing that *Masterpiece Cakeshop* reveals two cultural trends: (1) religious polarization and (2) an expanding concept of equality).

26. *See Obergefell*, 135 S. Ct. at 2608.

27. State and local public accommodation laws vary. Some provide more coverage (adding, for example, gender identity and transgender to the list of protected classes) and apply to employers and landlords. *See, e.g.*, H.R. 2661, 59th Leg. 2006 Reg. Sess. (Wash. 2006) (expanding public accommodation laws to include sexual orientation); Larissa Hamblin, *Florida Now Has an LGBTQ Consumer Advocate for the First Time Ever*, CLICK ORLANDO (Mar. 21, 2019, 4:51 PM), https://www.clickorlando.com/news/nik-harris-appointed-as-first-lgbtq-consumer-advocate (discussing how the current commissioner of the Florida Department of Agriculture has expanded protections in the Department to include the LGBTQ community and is "lead[ing] the south").

28. *See* Adam K. Hersh, *Daniel in the Lion's* Den*: A Structural Reconsideration of Religious Exemptions From Nondiscrimination Laws Since* Obergefell, 70 STAN. L. REV. 265, 286 (2018).

29. *See, e.g.*, Elane Photography v. Willcock, 309 P.3d 53, 59 (N.M. 2013) (alleging that a photography company refused to offer its photographic services to customer because of her sexual orientation).

30. The term is linked to Senator William L. Marcy, referring to the victory of Andrew Jackson in 1828, meaning that the winner of a conflict gains additional benefits, beyond the subject of the conflict. *William L. Marcy*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/William-L-Marcy (last visited Nov. 18, 2019).

conservative and evangelical base, the forecast for the next *Masterpiece Cakeshop*-like case does not look bright for the LGBTQ community.[31]

A better solution would be for those jurisdictions that have extended anti-LGBTQ discrimination in their public accommodation laws to create a small legislative religious exemption. The narrow exemption would apply to sole proprietors, like Mr. Phillips, who believe that using their services to facilitate a same-sex marriage is wrong according to their sincerely held religious beliefs. In this post-*Obergefell*, anti-political correctness era, the proposed compromise is based on the acceptance of two basic assumptions: (1) *Obergefell* left a door open for religious adherents to continue in belief and perhaps actions deemed expressive conduct to oppose same-sex marriage[32] and (2) compelling small business owners with sincerely held religious beliefs to provide services for same-sex marriages is, in essence, forcing a politically correct view of marriage.

Part II of this Article will summarize the central meaning of the First Amendment discussed in a previous article.[33] Part III will describe the history and meaning of the political correctness movement.[34] Part IV will discuss microaggression, a concept born out of the political correctness movement.[35] In exploring the question of compelling political correctness, Part V will discuss the likely difficulties in litigating microaggression-related claims.[36] The New York City Human Rights Law ("NYCHRL"), an existing example of compelled political correctness, will be discussed in Part VI.[37] The NYCHRL includes proper gender usage under the umbrella of public accommodation gender discrimination.[38] Part VII revisits the *Masterpiece Cakeshop* conflict between anti-discrimination protection for same-sex marriage rights and religious beliefs, suggesting a legislative compromise.[39] In conclusion, Part VIII will make the case for compromise.[40]

31. Ariana Eunjung Cha et al., *Trump Touts New Faith-Based Protections for Health-Care Workers at National Day of Prayer Ceremony*, WASH. POST (May 2, 2019), https://www.washingtonpost.com/religion/2019/05/02/trump-touts-new-faith-based-protections-health-care-workers-national-day-prayer-ceremony.

32. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

33. *See generally* Day & Weatherby, *supra* note 2 (discussing the First Amendment and its central meaning); *see infra* Part II.

34. *See infra* Part III.

35. *See infra* Part IV.

36. *See infra* Part V.

37. *See infra* Part VI.

38. *See infra* text accompanying notes 164-72.

39. *See infra* Part VII.

40. *See infra* Part VIII.

II. THE CENTRAL MEANING OF THE FIRST AMENDMENT

"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."[41] For three-quarters of a century, Supreme Court Justices have quoted Justice Jackson's eloquent words in their opinions as they gave meaning to the First Amendment.[42] The relevant text of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[43] For over a century, the First Amendment Speech Clause has been the quintessential American hallmark of a self-governing people.[44] But, in modern times, freedom of speech has been challenged, and oftentimes restricted, in places traditionally open to robust intellectual discourse, such as college campuses.[45]

In the early 1900s, Justices Holmes and Brandeis first breathed life into the Free Speech Clause as they articulated the core principles of the First Amendment in a line of seminal cases, namely—*Abrams v. United States*[46] and *Whitney v. California*.[47] In *Abrams*, the Court upheld the conviction of defendants for distributing pro-Russia political leaflets in New York City in violation of the Espionage Act.[48] Dissenting, Justice Holmes wrote, "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[49] Justice

41. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

42. Agency for Int'l. Dev. v. All. for Open Soc'y. Int'l., Inc., 570 U.S. 205, 220-21 (2013) (quoting Justice Jackson in finding that the requirement that recipients of federal funding under AIDS prevention statute oppose prostitution violated the First Amendment); Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (quoting Justice Jackson in the plurality opinion finding that removing certain books from the school libraries violated the students' First Amendment rights).

43. U.S. CONST. amend. I.

44. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

45. *See, e.g.*, GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 11 (2014) ("Political correctness has become part of the nervous system of the modern university and it accounts for a large number of the rights violations I have seen over the years."); Peter Wright, *Problematic: The Battle for Free Speech*, HARV. POL. REV. (Dec. 6, 2015), http://harvardpolitics.com/harvard/problematic-battle-free-speech (discussing censorship of speech and "safe-zone" on Harvard Law School's campus); Harvey C. Mansfield Jr., Frank G. Thomson Professor of Gov't at Harvard Univ., Political Correctness and the Suicide of the Intellect (June 26, 1991) (discussing the opinion that modern "scholarship must not only be inspired by, but infused with political correctness").

46. 250 U.S. 616 (1919).

47. 274 U.S. 357 (1927).

48. *Abrams*, 250 U.S. at 616-17, 624.

49. *Id.* at 630.

Holmes's concept of an open market for the exchange of ideas would become a pillar of First Amendment jurisprudence.[50]

Even before Justice Holmes, the writings of John Milton eloquently explained this concept of finding truth through free and open debate:

> [T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?[51]

The United States secured its independence from the oppression of the English crown. The founding fathers fought the American Revolution, in part, to secure the right for free speech and a free press, which are essential to self-governance and representational democracy.[52] In *Whitney*, Justice Brandeis believed that it was a citizen's "political duty" to engage in uninhibited public discussion.[53] He recognized that the founding fathers "valued liberty as both an end and as a means" to secure autonomy and happiness.[54] Moreover, he believed that "the greatest menace to freedom is an inert people."[55]

Together, *Abrams* and *Whitney* laid the foundation for the marketplace of ideas and the civic duty to engage in political discourse as essential for a self-governing people.[56] It was several decades later that the Court took the next step in defining the central meaning of the First Amendment. In *New York Times Co. v. Sullivan*,[57] Justice Brennan tied the First Amendment to "[a] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes

50. Knox v. Serv. Emps. Intern. Union, Local 1000, 567 U.S. 298, 309 (2012) ("The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference."); Consol. Edison Co. of N.Y., Inc, v. Pub. Serv. Comm'n, 447 U.S. 530, 530, 534 (1980) (utilizing Justice Holmes's test in holding the commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First Amendment).

51. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND 69 (EBSCO Indus. 2009) (1644).

52. Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (noting clear and present danger test overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969)).

53. *Id.* at 375.

54. *Id.*

55. *Id.*

56. For interesting discussions of these cases, see, e.g., Michael Kahn, *The Origination and Early Development of Free Speech in the United States*, FLA. B.J., Oct. 2002, at 74; David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303, 1305-06 (1983); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 521 (1981); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 336-39 (1991).

57. 376 U.S. 254 (1964).

unpleasantly sharp attacks."[58] The Court recognized that in the exchange of ideas, some ideas are more palatable than others, but offensive ideas are a necessary price to pay for all ideas to "have their way" in the market.[59] Even wrong or "erroneous statement[s] [are] inevitable in free debate" but must be protected "if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[60] In other words, wrong-headed ideas must be protected to make room for better ideas.[61]

To hold otherwise would either chill speech or would restrict speech based on viewpoint, both of which are intolerable under the First Amendment.[62] The Court has consistently recognized that "[u]nder the First Amendment there is no such thing as a false idea."[63] When citizens engage in public debate on matters of public concern,[64] all opinions should be heard; and "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[65]

In fact, the Court has only delineated a very few, narrowly defined categories of speech which fall outside the ambit of First Amendment protections—"obscenity, defamation, fraud, incitement, and speech integral to criminal conduct [including child pornography]."[66] The Court has expressly confined categorical restriction of speech to these above stated areas, refusing to extend the categorical approach to other types of speech.[67]

It is a long-standing assumption, supporting the *New York Times'* broad concept of uninhibited public debate, that Americans are hardy and

58. *Id.* at 270.

59. *Id.* at 271-72.

60. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

61. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974).

62. *Sullivan*, 376 U.S. at 278; *see also* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1650 (2013).

63. *Gertz*, 418 U.S. at 339.

64. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 447, 452-53 (2011) (discussing the tort liability of Westboro Baptist Church members for picketing near a soldier's service); *see also* Jason Paul Saccuzzo, Note, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. WESTERN L. REV. 395, 414-15 (2001) (arguing that tort liability is being utilized to repress unpopular speech).

65. *Gertz*, 418 U.S. at 340-41.

66. United States v. Stevens, 559 U.S. 460, 460 (2010) (holding unconstitutional a statute criminalizing selling depictions of animal cruelty); Miller v. California, 413 U.S. 15, 27 (1973) (establishing the legal test for defining obscenity); Roth v. United States, 354 U.S. 476, 481, 485 (1957) (finding obscenity not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (finding fighting words have "such slight social value" so as to fall outside First Amendment protection).

67. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (rejecting a "free-floating test for First Amendment coverage . . . [based on] ad hoc balancing of relative social costs and benefits" for violations of the Stolen Valor Act).

can tolerate caustic speech.[68] The political correctness movement rejects this assumption, assuming instead that individuals need protection from offensive speech.

III. POLITICAL CORRECTNESS

Today, the term "political correctness" is invoked in a negative light.[69] In the twenty-first century, the term has a partisan meaning—that is, the phrase is detested by the right but required by the left.[70] The term did not always carry a negative connotation. The phrase had generally been a compliment and showed a belief of inclusivity of ideas and persons.[71] The shift came in the 1990s when the term became "laced with partisan feeling."[72] Now, the term is defined as "conforming to a belief that language and practices which could offend political sensibilities (as in matters of sex or race) should be eliminated."[73]

This conception of what it means to be "politically correct" makes apparent that the term generally applies to the expression of particular

68. *See generally* Texas v. Johnson, 491 U.S. 397, 397, 414 (1989) (noting, in holding unconstitutional a statute making it a criminal offense to burn a flag as a form of protest, that "[i]f 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"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964) (discussing that public officials cannot be shielded from criticism out of concern for their dignity and reputation and expecting public officials to be able to tolerate harsh criticism); Bridges v. California, 314 U.S. 252, 270-71 (1941) (noting that contempt powers cannot be used to protect the dignity and reputation of judges—the "character of American public opinion" would not tolerate "enforced silence" to protect the dignity and reputation of judges).

69. In a poll conducted by Fairleigh Dickinson University, sixty-eight percent of those polled agreed that "a big problem this country has is being politically correct." *Trump Taints America's Views on Political Correctness*, FAIRLEIGH DICKINSON UNIV., https://view2.fdu.edu/publicmind/2015/151030 (last visited Nov. 18, 2019); *see also* Eugene Robinson, *Republicans Are the Ones Hiding Behind 'Political Correctness'*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/opinions/republicans-are-the-ones-hiding-behind-political-correctness/2015/11/23/ec3bda34-921d-11e5-a2d6f57908580b1f_story.html?utm_term=.8ee71aaf5e8c ("The Republican presidential candidates and the far-right echo chamber have made 'politically correct' an all-purpose dismissal for facts and opinions they don't want to hear.").

70. Joshua Florence, *A Phrase in Flux: The History of Political Correctness*, HARV. POL. REV. (Oct. 30, 2015), http://harvardpolitics.com/united-states/phrase-flux-history-political-correctness; *see also* Hannah Fingerhut, *In 'Political Correctness' Debate, Most Americans Think Too Many People Are Easily Offended*, PEW RES. CTR. (July 20, 2016), https://www.pewresearch.org/fact-tank/2016/07/20/in-political-correctness-debate-most-americans-think-too-many-people-are-easily-offended (detailing a poll revealing that seventy-eight percent of Republicans felt people were too easily offended and sixty-one percent of Democrats felt people need to be more careful with their language use).

71. *See* Florence, *supra* note 70.

72. *Id.*

73. *Politically Correct*, MERRIAM-WEBSTER (2019), https://www.merriam-webster.com/dictionary/politically%20correct (last updated Sept. 17, 2019).

words. Thus, from a definitional standpoint, First Amendment principles are implicated when political correctness is followed.[74]

The driving force behind being politically correct is based on the best of intentions—that is to shed light on and address continuing racial or social stigma of traditionally targeted groups such as people of color, women, those who are gender non-binary, or who fall on the LGBTQ spectrum.[75] Topics that often demand political correctness are most frequently matters of public concern that touch on beliefs or social acceptance of these various groups of people. The social interest in equality, while weighty, must be balanced against robust political discourse among citizens of various opinions, which the First Amendment fosters. And while those who demand political correctness do so for noble reasons, the restriction of scathing, offensive, or hateful speech simply cannot be regulated without censoring other ideas as well.[76]

Political correctness invocations frequently come from speech that some view as offensive and contrary to what society should be willing to accept.[77] Yet the Supreme Court has expressly found that offensive speech may not be stifled under the First Amendment.[78] But rather, "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[79] The Court differentiated simple offensive speech from other words that could incite violence by their utterance.[80] The Supreme Court has long recognized that offensive remarks are "necessary side effects of the broader enduring values which [presuppose] the process of open debate."[81] Moreover, a core function of freedom of speech under a democratic form of government "is to invite dispute."[82]

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74. *See* Joseph Russomanno, *"Falsehood and Fallacies": Brandeis, Free Speech and Trumpism*, 22 COMM. L. & POL'Y 155, 163-65 (2017).

75. *See, e.g.*, James B. Clark III, *Political Correctness and the First Amendment: An Untenable Conflict*, NAT'L B. ASS'N MAG., Mar.–Apr. 1994, at 12.

76. *See, e.g.*, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 7-8, 70-71, 111-12 (Yale University Press 1st ed. 2017) (defending uninhibited free speech on college campuses); Craig B. Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 198, 209, 221 (1992); Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2010, 2025 (2017); Frank D. LoMonte, *"The Key Word Is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 318, 330, 354 (2013).

77. Florence, *supra* note 70.

78. Cohen v. California, 403 U.S. 15, 26 (1971); *see also* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

79. *Cohen*, 403 U.S. at 24.

80. *Id.* at 20; *see, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (discussing limited categories of speech that may be prohibited and punished without offending the Constitution).

81. *Cohen*, 403 U.S. at 25.

82. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

As such, the modern concept of political correctness seems ingrained in values that conflict with First Amendment principles. "[W]hen offensiveness becomes the litmus test for what constitutes appropriate speech, a robust dialogue and a vigorous exchange of ideas become meaningless concepts."[83] To protect Justice Holmes's free market of ideas and Justice Brandeis's citizen-critic public duty, compelled political correctness and robust First Amendment speech rights cannot co-exist.

Further, the implication of government proscribing what ideas should be orthodox or accepted in public discourse is forbidden under our Constitution,[84] but this is exactly what political correctness demands—that certain ideas and beliefs should give way to more mainstream ideas or beliefs. Many times, political correctness demands are made to those who spew hate speech, racial epithets, sexist, homophobic, or transphobic rhetoric. And the demand that comes for silence, or at least a change in speech, from these individuals or groups is absolute.[85] While these types of inflammatory statements are hateful and, indeed, hurtful to many—especially those groups of people traditionally discriminated against—when a state actor is promoting political correctness, it must be viewed in light of the First Amendment.[86] Considering the central meaning of the First Amendment, even divisive or hateful speech must be tolerated. To do otherwise—to prescribe what speech is favorable and tolerable—conjures Orwellian warnings when government transforms into a Ministry of Truth.[87] While the fight to exclude racist or discriminatory speech is a virtuous one and should be wholly pursued by society, courts are not the proper venue to achieve this goal.

Allowing the suppression of unpopular opinions based on political correctness permits the listener to exercise a "heckler's veto" over the speaker, which is contrary to principles of free and open public discourse.[88] Consider the following as an example of political correctness

83. Day & Weatherby, *supra* note 1, at 848.

84. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) ("The state may not ordain preferred viewpoints . . . . The Constitution forbids the state to declare one perspective right and silence opponents.").

85. *See* Caroline Simon, *Free Speech Isn't Free: It's Costing College Campuses Millions*, FORBES (Nov. 20, 2017, 4:35 PM), https://www.forbes.com/sites/carolinesimon/2017/11/20/free-speech-isnt-free-its-costing-college-campuses-millions/#6794e8491ee7; *see also* CHEMERINSKY & GILLMAN, *supra* note 76, at 70-71.

86. Note there are often other remedies for discrimination based on race, sex, or sexual orientation via statutory avenues such as Title VII (employment discrimination) and Title IX (education discrimination) actions. 20 U.S.C. §§ 1712–13 (2012); 42 U.S.C. § 2000e–16b(b) (2012).

87. United States v. Alvarez, 567 U.S. 709, 723 (2012). *See generally* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003) (1949).

88. Anne Neal, *Colleges Are Paralyzed by the 'Heckler's Veto'*, N.Y. TIMES (May 19, 2014), https://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto; *see also* Charles S. Nary, *The New Heckler's Veto:*

providing a heckler's veto to the offended listener. While walking to class, a liberal student, who is anti-Trump, encounters a group of pro-Trump supporters who are handing out "Trump 2020" pamphlets and chanting "MAGA" and "Build the Wall" outside of the university's student union. The student immediately complains to the university administration that she felt unsafe and uncomfortable being on campus because of the group. In response, school officials prohibit the dissemination of all political pamphlets, except in very limited, specifically defined, free-speech designated areas (often in areas far away from the heavily-trafficked campus quad).[89]

This type of encounter encapsulates the effect of the heckler's veto; it allows an individual to suppress speech that is subjectively offensive. Generally, the harm of a heckler's veto is application of a subjective standard for determining what and when speech is appropriate or not.[90] As such, sanctioning a heckler's veto undermines First Amendment principles and chills speech.[91]

In a different context, some critics say the political correctness movement has invaded the legal field.[92] In 2016, the American Bar Association ("ABA") enacted Rule 8.4(g), which provides that it is professional misconduct for an attorney to "engage in conduct that the lawyer knows or reasonably should know . . . is discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law."[93] One critic has described this rule as a "politically correct overlay" that does little more than give aggressive attorneys ammo for challenging "opponents who deviate from politically correct thought and action."[94] The argument follows that even though the rule is intended to curb discriminatory conduct that generally

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Shouting Down Speech on University Campuses, 21 U. PA. J. CONST. L. 305, 307-08 (2018) (discussing the origination of the heckler's veto and comparing it to the new heckler's veto where the fear is the "speech itself").

89. *See generally* Max Kutner, *Emory Students Explain Why "Trump 2016" Chalk Messages Triggered Protest*, NEWSWEEK (March 25, 2016, 8:22 AM), https://www.newsweek.com/emory-trump-chalk-protests-440618. The hypothetical is based on this actual incident.

90. Day & Weatherby, *supra* note 1, at 843.

91. One scholar labeled the 2016-17 year as the year of the "shout-down," documenting instances where presenters were shouted down from the stage and unable to speak. Nary, *supra* note 88, at 306, 312-14; Stanley Kurtz, *Year of the Shout-Down: It Was Worse than You Think*, NAT'L REV. (May 31, 2017, 1:48 PM), https://www.nationalreview.com/blog/corner/year-shout-down-worse-you-think-campus-free-speech.

92. George Leef, *Political Correctness Continues to Beat Up on Free Speech*, FORBES (Sept. 19, 2016, 2:00 PM), https://www.forbes.com/sites/georgeleef/2016/09/19/political-correctness-continues-to-beat-up-on-free-speech/#215ac0d44ece.

93. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR. ASS'N 2016).

94. Leef, *supra* note 92.

exhibits prejudice, it will nonetheless have the effect of chilling speech within the legal profession and create a tense environment where attorneys may fear sanctions for their speech.[95] Other critics allege that the ABA is endorsing "the new sexual order" and cautioning that "America's lawyers have been warned[,] [t]he ABA is taking the gloves off, looking for a knockout blow in round one of its plan to purify the legal profession."[96]

Just as college campuses import political correctness into their conduct codes, which stifles speech, now the legal profession is attempting to import political correctness into its ethical rules, threatening suppression of speech. While the ABA rules are not binding on attorneys, states often adopt ethical rules that mirror the ABA rules.[97] As such, if states promulgate a rule identical to Rule 8.4(g), attorneys in those states may be subject to professional discipline for their words or actions that do not comport with political correctness.[98]

IV. THE CONCEPT OF MICROAGGRESSION

Another topic, born from the political correctness wave, is a unique concept of "modern racism" called "microaggression." This concept has developed as societal standards on acceptable conduct and beliefs have shifted. Microaggression is defined as "a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group."[99] These types of comments "reflect less direct, although no less pernicious, forms of racial bias."[100]

95. *Id.*; *see also* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 135, 167, 176, 179 (2018); Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 HARV. J.L. & PUB. POL'Y 173, 201, 203, 207-08 (2019).

96. Bill Olson & Herb Titus, *The ABA Plan to Politically Purify the Legal Profession*, FEDERALIST SOC'Y (Aug. 2, 2016), https://fedsoc.org/commentary/blog-posts/the-aba-plan-to-politically-purify-the-legal-profession; *see also* Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?*, 22 CHAP. L. REV. 267, 272-73 ("The new rule could be applied to speech at dinners hosted by bar associations or similar legal groups, teaching at law schools, and a lawyer's speaking 'at career day at his or her child's Catholic school about the role of faith in the practice of law.' 'The important question is not whether a listener's reaction is "reasonable," but whether a speaker should "reasonably" know a listener will be triggered by disrespectful speech.'").

97. As of March 2019, four states adopted Rule 8.4(g) in its entirety, twenty states had already used "some or all ideas expressed in the Model Rule comments," and six states, including Louisiana and Texas, have expressly declined to adopt the Model Rule citing constitutional violations. *See* Kristine A. Kubes, et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A. (Mar. 8, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4.

98. Leef, *supra* note 92.

99. *Microaggression*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/microaggression (last visited Nov. 18, 2019).

100. Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSP. ON

One of the main proponents of this concept is Dr. Derald Wing Sue, a Professor of Psychology at Columbia University; he suggests that microaggressions are common experiences of everyday life.[101] Further, they may be expressed through speech or non-speech.[102] Examples of microaggressive comments include: "You speak good English"; "Gender pay gaps are a myth"; "You're cute for a dark-skinned girl"; or "No, like where are you FROM?"[103] While these comments may seem benign, Dr. Sue suggests they have a powerful impact on the individuals to whom the speech is directed.[104]

Microaggressions can be broken down into three categories—(1) microassaults which are "intentional discriminatory actions"; (2) microinsults which are verbal or nonverbal communications that "subtly convey rudeness"; and (3) microinvalidations which "subtly exclude[,] negate[,] or nullify the thoughts . . . of a person of color."[105] But not all microaggressions can be easily divvied up into these neat categories. Rather, microaggression is an "[o]pen concept[] . . . characterized by [] intrinsically fuzzy boundaries, [] an indefinitely extendable list of indicators, and [] an unclear inner nature."[106]

The problem or ultimate quandary with this concept lies in the invisibility and loose boundaries of microaggressions. Dr. Sue suggests "[t]he first step in eliminating [harmful] microaggressions is to make the 'invisible' visible."[107] These efforts can be seen by popular blog-style websites that are meant to address recurring microaggressions experienced by people of color, women, those who are gender-nonconforming, or homosexual and provide these individuals a platform to talk about interactions perceived to be microinsults or microinvalidations.[108] But, often the subtlety of a microaggression precludes its discussion and hides the impact on those people affected. An

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PSYCHOL. SCI., 138, 139 (2017).

101. Derald Wing Sue, *Racial Microaggressions in Everyday Life*, PSYCHOL. TODAY (Oct. 5, 2010), https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201010/racial-microaggressions-in-everyday-life.

102. *Id.*

103. *Id.*; *Is the Gender Pay Gap a Myth? 3 Highlights From Payscale ’s Reddit AMA*, PAYSCALE (Nov. 17, 2015), https://www.payscale.com/career-news/2015/11/is-the-gender-pay-gap-a-myth; Microagressions, TUMBLR, https://www.microaggressions.com/post/53189941400/youre-cute-for-a-dark-skinned-girl (last visited Nov. 18, 2019); Microaggressions, TUMBLR, https://www.microaggressions.com/post/82203830677/guy-next-to-me-on-plane-so-where-are-you (last visited Nov. 18, 2019); Sue *supra* note 101.

104. Sue, *supra* note 101.

105. *Id.*

106. Lilienfeld, *supra* note 100, at 143.

107. Sue, *supra* note 101.

108. *See, e.g.*, Microaggressions, TUMBLR, http://www.microaggressions.com (last visited Nov. 18, 2019).

individual, who feels targeted by a comment perceived to be a microaggression, may fear being labeled "oversensitive" or "too PC."[109] Dr. Sue describes these individuals as stuck in a "Catch-22"—either the person lets the slight go or risks being labeled in a negative manner.[110] Often, "[t]he person . . . is left to question what actually happened . . . . [R]esult[ing] [in] confusion [and] anger . . . ."[111] In other words, the individual is confronted with a Hobson's choice[112]—choose to express his or her feelings or stay silent.[113]

The *I, Too, Am Harvard* blog page reflects the impact microaggressions can have on individuals who are members of traditionally marginalized groups.[114] The page highlights examples of racial microaggressions targeted at African American students on Harvard University's campus.[115] Examples of microaggressive comments and students' responses are posted to the blog site and include: "No. I will not teach you how to twerk"; "Having an opinion does not make me an 'Angry Black Woman'"; "Don't you wish you were white like the rest of us?"; "You're lucky to be black . . . so easy to get into college"; and "You're dressed like you might shoot me right now—such a thug."[116] These statements are illustrative of microinsults and microinvalidations and the negative reactions they evoke from the members of the community to whom they are directed.

Recently, several universities have encouraged students to report microaggressions on campus and have included in student evaluations a section to report microaggressive comments.[117] Further, universities have

109. Sue, *supra* note 101; *see* Lilienfeld, *supra* note 100, at 144 (deeming the term "politically correct" to be a microaggression).

110. Sue, *supra* note 101.

111. *Id.*

112. *Hobson's Choice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Hobson's%20choice (last visited Nov. 18, 2019) (defined as "an apparently free choice when there is no real alternative.").

113. For a discussion of microaggressions in the legal field, see generally Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1 (2019).

114. *I, Too, Am Harvard*, TUMBLR, https://itooamharvard.tumblr.com (last visited Nov. 18, 2019).

115. *See id.*

116. *I, Too, Am Harvard*, TUMBLR (Mar. 1, 2014) https://itooamharvard.tumblr.com/post/78255448543; *I, Too, Am Harvard*, TUMBLR (Mar. 1, 2014) https://itooamharvard.tumblr.com/post/78255396970; *I, Too, Am Harvard*, TUMBLR (Mar. 1, 2014) https://itooamharvard.tumblr.com/post/78255367356; *I, Too, Am Harvard*, TUMBLR (Mar. 1, 2014) https://itooamharvard.tumblr.com/post/78255052774; *I, Too, Am Harvard*, TUMBLR (Mar. 1, 2014) https://itooamharvard.tumblr.com/post/78255069382.

117. *See, e.g.*, Luke W. Vrotsos, *School of Public Health Admins Flag Classes for Review After Students Report 'Insults'*, HARV. CRIMSON (Apr. 5, 2018), https://www.thecrimson.com/article/2018/4/5/hsph-insults-classes-flagged.

flagged professors' classes for review based on these evaluations.[118] Of the total responses to Harvard's course evaluation questionnaire, 85 students responded "yes" when asked if they had experienced microaggression while in class, and in 30% of classes reviewed (43 of 138), at least one student responded "yes" to hearing microaggressive insults.[119] These numbers reflect that microaggression is a growing concern and is beginning to affect the operation of public universities.[120]

Like the political correctness movement generally, the concept of microaggression has its critics.[121] They have been vocal about the weight given to microaggressions.[122] These apprehensions include claims that a focus on microaggression "discourages or suppresses controversial or unpopular speech, [] fosters a culture of political correctness, [] perpetuates a victim culture among aggrieved individuals, and [] contributes to, rather than ameliorates, racial tensions."[123]

V. LITIGATING MICROAGGRESSIONS

Because microaggressive comments are exactly that—micro—no court has considered a microaggression-related claim.[124] As this Article asks: Can political correctness be compelled?[125] Should or could courts address microaggression claims?[126] Likely claims might concern the prohibition or regulation of microaggressions or civil remedies for harms caused by microaggressions. Naturally, any microaggression-related claim would require a First Amendment analysis.

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118. *Id.*

119. *Id.*

120. In an independent student-run newspaper, one student comments on the list of microaggressions sent out by the then-current President of UC Berkley. *See* Rudra Reddy, *Words Are Violent*, DAILY CALIFORNIAN (Apr. 11, 2017), https://www.dailycal.org/2017/04/10words-are-violent.

121. *See, e.g.*, Vikram Amar, *A "Comparative" Analysis of the Academic Freedom of Public University Professors*, 14 FIRST AMEND. L. REV. 293, 293, 295, 297-98 (2016) (discussing the University of North Carolina and University of California's list of microaggressions and detailing professors' first amendment rights); Suzanne Rowe, *The Elephant in the Room*, 15 LEGAL COMM. & RHETORIC: JALWD 263, 268 n.22 (2018); Reddy, *supra* note 120 (commenting that "[i]f ideas alone can pierce your skin, it is not the ideas that need to be softened—it is your skin that needs to become less fragile.").

122. *See* Amar, *supra* note 121, at 297-98.

123. Lilienfeld, *supra* note 100, at 140.

124. *See* Kiani v. Huha, No. A18-0157, 2018 Minn. App. Unpub. LEXIS 873, at *10-11 (Minn. Ct. App. Oct. 8, 2018); *see also* Weinberg v. William Blair & Co., No. 12–cv–09846, 2015 WL 5731637, at *6 (N.D. Ill. Sept. 30 2015) (refusing to allow microaggression under Title VII for a hostile work environment claim).

125. *See supra* Part VI.

126. *See supra* Part VI.

Microaggressions by their very nature implicate the First Amendment. As discussed, the most common microaggressions involve comments that offend on the basis of race, gender, or sexual orientation. As such, these comments are content-based and viewpoint-based and would trigger the highest standard of judicial scrutiny.[127]

In *R.A.V. v. St. Paul*,[128] the Court analyzed the St. Paul Bias-Motivated Crime Ordinance that prohibited the display of symbols or objects likely to "arouse[] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender . . . ."[129] Here, the petitioner, along with a group of teenagers, taped together a cross made from broken chair legs and set it on fire inside the yard of an African American family.[130] The lower court narrowly construed the ordinance as limited to "fighting words," which are proscribed under *Chaplinsky v. New Hampshire*,[131] and upheld the petitioner's conviction, finding that "the ordinance is a narrowly tailored means toward accomplishing the compelling government interest in protecting the community against bias-motivated threats to public safety and order."[132] The Supreme Court, however, reversed and found the statute facially unconstitutional for it "prohibit[ed] otherwise permitted speech solely on the basis of the subject the speech addresses."[133] Writing for the majority, Justice Scalia stated that only where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot" can a law restricting speech, based on its content, pass constitutional muster.[134] The St. Paul Ordinance went a step further and banned a sub-class of speech within fighting words—that is, only speech which is likely to arouse anger, alarm, or resentment specifically on the basis of race.[135] This Ordinance went beyond banning just fighting words, "that do not themselves invoke race, color, creed, religion, or gender" by targeting only those fighting words that evoke negative emotions with regard to race.[136] Thus the Ordinance constituted viewpoint discrimination. Even taking into consideration the compelling state interest in ensuring basic

127. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227-28 (2015).

128. 505 U.S. 377 (1992).

129. *Id.* at 380.

130. *Id.* at 377-79.

131. *Id.* at 380-81; Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

132. *R.A.V.*, 505 U.S. at 381.

133. *Id.* at 381, 396.

134. *Id.* at 390.

135. *Id.* at 391.

136. *Id.*

human rights to marginalized groups, the Court found the ordinance too broad to effectuate that purpose.[137]

The Court recognized that St. Paul's ordinance served the city's interest in communicating to minority groups that race-based hate speech "is not condoned by the majority."[138] However, "majority preferences must be expressed in some fashion other than silencing speech on the basis of content."[139]

The *R.A.V.* framework sheds light on the dilemma of regulating microaggressions. If a public university or employer were to prohibit microaggressions, it is likely the prohibition would be limited to words or conduct that is bias-motivated and targeted at traditionally discriminated-against groups such as people of color, women, and members of the LGBTQ community—which are generally the areas in which microaggressive comments are reported.[140] But, just as in *R.A.V.*, this proscription of speech would not pass strict constitutional scrutiny for it does nothing more than censor speech based on a certain viewpoint. Additionally, such restriction attempts to ban subjectively offensive speech or conduct which is equally impermissible under the First Amendment.[141]

Just as the City of St. Paul could not communicate to minority groups that its citizens do not condone bias-motivated crime by targeting the most pernicious hate speech,[142] a state university could not proscribe the most egregious microaggressive comments. A category of "politically incorrect" speech cannot be carved out from First Amendment protection.

If the courts decline to employ a strict scrutiny analysis on the basis of content or viewpoint discrimination, intermediate scrutiny may be applied if the microaggression is more conduct based. In *United States v. O'Brien*,[143] the Court determined that a prohibition on burning a draft card in opposition to the Vietnam War did not violate the First Amendment.[144]

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137. *Id.* at 395-96.

138. *Id.* at 392.

139. *Id.*; *see also* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (finding that the power to regulate is limited and cannot do so in a way that restricts the individual to adhere to a particular preaching or worship).

140. *See generally* Kevin L. Nadal, et al., *The Adverse Impact of Racial Microaggressions on College Students' Self-Esteem*, 55 J. C. STUDENT DEV. 461 (2014) (conducting a study suggesting that members of a minority group are more likely to be the targets of microaggression than white students on college campuses); Michael R. Woodford, et al., *The LGBQ Microaggressions on Campus Scale: A Scale Development and Validation Study*, 62 J. HOMOSEXUALITY, 1660-61 (2015) (conducting a study suggesting that members of the LGBQ community are more likely to be targeted by microaggressions on college campuses than heterosexual students).

141. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18, 26 (1971).

142. *R.A.V.*, 505 U.S. at 392-93.

143. United States v. O'Brien, 391 U.S. 367 (1968).

144. *Id.* at 369-72.

Justice Warren opined that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[145] Justice Warren continued, stating:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[146]

The application of the *O'Brien* test to microaggressions is unlikely. Many microaggressions come in the form of words.[147] But, even assuming a court would apply the standard to conduct that was deemed microaggressive, the test would likely fail. Although the *O'Brien* test is a less demanding standard of judicial scrutiny than the highest standard applied to content-based and viewpoint-based speech restrictions, it would be difficult to establish that the governmental interest in prohibiting microaggressive conduct is unrelated to speech. Further, defining those fuzzy outer-boundaries of what *is* a microaggressive action is akin to applying offensiveness as the standard for speech restriction.

Another possible doctrinal avenue is to analyze the effects of microaggression according to the secondary effects test put forth in *Renton v. Playtime Theatres*.[148] In *Renton*, the Court upheld a zoning ordinance that prohibited adult theatres from being located within a certain distance from a residential area, school, church, or park.[149] In upholding the ordinance, the Court looked to the "secondary effects" the city was trying to protect against which included preventing crime, protecting retail trade, and protecting the "quality of urban life."[150] The Court found these justifications satisfactory and also noted that the ordinance was "unrelated to the suppression of speech."[151] The "'*predominate* concerns' [then] were with the secondary effects of adult theatres, and not with the content of adult films themselves."[152] The Court accepted the characterization of the *Renton* ordinance as content neutral,

145. *Id.* at 376.
146. *Id.* at 377.
147. Sue, *supra* note 101.
148. 475 U.S. 41, 47 (1986).
149. *Id.* at 43.
150. *Id.* at 48.
151. *Id.* at 45, 48.
152. *Id.* at 47.

notwithstanding compelling arguments to the contrary.[153] The ordinance applied only to those theatres that showed films with graphic sexual content, a typical characterization of a content-based restriction.[154] Nonetheless, the Court determined that the zoning ordinance did not violate the First Amendment based on the governmental interest of preventing certain secondary effects.[155]

Applying this framework to microaggressions, courts would begin by focusing on whether or not the interest in preventing the harm or the secondary effects caused by the microaggressive communication is substantial, is unrelated to the suppression of speech, and whether there are reasonable alternative avenues of communication.[156] Unlike in *Renton*, the secondary effects of microaggression are difficult to define because they include an indefinite list of possibilities.[157] Further, *Renton* was specific to zoning laws of adult theatres.[158] Microaggressions may happen anywhere; so, zoning laws are a misfit for regulating microaggression. Finally, the secondary effects doctrine has never been applied outside the context of zoning adult entertainment establishments.[159]

"[M]icroaggressions necessarily lie in the eye of the beholder."[160] The justifications for limiting microaggression will vary depending on the effect it has on people; those effects will be highly individualized and subjective. Microaggressions vary from subtle and ambiguous to something more concrete, such as a microassault, which further complicates a secondary effects analysis.[161] Importantly, unlike the secondary effects in *Renton*, which included the objective and measurable effects of declining property values and increasing crime—the government interest in regulating microaggression is aimed at reducing the speech's impact, which is totally subjective and hard to measure.[162] The secondary effects must be the targets of the asserted governmental interest and not the "emotive impact of speech on its audience" for the "[l]isteners' reactions to speech are not the type of 'secondary effects' [the

153. *Id.* at 48; Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 60-61 (2000).

154. *Renton*, 475 U.S. at 47.

155. *Id.* at 52.

156. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 78-79 (1976).

157. *See* Sue, *supra* note 101.

158. *See* Rappa v. New Castle Cty., 813 F. Supp. 1074, 1081 (D. Del. 1992).

159. *See* Free Speech Coal., Inc. v. Att'y Gen. U.S., 825 F.3d 149, 160-61, 163 (3d Cir. 2017) (declining to extend secondary effects to statutes); *Rappa*, 813 F. Supp. at 1081 (declining to extend secondary effects to political speech).

160. Lilienfeld, *supra* note 100, at 141.

161. Sue, *supra* note 101.

162. *Renton*, 475 U.S. 41, 47-48 (1986); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988).

Court] referred to in *Renton*."[163] The listeners' reaction to the microaggression cannot be the basis for regulating microaggressive words and actions. Thus, the secondary effects doctrine is ill-suited for application to any microaggression-related legal claim.

VI. COMPELLED GENDER PRONOUN USAGE

A separate wave of social conscience spawned by the political correctness movement is the formal recognition of the fluidity of gender. In 2002, the New York City Commission on Human Rights passed the Transgender Rights Bill ("NYCHRL") as an effort to extend discrimination protection to transgender or gender non-binary individuals.[164] The Bill allows for an individual to pursue remedial measures on the basis of a discriminatory act or gender-based harassment.[165] Recently, the New York City Council amended the definition of "gender" to include "actual or perceived sex[,] . . . gender identity, self-image, appearance, behavior or expression . . . or other gender-related characteristic, regardless of the sex assigned to that person at birth."[166] This amendment broadened the definition of "gender" and "gender-identity" from the 2002 law.[167] Under the amendment, "gender" also incorporates gender non-conforming and intersex.[168] Further, "[u]nder NYCHRL, gender-based harassment covers a broad range of conduct and occurs generally when a person is treated less well on account of their gender."[169]

NYCHRL prohibitions extend to employment, housing, and public accommodation discrimination.[170] The law "requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.)[171] with which a person self-identifies . . . ."[172] Also, included under the umbrella of pronouns is the use of he/him, she/her,

163. *Boos*, 485 U.S. at 321.

164. N.Y.C., N.Y., LOCAL LAW NO. 85 (2005); N.Y.C., N.Y., LOCAL LAW NO. 3 (2002); *see also* N.Y.C., N.Y., ADMIN CODE § 8-130 (Supp. 2018).

165. LOCAL LAW NO. 85; ADMIN CODE § 8-130; N.Y.C., N.Y., ADMIN CODE § 8-109(a) (2018).

166. N.Y.C., N.Y., LOCAL LAW NO. 38 (2018); ADMIN. CODE § 8-102.

167. *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002)*, N.Y.C. COMMISSION ON HUM. RTS. 1-2, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf (last updated Feb. 15, 2019) [hereinafter *Legal Enforcement Guidance on Discrimination*].

168. *Id.* at 3.

169. *Id.* at 4.

170. *Id.* at 1.

171. *Id.* at 4 n.15 ("The gender-neutral title Mx. is pronounced 'məks' (similar to 'mex') or 'mɪks' (similar to 'mix').").

172. *Id.*

they/them and ze/hir.[173] The Guidance on Discrimination offers some examples of violations of NYCHRL, which include intentional misuse of a person's title, pronoun, or name, or refusal to use a person's preferred pronoun after being requested to do so.[174] It is not a violation of NYCHRL to ask a person's name, gender, or self-identity in good faith.[175] Violations of NYCHRL's provisions come in the form of civil penalties ranging in the hundreds to tens of thousands of dollars.[176]

In 2017, the NYCHRL imposed fines against individuals on the basis of word choice.[177] In these cases, one employer placed a job listing on Craigslist seeking a "waitress,"[178] and the other posted a similar ad for an "Indian" waiter or waitress.[179] The employer in the first instance was fined $500 and the other employer was fined $1000.[180] The maximum fine an employer or entity may incur is a "civil penalt[y] of up to $125,000 for violations, and up to $250,000 for violations that are the result of willful, wanton, or malicious conduct. There is no limit to the amount of compensatory damages the Commission may award to a victim of discrimination."[181] In 2017, a medical center settled out of court and paid a transgender woman $25,000 in compensatory damages resulting from discrimination based on her gender identity.[182]

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173. Gender-neutral pronouns (pronounced "zee" and "here"). *"Ze" Pronouns*, MYPROUNOUNS.ORG, https://www.mypronouns.org/ze-hir (last visited Nov. 18, 2019). For more information on gender pronouns, see Lesbian, Gay, Bisexual, Transgender Resource Ctr., *Gender Pronouns*, U. WIS. MILWAUKEE, https://uwm.edu/lgbtrc/support/gender-pronouns (last visited Nov. 18, 2019).

174. *Legal Enforcement Guidance on Discrimination*, *supra* note 167 at 5.

175. *Id.*

176. *Decisions and Order-CCHR*, N.Y.C. HUM. RTS., https://www1.nyc.gov/site/cchr/enforcement/decisions-and-orders.page) (last visited Nov. 18, 2019) (listing final orders issued by the Commission's Office of the Chair for violations of NYCHRLs).

177. Decision and order at 1-2, 5-6, 8-9, N.Y.C. Comm'n on Human Rights v. Rozario, No. M-E-S-14-103-839-E) (2017) (accessed at https://www1.nyc.gov/assets/cchr/downloads/pdf/decisions-and-orders/Aksoy,%20Signed%20DO,%20June%2021,%202017_Redacted.pdf) [hereinafter *Rozario* Decision and Order]; Decision and Order at 6, 10, N.Y.C. Comm'n on Human Rights v. Bombay, No. M-E-NR-14-1029500-E (2017), (accessed at https://www1.nyc.gov/assets/cchr/downloads/pdf/decisions-and-orders/Shalom%20Bombay%202,%20Signed%20DO,%20June%2021,%202017_Redacted.pdf) [hereinafter *Bombay* Decision and Order].

178. *See Rozario* Decision and Order, *supra* note 177, at 1, 4.

179. *See Bombay* Decision and Order, *supra* note 177, at 1, 6.

180. *See Rozario* Decision and Order, *supra* note 177, at 9; *Bombay* Decision and Order, *supra* note 177, at 10.

181. NYC Comm. on Human Rights, *NYC Commission on Human Rights Announces Strong Protections for City's Transgender and Gender Non-Conforming Communities in Housing, Employment and Public Spaces,* NYC.GOV (Dec. 21, 2015), https://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender.

182. NYC Comm. on Human Rights, *Mount Sinai Beth Israel Medical Center Agrees to Implement New Procedures to Ensure Compliance with Gender Identity Protections*, NYC.GOV (July 13, 2017), https://www1.nyc.gov/site/cchr/enforcement/2018-settlements.page.

The Commission on Human Rights also created a Gender-ID Card to help spread awareness of the recent law changes.[183] The ID Card explains protections based on various non-binary gender associations and expressive representations, such as haircuts.[184] Further, the ID Card lists several recognized genders or self-identities which include, but are not limited to: drag queen, bi-gendered, trans, gender bender, agender, third sex, gender fluid, non-binary transgender, two-spirit, gender gifted, pangender, person of transgender experience, and genderqueer.[185]

A law that mandates the use of certain pronouns in order not to offend the listener is unequivocally a content-based regulation. NYCHRL is also viewpoint-based by endorsing the politically correct view of gender classifications. Compelled use of politically correct pronouns requires a speaker to convey the message of accepting non-binary gender classification, which may, in fact, contradict the personal beliefs of the speaker.[186] Government endorsement of favored speech offends the time-honored principle that "no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . . ."[187]

If challenged, New York City must justify NYCHRL by showing that it is necessary to serve a compelling government interest and there is no less speech-restrictive way to achieve that interest.[188] The Guidance on Gender Discrimination states the legislative intent behind the NYCHRL is to protect gender non-conforming persons from "discrimination [that] is 'very often a matter of life and death.'"[189]

Accepting this governmental interest as compelling, the NYCHRL must still be tailored to serve only that narrow interest and must not sweep so far as to include, and thus prohibit, other types of protected speech. Because the NYCHRL is expressly designed to target a broad swathe of conduct and speech, a court would likely find the law overbroad and, therefore, unconstitutional.

Further, there are no doubt less speech-restrictive means to serve the

183. NYC Comm. on Human Rights, *Gender Identity Expression*, NYC.GOV, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_Card2015.pdf (last visited Nov. 18, 2019).

184. *Id.*

185. *Id.*

186. *See* Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 237 (2017) (discussing whether mandating employers to use the employee's preferred gender pronoun is an unconstitutional instance of compelled speech).

187. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

188. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226, 2228, 2231 (2015).

189. *See* N.Y.C. COUNCIL, REP. OF THE GOVERNMENTAL AFFAIRS DIV., COMM. ON GEN. WELFARE, ADMIN. CODE 8-102, Int. No. 24, at 2 (2002); *Legal Enforcement Guidance on Discrimination*, *supra* note 167 at 2.

City's interest. Certainly, existing civil[190] or criminal penalties can be brought against a perpetrator who targets and harms an individual for discrimination based on the factors included in NYCHRL's anti-discrimination protections. It is a well-recognized principle of First Amendment jurisprudence that government cannot use speech restrictions to deter conduct, which is within the state's police power to prohibit.[191]

The NYCHRL has yet to be challenged in court. However, while lofty, some of its provisions are, in essence, codified anti-microaggression prohibitions. As such, if challenged, those provisions are unlikely to survive a First Amendment challenge. The penalties for violating the NYCHRL can be substantial.[192] Already, the NYC Human Rights Commission has imposed fines against employers for violating its law governing word usage in their employment ads.[193]

While eradicating societal discrimination against the LGBTQ community and providing LGBTQ individuals the same promise to equal rights and dignity afforded to all citizens should be a constitutional mandate, compelling political correctness may have a boomerang effect. To be sure, enforcing equal protection and due process rights is different than political correctness. As this Author has previously examined, the modern political correctness movement has caused a backlash of unintended consequences.[194] Johns Hopkins University Associate Professor Yascha Mounk[195] summarized a recent study on political correctness and concluded that a large majority of Americans believe that

190. Most civil tort remedies do not permit monetary damages for dignitary or emotional harm alone. Therefore, victims of discrimination cannot sue the perpetrator in tort law, without having suffered some physical harm in addition to their dignitary harm. Many state and local public accommodation laws, like NYCHRL, allow civil damage awards to victims of discrimination, often very substantial awards. 8 N.Y.C. ADMIN. CODE §§ 126, 404, 502(g), 603 (last updated May 4, 2016). These sometimes crushing damage awards raise due process issues, especially in the *Masterpiece Cakeshop*-type claims, where the Court has not definitively determined the legality of religious adherents' refusal to comply with public accommodation laws on the basis of sincerely held religious beliefs. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018). However, that issue is beyond the scope of this paper.

191. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 252-53 (2002) (striking virtual child pornography provision because government cannot restrict otherwise lawful speech to prohibit illegal conduct); Hill v. Colorado, 530 U.S. 703, 777 (2000) (Kennedy, J., dissenting) (objecting to the use of a speech restriction—protest-free buffer zone around entrance to abortion clinic—when actions sought to be deterred are actionable under criminal laws). Often this principle is illustrative of an overbroad speech restriction or a speech restriction that is not narrowly tailored to the government's interest.

192. *See* NYC Comm. on Human Rights, *supra* note 181.

193. *See supra* notes 177-80 and accompanying text.

194. *See* Day &Weatherby, *supra* note 2, at 338-39; Day & Weatherby, *supra* note 1, at 874.

195. *See* Katie Pearce, *Political Scientist Yascha Mounk Joins SNF Agora Institute at Johns Hopkins*, HUB (Dec. 21, 2018), https://hub.jhu.edu/2018/12/21/yascha-mounk-snf-agora-institute (providing information on Yascha Mounk and his scholarship).

"political correctness is a problem in our country."[196] Some blame President Trump's 2016 election victory on the political correctness movement.[197]

An in-depth discussion of any backlash to the political correctness movement, its connection to the election of President Trump and all that has transpired since his election must wait for a future article. However, it is quite obvious to the average current events observer that our country has become more divisive on issues of race, sexual orientation, gender, and religion over the past few years.[198] While the political correctness movement may not be the cause of those changes, one only has to listen to the words of President Trump[199] to realize the boomerang effect political correctness has had on our country.[200] During an August 2015 appearance on *Meet the Press*, President Trump stated:

> We have to straighten out our country, we have to make our country great again, and we need energy and enthusiasm . . . . And this political correctness is just absolutely killing us as a country. You can't say anything. Anything you say today, they'll find a reason why it's not good.[201]

196. Yascha Mounk, *Americans Strongly Dislike PC Culture*, THE ATLANTIC (Oct. 10, 2018), https://www.theatlantic.com/ideas/archive/2018/10/large-majorities-dislike-political-correctness/572581 (noting among the general population, eighty percent believe political correctness is a problem).

197. *See, e.g.*, *Letters: 'The Term* Political Correctness *Primes People to Respond Negatively'*, THE ATLANTIC (Oct. 22, 2018), https://www.theatlantic.com/letters/archive/2018/10/readers-respond-americans-dislike-pc-culture/572866.

198. *See, e.g.*, Peter Baker, *Trump Fans the Flames of a Racial Fire*, N.Y. TIMES (July 14, 2019), https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-race.html; Jeremy W. Peters, *In A Divided Era, One Thing Seems to Unite: Political Anger*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/us/politics/political-fights.html.

199. *See, e.g.*, TIM ALBERTA, AMERICAN CARNAGE: ON THE FRONT LINES OF THE REPUBLICAN CIVIL WAR AND THE RISE OF PRESIDENT TRUMP 293, 296 (2019); Douglas B. McKechnie, *From Secret White House Recordings to @REALDONALDTRUMP: The Democratic Value of Presidential Tweets*, 40 CAMPBELL L. REV. 611, 633-34 (2018); Sara Swartzwelder, *Taking Order From Tweets: Redefining The First Amendment Boundaries of Executive Speech in the Age of Social Media*, 16 FIRST AMEND. L. REV. 538, 554-56 (2018); Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915, 917-22 (2018); Gary O'Donoghue, *Donald Trump: 'We Can't Worry About Being Politically Correct'*, BBC NEWS (Dec. 11, 2015), https://www.bbc.com/news/av/world-35069227/donald-trump-we-can-t-worry-about-being-politically-correct.

200. *See, e.g.*, Ed Kilgore, *'Political Incorrectness' Is Just 'Political Correctness' for Conservatives*, N.Y. MAG. (July 17, 2018), http://nymag.com/intelligencer/2018/07/anti-pc-is-political-correctness-for-the-right.html.

201. Chris Cillizza, *The Dangerous Consequences of Trump's All-Out Assault on Political Correctness*, CNN (Oct. 30, 2018, 12:35 PM), https://www.cnn.com/2018/10/30/politics/donald-trump-hate-speech-anti-semitism-steve-king-kevin-mccarthy/index.html (internal quotation marks omitted).

VII. RECONSIDERING THE *MASTERPIECE CAKESHOP* CONFLICT

In his recent remarks on the National Day of Prayer, President Trump took credit for winning the "war on Christmas."[202] The so-called "war on Christmas," a reference to the secularization of the holidays, was one example used by religious conservatives to stir up fear that Christians were under attack by liberals and Democrats during the Obama years.[203] To win the support of religious conservatives and evangelical voters, then-presidential candidate Trump seized on this fear of an alleged persecution of Christians.[204]

Loyal to his base, President Trump has kept his promise to bring religion back.[205] According to the President: "[P]eople are so proud to be using that beautiful word 'God.' And they're using that word 'God' again, and they're not hiding from it. And they're not being told to take it down, and they're not saying, 'We can't honor God.' In God, we trust. So important."[206]

In another broad initiative to strengthen religious liberty, the Department of Justice, in 2017, issued a Guidance Memo to all executive departments and agencies that instructs "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming."[207] The Memo enumerates twenty Principles of Religious Liberty, setting out bold statements with an explanatory paragraph about religious rights and what government may and may not do.[208] Six of the Principles refer to the Religious Freedom Restoration Act of 1993 ("RFRA")[209] and the demanding strict scrutiny

202. Alan Noble, *The Evangelical Persecution Complex*, THE ATLANTIC (Aug. 4, 2014), https://www.theatlantic.com/national/archive/2014/08/the-evangelical-persecution-complex/375506; Eugene Scott, *At a National Day of Prayer Speech, Trump Falsely Claims There Was Little Religious Freedom Before His Election*, WASH. POST (May 2, 2019), https://www.washingtonpost.com/politics/2019/05/02/national-day-prayer-speech-trump-falsely-claims-there-was-little-religious-freedom-before-his-election/?utm_term=.60ace027e198.

203. *See* Brakkton Booker, *Fact Check: Trump's Pledge to Restore 'Merry Christmas' to the White House*, NPR (Nov. 30, 2017), https://www.npr.org/2017/11/30/567525913/fact-check-trump-s-pledge-to-restore-merry-christmas-to-the-white-house; Noble, *supra* note 202.

204. Scott, *supra* note 202.

205. *Id.*

206. *Id.*

207. Memorandum from Jeff Sessions, *supra* note 7, at 1.

208. *Id.* at 1-6.

209. 42 U.S.C. § 2000bb (2012); Memorandum from Jeff Sessions, *supra* note 7, at 1-6. Congress passed RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (holding that strict scrutiny does not automatically apply to Free Exercise claims seeking an exemption from compliance to neutral laws of general applicability). *See* Scott Bomboy, *What is the RFRA and Why Do We Care?*, CONST. CTR. (June 30, 2014), https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care. RFRA reinstates strict scrutiny

standard applicable to RFRA claims.[210] One of the Principles makes clear that "RFRA applies even when a religious adherent seeks an exemption from a legal obligation requiring the adherent to confer benefits on third parties."[211] Although RFRA applies only to the federal government,[212] many states have passed their own RFRA statutes.[213]

Given this President's strong support for religious freedom and two new conservative justices on the Supreme Court,[214] the next *Masterpiece Cakeshop*-like claim is likely to succeed on the merits of a Free Exercise claim. Just this past term, the Supreme Court had an opportunity to decide *Klein v. Oregon Bureau of Labor & Industries*,[215] a case factually similar to *Masterpiece Cakeshop*. Like Mr. Phillips, the Kleins owned a bakery shop, exclusively making custom-made wedding cakes.[216] When the Kleins refused to bake a cake for a same-sex wedding, they faced charges by the Oregon Bureau of Labor and Industries for violating the state's public accommodation law.[217] The Administrative Law Judge, investigating the complaint, awarded damages of $135,000 to the lesbian couple denied services, which was affirmed by the Oregon appellate court.[218] In their petition for certiorari, the Kleins alleged both Free Speech and Free Exercise claims, the same claims raised, but not decided, in *Masterpiece Cakeshop*.[219]

Fortunately, the Supreme Court "punted" once again, declining to decide the *Klein* case on its merits.[220] In an unsigned order, the Supreme

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standard of judicial review to claims that a law substantially burdens an adherent's free exercise rights, even when the law is neutral and generally applicable. *See generally* Terri R. Day, Leticia Diaz & Danielle Weatherby, *A Primer on* Hobby Lobby: *For-Profit Corporate Entities' Challenge to the HHS Mandate, Free Exercise Rights, RFRA's Scope, and the Nondelegation Doctrine*, 42 PEPP. L. REV. 55, 69-70 (2014).

210. Memorandum from Jeff Sessions, *supra* note 7 at 3-5.

211. *Id.* at 5.

212. City of Boerne v. Flores, 521 U.S. 507, 512, 516, 536 (1997) (holding that RFRA is not applicable to the states because Congress exceeded its authority under section five of the Fourteenth Amendment in passing RFRA).

213. *See generally* Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini-RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907 (2016) (discussing state RFRA laws).

214. *See Current Members*, SUP. CT. U. S., https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 18, 2019) (Justices Gorsuch and Kavanaugh).

215. 410 P.3d 1051 (Or. App. 2017) (petition for certiorari filed Oct. 19, 2018, distributed petition for conference, April 26, 2019) (seeking review on Free Speech and Free Exercise claims of bakery owners fined under Oregon's public accommodation law for refusal to make a custom-made wedding cake for a same-sex ceremony).

216. *Id.* at 1057.

217. *Id.* at 1057-59.

218. *Id.* at 1060.

219. *Id.* at 1056-57; *see* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723-24 (2018).

220. Klein v. Or. Bureau of Labor & Indus., 139 S. Ct. 2713 (2019).

Court vacated the decision of the Oregon appellate court and remanded the case for "further considerations in light of *Masterpiece Cakeshop*."[221]

Also, in *Arlene's Flowers, Inc. v. Washington*,[222] a case involving a florist who refused to create floral arrangements for a same-sex marriage ceremony, the Supreme Court vacated the decision below for "further consideration in light of *Masterpiece Cakeshop*."[223] On remand to the Washington Supreme Court, the Court affirmed the initial decision reached by its lower court.[224] The florist has subsequently stated her intention to bring the case before the Supreme Court once again.[225]

A constitutional decision in favor of the Kleins or Arlene's Flowers could have opened a Pandora's Box. As Justice Scalia wisely observed, some legal controversies are better left to the "people rather than to the courts [in] that the people, unlike judges, need not carry things to their logical conclusion."[226] If the Supreme Court were to hold that a religious adherent has a constitutional right under the Free Exercise Clause to be exempt from compliance with a public accommodation law, that decision could create a steep slippery slope threatening unlimited opportunities for LGBTQ discrimination with the imprimatur of the Constitution.

Typically, defenders of individual rights and equal protection look to the Supreme Court to enshrine those rights with constitutional protection.[227] In *Obergefell v. Hodges*, Justice Kennedy said: "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right."[228] Notwithstanding the strong dissents to the contrary, Justice Kennedy ensured that same-sex couples had the right to marry in every state guaranteed by the Due Process Clause of the federal Constitution.[229]

221. *Id.*

222. 138 S. Ct. 2671 (2018).

223. *Id.* at 2671; Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 548-49 (Wash. 2017).

224. Washington v. Arlene's Flowers, Inc., 441 P.3d 1203, 1237-38 (Wash. 2019) (holding that the flower shop owner discriminated on the basis of sexual orientation by refusing to provide custom floral arrangements for same-sex wedding and the Washington Law Against Discrimination did not violate First Amendment protections against compelled speech).

225. Jacqueline Thomsen, *Supreme Court Sends Same-Sex Wedding Cake Case Back Down to Lower Court*, THE HILL (June 17, 2019, 9:38 AM), https://thehill.com/regulation/court-battles/448868-supreme-court-sends-same-sex-wedding-cake-case-back-down-to-lower.

226. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J. dissenting).

227. *See, e.g.*, Arlene's Flowers, Inc. v. Washington, 2017 WL 3126218 (2017), *petition for writ of cert. filed*, 138 S. Ct. 2671 (2018) (No. 17-108).

228. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

229. *Id.* at 2605-04.

Justice Kennedy also wrote the majority opinion in *Masterpiece Cakeshop*. Referring back to his words in *Obergefell*, he wrote:

> The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *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.*[230]

Times have changed and the Court has changed. While the Constitution is usually considered a shield protecting individual liberties, the present Court has the potential to interpret the Constitution in such a way that Free Exercise becomes a sword justifying discrimination. With Justice Kennedy's retirement and the appointment of Justices Gorsuch and Kavanaugh, a state law remedy to the *Masterpiece Cakeshop* and *Klein*-like cases, pitting anti-discrimination against Free Exercise, may be preferable.

While somewhat counter-intuitive, a very specific, narrowly written religious exemption in those public accommodation laws that prohibit discrimination on the basis of sexual orientation would be a compromise to the *Masterpiece Cakeshop* conflict. In this post-*Obergefell*, anti-political correctness era, a call for compromise rests on the acceptance of two basic assumptions: (1) *Obergefell* left a door open for religious adherents to continue in belief and perhaps actions considered expressive conduct to oppose same-sex marriage[231] and (2) compelling small business owners with sincerely held religious beliefs to provide services for same-sex marriages is, in essence, compelling the politically correct view of marriage.

In *Masterpiece Cakeshop*, the Court noted that, while the Colorado Civil Rights Commission was adjudicating the CADA claim against Mr. Phillips, it ruled in favor of other bakers, who refused to bake cakes with messages that demeaned gay marriage.[232] Owners of Sweet Cakes by Melissa, the Kleins, who were ordered to pay $135,000 to the lesbian couple for whom they refused to custom-make a wedding cake, also refused to custom-make a cake celebrating a divorce.[233] Certainly, a

230. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct 1719, 1727 (2018) (emphasis added) (citations omitted) (internal quotation marks omitted).

231. *See Obergefell*, 135 S. Ct. at 2607.

232. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1728.

233. Ken Klukowski, *Oregon Encourages Intolerance by Punishing Aaron and Melissa Klein*, WASH. EXAMINER (March 13, 2018, 1:01 AM), https://www.washingtonexaminer.com/oregon-

baker's refusal to put a particular message on a cake is different than a general ban on making custom-made baked goods for same-sex marriages. But, is enforcement of public accommodation laws against those who hold religious beliefs condemning same-sex marriage, in effect, punishing a disfavored belief about marriage?

Calling on the legislative jurisdictions that have extended LGBTQ anti-discrimination protections in public accommodations, to now create a very limited religious exemption is, in this Author's view, a necessary and practical compromise. As a model for the workability of this approach, legislators and courts could look to the religious exemption provided in the Selective Service Act for conscientious objectors with sincerely held religious beliefs.[234] Conscription exemptions were a matter of statutory interpretation and not constitutionally based. Such an approach to the *Masterpiece Cakeshop* conflict might provide a path for accommodating sincerely held religious beliefs without creating a constitutionally-enshrined right to discriminate under a broad interpretation of the Free Exercise Clause. A statutory exemption can be construed narrowly with limited application;[235] a judicially-recognized

encourages-intolerance-by-punishing-aaron-and-melissa-klein.

234. The Selective Service Act identifies a group known as "Conscientious Objectors," which gives members of the group, if drafted, an "opportunity to file a claim for exemption from military service based upon their religious or moral objection to war." *See Who Must Register*, SELECTIVE SERV. SYS., https://www.sss.gov/Registration-Info/Who-Registration (last visited Nov. 18, 2019); *see also* Johnson v. Robinson, 415 U.S. 361, 383, 385 (1974) (noting that when "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory," and holding that the exclusion of conscientious objectors from veterans' educational benefits was rational, in part, because the benefits would not incentivize service for that class); United States v. Seeger, 380 U.S. 163, 175-76 (1965) (deciding that by using the words "Supreme Being" rather than "God," Congress intended to broaden the scope of religions included, and further ruling "[t]he test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."); Lawrence G. Sager, *In The Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U. L. J. 585, 588 (2016); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1389 (2012) (arguing that "in order for American law to reflect the kind of robust, autonomy-based respect for conscience to which every pluralistic society aspires, we must agree on a content-neutral guiding principle for negotiating future claims for legal accommodation."); Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1, 2-3 (2010).

235. *See, e.g.*, John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989) (applying this principle in the Freedom of Information Act context); *see also* FLA. STAT. § 761.061 (2017) (prohibiting government action against religious organizations based on the denial of services to same-sex couples); MISS. CODE ANN. § 11-62-5(5) (2017) (Mississippi law prohibiting state government from taking any discriminatory action for the denial of services based on "sincerely held religious belief or moral conviction" for providers of "photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services" and of "[f]loral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related

constitutional right may expand to its "logical conclusion," demonstrating Justice Scalia's point that some things are best left to the legislative process.[236]

In 2015, shortly after the *Obergefell* decision, the State of Indiana passed SB 101, a state Religious Freedom Restoration Act.[237] Despite opposition from the LGBTQ and business communities, then-Governor Mike Pence signed the bill into law, with resounding support from religious leaders and the conservative right.[238] Indiana's RFRA had language that opponents feared would permit for-profit businesses to discriminate in public accommodations and other services and use religious freedom as a defense to any private action brought against a business for violation of public accommodation laws or anti-discrimination laws.[239] There was a swift national outcry and huge economic losses to the state from cancellations of planned events and business expansions. Within a week, Indiana amended its RFRA adding sexual orientation and gender identity to the list of factors that could not be cause for denial of service.[240] The Indiana experience makes Justice Scalia's point that some legal controversies are better left to the people.[241]

Mr. Phillips and others have argued that their creatively-made cakes and wedding-related goods and services are expression protected under the First Amendment Free Speech Clause.[242] In *Masterpiece Cakeshop*, the Court did not decide this issue.[243] But, in oral arguments, many members of the Court expressed doubt about finding a logical standard for deciding where to draw the line between what is and is not artistic expression.[244] A few justices peppered Mr. Phillips's counsel with questions about line-drawing between wedding-related service providers, whose work is artistic expression: the hairdresser; the makeup-artist, the chef, the flower arranger, the baker, the tailor?[245] No satisfactory answers were forthcoming. A compelled speech argument based on characterizing

services, accommodations, facilities or goods").

236. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

237. Dwight Adams, *RFRA: Why the 'Religious Freedom' Law Signed by Mike Pence Was So Controversial*, INDYSTAR (May 3, 2018, 3:23 PM), https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

242. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1726-27 (2018); Maxine Bernstein, *Owners of 'Sweet Cakes' File Appeal*, THE COLUMBIAN (Mar. 12, 2018, 9:06 PM), https://www.columbian.com/news/2018/mar/02/owners-of-sweet-cakes-file-appeal.

243. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723-24, 1731-32.

244. Oral Argument at 09:04, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), https://www.oyez.org/cases/2017/16-111.

245. *Id.* at 08:55.

a custom-made cake as expressive art protected under the Free Speech Clause seems dubious, with no workable standard to apply.

But, compelled speech may be the right doctrine to apply, just in a different way. If religious objectors' sincerely held religious beliefs concern a particular view about marriage, and not a pretext to discriminate, then, to force the government's view of marriage contradicts the central meaning of the First Amendment. Religious views on marriage should have their way in the marketplace of ideas[246] and "no official . . . can prescribe what shall be orthodox in . . . matters of opinion . . . ."[247]

Discrimination in places of public accommodation robs "the rights and dignity of gay persons who are, or wish to be, married"[248] but are denied the same goods and services as others. It is a microassault. But, if the refusal of bakers like Mr. Phillips is based on a sincerely held belief that they will be complicit in furthering what their religion tells them is wrong, is punishing non-compliance, with potentially hefty fines, a way to deter discrimination or an act of intolerance for a socially unacceptable view of marriage?

This Author has consistently condemned LGBTQ discrimination; and this proposal, to amend public accommodation laws to provide a narrowly defined religious exemption, may seem contrary to previously held positions.[249] However, it is a practical "lesser of two evils" compromise given the political and judicial climate of today.

VIII. CONCLUSION

Public accommodation laws have become the next battlefield for religious conservatives, who lost the fight against same-sex marriage. *Obergefell* left the door open for businesses like Masterpiece Cakeshop to seek conscience protection against charges of discrimination in public accommodations when refusing to use their services in furtherance of a same-sex wedding. In *Obergefell*, Justice Kennedy provided a caveat that the constitutional right to same-sex marriage did not remove First Amendment protections from religious persons to continue to advocate that same-sex marriage should not be condoned.[250] In dissent, Justice Alito warned that post-*Obergefell*, religious believers who expressed their

246. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

247. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

248. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723.

249. *See generally* Day & Weatherby, *supra* note 213; Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015 (2016).

250. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

opposition to same-sex marriage would be labeled bigots; his prediction proved true for the owner of Masterpiece Cakeshop.[251]

This Article re-thinks an absolute position against religious exemptions in light of the current political and judicial climate. President Trump has pushed policies that would expand free exercise rights way beyond the facts of *Masterpiece Cakeshop*. With the re-configured Court and President Trump's expanded religious protections, a legislative compromise is the "lesser of two evils" rather than a court decision giving constitutional "permission" to discriminate under an expansion of Free Exercise. Such a decision could create a steep slippery slope with no brakes!

This Article proposes the perspective that those with sincerely held religious beliefs, who oppose using their services in furtherance of same-sex marriages, are expressing a religious view about marriage.[252] This view has become socially unacceptable in the jurisdictions that protect against discrimination based on sexual orientation in places of public accommodations.

After considering the political correctness movement and its microaggression-focused consequences, this Article suggests that enforcing a socially accepted view of marriage through public accommodation laws is, in essence, compelling political correctness.[253] The past few years have demonstrated that compelled political correctness has a boomerang effect and can increase LGBTQ discrimination.

While religious views against same-sex marriage are offensive to those whose right to marriage is protected, to punish such views is contrary to the central meaning of the First Amendment. Like microaggressions, those public accommodation businesses that refuse their services in furtherance of same-sex marriages affront the dignity of members of the LGBTQ community. But, the First Amendment requires that we tolerate the intolerable when it comes to matters of faith and opinion.

251. *Id.* at 2642-43 (Alito, J., dissenting); *see* Jason Salzman, *Spinning a Bigot into a 'Cake Artist'*, COLO. POL. (Dec. 1, 2017), https://www.coloradopolitics.com/opinion/spinning-a-bigot-into-a-cake-artist/article_dd3904a8-7382-54b2-9dc4-ccdf3ca423d6.html.

252. *See supra* Part VII.

253. *See supra* Part VII.