

# THE BUSINESS OF EXPRESSION: A COMMERCIAL, CONSTITUTIONAL, AND HISTORICAL EVALUATION OF THE LINE BETWEEN THE FIRST AMENDMENT AND ANTIDISCRIMINATION LAWS

AUDREY UHLAND

## I. INTRODUCTION

A painter opens up a small art studio and exclusively sells his own original work. From time to time, he will create custom pieces by request. One day, an individual requests a painting of a burning cross and the painter refuses. Such a refusal seems to fall within the painter's discretion. But what if he refused to paint a portrait of an African-American man? What if he refused to portray a wedding between two women? Is the right to any of these refusals protected under the Constitution, and if so, which one? These examples indicate the continuum on which instances of discrimination are placed, from acceptable to contemptible. The continuum exists not only within the minds of individuals, but also within the American legal system in determining the point at which courts will step in and condemn discriminatory conduct as illegal. While most people will have a sense of what they consider to be unacceptable as opposed to what should be an individual's choice, the law has yet to provide us with a conclusive boundary. The tension between the Constitution and antidiscrimination laws is growing, and it will continue to do so until the courts provide answers to some of the questions they have been avoiding.

### A. THE DISCRIMINATION CONTINUUM AND EQUAL PROTECTION

The Fourteenth Amendment of the United States Constitution is the source of the Equal Protection Clause, which provides that no state shall deny any person "within its jurisdiction the equal protection of the laws."<sup>1</sup> This amendment overruled the infamous *Dred Scott* case, where the Court held that Scott, an African American slave, could not be granted United States citizenship<sup>2</sup> and thus could not enjoy the protections afforded to citizens under the laws of any state, specifically the protection available from

---

<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> *Scott v. Sandford*, 60 U.S. 393, 420-23 (1857).

the courts.<sup>3</sup> Since the Fourteenth Amendment was ratified, such exclusions are clearly unconstitutional and laws have developed to help ensure that equal protection is given to all.

The Fourteenth Amendment does allow for some distinctions to be made in the law, as “equal treatment” can mean different things for different classifications of people.<sup>4</sup> For example, state laws may never single out a racial group in an unfavorable way, as that violates Fourteenth Amendment principles, but the law is less clear when it comes to distinctions based on gender or sexuality.<sup>5</sup> However, the road to the strict level of scrutiny applied in racial classification cases was a long one and there is the possibility for other classes to eventually receive that same level of review.

Following *Dred Scott*, cases involving racial classifications were systematically brought before the Supreme Court, and it was through these victories against the states that the current standard of strict scrutiny for racial classifications was established.<sup>6</sup> The process was slow, beginning with *Plessy v. Ferguson* in 1896, which held that separate could be equal in regard to racially segregated locations and amenities.<sup>7</sup> Justice Harlan’s dissent in this case was important for highlighting the reality that the law was oppressive in purpose and effect despite the supposed equality it offered. His opinion also foreshadowed the doctrinal changes to come.<sup>8</sup> It was not until 1950 that *Plessy* was finally overruled in *Brown v. Board of Education*.<sup>9</sup> The Court in *Brown* held that, despite everything being “equal,” there is still inequality that arises out of segregation itself—separation is inherently unequal.<sup>10</sup>

Laws making distinctions based on race and other “suspect classes” are evaluated under strict scrutiny and are subject to a two-part evaluation that considers whether the state has a compelling interest in passing the law and whether the classification is absolutely necessary to accomplish that purpose.<sup>11</sup> Despite having an established method of scrutiny, courts must still make some rather subjective judgments regarding what constitutes a compelling interest and what methods are narrowly tailored. For example, in 1978 the Supreme Court held that racial quotas in university admissions violated the equal protection clause, because they are not a narrowly tailored means to achieve diversity.<sup>12</sup> However, in 2003 the Court held that diversity programs that use race as one factor in a holistic admissions process are constitutional, because diversity is a compelling interest.<sup>13</sup> Thus, it is

---

3 *Id.* at 427.

4 Lenora M. Lapidus, *The Rights of Women*, AMERICAN CIVIL LIBERTIES UNION, 2 (2009), [https://www.aclu.org/files/pdfs/about/rightsofwomen\\_chapter1.pdf](https://www.aclu.org/files/pdfs/about/rightsofwomen_chapter1.pdf).

5 *Id.*

6 *Id.* at 5.

7 *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

8 *Id.* at 555-56 (Harlan, J., dissenting).

9 *Brown v. Bd. of Educ.*, 344 U.S. 1 (1952).

10 *Id.*

11 Lapidus *supra* note 4, at 5.

12 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

13 *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

apparent how the Court's focus in the application of strict scrutiny may yield results that could be considered conflicting.

For classifications involving a non-suspect class, a law is generally subject to a rational basis test and the state must only demonstrate that the classification is rationally related to a legitimate state interest.<sup>14</sup> Any classes not protected under strict scrutiny or intermediate scrutiny will be evaluated under rational basis review. Classifications aimed at gender or illegitimacy are subject to a heightened, or intermediate, level of scrutiny, as was established in *Reed v. Reed*.<sup>15</sup> This case involved a law that gave men preferential status over women in the administration of estates and the Court found that the law violated the Equal Protection Clause.<sup>16</sup> The Court stated that a challenged classification involving gender must serve an *important* state interest and that it must be *substantially* related to serving that interest.<sup>17</sup> Five years after *Reed* the Court applied this intermediate scrutiny to a case favoring women, and again held that the classification violated equal protection rights.<sup>18</sup> Intermediate scrutiny continues to be reserved primarily for gender classifications.<sup>19</sup>

Currently, sexuality as a means of classification falls under rational basis review and does not get the enhanced protection available under intermediate scrutiny or strict scrutiny.<sup>20</sup> Despite this, the courts have been more willing to invalidate laws that include such classifications, as well as laws targeting other "unpopular" groups, than is typical under rational basis review.<sup>21</sup> If a legal classification seems to be based on animus or targets one of these quasi-suspect groups without a rational and reasonably direct relation to the government's objective, then the law has failed the rational basis test.<sup>22</sup> The additional scrutiny that these classifications receive does not equal that of intermediate scrutiny, but it is markedly higher than average rational basis review, and thus, these classes fall under a type of heightened rational basis standard. As was the case with racial and gender classifications, there is the possibility that these classes will move up the continuum, and this could have substantial implications when considering antidiscrimination laws and their current effectiveness regarding these classes.

It is noteworthy that religious classifications are typically reviewed under the First Amendment, rather than the Equal Protection Clause, and that the Supreme Court has not protected religion as a matter of equal protection in the way it has for race and gender.<sup>23</sup> While theories on the reasons for this

---

14 Lapidus *supra* note 4, at 4.

15 *Reed v. Reed*, 404 U.S. 71, 75 (1971).

16 *Id.*

17 *Id.*

18 *Craig v. Boren*, 429 U.S. 190, 197 (1976).

19 Lapidus *supra* note 4, at 6.

20 *Romer v. Evans*, 517 U.S. 620, 640 (1996).

21 *See id.*

22 *Id.*

23 Abe Salander, *Religion and the Equal Protection Clause*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, 2 (2012), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1212&context=facultyworkingpapers>.

vary and some scholars find this to constitute discrimination within itself,<sup>24</sup> it means that matters involving religious distinctions must be analyzed differently and in a manner to be discussed herein. Apart from religion, when it comes to equal protection under the laws of the United States, there is a fairly well-defined continuum on which potential violations are scrutinized. The resulting status of a class as suspect or non-suspect is a vital element of courts' treatment of that class, and this status arguably informs matters beyond equal protection. Because of this, it is important to understand the classification system when considering the interplay of classified groups and the legal system at large.

#### B. THE FIRST AMENDMENT AND DISCRIMINATORY ACTS

The First Amendment to the United States Constitution prohibits laws that impede the freedom of speech; religion; expression; freedom of the press; or the right to peacefully assemble or petition the government.<sup>25</sup> The rights granted in this Amendment stand as pillars of American freedom in the minds of many people, and the protection of these rights has often been at the center of legal disputes. In recent decades, tension has arisen between the First Amendment and antidiscrimination (or "public accommodation") laws. These laws, while serving an important societal purpose, are increasingly at odds with First Amendment rights and threaten the freedoms guaranteed therein.

Throughout the last two decades, there have been numerous publications regarding the interaction of the First Amendment and antidiscrimination laws, particularly after the Supreme Court decided *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which was a direct example of the conflict at hand.<sup>26</sup> The Court held that the Boy Scouts of America had the right to remove a gay scoutmaster due to the organization's stance on homosexuality.<sup>27</sup> But the discrimination in this case was not against African Americans or other "suspect" groups, so the boundaries of the rule were unclear, and they continue to be so.

Recently, there has been a surge in cases regarding the right of business owners to express, or not express, their views on politically charged issues. This matter was further exasperated by this summer's marriage equality ruling in *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015). Same-sex couples have consistently challenged the applicability of *Boy Scouts* to these situations, likening the lack of accommodation to invidious discrimination not protected by the First Amendment, but *Obergefell* finally gave them a Constitutional right in which to ground their claims.<sup>28</sup>

---

<sup>24</sup> *Id.* at 1, 5.

<sup>25</sup> U.S. CONST. amend. I.

<sup>26</sup> See, e.g., DAVID BERNSTEIN, *Antidiscrimination Laws and the First Amendment*, George Mason Law & Economics Research Paper No. 00-39 (Oct. 2000), available at <http://ssrn.com/abstract=246463>; James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961 (2011).

<sup>27</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

<sup>28</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

Many are quick to object when antidiscrimination laws restrict or compel expression. After *Boy Scouts*, the First Amendment seemed to take precedent over antidiscrimination laws, particularly in the context of expressive association.<sup>29</sup> In *Obergefell*, the Supreme Court recognized the right to same-sex marriage.<sup>30</sup> Now business owners who presumed *Boy Scouts* permitted them to value expression above gay rights found the ground shifting under them. For same-sex couples that wanted equal access to businesses, the seismic shift created a more favorable landscape.

While the *Obergefell* holding has brought the matter of expression within commerce to the forefront of individual rights development, it would be a mistake to conclude—as many have—that the Supreme Court’s decision in that case further complicated the relationship between the First Amendment and antidiscrimination laws. On the contrary, the federal recognition of marriage equality has actually simplified some of the factors at play and, as a result, a distinction is discernable that may provide clarity for the remaining questions regarding free expression. It is now easier to take a step back and analyze the matter in the same way that other discrimination issues have been analyzed because same-sex marriage is legal. However, the clarity that such analysis can provide is fragile, as will become apparent when the interaction between the First and Fourteenth Amendments is explored.

While there are many important reasons to eliminate discrimination against same-sex couples, there is a point at which accommodation crosses over into personal expression and courts should be wary of allowing antidiscrimination laws to interfere with such expression. Put simply, customization marks the line between expression and impermissible discrimination. When a business creates a custom product, it engages in an act of expression, and it is this rather narrow act that should be preserved per the First Amendment. Drawing this line provides a clear and manageable boundary and allows only a narrow exception to antidiscrimination laws that maximizes business owners’ expressive rights. This is consistent with legal precedent, and worth making limited public accommodation concessions for. If this First Amendment protection is removed, the rights of business owners will be compromised in much broader instances than the one at hand. However, if the Supreme Court formally recognizes this distinction, there are legitimate concerns associated with effectively allowing a legal classification based on sexual identity.

## II. HISTORICAL EVALUATION

### A. THE COMPELLING INTEREST TEST AND THE RISE OF ANTIDISCRIMINATION LAWS

Tensions between the First Amendment and antidiscrimination laws followed the Civil Rights Act of 1964, which made any discrimination based

---

<sup>29</sup> *Boy Scouts*, 530 U.S. at 661; See Ilya Shapiro, *Antidiscrimination Law Can’t Trump the Freedom of Speech*, CATO INSTITUTE (Dec. 13, 2013, 9:00 AM), <http://www.cato.org/blog/antidiscrimination-law-cant-trump-freedom-speech>.

<sup>30</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

on race, color, gender, religion, or national origin illegal, and ended segregation in the workplace and at any public accommodation.<sup>31</sup> This immense leap in the advancement of civil rights advancement also inadvertently ushered in the current era of uncertainty regarding personal free expression.<sup>32</sup> This era has facilitated questions regarding freedom of expression that remain pertinent today. Before addressing these questions, however, the historical evolution of First Amendment protection must be understood, beginning with religious freedom.

Prior to the Civil Rights Act of 1964, the Supreme Court found that any government action that placed a substantial burden on religious freedom must be justified by a compelling governmental interest.<sup>33</sup> This “compelling interest” test was ultimately used for the review of any First Amendment claim, including cases involving the freedom of expression, association, and religious exercise. The test was applied in the case of *Sherbert v. Verner*, where the Court found that the government could not deny unemployment benefits to a Seventh-Day Adventist based on her inability to work on Saturdays.<sup>34</sup> This strict approach continued in 1977, when a New Hampshire resident claimed that a state law requiring him to display the state’s motto on his vehicle’s license plate was undermining his rights to free speech and religious expression.<sup>35</sup> Applying the compelling interest test, the Supreme Court found that the state’s interest in requiring the motto’s display was not strong enough to overcome an individual’s constitutionally protected rights.<sup>36</sup> By now, broad protections of free speech and expression were on a collision course with expanding antidiscrimination laws. The various rights and protections offered by the legal system were becoming increasingly incompatible. The states sought to eliminate discrimination while the Supreme Court continued to champion First Amendment guarantees. In the wake of the Civil Rights Act of 1964, cases slowly emerged involving the actions of private organizations and businesses, rather than those of the government, and potential problems began to surface.

Latent tensions between the First Amendment and the 1964 Act became acute in the 1983 case of *Bob Jones Univ. v. United States*. The Supreme Court held that the government’s interest in eradicating racial discrimination in education was compelling enough to overcome a private school’s right to free expression.<sup>37</sup> Bob Jones University was at risk of losing its tax-exempt status due to a rule banning interracial dating that the university claimed was religiously motivated and protected under the Free Exercise Clause.<sup>38</sup> The opinion, written by Chief Justice Burger, acknowledged the importance of the Free Exercise Clause and the protection it provides to religious conduct,

---

31 Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

32 Jack S. Vaitayanonta, Note, *In State Legislatures We Trust?: The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 886-87 (2001).

33 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

34 *Id.* at 408-09.

35 *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

36 *Id.* at 717.

37 *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

38 *Id.* at 580, 603.

but added, “[not] all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”<sup>39</sup> This was a reference to the compelling interest test from *Sherbert*, but with a twist. For the first time, the government could impede private expression based on an important interest. While this holding was limited to racial distinction in education and was not an overt threat to First Amendment rights, a precedent had been set that embraced government oversight of private expression. Indeed, it is difficult to imagine a more compelling reason behind an antidiscrimination law than the preservation of equality and the destruction of racism within educational institutions. Therefore, the test seemed to live on and this case remains an example of its proper application.

Nevertheless, the compelling interest test continued to weaken as opposition to public accommodation laws began to mount with new claims of First Amendment rights violations. The potential power of this test’s dilution was never more apparent than in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In what has been described as an “anti-First Amendment opinion,”<sup>40</sup> the Supreme Court held that the Jaycees, an organization established to offer support and development opportunities to young men, was required to offer full membership to women, as the state’s interest in eliminating discrimination against its female citizens was compelling enough to justify the impact on the Jaycees’ First Amendment “associational freedoms.”<sup>41</sup> In response to the argument that this broad application of the statute greatly endangered the rights of private institutions, the court stated that the antidiscrimination act did “not create an unacceptable risk of application to a substantial amount of protected conduct” and dismissed the matter without further consideration.<sup>42</sup> The reference to a “substantial amount of protected conduct” implied that there was an amount of protected conduct that could acceptably be lost in the interest of a state’s agenda. This is significant because it was the first time the Supreme Court acknowledged the loss of a *protected* right to an antidiscrimination law. *Bob Jones* had involved a rule banning interracial dating,<sup>43</sup> which was easily labeled as lacking constitutional protection and thereby avoiding strict scrutiny. Prior to *Roberts*, it was certainly feasible that a protected right could give way to a compelling interest given the “means-end” nature of the test. However, in this instance the government’s interest seems to have been given too much weight against the rights it overcame, and the test was ultimately misapplied.

The *Roberts* holding marked a shift in judicial application of the compelling interest test and greatly strengthened the ability of antidiscrimination laws to override the First Amendment. The alleged discrimination was gender-based, which is suspect in the eyes of the Court

---

39 *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257–258 (1982)).

40 BERNSTEIN, *supra* note 26.

41 *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

42 *Id.* at 631.

43 *Bob Jones*, 461 U.S. at 580.

but subject only to intermediate scrutiny.<sup>44</sup> It is certainly arguable that the reasons for the gender distinctions made within the organization should not have failed judicial review under the applicable level of scrutiny. The Jaycees was a private organization that focused on male mentorship.<sup>45</sup> Labeling this focus and its application as discrimination expanded the reach of antidiscrimination laws and favored a governmental interest that seemed to be overreaching. The fact that a public accommodation was not involved further broadened the realm in which antidiscrimination laws had effect. *Roberts* enabled the courts not only to redefine what qualified as a “compelling interest” or a “public accommodation,” but also addressed the remaining question of how far back the Court would scale the compelling interest test.

#### B. THE FALL OF THE COMPELLING INTEREST TEST AND RFRA

In 1990, the Supreme Court abandoned the compelling interest test in *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), as far as the test applied to religious freedom and expression. This case effectively overruled *Sherbert*, and formally handed down the death sentence to the compelling interest test as it applied to the Free Exercise Clause.<sup>46</sup> It held that otherwise valid laws that place an incidental burden on the free exercise of religion do not violate an individual’s constitutional rights.<sup>47</sup> The key element of this decision was that the burden was “incidental” and that it was not the intention of lawmakers to restrict religious freedoms with the passage of the law in question.<sup>48</sup> But the First Amendment does not mention the intention behind restrictive laws, and it is unclear why this distinction played such a vital role in the Court’s decision. *Smith* left the right to free religious expression extremely vulnerable as it could be easily overcome in a justice system that had failed to incorporate a definitive standard for protection.

Congress attempted to overrule *Smith* in 1993 by passing the Religious Freedom Restoration Act (“RFRA”). RFRA made it illegal for the government to substantially hinder the free exercise of religion, even in incidental ways, unless the government can show that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>49</sup> RFRA reenacted the judicial processes formerly in place under *Sherbert*, setting a very high standard for governmental restrictions on the free exercise of religion in particular. Just four years later, the Supreme Court invalidated RFRA as it applied to the states as beyond the enumerated constitutional powers of Congress.<sup>50</sup> Congress responded with the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which limits the application of the RFRA test at the state level to land use contexts and burdens on

---

44 Lapidus, *supra* note 4 at 6.

45 *Roberts*, 468 U.S. at 612–13.

46 *Sherbert*, 374 U.S. at 406.

47 *Id.* at 410.

48 *Emp’t Div. v. Smith*, 494 U.S. 872, 878 (1990).

49 42 U.S.C. §2000bb-1.

50 *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).



institutionalized persons.<sup>51</sup> The RFRA test continues to bind federal actors. Additionally, twenty-one states have adopted their own versions of RFRA, which generally mirror the federal statute.<sup>52</sup>

The statutory protection provided by RFRA and its state equivalents arguably bolsters the Free Exercise freedoms to the level of other First Amendment freedoms. Courts often approach religious freedom issues with the same severity as issues of expression, but do not always apply a formal test. This creates confusion when religious beliefs are at the heart of a discriminatory act or expression, and courts fail to utilize the appropriate standard for expression under the First Amendment. Cases involving expression, religiously motivated or otherwise, should be judged under the appropriate standard for First Amendment freedoms. These standards have, at times, closely mirrored the standards established for equal protection review.

Both prior to *Smith* and during RFRA, religious freedoms were treated in a manner very similar to gender classifications under the Fourteenth Amendment. This may also provide an explanation for the absence of religious classifications from the continuum of scrutiny under that Amendment, as the law had already provided a similar method for review of such classifications. With the overturning of *Smith* and the invalidation of RFRA however, the level of review has been significantly diminished and religious expression under the First Amendment is perhaps more vulnerable than religious classification would be if it were considered under the Equal Protection Clause.

### C. HURLEY, DALE, AND THE BOLSTERING OF THE FIRST AMENDMENT

Even as the Court limited the free exercise right, it reiterated the broad scope of other First Amendment rights. In 1992, a parade council was granted the right to deny a gay rights organization entry into its parade line-up in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>53</sup> The Court acknowledged that the exclusion was discrimination; but it was also a form of speech. In the Court's words: "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."<sup>54</sup> Speech trumped discrimination, at least in the field of sexual orientation. The Supreme Court reinforced the point and extended it to expressive association in *Boy Scouts of America v. Dale* (2000). It held that the Boy Scouts of America could remove a gay scoutmaster from his position because the message he advocated directly opposed the position held by the private organization.<sup>55</sup> Citing *Hurley*, the Court emphasized the right of individuals and private organizations to express their desired message, free

---

51 42 U.S.C. §2000cc.

52 *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

53 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 580–81 (1995).

54 *Id.* at 581.

55 *Boy Scouts*, 530 U.S. at 661.

from government interference and limitation, regardless of how unpopular that message may be.<sup>56</sup> Dale had previously won at the state level, where the court distinguished the case from *Hurley* by finding that *Hurley* had involved interference with “pure speech,” while the Boy Scouts was asserting a right to expressive association.<sup>57</sup> The Supreme Court did not agree that this distinction placed the Boy Scouts’ actions outside of First Amendment protection and a landmark holding resulted.

With *Hurley* and *Dale*, the Supreme Court recognized the ability of antidiscrimination laws to potentially erode First Amendment liberties and it moved to counteract that erosion. These holdings reminded lawmakers and citizens of the severity with which limits on expressive freedoms should be approached. While the government’s interest in eliminating discrimination on all fronts is legitimate and important, the freedom of private expression must be fiercely protected, lest the government gain the ability to silence the voices at odds with the popular sentiment.

### III. COMMERCIAL EXPRESSION, STATE SPLITS, & MARRIAGE EQUALITY

When RFRA became unconstitutional as it applied to the states, states were given the choice to enact a similar statute.<sup>58</sup> With less than half doing so, the country became split in its approach to free religious expression and antidiscrimination laws. Importantly, these statutes only apply when the government is involved; thus, a state’s antidiscrimination laws remain a vital element in the determination of private freedoms. The ability of private organizations or individuals to exclude certain people or deny sharing a particular message is largely determined by the state in which one resides and the outcome can differ drastically between states. Even within a particular state, the application boundaries of antidiscrimination statutes are often unclear.

The point at which commercial expression and sexual classifications intersect is very complex, as it holds both First and Fourteenth Amendment implications. Both impose standards of review upon state laws; and thus, a legal holding either way that becomes codified in state law could be opposed on constitutional grounds. The level of scrutiny and focus of the review will depend on whether the law is being challenged under freedom of expression or equal protection and both impose standards of treatment upon the involved parties. It is apparent how these situations may cause a constitutional conundrum, with courts being forced to walk a fine line between two important interests: free expression and nondiscriminatory treatment.

---

<sup>56</sup> *Id.*

<sup>57</sup> Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 559–560 (1998).

<sup>58</sup> Jeff Guo, *How Religious Freedom Laws Were Praised, Then Hated, Then Forgotten, Then, Finally, Resurrected*, THE WASHINGTON POST (Apr. 3, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/03/how-religious-freedom-laws-were-praised-then-hated-then-forgotten-then-finally-resurrected/>.

## A. YOU CAN'T REFUSE: ELANE PHOTOGRAPHY AND IMPOSED EXPRESSION

Elaine Huguenin, co-owner and lead photographer at Elane Photography in New Mexico, was contacted by Vanessa Willock, a bride-to-be who was interested in hiring Elane Photography to photograph her upcoming wedding.<sup>59</sup> Upon finding that Willock was marrying her same-sex partner, Misti Collinsworth, Ms. Huguenin informed Willock that she did not photograph same-sex weddings, as well as any other events that went against her religious beliefs.<sup>60</sup> Willock later filed a lawsuit against Elane Photography for discrimination in violation of the New Mexico Human Rights Act ("NMHRA").<sup>61</sup>

The NMHRA makes it illegal for a public accommodation to discriminate against a person based on sexual orientation.<sup>62</sup> Upon receiving the case, the Supreme Court of New Mexico decided three relevant issues: (1) whether Elane Photography had violated the NMHRA; (2) whether application of the NMHRA violated any part of the First Amendment; and (3) whether the NMHRA violated the state's RFRA ("NMRFA").<sup>63</sup> Somewhat surprisingly, there was no disagreement among the parties regarding Elane Photography's status as a public accommodation.<sup>64</sup> An argument could potentially be made that a special event photographer is no more engaged as part of a public accommodation than a professional painter, but that issue was not dealt with here.

Apparently taking a page from *Hurley*, Elane Photography insisted that it was not discriminating based on sexual orientation, but was rather exercising its right to avoid expressing a particular message.<sup>65</sup> As the court related:

Elane Photography explains that it "did not want to convey through [Huguenin]'s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners'] beliefs." Elane Photography argues that it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings. However, Elane Photograph's [sic] owners testified that they would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other. Elane Photography also argues in its brief that it would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage.<sup>66</sup>

These alleged distinctions between discrimination and a refusal of expression are vitally important and begin to illuminate a boundary within

---

59 *Elane*, 309 P.3d at 59–60.

60 *Id.*

61 *Id.* at 60.

62 *Id.* at 58.

63 *Id.* at 59.

64 *Id.* at 58.

65 *Id.* at 61.

66 *Id.*

the overlap of the two. While the refusal of expression is discriminatory per se, it also within the realm of First Amendment protections, so the issue is defining the point at which discrimination becomes a secondary concern to expressive freedoms. *Elane Photography* stated that this case fell on the “expressive freedom” side of the boundary, making the discrimination permissible, in a sense.<sup>67</sup> The fact that the discrimination was narrowly applied to same-sex marriages, and not requests by gay individuals in general served to bolster *Elane Photography*’s argument. Similar reasoning was indeed persuasive in *Hurley*, in which the parade council was allowed to exclude a gay rights activist group, but would not have been allowed to uniformly exclude the participation of gay individuals in non-advocating roles.<sup>68</sup>

Despite the similarities between *Hurley* and *Elane*, these cases are distinguishable in that *Hurley* involved a non-profit war veteran’s council,<sup>69</sup> while *Elane* involved a public business offering a service in exchange for money.<sup>70</sup> The difference between a public expression by a private council and a photographer’s expression through a commercial art is easy to identify, but difficult to resolve from a legal standpoint. While there is a general awareness that an artist’s product may convey a message that is not entirely her own, there is still something very personal about the craft and it is not clear that it is completely devoid of expression. Certainly the very existence of these lawsuits, and their progression to state supreme courts, indicates that there is legitimate disagreement regarding the protection due to these forms of “product” or “expression.”

The response to the *Elane* holding has been varied, and there was a concerted effort to get the case before the United States Supreme Court, with advocates like the Cato Institute filing briefs encouraging a grant of certiorari.<sup>71</sup> Even among marriage equality supporters, the holding seems to fly in the face of First Amendment freedoms and to set a potentially dangerous precedent.<sup>72</sup> However, the Supreme Court denied certiorari and, as of now, *Elane* remains valid law in the state of New Mexico.<sup>73</sup>

#### B. WHEN DOES DISCRIMINATION BECOME SECONDARY TO EXPRESSION?

The issue at the heart of *Elane* is how to distinguish when a business is engaged in free expression that is protected under the First Amendment, and when it is acting as a public accommodation subject first and foremost to local antidiscrimination laws. It is important to note that the Supreme Court has held that both non-profit and for-profit corporations qualify as “persons” under RFRA, capable of religious expression and thereby subject to religious freedom protection.<sup>74</sup> This opens up for consideration the issue of what

---

67 *Id.* at 63.

68 *Hurley*, 515 U.S. at 572–73, 74.

69 *Id.* at 560.

70 *See Elane*, 309 P.3d at 63.

71 *See Shapiro*, *supra* note 29.

72 *Id.*

73 *See Elane*, 134 S. Ct at 63.

74 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769, 2772 (2014).

constitutes an expression that lies outside the realm of public accommodation laws.

Surveying judicial precedent, some clarity regarding free expression emerges. *Wooley v. Maynard* provides precedent for the priority of individual free expression over a governmental interest in spreading a message.<sup>75</sup> Furthermore, when a private party does not support the message of another, the former is under no obligation to provide a means for the expression of that message, or to communicate it in any way.<sup>76</sup> These principles stand somewhat at odds with *Elane*, which compels the expression of a particular message that is, in fact, opposed by an unwilling communicator on religious grounds.<sup>77</sup> In *Wooley*, however, the government's interest of spreading the state motto was much less compelling than the interest in *Elane* of ending discrimination. While decisions like *Bob Jones* demonstrate that this latter interest is compelling enough to overcome free expression, the boundaries of this remain uncertain and have been expanded, perhaps too far, in *Elane* and similar cases.

The apparent struggle between First and Fourteenth Amendment freedoms raises questions regarding the ambiguity involved. Whether one amendment provides greater protection than the other is an unresolved issue that courts seem ill equipped to deal with. The justice system has established various tests and standards of review for these matters, but how these tests and standards translate when compared to different standards remains uncertain.

It is understandable that courts would shy away from declaring one set of rights more important than the other; they are both fundamental and constitutional. Case law also demonstrates how the balance between the two can shift given the particulars of each situation. The resolution may lie in the adoption of a common standard for both First and Fourteenth Amendment freedoms. Even if this was accomplished, courts may still reach an impasse if two freedoms fall within the same protected category (i.e. if religion and sexuality were both subject to intermediate scrutiny). Courts arguably do not need to go this far, however. As case law has shown, the freedom of expression has been fiercely protected throughout U.S. history and has been subject to a level resembling strict scrutiny at times.<sup>78</sup> While this standard has not been firmly maintained,<sup>79</sup> the challenges to First Amendment freedoms have not been subjected to a level of review as low as the rational basis standard.<sup>80</sup> Given that sexuality and sexual orientation currently remain under that standard, albeit in a somewhat heightened sense,<sup>81</sup> allowing a point at which expression trumps discrimination seems reasonable. Thus,

---

75 *Wooley*, 430 U.S. at 717.

76 *See Hurley*, 515 U.S. at 557.

77 *See Elane*, 309 P.3d at 7.

78 *The Three Tier Test: Levels of Analysis for Equal Protection*, REGIS UNIVERSITY, [http://academic.regis.edu/jriley/401three\\_tier\\_test.htm](http://academic.regis.edu/jriley/401three_tier_test.htm).

79 *See generally* Emp't Div., 494 U.S. at 872 (holding that since respondents' ingestion of peyote was constitutionally prohibited under Oregon law, Oregon may, consistent with the *Free Exercise Clause*, deny respondents unemployment compensation when their dismissal results from use of the drug).

80 *See* REGIS UNIVERSITY, *supra* note 78.

81 *See* Lapidus, *supra* note 4, at 4–5.

*Elane* may very well have mistakenly elevated discrimination concerns over those for expression due to the relatively limited exception being called for in the state antidiscrimination statute. This does not mean, however, that the positions of the rights involved cannot change if sexual classifications were to become more suspect under the Equal Protection Clause.

### C. MARRIAGE EQUALITY AND A PUSH FOR DISTINCTION

Cases involving discrimination against gays were relatively few and far between in the years following *Dale*, particularly due to the fact that same-sex marriage—a polarizing issue—was illegal in many states, giving those who opposed it a solid legal leg to stand on. But, this changed in June 2015 when the Supreme Court decided in favor of marriage equality, making same-sex marriage legal nationwide.<sup>82</sup> Those morally opposed to same-sex marriage continued to argue that ignoring same-sex unions was not a form of illegal discrimination.<sup>83</sup>

With the legalization of marriage equality, discrimination suits are seemingly approached with greater scrutiny and less concern for the freedom of expression. The opinions in these cases mirror the reasoning of the New Mexico court in *Elane*, and do not seem to be in keeping with current Supreme Court precedent. For example, a Colorado court recently held that a bakery and its Christian owner violated the Colorado Anti-Discrimination Act (“CADA”) when he refused to create a wedding cake for a same-sex marriage celebration.<sup>84</sup> The court stated that CADA was a neutral law of general applicability and that the bakery was not exempt from CADA on the basis of religious belief because it was not a place “principally used for religious purposes.”<sup>85</sup>

Similar to the defendant in *Elane*, the bakery claimed that there had been no act of discrimination because the service was not refused on the basis of the plaintiff’s sexual orientation.<sup>86</sup> Indeed, the owner had offered to sell them other baked goods for their celebration, but had drawn the line at creating a customized cake with a particular message, maintaining that such creations were a personal expression.<sup>87</sup> Therefore, it seemed the specific, customized message requested on the cake was the reason for the refusal, rather than the fact that the cake was for a gay couple.<sup>88</sup>

---

82 *Obergefell*, 135 S. Ct. at 2588 (2015).

83 Jacob Gershman & Tamara Audi, *Court Rules Baker Can’t Refuse to Make Wedding Cake for Gay Couple*, THE WALL STREET JOURNAL (Aug. 13, 2015, 6:51 PM), <http://www.wsj.com/articles/court-rules-baker-cant-refuse-to-make-wedding-cake-for-gay-couple-1439506296>.

84 *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272 (2015).

85 *Id.* ¶¶ 86–87, at 291, ¶ 89, at 291.

86 *Id.* ¶ 25, at 279.

87 *Id.* ¶ 3, at 276–77, ¶ 59, at 285–86.

88 It is of note that the bakery owner had cited the fact that Colorado did not recognize same-sex marriages at the time of the alleged discrimination (*Id.* ¶ 3). This information was included in the court’s opinion, which was written after same-sex marriage was nationally legalized, and its inclusion points to a potential issue: did the marriage equality holding complicate these cases? It seems reasonable to wonder whether this case would have been decided differently if the decision had been handed down a year earlier. However, there is no reason that marriage equality should further complicate these matters and it is likely that this decision made the issues regarding antidiscrimination laws more straightforward.

Governmental interests in eliminating discrimination, particularly against historically disadvantaged groups, does not (and should not) turn on whether or not practices associated with those groups are legally recognized by either the federal or state governments. The interest is in promoting equality, opportunity, and safety, and in ending discrimination against *individuals*. Therefore, the government's interest in protecting gays from discrimination should not depend on the legal status of same-sex marriage. Gays and lesbians were recognized as a protected class by the Supreme Court prior to the legalization of same-sex marriage, and so their status for antidiscrimination purposes has not changed. The protection due to gay individuals is similar to that afforded to minorities and women by the legal system, but discrimination based on sex is still not as suspect as discrimination based on race or gender.<sup>89</sup> Because of this, a heightened rational basis standard of scrutiny is applied, rather than strict or intermediate scrutiny. The legalization of same-sex marriage does not change this, but action by the Supreme Court certainly could.

The recent focus on antidiscrimination claims involving these matters may seem to send a different message, but in reality the Supreme Court's ruling in favor of marriage equality did not complicate or change the legal powers at play in these cases. More likely, the ruling eliminated a distracting factor from the debate and allows courts to now examine First Amendment claims and antidiscrimination laws through a clearer lens.

While the Supreme Court has done nothing that raises the level of scrutiny for sexual classifications, lower courts are moving in that direction with holdings like *Elane*. These courts are proactively combatting legislation that would explicitly allow a business to refuse certain creative services to gays in the name of free expression, as is discussed in the next section. If they were to allow legislation permitting such refusals, it would not be difficult for these laws to pass a rational basis test, even with the heightened level of review granted to classifications based on sexuality. The test merely requires that the distinction be in furtherance of a legitimate state interest and that it be rationally related to the desired result.<sup>90</sup> A state's interest in protecting the freedom of expression under the Constitution would undoubtedly qualify as legitimate. Furthermore, allowing a rather narrow exception to antidiscrimination laws for creative services denied for religious reasons seems rationally related to the advancement of this interest. Thus, the test would be satisfied and *Elane* and other holdings would likely be invalid.

A legal exception to antidiscrimination laws as explained above would be harder to justify if classifications based on sexuality were subject to a higher level of scrutiny. As laws move up the continuum and on to strict scrutiny, states must demonstrate a compelling interest that requires the specific classification in question.<sup>91</sup> This would be a much greater burden for states seeking to allow an exception to antidiscrimination laws in the name

---

<sup>89</sup> See Lapidus, *supra* note 4, at 4.

<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Id.* at 5.

of creative expression. Even when facing a First Amendment freedom, which likely constitutes the basis of a compelling interest, it is not clear that the expressive allowance is absolutely necessary to its preservation. Businesses could be required to have enough staff to accommodate clients in the instance of a conflict, or they could merely be given the right to disclaim certain performed services as not aligning with their beliefs. Regardless of the rationale, it is not obvious that a statutory allowance of this nature would withstand strict scrutiny.

#### IV. THE EXPRESSION OF A PUBLIC ACCOMMODATION

##### A. THE POINT OF DISTINCTION

At this point in time, laws barring discrimination because of sexual orientation and those protecting free exercise of religion are largely matters of state legislation. There has been a general inconsistency with how the interaction of these statutes is handled among the states. There have been federal cases that offer relevant insights into these matters, with recent precedent being established by *Dale* and *Hurley*. But, the Supreme Court has yet to grant certiorari to a case that deals directly with the question of whether a private business must create a product for an event that it morally opposes. At the state level in many jurisdictions, the answer seems to be “yes.”<sup>92</sup> Such holdings have been opposed by many advocates on both sides of the political spectrum<sup>93</sup> and pose a serious threat to private rights granted by the Free Exercise Clause.

While the right to freedom of expression and antidiscrimination laws may seem to fundamentally infringe upon one another, a point of distinction does exist at which they are compatible. This point is found where a public accommodation goes beyond actual accommodation and inclusion, and becomes an actor in a new and creative expression. Using a bakery for illustration, the point at which antidiscrimination laws cease to be the governing priority should be when a unique bakery good is requested that is not held out to the public as a generally available offering from the business. Thus, if a gay couple were refused the ability to purchase a ready-made cake to serve at their wedding, the bakery would be in violation of the antidiscrimination laws—even if that cake included a signature marking of the business that would be displayed at the event. But if the bakery offered the possibility of a custom cake with a unique message, it would be within its rights to refuse to create one that portrayed a message that it disagreed with. This essential distinction can be simplified down to the difference between inclusion or access and outward expression. The ready-made cake

---

<sup>92</sup> See, e.g., *Elane*, 309 P.3d at 59–60.

<sup>93</sup> See, e.g., Shapiro, *supra* note 29 (explaining that the Cato Institute, while supportive of marriage equality, was deeply concerned about the implications that *Elane Photography* could have for First Amendment freedoms); Helen Nianias, *Patrick Stewart Backs Bakery After ‘Gay Cake’ Court Battle*, THE INDEPENDENT (June 7, 2015), <http://www.independent.co.uk/news/people/patrick-stewart-backs-bakery-after-gay-cake-court-battle-10296738.html> (confirming that Patrick Stewart, a popular actor, supported the right of a bakery to refuse to ice a cake with a pro-gay message and argued that nobody should be forced to write a message they disagree with).



and the custom cake are distinguishable as items of communication, with one, but not the other, qualifying as an expression. The refusal of expression is discriminatory, but at the point of customization the matter should be treated first and foremost as an issue of free expression, given the standard of review currently imposed upon sexual orientation classifications.

In the context of a photographer, this distinction would allow for an antidiscrimination claim to be made if a customer was refused access to “stock” services, i.e. a passport photo or in-studio headshots. However, in instances involving creative expression through the artistic portrayal of an event, the photographer would be free to decline the request for services, whether it would be for a child’s birthday party or a same-sex wedding. This distinction allows lawmakers to get to the heart of discrimination within a public accommodation, but does not infringe on the freedom of expression granted by the Constitution. The key to the distinction is the unique quality and artistic expression behind certain services. In reiteration, this distinction would likely not withstand strict scrutiny and thus the outcome would be different if a classification is being made based on race.

The issue of whether the act of baking a cake or taking a photograph constitutes an expression is fundamental to this discussion as the means for implying First Amendment protection. The court in *Elane* acknowledged that these acts were expressive, though it found that such expression was not entitled to constitutional protection.<sup>94</sup> This decision was essentially based in the assumption that a refusal of expression was indistinguishable from a refusal of service, a notion the opinion illustrated by stating “if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.”<sup>95</sup> This statement is true, and may remain so even if the distinction proposed herein is adopted. Offering a set menu to one group of customers and denying it to others is indistinguishable from offering fruit tarts to certain bakery customers and not others. Requiring a restaurant to fully service its female customers is not the same as compelling an artist to create an original, expressive work for an outside event. The former situation should not be allowed regardless of whether the classification is based on gender or sexual identity.

Granted, this distinction seems controversial when applied to situations involving protected classes of people, including the homosexual community. The difficulty in applying this mode of evaluation is even more clearly identified when considering more antiquated forms of discrimination. Consider a bakery refusing to make a graduation cake for a female because it is fundamentally opposed to the notion of women being educated – would such discrimination be permitted? Under this proposed distinction, the answer is affirmative. Many will argue that this is discrimination in the most obvious form, and that antidiscrimination laws should prohibit such behavior. But if the refused services constitute an act of expression, then protection should be afforded to the actor, unless the involved class is protected under strict scrutiny and that test fails. While the refusal seems

---

<sup>94</sup> *Elane*, 309 P.3d at 66.

<sup>95</sup> *Id.* at 62.

extremely objectionable, expressive rights should be prioritized. Of course, society need not accept such practices and it would be an economic choice for people to continue to patronize such establishments.

Another distinction needs to be made in these cases, one that was cited by the defendant in *Elane*, and that is the difference between refusing service because of a person's identity and refusing because of the nature of the event involved. These things are closely linked, but there is an argument for their separation when it comes to legal matters. Discretionary service should be permitted based on the use of the product created by that service, while choosing to serve a person in any capacity based on their status or identity should not be allowed. This is because the former choice involves an assenting expression within an event that bears a message. If indeed these services constitute expressions, as was previously discussed, compelling such expression would fail to align with *Hurley* and allow governments to induce expression where silence seems improper. While baking a cake for money differs from hosting a parade in certain ways, the implications for expression are comparable. Bear in mind that failing to creatively express a message for an event also differs from categorically denying a service to a particular class of individuals (think of the example of the women being refused an entrée in the *Elane* opinion). The act that would be compelled if an antidiscrimination law were to trump the freedom of expression is the creation of a product for the *event* of a protected class, not service to the class itself, as such categorical denial clearly falls within the realm of prohibited discrimination already.

This division is necessary because freedom of expression would be greatly compromised if an individual's service could not be separated from an expression in favor of their event. *Elane Photography* illustrated this point when its defense stated that it would refuse service to a heterosexual customer in a context that endorsed same-sex marriage in the same manner that it had refused service to Ms. Willock.<sup>96</sup> This points to the distinction between discriminating against a customer due to her protected identity and refusing to endorse a specific event; in this distinction lies the point at which exceptions to antidiscrimination laws may withstand strict scrutiny. The New Mexico Supreme Court failed to fully address this distinction, and its decision leaves open the question of whether such a refusal to a heterosexual customer would be allowed. If the reason that *Elane Photography* was in violation of the NMHRA was because the event was tied to the protected identity of the potential customer and the business may not discriminate based on that identity, then it would seem to follow that a business could refuse service to a customer with an "unprotected" identity who wished to engage a service for a similar event. Under the court's ruling in this case, it seems that a system has been established in which a business could refuse to be hired by heterosexual parents wishing to pay for their son's same-sex wedding, but could not refuse to be hired by the son himself. The absurdity

---

96 *Id.* at 61.

of this distinction demonstrates that a difference does exist between serving the individual and creating product for an event.

This may seem like a hairsplitting method of application for antidiscrimination laws, and one that is too weak for those struggling for acceptance and equality within society. But this particular distinction is intended to protect everyone's rights. It is a protection that could be especially important for marginalized groups. It is in the interest of every business or group seeking to preserve a special interest or religious belief that *Roberts*-like reasoning does not get applied to its situation.

This distinction is well aligned with current Supreme Court precedents. Cases not involving expressive creation would not be implicated, and compelling government interests would continue to be served. The reasoning in *Hurley* and *Dale* would be made more broadly applicable in some ways, but the reasoning behind their protection of free expression would be carried forward and preserved. Additionally, most antidiscrimination laws would remain valid in their entirety. There merely needs to be a shift in the thought behind their application and a deeper understanding of what constitutes expression in a commercial setting. When the presence and value of such expression is acknowledged, the necessity of facilitating the freedom of expression is better comprehended.

## V. SEXUAL ORIENTATION AND THE CONTINUUM OF SCRUTINY

Previous sections of this note have suggested that the proposed point of distinction between expression and mandated service or action may not withstand strict scrutiny. If gays were considered a "suspect" class under the Equal Protection Clause, courts would have more leeway in the restrictions they impose on expression, both religious and personal. This is due to the fact that in these situations, the classification must be absolutely necessary to the attainment of the state's compelling interest.<sup>97</sup> Even if freedom of expression were found to outweigh a state's interest in ending discrimination, it would be very difficult for the state to prove that allowing an exception to public accommodation laws was the only way to ensure this freedom. Sexual orientation is not a suspect class as of yet,<sup>98</sup> but there is the possibility for this to change.

The consideration of race as a suspect class was the result of years of case law.<sup>99</sup> Finally, in 1995 the Court decided *Adarand Constructors, Inc. v. Peña*, holding that all racial classifications imposed by the government must be analyzed under strict scrutiny.<sup>100</sup> Prior to this holding the Court used strict scrutiny for laws with invidious racial discrimination, but had imposed intermediate scrutiny in reviewing laws with benign racial classifications.<sup>101</sup>

---

<sup>97</sup> Lapidus, *supra* note 4 at 5.

<sup>98</sup> *Id.* at 5–6.

<sup>99</sup> See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (establishing a two-part test for analyzing racial classifications that fell short of strict scrutiny, following many cases leading to a higher and higher standard over time).

<sup>100</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

<sup>101</sup> *Metro*, 497 U.S. at 606.

As far back as 1980, the Court held that the exclusion of African Americans from juries violated the equal protection rights of other African Americans standing trial because they were entitled to appear before a jury without racial exclusions.<sup>102</sup> The case of *Korematsu v. United States* expressly enumerated the need for strict scrutiny whenever a racial group's civil rights are curtailed.<sup>103</sup> In *Korematsu* however, the Court found that the laws mandating the removal of Japanese Americans to internment camps during World War II passed strict scrutiny and were constitutionally valid.<sup>104</sup> In hindsight, it is shocking that these laws were found to be as narrowly tailored as possible to meet the compelling interest at hand. However, because the statute had been analyzed under the proper standard of scrutiny, this case remains good law and formally generated the use of strict scrutiny for invidious discrimination.<sup>105</sup> Additionally, it helped pave the way for other civil rights decisions and the ultimate application of the standard to all racial distinctions in the law.<sup>106</sup>

Following a 1967 case, strict scrutiny was required even if a law was not discriminatory on its face—the fact that an invidious distinction was made according to race was enough to trigger the standard.<sup>107</sup> This was the final step leading up to *Adarand* and the establishment of race as a highly suspect class. This status was achieved through an incremental process that took time. The path for other classifications to be highly suspect is open, but it seems that the group must be subject to, or previously subjected to, invidious discrimination.

Sexual orientation has not achieved a status as a suspect classification under the Constitution, but decisions from both state and federal courts indicate that this may soon change.<sup>108</sup> The fact that gays have been the victims of explicitly discriminatory laws in the past and continue to face open opposition<sup>109</sup> makes the elevation of this class seem all the more imminent. If the timeline for racial classifications is any indication, however, sexual orientation may remain a non-suspect class for some time further.

As recently as the 1980s, the Supreme Court found that laws prohibiting sodomy did not violate the Constitution because the act was associated with homosexuality, which was distinguished from other fundamental rights cases involving marriage and procreation.<sup>110</sup> The *Obergefell* holding finally signaled the end of disconnect between sexual orientation and marriage as a legal matter—so this reasoning would not hold up today. But even prior to that holding, the Court has rejected this frame of reasoning and taken

---

102 *Strauder v. West Virginia*, 100 U.S. 303, 311–12 (1879).

103 *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

104 *Id.* at 224–25.

105 Greg Robinson & Toni Robinson, “*Korematsu*” and Beyond: Japanese Americans and the Origins of Strict Scrutiny, 68 *LAW & CONTEMP. PROBS.* 29, 29 (2005).

106 *Id.* at 29–30.

107 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

108 See, e.g., *Obergefell*, 135 S. Ct. 2584; *Elane*, 309 P.3d. at 61 (deciding favorably toward same-sex couples despite strong opposition).

109 E.g. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a state law criminalizing homosexuality was unconstitutional); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a statute barring local governments from enacting antidiscrimination measures to protect the LGBT community).

110 *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

incremental steps toward ending legal discrimination on the basis of sexual orientation. *Romer v. Evans* was the first Supreme Court case to acknowledge the animus often present in legislation involving the LGBT community and recognize the need for a somewhat heightened level of scrutiny in these cases.<sup>111</sup> This was a huge victory for equal protection over illegitimate government interests and set the stage for stricter scrutiny in similar cases. In 2003, the Court in *Lawrence v. Texas* held that a Texas statute criminalizing homosexual sex was a constitutional violation of gay individuals' right to engage in private conduct under the Due Process Clause.<sup>112</sup> Even though this case was not tried as an equal protection matter, the Court employs a similar standard of review in Due Process cases and, in this instance, evaluated the law under a standard somewhere between rational basis and strict scrutiny, seemingly equivalent to intermediate scrutiny.<sup>113</sup> As was previously argued, the standards used in procedural analysis likely inform those applied for the same classification in other areas, be it Due Process analysis, Equal Protection, or First Amendment evaluation.

Each one of the above cases represents the movement of sexual orientation as a class up the continuum of discriminatory review. While this class has yet to be formally recognized as suspect and requiring intermediate or strict scrutiny, it often receives a standard very close to intermediate review in practice.<sup>114</sup> It seems reasonable to infer that if laws continue to draw lines based on sexual orientation, then strict scrutiny may eventually be applied. Until the Court makes a formal ruling on this however, laws making these classifications need only meet a heightened rational basis standard. If New Mexico, or any other state, were to make a ruling allowing businesses to refuse services that contain an expressive message regarding sexuality, the resulting state law should likely withstand the rational basis standard that is called for under current precedent. If this is to change, then the Supreme Court needs to make a definitive ruling that shifts the standard upward and allows discrimination against the LGBT community to successfully overcome the First Amendment concerns involved. If a non-suspect group can take preference over the freedom of expression, then the First Amendment will be made too vulnerable and these rights would be open to opposition from all classifications. This would have immense implications, not only for individuals, but also for businesses.

## VI. CONCLUSION

While the legal evolution of antidiscrimination statutes has caused fluctuations in the level of protection afforded to First Amendment freedoms, those freedoms have ultimately been granted utmost protection by the Supreme Court. But with the dissemination of discrimination legislation and religious freedom acts to the states, elements of the First Amendment have become vulnerable in certain situations, particularly freedom of expression.

---

<sup>111</sup> *Romer*, 517 U.S. at 633-34.

<sup>112</sup> *Lawrence*, 539 U.S. at 575.

<sup>113</sup> *Id.* at 585.

<sup>114</sup> *See id.* at 576; *Romer*, 517 U.S. at 640.

State governments are increasingly hesitant to allow individuals in public accommodations the right to refuse a service based on any factor that is linked to a protected group. While such hesitation is warranted, there should be a recognized distinction between refusal based on identity and refusal based on the expressive nature and context of a creative request. The courts in *Elane* and *Roberts* misapplied the relevant test, though in different ways, and the results are a threat to the freedom of expression enjoyed by businesses under the First Amendment.

These holdings violate the freedoms of expression and association and overreach antidiscrimination interests. There is a distinction between discrimination on the basis of an impermissible bias, and the refusal to render a unique creation that would convey a message inconsistent with the creator's beliefs. It is at this point that a line must be drawn and that expression must be protected. So long as an expression is involved, constitutional protection should be given great deference over other statutes. To do otherwise would harm all factions of society and erode some of the most fundamental freedoms granted to the American people.

This could change if sexual orientation is elevated to a suspect class and granted strict scrutiny. The results of this would be two-fold: (1) the First Amendment interest involved would have to be both compelling and as narrowly tailored as possible to achieve that interest, and (2) the sexual orientation class would be considered as protected as other constitutional rights, giving the group more clout when faced with a First Amendment freedom.<sup>115</sup> This would also serve to protect the freedom of expression, even if it was overcome in these antidiscrimination cases. If the right is overcome under strict scrutiny, it greatly limits the instances in which it is truly vulnerable. This is important for the continued protection of First Amendment liberties, and other constitutionally granted rights. While freedom of expression should allow businesses a narrow exception from antidiscrimination laws in the cases examine herein, this may not always be the case, and a Supreme Court move in the right direction could spell the change necessary to end the ambiguity involved.

---

115 Lapidus, *supra* note 4 at 5.