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Seeing the No-Compelled-Speech Doctrine Clearly through the Lens of *Telescope Media*

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* Sherman S. Welpton, Jr. Professor of Law and Warren R. Wise Professor of Law, University of Nebraska College of Law. This Article is dedicated to the memory of my wonderful friend and colleague, Professor Marty Gardner. Marty was an exceptional teacher and scholar, and he was a wonderful mentor to decades of students at the University of Nebraska College of Law. He is missed by everyone in our community.

I. INTRODUCTION

It is better to have too much freedom of speech than too little. Freedom of thought, belief, and speech are fundamental to the dignity of the human person. When the law strikes at free speech it hits human dignity—the right of a person to express what he believes to be true. What is even worse, when the law compels a person to say that which he believes to be untrue, the blade cuts deeper because it requires the person to be untrue to himself, perhaps even untrue to God.

We live in an era of increasing instances in which government compels persons to say things they believe are untrue or are contrary to their religious conscience. For example, in recent years government has required: (1) pro-life pregnancy centers to provide clients with information about how to obtain "free or low-cost" abortions;[1] (2) a wedding cake artist to create wedding cakes celebrating same-sex weddings;[2] (3) a florist to create floral arrangements celebrating same-sex weddings;[3] (4) a wedding photographer to take photographs of same-sex weddings;[4] (5) calligraphers to create wedding invitations for same-sex weddings;[5] and (6) a printing and graphic design business to print t-shirts celebrating a local gay pride festival.[6]

Although the Supreme Court has a long history of protecting persons against laws compelling speech,[7] until recently expressive wedding vendors have been denied this protection.[8] However, the

1. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).
2. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
3. State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018). On remand, the Washington Supreme Court again ruled against the florist. State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).
4. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).
5. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).
6. Lexington-Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals, 592 S.W.3d 291 (Ky. 2019).
7. *See* Richard F. Duncan, *Defense Against the Dark Arts: Justice Jackson, Justice Kennedy and the No-Compelled-Speech Doctrine*, REGENT L. REV. (forthcoming 2020), https://poseidon01.ssrn.com/delivery.php?ID=049017110001010030003005076031031127017040064087064044065084016074105064122118001077026023006005053121011073112029080017103010060021056026068029017082011111095015006064049067113122016124112087099093120116006097073115099125112000066086073098126001119&EXT=pdf [https://perma.unl.edu/RE3L-RKK3]; Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).
8. *See, e.g.*, *Elane Photography, LLC*, 309 P.3d 53; *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203; *see also* Douglas Laycock, *The Broader Implications of Master-*

prevailing winds have started to shift, and cake artists,[9] videographers,[10] and wedding-invitation artists[11] all have prevailed against compelled speech requirements in the last two years.

The purpose of this Article is to take a close look at what has become the leading case on the right of expressive wedding vendors to resist speech compulsions—the Eighth Circuit's decision in *Telescope Media Group v. Lucero*.[12] First, I will briefly describe the Court's longstanding doctrine protecting persons against compelled speech requirements. I will then take a careful look at the holding and reasoning of *Telescope Media*. Finally, I will suggest that Judge Stras's majority opinion in *Telescope Media* is very persuasive and that the arguments against applying the no-compelled-speech doctrine to commercial wedding vendors are not persuasive.

II. THE NO-COMPELLED-SPEECH DOCTRINE: A SUMMARY OF THE SUPREME COURT'S JURISPRUDENCE

Compelled speech is unconstitutional. Of this there can be no doubt.[13] In an earlier work, I stated the Court's no-compelled-speech rule as follows: "[U]nder the Free Speech Clause government may not compel a person to express or disseminate any belief, creed, or statement of values, whether it is the government's own message or the message of a third-party."[14] Or, in the words of one of the leading First Amendment scholars, Professor Eugene Volokh, "Government coercion is presumptively unconstitutional . . . when it compels people to speak things they do not want to speak."[15]

Although there are numerous Supreme Court cases focusing on the no-compelled-speech doctrine in many different contexts,[16] in this section of this Article I will focus on what I consider to be the canon of the

piece Cakeshop, 2019 BYU L. REV. 167, 180 (2019) (noting various cases where such religious claimaints were unsuccessful).

9. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (concluding that wedding cake artist prevailed under Free Exercise Clause; the Court did not decide compelled speech claim).
10. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).
11. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019) (adjudicating dispute brought by business that designs custom wedding invitations, including hand-drawn images and calligraphy).
12. 936 F.3d 740.
13. *See generally* Duncan, *supra* note 7 (manuscript at 23) ("Under the no-compelled-speech doctrine, no schoolchild, no automobile owner, no parade organizer, no artist, and no individual may be compelled to say that which they do not think."); Volokh, *supra* note 7, at 355 ("Speech compulsions, the Court has often held, are as constitutionally suspect as are speech restrictions . . . .").
14. Duncan, *supra* note 7 (manuscript at 11).
15. Volokh, *supra* note 7, at 368.
16. Professor Volokh's article does an excellent job of collecting the cases. *See* Volokh, *supra* note 7.

Court's jurisprudence of compelled speech: *West Virginia State Board of Education v. Barnette*,[17] *Wooley v. Maynard*,[18] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[19] and *NationaI Institute of Family & Life Advocates v. Becerra* (*NIFLA*).[20]

A. Justice Jackson's Iconic Opinion in *Barnette*

Although *Barnette* is often referred to as the Court's "flag salute" decision, it is actually the Court's second flag salute decision. The first, *Minersville School District v. Gobitis*,[21] was an 8–1 decision which held that it was constitutional for a public school to expel students who refused to salute the flag based upon their sincerely held religious beliefs.[22] *Gobitis* was decided under the Free Exercise Clause, not the Free Speech Clause.[23] Less than three years after the decision in *Gobitis*, the Court decided an almost identical case—one involving Jehovah's Witness schoolchildren expelled from public school for conscientiously refusing to salute the flag[24]—but this time the Court focused on the free speech rights of all students, not merely the free exercise rights of religiously-motivated students.[25]

In one of the most lyrical and powerful opinions ever handed down by any court, Justice Jackson made it clear that the right of free speech includes the right not to be compelled to speak. "To sustain the compulsory flag salute," said Justice Jackson, "we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[26] Jackson's justification for the no-compelled-speech doctrine was the overriding importance of "intellectual individualism" and the right to resist "[c]ompulsory unification of opinion."[27] Jackson denounced "village tyrants"[28] who wish to "coerce

17. 319 U.S. 624 (1943).
18. 430 U.S. 705 (1977).
19. 515 U.S. 557 (1995).
20. 138 S. Ct. 2361 (2018). Much of the discussion of these cases is a summary of my earlier work on compelled speech jurisprudence. *See generally* Duncan, *supra* note 7.
21. 310 U.S. 586 (1940).
22. *Id.* Although religious students had a right to believe that it was sinful to bow down before any image other than God, the Constitution does not "compel exemption from doing what society thinks necessary for the promotion of some great common end." *Id.* at 593. *See also* Duncan, *supra* note 7 (manuscript at 2–5) (providing further explanation of the decision in *Gobitis*).
23. *Gobitis*, 310 U.S. at 594.
24. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629–30. For an excellent "close reading" of *Barnette*, see Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. REV. 689 (2019).
25. *Barnette*, 319 U.S. at 634–35.
26. *Id.* at 634.
27. *Id.* at 641.

uniformity of sentiment"[29] and composed a powerful manifesto against authoritarian government that is as relevant in 2020 as it was in 1943:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[30]

Thus, for the government to compel schoolchildren to salute the flag is tyrannical and even worse than compelled silence because it invades the private space of one's mind and beliefs.[31] As Professor Robert George has said: "Ordinary authoritarians are content to forbid people from saying things they know or believe to be true. Totalitarians insist on forcing people to say things they know or believe to be untrue."[32]

So was born the no-compelled-speech doctrine which protects the right not to speak from authoritarian government and village tyrants. Every age has its village tyrants, and our age seems to have more than its fair share. Thus, *Barnette* and its progeny may be more important today than ever before.

B. *Wooley* and Libertarian Authoritarianism

Although it was once possible to read *Barnette* as only prohibiting government from compelling affirmations of belief, such as by saluting the flag, it soon became clear that the no-compelled-speech doctrine also forbids government from compelling the dissemination of unwanted expression. Thus, under the Free Speech Clause, government may not compel a person to express or disseminate any belief, creed, or statement of values, whether it is the government's own message or the message of a third-party.[33]

In 1977, forty-four years after its decision in *Barnette*, the Supreme Court decided *Wooley v. Maynard*.[34] The facts of *Wooley* tell an amaz-

28. *Id.* at 638.
29. *Id.* at 640.
30. *Id.* at 642.
31. *Id.* at 633 ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").
32. Robert P. George, FACEBOOK (Aug. 2, 2017), https://www.facebook.com/RobertPGeorge/posts/10155417655377906 [https://perma.unl.edu/HQS5-VR2M]. I have developed these points in more depth in an earlier article. *See* Duncan, *supra* note 7 (manuscript at 8–9).
33. *See* Duncan, *supra* note 7 (manuscript at 10–11).
34. 430 U.S. 705 (1977).

ing story that demonstrates that even libertarians can become tyrannical in pursuit of liberty.

The State of New Hampshire adopted a wonderful state motto ("Live Free or Die"), placed this libertarian motto on its automobile license plates, and, ironically, made it a misdemeanor for an automobile owner to knowingly obscure "the figures or letters on any number plate."[35] George Maynard and his wife Maxine were Jehovah's Witnesses who considered the motto "repugnant to their moral, religious, and political beliefs."[36] In order to avoid displaying this ideological message on their license plates, the Maynards covered the motto with tape, and the state of New Hampshire prosecuted Mr. Maynard for obscuring the motto on his license plate. He actually served a brief sentence in jail for acting upon, rather than displaying, the "live free" creed.[37]

The Court held that New Hampshire violated the First Amendment by compelling "an individual to participate in the dissemination of an ideological message by displaying it on his private property."[38] Importantly, *Wooley* makes clear that the no-compelled-speech doctrine does not require an individual to speak any words, affirm any beliefs, or create or compose any expressive message. In *Wooley*, it was sufficient that New Hampshire required Mr. Maynard to act as a "mobile billboard" for the state's ideological motto "[a]s a condition to driving an automobile—a virtual necessity for most Americans."[39]

Moreover, focusing on the First Amendment's protection of "'individual freedom of the mind," the Court stated the no-compelled-speech rule in the strongest possible way:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.[40]

The significance of *Wooley* is that it makes clear that the landmark doctrine of *Barnette* protects an individual's intellectual autonomy not merely from compelled affirmations of belief, but also from attempts by the State to compel an individual to speak or even to help disseminate any religious, political, or ideological creed.[41] If *Barnette* is the lyrical genesis of the no-compelled-speech doctrine, *Wooley* is its rock-solid realization. Taken together, *Barnette* and *Wooley* clearly establish that under the Free Speech Clause government has no legitimate

35. *Id.* at 707.
36. *Id.*
37. *Id.* at 708.
38. *Id.* at 713.
39. *Id.* at 715.
40. *Id.* at 714 (citations omitted).
41. *See* Duncan, *supra* note 7 (manuscript at 13).

power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern.

C. When Government Treats Speech as a Public Accommodation: *Hurley*'s Unanimous Decision

In *Hurley*, the Court held that the no-compelled-speech doctrine applies even in the context of a generally applicable public accommodations law forbidding discrimination on the basis of sexual orientation.[42] In this case, an assembly known as "GLIB," a group "of gay, lesbian, and bisexual descendants of the Irish immigrants," wished to march in the Boston St. Patrick's Day Parade in order "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[43] When the private sponsors of the St. Patrick's Day Parade refused to allow GLIB to march as a group in the parade, GLIB sued to enforce the public accommodations law. The state trial court held that the St. Patrick's Day Parade was a place of public accommodation under the law and that the parade sponsors' decision to ban GLIB because of "its values and its message" was illegal discrimination on the basis of sexual orientation.[44]

Remarkably, this trial judge asserted that rejection of the values and message of a group constitutes discrimination on the basis of the innate personhood of the group's members. Apparently, the good judge believed that discrimination against the message is, without more, discrimination against the person. This is seriously wrong. Under the Free Speech Clause and the no-compelled-speech doctrine, this conflation of message with messenger should be rejected because a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine. Speaker autonomy inherently permits a speaker to discriminate in favor of viewpoints he wishes to express and against viewpoints he wishes not to express. Discrimination among content and viewpoints is what speakers do and must be allowed to do.

Although the State argued that the public accommodations law was a content-neutral regulation of discrimination in the marketplace for goods and services (including recreational services such as holiday parades), the Supreme Court disagreed. The Court held that the Massachusetts public accommodations law, although facially targeting only discriminatory conduct, not speech, "has been applied in a peculiar way"[45] because the "state courts' application of the statute had

42. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
43. *Id.* at 561.
44. *Id.* at 561–62.
45. *Id.* at 572.

the effect of declaring the [parade] sponsors' speech itself to be the public accommodation."[46] Thus, Justice Souter's unanimous opinion in *Hurley* declared that the state court order violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[47]

The rule of *Hurley* is this: a public accommodations law unconstitutionally compels speech when it treats speech as a public accommodation. Justice Souter's unanimous opinion also makes clear that the First Amendment protects one private individual from being compelled by law to express, convey, or help disseminate the political, ideological, or social ideas of another private individual. *Hurley* is of fundamental importance to speaker autonomy, no less today than when it was decided.

D. Justice Kennedy Reaches Across Time to Unite with Justice Jackson

Seventy-five years after Justice Jackson's landmark opinion on compelled speech in *Barnette*, Justice Kennedy penned an equally strong libertarian manifesto in his concurring opinion in *NIFLA*.[48] In *NIFLA*, the State of California had compelled pro-life crisis pregnancy centers to provide certain "government-drafted" notices to their clients and in their advertisements.[49] For example, licensed pro-life clinics were required to "notify women that California provides free or low-cost services, including abortions" and provide a phone number to learn more about those services.[50] The Court, in a majority opinion written by Justice Thomas, held that this compelled expression was an unconstitutional "content-based regulation of speech."[51]

But the most interesting opinion by far in *NIFLA* is Justice Kennedy's concurrence. In a powerful opinion echoing Justice Jackson in *Barnette*, Justice Kennedy made clear that although he joined the majority opinion "in all respects," he was writing a separate opinion to make an even stronger case against California's compelled speech law.[52]

First, Kennedy observed that California's compelled speech law was not merely a content-based regulation of speech; rather, the California law constituted "viewpoint discrimination" and served as "a

46. *Id.* at 573.
47. *Id.*
48. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring). Justice Kennedy's concurring opinion was joined by Chief Justice Roberts, Justice Alito, and Justice Gorsuch. *Id.*
49. *Id.* at 2369 (majority opinion).
50. *Id.* at 2368.
51. *Id.* at 2371.
52. *Id.* at 2378 (Kennedy, J., concurring).

paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."[53] Second, Justice Kennedy forcefully denounced the California law as a deplorable and tyrannical example of authoritarian government.

Justice Kennedy described the compelled speech law as one in which California had required pro-life crisis pregnancy centers to disseminate and promote the state's message "advertising abortions" and thereby "to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts."[54] But what makes this opinion reminiscent of Justice Jackson's masterpiece in *Barnette* is Kennedy's response to the self-congratulatory statement by the California Legislature that "the Act was part of California's legacy of 'forward thinking.'"[55] Justice Kennedy observed that it is not "forward thinking" to compel ideological uniformity and continued:

> It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[56]

We live in an era in which compelled speech is becoming commonplace—especially in cases involving wedding photographers, printers, cake artists, and florists—and Justice Kennedy, in one of his last opinions as a member of the Court, wrote to help us resist authoritarian government and tyrannical speech compulsions. And perhaps—just perhaps—the spirit of Justice Kennedy's disdain for laws compelling speech is beginning to find traction. This seems to help explain the Eighth Circuit's recent decision in *Telescope Media*.

III. A CAREFUL READING OF *TELESCOPE MEDIA*

In his majority opinion in *Obergefell v. Hodges*,[57] the decision in which the Court created a constitutional right to same-sex marriage, Justice Kennedy reassured those who believe in traditional marriage that their beliefs would continue to be respected and protected. "Many who deem same-sex marriage to be wrong," said Justice Kennedy, "reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are dispar-

53. *Id.* at 2379.
54. *Id.*
55. *Id.*
56. *Id.*
57. 135 S. Ct. 2584 (2015).

aged here."[58] In even further reassuring dictum, Justice Kennedy continued: "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."[59] If those comforting words were sincere, then surely they apply to Carl and Angel Larsen, the professional filmmakers who own and operate Telescope Media Group.

Carl and Angel Larsen are filmmakers and storytellers. They are also devout Christians who "aim to glorify God in everything they do," including in their work as filmmakers.[60] Although the Larsens are in business to make films for their clients, they maintain "creative control over the videos they produce,"[61] over which events to make films about, and what audio and video content to use.[62] Moreover, although they happily serve all persons without regard to race, gender, religion, or sexual orientation, they "decline any requests for their services that conflict with their religious beliefs."[63] Thus, their religious conscience precludes them from making films with messages that are inconsistent with "'biblical truth,'" such as those that "'promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.'"[64] In other words, it is indisputable that the Larsens' "decisions on whether to create a specific film never focus on *who* the client is, but on *what* message or event the film will promote or celebrate."[65]

This litigation arose when the Larsens decided they would like to expand their filmmaking business to include making films promoting "Christian ideas about marriage" by telling stories "through their films of marriages between one man and one woman that magnify

58. *Id.* at 2602.
59. *Id.* at 2607.
60. Opening Brief for Appellants at 5, Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) (No. 17–3352) [hereinafter Appellants' Brief]. Even the name of their business, *Telescope Media Group*, was chosen to reflect the religious vision of their vocation. "As stated on their business website, the Larsens aim to 'magnify [God's] glory the way a telescope magnifies stars' . . . . This vision impacts both how the Larsens treat their clients and what stories they choose to tell through their films." *Id.* at 6.
61. *Telescope Media*, 936 F.3d at 747.
62. *Id.* at 747–48.
63. *Id.* at 748.
64. *Id.*
65. Appellants' Brief, *supra* note 60, at 7. This is important for First Amendment purposes because it demonstrates that expressive vendors are asserting a right to discriminate against ideas, not persons. *See infra* notes 176–77 and accompanying text.

God's design and purpose for marriage."[66] However, under the Minnesota Human Rights Act (MHRA), as interpreted by the State of Minnesota, if the Larsens were to make films celebrating opposite-sex marriage, they would be compelled to make films depicting same-sex marriage "in an equally 'positive' light."[67] Moreover, if the Larsens should refuse to make films celebrating same-sex marriage, they would face penalties including "fines, damages awards, and even up to 90 days in jail."[68] Thus, in the concise words of Judge Stras, the question before the court was: "Can Minnesota require [the Larsens] to produce videos of same-sex weddings, even if the message would conflict with their own beliefs?"[69] Although the Larsens (the appellants) raised many different constitutional claims in this case, including free exercise and equal protection, this Article will focus only on the court's analysis of the free speech claim under the no-compelled-speech doctrine.

Basically, this case asked the court to decide whether the MHRA is a content-neutral regulation of discriminatory conduct, as Minnesota argued it is,[70] or a content-based burden on speech at the core of the First Amendment, as the appellants argued it is as applied to their filmmaking business.[71] Certainly, on its face the MHRA is a generally applicable, content-neutral prohibition of discriminatory conduct in places of public accommodations. It does not mention speech, filmmaking, or storytelling. It simply bans discriminatory practices on the basis of sexual orientation concerning "the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation."[72] However, as in *Hurley*, it was applied to the Larsens' videography business in "a peculiar way" because it had the effect of declaring the Larsens' artistic expression "to be the public accommodation."[73]

Judge Stras, writing for a 2–1 majority, agreed with the Larsens and stated pointedly that "[s]peech is not conduct just because the government says it is."[74] Rather than an incidental burden on speech

66. Appellants' Brief, *supra* note 60, at 7–8.
67. *Telescope Media*, 936 F.3d at 748–49; *see also* Oral Argument at 26:08–27:15, *Telescope Media*, 936 F.3d 740 (No. 17-3352), http://media-oa.ca8.uscourts.gov/OAaudio/2018/10/173352.mp3 [https://perma.unl.edu/BC24-NZ74] (explaining the operation of the MHRA to a hypothetical situation).
68. Appellants' Brief, *supra* note 60, at 1.
69. *Telescope Media*, 936 F.3d. at 747.
70. *Id.* at 756–57.
71. *See id.* at 758 (noting that speech compulsions violate a "cardinal constitutional command" (quoting Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018))).
72. MINN. STAT. § 363A.11(1)(a)(1) (2019); *Telescope Media*, 936 F.3d at 748.
73. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995).
74. *Telescope Media*, 936 F.3d at 752.

by a content-neutral law regulating discriminatory conduct, the court held that Minnesota's regulation of the Larsens' wedding videos constituted a content-based[75] compulsion of "speech that is entitled to First Amendment protection."[76] The public accommodations law was content-based, according to Judge Stras, because it "compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage."[77] It is certainly, *at the very least*, content-based. However, as applied to the Larsens, it is probably best described as viewpoint-based because it compels them to make films depicting same-sex marriage in a positive light if they choose to make films depicting marriage between one man and one woman in a positive light. The law does not merely compel the Larsens to speak generally about the subject of same-sex marriage; rather, it compels them to express a positive view of same-sex marriage even though that perspective conflicts with their deeply held religious beliefs about the good of marriage. That is a viewpoint-based mandate, a particularly egregious form of content-based regulation of protected speech.[78]

Telescope Media is a wonderful case through which to view expressive wedding vendors and the no-compelled-speech doctrine because it features a compelling debate between Judge Stras for the majority and Judge Kelly in dissent. Judge Stras and Judge Kelly disagreed on many crucial issues, and it is worthwhile to focus on the analytical volleys between them. The main issues they debated were speech versus conduct, content-neutral versus content-based laws, and application of the compelling interest test if strict scrutiny applies.

A. Stras Versus Kelly: Regulation of Speech or Conduct?

In her dissent, Judge Kelly viewed the MHRA as a content-neutral regulation of conduct that only incidentally touched upon speech.[79] She supported this conclusion by citing *Roberts v. United States Jaycees*,[80] a case in which the national organization of the Jaycees excluded women from membership in violation of—coincidentally—the MHRA. The Supreme Court held that applying the MHRA against the Jaycees did not violate their right of expressive association under the First Amendment, but the Court did so only after deciding that the Jaycees had discriminated against women as persons and not against any particular message compelled by application of the MHRA. As the

75. *Id.* at 758.
76. *Id.* at 750.
77. *Id.* at 752.
78. For an extensive discussion of the content-based versus viewpoint-based issue, see *infra* section III.B.
79. *See Telescope Media*, 936 F.3d at 773, 776 (Kelly, J., dissenting).
80. 468 U.S. 609 (1984).

Court put it, there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability . . . to disseminate its preferred views."[81] Moreover, the Court made clear that the MHRA "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[82] There was no compelled speech at all in the case, just naked discrimination against admitting women as members of an organization of young business and community leaders.[83]

On the speech versus conduct issue, Judge Stras was clear that the Larsens' wedding videos are "in a word, speech"[84] protected by the First Amendment because "they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage."[85] Moreover, it makes no difference that their filmmaking and storytelling are produced "through a for-profit enterprise."[86]

Indeed, even the purest of pure speech involves physical movements and activities that could be described as conduct. A fine artist, such as Rembrandt, must physically stretch his canvas and move his brush.[87] A parade could be deemed conduct because it involves marching and walking down the streets.[88] A novelist, such as Dickens, must sharpen his pencils or move his fingers on a keyboard. Is the creative process of writing a novel mere unprotected conduct, or protected speech? Even publishing a newspaper, such as the *New York Times*, could be considered conduct "because it depends on the mechanical operation of a printing press."[89]

Thus, Judge Stras concluded that as applied to the Larsens' creation of wedding videos, the MHRA is not a mere regulation of commercial conduct, but rather a direct governmental compulsion of artistic

81. *Id.* at 627.

82. *Id.*

83. There is no reason to think that women members would in any way restrict the ability of the Jaycees to speak about business and community issues from its preferred organizational viewpoint. If there had been any such evidence in the record, this would have been a very different case. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

84. *Telescope Media*, 936 F.3d at 751. There is a long line of Supreme Court cases recognizing that filmmaking and motion pictures are speech protected by the First Amendment. *See id.* at 750–51 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65–66 (1981); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952)).

85. *Id.* at 751.

86. *Id.*

87. *Id.* at 752.

88. *Id.*

89. *Id.*

speech at the core of the First Amendment.[90] The governing Supreme Court precedent is *Hurley*, not *Roberts*. Under the Court's unanimous decision in *Hurley*, when a public accommodations law is applied to compel a wedding videographer to make wedding videos depicting same-sex weddings in a positive light, it constitutes compelled speech within the meaning of the First Amendment.[91] Judge Stras clearly won this round of the debate with Judge Kelly.

B. Stras Versus Kelly: Content-Neutral or Content-Based Law?

Even if wedding videos are some "form of speech protected by the First Amendment,"[92] Judge Kelly argued that the MHRA was a content-neutral regulation that has only "an incidental effect on some speakers or messages but not others."[93] Since the general purpose and effect of the law was to prohibit discriminatory conduct in public accommodations and not to regulate speech, when applied to commercial wedding video services its effect on speech was only incidental. Thus, the MHRA is a content-neutral law and its incidental regulation of protected speech is subject only to intermediate scrutiny.[94] Judge Kelly tried (I think unsuccessfully) to distinguish the parade in *Hurley* from the Larsens' filmmaking by claiming that, by offering their wedding videos as a commercial service, the Larsens had somehow chosen to subordinate their "own messages to those of their customers."[95] Thus, although the application of the Massachusetts public accommodations law in *Hurley* "improperly transformed the parade sponsors' speech into a public accommodation, here it is the Larsens who are affirmatively declaring their speech to be a public accommodation by selling their videography services on the open market."[96]

However, in both *Hurley* and *Telescope Media*, the speakers chose to bring their expression into a place deemed to be a public accommodation under applicable law. In *Hurley*, the parade sponsor chose to offer community groups (but not GLIB) an opportunity to march in a parade that state law deemed to be a public accommodation; in *Telescope Media*, the Larsens wished to create wedding videos for traditional weddings but not for same-sex weddings. In each case the public accommodations law, as applied to the parade in the one and the wedding videos in the other, has the direct effect of treating speech as a

90. *Id.* at 751–54.
91. *See supra* notes 42–47 and accompanying text.
92. *Telescope Media*, 936 F.3d at 771–72 (Kelly, J., dissenting).
93. *Id.* at 772 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
94. *Id.* at 773 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24 (1984)).
95. *Id.* at 775.
96. *Id.*

public accommodation. In both cases, the law compels unwanted speech, speech that alters the message the speakers wish to express.

Indeed, the effect on protected speech in *Telescope Media* is arguably greater and more direct than it was in *Hurley*. In *Hurley*, the parade organizer was merely required to permit GLIB to march in the parade under its gay pride banner. In *Telescope Media*, the MHRA applies to commandeer and conscript the Larsens' artistic abilities; the law compels them to create films depicting same-sex marriage in a positive light, a message that violates their religious conscience about what they believe is a sacred institution established by God.

Judge Stras criticized the dissent as "a moving target"—as sometimes admitting that "speech is protected, at least in some form," and at other times suggesting "that the videos are not speech at all, primarily because the Larsens are telling someone else's story as part of a for-profit service."[97] However, as applied to the Larsens' videography enterprise, the MHRA not only regulated speech, but it did so "as a content-based regulation."[98] Just as the speech compulsion in *Hurley* interfered with the right of the parade sponsors to shape their own message, in *Telescope Media* the MHRA similarly interferes with the Larsens' right to speaker autonomy: "By treating the Larsens' choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages,"[99] the MHRA restricts both the Larsens' right to speak their own message as well as their right not to create a message that offends their decent and honorable religious beliefs.[100] In other words, the MHRA unconstitutionally exacts a penalty on the Larsens' speech celebrating traditional marriage by compelling them to convey an equally positive viewpoint about same-sex marriage.[101] This results in a "your money or your life" choice for the Larsens—either express a message they wish not to express or choose the safe harbor of self-censorship.[102] The First Amendment does not permit this scenario; speaker autonomy includes both the right to speak and the right not to speak.

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97. *Id.* at 751 n.3 (majority opinion).
98. *Id.* at 753.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 753–54. As Justice Holmes once put it: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Union Pac. R.R. Co. v. Pub. Serv. Comm'n of Mo., 248 U.S. 67, 70 (1918), *cited in* Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL'Y 583, 586–87 (2016).

C. Stras Versus Kelly: Strict Scrutiny/Compelling Interest Test

As Judge Stras observed, "Laws that compel speech or regulate it based on its content are subject to strict scrutiny . . . ."[103] Under the jurisprudence of the First Amendment, such a law is presumptively unconstitutional and the burden is on the State to justify the law by establishing that it is narrowly tailored to advance a compelling state interest.[104]

For Judge Kelly, this is an easy case. Even if the compelling interest test applies when the MHRA compels the Larsens to make films depicting same-sex marriage in a positive light, "the MHRA would survive even strict scrutiny."[105] This is so, she concludes, because "[i]n general, public accommodations laws further compelling state interests of eradicating discrimination and ensuring residents have equal access to publicly available goods and services."[106] Moreover, the law is narrowly tailored because—here comes the conduct versus speech argument again—"it targets only conduct, not speech."[107] Like the legendary cliff swallows who always return to San Juan Capistrano, Judge Kelly constantly revisits her assertion that the MHRA "regulates only discriminatory conduct."[108] Thus, since the government "is not forcing them to speak," there is no need to demonstrate a more particularized compelling interest to justify a restriction of their free speech rights.[109] Judge Kelly's First Amendment analysis is wrong because she gets the facts wrong. Judge Stras hammered that point home in his majority opinion.

Although Judge Stras conceded that, in general, states have "powerful reasons"[110] for prohibiting discriminatory conduct in places of public accommodations, "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution."[111] Under the First Amendment, strict scrutiny requires a more particularized focus.[112] As the unanimous Court in *Hurley* made abundantly clear,[113]

103. *Telescope Media*, 936 F.3d at 754.
104. *Id.*; *see also* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (reiterating the standard of review for content-based regulations of speech). If the law regulates or compels speech on the basis of viewpoint, the standard of review is even stricter. *See supra* section III.B.
105. *Telescope Media*, 936 F.3d at 776 (Kelly, J., dissenting).
106. *Id.* at 777 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).
107. *Id.* at 778.
108. *Id.* at 777.
109. *Id.* at 778.
110. *Id.* at 754 (majority opinion).
111. *Id.* at 755.
112. As Professor Douglas Laycock notes, a general governmental interest in nondiscrimination is not sufficient under strict scrutiny. The proper inquiry "is whether enforcement of the government's interest *as applied* to the particular religious claimant—and to all others whose similar claims cannot be fairly distinguished—

"regulating speech because it is discriminatory or offensive is not a compelling state interest."[114]

At the end of the day, *Telescope Media* stands for the principle that under the First Amendment, "antidiscrimination laws can regulate conduct, but not expression."[115] It would seem as though this reasoning applies not only to commercial videographers, but also to other expressive businesses such as photographers, fine artists, printers, musical performers, and perhaps even to cake artists and floral arrangers.

Judge Stras is correct; even antidiscrimination laws must "yield" to the First Amendment.[116]

IV. DEFENDING THE REASONING OF *TELESCOPE MEDIA*'S COMPELLED SPEECH DECISION

The majority opinion in *Telescope Media* has become the leading federal decision on the no-compelled-speech doctrine as applied to expressive wedding vendors. Although the majority opinion written by Judge Stras is very persuasive, many commentators do not agree. I believe Judge Stras is right and the commentators are wrong. In this Part of the Article, I hope to demonstrate why the critics are wrong and Judge Stras is right.

In a forthcoming chapter of a book on the wedding vendor issue, Professor Daniel Conkle argues that the compelled speech claims of expressive wedding vendors should be rejected by the courts.[117] Professor Conkle makes three main arguments in support of this conclusion.

First, Conkle suggests that even if a wedding vendor provides a service that is sufficiently expressive to be under the general protection of the Free Speech Clause, "the compelled speech argument hinges on a more narrow issue: does the vendor's expressive conduct in fact convey, to a reasonable observer, the message to which the vendor objects, that is, does it convey his or her personal approval and

is necessary to serve a compelling government interest." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872 (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

113. *See supra* notes 42–47 and accompanying text.

114. *Telescope Media*, 936 F.3d at 755.

115. *Id.* at 756.

116. *Id.* at 755.

117. Daniel O. Conkle, *Equality, Animus, and Expressive and Religious Freedom Under the American Constitution:* Masterpiece Cakeshop *and Beyond*, *in* LA LIBERTÉ D'EXPRESSION EN DROIT COMPARÉ [FREEDOM OF EXPRESSION IN COMPARATIVE LAW] (Gilles J. Guglielmi ed., Les Editions Panthéon-Assas, forthcoming 2020) (manuscript at 23–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417932 [https://perma.unl.edu/Y89K-7VHV].

endorsement of the same-sex wedding?"[118] He suggests the answer to this question is no and that, therefore, there is no compelled speech claim involved when a wedding vendor is required to accept work celebrating same-sex weddings.[119] Second, Conkle argues that the no-compelled-speech doctrine is not implicated because antidiscrimination laws do not target "the vendor's conduct in order to dictate its expressive content or to require the vendor to communicate a message of the government's choosing."[120] In other words, public accommodations laws are content-neutral regulations of conduct "and therefore should not trigger free speech strict scrutiny."[121] Finally, he argues that even if strict scrutiny applies, public accommodations laws are justified because they satisfy the compelling interest test.[122] Although Conkle was not writing about *Telescope Media*, his reasoning is almost identical to that of Judge Kelly's dissent in the case. This Part of the Article will now evaluate each of Professor Conkle's arguments.

A. The No-Compelled-Speech Doctrine Applies when "A" Is Compelled to Speak, Create, or Help Disseminate the Message of "B"

Professor Conkle seems to believe that, under public accommodations laws, religiously-motivated expression by a for-profit business should be protected—if at all—only under the Free Exercise Clause and not by the Free Speech Clause.[123] However, the Court's free speech jurisprudence clearly "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[124] Indeed, in the memorable words of Justice Scalia, "a free-speech clause without religion would be Hamlet without the prince."[125] Moreover, as Judge Stras noted in *Telescope Media*, it makes no difference that the regulated speech is part of a for-profit business.[126]

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118. *Id.* (manuscript at 23). In her dissent in *Telescope Media*, Judge Kelly makes this argument as well. *See Telescope Media*, 936 F.3d at 773; *see also* Steven H. Shiffrin, *What is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 506–07 (2014) (arguing that a wedding photographer is not objectively endorsing the ceremony).

119. Conkle, *supra* note 117.

120. *Id.*

121. *Id.*

122. *Id.* (manuscript at 24).

123. *See id.* (manuscript at 3).

124. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

125. *Id.*

126. Telescope Media Grp. v. Lucero, 936 F.3d 740, 751 (8th Cir. 2019); *see, e.g.*, Citizens United v. FEC, 558 U.S. 310, 342 (2010) (collecting First Amendment caselaw); N.Y. Times v. Sullivan, 376 U.S. 254, 265–66 (1964) (holding a for-profit newspaper's paid commercial advertisement is protected speech). Specifically, the fact that motion pictures and films are made and sold for profit "does not prevent

Under *Wooley* and *Hurley*, it is abundantly clear that the no-compelled-speech doctrine does not require a showing that a reasonable observer would understand the compelled message as the personal expression of the compelled speaker. The doctrine is triggered when a law usurps speaker autonomy by compelling speech. When A is compelled to help disseminate either the message of the government or the message of a third person, even under circumstances in which it is apparent that A is acting merely as messenger or a "billboard," the no-compelled-speech doctrine applies.

Wooley v. Maynard[127] is conclusive on this point. Recall that in *Wooley* the State of New Hampshire had prosecuted Mr. Maynard for using tape to cover the state motto ("Live Free or Die") on his license plate.[128] No reasonable observer would have mistaken the state motto on an automobile license plate as conveying the endorsement or approval of the automobile's owner or driver. It was clearly the State's speech and clearly not Mr. Maynard's speech. Nevertheless, the Court held that New Hampshire had violated the First Amendment by compelling Mr. Maynard to act as a "mobile billboard" for the State's ideological message.[129] It would not have made a difference if New Hampshire had allowed a third person, perhaps Mr. Maynard's next-door neighbor, to write the slogan for Maynard's license plate. Under *Wooley* and *Hurley*, government may not compel any individual to help disseminate any ideological message.[130]

In *Telescope Media*,[131] the Larsens had a far stronger case than Mr. Maynard had in *Wooley*. Maynard was only required to register his automobile and drive it about with the unobscured state motto on his license plate. He was merely a passive messenger, not a compelled speaker or creator of the message. The Larsens, however, are required to actually create films with ideas and messages that contradict their reasonable and honorable religious beliefs about what marriage is and what it is not. If they make films portraying traditional marriage in a positive light, they are compelled by law to make films depicting same-sex marriage in an equally positive light.[132] This clearly violates the no-compelled-speech doctrine, even if no reasonable observer would view the Larsens' compelled films as expressing their personal approval of same-sex marriage.

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them from being a form of expression whose liberty is safeguarded by the First Amendment." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

127. 430 U.S. 705 (1977).

128. *Id.* at 707–08; *see also supra* notes 35–37 and accompanying text (elaborating on the facts of *Wooley*).

129. *Wooley*, 430 U.S. at 715; *see also supra* notes 38–41 and accompanying text (elaborating on the facts of *Wooley*).

130. *See supra* notes 38–47 and accompanying text.

131. *Telescope Media*, 936 F.3d 740.

132. *Id.* at 752.

B. Compelled Speech Under Public Accommodation Laws Is Usually Viewpoint-Based, and Certainly Not Content-Neutral

In almost every compelled speech case, including *Telescope Media* and *Masterpiece Cakeshop*,[133] the speech compulsion is not content-neutral. Indeed, not only are these speech mandates content-based, they are usually viewpoint-based. Professor Conkle is simply wrong when he argues that when enforcing these laws against expressive wedding vendors, the government is regulating only discriminatory conduct and is not "dictat[ing] [the] expressive content" of the wedding vendor's speech.[134]

Again, the Court's unanimous opinion in *Hurley* is the key precedent. When a public accommodations law is applied in such a way as to treat a vendor's speech as a public accommodation, the result will almost always be at least a content-based speech mandate. In *Hurley*, the parade sponsors were required to allow a group to march under a banner expressing a message of gay pride.[135] Was this speech mandate content-neutral, content-based, or viewpoint-based?

A content-neutral restriction is one in which the law is designed to regulate some non-speech interest—such as excessive noise—and only incidentally restricts speech. A law prohibiting all excessive noise on residential streets after ten o'clock at night is an example of a content-neutral time, place, or manner regulation. If it is enforced evenhandedly against all loud protests and speakers after ten, its effect on speech is merely incidental. This law is almost certainly constitutional under cases like *Frisby v. Schultz*.[136]

A content-based mandate might be one in which the law requires a speaker to express an opinion—any opinion—on a particular subject. For example, the law might compel a speaker to say something—anything she wishes—about same-sex marriage. That law is a content-based speech compulsion and is therefore presumptively unconstitutional unless the government can demonstrate it is narrowly tailored and serves a compelling state interest.[137]

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

134. Conkle, *supra* note 117. In her dissent in *Telescope Media*, Judge Kelly makes this argument as well. *See Telescope Media*, 936 F.3d at 774; *see also* Shiffrin, *supra* note 118, at 503 (describing similar New Mexico Supreme Court decision relating to a photographer).

135. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 572–74 (1995).

136. 487 U.S. 474, 481 (1988) (holding that content-neutral time, place, or manner rules will be upheld so long as they are narrowly-tailored to serve a significant—but not necessarily compelling—government interest).

137. *Telescope Media*, 936 F.3d at 754; *see, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

But now suppose, as in *Telescope Media*, that a public accommodations law not only treats wedding videography as a public accommodation, but requires the filmmaker to create films depicting same-sex marriage in a positive light.[138] This, I think, is a viewpoint-based requirement, a particularly egregious form of content-based regulation.[139] In other words, viewpoint-based mandates are laws that compel an unwilling speaker to express a message that takes a particular ideological position on a particular subject. If the subject is same-sex marriage and the requirement is to depict same-sex marriage in a positive light, the requirement is viewpoint-based. Therefore, the compelled gay pride message in *Hurley* and the compelled positive message about same-sex marriage in *Telescope Media* are viewpoint-based mandates.[140]

The Court has never upheld a law imposing a viewpoint-based restriction on free speech.[141] Indeed, in the words of Justice Alito, "Viewpoint discrimination is poison to a free society."[142] Thus, although the Court has never clearly said so, "as a practical matter, there is a per se rule against viewpoint discrimination."[143] As Justice Alito suggests, the idea is that in a free society it is never appropriate for government to restrict speech on the basis of viewpoint or enact viewpoint-based speech compulsions. In other words, viewpoint discrimination "is so inconsistent with First Amendment values that it would not even qualify as a legitimate interest capable of satisfying the lowest level of judicial scrutiny."[144]

The bottom line is that in compelled speech cases involving expressive wedding vendors, whether they are wedding photographers, videographers, printers, graphic designers, or cake artists, when a public

138. 936 F.3d at 748–49.

139. Although a content-based restriction of speech is a grievous First Amendment problem, viewpoint-based discrimination by government is a "more blatant" and "egregious form of content discrimination." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). Thus, when the government compels a private individual to express a particular ideological message or creed, as in *Hurley* and *Telescope Media*, it is an egregious viewpoint-based wrong under the First Amendment.

140. Justice Kennedy has defined the test for viewpoint discrimination as "whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (noting racially disparaging trademarks are protected by the Free Speech Clause).

141. *See* Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 35 (2019).

142. Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring); *see also* Bloom, *supra* note 141, at 36 ("In *Iancu*, Justice Kagan assumed that proof of viewpoint discrimination resulted in automatic invalidation of the law.").

143. Bloom, *supra* note 141, at 35.

144. *Id.* at 36.

accommodations law compels them to create messages or artistic expression celebrating same-sex weddings, the result will inevitably be at least a content-based—and probably a viewpoint-based—speech mandate. If the mandate is content-based, the State will be required to demonstrate that, as applied specifically to the vendor's expressive enterprise, the mandate is narrowly tailored to advance a compellingly important state interest. If the mandate is viewpoint-based, it will be reviewed under what amounts to a categorical rule of unconstitutionality. Wedding vendors should always—or almost always—prevail in these cases.

C. Herein of Compelling Interests and Relative Harms

Professor Conkle argues that even when a wedding vendor is subject to a content-based speech mandate, his free speech claim must fail because the government "can satisfy even strict scrutiny."[145] Of course, if the compelled speech is viewpoint-based, the wedding vendor should prevail under the categorical rule that views viewpoint discrimination as poisonous to a free society.[146]

Assuming strict scrutiny applies, the question becomes: What is the compelling government interest advanced when the antidiscrimination law is applied to treat a vendor's speech as the public accommodation? As Conkle admits, "disadvantaged couples generally will be able to obtain the same goods or services elsewhere with minimal inconvenience and little if any tangible injury."[147] But even if there is no serious economic or tangible harm resulting from a wedding vendor's exercise of his right not to speak, Conkle argues that same-sex couples suffer a much more serious harm—"the indignity of being denied goods or service by a commercial business that serves the general public."[148] If Conkle's argument is persuasive, not even the Bill of Rights and the First Amendment protect a wedding vendor's right to decline to create expressions celebrating same-sex weddings.

Some commentators argue that the First Amendment should not be construed to protect free speech or religious liberty that causes harm to third parties.[149] Like Professor Conkle, these scholars "view discrimination, and its attendant 'dignity harm' as a particularly salient form of cognizable harm."[150]

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145. Conkle, *supra* note 117 (manuscript at 24).
146. *See supra* notes 141–44 and accompanying text.
147. Conkle, *supra* note 117 (manuscript at 28–29).
148. *Id.* (manuscript at 29).
149. *See generally* Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385311 [https://perma.unl.edu/WCV3-LY5K].
150. *Id.* (manuscript at 21); *see* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 644–49 (2015).

Certainly, dignitary harm is real harm; the kind of harm often caused by speech that deeply offends persons who take issue with the speech, or with a refusal to speak as in the wedding vendor cases. Some commentators argue that the dignitary harm is even more severe when the objection to providing the service is based upon a religious belief that the customer's conduct is sinful.[151] However, the Court has repeatedly held that, under the Free Speech Clause, "[p]reventing offense, preventing emotional harm, or preventing insult"[152] does not justify content- or viewpoint-based restrictions or compulsions of speech.

Consider, for example, *Snyder v. Phelps*,[153] a case in which the Court held, in an 8–1 decision, that not even the most vile and disgusting hate speech can be the basis of liability for the tort of intentional infliction of emotional distress. The Court, in an opinion by Chief Justice Roberts, made clear that offensive and emotionally disturbing speech is constitutionally protected: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[154] Even more clearly, in *Matal v. Tam*,[155] the Court unanimously held that hate speech and offensive speech are protected by the Free Speech Clause, and Justice Alito explained why the Free Speech Clause cannot give in to the argument that offensive speech is not protected:

> But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[156]

Moreover, what if the "do no harm principle" were applied evenhandedly to take account of the harm caused on both sides in cases like *Telescope Media*? If religious speech must be suppressed when it causes harm to gay couples, should public accommodations laws be suppressed when they cause harm to wedding vendors?

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151. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2577 (2015) (arguing that a religious belief that certain conduct is sinful expresses a particularly harmful "social meaning").

152. Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 65 (2018).

153. 562 U.S. 443 (2011).

154. *Id.* at 458 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

155. 137 S. Ct. 1744 (2017) (holding that disparaging trademarks are protected by the Free Speech Clause).

156. *Id.* at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

As Professor Stephanie H. Barclay explains, "[S]omeone will always experience a cost or harm when government acts to protect, or not protect, any constitutional right."[157] Therefore, she argues that "we must broaden our lens to observe harms on both sides of the scale."[158] If we look at the harms on both sides, it seems clear that in most cases the scales will tip in favor of protecting wedding vendors such as the Larsens. Although their customers can easily obtain videography services from other nearby businesses in the marketplace, the Larsens will be forced by government to choose between their religious conscience and their livelihood.[159] As Professor Richard Epstein puts it, "The ability to attribute coercive behavior to the victims of coercion is one dire consequence of [a] massive breakdown in the English language."[160] In other words, the Larsens are the victims—not the perpetrators—of coercive harm.[161]

The Larsens also suffer severe dignitary harm to their religious identity when the government uses the force of law to treat them like outlaws merely for their conscientious decision not to speak. Under the MHRA, they are being compelled to create films with messages and ideas they believe are untrue to the institution of marriage as God has ordained it. They are being forced "to defy God's will—to disrupt the most important relationship in their lives," and to commit a "serious wrong that will torment their conscience for a long time thereafter."[162] In terms of relative harm, the harm caused to the Larsens by the MHRA "is permanent loss of [religious] identity or permanent loss of occupation, and that far outweighs the one-time dignitary or insult harm on the couple's side."[163]

D. The Race Analogy Does Not Apply to Wedding Vendors and Compelled Speech Cases

A final contention by the dissent in *Telescope Media*, one that often arises in wedding vendor cases, is the argument that the Larsens refusal to create videos celebrating same-sex weddings is morally and legally equivalent to racial discrimination by restaurants during the

157. Barclay, *supra* note 149 (manuscript at 62).

158. *Id.*

159. *See* Epstein, *supra* note 102, at 586 (noting that the state forces wedding vendors "by fines, injunctions, or imprisonment" to choose between their religious conscience and their business).

160. *Id.* at 585–86.

161. Refusing to serve a customer in a competitive market is not coercive in the same way that the fines and even criminal sanctions of public accommodations laws are. *Id.* at 586. As Epstein puts it, "[A] world with multiple alternatives is always less coercive than a world with only one." *Id.*

162. Laycock, *supra* note 152.

163. *Id.*

Jim Crow era.[164] But this analogy completely disregards Justice Kennedy's promise in *Obergefell* not to disparage the "decent and honorable religious or philosophical premises"[165] of those who, like the Larsens, are conscientiously opposed to expressing or creating messages that celebrate same-sex marriage. The owners of segregated restaurants, such as those in *Piggie Park*, were acting on the indecent and dishonorable bigotry of white supremacy. Deeply religious wedding vendors, such as the Larsens in *Telescope Media* and Jack Phillips in *Masterpiece Cakeshop*, are standing on reasonable, decent, and honorable principles of religious conscience.

As Professor Andrew Koppelman observes, one of the goals of antidiscrimination laws protecting gay persons is to transform the culture in order to create a society in which "prejudice against gays is despised in the same way as racism."[166] This purpose of gay rights laws, says Koppelman, "is the most fundamental source of the conflict between gay rights and religious liberty."[167] If we value free speech and religious liberty as fundamental natural rights,[168] it is imperative that we push back against this purpose to stigmatize decent and honorable religious beliefs about what marriage is and what it is not. To the extent public accommodations laws are designed to stigmatize and marginalize traditional religious beliefs about marriage and sin, not only is it not a compellingly important interest, it is not even a legitimate state interest. It is tyrannical to use the force of law to compel wedding vendors to create messages expressing ideas they believe are untrue to their deepest beliefs about the good life. The Larsens and similar religious wedding vendors are not asking courts to protect their right to "discriminate" against same-sex customers. Rather, they

164. Telescope Media Grp. v. Lucero, 936 F.3d 740, 777 (8th Cir. 2019) (Kelly, J., dissenting) ("If eradicating discrimination based on race or sex is a compelling state interest, then so is Minnesota's interest in eradicating discrimination based on sexual orientation."); *see also* Conkle, *supra* note 117 (manuscript at 29–30) (noting the Supreme Court's finding of a compelling state interest in *Newman v. Piggie Park Enters., Inc*., 390 U.S. 400, 402–03 n.5 (1968) (per curiam), a racial discrimination case involving a chain of restaurants and drive-ins that refused to serve African-Americans, and arguing that the government also "has a compelling justification for rejecting religious exemptions" in cases involving discrimination on the basis of sexual orientaion).

165. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015); *supra* notes 57–59 and accompanying text.

166. Koppelman, *supra* note 150, at 649.

167. *Id.*

168. Free speech and religious liberty are fundamental human rights "grounded in the 'inherent dignity' [of] every person." Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 494 (2015). The conflict between gay rights and First Amendment freedoms is, therefore, a "tension . . . *among* civil rights claims." *Id.* at 500.

are "asserting [their] civil liberty against state coercion in the form of compelled speech."[169]

Moreover, as Professor Douglas Laycock has said, it "is absurd"[170] to compare a handful of wedding vendor cases to the "monolithic southern-white support for subordinating African-Americans"[171] that resulted in a vile system of racial apartheid prior to enactment of the Civil Rights Act of 1964. As Ryan T. Anderson notes:

> Before the enactment of the Civil Rights Act of 1964, racial segregation was rampant and entrenched, and African Americans were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the government's tacit and often explicit backing.[172]

It also is clear that "[o]pposition to interracial marriage developed as one aspect of [this] larger system of racism and white supremacy."[173] Indeed, in *Loving v. Virginia*,[174] the Court's landmark decision striking down Virginia's laws prohibiting interracial marriages, Chief Justice Warren explicitly noted that these laws were based upon "the doctrine of White Supremacy."[175]

However, as in *Telescope Media*,[176] wedding vendors who decline to create messages celebrating same-sex marriage do not discriminate against customers who identify as gay, but rather assert, based upon their decent and honorable religious belief, "that marriage is the union of husband and wife."[177] This is critically important for First Amendment purposes because even if state public accommodations laws treat same-sex marriage discrimination as discrimination against gay persons, this reasoning should not apply to free speech analysis. The First Amendment allows speakers to discriminate in favor of messages they wish to express and against messages they

169. Erica Goldberg, *"Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. REV. 639, 648 (2019).

170. Laycock, *supra* note 8, at 190.

171. *Id.* at 191.

172. Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 131 (2018).

173. *Id.* at 125.

174. 388 U.S. 1 (1967).

175. *Id.* at 7; *see also* LUKE GOODRICH, FREE TO BELIEVE: THE BATTLE OVER RELIGIOUS LIBERTY IN AMERICA 126–30 (2019) (noting the race analogy is not persuasive).

176. *See supra* notes 60–65 and accompanying text.

177. Anderson, *supra* note 172, at 130. "That view of marriage is based on the capacity that a man and woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father. Whether ultimately sound or not, this view of marriage is reasonable, is based on decent and honorable premises, and disparages no one." *Id.* at 125. *See also* Laycock, *supra* note 152, at 63 ("[Wedding vendors] are not singling out gays and lesbians; they are singling out weddings.").

wish not to express. That was clearly the case in *Telescope Media*, and Judge Stras was correct to decide the case on that foundation.

V. CONCLUSION

Under the no-compelled-speech doctrine, government may not compel anyone to speak or even to help disseminate any religious, political, or ideological message or idea. It applies to all speakers, artists, videographers, photographers, printers, and expressive enterprises. There is no reason to think that it does not apply to wedding vendors when they decline to create or help disseminate a message celebrating same-sex marriage.

The issue before the Eighth Circuit in *Telescope Media* was not whether same-sex couples "can have a wedding with the full panoply"[178] of wedding services, including wedding videography services. All of these goods and services are available to them in the marketplace. Rather, the issue in *Telescope Media* was whether Minnesota may compel the Larsens to create films depicting same-sex weddings in a positive light despite their decent and honorable religious beliefs about what marriage is and what it is not.[179]

In a very persuasive majority opinion by Judge Stras, the Eighth Circuit held that commercial wedding videos are speech protected by the Free Speech Clause.[180] Moreover, when a wedding videographer is compelled by law to create films depicting same-sex weddings in a positive light, the government is guilty of (at the very least) a content-based speech compulsion.[181] Finally, the court held that Minnesota did not have a compelling state interest sufficient to justify such a content-based speech mandate.[182] Therefore, as Judge Stras put it so pointedly, "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution."[183]

The Supreme Court has a long and distinguished jurisprudence protecting the right of individuals not to be compelled to speak. This Article has attempted to demonstrate that in *Telescope Media*, the Eighth Circuit properly applied the Supreme Court's no-compelled-speech jurisprudence.

In *Nineteen Eighty-Four*, George Orwell's classic novel of a dystopian state in which the Party and the Thought Police control all speech and thought, the protagonist, a man named Winston, says this: "Freedom is the freedom to say that two plus two make four. If that is

178. Laycock, *supra* note 112, at 877.
179. *Id.* ("The issue is whether the religious conscientious objector must be the one who provides these things.").
180. *See supra* notes 84–89 and accompanying text.
181. *See supra* notes 98–102 and accompanying text.
182. *See supra* notes 110–14 and accompanying text.
183. Telescope Media Grp. v. Lucero, 936 F.3d 740, 755 (8th Cir. 2019).

granted, all else follows."[184] In other words, intellectual autonomy consists of the freedom to say what you think is true and to not say what you think is untrue. Only a tyrannical government requires one to say that which he believes is not true—to say two plus two make five. In *Telescope Media*, the court recognized this powerful insight about the heart and soul of freedom of thought and freedom of speech. Under the no-compelled-speech doctrine, Minnesota may not compel the Larsens—or anyone else—to speak, create, or help disseminate ideas with which they disagree.

State laws—even state laws governing very important state interests—must yield to the Constitution. State laws defining marriage must yield to the Due Process Clause.[185] State laws regulating the curriculum for public schools must yield to the Establishment Clause.[186] And, yes, public accommodations laws compelling speech must yield to the Free Speech Clause.[187] Judge Stras's powerful opinion in *Telescope Media* gets the caselaw right, and more importantly, it gets the First Amendment right. It is now the leading case on wedding vendors and compelled speech, and this preeminent status is well-deserved.

184. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 81 (1949).
185. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (recognizing same-sex marriage).
186. Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down "creation science" curriculum).
187. *Telescope Media*, 936 F.3d at 755.