

CONSTITUTIONAL CONSTELLATION AT THE CROSSROADS: THE FUTURE OF COMPELLED SPEECH AND THE FIRST AMENDMENT’S “FIXED STAR”

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Seventy-three years ago, Justice Jackson wrote for the United States Supreme Court: “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.”¹ At that time, the Court found no exception to this principle.² Today, some judges call the sacrifice of this principle “the price of citizenship.”³ At these crossroads, the courts of law and culture will determine the future of freedom: whether the star really is fixed, or whether it is falling.

I was asked to address the emerging conflict that occurs when a law, in the name of non-discrimination, forces a creative professional to create, communicate, or facilitate a message that conflicts with the creative professional’s viewpoint.⁴

Last year, a major print shop refused to print a pro-life flyer with a prayer on it.⁵ The company later apologized,⁶ but this situation raises

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¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It is worth noting that this opinion was written during World War II, when social interests in national unity and patriotism were heightened.

² *Id.*

³ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring).

⁴ See, e.g., Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 242–43 (2015) (addressing whether creative professions such as baking or photography should be considered expressive conduct for purposes of the Free Speech Clause); Ta’lor McFarland, Note, *The Right to Refuse: The Legal Counterbalance for Religious Businesses and Same-Sex Marriage Promotion to Curtail the Rippling Wave of Tension Erupting Across the Nation and Florida*, 21 BARRY L. REV. 265, 265–66 (2016) (discussing the “growing tension” between the beliefs of small businesses and creative professionals, and supporters of same-sex marriage).

⁵ Manya Brachear Pashman, *Office Depot Accused of Religious Discrimination*, CHI. TRIB. (Sept. 10, 2015, 2:30 PM), <http://www.chicagotribune.com/news/local/breaking/ct-office-depot-refused-printing-prayer-20150910-story.html>.

⁶ Manya Brachear Pashman, *Office Depot Apologizes Over Refusal to Copy Anti-Abortion Prayer*, CHI. TRIB. (Sept. 11, 2015, 7:52 PM), <http://www.chicagotribune.com/news/ct-office-depot-apologizes-refusing-anti-abortion-prayer-20150911-story.html> (discussing

the question: Can the government force the business to print the flyer because not to print it would discriminate on the basis of religion and political belief (both protected classes in many jurisdictions)?

Imagine you are same-sex attracted, and the state finally issued a marriage license to you and your long-time partner. You are video production artists and work as a team. You shoot, edit, and help write promos for events, concerts, high-profile weddings, and conferences. What if the Catholic Conference asks you to write and produce a promo for the Synod of Bishops on the Family, where the message opposes same-sex marriage? *Should* the government force you to not discriminate against Catholics? *Can* the government constitutionally force you to?

I posit that the answer is no to both. We'll address it in a moment, but note that the first question is normative: should the government regulate this action? The second is a question of positive law: is a law constitutional when it is applied to coerce expression, whether created, hosted, or facilitated?

Before we dig into these questions, though, they need to be narrowed. In the hypotheticals just mentioned, I intentionally misstated the appropriate questions presented in order to illustrate a very important point. The print shop did not refuse to serve the pro-life *person*; the print shop refused to print the pro-life *message*. If the same-sex couple refused the Synod of Bishops on the Family but was happy to promote the Synod of Bishops on Poverty Reduction, then they didn't refuse the *people*, they refused to promote and create the *message*.

Today, many creative professionals face a dilemma: Can I, in good conscience, use my talents to promote, facilitate, or associate with the message my customer is requesting?⁸

Most of the time this isn't an issue. For example, Blaine Adamson is a promotional printer and graphic design shop owner.⁹ He's turned down many orders that he cannot in good conscience produce—T-shirts that promoted a strip-club, pens that promoted a sexually explicit movie, and shirts that contained a violent message—all without any legal

Office Depot's apology to the woman who had sought their services to print her pro-life prayer).

⁷ See, e.g., D.C. Code § 2-1402.31 (LEXIS through Apr. 5, 2017) (listing both religion and political affiliation as protected classes); MADISON, WIS., CODE § 39.03(2), 39.03(5) (entitling all persons to "full and equal enjoyment" of public accommodations regardless of the individual's "religion or nonreligion, . . . sexual orientation, . . . [or] political beliefs," among other things).

⁸ McFarland, *supra* note 4, at 265.

⁹ Brief of Appellee Hands On Originals, Inc. at 2, Lexington-Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals, Inc., No. 2015-CA-000745 (Ky. Ct. App. Feb. 5, 2016).

problems.¹⁰ He refers these customers to other printers who are happy to oblige and he forgoes the profits for conscience sake.¹¹

Lately, however, the addition of sexual orientation to non-discrimination laws as a protected class, combined with the redefinition of marriage to include same-sex relationships, has created a clash with speech and conscience rights.¹² This clash is teeing up to be a constitutional quagmire for creative professionals in the wedding industry in particular, but also in other expressive services.¹³

This is the case for Blaine. Significantly, although he's referred specific orders to other printers, Blaine never refuses to serve a person because of who they are.¹⁴ He hires based on talent, and serves anyone: including his same-sex attracted employees and clients.¹⁵

When he was asked to print promotional t-shirts for the fifth anniversary of the local gay pride parade, Blaine could not in good conscience do it.¹⁶ As the parade representatives made clear, the message was that people should be proud of sexual relationships outside the union of one man and one woman.¹⁷ Like many who adhere to Christian orthodoxy,¹⁸ Blaine believes sexual activity should only take place between a married man and woman and that it would be wrong for him to promote a message contrary to that.¹⁹ Thus, he politely referred the order to another printer who he knew would do it for the same price as him.²⁰

Instead of going to the other printer, the pride parade organizers sued Blaine (with the publicity of the suit, they got their t-shirts for

¹⁰ *Id.*

¹¹ *Id.* at 2–3.

¹² *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (declaring that same-sex couples have a fundamental right to marry); *see also Non-Discrimination Laws: State by State Information - Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Feb. 13, 2017) (listing the states that have public accommodation laws which protect sexual orientation).

¹³ *See* Corbin, *supra* note 4, at 241–43 (explaining the status of marriage and non-discrimination laws and challenging whether expressive conduct constitutes free speech); James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 986–87 (2011).

¹⁴ Brief of Appellee Hands On Originals, Inc., *supra* note 9, at 3.

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 3.

¹⁸ *See* Donald H.J. Hermann, *Defending the Public Good and Traditional Society: Non-Scriptural Religious Objections to Same-Sex Marriage*, 49 VAL. U. L. REV. 1, 4 & n.11 (2014) (“Various religious denominations initially based their opposition [to same-sex marriage] on an understanding that the Hebrew Bible and the New Testament’s condemned homosexuality and, by extension, condemned same-sex unions.”).

¹⁹ Brief of Appellee Hands On Originals, Inc., *supra* note 9, at 5.

²⁰ *Id.*

free).²¹ Despite his willingness to serve anyone, the Lexington-Fayette Urban County Human Rights Commission (the “Commission”) found that Blaine discriminated based on sexual orientation and ordered him to print the shirts in the future.²² The Commission found that the anti-discrimination law didn’t violate Blaine’s right to free speech, it just required him to treat everyone the same.²³

On appeal, the state circuit court rejected both these propositions and found that Blaine does treat everyone the same (just not all messages).²⁴ It held that compelling him to print the t-shirts would violate the First Amendment’s prohibition on government-compelled speech.²⁵

And of course, there is the famous case of Elane Photography—the vanguard of these types of cases. In that case, the New Mexico Supreme Court held that a photographer who serves everyone, but cannot in good conscience use her artistic talents to promote every message, can be forced by the state to tell the story of a same-sex commitment ceremony in a positive light with her creative talent.²⁶

I want to highlight the concurrence in that case because it illustrates an important normative point that our society has to wrestle with, and I believe it also illustrates why some courts are attempting to shift that fixed constellation of constitutional protections against compelled speech.

In that concurrence, Justice Bosson wrote the following passage. I want to note: I don’t believe he said this with malice. During oral argument in this case he expressed genuine sympathy for Elaine Huguenin (the photographer),²⁷ and sitting there, I was hopeful he would rule in her favor.

²¹ *Id.* at 5–6.

²² *Id.* at 6, 13–14.

²³ Order Granting Summary Judgment Motion of Complainants & Denying Summary Judgment Motion of Respondent at 13–14, 16, *Baker v. Hands On Originals, Inc.*, HRC No. 03-12-3135 (Oct. 6, 2014), <http://www.adfmedia.org/files/HOOrecommendation.pdf> (Hearing Commissioner’s recommended ruling), *adopted by Baker v. Hands on Originals, Inc.*, HRC No. 03-12-3135 (Nov. 19, 2014), <http://www.adfmedia.org/files/HOOorder.pdf> (final commission ruling).

²⁴ Opinion and Order at 9, *Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm’n*, No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015), <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf>.

²⁵ *Id.* at 11–13.

²⁶ *Elane Photography, L.L.C. v. Willock*, 2013-NMSC-040, ¶¶ 23, 57, 309 P.3d 53, 63, 72.

²⁷ Although the corporation was registered as “Elane Photography,” Ms. Huguenin’s name is spelled “Elaine.” See Thomas Messner, *New Mexico Photography Business Seeks Supreme Court Review*, HERITAGE FOUND. (Jan. 3, 2014), <http://www.heritage.org/courts/report/new-mexico-photography-business-seeks-supreme-court-review> (noting the name discrepancy).

Ultimately, however, he wrote:

[T]he Huguenins . . . are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views. . . . At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. . . . In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.²⁸

Constitutional questions aside, what Justice Bosson touched on here is that, at their heart, these cases involve true conflicts of values, and these laws pick winners and losers. There are real people on each side of these cases, both with real values and real harms. What the law told Elaine, was that her values lost. That she must choose between her life's dream job, her company, or her conscience. She chose her conscience at high cost to her company and career.²⁹

I don't want to minimize the hurt that can occur when a service is denied to someone. Vanessa Willock (the woman who sued Elaine) was hurt that Elaine declined to shoot the commitment ceremony and present it like a wedding.³⁰ But I do think it is appropriate to weigh the relative harms to the parties involved. Elaine suffered considerable loss to her company to save her conscience, while Vanessa was easily able to retain another photographer after receiving a recommendation from a friend.³¹

Consider also Baronelle Stutzman in Washington State, the florist who lovingly served her friend Rob Ingersoll and his partner for nearly ten years before the American Civil Liberties Union convinced them to sue Baronelle because she could not in good conscience provide flowers for their wedding—despite there being dozens of other nearby florists happy to create the arrangements.³² The plaintiffs claimed less than ten dollars in damages—the reimbursement cost for the mileage to drive to

²⁸ *Elane Photography*, 2013-NMSC-040, ¶¶ 90–92, 309 P.3d at 79–80 (Bosson, J., concurring).

²⁹ Decision and Final Order at 19, *Willock v. Elane Photography, L.L.C.*, No. 06-12-20-0685 (N.M. Human Rights Comm'n Jan. 4, 2008), www.volokh.com/files/willockopinion.pdf (“IT IS THEREFORE ORDERED that the Respondent, Elane Photography, LLC, shall pay an award of attorney’s fees and costs, for the attorney’s representation of the Complainant, Vanessa Willock, in the amount of \$6,637.94.”).

³⁰ *Id.* at 6 (“Ms. Willock was shocked, angered, and saddened to receive Ms. Elaine Huguenin’s response.”).

³¹ *See id.* at 7–8 (stating that Ms. Willock obtained another photographer for \$1,200.00—\$250 less than the lowest price offered at Elane Photography, LLC).

³² Christine Mai-Duc, *Florist Who Rejected Same-sex Wedding Job Broke Washington Law, Judge Rules*, L.A. TIMES, (Feb. 18, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-florist-same-sex-wedding-20150218-story.html>.

another florist.³³ But, although she is represented pro bono, Baronnelle could be required to pay attorney's fees for the plaintiff large enough to put not just her business at risk, but her home as well.³⁴ Even those who have stayed in business, like Blaine Adamson the printer, have lost major contracts because of their stance—while the plaintiffs have almost universally received the requested services for free from other businesses.³⁵

The harms to the artist or business owner almost universally outweigh the harms to the individual who has to go next door for a creative professional able, in good conscience, to facilitate her wedding.³⁶ The imbalance of harms thus clearly counsels, from a normative perspective, against forcing creative professionals out of business.

Returning to the constitutional question, a New York lower court once rightly held: "Discrimination in the name of civil rights is as abhorrent as discrimination which does violence to the concept of civil rights."³⁷

The conflict we see today between non-discrimination laws and free speech rights represents such an abuse of the concept of civil rights. The core of civil rights is not to force a fellow citizen to approve of or facilitate your message or belief; it is to be free from unjust government discrimination.³⁸

³³ *Id.*

³⁴ *Id.* (Ms. Stutzman's lawyer believed the economic and professional cost of the lawsuit would affect her business, home, and retirement). The case was heard in the Washington Supreme Court on November 15, 2016 and on February 16, 2017, the Washington Supreme Court affirmed the lower court's holding that Ms. Stutzman violated the public accommodations statute and that she is personally liable. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 568 (Wash. 2017). That order did not address final damages and costs, which, at the time of this publication, have yet to be determined. *Id.* Ms. Stutzman's attorney indicated she will petition the United States Supreme Court for a writ of certiorari. Press Release, Alliance Defending Freedom, Statement of ADF Senior Counsel Kristen Waggoner from media briefing, Feb. 16, 2017 regarding Washington Supreme Court decision in *State of Washington v. Arlene's Flowers* and *Ingersoll v. Arlene's Flowers*, <http://www.adfmedia.org/files/20170216WaggonerMediaBriefingStatement.pdf>.

³⁵ *E.g.*, Brief of Appellants at 46, *State v. Arlene's Flowers, Inc.*, No. 91615-2 (Wash. Mar. 27, 2015), <http://www.adfmedia.org/files/ArlenesOpeningBrief.pdf>; Brief of Appellee Hands On Originals, Inc., *supra* note 9, at 5–6.

³⁶ *See, e.g.*, Brief of Appellants, *supra* note 35, at 13 (noting that the florist unable by reason of conscience to provide flowers for same-sex couple offered the information for three alternative local florists); Brief of Appellee Hands On Originals, *supra* note 9, at 5–6, 14 (discussing the business loss for the professionals while those ordering the services were able to find other sources with ease); Gottry, *supra* note 13, at 988–89 (stating that loss of business is a legitimate threat to creative professionals in these situations).

³⁷ *State Comm'n for Human Rights v. Suburban Assocs., Inc.*, 286 N.Y.S.2d 733, 739 (N.Y. Sup. Ct. 1967).

³⁸ *Cf.* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010) (explaining two ideologies of free speech: one that is focused on equality, and the other focused on political liberty).

We have to be prepared to protect equally speech which we like *and* dislike from government discrimination. Truly, the right to free speech (or, in these cases, the right not to be compelled to speak) is only effective if it protects that which society rejects.³⁹

And it cuts both ways. The constitution equally forbids the government from forcing the same-sex couple to promote the Catholic view of marriage as it forbids the government from forcing Elaine to promote and present a same-sex relationship as a marriage.⁴⁰ A same-sex attracted event coordinator should not have to coordinate an event for the Westboro Baptist cult (that spews hateful messages against the LGBT community⁴¹), but Mrs. Gifford up in New York should not be required to coordinate a same-sex wedding ceremony that her faith tells her it is wrong for her to participate in.⁴²

Tolerance is a two-way street. There is room for all viewpoints without the government compelling American citizens to express or facilitate messages that violate their conscience.

In stark contrast to Justice Bosson of the New Mexico Supreme Court, Justice Jackson explained the value of diversity and tolerance in this way when he wrote for the majority in *West Virginia State Board of Education v. Barnette*, holding that the state could not compel the Barnette sisters to salute the American flag or recite the pledge of allegiance:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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.⁴³

The future of this once-fixed star hangs in the balance. What that future holds, we do not know. But we, you and I, can help shape it. It is

³⁹ *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 706 (2010) (Alito, J., dissenting), (citing *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting)).

⁴⁰ McFarland, *supra* note 4, at 268.

⁴¹ *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009).

⁴² *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426, 429 (N.Y. App. Div. 2016).

⁴³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (footnote omitted).

up to each of us to ensure that the freedom to differ is not limited to things that do not matter much, and to join with Justice Jackson to hang the constellation of freedom high so that, in the country we leave our children, compromising conscience is *not* the price of citizenship.