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***Masterpiece Cakeshop's* Homiletics**

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MASTERPIECE CAKESHOP'S HOMILETICS

MARC SPINDELMAN*

ABSTRACT

Viewed closely and comprehensively, *Masterpiece Cakeshop*, far from simply being the narrow, shallow, and modest decision many have taken it to be, is a rich, multi-faceted decision that cleaves and binds the parties to the case, carefully managing conflictual crisis. Through a ruling for a faithful custom-wedding-cake baker against a state whose legal processes are held to have been marred by anti-religious bias, the Court unfolds a cross-cutting array of constitutional wins and losses for cultural conservatives and traditional moralists, on the one hand, and for lesbians and gay men and their supporters committed to civil and equal rights, on the other. The Court's central anti-religious-discrimination holding doesn't only potentially benefit opponents of such discrimination in other cases. This holding also has boomerang-like tendencies that should make it useful for those who would level anti-discrimination claims on a variety of other grounds. Liberal and progressive audiences might thus reconsider their aversions to the decision for this reason alone. What's more, *Masterpiece Cakeshop*'s "shadow rulings," described in detail here, dole out notable victories to cultural conservatives, traditional moralists, and lesbians and gay men alike. Officially declining to adjudicate the merits of the baker's artistic freedom claim under the First Amendment, the Court's opinion expresses openness and sympathy, but ultimately substantive doubt about it. In these respects, and notwithstanding suggestions to the contrary, *Masterpiece Cakeshop* is full of substantive lawmaking. Having tracked that lawmaking to its textual limits, analysis turns to the opinion's final passage, which, on one level, importantly recapitulates the opinion's constitutional rulemaking, instructing courts and governmental actors one last time on how to handle cases like this one in the future. On another level, the passage is a compass pointing to lessons in moral politics that the opinion offers to the partisans of the *Kulturkampf*. One version of the Court's moral-political teaching involves instruction in a moral politics of respect and friendship. This may be practically politically viable, leaving aside whether it will in fact be accepted. A more ambitious version of the opinion's moral-political teaching involves a moral politics of sibling love that's certain to be widely and emphatically rejected. Reconfigured in aesthetic terms, however, the moral politics of sibling love may receive a more nuanced hearing: widely dismissed as an undertaking appropriate for politics, but

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received with perhaps different sensibilities on an aesthetic plane. If it's presently uncertain and undecidable whether *Masterpiece Cakeshop* will prove to have been a major legal event, whatever is ultimately made of it, it covers plenty of ground, doing plenty of legal and extra-legal work, in the here and now.

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INTRODUCTION

There is more to the Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* than initially meets the eye.¹

Masterpiece Cakeshop isn't simply a narrow, shallow, and modest ruling by the Court for a faithful custom-wedding-cake baker against a state whose legal processes were marred by anti-religious taint.² The Court's decision does entail that ruling, of

¹ 138 S. Ct. 1719 (2018).

² For some illustrations of thinking describing *Masterpiece Cakeshop* in these basic terms, see, e.g., Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. REV. 167, 167 n.2 (2019) [hereinafter, Laycock, *Broader Implications of Masterpiece Cakeshop*] (collecting sources describing the case along these lines, and noting the narrow readings courts have given *Masterpiece Cakeshop*); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. FORUM 201, 202 n.5 (2018) (noting sources) [hereinafter NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*]; Robert Barnes, *Supreme Court rules in favor of baker who would not make wedding cake for gay couple*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-in-favor-of-baker-who-would-not-make-wedding-cake-for-gay-couple/2018/06/04/50c68cf8-6802-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.c3e0d13c12df (talking about "Kennedy's narrow ruling"); Amy Howe, *Justices send cake sequel back to state court*, SCOTUSBLOG (June 17, 2019), <https://www.scotusblog.com/2019/06/justices-send-cake-sequel-back-to-state-court/> (describing *Masterpiece Cakeshop*'s "narrow ruling"); Adam Liptak, *In Narrow Decision, Supreme Court Sides With Baker Who Turned Away Gay Couple*, N.Y. TIMES, June 5, 2018, at A1 (remarking that "[t]he breadth of the court's majority was a testament to the narrowness of the decision's reasoning"); see also Chad Flanders & Sean Olivera, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISC. 154, 158 (2019) (characterizing *Masterpiece Cakeshop* not only as "a narrow decision," the "goals" of which may have been "avoidance and minimalism," but also as "an incomplete decision, even a badly incomplete one"); Mark Movesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 750 (2019) (concluding that "*Masterpiece Cakeshop* is a narrow decision," and that "[t]he case turns on rather unique facts and does little to resolve conflicts between our anti-discrimination laws . . . and our commitment to religious freedom," but then observing that the decision's "narrowness" is "deceptive" and reflects broad "cultural and political trends" that may impact the shape of future doctrine). The analysis in these pages converges with and exceeds perspectives that have already challenged the received wisdom on *Masterpiece Cakeshop*. See, e.g., Laycock, *Broader Implications of Masterpiece Cakeshop*, *supra*, at 168 (venturing that *Masterpiece Cakeshop* isn't narrow, because, "as written, combined with . . . savvy lawyering . . . , [it] logically leads to a general protection for conscientious objectors, at least in religiously important contexts such as weddings"); NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, *supra*, at 202 (arguing that *Masterpiece Cakeshop* is not narrow, because it "supplied more guidance on the relationship between religious exemptions and antidiscrimination law [in cases of sexual orientation as well as race] than most have acknowledged"); Mark Strasser, *Masterpiece of Misdirection*, 76 WASH. & LEE L. REV. 963, 964 (2019) (describing *Masterpiece Cakeshop* as a "narrow opinion" while pointing to its "potential to . . . bring about significant changes in existing law" where "the bases for these important deviations are found not in the holding itself but in the factors that the Court implicitly endorses for consideration and in the implicit roles that these factors should play in future cases").

course, but it also unfolds a more complex and cross-cutting array of constitutional wins and losses for cultural conservatives and traditional moralists, on the one hand, and for lesbians and gay men and their supporters, and for others committed to civil and equal rights, on the other.³

This larger tally of *Masterpiece Cakeshop* includes dimensions of it that have been widely missed. Not only does the Court's central anti-religious-discrimination holding pour a jurisgenerative foundation that may prove useful for opponents of discrimination on religious grounds, but that same ruling also has boomerang-like tendencies that make it useful for those who might wish to level other sorts of anti-discrimination claims. There is also the matter of *Masterpiece Cakeshop*'s "shadow rulings"—rulings that, to varying degrees, dole out notable victories to cultural conservatives, traditional moralists, and to lesbians and gay men and other members of other traditionally subordinated groups alike. Of the opinion's textured treatment of the First Amendment claims to protections for artistic freedom ventured on the cakemaker's behalf, the Court, officially declining to adjudicate their merits, nevertheless subtly does, striking a pose of openness, sympathy, but ultimately substantive doubt about them. Having surveyed these aspects of *Masterpiece Cakeshop*, discussion focuses on the final passage of the Court's opinion, which is a source of constitutional rulemaking and an important aspect of the larger moral-political instruction that *Masterpiece Cakeshop* provides: teachings on and around moral politics of respect and friendship, and, more ambitiously, of sibling love, key aspects of the opinion's homiletics.

Viewed closely and comprehensively, *Masterpiece Cakeshop*, far from being simply a narrow, shallow, and modest decision, though not wholly lacking in those elements in some refined respects, is an opinion that complexly cleaves and binds the parties to the case. It carefully manages conflictual crisis while leaving uncertain and undecidable as of yet whether the case is or will become a major or minor legal event. As Justice Kennedy explained shortly after issuing his enigmatic decision for the Court in *Romer v. Evans* when pressed in an interview to reveal its meaning: "It will be interesting to see how [it] is understood[.]"⁴ Everything depends on what's done with it. Whatever that is, with time, *Masterpiece Cakeshop* covers plenty of ground and does plenty of legal and extra-legal work in the here and now.

I. READING THE MAJORITY OPINION

This engagement with the Supreme Court's opinion in *Masterpiece Cakeshop* begins with the reasons for the broad agreement that quickly emerged and coalesced

³ Saying this this way and so following standard imaginaries of the stakes of the case to some degree isn't to forget that some LGBT people are cultural conservatives and traditional moralists. A different, but connected, way of thinking along these lines is supplied by Joseph William Singer, *Public Accommodations & Human Flourishing: Sexual Orientation & Religious Liberty (An Essay in Honor of Greg Alexander)*, CORNELL J.L. & PUB. POL'Y (forthcoming 2020) (manuscript at 10) ("Baker Jack Phillips saw marriage as a religious matter and same-sex marriage as a sin, and if that is so, then he refused to design a wedding cake for Craig and Mullen because their religious beliefs differed from his own." (footnote omitted)).

⁴ *Romer v. Evans*, 517 U.S. 620 (1996); Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 90 (quoting Justice Kennedy).

around the decision in liberal and progressive circles, where it is already ordinarily portrayed as a narrow, shallow, and modest ruling.⁵ This representation is highly congenial to projects circulating among left-liberals and left-progressives that, owing to their various commitments, seek to minimize the reach of the victory that *Masterpiece Cakeshop* hands to anti-liberal and anti-progressive forces of cultural conservatism and traditional moralism.

The tactical utility of this gloss is one thing, but as an account of *Masterpiece Cakeshop* as text it is something else. Certainly it is if one begins with the issue of authorship. Here, right now, in this case suddenly, an emerging convention effectively braves to say that Justice Anthony M. Kennedy, at the very tail end of his career on the U.S. Supreme Court, has broken with the romantic, mysterious, agonized, and ultimately quite maximalist method that has for years been a signature of his jurisprudence and legacy, not least of all respecting the rights of lesbians and gay men in intimate relationships.⁶

This is a possibility to be sure, but it is sensible to approach it with a degree of skepticism—skepticism warranted even acknowledging that *Masterpiece Cakeshop* itself purports to focus in a very common-law-like fashion on the particularities of the record and the legal proceedings in the case and even acknowledging that the common-law-like features of the Court's opinion are designed to give it the appearance of being minor and slow-going, an incremental, one-case-at-a-time ruling.⁷ Nor is the skepticism about *Masterpiece Cakeshop*'s ostensible judicial minimalism overcome by the way Justice Kennedy's opinion for the Court, again on its surface, purports to leave the deep questions and clashes of values swirling in the case undecided.⁸

These calibrated assertions by the Supreme Court's *Masterpiece Cakeshop* decision may—indeed, should—be doubted. As the argument developed in the

⁵ See, e.g., Press Release, ACLU, Supreme Court Upholds Basic Principles of Nondiscrimination, Reverses Colorado Civil Rights Commission Decision (June 4, 2018) (available at <https://www.aclu.org/press-releases/supreme-court-upholds-basic-principles-nondiscrimination-reverses-colorado-civil>) (“The court did not accept arguments that would have turned back the clock on equality by making our basic civil rights protections unenforceable, but reversed this case based on concerns specific to the facts here.”); Press Release, Lambda Legal, Supreme Court Fails to Affirm LGBT Equality Rights (June 4, 2018) (https://www.lamdalegal.org/news/us_20180604_masterpiece-cakeshop-decision) (“Today, the U.S. Supreme Court handed the religious right a limited, fact-specific victory . . .”). The standard reading of the case as narrow, shallow, and modest holds even against the ways liberal and progressive readers also recognize some of the decision's more far-reaching aspects. See, e.g., *id.* (“The Court today has offered dangerous encouragement to those who would deny civil rights to LGBT people and people living with HIV.”) (statement by Lambda Legal CEO Rachel B. Tiven). See also sources cited *supra* note 2.

⁶ A number of criticisms leveled at Justice Kennedy and his jurisprudence are collected and responded to in Douglas M. Parker, *Justice Kennedy: The Swing Voter & His Critics*, 11 GREEN BAG 2d. 317 (2008).

⁷ See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723–24, 1732 (2018).

following pages maintains, *Masterpiece Cakeshop* textually addresses, and in important ways engages, the deep and broad clashes of values between equality-based civil rights, particularly for lesbians and gay men, and freedom of speech and of religion. Beyond any question of authorial intent, there is action, there is text: Justice Kennedy's *Masterpiece Cakeshop* opinion for the Court puts down markers on the very issues it says it's leaving unresolved and does so in ways that, once comprehended, should be taken as legally authoritative in important, if variegated, respects.

Sketching the larger thought while leaving details to be filled in: A minimalist gloss on *Masterpiece Cakeshop* has its tactical utilities, but in its robust forms above all, it cannot be sustained as a meaningful account of the text of the opinion the Supreme Court actually has brought down. Without venturing prediction, it is possible that, in time, *Masterpiece Cakeshop* will be recognized as a deeply generative source of law, much in the way that *Romer v. Evans*, which eventuated in *Obergefell v. Hodges*, now is.⁹ The ground that *Masterpiece Cakeshop* turns is certainly jurisprudentially fecund. How fecund and in exactly what ways remains to be seen.

To summarize the argument pressed in this part: Closely read, the opinion's fact-minded holding in favor of *Masterpiece Cakeshop* and its owner, Mr. Jack Phillips, operationalizes ideas about governmental discrimination that are strikingly far-reaching; moreover, those ideas far exceed the central holding of the case—that Jack Phillips and his cakeshop suffered unconstitutional discrimination based on religion at the state's hands—and involve several supplemental or “shadow” rulings that *Masterpiece Cakeshop* also delivers.¹⁰ These shadow rulings practically engage and resolve significant aspects of the deep and “difficult questions” the opinion suggests it is bracketing in their entirety.¹¹ The significance of the substantive constitutional—and by extension, as will be seen, the political and moral—promises the Court makes as shadow law, importantly structured so as symmetrically to benefit both supporters of equality-based civil rights, including LGBT rights, and cultural conservatives and traditional moralists, elevates these rulings to a doctrinal status that, if not formally black letter law, is not very far from it, and that cannot be treated merely as dicta.¹²

⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); *Romer v. Evans*, 517 U.S. 620 (1996). On *Romer*'s potential generativity, which proved prophetic, see generally Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67 (1997). For a similar notion of this comparison of *Masterpiece Cakeshop* with *Romer*, see Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors*, 2017 CATO SUP. CT. REV. 139, 151 (2017–18) (invoking Seidman's prediction and suggesting that *Masterpiece Cakeshop* may be “‘generative’ of broader holdings” for religious conservatives).

¹⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

¹¹ *Id.* at 1723.

¹² According to reports, this symmetry was on display even as *Masterpiece Cakeshop* was being handed down. Here's Mark Walsh's description: “Kennedy keeps teetering from principles favoring one side or the other.” Mark Walsh, *A “View” from the Courtroom: Justice Kennedy's Master-pièce de Résistance*, SCOTUSBLOG (June 4, 2018), <https://www.scotusblog.com/2018/06/a-view-from-the-courtroom-justice-kennedys-master-piece-de-resistance/>. For a different reading of the case than the one offered here that also

This suggests the need in the future for some mapping of the forms of shadow law.¹³ In any event, viewed together, all the rulings in *Masterpiece Cakeshop* cast the tactical description of it in liberal and progressive quarters as a narrow, shallow, and modest ruling as, at best, more politically useful than faithful to the complexities of the Court's text. *Masterpiece Cakeshop* has ambitions that run wide and deep and that are not modest in any meaningful sense. Everyone either already knows this or should to a degree. What follows explores the substantive ground this knowledge treads.

A. An Initial Look: *Masterpiece Cakeshop's* Formal Holding

Before the Supreme Court handed down its opinion in *Masterpiece Cakeshop*, many in left-liberal and left-progressive circles were convinced that they knew and understood the relevant scene of constitutional discrimination the case involved. That scene, naturally, involved the refusal by Mr. Jack Phillips, *Masterpiece Cakeshop's* owner, a baker and a man of deep faith, to prepare and bake a custom wedding celebration cake for Mr. Charlie Craig and Mr. David Mullins, a gay couple who wished to celebrate their love and their out-of-state wedding back in their home state of Colorado.¹⁴ And so it was that many left-progressives were surprised—shocked, alarmed, outraged, too—when Justice Kennedy's majority opinion in *Masterpiece Cakeshop*, seemingly out of nowhere, rewriting the script, changing the subject, and making the case's central holding turn on the record and proceedings below, announced that another scene of decision—the legal proceedings themselves—was constitutionally dispositive.¹⁵

Famously, Justice Kennedy's *Masterpiece Cakeshop* opinion trains its sights on the machinery of state in Colorado and how it processed Craig and Mullins's complaint against Phillips and *Masterpiece Cakeshop*, zeroing in on a few key moments during the hearings before the Colorado Civil Rights Commission which took place after a state Administrative Law Judge had issued a decision finding Phillips and *Masterpiece Cakeshop* had in fact and at law discriminated against Craig and Mullins when refusing to make them a bespoke wedding celebration cake.¹⁶

Surveying this extended bureaucratic moment via a review of the paper record, the Court announces its conviction that a few moments of the proceedings and their

recognizes the symmetries it involves at the level of its "tone and spirit," but that emphasizes its "reasoning betrayed its own rhetorical posture" and could "undermine the very spirit of symmetric toleration that the opinion's rhetoric aims to advance," see Zachary Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1292 (2019).

¹³ The concept of "shadow law" as used here doesn't map onto ideas of secret law, say, in the way discussed in the government secrets literature, e.g., David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010), Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241 (2015), nor to customary law as found in the social norms theory literature, see, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extra Legal Contractual Relations in the Diamond Industry*, 21 J. LEGAL. STUD. 115 (1992); Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179 (2011).

¹⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

¹⁵ See, e.g., *id.*

¹⁶ *Id.*; *id.* at 1725–27.

aftermath tainted the entire legal processing of Craig and Mullins's anti-discrimination claim against Phillips and his bakery.¹⁷ This, in short, is because the process, in the Court's estimation, was "inconsistent with the State's [constitutional] obligation of religious neutrality."¹⁸

Justice Kennedy's *Masterpiece Cakeshop* opinion describes the Commission's proceedings in sharply reactive terms. Treating the two hearings before the Commission together—the first hearing held on May 30, 2014, and the second, on July 25, 2014—the Court says that they involved "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated" Phillips to refuse to make Craig and Mullins the wedding celebration cake they wanted.¹⁹ According to the Court, the record of the Commission's proceedings reveal that "hostility" toward religion, and Phillips's faith in particular, "surfaced" at both "formal, public hearings."²⁰

Starting chronologically with the May 30, 2014 hearing, the Court explains that, during a "public[]" "conven[ing]," state "commissioners [at several points] endorsed the view that religious views cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."²¹ Bolstering this interpretation of the record, the Court points to statements by an unnamed civil rights commissioner—pure bureaucrat in this sense, but also importantly an adjudicator—saying in public and for the official record "that Phillips can believe 'what he wants to believe,' but [he] cannot act on his religious beliefs 'if he decides to do business in the state.'"²² This is worse than it may initially sound, the Court explains, for no sooner does the commissioner offer these thoughts than "[a] few moments later," in slightly different language, repeats them.²³

If you find yourself puzzled, not yet seeing the anti-religious bigotry the opinion is highlighting, do not be alarmed. The opinion, having rehearsed these remarks, itself affirms that they may be understood in a wholly anodyne light. On one view, the Court acknowledges, these statements merely indicate that Phillips, from the commissioner's perspective, had an obligation to accommodate Craig and Mullins under state law regardless of his religious beliefs. Here the commissioner would be understood to say

¹⁷ *Id.* at 1723–24, 1729–30.

¹⁸ *Id.* at 1723. Indeed, the constitutional rot that *Masterpiece Cakeshop* sees is so deep that it declines to send the case back for a do-over. It sets "the order [of the Commission] . . . aside" and "invalidate[s]" the state court's enforcement of the Commission's order, closing the book shut on this chapter of the proceedings. *Id.* at 1732. Thoughtful, if brief, discussion on this point is in Flanders & Olivera, *supra* note 2, at 174–75.

¹⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (both dates and quoted language).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

that Phillips's "refus[al] to provide services [to Craig and Mullins] based on [their] sexual orientation [is unlawful], regardless of [his] . . . personal[, religious] views."²⁴

No sooner is this understanding noted, however, than it is set against another, in which the commissioner's observations entail an anti-religious attack. "On the other hand," the Court continues, the commissioner's statements "might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced."²⁵

In saying this, the Court's opinion is not setting two equally available interpretive options on the table. Rather, the opinion is actively framing its own case that the Commission proceedings against Phillips and Masterpiece Cakeshop involved anti-religious bias, a reading of the record that takes fuller shape as the opinion engages "comments that followed" at the second public hearing of the Colorado Civil Rights Commission in July 2014, a few months later on.²⁶

Almost luckily, the commissioner's remarks at this second public hearing, quoted by the Court at some length, expressly reach back to what was said in the first public hearing, making them, by their own terms, a continuation of "what we[, the commissioners,] said in the hearing or the last meeting."²⁷ This collapse of time, space, and thought, which unifies two otherwise distinct legal events, turns out not to be all that significant. It is the observations that follow this looking-back, the observations independently made at the second Commission hearing, that ultimately serve as the touchstone for the Court's decision that *Masterpiece Cakeshop* involves a scene of state-based, anti-religious discrimination that must, constitutionally, be addressed, and that is, formally speaking, more fundamental to the case's disposition than whatever private and statutorily-appointed discrimination Craig and Mullins suffered at Phillips's and Masterpiece Cakeshop's hands.

The commissioner's remarks during the July 2014 hearing being as important as they are to the Court's disposition of *Masterpiece Cakeshop*, and in its view so harmful that they drive the Court to overturn the entire proceedings against Phillips and his bakery, they are worth quoting at the exact same length as they appear in the Court's opinion. Hear the commissioner speak:

"I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be

²⁴ *Id.*

²⁵ *Id.*

²⁶ There are recognizable parallels between *Masterpiece Cakeshop*'s aggressive reading protocol and the one featured in *Romer v. Evans*. *Romer v. Evans*, 517 U.S. 620, 623–24, 626–36 (1996).

²⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1729. The commissioners quoted by the Court's opinion at the two Commission hearings are different. By name, the commissioner quoted by the Court at the first hearing was Commissioner Raju Jairam, and at the second hearing, Commissioner Diann Rice. See Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 274–75 (2019) (naming the commissioners); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 139–40 (same).

the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”²⁸

After quoting this language, the Court repeats the comments it considers disparaging to religion: when the commissioner said that using religion “to justify discrimination” is “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”²⁹ From the Court’s perspective, its own repetition of the very language that generates the constitutional injury does not redouble but repairs it. It does this by rejecting the thought that the commissioner was taking a constitutionally permissible normative stance in the course of the proceedings, saying in basic form something like this: Faith ought to be about love and caring for others, and, therefore, invoking religion to justify discrimination darkens faith’s name in problematic ways that the state remains free to regulate.

The Court’s opinion is clear that the commissioner’s remarks insult religion in a double sense. “To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”³⁰

Leave aside the opinion’s curious, if common, understanding of “rhetoric” in order to focus on its deeper didacticism, along with its sense of how unavoidably wounding for a person of faith like Phillips the commissioner’s remarks are. In the Court’s opinion, the commissioner’s remarks are, without question, harmful.

The opinion’s instruction and simple conviction on this point are notable handiwork for other reasons. In certain faithful circles, Justice Kennedy’s own pre-*Masterpiece Cakeshop* efforts delivering and securing constitutional rights for LGBT persons achieved their disapproved-of advances through what amounted to a homologous and practically indistinguishable set of anti-religious insults. The entire line of cases from *Romer v. Evans* to *Lawrence v. Texas* to *United States v. Windsor* to *Obergefell v. Hodges* constitutionally set back the religious views and traditional moral values that had long supported a broad and traditional sexual morality that condemned all non-marital sexuality, including sodomy, as sin, as dangerous to the social fabric, hence properly public offenses, while holding up marriage as an article of faith and definition as the union of one (bio) man to one (bio) woman as husband and wife.³¹ From this point of view, the Court’s pro-lesbian-and-gay decisions, certainly most emphatically from *Lawrence* on to *Obergefell*, which variously likened and ultimately equated sodomitical sexual relations with cross-sexed intimacies

²⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). See also Kendrick & Schwartzman, *supra* note 27, at 142–43 (noting continuities between the Supreme Court’s pro-lesbian-and-gay rights decisions and the positions expressed in Civil Rights Commission hearings).

between husbands and wives in two-in-one-flesh unions in marital bedrooms across the nation, were their own offenses to religious and moral values that far exceeded a rhetorical insult to religion. The body of Justice Kennedy's lesbian and gay rights jurisprudence thus not only refused to give religious or traditional moral values the political respects that those who subscribed to them believed they were due and that everyone knows they had long enjoyed, but also, as many understood those decisions (some hissing, some cheering), the cases in this line diminished religious views and moral values when announcing the laws they were declaring unconstitutional were grounded in no more than what, in constitutional terms, appeared as animus or irrationality.³² Painting religious views and moral values supporting limits on lesbian and gay rights, along with other anti-gay sentiments, as *hateful* or *crazy* in constitutional terms, hence inconsistent with the Constitution's public morality, regardless of the historical dominance and sway they enjoyed, the Court's and Justice Kennedy's own pro-lesbian-and-gay jurisprudence registered with many people of faith and conservative moralists in exactly the same key as the commissioner's remarks now register with the Court: as state action entailing unconstitutional, anti-religious insult.³³ Many liberal, libertarian, and progressive supporters—irreligionists and immoralists perhaps above all—understood and secretly cheered these aspects of that body of law.

Set against these understandings of his constitutional legacy, *Masterpiece Cakeshop's* didacticism about the commissioner's observations on religion extends beyond its pedantry—a pedantry that joins it to the larger pedantic through-line in Justice Kennedy's constitutional jurisprudence.³⁴ It is also an effort that operates,

³² See, e.g., *Romer*, 517 U.S. at 632 (1996) (“[The sheer breadth of the law] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”); see also, e.g., *Windsor*, 570 U.S. at 770 (2013) (noting how § 3 of the federal Defense of Marriage Act (DOMA) was unconstitutionally animus-based).

³³ On “hateful” and “crazy” in the relevant constitutional sense, see, e.g., *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (“The Court has mistaken a Kulturkampf for a fit of spite.”); *id.* at 645 (“The Court’s portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ is so false as to be comical.”); see also, e.g., *Windsor*, 570 U.S. at 795 (Scalia, J., dissenting) (describing it as a “lie” “that only those with hateful hearts could have voted ‘aye’ on this Act”); *id.* at 798 (reading *Windsor* as describing Congress’s opposition to same-sex marriage as a “hateful moral judgment”); *id.* at 800 (describing *Windsor* as indicating Congress acted “irrationally and hatefully” when passing DOMA); *id.* at 795–96 (noting how extraordinary the charge of irrationality, or a “bare . . . desire to harm a politically unpopular group,” is, and describing the position as creating and maintaining “the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob”). On “insult,” see, e.g., *Romer*, 517 U.S. at 652 (“To suggest, for example, that this constitutional amendment springs from nothing more than ‘a bare . . . desire to harm a politically unpopular group’ . . . is nothing short of insulting.”); see also, e.g., *Obergefell*, 135 S. Ct. at 2626 (2015) (Roberts, C.J., dissenting) (“Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. . . . These apparent assaults on the character of fairminded people will have an effect, in society and in court.”).

³⁴ See, e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

consciously or not, to restore constitutional faith, to make amends with people of conservative faith and moral traditionalists who found the Court's reasoning in earlier pro-LGBT opinions insulting and discriminatory against *them*. Interestingly, the apologia's structure bears an uncanny resemblance to the form of projection widely seen operating in cases of gay panic, in which someone else is blamed and punished for thoughts and desires that "are properly one's own."³⁵ Here, in a panic involving religious rights, the commissioner's remarks are pinned and blamed for what Justice Kennedy's own writings had previously said and done.³⁶ Form aside, *Masterpiece Cakeshop*'s instruction on anti-religious insult and discrimination demonstrates that Justice Kennedy, speaking for the Court, may have achieved a new (or anyway, a different) level of understanding of the relationship between pro-lesbian-and-gay sentiment and anti-religious and anti-morality discrimination.³⁷ *Masterpiece Cakeshop*'s constitutional repudiation of the commissioner's remarks in this sense reads not as self-condemnation but rather as expiation, a release achieved not by formally apologizing and repudiating the pro-lesbian-and-gay constitutional opinions that many religionists and moralists found insulting, hurtful, and plainly wrong, but rather by cutting short their replication in this case, which underscores their ongoing constitutional importance and the challenges and imperatives of state accommodations of them.

If this is right, *Masterpiece Cakeshop* involves a return to thinking that guided Justice Kennedy's first major pro-lesbian-and-gay rights opinion, *Romer v. Evans*, which like this new ruling, of course, involved Colorado's anti-discrimination rules and state-based discrimination related to them.³⁸ Just as *Romer* disavowed what was widely taken as the open season for anti-lesbian and anti-gay discrimination announced by the Supreme Court's earlier ruling in *Bowers v. Hardwick*,³⁹ which sanctioned making homosexuals criminal outcasts, *Masterpiece Cakeshop* repudiates the reverberations sent out from the Supreme Court's pro-lesbian-and-gay rulings from *Romer* on, most notably *Obergefell*, and the suggestion many perceived in those cases that they reflected an elevation of secular liberal political values over and with whatever effects on religion and traditional morality the people and governors of a given jurisdiction would allow. *Masterpiece Cakeshop*'s correspondence with *Romer*'s limiting logics is thus almost predictably visible in various expressions *Masterpiece Cakeshop* uses, including its suggestion that the commissioner's statements "implying that religious beliefs and persons are less than fully welcome in Colorado's business community" are inconsistent with a wide and welcoming view of

³⁵ See Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 183, 195 (Catharine A. MacKinnon & Reva Siegel eds., 2003) (describing gay panic as "a way of punishing someone else for desires that are properly one's own"). See also Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008) (discussing "gay panic").

³⁶ See *supra* note 33 and accompanying text.

³⁷ Compare this to the perspective expressed in *United States v. Windsor*, where the Court's opinion describes the evolution both of general thinking and, more concretely, public sentiment in New York State on same-sex marriage, a description that also might be taken as an account of Justice Kennedy's own. 570 U.S. at 763–64.

³⁸ *Romer*, 517 U.S. at 623–24 (describing Colorado law as it existed at the time).

³⁹ 478 U.S. 186, 196 (1986).

political community, belonging, and equal concern and respect on display in *Romer*, here turned to protect people of faith and moralists from the exuberant operations of the liberalism promoted by the Court's pro-LGBT jurisprudence.⁴⁰ While the Court's pro-LGBT caselaw unmistakably prohibits faith-based and moral views about homosexuality and the unequal treatment of lesbians and gay men from defining the outputs of democratic political processes—requiring the state to treat lesbians and gay men just like their cross-sex counterparts—*Masterpiece Cakeshop* teaches that the cases in that line in no way stand for the proposition that conservative people of faith and their religions, or traditional moralists and their moralities, may be subject to treatment as political outcasts who must endure insulting, disparaging, hurtful, and discriminatory treatment by lesbians, gay men, and their political allies, whom the Court's pro-lesbian-and-gay rights decisions have given a boost. Equality, not hierarchy, is *Masterpiece Cakeshop*'s message in this respect. Faith and morality may operate in the constitutionally animus-based and/or irrational ways the Court's cases had declared, but calling faith and morality out for those possibilities doesn't, *pro tanto*, amount to a warrant for the hateful disrespect and discrimination that the Colorado civil rights commissioner showed Phillips, dubbing religion a “despicable piece[] of rhetoric,” maybe “the most despicable . . . that people can use to . . . hurt others.”⁴¹ If Justice Kennedy's *Masterpiece Cakeshop* opinion aggressively attacks on this point, and if those attacks bear the hallmarks of a projection that distances the opinion from the ideas that the commissioner expressed, this may be a reason why: Saying things this way preserves the ground that the Court's earlier pro-LGBT decisions cleared and claimed while simultaneously clarifying that those cases will not operate to authorize an open season on religionists or moralists who agree with Phillips. Of course, if this is what *Masterpiece Cakeshop* is about, if it is designed in this way to secure Justice Kennedy's pro-LGBT legacy into the future, it may be seen to involve a full-circle return to the seemingly humble origins of Justice Kennedy's pro-LGBT rights jurisprudence in *Romer v. Evans*.⁴² Or—and this line of thought may be more accurate—it may mean that *Masterpiece Cakeshop* contains the signs of personal melodrama, even psychodrama, of a sort that has characterized important strands of Justice Kennedy's jurisprudence, revealing *Masterpiece Cakeshop* to be,

⁴⁰ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

⁴¹ *Id.*

⁴² Saying this this way, of course, is to talk about Justice Kennedy's LGBT rights jurisprudence during his tenure on the Supreme Court. Formally, his LGBT rights jurisprudence began earlier, when he was on the Ninth Circuit. *See, e.g., Beller v. Middendorf*, 632 F.2d 788, 792 (9th Cir. 1980) (opinion by Kennedy, C.J.) (upholding as rational against constitutional attack a Navy rule that served as predicate for discharging enlisted persons with “otherwise fine performance record[s]” who “admitted engaging in homosexual acts”); *see also, e.g., Sullivan v. I.N.S.*, 772 F.2d 609, 609–10 (9th Cir. 1985) (opinion by Kennedy, C.J.) (affirming decision by Board of Immigration Appeals to deny an application by a gay male Australian to suspend his deportation from the U.S. on the grounds, *inter alia*, that it would cause “extreme hardship” to him and to the U.S. citizen man he had married after they “obtained a marriage license and participated in a marriage ceremony conducted by a minister in Colorado”); *cf. also United States v. Smith*, 574 F.2d 988, 989 (9th Cir. 1978); *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 248 (9th Cir. 1976) (opinion of Jameson, J.), *vacated sub nom. McDonald v. United States*, 429 U.S. 1033 (1977); *Soc'y for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (per curiam) (9th Cir. 1975).

psychologically anyway, maximally egotistical and personally immodest, about Justice Kennedy and his role in history as much as about the rights and interests the case involves.⁴³ On this view, the question to ask is how likely it would be that an egoistic decision like this would also turn out, on close inspection, to be jurisprudentially minimalist.

Precisely at the point where this question opens up, *Masterpiece Cakeshop* doubles down more fully to expose the sweep of its formal holding on anti-religious discrimination. The process unfolds as the opinion draws out for condemnation yet another aspect of the Colorado civil rights commissioner's brief remarks. Beyond quoting the commissioner's characterization of religion as "despicable" "rhetoric," the Court's opinion explains that "[t]he commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."⁴⁴ The opinion doesn't deny that slavery and the Holocaust were at times defended in religious terms—nor could it—but it does issue an extremely stern rebuke.⁴⁵ "This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation."⁴⁶ One sign of the emotional intensity that is actually moving beneath the surface of the Court's seemingly wholly affectless scolding is the parapraxis it commits. Justice Kennedy's opinion says that Colorado's anti-discrimination law is "a law that *protects discrimination* on the basis of religion as well as sexual orientation."⁴⁷ But that is *exactly the opposite* of what Colorado's anti-discrimination

⁴³ Compare the depiction of Justice Kennedy's majority opinion in *Obergefell v. Hodges* as found in Justice Antonin Scalia's dissent in the case. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627–28, 2629–31, 2630 n.22 (2015) (Scalia, J., dissenting); *see also, e.g.,* Rosen, *supra* note 4.

⁴⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

⁴⁵ Sketches of the relevant point, with sources, are in Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBT Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 52–56 (2018), and Murray, *supra* note 27, at 276–77.

⁴⁶ *Masterpiece Cakeshop*, No. 16–111, slip op. at 14 (June 4, 2018). This is the original language from the Court. The development of this language in subsequent versions of the Court's opinion is traced *infra* note 47.

⁴⁷ *Id.* (emphasis added). The italicized language appears in the initial slip opinion issued on June 4, 2018, and in the revised, hence corrected, slip opinion issued that same day. Compare *Masterpiece Cakeshop*, No. 16–111, slip op. at 14 (June 4, 2018), with *Masterpiece Cakeshop*, No. 16–111, slip op. at 14 (June 4, 2018) (rev. slip op.). The language was finally corrected in the revised slip opinion issued on June 13, 2018. *Masterpiece Cakeshop*, No. 16–111, slip op. at 14 (June 13, 2018) (rev. slip op.). The full sentence now officially reads: "This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. The textual indications on this passage notwithstanding, it remains true that a typographical error, even on a significant point, twice missed, can be just and only that, even if, as here, attending to the emotional intensity of the text in its original form gives rise to a different reading.

law does. Colorado law does not “protect[] discrimination on the basis of religion [or] . . . sexual orientation.” It offers protections *against* discrimination on these grounds.⁴⁸

After condemning and repudiating the commissioner’s remarks—and thus issuing a bold warning to all government officials, who are now on a renewed and heightened notice not to say hateful, hence discriminatory, hence unconstitutional, things about the religious views of people of faith or, one presumes, about traditional morality—the Court chastises those who remained silent in the face of this discriminatory likening of Phillips’s faith to support for slavery or Nazism or both.⁴⁹ Formally, the opinion mobilizes the refusal of any government official at the time of the remarks or later, in subsequent legal proceedings, to disavow what the commissioner said.⁵⁰ It treats all this silence as part of the matrix of constitutional considerations for declaring what the commissioner put on the record, hence what the state did and then didn’t do, to be constitutionally offensive: harm not only to Phillips and Masterpiece Cakeshop but also to the nation and our shared national values as reflected in the Constitution. Thus does the Court’s decision observe: “For these reasons [involving both the initial statement likening Phillips’s invocation of his religion to support for slavery and the Holocaust, and the silence in its wake], the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.”⁵¹

This overstated conclusion—at once both banal and marvelous, the Court’s conclusion being, after all, defined entirely by its choice—is immediately paired with an observation that reveals its looming insecurity as a ruling that’s compelled. While the essence of the Court’s case that the commission proceedings lacked the “fairness and impartiality” required by the Constitution has been fully made by this point in the opinion, the Court shores up this conclusion by adding some additional weight to it. The Court notes the comparatively different treatment Phillips received at the Commission’s hands from cases involving “other bakers who objected to . . . requested [custom-made] cake[s] on the basis of [their] conscience[s]” but who, unlike Phillips, “prevailed before the Commission” against discrimination claims.⁵² If these cases and their comparison to Phillips’s loom large in exchanges found in the other opinions in the case,⁵³ they function in the majority opinion’s argument as a supplemental set of

⁴⁸ As described *supra* note 47, this is the position expressed in the current version of the opinion. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

⁴⁹ A refinement of this point, on the obligation of government officials, which takes account of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), appears below. See *infra* notes 70–72 and accompanying text.

⁵⁰ This excludes Supreme Court oral arguments, where Justice Kennedy asked the state’s representative for and effectively got the disavowal that he was after, if too late. See Transcript of Oral Argument at 51–57, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16–111) (discussing the point).

⁵¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

⁵² *Id.*

⁵³ Compare *Masterpiece Cakeshop*, 138 S. Ct. at 1732–34 (Kagan, J., concurring) (discussing and comparing the cases), with *Masterpiece Cakeshop*, 138 S. Ct. at 1734–40 (Gorsuch, J., concurring) (same).

considerations—a constitutional add-on—that amounts to yet “[a]nother indication of [anti-religious] hostility” at the Commission, which had, in its essential form, been established based on the record of the administrative proceedings in the case.⁵⁴

1. An Assessment

The tactical bid to view Justice Kennedy’s *Masterpiece Cakeshop* opinion as a narrow, shallow, and modest ruling largely depends upon the sense that the Court’s conclusion is closely tethered to the record, hence tailored to the facts of the case, hence how manageable the decision’s requirement is. It seems very likely now that public officials at public hearings in *Masterpiece Cakeshop*’s wake will not slip up so readily and talk about religion in the ways the commissioner at the second public hearing in this case did nor, for that matter, remain silent in the face of such now-obviously and unconstitutionally offensive remarks. Initially, there’s reason to wonder how exactly it is that altering and superintending the speech and silence practices of public officials across the country in such a highly centralized and coordinated fashion like this lends itself as an act of power to being described as modest. In other comparative terms, it may prove true that *Masterpiece Cakeshop* maps a future in which it is seen to have picked absurdly low-hanging constitutional fruit the likes of which will not be seen again for some time, if ever.

That possibility holds, but not as a superficial one-off proposition. The Court’s analysis of the record reflects a deeper, indeed an aggressive, normative solicitude for claims of anti-religious bias by state actors, a normativity that’s complexly situated within and related to a larger vision of the import of constitutionally safeguarded political pluralisms. In this sense, even those who highlight *Masterpiece Cakeshop*’s minimalism as being intimately bound up with the record have to recognize that the normative points of view that coalesced and moved the Court to read the record in what seemed to so many a surprising, even misguided, way, do so in something of the spirit of wish-fulfillment. They *want Masterpiece Cakeshop*, with its reconstruction of the record as containing proof positive of anti-religious discrimination, to be a minimalist decision, even as they also have a sense, hence on some level know, that the normativities driving it suggest it can’t be or anyway stay that way. If the sorts of seemingly anodyne remarks in the record, all of which can be understood as stating a liberal view of the facts of how religious and moral convictions and practice must yield in the face of anti-discrimination norms, are readily construed as constitutionally illicit state action, how will anti-discrimination norms not give way as a matter of

⁵⁴ *Id.* at 1730 (majority opinion) (emphasis added). Reinforcing this point and its understanding is how the Court restates the basis for its conclusion a bit later on, where these other cases make no appearance within the Court’s basic account of why the Free Exercise Clause was violated, and only operate as an add-on: “The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.” *Id.* at 1732. *Accord* Feldman, *supra* note 45, at 42–43 (expressing a similar view on the structure of this part of the Court’s decision).

constitutional right to religious views and moral values in other respects?⁵⁵ In this sense, the effort to minimize the doctrinal significance of *Masterpiece Cakeshop* may be one way to avoid coming to terms with the fact that if what the Court says about the Commission proceedings is right—if what was said on the record, rounded out by silence, is anti-religious discrimination—then a great many liberals and progressives who share those views might be potential discriminators, too, who should check their own anti-religious impulses lest they act on them in ways amounting to unlawful private, or, depending on their statist authorities, state practice. *Masterpiece Cakeshop*'s ostensible minimalism must be deeply psychologically satisfying for those decidedly and proudly faithless liberals and progressives who, either openly or secretly, look down their noses at people, particularly conservatives, of faith and traditional moralists, or who otherwise feel justified within their positions of constitutional safety to exercise political power—including, at times, the massive powers of the state—over their religious and moralistic enemies to check their vanquished views in the public realm.

Herein lies the worry: Lurking in *Masterpiece Cakeshop* may be the seeds of a larger heuristic that sharply lines up against the worldview that many liberals and progressives rightly understand *Obergefell* to have embraced and deployed. Should *Masterpiece Cakeshop* be anything other than a minimalist decision, the constitutional liberalism of the Court's lesbian and gay rights jurisprudence may soon be subject to even more instability and challenge than it was previously or was otherwise thought to face.⁵⁶ Following that, of course, or even before it, other aspects of existing civil rights structures may come under the same pressures.⁵⁷

More immediately, but no less auspiciously, to the extent *Masterpiece Cakeshop* is serious about its disapproval of anti-religious discrimination by the state and about its commitment to ensuring that political and legal, including adjudicative, processes subject to the First Amendment's religious freedom strictures are not to be constitutionally suspect because "doubt" has been "cast . . . on the[ir] fairness and impartiality,"⁵⁸ the Court's decision in the case creates the conditions for conservatives of faith and for traditional moralists to insist upon constitutional inquiries in a range of cases in which their rights to act in conformity with their beliefs are limited by the government, testing the adequacy of the government's justifications.⁵⁹

⁵⁵ Saying this is to imagine different sorts of epistemologies within which this view holds. It is not to say that describing religion as "despicable" "rhetoric," much less analogizing conservative religious views to those supporting slavery or the Holocaust, are, as a matter of fact, anodyne. There is a separate question on this line whether even if they are not, they warrant the constitutional conclusion *Masterpiece Cakeshop* reaches, and the remedy the Supreme Court orders in the case.

⁵⁶ See *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, ___ U.S.L.W. ___ (U.S. Feb. 24, 2020) (No. 19-123).

⁵⁷ This obviously includes women's reproductive rights.

⁵⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

⁵⁹ The results of these inquiries may not always be what conservatives of faith and traditional moralists might want, but the Court's opinion in *Masterpiece Cakeshop* may nevertheless be

Consistent with *Masterpiece Cakeshop*'s teaching, the press here may be made in relation to stray comments in the record *and* to punctuated silences about them, all of which may serve as grounds for a constitutional cause of action collateral to first-order legal proceedings. Nominally and formally, *Masterpiece Cakeshop* breaks no new legal ground here. State-based, anti-religious discrimination has long been verboten, at least on the books and at least insofar as the religions and moral values are mainstream. What *Masterpiece Cakeshop* does, though, is demonstrate the Court's now-activated willingness to perform its sensitivities to claims of anti-religious or anti-morality bias in ways that show the Supreme Court to be in session—it's open for business—when it comes to pro-religion and pro-morality understandings of religious and moral freedom claims.⁶⁰

This is not to say that *Masterpiece Cakeshop* could not be held to its apparent context. The decision, it might be said, is only for the unusual case in which the constitutional imperatives of fairness and impartiality toward religion and morality have been breached in anti-discrimination proceedings, which true to their own underlying commitments must be exquisitely fair, neutral, and beyond even the appearance of discrimination as between religion and irreligion.

There's more to say about this argument, but for now, one obvious problem with it is that the First Amendment's religious non-discrimination principle on which *Masterpiece Cakeshop* sits—the basis for the Court's declaration that Jack Phillips and his cakeshop, by extension, suffered state-based anti-religious discrimination—is not in principle limitable or limited to the anti-discrimination law setting. In every case in which religious-based or morality-based discrimination is advanced as a challenge to a governmental action, in every case in which state fairness and neutrality vis-à-vis religion or morality is potentially implicated, the First Amendment's religious freedom guarantees are potentially in play. All state actors involved in official actions must now choose their words and silences with respect to religion and morality with constitutionally-sensitized care. Even casual remarks that to some liberal or progressive ears may sound utterly innocent, normatively innocuous, or otherwise harmless, may be held to be constitutionally beyond the pale, judged not (or no longer) by secularized liberal or progressive sensitivities and standards, but from within religious or moral worldviews as grounds for declaring a constitutional taint to governmental action. If so, *Masterpiece Cakeshop* may have announced the advent of a new era of "constitutional political correctness" respecting religion and morality.⁶¹

distinctively empowering, giving them the opportunity to make strategic and tactical calls about when to seek judicial review and vindication of their rights claims. *See supra* note 56.

⁶⁰ Cf. Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 Hous. L. Rev. 533, 540 (2010) ("Simply put, federal courts [after the 2000 election, in the era of *Bush v. Gore*] were open for business when it came to adjudicating election administration claims, and the post-2000 era witnessed an immense growth in election-related litigation"). Thanks to Dan Tokaji for noting the parallel thought.

⁶¹ A similar point using the language of "etiquette" is suggested in Kendrick & Schwartzman, *supra* note 27, at 135 ("In our view, the Court erred by elevating matters of etiquette—the importance of appearing respectful and considerate—over giving a reasoned justification for resolving conflicts between religious liberty and antidiscrimination law." (internal citation omitted)).

The articulation of a reasonable faithful person or a reasonable moralist standard of and for First Amendment adjudications might not be far behind.

While these prospects may generate a preliminary sense of dread among some liberals and progressives, they may also illuminate why many liberal and progressive audiences have not sought to attend more carefully and openly to the opinion's deeper resonances.

Still, to state what may initially sound a counterintuitive point, these highly negative prospects may also contain within them the seeds of much happier future news. Unless *Masterpiece Cakeshop* involves the abandonment of neutral principles of constitutional adjudication, its sensitivities to religious and moral perspectives as a basis for judging "doubt" about the "fairness and impartiality" of governmental proceedings are part and parcel of a ruling that also brings with it an announcement of a new era for adjudicating *all manner of constitutional anti-discrimination claims* that are or might be leveled against state actors involved in enforcing or adjudicating the enforcement of otherwise neutral and generally applicable legal rules.

There's no mystery about why this is. If the state processes of administration and adjudication must remain free of "doubt" about "the[ir] fairness and impartiality"⁶² in relation to the operation of neutral and generally applicable legal rules with respect to religion and morality, and if that doubt is to be judged from within the perspective from which it is launched, there's no reason to suppose *Masterpiece Cakeshop's* ruling on a religious-based right to non-discrimination shouldn't apply consistently and with equal force to other kinds of constitutionally grounded anti-discrimination claims. The constitutional anti-discrimination norms of the First and Fourteenth Amendments being on a par with one another, the prospect that the case sets forth, of first-order legal proceedings being "set aside" in their entirety because of record evidence of statements and silences amounting to religious-based or morality-based discrimination, well, who could possibly miss the legal opportunities that this should open up?⁶³ What lawyer seeking to challenge adverse governmental action, whether in a civil or a criminal setting, will not, indeed, should not, seize upon *Masterpiece Cakeshop's* teaching to assail stray remarks and silences of governmental actors, while saying of them—judged from the perspective of the claimant's group—that they demonstrate a discriminatory attitude that casts "doubt" on the "fairness and impartiality" of state proceedings in ways that violate the Constitution?

Think here, perhaps most obviously, about various claims of discrimination based on race, ethnicity, national origin, sex, sexual orientation or identity, and maybe gender identity and expression, either alone or at their intersections, and how legal records of proceedings and other aspects of legal processes can be scoured and dissected for remarks that, to the uninitiated, might seem wholly innocuous, but that viewed from a sympathetic perspective, as in *Masterpiece Cakeshop*, particularly when strung together, tell a story of discrimination at least as persuasive as the one *Masterpiece Cakeshop* tells. Cards on the table: Even if *Masterpiece Cakeshop's* story of anti-religious discrimination is not understood to be altogether compelling, and for many it isn't, it still sets a strikingly low threshold, easily crossed, in countless other

⁶² *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

⁶³ Needless to say, *Masterpiece Cakeshop* runs its religious freedom protections through the Fourteenth Amendment's Due Process Clause.

cases involving remarks that, to liberals and progressives, will sound much more clearly like they are evidence of other sorts of discrimination the Constitution presently outlaws.⁶⁴

All of this depends on the unexceptionable proposition that *Masterpiece Cakeshop* is announced within a rule of law system in which its own commitment to neutrality and generality of constitutional and legal rules is both not at all and also always in doubt. Assuming Herbert Wechsler's views still find a receptive audience on the Supreme Court, it stands to reason that the more robustly the Court is inclined, as in *Masterpiece Cakeshop*, to treat statements like those during the Colorado Civil Rights Commission's hearings as reflecting constitutionally actionable anti-religious bias, the more the decision throws open the door to a broad array of anti-discrimination challenges to first-order legal proceedings.⁶⁵ This narrow, shallow, and modest little decision is thus an invitation to second-order re-litigation that seeks to set aside first-order legal proceedings on constitutional anti-discrimination grounds. The question to ask when liberals and progressives are overheard cabining *Masterpiece Cakeshop* is why? Given their own and the Court's own rule of law commitments, why aren't they shouting "*Charge!*"?⁶⁶

Especially when *Masterpiece Cakeshop* sets the evidentiary bar for making out a discrimination claim where it does, and arguably as low. When, at the very least, everything that any government official says in his or her or their official capacities and in public on the record is in play as part of a constitutional discrimination suit.⁶⁷ Harder questions might soon involve the operative sweep of *Masterpiece Cakeshop*'s discriminatory-statement or approving-silence rule. When it does, the questions to be asked may begin with why only statements by public officials made in public and on the record count? What's special about what is audibly recorded and placed on an official transcript? After *Masterpiece Cakeshop*, the pressure should soon be on to

⁶⁴ Consider in this regard *Serial: You've Got Some Gauls*, CHICAGO PUBLIC RADIO (Sept. 20, 2018), <https://serialpodcast.org/season-three/2/youve-got-some-gauls>. This move is available notwithstanding the ways in which many readers of *Masterpiece Cakeshop* take the decision to be one that broadly cuts in favor of religious conservatives. See generally, e.g., Berg, *supra* note 9.

⁶⁵ Herbert Wechsler's standard on this score remains standard. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Importantly, it has not only been the critical legal studies set that warned against taking Wechsler's neutral principles too seriously. See, e.g., Owen M. Fiss, *The Law According to Yale*, in POWER AND POLICY IN QUEST OF LAW, ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 417, 417 (Myres S. McDougal & W. Michael Reisman eds., 1985) (recalling how Eugene Rostow "chided [him] for taking Wechsler's account of 'neutral principles' so seriously.").

⁶⁶ This suggestion, directed at the Court, is in Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 178 (2019) ("Now the Court should extend that approach beyond religious cases, and make discriminatory motivation against subordinate groups presumptively unconstitutional.").

⁶⁷ Along these lines, consider *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425, at *1, *11, *15 (W.D. Mich. Sept. 26, 2019) (focusing on statements by Michigan Attorney General Dana Nessel while on the campaign trail and linking subsequent official actions by Nessel as Attorney General to her earlier remarks in ways that liken them to statements adjudicated in *Masterpiece Cakeshop*).

seek to hold minitrials about the meaning of an “inaudible” that’s officially recorded in a proceeding’s transcript but which those in attendance can attest had relevance to a discrimination claim. It is hard to see—if the “doubt” about the “fairness and impartiality” of a proceeding is where the constitutional game is—why proceedings in conference (or for that matter, a jury room, say) should not likewise be fair game. Ditto unofficial statements by public officials, say, to the media or on social media. Why shouldn’t they count as evidence of discrimination that casts doubt on the fairness and impartiality of a state proceeding? If the constitutional concern is what *Masterpiece Cakeshop* says it is—“doubt” about “the fairness and impartiality” of governmental proceedings—why shouldn’t all those remarks count as evidence every bit as much as silence that never makes its way onto the record? At some point, a supervening line must be and will be drawn to make this rule workable.⁶⁸ But if the line isn’t principled, if it improperly applies to some but not all similarly situated discrimination claims, *Masterpiece Cakeshop* should be overturned—as an arbitrary, a political, and/or an unprincipled ruling. And if overturning *Masterpiece Cakeshop* is in fact the goal, as it is for many liberals and progressives, why relent so easily and accept the bid that this is a minimalist, fact-bound decision? Once the initial daze of this ruling, which many didn’t see coming, finally wears off, liberals and progressives may cease relinquishing what could be retooled as a powerful anti-discrimination weapon.⁶⁹

To be sure, *Masterpiece Cakeshop* may or may not prove to be a principled decision. For some, it has already plainly shown itself not to be, and for understandable reasons. Very quickly on the heels of this decision, the Court—in the first major opportunity available to it in the same Term—refused to take the principle of the case seriously and to apply it to governmental action that would’ve proven beyond any doubt its principle has sharp teeth that bite, cutting deep. To say this is to be thinking about *Trump v. Hawaii*, where the facts in evidence in the record seemed to many liberals and progressives, and to some conservatives, much more clearly than in *Masterpiece Cakeshop*, an unassailable indication that governmental action, in the

⁶⁸ For one example, see 303 Creative LLC v. Elenis, No. 16–CV–02372–MSK, 2019 WL 4694159, at *911 (D. Colo. Sept. 26, 2019) (rejecting a “pre-enforcement challenge” to Colorado’s public accommodations law based on statements made by members of the Colorado Civil Rights Commission adjudicated in *Masterpiece Cakeshop*).

⁶⁹ A similar press might involve the question of whether the relevant proceedings must entail something at least as legally, if not also socially, significant as a civil anti-discrimination ruling, which, of course, is not criminal, though it may partake of some of the attributes of it within regulatory logics and the social imagination. Think here of the ways in which, for example, sex discrimination rules in the context of Title IX proceedings, 20 U.S.C. § 1681 (2018), on college campuses often operate with and struggle against a criminal law cast. If the stakes of the proceedings are high enough, the consequences severe enough, it might be that discriminatory statements on the record or silences related to them become actionable across the board, or it might be that different rules are put in play. These ideas follow from *Masterpiece Cakeshop*’s holding’s teaching, read against the backdrop of our rule-of-law system’s rules of regularity and equal treatment, with their constitutional expressions—but the text of the Court’s opinion in the case doesn’t provide all that many helpful clues, finally, on how they should be resolved. The Court’s order in the case is certainly telling of the possibilities notwithstanding the effects on Craig and Mullins or the public at large in relation to the vindication of anti-discrimination claims.

form of President Donald J. Trump's "travel ban," was traceable to anti-religious, specifically, anti-Muslim, sentiment.⁷⁰ How, if the remarks by a nameless state commissioner and the silences by other commissioners and later by other state officials who reviewed the Commission's decision—how if all that was so obviously anti-religious discrimination violative of the First Amendment could the national travel ban involved in *Trump v. Hawaii* stand in light of Donald J. Trump's and others' anti-Muslim remarks and the loud silences in their wake? Did they not, to many people's ways of thinking, cast "doubt" on the fairness and neutrality of the governmental processes that produced the positive law rule being challenged in the case? This was at least partly, if not exactly, what Justice Sonia Sotomayor had in mind when, in the course of her *Trump v. Hawaii* dissent, she tapped on *Masterpiece Cakeshop* as precedent that required the conclusion that the travel ban could not withstand a First Amendment constitutional analytic.⁷¹

What to make of *Trump v. Hawaii* as a case that reveals something about *Masterpiece Cakeshop*'s meaning? Does *Trump v. Hawaii* already teach that *Masterpiece Cakeshop* is unprincipled, the empty personal preference politics of the Justices at its core? Perhaps it does. There's no point in strenuously denying it.

It is also possible, however, indeed it is quite easy, to distinguish *Trump v. Hawaii* as a case about presidential powers operating at their height, at the intersection of foreign affairs powers and immigration in a distinctive way.⁷² Everyone realistically knew that, at a certain point, then-candidate Trump's anti-Muslim remarks, revealing the anti-Muslim motivations behind his travel bans, would eventually be washed out by rules of regular order involving the Executive Office and intergovernmental processes in the executive branch. Everyone realistically knew about the inter-branch reluctance the U.S. Supreme Court would manifest in relation to a request for a declaration that a sitting President of the United States had, constitutionally speaking, manifested unlawful animus or irrationality toward those of the Muslim faith.

⁷⁰ A careful expression of this view is in *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Breyer, J., dissenting). For a more direct account, see *infra* note 71 and accompanying text.

⁷¹ In her dissent in *Trump v. Hawaii*, Justice Sotomayor observes that *Masterpiece Cakeshop*'s

principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant.

Id. at 2447 (Sotomayor, J., dissenting) (citations omitted).

⁷² See, e.g., *id.* at 2409 (majority opinion) (locating Presidential action "in the context of international affairs and national security," and noting the propriety of judicial deference in this setting); *id.* at 2419–20 (same, while noting separation of powers concerns).

The point here is not to get lost in digression, as significant as it absolutely is. It is instead to affirm the strength of the operative norm pushing the Supreme Court in *Trump v. Hawaii*, even the Court's liberals, to see the dignity of the office of the President of the United States in a context like the one the travel ban litigation touched on, and to imagine the Constitution requires greater deference to a processed travel ban, indeed much greater deference, than the comments of a state administrative apparatchik, or the silences related to it, by those who are all in the Supreme Court's direct constitutional line-of-command. *Trump v. Hawaii* doesn't treat *Masterpiece Cakeshop*'s anti-discrimination rule as controlling, as many believed it should have, but that refusal needn't (doesn't) (shouldn't) be imagined to cut short the operation of an otherwise still quite broadly principled understanding and application of *Masterpiece Cakeshop*. One version of the doctrinal schema might thus look like this: Over here is *Masterpiece Cakeshop*, with its anti-discrimination rule operating as a powerful and properly principled ruling, and over there, at the far, outer edge of that rule's operation, is *Trump v. Hawaii*. If that's how the cases are seen to relate to one another, and this isn't to validate either decision, there's still ample ground on which *Masterpiece Cakeshop*'s anti-discrimination rule can and should, as a matter of neutral principles, function. All that ground is abandoned, all that ground is given up, however, if *Masterpiece Cakeshop* is taken to be a narrow, shallow, and modest ruling. Gone with that understanding is the opportunity to leverage the boomerang-like quality of *Masterpiece Cakeshop* as a case about religious discrimination benefitting many others who belong to other subordinated groups protected by the Constitution who have constitutionally grounded anti-discrimination claims to make.

B. Masterpiece Cakeshop's "Shadow Rulings"

Argument to this point has operated by calling the case for reading *Masterpiece Cakeshop* as a narrow, shallow, and modest opinion into question by focusing on the opinion's central holding that Jack Phillips and Masterpiece Cakeshop were the victims of unconstitutional state discrimination on the basis of religion. Here the understanding of the law of the case is expanded based on legal propositions—call them "shadow rulings"—found within *Masterpiece Cakeshop* that carry demonstrable authoritative legal force. As those rulings come into focus, the reasons for doubting the constitutional channel that *Masterpiece Cakeshop* cuts is narrow, shallow, or modest are amplified.

At the outset, it bears repeating that *Masterpiece Cakeshop* expressly tells its readers that it is bracketing the "difficult questions" and the deep and broad clashes of values that the case involves.⁷³ That is partly true. *Masterpiece Cakeshop* doesn't openly air, examine, and settle those "difficult questions" to their fundamentals. But the suggestion entails some misdirection, a ruse. What the opinion brackets, it also detectably unbrackets—and engages—in important respects.

As *Masterpiece Cakeshop* characterizes the "difficult questions" it purports to be placing beyond its reach, it sketches a picture of the U.S. *Kulturkampf*—with its recognizable friend/enemy dynamics and partisan, identity-based positions reflecting very different ways of life—that the Court's earlier pro-lesbian-and-gay rights decisions weighed in on. The picture of the *Kulturkampf* in *Masterpiece Cakeshop* is

⁷³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

basically the same one supplied by Justice Antonin Scalia in *Romer v. Evans*, if normatively updated to function in a new time.⁷⁴ In one corner, the “difficult questions” in *Masterpiece Cakeshop* involve the ongoing struggles for recognition of the liberty, the equal dignity and worth, and the first-class citizenship status of “gay persons who are, or wish to be, married.”⁷⁵ The total victory of the right to marry project over the basic terms of LGBT rights within this description is unmistakable. In the other corner are the religious and speech liberty claims advanced by conservative religionists and traditional moralists whose faithful and moral visions remain steadfastly opposed to the right-to-marry-centered lesbian and gay rights program. Thus does the Court’s opinion in *Masterpiece Cakeshop* frame the conflict it involves in these highly partisan, oppositional, and concretely personal terms: The rights and interests of gay persons who were or who wished to be married, like the gay male couple in the case, Craig and Mullins, with their bids for full and equal access to public life reflected both in their marriage vows and their claims under Colorado’s state accommodations law, are pitted against the rights and interests of Phillips and his cakeshop, the stand-ins for the constitutional rights of faithful conservatives and traditional moralists who wish to practice and live their sincerely held views and values and, recalling the First Amendment artistic freedom claim in the case, to speak artistically through their faithful, moral work.

The Court’s framing of the contest that *Masterpiece Cakeshop* involves, while not unproblematic, is not without its uses.⁷⁶ High among them is how the Court’s understanding of the deep and difficult questions the case sits atop is broadly continuous with how the partisans involved in the case and the broader publics to which they are responsive and related have likewise tended to view the case, its issues, and their implications. Indeed, the line-up of the parties and their social identities subtend the full range of legal and political engagement with the issues that the case involves outside the constitutional judicial decisional context.

As significantly, the Court’s framing of the difficult questions the case involves and their partisan-sidedness tracks the Court’s own way of keeping score in relation to the central ruling and the shadow rulings in the case, which benefit the different sides of the enduringly deep clashes through offerings that are plainly designed as

⁷⁴ *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“The Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment before us here is not the manifestation of a ‘bare . . . desire to harm’ homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” (citation omitted)).

⁷⁵ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

⁷⁶ Not unproblematic in the sense that it leaves to the margins the rights of “gay persons” who wish to have nothing to do with marriage, as well as of the equal stature and rights of lesbians, bisexuals, transfolk, and many others with whom they’re allied. It also brackets the deeper considerations of substantive equality to which LGBT constitutional rights are related. No less significantly, this perspective is not unproblematic in the sense that it misses the ways in which people of faith don’t always line up against lesbians and gay men and LGBT equality, and that even within those communities are found religiously faithful people, and even some conservative religionists and traditional moralists. See *supra* note 3. This, of course, also means that there are LGBT people (and of course conservative religionists and traditional moralists) on both sides of the *Kulturkampf* the Court describes.

magnets inviting all the *Kulturkampf*'s players to identify with the opinion, the Court, and the Constitution by extension, while recognizing their shared and convergent legal authority finally to settle the deep clash of values the *Kulturkampf* involves within a larger shared national project of Americanness. Neither "side" in the ongoing culture wars—which are cultural wars, after all—emerges singularly victorious in the case. No side, with the Court's aid, vanquishes its foe via the sword of constitutional justice.⁷⁷ Far from it, the Court's opinion doesn't openly command the warring parties to beat their own swords into ploughshares.⁷⁸ What it does do is announce constitutional promises that invite the parties to accept *Masterpiece Cakeshop* as staking out its own reasonable and reasonably balanced accommodations of highly divergent and antagonistic positions—accommodations that everyone might accept and respect going forward, de-escalating the conflict and eliminating its most highly contested aspects from the realm of ordinary law and politics. The war that politics is, is subtly but recognizably coded as dangerous to the national peace.⁷⁹

Reflecting these broad aspirations, *Masterpiece Cakeshop*'s practice of constitutional lawmaking is both smooth and sticky. Smooth in the serene sense that *Masterpiece Cakeshop* means to reduce some of the enduring partisan frictions that might otherwise manifest, flaring up, both legally and politically in potentially socially problematic ways. It is sticky, by contrast, in the sense that the decision announces legal positions that, in their authoritative reasonableness, are meant to hold the Court to a neutral course somewhere in the middle between, without picking, the *Kulturkampf*'s sides, when the Court is asked to flesh out some other aspects of the decision's deeper shades of meanings in future cases. As it happens, this stickiness also supplies what amount to reasons for lower courts and other governmental and nongovernmental readers to attend to, and to abide, its call for reasonableness. The multi-sided position mapping *Masterpiece Cakeshop* does in the shadow of its religious discrimination ruling is lawmaking in Holmes's predictive sense.⁸⁰

1. The Pro-LGBT Rulings

Begin with what *Masterpiece Cakeshop* delivers to the Court's model of lesbians and gay men—"gay persons who are, or wish to be, married"—along with other "gay persons" and not-gay others who are nominally situated on this side of the case's clash.⁸¹ (This opinion is short on intersectional thinking: It doesn't actively imagine religious and moral liberals or lesbian and gay conservative religionists or traditional moralists.) Represented by Craig and Mullins, whose anti-discrimination claim against

⁷⁷ There are more than two sides, obviously, even if the Court doesn't recognize them.

⁷⁸ For this line of thought, see *infra* Parts II.B–II.D.

⁷⁹ This isn't meant as any kind of categorical embrace of Carl Schmitt's views on politics. See generally CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 1996).

⁸⁰ See Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

⁸¹ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

Phillips and his cakeshop suffers defeat, they receive other rewards, indeed significant treasure, on the way to that disposition.

At the broadest level, and without forgetting how the Court's recognition of Phillips's constitutional anti-discrimination claim may give *them* a boost, too, *Masterpiece Cakeshop* enthusiastically and repeatedly endorses the decisions in which the Court has previously announced pro-LGBT equality, dignity, and rights-based victories. Victories, of course, that reached their high watermark in *Obergefell v. Hodges*, and that have promised lesbians and gay men constitutional rank as first-class citizens entitled to fully equal treatment under law. That line of cases and the principles they have announced are, in fact, both the occasion for *Masterpiece Cakeshop*, and, notwithstanding the victory Phillips achieves in the case, its ongoing doctrinal teaching.

There is plenty to criticize in this, and not only from conservative religious or traditionally moralistic points of view. Powerful critiques have already been offered of the normativities that undergird and animate the Court's pro-lesbian-and-gay rulings, variously focusing on how these gains have been accomplished as a result of the Court's endorsement of ideologically driven and hierarchically inflected thinking about sex, sexuality, race, ethnicity, and class, among other grounds.⁸² Recognizing the formal equality conventionalism of existing lesbian and gay rights under the federal Constitution, hence the constitutional parity between same-sex and cross-sex relationships and marriages, and lesbians and gay men and heterosexuals more generally, which *Masterpiece Cakeshop* fortifies, there is no denying the widely recognized significance and value of the decision's reaffirmation of the Court's lesbian and gay rights jurisprudence by those who have in the past and by those who may in the future wish to arrange their lives in relation to these normative intimacy-focused marks, and by those who likewise see that the politically liberal state can have no good reason for nonneutrally excluding lesbians and gay men and same-sex couples from the traditional institutions of public and private life.

While, from one perspective, the gain here may appear minimal and formalistic—exactly what one would not just insist upon but take for granted based on ordinary applications of *stare decisis*—*Masterpiece Cakeshop*'s reaffirmation of the Court's existing lesbian and gay rights jurisprudence mustn't be too quickly dismissed. For *Masterpiece Cakeshop* to make clear that the Supreme Court's lesbian and gay rights caselaw is robustly good law is highly significant. This is not simply because of the powerful dissents filed from that positive jurisprudence, including in *Obergefell*, which insisted in different ways, often in eruptive rhetoric, that none of these cases is constitutionally legitimate, all, and perhaps none more so than *Obergefell*, being wholly lawless power grabs by Justices described as hellbent on dominating the nation

⁸² These perspectives are variously reflected in, among other sources, Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53 (2015); Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521 (2015); Praatika Prasad, *More Color More Pride: Addressing Structural Barriers to Interracial LGBTQ Loving*, 87 FORDHAM L. REV. ONLINE 89 (2018); Russell K. Robinson, *Marriage Equality & Postracialism*, 61 UCLA L. REV. 1010 (2014); Marc Spindelman, *Tyrone Garner's Lawrence v. Texas*, 111 MICH. L. REV. 1111 (2013).

and its politics through imperial and imperious acts of judicial will that have forced lesbian and gay rights—including a right to same-sex marriage—on an American people that had not democratically supported them.⁸³

Notably, *Obergefell*'s slim, one-vote margin of decision and its anti-originalist methodology placed it and the rights it protects—and in a way, potentially, all the cases it built on—squarely in the cross-hairs of a majority of the Supreme Court that, even as *Masterpiece Cakeshop* was being decided, was on the precipice of a conservative lurch away from the centering Justice Kennedy had provided since Justice Sandra Day O'Connor's retirement (and sometimes before).⁸⁴ Against this, *Masterpiece Cakeshop*'s approval of *Obergefell* and the Court's earlier pro-lesbian-and-gay rights jurisprudence by extension have the look and feel of an institutional commitment that entails an important compromise. Justices who dissented from *Obergefell* (or who might have been expected to had they been on the Court when it was decided) have now signaled, by joining Justice Kennedy's *Masterpiece Cakeshop* opinion and by staying their hands in separate opinions filed in the case, where they might have reserved judgment on the prospect of revisiting the Court's lesbian and gay rights jurisprudence, that this body of constitutional law has garnered the entire Court's authoritative respect. Whatever concerns existed about *Obergefell*'s ongoing authority after the 2016 presidential elections, *Masterpiece Cakeshop* gives reasons for thinking they may be, at least somewhat, put to rest. The entire Court—save Justice Kavanaugh, Justice Kennedy's replacement, who may have his own reasons to honor Justice Kennedy's lesbian and gay rights legacy jurisprudence—has now openly joined an opinion that figures *Obergefell* and its understanding of the right to marry as settled constitutional law. What's more, this perspective is powerfully endorsed by an opinion that prominently highlights the significance of official silences in the face of spoken words as being constitutionally dispositive.⁸⁵

⁸³ The *Obergefell* dissents are critically engaged along these lines in Marc Spindelman, *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039 (2016) [hereinafter, Spindelman, *Obergefell's Dreams*], but both Chief Justice John Roberts' dissent, and, more vividly on the surface of the text, Justice Antonin Scalia's dissent make the relevant points. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612, 2621, 2626 (2015) (Roberts, C.J., dissenting) (emphasizing *Obergefell*'s anti-democratic and extra-constitutional grounding); *id.* at 2626, 2627, 2629–31 (Scalia, J., dissenting) (same).

⁸⁴ Recognizing that *Obergefell* is anti-originalist as to method and outcome, as the *Obergefell* dissents point out, on which, see generally Spindelman, *Obergefell's Dreams*, *supra* note 83, the majority opinion in the case does not give up the cause of linking the reasons for its holding to history, including constitutional history. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015) (noting “transcendent importance of marriage” in “the annals of human history,” commenting on its transformative powers “[s]ince the dawn of history,” and recognizing how the claims are part of an understanding of history as living); *id.* at 2595 (observing that marriage's history “is one of both continuity and change”); *id.* at 2598 (commenting that the Founders “did not presume to know the extent of freedom in all of its dimensions, and so . . . entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning”); *id.* at 2598–602 (reasoning from the constitutional protections accorded to cross-sex marriage that same-sex marriages are just like it in terms of marriage's basic attributes).

⁸⁵ See *supra* text accompanying notes 49–51.

However superficially uninteresting *Masterpiece Cakeshop*'s adherence to principles of *stare decisis* may seem, the controversial nature of the Supreme Court's lesbian and gay rights jurisprudence and *Masterpiece Cakeshop*'s endorsement of it is nevertheless a major achievement. Nothing in *Masterpiece Cakeshop* prevents the winds of uncertainty about the future of the Court's lesbian and gay rights jurisprudence, including *Obergefell*, to begin to turn again, particularly if the Supreme Court begins to cut back on individual rights decisions in the closely doctrinally related area of reproductive rights. But in a ruling that technically did not require it, *Masterpiece Cakeshop*'s assurances that the Supreme Court jurisprudence of lesbian and gay rights, including *Obergefell*, is sound, is part of the law of the case that must not be missed or ignored. The constitutional rights of those inside the LGBT communities—including the right to marry—remain rights of equal dignity, respect, and first-class citizenship rank. So teaches *Masterpiece Cakeshop*.

And that's hardly all that *Masterpiece Cakeshop* offers to lesbians and gay men. Related to the way it secures the existing constitutional infrastructure of lesbian and gay rights, *Masterpiece Cakeshop* makes clear that the Court remains constitutionally committed to the basic structures of existing anti-discrimination laws.⁸⁶

Masterpiece Cakeshop's express insistence that it is not weighing in on the "difficult" question of how to settle the deep clash of civic equality and religious or moral values notwithstanding, the opinion describes the longstanding practice of translating constitutional equality norms into positive law, anti-discrimination rules as constitutionally "unexceptional"—even in the face of First Amendment religious liberty challenges to it.⁸⁷ Indeed, *Masterpiece Cakeshop* returns to this theme over and

⁸⁶ A more emphatic articulation of the point, which reaches the conclusion in its own way, is in NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, *supra* note 2, at 203: "*Masterpiece Cakeshop* is not a narrow opinion that avoids fundamental questions about the relationship between antidiscrimination law and religious liberty; rather, the opinion offers a resounding answer to a full-bore challenge to public accommodations law."

⁸⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1723, 1728. The same holds true in the face of First Amendment speech-based challenges on behalf of artistic freedom, on which see *infra* Part I.B.3. Recalling the double meaning of the "unexceptionality" of these anti-discrimination rules, their non-extraordinariness might render them either safeguarded against or distinctively vulnerable to constitutional challenge, on the thought that there's nothing unusually special about them. Noting this vulnerability may be prophetic, though the text of *Masterpiece Cakeshop* reads as seeking to stabilize, not undermine, the protections against discrimination that anti-discrimination laws provide lesbians and gay men. See, e.g., *id.* at 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."). Accord NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, *supra* note 2, at 208 (describing the Court's opinion as "treat[ing] lesbian and gay individuals as full members of the national community deserving of equal protection from discrimination," and noting that "[t]he Court accomplishes this by analyzing the case as presenting an ordinary question of public accommodations law"); Sager & Tebbe, *supra* note 66, at 174 (characterizing as "constitutional bedrock" *Masterpiece Cakeshop*'s observation that "it is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in

over again, always more or less to the same basic effect, as the deep logic of the opinion itself suggests. Just as religious and moral views and values must not interfere with neutral and general *constitutional* rules of lesbian and gay equality—including in the marriage setting—and just as the First Amendment Free Exercise Clause provides no religious freedom exceptions to those constitutional obligations, so, too, in the context of anti-discrimination norms: Legislative commitments to the first-class citizenship status of lesbians and gay men and their rights to equal dignity and respect, as expressed in positive law rules of neutral and general applicability, hold against First Amendment religious freedom challenges to them.

An initial sense of this perspective emerges even as *Masterpiece Cakeshop* is found saying, early on, it won't be engaging the "difficult" questions involving the deep clashes of public values around equality and religious liberties the case entails. As it says this, the opinion goes out of its way to highlight the "difficulties" it believes would attend announcing a valid religious freedom claim as a defense to the ordinary operations of a public accommodations/anti-discrimination regime like Colorado's. The permutations of First Amendment free exercise claims in this setting, the Court explains, "seem all but endless."⁸⁸ Endless they might be, were the Court ever to recognize that a right to religious freedom conditions, hence limits, the exercise of neutral and generally applicable anti-discrimination protections under law. But the problem the Court is identifying at this juncture goes beyond its implicit configuration of a problem of judicially manageable (or unmanageable) standards in the face of the possibility of readily proliferating religious liberty claims. Those constitutional challenges must be set against the highly serviceable and simple rule of regularity that has governed in this arena, and generally, for some time. As the Court characterizes the normal constitutional rule: "The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."⁸⁹

This use of "might"⁹⁰—the baker "might have his right to the free exercise of religion limited by generally applicable laws"⁹¹—may initially sound like a hedge on what "the Court's precedents [otherwise] make clear[.]"⁹² Viewed this way, it is interesting that the Court declines at this precise textual moment to cite the most obvious and relevant precedent for its point, *Employment Division, Department of*

society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law" (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727)).

⁸⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

⁸⁹ *Id.* at 1723–24.

⁹⁰ *Id.* at 1724.

⁹¹ *Id.*

⁹² *Id.* at 1723.

*Human Resources of Oregon v. Smith*⁹³ or any other decision announcing the constitutional rule that “[t]he Court’s precedents make clear.”⁹⁴

One possible explanation for this elision arrives in Justice Neil Gorsuch’s separate concurring opinion. Justice Gorsuch’s opinion emphasizes the controversy that *Smith* has engendered “in many quarters”⁹⁵ as a prelude to its own careful description of *Smith*’s scope. As the concurrence puts it, providing an opening for just the sort of exception *Masterpiece Cakeshop* potentially involved, “this Court held that a neutral and generally applicable law will *usually* survive a constitutional free exercise challenge.”⁹⁶

Looking at the Court’s *Masterpiece Cakeshop* opinion in light of Justice Gorsuch’s concurrence, it could be that the majority opinion’s studious avoidance of *Smith* and the family of cases associated with it is an element of what Walter Murphy felicitously dubbed “judicial strategy.”⁹⁷ It could be part of an underlying project that responds to sensitivities that Justice Gorsuch’s separate opinion or one or more of the other justices making up the Court’s majority expressed, a vote-getting or vote-holding move.

Another understanding of the majority opinion’s elision of *Smith* and the precedents to which it’s related is also in sight. When *Masterpiece Cakeshop* observes that Phillips-the-baker “might”⁹⁸ have his religious freedom rights curtailed by the state through its anti-discrimination laws, it may well be doing nothing more than characterizing *Smith*’s rule while carefully noting that it operates in part by giving the state a constitutional permission about how it legislates against discrimination.

Consistent with *Smith*, the state must not purposefully discriminate against religion when enacting neutral anti-discrimination rules of general applicability. But those laws “might” nevertheless contain within them safe harbors for the free exercise of

⁹³ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). *Smith* is cited by the majority opinion in its description of the Administrative Law Judge’s ruling in the case. *Masterpiece Cakeshop*, 138 S. Ct. at 1726. It is also cited in the Court’s description of proceedings in the Colorado Court of Appeals. *Id.* at 1727.

⁹⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

⁹⁵ *Id.* at 1734 (Gorsuch, J., concurring).

⁹⁶ *Id.* (emphasis added).

⁹⁷ See generally WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). Consider *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (mem.) (Alito, J., concurring in the denial of certiorari) (discussing *Smith* as having “drastically cut back on the protection provided by the Free Exercise Clause”). See also Linda Greenhouse, *The Court and the Cross*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/opinion/supreme-court-religion-first-amendment.html> (“The court’s most conservative justices — Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh — are currently trolling for a case that would provide a vehicle for reinterpreting the Free Exercise Clause to give the same robust protection for believers as the statute [the Religious Freedom Restoration Act], in the court’s view, currently does. Achieving that goal means overturning a 1990 precedent, *Employment Division v. Smith*[.]”). See also, e.g., Laycock, *Broader Implications of Masterpiece Cakeshop*, *supra* note 2, at 201 (“Some religious conservatives look forward to *Smith* being overruled. That could happen; four Justices recently invited litigants to explicitly present the question.”).

⁹⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

religion, which function to limit the anti-discrimination rubric's ordinary sweep.⁹⁹ The Court here, then, may simply be expressing the obvious: that states might, as Colorado did, enact neutral and general public accommodations rules that govern all businesses serving the public without exception. Business owners like Phillips, whose faith might counsel action that would violate public accommodations rules, might in those circumstances be required to abide by the neutral and general rules which regulate them "in [their] capacit[ies] as the owner[s] of . . . business[es] serving the public."¹⁰⁰ In the alternative, the states "might" instead choose to carve out exceptions in their public accommodations statutes for religious or moral views and values, enabling those who sincerely adhere to them, say, to have a valid defense against what would otherwise be a claim or liability for unlawful discrimination. Seen this way, the Court's opinion is a simple and straightforward invocation and endorsement of *Smith* and its teaching.

Although this may sound strange, both possibilities may be right in this instance. It might both be significant and not significant at all that *Masterpiece Cakeshop* avoids invoking *Smith* and the cases related to it by name at this moment when the Court could obviously lean on their authority. That it doesn't flags the enduringly significant issue of *Masterpiece Cakeshop*'s meaning in relation to *Smith*. On this score, there's much more to *Masterpiece Cakeshop* than its invocation (not citation) of *Smith*'s rule as both "clear" and well-settled law.

Among the more potent facts in evidence in *Masterpiece Cakeshop* is the way the opinion builds on and reinforces *Smith*'s basic structure, and in particular, *Smith*'s view that the state may regulate religious and moral practices along with their secular counterparts without running afoul of the First Amendment—so long as it produces and adheres to neutral rules of general applicability that don't purposefully discriminate against religious and moral conduct, or religious or moral actors, because of their religious or moral views and values.

Masterpiece Cakeshop's basic alignment with this understanding of *Smith* is easily obscured by the Court's own representation of its decision in the case, amplified by those who see it as a narrow, shallow, and modest decision, involving only what is sometimes regarded as an exception to *Smith*'s rule: a stand-alone anti-religious discrimination claim against the state of Colorado.¹⁰¹ The opinion's idea here is that

⁹⁹ *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669 (2010) ("CLS . . . seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity."); *id.* at 694 n.24 ("The question here, however, is not whether Hastings *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their faith. It is instead whether Hastings *must* grant that exemption.").

¹⁰⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

¹⁰¹ See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993). *Lukumi* is cited in the majority opinion, *Masterpiece Cakeshop*, 138 S. Ct. at 1730, 1731, including for the important proposition "that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of

Colorado breached its constitutional obligation to avoid religious discrimination when its agents, during the course of enforcement proceedings involving what happens to have been the state's public accommodations laws, revealed their anti-religious bias while in different ways also remaining inappropriately silent in the face of it.

What this account of *Masterpiece Cakeshop* achieves in simplicity it loses in its capacity to explain how *Masterpiece Cakeshop* reaffirms and extends the promises of *Smith* and its rules.

The thinking here is not complex. *Masterpiece Cakeshop* teaches that laws of general applicability must not only be neutral in the abstract and in their initial promulgation, but that they must steadfastly remain neutral throughout the course of their actual operations. When they do not, when they “even ‘subtl[y] depart[] from neutrality’ on matters of religion”¹⁰²—as the record in *Masterpiece Cakeshop* indicates to the Court is what took place in this case—the state will be held to have violated its “obligation of religious neutrality”¹⁰³ under the First and Fourteenth Amendments.

This shift in perspective here is conceptually small, but significant in terms of its implications. Seen this way, *Masterpiece Cakeshop* is not merely about the constitutional wrongfulness of statements and silences amounting to state discrimination against a person of faith, much as that is involved in the case. *Masterpiece Cakeshop* is an object lesson about both the constitutional wrongfulness and the constitutional propriety of state laws written consistent with *Smith* and how those laws function in action. *Masterpiece Cakeshop* is very strict with the state in order to exact compliance with the constitutional guarantee of state neutrality with respect to religion under *Smith*. When the state truly remains neutral the ways that *Smith* and now *Masterpiece Cakeshop* instruct that it must, it may continue to bar discrimination in public accommodations through a unitary and general rule of conduct that governs “business[es] serving the public”—even when they’re owned and operated by people of deep religious faith or by traditional moralists of a different stripe.¹⁰⁴ *Masterpiece Cakeshop* hammers the state proceedings in the case in a way that effectively defends the ongoing constitutional tenability of anti-discrimination regimes like Colorado’s that regulate, while seeking to guarantee, broad equal access to public accommodations on various non-discrimination grounds.

While this is partly an argument from—and of—interpretive atmospherics, passages emerge at various points in *Masterpiece Cakeshop* that condense and sediment the understanding.¹⁰⁵ In one important passage, for instance, in which the

affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Id.* at 1731. The opinion then clarifies that “even ‘subtle departures from neutrality’ on matters of religion” are “bar[red],” *id.*, continuing by explaining that, “[h]ere, this means that the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs.” *Id.*

¹⁰² *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

¹⁰³ *Id.* at 1723.

¹⁰⁴ *See id.* at 1724, 1727–29.

¹⁰⁵ *See*, for instance, *supra* text accompanying note 98.

Court's text is working overtime to keep up the appearance of solidarity with both of the ways of life it understands to be warring in the case, the Court remarks that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."¹⁰⁶ This is the Court speaking plainly to what it regards as the Constitution's, hence the positive law's, "normal science": Positive law civil rights protections are part and parcel of our shared political life and in accord with its deepest values.¹⁰⁷ So long as these rules satisfy conditions of religious neutrality, they are not subject to constitutional doubt. "Unexceptional" means just that. Here the Court illustrates the difficulty that religious liberty arguments recommending constitutional limits on what is otherwise unexceptional will and should face in the courts. So far, *Smith* and anti-discrimination rules enacted and enforced consistent with it, hold.

Leading arguments for Phillips's position in *Masterpiece Cakeshop* affirmed without calling into question the authority of these basic constitutional and positive law conventions, treating them as axiomatic in our constitutional regime. Thus did supporters of Phillips's position have to try to thread what they sought to describe as a very small eye of a very sharp needle, mounting religious liberty claims that would not blow a big constitutional hole through public accommodations rules like Colorado's. Consistent with this thinking were ideas in the case about how public accommodations rules might apply to the off-the-shelf baked goods that religious bakers made, but not to those goods that were custom-made for events like weddings.¹⁰⁸ Only the custom-made items, not "premade baked items," were to be given First Amendment religious liberty protections.¹⁰⁹

This purportedly circumscribed religious liberty claim even in this purportedly circumscribed form involved a roll-back of *Smith*'s authorization of state action

¹⁰⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

¹⁰⁷ On "normal science," see Kathryn Abrams, *Introduction, The Distinctive Energies of "Normal Science,"* 9 ISSUES IN LEGAL SCHOLARSHIP 1, 5 (2011) (citing Angela P. Harris, *What Ever Happened to Feminist Legal Theory?*, 9 ISSUES IN LEGAL SCHOLARSHIP 12 (2011), which itself draws the metaphor from THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962)).

¹⁰⁸ *Compare Masterpiece Cakeshop*, 138 S. Ct. at 1726 ("The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop 'had a policy of not selling baked goods to same-sex couples for this type of event.'"), with Brief of Petitioners at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16–111) ("These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked."), and with *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment) (noting that "the Colorado Court of Appeals resolved [a] factual dispute [about "whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding cake (including a premade one)"] in Phillips' favor.").

¹⁰⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1728; Brief of Petitioners, *supra* note 108, at 9 ("These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked.").

regulating religious practice consistent with neutral rules of general applicability. Understanding this, *Masterpiece Cakeshop* shoots back against this position with respectful constitutional doubt. A “decision in favor of the baker”¹¹⁰ that created a new, constitutionally grounded religious freedom exception to the state’s public accommodations rules “would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages,’ something that would impose a serious stigma on gay persons.”¹¹¹

The Court’s careful locution technically leaves open the prospect that a “sufficiently constrained” claim of just this sort might be proposed to and accepted by the Court in a future case. To succeed, the Court would have to perceive, as it did not in *Masterpiece Cakeshop*, a meaningful constitutional offramp. Emphasizing the Court’s expressive care here risks missing the degree to which *Masterpiece Cakeshop* itself discounts the prospect of the Court finding, then affirming, such a “sufficiently constrained” argument. The Court, after all, had before it the best and most “constrained” arguments that supporters of religious liberty, representing Jack Phillips and Masterpiece Cakeshop, could come up with. Faced with those arguments, constructed by some of the cultural conservative movement’s best and brightest lawyers, the Court was not moved to accept them. Presumably, the Court knew what it would be committing itself to doing if it did so. It would have been starting itself down a path that would immediately commit it to limiting *Smith*, hence undermining its foundations, potentially paving the way of its overruling, while also—this is important in light of what *Masterpiece Cakeshop* says—authorizing a return to an open season of public discrimination against gay marriage that, in the Court’s words, “would impose a serious stigma on [lesbian and] gay persons.”¹¹²

In the age of *Obergefell*—which *Masterpiece Cakeshop* preserves, hence continues—First Amendment religious freedom ought not be understood to include a constitutional right to practice anti-lesbian and anti-gay discrimination that the Constitution forbids the state to impose. Just as lesbians and gay men, married and not, are themselves constitutionally guaranteed freedom from state discrimination in a range of aspects of state-regulated life, they may also be granted, hence enjoy, broad and basic anti-discrimination protections that shore up their constitutional equality, dignity, and liberty rights—free from judicial interference in the name recognizing and vindicating First Amendment rights to religious or moral free exercise.¹¹³

All this in *Masterpiece Cakeshop* is a function not only of the Court’s own general understandings of the relationship between legal and constitutional equality and religious freedom norms, but also, more particularly, as a function of the meaning and implication of the Supreme Court’s lesbian and gay rights jurisprudence, a body of law that, much to the bitter disappointment of some faithful conservatives and

¹¹⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

¹¹¹ *Id.* at 1728–29.

¹¹² *Id.* at 1729.

¹¹³ *But see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643, 659 (2000). This makes *Dale* an outlier.

traditional moralists, has effectively blocked the operation of religious and moral views and values in the political, hence the legal, realm, where they long supported laws and legal rules that actively discriminated against and stigmatized lesbians and gay men. In vital respects that *Masterpiece Cakeshop* reaffirms, the Supreme Court's lesbian and gay rights jurisprudence, including *Obergefell*, has, after all, announced a highly politically liberal view of the state's normative relation to lesbian and gay rights and lesbians and gay men. Nothing may stop religious or moral views on the status of homosexuality from being expressed in the public arena, but those views, however else they circulate, cannot become the basis for anti-lesbian and anti-gay state regulation. It is partly with views like these in mind that *Masterpiece Cakeshop* proposes that: "Our society" (and not just the Court) "has come to" recognize that rules of law, including those that are religiously or morally driven, that would treat "gay persons and gay couples . . . as social outcasts or as inferior in dignity and worth" impinge upon the freedoms lesbians and gay persons must be allowed "in the exercise of their civil rights."¹¹⁴ Courts and other governmental actors are duty-bound to give the civil rights and freedoms lesbians and gay men are entitled to both "great weight and respect," respect that isn't cross-cut or diminished by constitutional respect for religious views and moral values.¹¹⁵

This being the deeply liberal structure of the Court's lesbian and gay rights jurisprudence, now reaffirmed by *Masterpiece Cakeshop*, it stands to reason that this constitutional rights framework would find structurally analogous expression in the positive-law anti-discrimination setting. As the Court notes, the state is authorized to regulate private actors in ways that conform to the constitutional rules of civil society that the state itself must abide. By extension, just as constitutional norms of lesbian and gay equality rights—rights the Court has given expression in both neutral and generally applicable ways—are not subject to an override by the state in the name of religion or of morality, those claims having no constitutional force against lesbian and gay rights in the political realm, there is likewise to be no constitutionally based religious freedom exception that would cut short the operation of positive law anti-discrimination rules for reasons of faith or morality. This understanding of what *Masterpiece Cakeshop* proposes exfoliates the Court's position that positive law anti-discrimination rules, including when they bar anti-gay discrimination by private actors, are "unexceptional" and remain "unexceptional" when applied to, hence regulate, faithful and moral action on the same terms applied to all other forms of public conduct. Nor, one might think, could it be otherwise, if the structure of constitutional governance rules is effectively to ensure lesbians and gay men get the equal dignity and worth, first-class citizenship rights, and individual liberty they deserve.

To repeat, this does not mean that people acting from their faith-based or moral commitments who stand opposed to homosexuality and to same-sex intimacies and relationships may not hold to their views and express them in the public arena. *Obergefell* expressly confirms that right and nothing in *Masterpiece Cakeshop* takes

¹¹⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

¹¹⁵ *Id.*

it away.¹¹⁶ But expression is one thing and translation of that expression into discriminatory action is another. So, as faithful conservatives and traditional moralists have no First Amendment religious right to translate their opposition to homosexuality into policy that would serve to govern, so, too, they may not govern lesbians and gay men through their interpersonal and public conduct in those jurisdictions that, like Colorado, have legally constrained it. The First Amendment's Free Exercise Clause is in this respect not a source of a political right: No right to translate religious or traditional moral views and values against homosexuality into law and no right to translate them into a legal exception to the operation of neutral and generally applicable anti-discrimination laws that conform to the demands of *Smith*. Though deeply politically liberal in its orientation, this approach to the rights of the faithful and of traditional moralists is no warrant to discriminate against them in the enforcement of existing anti-discrimination rules. And while some very particular and very limited constitutional incursions on the rights of lesbians and gay men may be tolerated in order to protect the rights of the faithful and of traditional moralists—more about which momentarily—the general pattern set that *Masterpiece Cakeshop* confirms, broadly but not rigidly and not without exception to balance it out, is deeply pro-lesbian-and-gay.

Recognizing that *Masterpiece Cakeshop* does not finally settle these matters in all their particulars, indeed, acknowledging that the opinion formally leaves open the narrow question of whether there might be some “sufficiently constrained” Free Exercise right that may yet be articulated that will not cut too deeply into the regular operation of public accommodations and other anti-discrimination laws, the Court's opinion in the case insists on the basic security of both constitutional and positive law anti-discrimination claims that lesbians and gay men enjoy, if not as commonly as many would like.¹¹⁷ Consistent with *Masterpiece Cakeshop*, no argument will prevail against these claims of right that does not preserve them in their basic and broad operation, lest the Court begin to unwind its lesbian and gay rights jurisprudence, allowing private actors acting for religious or moral reasons to stigmatize lesbians and gay men by excluding them from ordinary aspects of public life. From this starting point, it would be easy to imagine other politically based, anti-gay attacks being defended in the name of religious freedom from the Court's own constitutionally grounded anti-discrimination rules. *Masterpiece Cakeshop* promises the Court won't walk this path.

¹¹⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential . . . may engage those who disagree with their view in an open and searching debate.”).

¹¹⁷ For some of these limits, consider Adam Liptak, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES, Apr. 23, 2019, at A1. See *infra* note 210.

2. The Pro-Faith and Pro-Traditional-Morality Rulings

All that is what lesbians and gay men—and others concerned with civil rights, civil liberties, and civil justice—receive. What about faithful conservatives and traditional moralists? What does *Masterpiece Cakeshop* give them?

In general terms, to return to *Masterpiece Cakeshop*'s central holding, the Court's opinion promises that constitutionally unexceptional public accommodations and anti-discrimination regimes like Colorado's will be meaningfully neutral both on their face and in operation. These regimes must not come at the expense of faithful conservatives or traditional moralists and their own constitutional entitlements to equal dignity, respect, and full membership in political community. *Masterpiece Cakeshop* announces that the Supreme Court is now on watch in a renewed, activated way over the vast operations of the legal system, prepared to protect faithful conservatives and traditional moralists from the vicissitudes of state discrimination against them because of their religious and moral views, values, and beliefs. Liberal secular views and sensitivities, which may in certain respects themselves be constitutionally required, must not blunt the state's and its agents' capacities for understanding and treating conservative religionists and traditional moralists with equal concern and respect—even, or perhaps especially, when they are charged with violating anti-discrimination rules. But these promises, which include the elevation of a conservative religious and moralistic perspective to the level of a constitutional norm that constrains the deployment of state power, are not the only promises that *Masterpiece Cakeshop* makes to them.

Perhaps most significantly, over and above the central ruling in the case, is how *Masterpiece Cakeshop* concretely delivers a First Amendment Free Exercise ruling on the rights of clergy to practice their faith when serving as civil marriage officiants. The articulation of this rule—part of a long-assumed axiom of First Amendment religious liberty—marks an important outer limit of the Supreme Court's pro-lesbian-and-gay jurisprudence,¹¹⁸ and one that also potentially supplies a foothold against it for any future attempt seeking to claw back pro-lesbian-and-gay constitutional gains.

Masterpiece Cakeshop's declaration about the rights of clergy serving as civil marriage officiants arrives against the backdrop of *Obergefell*. Although Justice Kennedy's majority opinion in *Obergefell* went out of its way to insist that its right-to-marry ruling was no knock against religion, a number of its readers, building on the *Obergefell* dissents, saw it as a deeply politically liberal decision the secular liberal impulses of which were insensitive, indeed hostile, to religion and traditional morality.¹¹⁹ At the sharpest edges of these concerns was the prospect that *Obergefell*'s

¹¹⁸ See, e.g., Brief of Amicus Curiae Douglas Laycock et al. in Support of Petitioners at 30, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Laycock, *Obergefell* Brief] (indicating that the “broader principle” on which *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), “rests” “plainly covers [a] religious body’s definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or provide the space for doing so.”).

¹¹⁹ See *Obergefell*, 135 S. Ct. at 2594, 2607 (making the point that the opinion intends respect for religious views and values). For perceptions of *Obergefell*'s actual insensitivity and hostility

“transformation” of civil marriage, “a keystone” of the social order, might fully secularize it, and, in the process, diminish or eliminate the clergy’s rights to be involved with it on faithful terms.¹²⁰

Alarmist as they may sound, these concerns are within *Obergefell*’s doctrinal reach in ways that Justice Antonin Scalia anticipated during oral arguments in the case.¹²¹ *Obergefell*’s central holding, constitutionally prohibiting the state from differentiating between same-sex and cross-sex couples for civil marriage purposes, technically operates by limiting the state’s authority over civil marriage through cases brought against various state agents. That *Obergefell*’s limits on the state’s authority over civil marriage apply equally to state and state agents alike was dramatically reinforced after the decision came down when various state actors from different jurisdictions, objecting to the ruling, sought to evade its strictures on religious and/or moral grounds.¹²² The official decisions variously requiring those agents to submit to *Obergefell*’s authority spotlighted a prospect that could independently be perceived: that clergy who receive their legal authority to consecrate civil marriage from the state,

to religion and traditional morality expressed by the *Obergefell* dissents, see, for example, *id.* at 2625 (Roberts, C.J., dissenting) (discussing some of the “serious questions about religious liberty” the majority opinion raises, and observing that “[t]he First Amendment guarantees . . . the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”); *id.* at 2638–39 (Thomas, J., dissenting) (noting *Obergefell*’s threats to religious liberty); *id.* at 2642 (Alito, J., dissenting) (suggesting *Obergefell* will “be used to vilify Americans who are unwilling to assent to the new orthodoxy” and leveraged to “stamp out every vestige of dissent,” except perhaps “whisper[ing] their thoughts in the recesses of their homes”). An impassioned sense of the secular, anti-religious stakes of *Obergefell*, traceable to the goals of the “homosexual rights advocates” behind it, is found in Michael Stokes Paulsen, *The Wreckage of Obergefell*, FIRST THINGS, Oct. 2015, at 33, 36 (“If same-sex marriage is, as the Court has now said, a fundamental constitutional liberty, those who resist it are like segregationists resisting *Brown v. Board of Education*—forces of evil to be extirpated. Civil rights laws provide the bulldozer for eliminating such views. . . . The[] goal of [“[h]omosexual rights advocates”] is to stigmatize, delegitimize, and quickly extinguish opposition to the new norm, especially dissent grounded in religious conviction. They avowedly seek to run traditional religious views off the field.”).

¹²⁰ The quoted language is from *Obergefell*, 135 S. Ct. at 2595 (“These and other developments in the institution of marriage over the past centuries . . . worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.”); *id.* at 2590 (“[M]arriage is a keystone of the Nation’s social order.”).

¹²¹ See Transcript of Oral Argument at 23–27, *Obergefell*, 135 S. Ct. 2584 (No. 14–556).

¹²² See, e.g., BILLY CORRIHER, CTR. FOR AM. PROGRESS, A HANDFUL OF ELECTED STATE JUDGES CONTINUE TO DENY MARRIAGE EQUALITY (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/11/30105912/JudgesMarriageDefiance-brief2.pdf>; The Editorial Board, *Illegal Defiance on Same-Sex Marriage*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html> (collecting a few examples).

might, as state agents in this limited respect, be similarly compelled to recognize that *Obergefell* was their “Ruler,” too.¹²³

Prominent among the forms of resistance to these prospects were state law reform efforts expressly authorizing clergy generally licensed by state law to perform civil marriages to refuse to do so in cases of same-sex marriage.¹²⁴ One problem with these measures was how they flouted what many understood to be *Obergefell*'s command. Problematically, they imagined the state retained the authority even after *Obergefell* to license (at least some of) its agents to do what it itself could not: discriminate for religious and/or moral reasons between same-sex and cross-sex couples who wished to marry.¹²⁵

Against the prospects of the unconstitutionality of these measures, which underlined the case for *Obergefell*'s threat to the rights of clergy acting as civil marriage officiants, many remained certain that nothing in *Obergefell* generated any actual instability around the free exercise rights of clergy to refuse to perform civil marriages in contravention of their faith. Those who saw matters this way found support in the comprehensive responses offered to Justice Scalia's concerns at the time he expressed them. After he first raised a question at oral arguments about ministerial rights to refuse participation in same-sex marriages, Justices Stephen Breyer and Elena Kagan joined cause to remind him and those who shared his concerns that the clergy had in fact long been understood to enjoy a First Amendment free exercise right not to celebrate marriages for couples of different faiths.¹²⁶ That being the case, their remarks suggested, any decision in *Obergefell* affirming the right to marry for same-sex couples would surely not operate to restrict clergy rights to decide whether to solemnize those marriages. When Justice Scalia even more pointedly asked, “You agree that – that ministers will not have to conduct same-sex marriages?,” Mary Bonauto, for the petitioners, responded unhesitatingly and unequivocally: “If they do not want to, that is correct. I believe that is affirmed under the First Amendment.”¹²⁷

¹²³ See *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting) (“Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”).

¹²⁴ See, e.g., H.B. 1706, 217th Leg., Reg. Sess. (N.J. 2016); H.B. 36, 132d Gen. Assemb., Reg. Sess. (Ohio 2017). Perspective on religious accommodations measures in antidiscrimination statutes is found, among other works, in Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015) [hereinafter, Koppelman, *Gay Rights, Religious Accommodations, and Antidiscrimination Law*], and Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

¹²⁵ A version of this argument is in *Testimony Regarding H.B. 36 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (statement of Prof. Marc Spindelman), <https://moritzlaw.osu.edu/faculty/wp-content/uploads/sites/7/2017/02/Spindelman-IP-testimony-H.B.36.pdf>.

¹²⁶ See Transcript of Oral Argument at 26–27, *Obergefell*, 135 S. Ct. 2584 (No. 14–556) (comments by Justice Stephen Breyer and Justice Elena Kagan).

¹²⁷ See Transcript of Oral Argument at 27, *Obergefell*, 135 S. Ct. 2584 (No. 14–556) (question by Justice Scalia and answer by Mary Bonauto).

Bonauto cited no Supreme Court authority for this “belief,” but that was because there was none at hand to cite for the point. The First Amendment free exercise rule she invoked was so axiomatic that no Supreme Court case had ever had to declare and set its boundaries.¹²⁸ Just the same, Bonauto’s view, which Chief Justice Roberts curiously characterized as a litigation “concession,” as though there might still be some doubt about it, expressed a clear, if not the only, vision of the constitutional landscape that *Obergefell* took as background when it was decided.¹²⁹ Seen this way, *Obergefell*’s silence on the rights of clergy to refuse to perform same-sex marriages was predictable but in an entirely uninteresting sense. It meant nothing and did nothing to call the pre-existing rights of clergy into doubt. All the *Sturm und Drang* about *Obergefell*’s implications for the clergy’s constitutional freedom was a distraction that, viewed critically, was either a political strategy to whip up a base in opposition to *Obergefell*, a wildly irrational reading of the decision, or, maybe, both.

What these critical registers achieve from a certain point of view they achieve by not acknowledging, and even evading, how *Obergefell*, as its dissents attested, conduced to a phenomenology of upheaval, groundlessness, and doubt. As the dissents maintained, *Obergefell*’s decision to “order[] the transformation of a social institution that ha[d] formed the basis of human society for millennia” did not have the look and feel of a measured constitutional ruling that took the next logical step in the course of the Supreme Court’s evolving lesbian and gay rights jurisprudence.¹³⁰ Instead, it appeared to involve the production of what the dissents saw as a radical, unprecedented, revolutionary rupture that, as an act of pure judicial will, broke faith with the past, raising the wonder Chief Justice Roberts’s dissent expressed: “If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?”¹³¹ This ruling, in which the Supreme Court arrogated to itself the power to be the nation’s and the nation’s people’s “Ruler,” not only banished conservative religious views and traditional moral values from their place within the public square, where their traditional understanding of marriage as the union of one man to one woman as husband and wife could hold sway in law, but it also threatened to closet them so that they might only speak their “old beliefs” in “whispers,” as Justice Alito’s dissent put it, “in the recesses of their homes[.]”¹³² In these and other ways, the *Obergefell* dissents depicted *Obergefell* as revolutionary in the sense of turning the world upside down in a grand act of theft—“[s]tealing this

¹²⁸ Consider the precise location of the remarks found in the amicus brief Douglas Laycock filed in *Obergefell*, Laycock, *Obergefell* Brief, *supra* note 118 at 30 (indicating that “broader principle” on which *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), “rests” “plainly covers [a] religious body’s definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or provide the space for doing so.”).

¹²⁹ Transcript of Oral Argument at 36, *Obergefell*, 135 S. Ct. 2584 (No. 14–556) (“We have a concession from your friend that clergy will not be required to perform same-sex marriage[.]”).

¹³⁰ The quoted language is from *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

¹³¹ *Id.* at 2622.

¹³² The quoted language is from *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting) (“Ruler”), and *id.* at 2642 (Alito, J., dissenting).

issue from the people”—in ways that meant that all bets were off on what the Supreme Court would or wouldn't or could or couldn't possibly do next.¹³³ This was not a Supreme Court that could be counted on to recognize the histories and traditions of the American people, including people of faith, as constitutional ballast. So, yes, *Obergefell*'s silence around the constitutional rights of clergy to refuse to involve themselves in same-sex civil marriages *might* be meaningless. It might precisely signal *Obergefell* left them untouched and intact. But the silence could also be a wink to “homosexual rights advocates” who proffered a litigation concession recognizing the constitutional rights of clergy while harboring dreams of “stigmatiz[ing], delegitimiz[ing], and quickly extinguish[ing] opposition to the new [pro-homosexual] norm [that *Obergefell* announced], especially dissent [to it] grounded in religious conviction,” all in the hopes of “avowedly seek[ing] to run traditional religious views off the field.”¹³⁴ If the traditional definition of marriage didn't stop the *Obergefell* Court from doing what it did, why would an axiom about the free exercise rights of the clergy in relation to traditional marriage fare any better? If *Obergefell* did not intend to sow doubts around the rights of clergy after Justice Scalia brought them up, it could very easily have followed the lead of some earlier same-sex marriage rulings that premitted worries like these with only a few, direct words.¹³⁵ Recognizing its choice not to utter them, *Obergefell* left open the possibility that its silence on the clergy's rights—whatever the Court's original intention behind it—could later be filled up with anti-religious content that would have the practical effect of compelling clergy to perform civil marriages they did not wish to, or of practically pushing them out of the civil marriage business altogether. Hence the phenomenology that *Obergefell* produced for some: of upheaval, groundlessness, and doubt.

Masterpiece Cakeshop firmly and finally puts these possibilities—however remote or imminent they once were—to rest.¹³⁶ Without being required to, *Masterpiece Cakeshop* clarifies retrospectively that *Obergefell* implied no abandonment of constitutional respect for our country's longstanding commitment to

¹³³ The quoted language is from *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

¹³⁴ Paulsen, *supra* note 119, at 36. Many will have trouble recognizing Paulsen's “homosexual rights advocates” and their views, particularly those lesbians and gay men who have deeply faithful commitments and the many others who themselves do not but who nevertheless are deeply dedicated to ensuring that faithful commitments and those who hold them get their full constitutional respects. Cf., e.g., CHRISTIAN DE LA HUERTA, *COMING OUT SPIRITUALLY: THE NEXT STEP* (1999).

¹³⁵ See, e.g., *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (“no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs”); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965 n.29 (Mass. 2003) (observing that “[o]ur decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons”).

¹³⁶ On the inevitability, consider the positions mapped out in the *Masterpiece Cakeshop* litigation in Brief of Agudath Israel of America as Amicus Curiae in Support of Petitioners at 3, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2017) (No. 16-111) (arguing that “under the reasoning of the court below, the state could even force an Orthodox rabbi to preside at a wedding of two men, or of a Jew and a non-Jew”), and the answer in Brief for the Central Conference of American Rabbis et al. as Amici Curiae at 22–23, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (explaining that there is “no basis” for concerns like this in light of *Obergefell*, with its references to religious liberty).

religious liberty, and specifically, no diminution or elimination of the clergy's free exercise rights in relation to civil marriage. *Masterpiece Cakeshop* reaffirms *Obergefell*'s promise of the right to marry, but this time around as a promise that is subject to an important caveat for the free exercise rights of clergy acting under color of state law. They are told that they may continue to choose which civil marriages to perform—including same-sex, cross-sex, or both—consistent with their faith. *Masterpiece Cakeshop* licenses clergy to treat cross-sex and same-sex couples and marriages differently for religious and/or moral reasons, assuring them the constitutional right to do what the state from which their civil marriage authority derives must not do for itself. If and when the clergy exercise this right and discriminate against same-sex couples and same-sex marriages, their actions will not be chalked up to the state as unconstitutional state action under *Obergefell*.¹³⁷

Masterpiece Cakeshop structures this announcement in simple and direct, if situationally qualified, terms:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.¹³⁸

In saying this, *Masterpiece Cakeshop*'s constitutional assumption effectively recognizes what the Court regards as a reasonable accommodation of conflicting constitutional values. Past its awkward conditionals, the passage delivers present-tense declarations that readers are urged to accept as constitutional fact. "When it comes to [the] weddings" of same-sex couples, the right to marry is constitutionally protected, but "it can [still] be assumed" that religious officiants need not involve themselves in consecrating these civil marriages under state law.¹³⁹ Members of the clergy who refuse to be involved in same-sex marriages cannot "be compelled" to do so without violating their "right[s] to the free exercise of religion."¹⁴⁰ In "our constitutional order," these refusals are constitutionally safeguarded "exercise[s] of religion" that "gay persons could"—meaning, in context, will have to—"recognize and accept."¹⁴¹ Protecting the rights of clergy not to involve themselves in same-sex marriages does not violate lesbian women's and gay men's constitutional rights. For the Court certainly, if not for everyone else, this is a modest, reasonable constitutional adjustment that must be made consistent with the traditions of our pluralistic

¹³⁷ Important insights on state action doctrine works are in Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1 (2006).

¹³⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

¹³⁹ *Id.* Nothing in *Masterpiece Cakeshop* formally precludes states from de-conferring authority on the clergy to officiate civil marriages. It clarifies only that *Obergefell*'s constitutional rule on civil marriage "can be assumed" not to require them to use the civil marriage authority they receive from the state in contradiction of their faith. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

constitutional system and that should be acceptable to “gay persons” since there is no “serious diminishment to their own dignity and worth,” or their basic legal rights.¹⁴² So far, *Masterpiece Cakeshop* has proven to be right: No serious resistance to these First Amendment restrictions on the constitutional right to marry has yet emerged.

In making this announcement about the constitutional free exercise rights of the clergy not to officiate same-sex marriages that the state itself must recognize, *Masterpiece Cakeshop* is, of course, once again weighing in on precisely the “difficult” terrain it indicates at the outset it is not going to decide. The Court does so in a way that suggests a certain symmetry is its guide. The Court is seeking to construct a neutral balance between the rights and respect accorded to the two “sides” involved in the deep clash of values the case implicates. Just as conservatives of faith “might have [their] right[s] to the free exercise of religion limited by generally applicable laws”¹⁴³ when those laws operate in truly neutral ways, so lesbians, gay men, and same-sex couples “might have [their own constitutional] right[s]”¹⁴⁴ diminished, albeit not in any “serious” way, in the face of a limited range of free exercise claims by clergy consistent with their “moral and religious” views and values.¹⁴⁵ The Court is asking conservatives of faith and traditional moralists, along with “gay persons,” to “recognize and accept” these cross-party checks on their constitutional rights as part of what it means to live together in a pluralistic constitutional community.¹⁴⁶

While the Court’s articulation of this “assumption” about the rights of clergy to be state agents and still to use their state-conferred powers in ways that are consistent with their faith is technically only that, to imagine this is nonbinding dicta instead of a binding rule of law that lower courts should and will follow and that the Supreme Court in a future case would, too, is to give short shrift to the practical gravity of this declaration in a Supreme Court opinion such as this.¹⁴⁷ Here is the Supreme Court making a constitutional commitment to clergy who lead communities of faith and moral values. There are no easy take-backs with a constitutional assumption like this one, about as solemn a constitutional promise as any the Supreme Court might make as a matter of secular constitutional faith.

Herein lies a key point to understanding the authoritative status in law of *Masterpiece Cakeshop*’s other shadow rulings. Recognizing the cross-cutting balances animating the opinion and the ways it affirms the rights of those the Court sees on both sides of the controversy, *Masterpiece Cakeshop*’s various shadow rulings may be regarded as all having the same basic legal stature: not formal holdings, but something closer to that than to what the language of dicta would conventionally suggest. These are promises that emerge from the Constitution, that covenant Justice Kennedy famously understood to run from generation to generation of Americans, which the

¹⁴² *Id.*

¹⁴³ *Id.* at 1724.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1727.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (noting that the relevant rights of the clergy “can be assumed”).

Court has repeatedly stood prepared to make good on, and, as Justice Kennedy put it elsewhere, whose meaning may become clearer as time and understandings change.¹⁴⁸

Seen in this light, and surveying all the legal ground that Justice Kennedy's *Masterpiece Cakeshop* opinion claims and occupies and presumably is ready to defend, and even without forgetting all the aspects of the "difficult questions" the case presents that the Court does not in any way address, it is time to ask once more: Exactly how is this a narrow, shallow, and modest ruling?

3. The First Amendment Speech Arguments for Artistic Freedom

The overarching thrust of the argument to this point has been that *Masterpiece Cakeshop* is a wider, deeper, and less modest decision than it has regularly been understood to be. That argument is about to be extended, but first it needs to be acknowledged that the majority opinion in the case doesn't claim as much ground as it might have. This isn't intended as an observation on how the Court could have done more to fill out and rule on aspects of the case it does decide. It is, rather, a way of focusing attention on the Court's treatment of the other First Amendment claims presented in the case: claims that variously circled around the notion that Phillips is a custom cake artist whose artistry, which is in service of his faith, enjoys First Amendment speech protections that guarantee him the artistic freedom to decide whether or not to use his talents to create custom-made cake commissions for same-sex marriage celebrations and to do so free from the pain of violating the state's anti-discrimination laws.¹⁴⁹

As background, Phillips's artistic speech freedom claims emerged in a distinct range of doctrinal terms. His merits brief alone features the claims as a stand-alone work-up of the import of artistry as a distinctive form of speech, as a compelled-speech claim, as an expressive conduct argument, and within the context of content and viewpoint discrimination bids.¹⁵⁰ All these expressions advanced the notion that

¹⁴⁸ On the Constitution as "covenant," see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992) ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents."). For more on the Constitution as a document with a changing meaning in the context of lesbian and gay rights, see, for example, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry [into fundamental rights] but do not set its outer boundaries. . . . The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."); *id.* at 2603 ("Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

¹⁴⁹ See *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

¹⁵⁰ Brief of Petitioners, *supra* note 108, at 17 ("The Free Speech Clause protects both expression and expressive conduct. This Court must initially decide whether Phillips's custom wedding cakes are artistic expression."); *id.* at 19 ("Phillips's custom wedding cakes are his artistic expression because he intends to, and does in fact, communicate through them."); *id.* at

there's something about art and artistry, with their special emphasis on expression, hence communication, that the First Amendment speech clause, with its values and doctrinal forms, should be understood to countenance and protect.¹⁵¹

Equally salient as a shared feature of these various constitutional expressions of the idea that Phillips's artistry is protected as First Amendment speech is how they relied on the standard secular language of other speech rights, an orientation that all constitutional rights share. But if First Amendment protections themselves were secular in their basic form, in content they were not. For Phillips, the speech right to artistry is religious. His artistry is indissolubly bound up with his faith. In Phillips's briefs, this is a point of pride, as when it is said that he uses his artistry—from the earliest stages of his artistic process to the deployment of his talents in preparing a finished work: a custom-made cake—for the glory of his God.¹⁵² Wedding cakes, his papers argued, are distinctive not only in their historical and present-day social meanings, but, in Phillips's artistic-religious view, because weddings celebrate marriage, which definitionally involves the union of one man and one woman as husband and wife, a sacred union that “exemplifies the relationship of Christ and His Church,” and that accordingly manifests and furthers “God’s design.”¹⁵³ The Heavenly

23 (“Phillips’s creation of custom wedding cakes at least qualifies as a form of expressive conduct.”); *id.* at 27–28 (“[T]he Commission directly interfered with Phillips’s artistic discretion” and “forced him to express views different from his own.”); *id.* at 35 (“Ordering citizens to engage in unwanted artistic expression is such an affront to the First Amendment freedoms that no less than strict scrutiny will do.”); *id.* (“Phillips triggered CADA only because he addressed the topic of marriage through his art . . . Penalizing an artist because of the topics on which he has chosen to speak is decidedly content based.”); *id.* at 36 (“Going beyond mere content discrimination, the Commission has engaged in viewpoint discrimination . . . [because] the Commission’s order here requires Phillips to express ideas diametrically opposed to his own.”). For an incisive take on the artistic freedom arguments in the case, see Robert Post, *What About the Free Speech Clause in Masterpiece?*, TAKE CARE BLOG (June 13, 2018), <https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece>. See also James Hart, *When the First Amendment Compels an Offensive Result: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 79 LA. L. REV. 419, 427–36 (2018) (arguing that *Masterpiece Cakeshop* involves compelled speech and viewpoint discrimination).

¹⁵¹ It may thus be that, in a certain sense, describing Phillips’s custom cake-making as art, including for constitutional purposes, gives it both expressive, and so distinctive First Amendment, legs, while also functionally serving to limit its still otherwise potentially sweeping (and so not unproblematic) scope. Thanks to Dan Tokaji for conversation on this point.

¹⁵² See, e.g., Petition for Writ of Certiorari at 4–6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111) (discussing the relation between Phillips’s “religious conviction” and his wedding celebration cakes).

¹⁵³ *Id.* at 6; *id.* at 5–6 (“Of any form of cake, wedding cakes have the longest and richest history. In modern Western culture, the wedding cake serves a central expressive component at most weddings and is traditionally served at the reception celebrating the couple’s union [It] forms the centerpiece of a ritual in which the couple celebrates their marriage by feeding each other cake and then sharing cake with their guests. Only a wedding cake communicates this special celebratory message” (citations omitted)); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (“Jack Phillips is an expert baker[.] . . . Phillips is a devout Christian. He has

Father looms here as the Great Creator, the Author of All Things—making him, among all else, The Artist of Artists. There being consonance, harmony, and beauty in the dynamic unity of Phillips’s art and faith, a unity that is revealed in the good work of his wedding cakes, his refusal on religious scruples “to use his creative talents to design and create cakes that violate his religious beliefs” is but another way he submits in his devotion and “honors God.”¹⁵⁴ Preferring not to is not resistance for resistance’s sake, but art’s, which in Phillips’s case, makes it also for religion’s.¹⁵⁵ Central as his God is to Phillips’s artistry, faith is not, for constitutional purposes, offered up as a necessary condition for the exercise of the First Amendment right claimed on his behalf, here, again, a secular right to speech protections for his art, which liberate it from state anti-discrimination regulation.

The apparent overlap between Phillips’s First Amendment speech claims to artistic freedom and his First Amendment claims to religious freedom makes it easy to imagine these arguments have no meaningful independence of terms.¹⁵⁶ There may be truth to that as a matter of litigation tactics, but the protections for artistic freedom that Phillips sought, transcend creativity’s inspirational source as well as its aims. Hence the alliance Phillips’s arguments tried to build with artists everywhere, be they faithful or faithless, as with his merits brief’s ominous warning early on that “a ruling against Phillips [on First Amendment speech grounds] threatens the expressive freedom of all who create art or other speech for a living.”¹⁵⁷

While the First Amendment claims for artistic freedom were leading arguments in the Supreme Court litigation phase of *Masterpiece Cakeshop*—they were featured as the principal arguments in Phillips’s paper submissions, and, perhaps more importantly, they grounded the federal government’s arguments in the case—Justice Kennedy’s majority opinion downgrades them to claims of relatively minor textual significance.¹⁵⁸ They are found dwelling more or less at the operative margins of the Court’s official text.¹⁵⁹

What little *Masterpiece Cakeshop* ventures to say about the First Amendment speech protections for artistic freedom, it says while regularly keeping their precise

explained that his ‘main goal in life is to be obedient to’ Jesus Christ and Christ’s ‘teachings in all aspects of his life.’ And he seeks to ‘honor God through his work at Masterpiece Cakeshop.’ One of Phillips’ religious beliefs is that ‘God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.’ To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.” (citations omitted)).

¹⁵⁴ Petition for Writ of Certiorari, *supra* note 150, at 5.

¹⁵⁵ *Id.* at 5–6.

¹⁵⁶ One version of the thought would be that the First Amendment religious freedom claims “really” drive both.

¹⁵⁷ Brief of Petitioners, *supra* note 108, at 3.

¹⁵⁸ See, e.g., Brief of Petitioners, *supra* note 108, at i, 16–37; Brief for United States as Amicus Curiae at 9–33, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16–111).

¹⁵⁹ On these claims being pushed to the margins of *Masterpiece Cakeshop*, see, in addition to aspects of the opinion discussed in the text, for example, *Masterpiece Cakeshop*, 138 S. Ct. at 1723, 1726.

doctrinal variations blurred in their focus, and while regarding their central impulse—that the First Amendment protects speech that includes artistic freedom in state-power-limiting ways—with an admixture of openness, sympathy, but, finally, discernibly active doubt.¹⁶⁰

Early on, *Masterpiece Cakeshop* remarks that “[t]he free speech aspect of this case is difficult[.]”¹⁶¹ In the context of Phillips’s First Amendment speech claims for artistic freedom made to the Court, which the Court’s opinion duly acknowledges, this suggestion indicates the Court finds it “difficult” to accept the claims outright.¹⁶² Explaining why, the Court observes that “few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.”¹⁶³ It is hard to read this passage and not surmise the Court is at least partly talking about itself. Among those “few persons” anyway, may have been a few of the Justices who, like others, before *Masterpiece Cakeshop* may never have thought about constitutionally protected speech when they saw a beautiful wedding cake, which they then proceeded to eat. One doesn’t eat words like that.

Ordinarily, the Court’s response to a previously unheard-of position like this First Amendment speech claim, particularly as the source of a binding rule of constitutional law that would forever bind and govern the nation, would be in the form of swift and certain dismissal. But the Court resists and pulls its punch. “[F]ew persons” who have ever “seen a beautiful wedding cake might have thought” of its artistic creation as constitutionally safeguarded free speech, but that, *Masterpiece Cakeshop* indicates,

¹⁶⁰ An exception arises in the Court’s treatment of the religious liberty argument. See *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (“The treatment of the other cases and Phillips’ could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished.”). See also *infra* note 185.

¹⁶¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

¹⁶² There are two passages in which the Court unambiguously recognizes the relationship between Phillips’s First Amendment speech claims and how they’re grounded in his argument in notions of artistic freedom. The first arrives as the Court discusses proceedings below. *Id.* at 1726. The second arrives as the Court is discussing Phillips’s argument to the Court. *Id.* at 1728 (“He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs.”). This second passage is discussed in greater detail below. See *infra* text accompanying notes 167–175.

¹⁶³ *Masterpiece Cakeshop*, 138 S. Ct. at 1723; accord Brief of American Unity Fund & Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16–111) (“[C]ake-making—even cake-making for ceremonial occasions (such as weddings and birthdays)—lacks any . . . longstanding legal recognition as an expressive medium. . . . [T]he absence of any case law protecting the expressiveness of cake baking suggests that it has not been regarded in our constitutional tradition as a medium of expression. That makes cake baking distinct from long-recognized mediums of expression such as writing, singing, or photography.”); Post, *supra* note 150 (“Phillips’ claim that his free speech rights were infringed faced the obvious objection that baking is a simple provision of services rather than a medium for the communication of ideas.”). For contextualized, critical engagement with Carpenter and Volokh’s position, see ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT (forthcoming 2020) (manuscript at 71–72, 81–82).

might turn out to be all that's required to do the constitutional trick.¹⁶⁴ "This," the Court flatly observes, "is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning."¹⁶⁵

This statement, with its "is," is remarkable. In a decision affecting the rights of lesbians and gay men written by Justice Kennedy, it also feels portentous. The language of the Court's instruction conjures the familiar sound of the Court ringing this very bell in its earlier pro-lesbian-and-gay rights decisions as they proudly, if not uncontroversially, broke new constitutional ground, stoking the forces of living constitutionalism.¹⁶⁶ What's more, and more disconcerting, the massively obvious social differences between the claims of liberty involved in those lesbian and gay rights cases and in this one do not register at all at this point in the opinion. The social movement work, the organizing, the actions, the contests, the setbacks, the regroupings, not to forget the study, the thinking, and the writing, along with all the other struggles and bodily tolls during the long, dark years of homosexuality's outlawry and the national debates about it all, all of which finally moved the country and then the Court to recognize the liberty, equality, and first-class citizenship claims of lesbians and gay men, are now lined up in a comparative way with a breezy idea fronted in litigation that has not been the subject of any national debate, hence testing, and that could not have been, because, as the Court itself authoritatively says, "few persons" had even thought or heard of the idea animating it before now. But no matter. The prospects of constitutional reform are anyway tacitly potentially equated. *Masterpiece Cakeshop* formally declines to opine on the merits of any of the First Amendment speech claims involving artistic freedom, but that declination is attended by a courtly openness to the very ideas that the Court officially refuses to accept. For now.

Masterpiece Cakeshop reaffirms its openness to the idea of First Amendment protections for artistic freedom later on. During a larger discussion emphasizing the constitutional, legal, and citizenship status of lesbians and gay men, which underscores the existence and "unexceptional" nature of anti-discrimination laws, the Court acknowledges that Phillips "claims" his artistry is protected as a First Amendment speech matter.¹⁶⁷ Notice how the opinion's text, which goes out of its

¹⁶⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment . . . entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) ("[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

¹⁶⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1728. The text at this point raises a prospect that this talk of the "unexceptional" nature of anti-discrimination law undercuts ideas that see this large,

way to flag Phillips's association of protected speech and art, shifts its own perspective while describing Phillips's position:

[Phillips] argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' right to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.¹⁶⁸

The opinion's sensibilities here are nuanced and become increasingly fictive, hence literary. The opinion's observations, which finally figure the Court not simply as repeating Phillips's argument objectively but discovering it operating in Phillips's head, is scarcely epistemically modest in any meaningful jurisprudential sense. Narratively speaking, its qualities are imagined and omniscient. Past its qualification ("the baker *likely* found it difficult . . ."), the opinion proceeds as though the Court has direct access to the baker's interiority, his perspective, his thoughts, and more, including how belief in the Spirit touches his heart and organizes his faithful obligations in relation to law.¹⁶⁹ In this respect, the opinion temporarily performs a complete merger with Phillips through an identification with him, a multiples-in-one union that reads as an indication not only of an openness to Phillips's speech claim, but a highly identified, hence sympathetic, engagement with it, as well. Clearly, the Court is seriously contemplating his position, imagining affording his artistry First Amendment speech protections, just as Phillips asked.¹⁷⁰

What this means for how far *Masterpiece Cakeshop* is willing to go on Phillips's First Amendment speech and artistry arguments will become clearer soon enough, but before getting to that there's the question of why the opinion goes out of its way to identify itself with Phillips in relation to his First Amendment speech claims and their protections for artistic expression. One prospect of what, in fact, is undoubtedly an

complex body of law as having constitutional stature. *See generally* BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2018); WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2013). Here, by contrast, they may be thought to be no different than unexceptional laws, like traffic ordinances. Recognizing this possibility, the weight of the opinion seems to run closer to Ackerman's view than this one, without finally settling anything. Just so, there is also a comparison on all this to *Hosanna Tabor*, in which anti-discrimination norms were not, to say the least, heavily weighted in the face of religious liberty claims. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."). *See also* discussion *supra* Part I.B.1.

¹⁶⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ The good news here is that the opinion, written by Justice Kennedy, makes this at least in part a same-sex merger?

over-determined answer is that the Court's convergence with Phillips has less to do with the Court's own normative view of the claims he's made than it is about a majority of the Court being comfortable offering what may be regarded as anodyne expressions of openness and identification with, and an understanding of, Phillips's position. After all, two of the Justices who join the Court's opinion basically accept it. The story here is judicial strategy all over again.¹⁷¹

This much, as a partial explanation, comes into view through Justice Clarence Thomas's concurring opinion, joined by Justice Neil Gorsuch, which validates and normalizes what it dubs Phillips's "free-speech claim" far in excess of the majority's identification with Phillips and his views.¹⁷² The concurrence gets, accepts, and would have the Court deliver Phillips constitutional First Amendment speech protection for his art. The concurrence endorses the view that Phillips's custom cake making—"creating and designing custom wedding cakes"—is "expressive conduct," a conclusion it reaches via a line of thought emphasizing and accepting that Phillips-the-baker should be seen constitutionally as Phillips-the-baker-artist whose cakeshop is an artistic studio proudly held out to the world as such and whose artistic creations result from a highly intentional artistic process.¹⁷³ Thus: "Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message."¹⁷⁴ This message, the concurrence maintains, is altered by the state's public accommodations law, which "[f]orc[es] Phillips . . . to, at the very least, acknowledge that same-sex weddings are 'weddings' and [to] suggest that they should be celebrated—the precise message he believes his faith forbids."¹⁷⁵ Both against, but also in a sense with, this thinking, which the concurrence rounds out and defends, the majority opinion's willingness to be open to, and sympathetically to identify with, Phillips and his position may operate as a kind of transference in which the Court wishes to perform a limited solidarity with the views expressed in Justice Thomas's

¹⁷¹ See generally MURPHY, *supra* note 97.

¹⁷² See *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment); see also, generally, *id.* at 1740–48. See also, e.g., Brief for United States as Amicus Curiae, *supra* note 158, at 8 ("The law compels Phillips to design and create a custom wedding cake for a same-sex couple, if he would do the same for an opposite-sex couple. A custom wedding cake is a form of expression, whether pure speech or the product of expressive conduct. It is an artistic creation that is both subjectively intended and objectively perceived as a celebratory symbol of marriage.").

¹⁷³ *Masterpiece Cakeshop*, 138 S. Ct. at 1742–44 (Thomas, J., concurring in part and concurring in the judgment).

¹⁷⁴ *Id.* at 1743. An illuminating counterpoint is in WENDY BROWN, *Speaking Wedding Cakes and Praying Pregnancy Centers*, in *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 123, 137 (2019) (Phillips's wedding "cakes carry . . . religious meaning for him, though not necessarily for others and thus not necessarily when they 'speak' wedding at the events they adorn. Phillips himself speaks, then, not through his art, but through his willingness or refusal to provision for events he believes to be divinely ordained or condemned.").

¹⁷⁵ *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment).

concurrence. If so, the Court may have ultimately done so for itself, as a way to draw Justice Thomas's vote and hold it in the Court's opinion's fold.

Still, there are different kinds of openness and identificatory sympathy, and indications in *Masterpiece Cakeshop* are that, on the other side of them in the case are discernible reserves of constitutional doubt. This is the indication that comes through the opinion as it releases its temporary identification with Phillips in order to turn to an explanation for why the Court thinks he was "not unreasonable" in making the choice he did to refuse Craig and Mullins the custom wedding celebration cake that they wanted at the time they wanted it.¹⁷⁶ What's about to materialize is a highly temporized constitutional speech gambit that shows the dynamism of rules in an evolving constitutional ecosystem.

The Court's *Masterpiece Cakeshop* opinion explains that Phillips's decision not to use his artistry to create the custom wedding cake Craig and Mullins wanted may have been understandable at the time of his refusal. This is a function, as the Court describes it, of Phillips's concern with the expressive meaning and the value of making the couple the custom cake they desired for their marriage celebration. Syntactically, the opinion's account is agonized. Noting that Phillips's "actions leading to the refusal of service . . . occurred in the year 2012[.]" the Court timestamps the refusal as occurring both before Colorado legalized same-sex marriage and before the Court's rulings in *United States v. Windsor* and *Obergefell v. Hodges*.¹⁷⁷ The opinion goes on to remark:

Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.¹⁷⁸

Leaving aside how the Court re-identifies itself with Phillips in this passage, even seeming to confuse its own authority to declare what this law is with his authority to "deem" his own refusal of service "lawful," more significant for present purposes is the proliferation of subordinate clauses in the Court's account. With their various qualifications, they indicate the Court is pumping the brakes on its own thinking. Slowed down a bit to restate it, the Court's notion is straightforward, if also surprising. Since at the time Phillips refused to make Craig and Mullins the custom wedding cake they wanted they did not have a right to marry under Colorado law or the federal Constitution, there's "some force" to the idea it was understandable—more exactly: "not unreasonable"—for Phillips to have imagined that using his artistry the way that Craig and Mullins wanted him to might well have been taken to send a message of support for their marriage or the right-to-marry project, "the precise message," as Justice Thomas's concurrence puts it, that Phillips "believes his faith forbids."¹⁷⁹ One

¹⁷⁶ *Id.* at 1728 (majority opinion).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; *id.* at 1744 (Thomas, J., concurring in part and concurring in the judgment).

implication of this position—or just a click away from it—would seem to be that Phillips may have acted lawfully, consistent with his rights at the time he refused this service. How this is so should become more apparent presently.

On a technical, objective level, the Court's perspective is pure speculation, *ipse dixit*, nothing more. It delivers a retrospective verdict on the then-once-would-have-been social meaning of Phillips making a custom wedding cake for a same-sex wedding celebration situated at that time, in that place, and in that setting—an eventuality, to be clear, that never came to pass—and it delivers that verdict without citing any authority for this never-eventuated action's expressive meaning. Bracketing those concerns, the opinion's point is easily allowed as more or less right as a loose conversational observation seeking to describe how some people back in 2012 in Colorado might reasonably have understood Phillips's use of his artistic skills had he agreed to use them in the ways that Craig and Mullins asked and against his own faith.

Noteworthy about this thinking in *Masterpiece Cakeshop* is less its historically situated, but counterfactual, hermeneutics than how, on reflection, it shows the Court's opinion is suggesting—through an imbedded negative logic—that Colorado law having now changed to recognize same-sex marriage, and *Windsor* and *Obergefell* having now been decided, it is no longer reasonable for Phillips or anyone else to think that his willingness to use his artistry to make a custom cake for gay fellas like Craig and Mullins sends any message of support for them, their marriage, or the right to marry, more generally.¹⁸⁰ Whatever Phillips's inspiration as an artist and whatever

¹⁸⁰ Here one might think of some of the individualized discriminatory options that some who sought to resist the march of civil rights historically availed themselves of. *See, e.g.*, JUDITH ROLLINS, *ALL IS NEVER SAID: THE NARRATIVE OF ODETTE HARPER HINES* 197 (1995) (offering, as part of an account of the “very first day of testing” by Judy and Betty Chenevert “at a number of restaurants on Highway 71” before they learned the technique of it, that there was “no telling what those angry crackers might have put in their food. At one restaurant, they saw the man spit into their Cokes and they didn’t drink them. But what might have been put in their food at other restaurants that they *didn’t* see? Spit or worse.”); JORDANA Y. SHAKOOR, *CIVIL RIGHTS CHILDHOOD* 152 (1999) (“Many blacks in Greenwood preferred to continue to hang out on Johnson Street. The right to vote was one thing; eating alongside resentful whites was another. Those who could afford it had to wonder whether eating a nice juicy steak was worth possibly receiving burnt food or meals that might have spit or something worse seasoning them.”). A return that some might regard as doing rough justice is described in William Serrin, *Jesse Jackson: ‘I Am . . .’ Audience: ‘I Am . . .’ Jesse: ‘Somebody’s Audience: ‘Somebody,’* N.Y. TIMES (July 9, 1972), <https://www.nytimes.com/1972/07/09/archives/jesse-jackson-i-am-audience-i-am-jesse-somebody-audience-somebody.html> (“Always, Jackson was defiant. As a young man, when he worked as a waiter in the Jack Tar Hotel in Greenville, S.C., and whites did not tip him, Jesse would spit into their soup or salad before he brought it to the table, and watch with enjoyment as whites ate gobs of saliva as though it were, say, oil and vinegar dressing.”). Relatedly, in the context of homophobically inflected discourses, there are the straight nightmares of gay men discussed to dramatic effect in DOUGLAS CRIMP, *Randy Shilts’s Miserable Failure*, in *MELANCHOLIA AND MORALISM: ESSAYS ON AIDS AND QUEER POLITICS* 118–19, 124 (2002) (describing homophobic fantasies about “gay foreigners attending health conferences” and gay waiters and salad dressing). Along similar lines, see also James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoners’ Rights*, 10 N.Y. CITY L. REV. 97, 111–12 (“The Ninth Circuit . . . deferred to defendants’ explanation for excluding HIV-positive inmates from serving food to the mainline population. The defendants asserted

artistic message of faith he may intend to convey through his art, its received social meaning as expression, at least so far as the Court is presently concerned, is to be understood in the context and against the backdrop of a politically liberal constitutional regime in which marriage is marriage. Constitutionally speaking, all marriages are alike. Same-sex marriage has ceased being a term of political contest and meaning in constitutional terms. There are not *real weddings* and “weddings” in scare quotes as in Justice Thomas’s concurrence.¹⁸¹ This, of course, helps explain why many, disagreeing with Justice Thomas’s concurrence, presently believe that Phillips’s custom-made wedding cakes don’t have any constitutionally cognizable expressive dimension at all, and why they don’t indicate any kind of support for the right to marry, or dissent from it, that the First Amendment’s speech clause protects. Not least of all in view of positive law obligations of equal treatment, themselves consistent with constitutional norms of equality as set forth in *Obergefell*, a wedding cake, without more, is just a wedding cake.

From a different angle of vision, *Masterpiece Cakeshop*’s observations on the “not unreasonableness” of Phillips’s idea that making a custom cake for Craig and Mullins’s wedding celebration in 2012 would send a message of support for same-sex marriage against his faith resonate quite well, if not exactly perfectly, with elements of the Court’s First Amendment “expressive conduct” doctrine.¹⁸² Here, the majority’s silence speaks in ways that put its opinion at odds with Justice Thomas’s concurrence.¹⁸³

That disagreement obtaining, it is easy to imagine why the majority does not come out and say what the logic of its historical hermeneutics may be taken to imply: that no reasonable observer would now take Phillips to be supporting same-sex marriage when, consistent with the obligations of state law, themselves consistent with the state’s own constitutional equality obligations, he uses his artistry to make a couple like Craig and Mullins a custom wedding celebration cake. But if the *Masterpiece Cakeshop* majority opinion is constrained, free only to leave its views implicitly submerged in its text to be discovered or not via close and careful reading, Justice

that they had catered to inmates’ ‘think[ing] the worst—that . . . [HIV-positive food servers] will bleed into the food, spit into the food, or even worse. This . . . could lead to ‘violent actions’ against HIV-positive food servers.”).

¹⁸¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment) (“Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are ‘weddings’ and suggest that they should be celebrated—the precise message he believes his faith forbids.”).

¹⁸² See *infra* note 183.

¹⁸³ Although Justice Thomas’s concurrence recognizes that, “[o]f course, conduct does not qualify as protected speech simply because ‘the person engaging in [it] intends thereby to express an idea,’” *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment) (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968)), it immediately goes on to add: “To determine whether conduct is sufficiently expressive, the Court asks whether it was ‘intended to be communicative’ and, ‘in context, would reasonably be understood by the viewer to be communicative.’” *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); see also *id.* at 1742–44 (discussing related aspects of the doctrinal point). For a sharp response to the concurrence’s mobilization of these doctrinal points, see KOPPELMAN, *supra* note 163 (manuscript at 75–77).

Thomas's concurrence, by contrast, is free to express its disagreement with the implications that follow from the majority opinion's text and thoughts. And it does. It swings away directly at the logical implications of what the majority says, repudiating the idea that "*Obergefell v. Hodges* somehow diminish[es] Phillips' right to free speech."¹⁸⁴ Notice, though, what else this suggests: That *Masterpiece Cakeshop* has nodded toward approval for the kernel of an argument that indicates that Phillips once, as late as 2012 and maybe later, until *Obergefell*, may have had a right to free speech that protected his artistry just the way he claimed in *Masterpiece Cakeshop*. At least that view in the Court's view has "some force." That qualification plus the careful use of the double negative—"not unreasonably"—separates the opinion from any retrospective ruling, but its care suggests the Court sees and can imagine itself embracing that possibility—or might have. What result in *Masterpiece Cakeshop* if its litigation timeline had been such that it had arrived at the Court before *Windsor* and *Obergefell*?

While *Masterpiece Cakeshop* arcs in these directions, suggesting no speech protections now obtain for artistry that once might have been protected, it is striking that, in making the points it does, the decision keeps all the potentially associated First Amendment doctrinal scaffolding—involving expressive conduct and compelled speech, principally—far away from the page.¹⁸⁵ Still, the passage isn't wholly lacking in all authoritative supports. The cases *Masterpiece Cakeshop* does cite as it works its way through this subtle line of thought have, to a number, a decidedly pro-lesbian-and-gay cast to them: *Windsor*, *Obergefell*, and state court rulings from Colorado that the Court takes to have authorized bakers back in 2012 to refuse "to create cakes with decorations that demeaned gay persons or gay marriages."¹⁸⁶ The weight of authority in this setting, which partly cuts in the direction of an erstwhile right to speech that might have given the Phillips of 2012 a constitutional right to refuse a public accommodation as he did, now points in the opposite direction, which happens to be the same direction as the implicit logic of what the Court writes: In the balance of competing interests, the Court is against, not with, Phillips's First Amendment speech claims for artistic expression. The Court occupies that ground as a way of vindicating the constitutional rights that its decisions, including *Windsor* and *Obergefell*, announced, the overall significations of which are not to be demeaned any more than lesbians and gay men themselves are through a First Amendment rule exempting Phillips and other artists from anti-discrimination rules.

Temporized and tempered thinking like this, found in the cool silences of *Masterpiece Cakeshop*'s text, doesn't produce the sound, excitement, drama, or the

¹⁸⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted).

¹⁸⁵ Saying this this way is meant to consider that moment in *Masterpiece Cakeshop* when the Court, in a highly specific factual setting, contemplates the prospects of a speech claim based on a discriminatory viewpoint problem. *Id.* at 1730 (majority opinion) ("The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished."). In saying what it does on this front, the Court seems to be expressly leaving open the prospect of at least certain viewpoint-based and maybe content-based discriminations. The argument in the text should be read with this qualification in mind.

¹⁸⁶ *Id.* at 1728.

certainty of a gavel dropping and the loud announcement of a ruling against Phillips on First Amendment speech and artistic freedom grounds. It's a much subtler gesture of power, filled with meditative cues that appear only through a search into recesses of the Court's text. *Masterpiece Cakeshop* doesn't expressly accept or reject Phillips's First Amendment speech arguments for artistic protection, indeed, it expressly indicates it's not passing on them, which leaves the Court at liberty to rule on them however it may in some future case. *Masterpiece Cakeshop*, however, indicates that this Court isn't having them, certainly not the way Justice Thomas's concurrence is. Once upon a time, yes . . . perhaps (the arguments back then had "some force"), but no longer. For the majority, views and constitutional arguments, and so positive law and constitutional rights and rules, can wax and wane.¹⁸⁷

This all points to a different reading and explanation of the Court's merger-identification with Phillips. It is more than a psychologically curious demonstration of sympathies with and for him and his position. What it also is, is an active demonstration that the Court has heard, understood, and appreciated his speech arguments for artistic freedom under the First Amendment, and that it has heard, understood, and appreciated where they—and he—were coming from, especially at the time he refused to use his artistry to make Craig and Mullins the custom cake to celebrate their wedding that they wanted, when the Court—if it had been asked to do so—might have confirmed them. In this respect, *Masterpiece Cakeshop*'s treatment of Phillips's First Amendment speech claims for artistic freedom reflects not largesse,

¹⁸⁷ The same conclusion is confirmed by an additional textual check found in what *Masterpiece Cakeshop* says as it draws this section of discussion to a close, where it offers a remark previously encountered in the context of Phillips's Free Exercise claim. By this point, it is clear that a passage capping a discussion that in part involves Phillips's First Amendment speech bids may carry with it both implications for both his speech/artistry and his religious liberty claims. With that in mind, here's the relevant language from the case:

[A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons.

Id. at 1728–29.

As before, if in different ways here, the best arguments for a limited right to free speech in the form of artistry that could be mustered at the time of *Masterpiece Cakeshop* were in fact supplied to the Court. Considering those arguments as presented on the paper, oral arguments in the case publicly revealed how deeply concerned the Justices were about their ability to find meaningful and principled limits for the First Amendment speech protections for Phillips's artistry that they were being asked to approve. (The same basic point is made early on in the Court's opinion in relation to both First Amendment speech and religious liberty claims. *Id.* at 1723.) Unremarkably, *Masterpiece Cakeshop* mentions no argument that could serve those purposes to its exacting standards without creating a constitutional exception to the state's anti-discrimination rules that would, in practical consequence, "impose a serious stigma on gay persons" by allowing them to receive unequal treatment in the public sphere. *Id.* at 1729. Evidently, the Court felt uncompelled to enter the doctrinal fray by registering this point even more emphatically than it has, and if it did, it might have disturbed the finely wrought balance required to build and sustain a supermajority opinion in a controversial case like *Masterpiece Cakeshop*.

politesse, or etiquette simply, but something deeper, more in the model of an idealized case disposition by an institution of the government managed by agents in a politically liberal constitutional regime, who, when making binding rules of law backed by the state's coercive powers, are supposed to provide public justifications for their decisions that address those whom their rules will govern as rational, autonomous citizens whose comprehensive worldviews are, if not as governance rules, deserving of respect.¹⁸⁸

If, as seems likely, the First Amendment speech arguments for protecting artistic freedom return to the Court, they are returned at their bringers' peril.¹⁸⁹ Judging from *Masterpiece Cakeshop*, they face a significant risk of loss. Insofar as *Masterpiece Cakeshop* is the indication, what these arguments may be expected to encounter is a Court that, while maintaining formally that it has not decided the First Amendment speech issues Phillips raised, has deeply wrestled with them and finally produced a set of thoughts that, however provisionally, are inconsistent with them as ways to vindicate protections for artists, including artists of faith. A new theory, a new principle, new arguments with new limits, and/or a materially changed politico-legal context could gain First Amendment speech protections for artistic freedom a different hearing. They could also produce a different result than in *Masterpiece Cakeshop*.

So much is always a possibility under a living Constitution—the kind of Constitution that *Masterpiece Cakeshop* demonstrates yet again that we live under. For now and the foreseeable future, the First Amendment speech arguments for the artistic freedom of artists like Phillips-the-artist-of-faith and others do not command a majority of the Supreme Court.

Perhaps this goes without saying, but recalling some of what Oscar Wilde taught about aesthetics and the perils of certainty about the interplay of surface and depth, it seems worth confirming that this depth sounding of the opinion is a deeper and more textually engaged way of reaching a conclusion that, in rough form, can immediately be read off the surface of the ruling's basic decisional architecture.¹⁹⁰ Justice Thomas's concurrence in the case formally supplied any Justice who wished to take advantage of it a chance to indicate his or her support for First Amendment speech protections for artistry like Phillips's.¹⁹¹ Justice Gorsuch was the only taker.

¹⁸⁸ For thoughtful thoughts on etiquette and *Masterpiece Cakeshop*, see Kendrick & Schwartzman, *supra* note 27, at 133. A sharp and accessible introduction to public justification, including John Rawls's idea of it, is in *Public Justification*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2018 ed.), <https://plato.stanford.edu/entries/justification-public/>.

¹⁸⁹ See, e.g., *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (mem.) (remanding the case “in light of *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n.*”). Other cases will certainly arise to enable the issue's return to the Supreme Court.

¹⁹⁰ OSCAR WILDE, *The Preface*, in *THE PICTURE OF DORIAN GRAY* 3 (Michael Patrick Gillespie ed., 2007) (“All art is at once surface and symbol. / Those who go beneath the surface do so at their peril. / Those who read the symbol do so at their peril.”).

¹⁹¹ “His” or “her” only, because there's no “their” there yet, on which, see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

II. THE POLITICAL HOMILETICS OF THE TEXT

Now that all of *Masterpiece Cakeshop*'s cross-cutting substantive holdings are in sight, it's almost time to offer a final assessment of how the opinion should be understood in terms of narrowness, shallowness, and modesty. First, though, these remarks on two broadly different, but related types of instruction the opinion gives—one properly legal, the other moral-political—that arrive just as the opinion draws to a close. Having considered them on their own terms, in their variations, one of them is reconfigured as an aesthetic proposition to see what sorts of prospects it holds.

A. *Tolerance by Courts*

Having reached this point with *Masterpiece Cakeshop*, all that's left to consider in a formal sense is its final substantive passage. This last, climatic moment in the text arrives, obviously enough, after its holding and shadow holdings have been issued. Unlike other similarly placed passages in other Kennedy opinions that have gone on to become famous, the drama of this one is not simply a function of its textual position, where it crystallizes key teachings the opinion means to give in one final burst.¹⁹² In addition to being the endcap to this particular decision, this passage is also the endcap to Justice Kennedy's writing on his legacy issue of lesbian and gay rights while speaking for the Court. His public letter of resignation would arrive later, but by the time *Masterpiece Cakeshop* came down, he certainly knew these were going to be his final words on the jurisprudential subject that, perhaps more than any other, would define his positive career as an Associate Justice.¹⁹³ The significance of these remarks and their capacity to do the work that they're about to be shown to be doing thus should not be doubted.

Curiously, as a matter of style, *Masterpiece Cakeshop*'s final remarks, despite their significance, eschew classic Kennedy grandness. This absence subtly colors them with an eerily deflated, melancholic air. The remarks, comprised of a single sentence with three subordinate clauses that constantly slow the reader down, are laconic, its language, if anything, spartan, maybe a tad meditative. Content-wise, the passage commences by addressing nobody in particular, hence everyone in general, weighing in on nothing so much as the general situation *Masterpiece Cakeshop* has implicated and resolved, if not, as it points out, for the last time. No sooner does the opinion start filling the details of that situation in than, in its second breath, the reader notices that the text, without announcing what it's doing, has shifted direction. It has begun specifically addressing itself to courts, which are being given marching orders about how they should consider and resolve cases like *Masterpiece Cakeshop* in the future.

¹⁹² See, for example, the concluding substantive paragraphs in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), and *Lawrence v. Texas*, 539 U.S. 559, 578–79 (2003).

¹⁹³ *Masterpiece Cakeshop* was handed down on June 4, 2018, and Justice Kennedy's public announcement arrived on June 27, 2018. Letter of Resignation from Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, to Donald J. Trump, President, U.S. (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf. See also Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES, June 28, 2018, at A1.

The template is, of course, one that *Masterpiece Cakeshop* itself sets. The Court comments:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.¹⁹⁴

Note with precision where and how *Masterpiece Cakeshop* is prophesying disputes in “cases like this in other circumstances” will be “resolved” in the future.¹⁹⁵ “[T]hese disputes” are going to be settled “in the courts”—courts that are being instructed to reflect upon and perform the single-word mantra—“tolerance”—that the opinion immediately proceeds to give specific content.¹⁹⁶ The substance here arrives not in an affirmative sense—“Tolerance, Tolerance shalt thou pursue”—but through two injunctive commands issued in succession both in the form of thou-shalt-not’s.¹⁹⁷ The language of the commands places them comfortably within the Constitution’s dialect of negative rights, which, presumably, is their source. The first commandment, which sounds in the registers of the First Amendment, holds that courts shall not show “undue disrespect to sincere religious beliefs.”¹⁹⁸ The second, which sounds in the registers of the Fourteenth Amendment, maintains that courts shall not “subject[] gay persons to indignities when they seek goods and services in an open market.”¹⁹⁹ Taken together, these commandments reflect and convey what the opinion has effectively already, earlier made clear: the basically equal constitutional stature of these two ways of life. Here, courts are to afford them equal respects—show them tolerance—by avoiding the Scylla of anti-religious discrimination and the Charybdis of anti-gay sentiment as they do their job of “resolv[ing]” “cases like this in other circumstances” and “elaborat[ing]” their “outcome[s].”²⁰⁰

¹⁹⁴ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Remarks for Touro Synagogue (Newport, Rhode Island): Celebration of the 350th Anniversary of Jews in America (Aug. 22, 2004) (available at https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_08-22-04) (“The security I feel is shown by the command from Deuteronomy displayed in artworks, in Hebrew letters, on three walls and a table in my chambers. ‘Zedek, Zedek, tirdof’ ‘Justice, Justice shalt thou pursue,’ these art works proclaim; they are ever present reminders of what judges must do ‘that they may thrive.’”).

¹⁹⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

¹⁹⁹ *Id.* It is presently of no moment, though it is not insignificant, that the indignities that “gay persons” might otherwise suffer are harms that, in this passage, collapse traditional distinctions between economic and non-economic rights. The implications, traceable at least to *United States v. Windsor*, 580 U.S. 744 (2013), and back again, are potentially far-reaching.

²⁰⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Insofar as these rules are constitutionally grounded, they, of course, also apply to other state actors, including legislators, hence implicate

Notwithstanding the evident care the opinion has taken to produce its multiple non-affirmative locutions, the commandments it winds up issuing when carefully parsed are almost amusingly non-neutral as between the ways of life that they point to. *Masterpiece Cakeshop* tells courts that “these disputes must be resolved . . . without undue disrespect to sincere religious beliefs.”²⁰¹ The implication of this phrasing would ordinarily be that some “disrespect to sincere religious beliefs” may itself not be undue.²⁰² Meantime, *Masterpiece Cakeshop*’s second commandment, that “these disputes must be resolved . . . without subjecting gay persons to indignities when they seek goods and services in an open market,” is, within the limits of the marketplace that it sets, perfectly categorical.²⁰³ “[G]ay persons,” which includes both lesbian women and gay men (the gendered erasure is subtle, but apparent), are to suffer no indignities in this respect.²⁰⁴ In this, the second commandment contrasts not only the first, but also that moment earlier in the opinion when the Court secures First Amendment protections for clergy who’d like to refuse to perform same-sex civil marriages when doing so contravenes their faith. While granting them that right, *Masterpiece Cakeshop* affirms this is a practical “diminishment” of lesbians’ and gay men’s rights by telling them they must lump it anyway, because this isn’t a “serious diminishment to their own dignity and worth.”²⁰⁵ In relation to economic freedom, the rights of “gay persons” must not be subjected to indignities.²⁰⁶ Economic equality, hence justice, for them is fully insured.

This asymmetry readily lends itself to an understanding in which *Masterpiece Cakeshop*’s final passage is offering courts its parting instruction on how they’re to resolve the question the case centrally involves, but formally evades, but then actually provides instruction on. Here the Court’s opinion recapitulates the impulse of its earlier thinking. In suggesting that the rights of sincere religious believers may be given due *disrespects*, while the rights of lesbians and gay men not to suffer indignities in the marketplace is categorical, the opinion tips its hand on the outcome it wants to see in a future case: public accommodations regimes hold against constitutional claims to religious exception.

It’s dangerous business to try to read the passage as ordering any more broadly binding instruction than that. *Masterpiece Cakeshop*, which otherwise takes such

“the drafting of legislation,” on which, in this setting, *see* NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop* *supra* note 2, at 205, 221–24. Of course, it is true that how and why courts decide as they do and not simply what they decide on the bottom-line is key to the successful judicial avoidance of these constitutional obstacles.

²⁰¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1727.

²⁰⁶ *Id.* at 1732. This doesn’t mean to foreclose the prospect that “the Court makes clear that exemptions must be limited to protect gays and lesbians not only from material but also from dignitary harm.” NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, *supra* note 2, at 215.

pains to remain scrupulously “fair and neutral” between the parties, so as to avoid committing the same mistake the Colorado Civil Rights Commission did, cannot at precisely this point in the opinion be ventilating an active and more general preference for “gay persons” and their ways of life over “sincere religious belie[vers]” and theirs.²⁰⁷ Right? Right. This indicates that what the Court means when it refers to “cases like this in other circumstances” and “these disputes” in this passage, it doesn’t have in mind cases of a broad set to which *Masterpiece Cakeshop* belongs: cases that involve clashes between and among religious conservatives and traditional moralists, on the one hand, and lesbians and gay men, on the other.²⁰⁸ It is talking in a more bounded sense about *Masterpiece Cakeshop* as a case that involves a clash between these forces and the constitutional values that protect them on the turf of anti-discrimination law.²⁰⁹ If this is right, a direct line might be drawn from *Masterpiece Cakeshop* to the proper resolution of the Title VII cases now before the Supreme Court, on the meaning of its sex discrimination protections.²¹⁰ Figured as the latest front in *Kulturkampf*—and who would seriously deny that they are?—*Masterpiece Cakeshop* teaches that the victories go to lesbians and gay men, perhaps by extension to those who are transgender or otherwise gender nonconforming. As marketplace regulations, they are to suffer no indignities. How’s that for a departing bequeath?

²⁰⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732.

²⁰⁸ *Id.*

²⁰⁹ Even there, though, where the lesson of *Masterpiece Cakeshop* in principle should be that federal anti-discrimination protections are interpreted in accordance with the evolving constitutional status of lesbians and gay men as citizens of first-class rank, letting them in on Title VII’s sex discrimination protections, over and against religious conservatives and traditional moralists who would argue for a more conservative interpretive approach, it may be the connotative rather than the denotative meaning of this final passage that is the more enduring rule, now that Justice Kennedy has left the Court. Certainly, some of the Justices who signed the Court’s *Masterpiece Cakeshop* opinion were more inclined to a view that would take the final passage of *Masterpiece Cakeshop* as instructing courts, within the limits of the Constitution’s negativity, to demonstrate tolerance by both reflecting it toward the parties and their ways of life and by announcing results that seek to keep them in conditions of equipoise. If so, the rule of *Masterpiece Cakeshop* could be taken to be that lesbians and gay men can receive the protections of anti-discrimination law without First Amendment exceptions to it being created in cases where discriminators discriminate because of their sincere religious or moral beliefs. But to preserve the balance, that rule will only obtain where legislators, through law-making, have crafted the operative anti-discrimination rule that courts are being asked to affirm.

²¹⁰ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted sub nom. Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019). A primer on the cases is in Amy Howe, *Court to Take Up LGBT Rights in the Workplace (Updated)* (Apr. 22, 2019), SCOTUSBLOG, <https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/>. More in depth analysis of these cases as they were litigated at the Supreme Court is in Marc Spindelman, *The Shower’s Return* (unpublished manuscript) (on file with author).

B. Toward a Political Morality: Minima and Maxima (Or: A Moral Politics of Sibling Love Introduced)

Lest it already be forgotten, *Masterpiece Cakeshop*'s final passage isn't only an instruction for courts. The passage only becomes that after starting out as a general address to no one, hence everyone, about the general situation that the case implicates. Of chief rank in this general class of the everyone that's being addressed are *Masterpiece Cakeshop*'s readers whose rights, welfare, and political prospects are most immediately and directly affected by the ruling. By this point, everyone knows who they are.

Masterpiece Cakeshop, though, is actually in no official position to speak to the parties whose ways of life its decision rules with the same authoritative voice used to instruct courts in the Court's chain-of-command and that operate as the state's Constitution-bound wings. This, as a rule, is because the Court's constitutional authority is limited to negative instructions involving the state or, more capaciously, state action. For all the tremendous powers this affords the Court to manage parties and their ways of life, it is not officially empowered to boss them around. This doesn't mean the Court is bereft of ways to give instructions to the parties themselves, only that it must do so in a different and unofficial mode. When it does this in *Masterpiece Cakeshop*, what it does is to leverage the moral-political impulses that guide and shape its own conduct and the authoritative constitutional rules it formally announces in the direction of generating moral-political exhortations that are to function by willing private acquiescence in the vision the Court has for how they should conduct themselves as they pursue and seek to vindicate their ways of living in the public and political realms.²¹¹ To speak of this undertaking, then, is to speak of *Masterpiece Cakeshop*'s moral-political homiletics: its constitutionally inspired, but ultimately extra-constitutional, and, indeed, extra-legal teachings in political morality, which it recommends for the parties' use on the field of politics that its substantive holdings don't displace.²¹²

²¹¹ This is to reverse the standard translation of moral into constitutional questions that Robin West has described, among other places, in Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1131 (2006) (noting the easy, but problematic, constitutional-cultural translation of "substantial moral questions about governance" into "'Constitutional' questions" and the way this thus turns these moral questions into "questions of law awaiting judicial resolution"). Here, *Masterpiece Cakeshop*, without forgetting how it involves legal questions "awaiting judicial resolution," *id.*, also tracks the possibility of pressing them back into questions of governance for politics themselves. Reframed in terms that Jamal Greene has wonderfully put into play, this may be both a pathos-based and an ethical argument. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1390–91 (2013).

²¹² In this respect anyway, *Masterpiece Cakeshop* may be taken not only to reflect "a specious neutrality," but also to attempt to "affirmatively nurture democratic culture" in a way that recognizes "political community." Feldman, *supra* note 45, at 60–61.

As seen both in *Masterpiece Cakeshop*'s final passage and across the larger sweep of the opinion, this instruction in political morality delivers in at least two forms: one minimal, one maximal.²¹³

The minima of *Masterpiece Cakeshop*'s instruction in political morality are readily articulated: They're the private party version of *Masterpiece Cakeshop*'s final passage's teaching on tolerance, defined with reference to those two thou-shalt-not's, understood here not in terms of their precise, technical limits, which matter as authoritative, constitutional rules for courts, but rather as general mandates in a political morality of nonmalfeasance. The broad moral sensibilities that the thou-shalt-not's entail sound in themes of tolerance as a type of political respect. A Golden Rule, they speak to a political morality by which those who are struggling to protect and defend their ways of life against unwanted incursions by their political foes may commence a phase of political combat that operates not lawlessly but "in a respectful fashion that can work in our pluralist society."²¹⁴ Political enmity needn't be dropped entirely, though it could be somewhat smoothed around its sharpest edges enough so that each side to the *Kulturkampf* recognizes that they and their opposing numbers are all members of a larger political community whose health, as a vessel that contains them and their politics and their political disputes, is a matter of general, including their own, political interest that must not be taken entirely for granted—like clean air. In this sense only, and as antithetical to a Schmittian notion of what politics is, these minima imply not just tolerance and respect but also friendship in a political sense.²¹⁵ As thinkable as these politics may be in those terms, they're still likely to be greeted with, at best, ambivalence, including a deep aversion to them born of, among other things, the deep wounds and deep distrust that have been an enduring part of the *Kulturkampf* and that have even come to be baked into the identities of its warring camps. This makes the politics of friendship as a modification of the politics of enmity—or the politics of politics—acceptable only if the parties are prepared to relinquish the established constructions of who they, socially speaking, are.²¹⁶ This

²¹³ This may or may not imply the operation of a spectrum. Given the practical resistance both these points are, by turns, likely and certain to face, the conceptualization of the middle may not matter all that much at just this point.

²¹⁴ Joshua Matz, *Fury and despair over the Masterpiece Cakeshop ruling are misplaced*, THE GUARDIAN (June 6, 2018), <https://www.theguardian.com/commentisfree/2018/jun/06/fury-despair-masterpiece-cakeshop-ruling-misplaced>. Others have also seen a pluralist vision with aspirations for "peaceful coexistence between the LGBT and faith communities" at work in the case. Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise*, 51 CONN. L. REV. 1, 6 (2019); *id.* at 11–12 (noting that "*Masterpiece Cakeshop*'s signal contribution was its call for a new pluralism that 'leaves space for everyone,'" and then providing some description of it).

²¹⁵ The locus classicus is SCHMITT, *supra* note 79. For examples of modern reflections on older themes of political or civic friendship that move in decidedly non-Schmittian directions, see DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* 9–24, 101–59 (2004), and see also Sibyl A. Schwarzenbach, *On Civic Friendship*, 107 ETHICS 97, 98–99 (1996) (commenting preliminarily that "political friendship" is "a necessary condition for genuine justice" and linking "civic friendship" to traditions of women's lives involving reproduction).

²¹⁶ See the qualification in *supra* note 79.

isn't impossible, naturally, but it isn't nearly as easy as from outside of these perspectives it can sound.

While the minima of *Masterpiece Cakeshop's* moral-political homiletics appear and can practically be read off the surface of *Masterpiece Cakeshop's* text, they travel in the decision with a set of maximal conditions that are discoverable deeper in the structure of the text: in the opinion's active performance of them.²¹⁷ Nobody should be surprised to hear at this point that *Masterpiece Cakeshop* is not a decision that, for its own part, shows only a bare minimum level of tolerance defined as non-disparagement, non-disrespect, or non-indignity, toward the parties. The Court's actual treatment of the parties' ways of life is far more robust and generous than that. So, too, then, the maximal version of moral-political instruction that *Masterpiece Cakeshop* offers.

Begin here by briefly returning to the pose that *Masterpiece Cakeshop* strikes toward the ways of life involved in the case. The Court's stance toward these constitutionally countenanced, competing ways of life isn't one of a detached, distanced, affectless rationality by which the Court mechanically and hierarchically goes about issuing rules that in their robotic way dispense legal justice. The Court's stance toward the case and the lives the parties lead is marked by more thoughtful, affective investments. The Court elaborates its own thinking in the case by means that are both creative and sensitive. It generates, then seals, distinctive relationships with the parties and with others who share their ways of life. These relationships involve connection, identification, and, recall, even forms of psychological and literary merger with the parties in ways that give the Court the ability, however fleetingly, to be in another's shoes walking his path, as part of its own process of giving voice both to arguments and the substantive rulings it issues.²¹⁸ In other words, *Masterpiece Cakeshop* gets professionally and textually intimate with the parties in a way that far surpasses the "tolerance" its opinion formally and finally names.

The way that *Masterpiece Cakeshop* exceeds the minima that it makes binding on other courts suggests the Court is aware of its own exertions and sees them as elements in a supererogatory performance. The Court may think it cannot realistically expect future courts to be as welcoming to such wildly divergent ways of life, or to be as fully engaged with them, as it itself is. This might be hubris or it might just be a frank recognition of the range of investments and sympathies that other courts may have in cases like this, which may duly limit their capacity or willingness to achieve *Masterpiece Cakeshop's* own model heights. Comparisons aside, the Court's treatment of the parties in the case may help to explain why so many of its readers, who live the case's opposing ways of life, experience it the way that they have and do: feeling seen, recognized, heard, understood, esteemed, known, and cared for, to the point of being held by the Court's attentions and its ministrations, which ensure they

²¹⁷ The notion that the Court's opinion's performative dimensions are pedagogical is also found in Matz, *supra* note 214, which, Berg, *supra* note 9, at 160, quotes approvingly on this point.

²¹⁸ It is this that partly makes the Court's command to lower courts to follow in its footsteps seem so problematic: Requiring this kind of relationship with the parties will assuredly be easier for some judges than for others, who may wish nothing so much as to resist it.

are constitutionally protected, safe, against what they themselves take to be, and what the Court appreciates as, harmful and discriminatory political predations.

Figured this way, *Masterpiece Cakeshop* refuses to adopt, as *Obergefell*, *Windsor*, and *Lawrence* before it all did, the rhetorical posture of the fearsome figure of Lady Justice with her blindfold on, balancing her scales without being able to see who the parties are, her monumentally lethal sword, so dangerous, powerful, and ominous, in her other hand, a figure nightmares can be made of.²¹⁹ *Masterpiece Cakeshop* prefers instead a different performance of masculinity, the rhetorical posture of which is that of the Father Judge who, needing no sword other than his wisdom, approaches and decides the case in ways that epitomize conviviality in political community and that, by example, encourages the parties to conduct themselves thus.²²⁰ So much does this Father Judge love the parties who have brought this dispute before him to resolve that, in his final remarks, as a fatherly judicial bequeath, he wills them to receive a modest version of the exemplary treatment he has given them.

Suppressed, but still evident, is the subtle message that this disjunction implies. If the parties are to escape the constant warfare of *Kulturkampf* into freedom to live their respective ways of life the ways they wish, if they are to find the sort of full-bodied, loving fatherly treatment that the Father Court has showed them in this case, they must look not outward to courts but inward to themselves. Following the Court's opinion's lead, they can—and should—seek each other out the way that *Masterpiece Cakeshop* itself has. Recalling their equality to one another and their shared relation to the Father Court, the offering is in the form of a political morality of sibling, like paternal, love, the sole means of full release unto freedom from the political warfare that has become an element, hence part of the meaning and practice, of these ways of life.²²¹ Tolerance and rules of forbearance aren't nothing, are very important, certainly against a baseline of a limitless Hobbesian war of all against all. They are also limited, regularly, to being tickets to an eternal return to courts. In order to achieve another way of living, the parties to this dispute and ones like it will have to dig deeper and reach for more. This is seriously difficult work, but *Masterpiece Cakeshop* shows it can be done, and how, by providing an object lesson in the possibilities of growth that surpasses a formerly well-defined and well-bounded self, a self that has been steeped in a way of life and the certainties of the world that go along with it. Remember the line that Justice Kennedy's opinions have repeatedly intoned in different ways about how "times can blind us to certain truths," a sentiment *Masterpiece Cakeshop* echoes, too?²²² Those who live the simultaneously loving and warring ways of life at odds in *Masterpiece*

²¹⁹ These rhetorical postures, including Lady Justice's phantasmatic horrors, are sketched in Spindelman, *Obergefell's Dreams*, *supra* note 83, at 1094–1108.

²²⁰ JEROME FRANK, *Getting Rid of the Need for Father-Authority*, in *LAW AND THE MODERN MIND* 243–52 (1930).

²²¹ Others have read this passage in similar ways as speaking about certain values of political pluralism and conviviality. Matz, *supra* note 214; Berg, *supra* note 9, at 156; Aaron M. Streett, *Supreme Court Review: An Analysis of Masterpiece and Janus*, 23 TEX. REV. L. & POL. 311, 312 (2018–2019) ("In *Masterpiece*, Justice Kennedy similarly sought to forge a national compromise in which the dignity of gay and lesbian persons is respected, while sincere religious beliefs are protected and not equated by the government to bigotry").

²²² *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

Cakeshop may benefit from this teaching. If in other instances it has mostly been aimed to reveal how one can grow past homophobic versions of a self, the lesson, in principle, runs in any number of directions, and it involves a revelation of the importance of the moral-political value of fraternity as an aid in that process. *Masterpiece Cakeshop*'s moral politics of sibling love holds out the prospect—for those who wish to take it—of giving religious conservatives, traditional moralists, and lesbian and gay men and their allies, all, an opportunity to get their individual and collective sense of fraternity—and sorority—back.

Masterpiece Cakeshop's instruction in a moral politics of sibling love notably tracks highly traditional and romantic sensibilities about “the family” and what it is or should be.²²³ These sensibilities don't originate in *Masterpiece Cakeshop*, though its expression of them broadly concords with ideals of marriage, family, family life, and familial love on display elsewhere in Justice Kennedy's constitutional jurisprudence.²²⁴ Famously, this constellation of sensibilities has underwritten Justice Kennedy's lesbian and gay rights jurisprudence, nowhere more dramatically than in its right-to-marry decisions. *Masterpiece Cakeshop* brings this tradition forward into the present tense while charting a course for its operation in its own aftermath, after Justice Kennedy has left the Court. Scarcely inevitable, it might be thought to have been predictable enough, that in *Masterpiece Cakeshop*, Justice Kennedy's romance

²²³ The normativity of sibling love as a model for moral-political relations is challenged in part by work recognizing and engaging its dark sides, including its classically deeply gendered, horizontal, violent, and sexual dimensions, on which, see, for example the different permutations discussed in JULIET MITCHELL, *SIBLINGS: SEX AND VIOLENCE* 1–31, 111–29 (2003) (reflecting on aspects of the topic). On some of the problematics of the traditional political conception of fraternity, see, for example, CAROLE PATEMAN, *The Fraternal Social Contract*, in *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 33 (1989) (providing an account that “reveals that the social contract is a fraternal pact that constitutes civil society as a patriarchal or masculine order”), and CAROLE PATEMAN & CHARLES W. MILLS, *CONTRACT AND DOMINATION* 134–99 (2007) (discussing the social contract at the intersection of race and gender). Cf. generally Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005) (engaging the incest taboo for its role in and against the struggles for lesbian and gay equality, particularly same-sex marriage).

²²⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (“But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”) (citing *United States v. Windsor*, 570 U.S. 744, 772 (2013)); *id.* at 2608 (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1996) (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice.”); see also, e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 159–60 (2007) (“It is self-evident that a mother who comes to regret her choice to abort must suffer with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know[.]”).

with “family” would travel with a sense of how family life should work as a model for the Court, with all the Court’s children being equal and treated equally, if not exactly the same, in the distribution of goods that flow to them, precisely what *Masterpiece Cakeshop*’s round-robins of equal treatment and their distributions of constitutional goods effectively achieves. All of the Father Court’s equally loved children share equally in *Masterpiece Cakeshop*’s constitutional bounty.²²⁵ Even if “gay persons,” as that asymmetry at the end of the opinion may be taken to reveal, are the opinion’s favorites. Favorites who, of course, lose on the central issue in the case, but who don’t really lose at all in the opinion’s wider scope, and who are set up for victory when the central issue returns to the Court.

Now, to think of “the family” as the normative model for political relations and political community is very old school.²²⁶ Familiarity notwithstanding, the prospect that those whose ways of life have been adjudicated in *Masterpiece Cakeshop* will in any serious numbers find this classic view’s expression in the moral politics of sibling love acceptable—rather than a proper object of ridicule—beggars belief.²²⁷ This even though efforts that bathe the opinion’s love for family love in the cynical acid of critique run the risk of weakening the family-based, affective structures that are

²²⁵ See, e.g., Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (“Parents know . . . children will accept quite readily all sorts of arbitrary substantive dispositions[.] . . . But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.”). Naturally, this involves no suggestion of any substantive comparisons. Nor does it forget arguments from false equivalences as suggested, *inter alia*, by Sager & Tebbe, *supra* note 66, at 189–90.

²²⁶ See, e.g., *Obergefell*, 135 S. Ct. at 2594 (invoking Confucius, who “taught that marriage lies at the foundation of government”) (citing 2 LI CHI: BOOK OF RITES 266 (C. Chai & W. Chai eds., J. Legge trans., 1967)); see also, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 108 (1834):

Marriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law. It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, and not the child of society; *principium urbis et quasi seminarium reipublicæ*.

²²⁷ Hence the potential for some of the moves elaborated in, *inter alia*, Mary Anne Case, *Why “Live and Let Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, in INSTITUTIONALIZING RIGHTS AND RELIGION: COMPETING SUPREMACIES 74–89 (Leora Batnitzky & Hanoch Dagan eds., 2017); Alan Jacobs, *What a Clash Between Conservatives Reveals*, THE ATLANTIC (June 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/conservative-christians-need-stay-civil/590866/>; Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism>. See also Petition for Writ of Certiorari, *Klein v. Or. Bureau of Labor & Indus.*, No. 18-547, 2018 WL 5308156, at 4–5 (2018), *cert. granted*, *Klein v. Or. Bureau of Labor & Indus.*, No. 18-548, 2019 WL 2493912 (2019) (“Because [The Kleins’] religion forbids complicity with sin, they could not design and create cakes to celebrate events that violate their religious beliefs.”). But see, e.g., Adam Serwer, *The Illiberal Right Throws a Tantrum*, THE ATLANTIC (June 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/ahmari-french-orban/591697/>.

integral to the foundations of the decision as it is written. This is one practical reason why everyone who's invested in the substantive outcomes that *Masterpiece Cakeshop* generates, but who is additionally unwilling to embrace a sibling politics of love, may practically be forced to countenance it and the general situation it produces: a situation in which the Supreme Court governs the nation not merely by means of constitutional mandate, nor by the light of reason's objectivity, but in detectable measure by virtue of a judicial preference for an aesthetic form—romance—that is to be tolerated on pain of potentially losing access to the constitutional goods the case delivers. Walt Whitman may well have been right that “sermons never convince.”²²⁸ The power of the constitutional purse to purchase the silence of an unconvinced crowd, here, involving the thick morality that *Masterpiece Cakeshop* is preaching, should not be doubted.²²⁹

C. The Moral Politics of Sibling Love: Reconfigured

Let it be stipulated, then, that *Masterpiece Cakeshop*'s moral politics of sibling love is doomed as a project that the parties to the *Kulturkampf* would willingly take up to regulate their own political dealings with one another.²³⁰

Having noticed this political morality's aesthetic investments, what if its commitment to romanticism were not imagined to inspire any form of *political* morality at all? What if, likewise, its aesthetic conditions were amplified in a way that would drain the moral politics of sibling love of its evangelizing, moralizing energies? Adverting to the prospect that *Masterpiece Cakeshop* itself raises, what if the moral politics of sibling love involved an extra-constitutional, extra-legal, extra-political, and non-morals-based project, say, a procedural protocol for encountering one's political enemies at a distance from politics in an aesthetic sphere? (If you've got a thing against aesthetics as such, just imagine this is a non-legal, non-political, non-morals-based plane of existence with room in it for reflection and repose.) Might the politics of sibling love then be emphatically rejected as a political morality and still countenanced, even favorably, as an aesthetic bid? Might the politics of sibling love operate aesthetically to hold up a mirror to the world and how those who live the ways of life implicated by *Masterpiece Cakeshop* look out onto others, both enemies and friends, and likewise themselves, in ways that might begin to capture the lived complexity of ideas and ideals of sibling love and their own, actual multi-faceted reactions to them? Might the moral politics of sibling love be valued for its way of

²²⁸ WALT WHITMAN, *Song of Myself*, in LEAVES OF GRASS 53 (Deathbed ed., 1891–92) (“Logic and sermons never convince, / The damp of the night drives deeper into my soul.”).

²²⁹ What's partly being bought here is what David Luban has called “legal instrumentalism.” See David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 284 (1987).

²³⁰ This is beyond the boundaries of what's been recommended in, say, Koppelman, *Gay Rights, Religious Accommodations, and Antidiscrimination Law*, *supra* note 124, at 628 (maintaining “[t]he gay rights movement has won[;] [i]t will not be stopped by a few exemptions[;] it should be magnanimous in victory”); or Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) (noting some of the conflicts in “the culture wars” and suggesting some positions that each side might take).

conditioning encounters with beauty, including the beauty of worlds one does not normally see within one's own way of life?

An initial set of challenges of imagining an aesthetic encounter with the moral politics of sibling love involves how pervasively, particularly but not only of late, "the political" structures consciousness, experience, thought, and action. This is especially, but not only, true in legal circles. No less significant a difficulty is how deeply moral norms and sensibilities saturate U.S. modes of thought, making it a challenge, if not an insurmountable task, to think beyond these terms. What could it even *mean* to have an aesthetic encounter with the moral politics of sibling love? What could it mean to think of these relations without thinking about politics or morality? What might it mean to take up *Masterpiece Cakeshop*'s moral-political teaching as a way to encounter the beauty, which is not the same thing as the political truth, that there can be in discovering how the world looks not through one's own eyes as they are trained to see through the political and moral exigencies associated with one's politics and one's identity, but as they would differently look upon the world as from within the perhaps inside-outness of an enemy's worldview? How might an encounter with such a different way of being-in-the-world and such a foreign manner of seeing-the-world feel? What would its sensations, intensities, contours, dark and bright, be like? What could its pleasures otherwise entail? What thoughts and feelings might it generate about the opportunities to live a beautiful life in step with the glory of God, with traditional morals, or with the ways that lesbians and gay men and their allies have sought to construct lives for themselves? What new admixtures, what new forms of life and its beauty might come into sight—or erupt into being—through these encounters?²³¹

Masterpiece Cakeshop itself supplies a convenient point of entry into these questions. While the case obviously involves a real, live legal dispute that features multiple, conflictual encounters between real, living persons complexly situated in relation to living, breathing institutional forms, all of which makes the opinion highly materialist, *Masterpiece Cakeshop* is, in the final analysis, also a text. Seen in those terms, it is unavoidably bound up with immaterial and literary representations: of the parties, what happened between and among them, their resulting injuries and institutional movements and adjudications of them, and the effects of the litigation and its resolutions on the represented parties and those others in society that they serve as stand-ins for. Read as a text, *Masterpiece Cakeshop* exceeds its functions as a site for the announcement of authoritative legal propositions or for recommending moral-political ones. It is also itself precisely in its textual form a form of artifice, an aesthetic creation that readily lends itself as grist for aesthetic encounters, both with itself and with the ideas and characters that emerge within it, who are always, at most, partial representations, hence distortions, of their comprehensive material truths.

Approached that way, imagine . . .

What it might be like for the figures called Charlie Craig and David Mullins to encounter the figure named Jack Phillips and look out unto the world through his

²³¹ See, e.g., Bog Gallagher & Alexander Wilson, *Michel Foucault: An Interview: Sex, Power and the Politics of Identity*, ADVOCATE, Aug. 7, 1984, at 27 (quoting Michel Foucault discussing the possibilities of "new forms of relationships, new forms of love, new forms of creation," and, generally, the "possibility of a creative life").

mind's eye. What might he see happening in his world: his business, his kitchen, his relationships, his faith, his artistry, his recipes and secrets, and the God and faith that inspire him? How did Phillips decide to refuse Craig and Mullins the custom wedding cake they wanted for their marriage celebration? It is said the decision served his God, hence was a practice of his faith and/or artistic faith, but how did the choice get made, and when? Did Phillips choose to refuse Craig and Mullins a custom wedding celebration cake before he ever encountered them? (Is "choice" even the right concept here?) Was it when Phillips first saw Craig and Mullins in person? When they asked him to make the cake for their shared celebration? Did Phillips see them when he looked at, and encountered, them? Were they recognizable to him as created in God's image, like himself, his brothers? As men in love? Did they appear to him either initially or as their encounter unfolded, consistent with his religion, as sodomites, sinners, evil-doers, sinning or doing evil, or wanting to, while talking to him and telling him what they wanted him to do for them? Was conversation with them itself a sinful, erotic, maybe a dirty-feeling, experience? Is that why Phillips couldn't imagine making them the custom cake they wanted without participating in their sinful reverie? How important was it for Phillips to stay away from them? Why was this distance so important? Was it all simply the principled affair reflected in the systematized and worked-out account provided to authorities in litigation? What else might it have been?

What did the decision that Craig and Mullins made to bring an action against Phillips mean to him in terms of his ability to practice his religion, his artistic faith, or simply his artistry through his business in the public realm? Did the ultimately failed attempt to hold him legally to account itself asymmetrically seek to distribute opportunities to live the fullness of one's personality—so that Craig and Mullins but not Phillips could fully be themselves in their sexual and religious and artistic identities, respectively, in the public realm? From Phillips's point of view, does bringing the "hammer of government," in the form of the state's anti-discrimination law machinery, to bear on him for his service refusal decision limit his ability as a person of faith or an artist to live his life out and proud, as who he is?²³² Are those modes of self-expression or expression to be limited to non-public realms, like homes or houses of worship? If so, does anti-discrimination law in its exemplary forms actually reflect rule-of-law values of generality and neutrality? Appearances to the contrary notwithstanding, do anti-discrimination laws violate liberal tenets of state neutrality between competing conceptions of the good life, favoring some, disfavoring

²³² The "hammer of government" language is George Will's. *Fox News Sunday with Chris Wallace* (Fox News Network television broadcast Mar. 2, 2014) (available at https://archive.org/details/FOXNEWSW_20140302_230000_FOX_News_Sunday_With_Chri_s_Wallace/start/3060/end/3120) ("It's a funny kind of sore winner in the gay rights movement that would say a photographer doesn't want to photograph my wedding. I have got lots of other photographers I could go to. But I'm going to use the hammer of government to force them to do this. It's not neighborly and it's not nice. The gay rights movement is winning. But they should be, as I say, not sore winners."). Similar thinking is in 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, 124 (2018) (describing Colorado's anti-discrimination statute as "part of a larger national trend in which authorities are using antidiscrimination statutes as swords to punish already marginalized people (such as supporters of the conjugal understanding of marriage), rather than as shields to protect people from unjust discrimination (such as African Americans in the wake of Jim Crow and today).").

others, hence contemplating, if not constituting, a practice of discrimination against people of faith in itself?

From Phillips's perspective, what might the organized forces of political power look like in light of *Masterpiece Cakeshop's* reaffirmation of *Obergefell*, a decision that reflects a politically liberal regime that may be extended by Colorado's anti-discrimination rules? Might Phillips think of himself as a minority and an outsider in the community he shared with Craig and Mullins? Is it because of his faith, his artistic faith, or both? Were Craig and Mullins the majoritarian, hence socially dominant, forces in the case, backed with state power, when they sought to make him make them a custom wedding celebration cake against his wishes not to be involved with them, their relationship, and their "marriage"? Against these arrangements of power, was Phillips's refusal of service a defensive or an offensive act? Was it more about preserving his own self-understanding and his religious and artistic commitments than transgressing against Craig and Mullins's selfhood as capacitated by the political community at large and also by the state? From Phillips's point of view, did Craig and Mullins see him in the fullness of his personality as they sought to exercise the state-backed power that they had over him? In seeking to override his faithful and artistic refusal, did they discriminate against him because of his faith or artistry or otherwise violate his religiously grounded autonomy?

Sticking with this perspective just a bit longer, as Jack Phillips saw it, what were the meanings of the attitudes and expressions, along with the silences, of state actors as his "case" was processed by governmental institutions? Did they reveal exceptional sensibilities that could, as *Masterpiece Cakeshop* suggested, be corrected, or are they in fact the ordinary sensibilities of the logic of politically liberal, including pro-LGBT, legal regimes? Do they invariably function to make Phillips and others like him a pariah? Do politically liberal equality politics operative in Colorado (and elsewhere) risk making cultural conservatives and traditional moralists the outlaws that lesbians and gay men once, not too long ago, were, and still are in certain communities? Is what happened here also bad for artists generally or only artists of faith? What do these deployments of power reveal, if anything, about the complex meanings of the equality and freedom, hence the justice, that the lesbian and gay movements have been fighting for? If those principles guarantee Craig and Mullins a right to public life and equal service, what does it mean for them to exercise and enforce that right against Jack Phillips?

Turning the tables around, what might it be like for the figure of Jack Phillips to imagine what transpired between him and the figures of Charlie Craig and David Mullins through their fictive minds' eyes? Who were these men? What were their lives like—separately then together—before they encountered Phillips? How did they know and experience and suffer the conditions of homosexuality's political and legal outlawry in the time before *Obergefell*, when they were practically required to leave the state to have their love and commitment to one another sanctified by law as the union of man and man as spouses? How have they experienced homosexuality's political and legal outlawry since *Masterpiece Cakeshop*? What did their political and legal exclusions from marriage and the complex histories of homophobia to which they were related do to shape Craig and Mullins and their lives? How might it have informed their encounters with religious conservatives and traditional moralists who viewed them, their intimacies, and their relationships as sinful, evil, wicked, hell-bound, or the corruption of the community, and thus would have—as law in Colorado

once did—happily cast them out of political community altogether? How, to them, might Phillips have represented, and even historically in a general sense been, a source of their suffering—long before they entered Masterpiece Cakeshop? How safe did they feel being themselves in public and in Phillips's bakery? What effects on them did Phillips's refusal have? What embarrassment, humiliation, pain, trauma, did it involve—or reopen? What injustice did they understand the refusal of service to involve? Who else, as word of Phillips's refusal spread, may Craig and Mullins have understood to have been harmed by Phillips's actions? How might they have taken Phillips's refusal as a tear in the politically liberal social fabric *Obergefell* represents and which they esteem, and maybe experience as a condition of their own security? How much did they see lodging an official complaint against Phillips as an attempt to redress their own injuries and the injuries to the community that Phillips's actions involved? How much was it about protecting others from suffering what they did? Was the action a *cri de cœur* by which they insisted they wouldn't shrink into the sorts of debased, shamed selves they may have understood Phillips's refusal as seeking to enforce? Did they care about the source of Phillips's discriminatory refusal or were they indifferent to it?

From the perspective of the figures of Craig and Mullins, what might the organized forces of political power to which Phillips willingly allied himself look like both in the run-up to and in the aftermath of the Supreme Court's *Masterpiece Cakeshop* decision? When significant elements in a large-scale and complex social movement of cultural conservatives and traditional moralists from across the country and with local roots in Colorado and every state in the union rallied to Phillips's cause, joined no less by the institutional authority of the federal government in the form of the U.S. Solicitor General, how weak, how marginal, how dispossessed, how powerless, how unable to inflict real political harm, including subordination on Craig and Mullins, might he have looked to Craig and Mullins then? How much was the U.S. Supreme Court's decision a reminder of the insubstantiality and precarity of rules of law holding that what Phillips did was discrimination that should be and was outlawed? How much did *Masterpiece Cakeshop* remind Craig and Mullins that their legal rights under state law are readily displaced by the authoritative force of a worldview that, seemingly out of nowhere, decides that Phillips, despite his discriminatory refusal of service, was the real victim at the state's hands in the case? So victimized, in fact, that the state was given no opportunity for a do-over in order to vindicate Craig and Mullins's legal rights? Considering all this, how is power nationally being arranged when state administrative and judicial processes are this easily overturned in Phillips's favor? What does it mean when the injury that the figures of Craig and Mullins experienced, recognized by state law and state actors, and consistent with the state's obligations to ensure equal treatment of lesbians and gay men, is legally for naught in relation to the central holding of *Masterpiece Cakeshop*?²³³

²³³ Compare Laycock, *Broader Implications of Masterpiece Cakeshop*, *supra* note 2 at 193 (venturing that the "problems of hostility to the LGBT community" that remain "are very far from systemic" and "are not remotely comparable to the plight of African-Americans" of the mid-twentieth century, and then observing that the "[r]efusal to protect religious liberty cannot be justified by the absurd claim that conservative Christians today systematically suppress gays and lesbians in the way that southern whites systematically suppressed African-Americans

D. Aesthetics unto Itself & The Tragedy of the Moral Politics of Sibling Love

These are, of course, highly stylized representations of the radically discontinuous and fundamentally oppositional perspectives framed by worldviews operative in *Masterpiece Cakeshop*. Viewed aesthetically, they need not be abandoned, compromised, or reconciled. Aesthetically, these representations may just be what they are or as they seem as one considers them, moving one's own mind's eye across the representational terrain. As one does, it is possible, but not necessary, that one's enemy and one's enemy's world, hence oneself and one's own, may begin emerging in a new and different light. On the aesthetic plane, unlike the political, experientially, nothing needs to be decided or acted upon in relation to these perspectival shifts. Non-decisionism and inaction may be the rule here, the rule of beauty, of the encounter, of its sensations, nothing more.

To be sure, none of this is the point *Masterpiece Cakeshop* seeks to make. It is not the point of either the minima or the maxima of its moral-political instruction.

Be that as it may, taken strictly on its own terms, there's something deeply ironic, if also tragic, about the Court's moral-political homiletics, particularly its moral politics of sibling love. The irony is in the way this attempt to forge new political moralities emerges in an opinion authored by a Supreme Court Justice whose benchwork, particularly but not only in the context of lesbian and gay rights, was, throughout his career on the Bench, willing to extract so many hotly contested issues from the field of politics, deciding for the people who have been politically engaged, in the name of the Constitution, the nation, and the people themselves. As James Bradley Thayer noted over a century ago, robust practices of judicial review like this are notable for their tendency to sap the people themselves of their capacities for managing their own political relations, conflicts, and contests.²³⁴ It is thus tragic in the sense that this opinion, which arrives at the endpoint of a career-defining jurisprudence, seeks to return to the people and their politics something that it recognizes they have seemingly lost. Now, at the end of his judicial career, Justice Kennedy, who did what he did on the Court to rule the nation, produces a text that's actively searching for ways to express the view in moral-political terms that one of the hopes for the country he unquestionably loves is to be found, after all, in how the people relate to one another and govern themselves. It is fitting that the opinion's moral-political teaching, both its instruction in a moral politics of respect and fraternity, but more especially its instruction in a moral politics of sibling love, arrives not with a bang that announces itself, but with a whimper that must be carefully attended to in order to discover its meaning. This whimper, not coincidentally, also

through the mid-twentieth century"), with Sager & Tebbe, *supra* note 66, at 187–88 (describing lesbians and gay men as "long . . . the victims of structural injustice—or patterns of 'disrespect and subordinat[ion],’ to use Justice Kennedy's language in *Obergefell*—that are enduring, pervasive, and tentacular."). To challenge the structuralism or the systematicity of anti-lesbian and anti-gay discrimination in the present tense is at least in part to weaken the foundations on which *Obergefell*, decided practically yesterday, rests.

²³⁴ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

expresses the dim likelihood of this instruction's success, virtually nil for the maximal political morality of family, fraternity, sorority, and love.

Whether the partisans involved in *Masterpiece Cakeshop* choose on any level—political, aesthetic, or otherwise—to hear and heed the call for sibling love that the opinion issues is, again, beyond anything officially in the Court's power to command.²³⁵ This opinion, which does what it practically can to secure Justice Kennedy's jurisprudential legacy at the level of constitutional doctrine, promising to continue the era he helped inaugurate of constitutional equal dignity, respect, and full citizenship status for lesbians and gay men, has, as many landmark principles do, met the practical limits of the power of judicial review and decision. While Justice Kennedy may well have changed the course of lesbian and gay rights, hastening their realization through Supreme Court opinions that altered our country's history, and perhaps by extension, the world's, his position of high office left him and the other Members of the Supreme Court utterly powerless to bring Messrs. Jack Phillips and Charlie Craig and David Mullins—real, living persons, and not just figures in the text—together in political friendship or in family, fraternity, and love, in a political space of mutual understanding in which they might will to work together, lovingly, toward a shared future of equal concern and respect for all that is of their own collective making. Not even a swing Justice on the highest court in the most powerful land on the face of the planet Earth can make of these neighbors, these enemies, friends, much less brothers, nor teach them, finally, how to meet one another as though in political family in their rich, complex, same and different, authentic fullnesses. The source of that grace, or that outrage, whatever it is and wherever it is to be found, comes from someplace else.

III. CONCLUSION

In this respect anyway, Justice Kennedy's opinion for the *Masterpiece Cakeshop* Court is a narrow, shallow, and modest ruling. As a sign, *Masterpiece Cakeshop* both is and is not.

²³⁵ Charles L. Black, Jr.'s thinking is apt here:

I think the concept of citizenship might be a useful corrective to another concept—that of “brotherhood”—which played so prominent a part a few years ago in the utterances of the opponents of racism. I have to say that it seems to me that this word embodied a concept deeply wrong. It suggested that the public demand was that some men had a duty to feel toward and to treat other men as brothers. This, I submit, is an overreaching, a basic defect in theory, a radically wrong symbolism. That demand never can be made as of right; to make it invites disappointment, and may easily tend to frighten and repel those on whom the demand is made. Brotherly love may stand somewhere in the shadow of time, waiting. There is not very much that law can do about that. But fellow-citizenship is for now, for the day before yesterday. The robust clarity, the received authority of right law, could make no greater symbolic contribution to the theory of our race relations than by using this concept as its chief building material.

CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 60 (1969).