

# POSTPONEMENT AS PRECEDENT

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I. INTRODUCTION

*“Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it.”<sup>1</sup>*

*“Pre-c-e-dent—noun—any act, decision, or case that serves as a guide or justification for subsequent situations.”<sup>2</sup>*

One of the most anticipated U.S. Supreme Court decisions of the October 2017 term—*Masterpiece Cakeshop v. Colorado Civil Rights Division*<sup>3</sup>—went into oral argument with a bang and came out with a doctrinal whimper, or at least that is the assessment offered by many commentators and scholars.<sup>4</sup> It is true that Justice Kennedy’s majority

<sup>1</sup> Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

<sup>2</sup> *Precedent*, DICTIONARY.COM, <https://www.dictionary.com/browse/precedent> (last visited Feb. 20, 2020).

<sup>3</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

<sup>4</sup> See, e.g., Klint W. Alexander, *The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1101 (2019) (“Although the Supreme Court ruled in favor of Phillips in *Masterpiece Cakeshop*, its reasoning was narrow in scope and did not diminish LGBT rights as originally feared.”); Kathleen A. Brady, *Opinion, Religious Freedom and the Common Good*, 50 LOY. U. CHI. L.J. 137, 143 (2018) (“The Supreme

opinion largely punted on the central question presented, namely whether enforcement of the Colorado Antidiscrimination Act (“CADA”) violated baker Jack Phillips’s First Amendment Free Exercise and Free Expression rights. As a purely doctrinal matter, then, the opinion does little, and perhaps nothing, to advance the efforts of the Religious Right<sup>5</sup> to create quasi-theocratic zones of exemption to state antidiscrimination law. Instead of reaching the merits, the Court found that the procedure through which the baker’s claims were adjudicated was tainted with, in the Court’s language, “religious hostility” and with statements “inconsistent with the State’s obligation of religious neutrality,” thus violating the baker’s Free Exercise rights.<sup>6</sup> As a result, the Court reversed the Colorado Court of Appeals’ affirmance of the Colorado Civil Right Commission’s order finding the baker in violation of CADA.<sup>7</sup>

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Court sidestepped this issue in *Masterpiece Cakeshop* when it delivered a narrow win for a Colorado baker on the ground that the state’s civil rights commission had demonstrated hostility to the baker’s religious views and, thus, failed to consider his case with the religious neutrality required by the Free Exercise Clause.”); Olivia Brown, et al., *Religious Exemptions*, 20 GEO. J. GENDER & L. 397, 412 (2019) (“The decision in *Masterpiece Cakeshop* provides limited guidance for lower courts facing similar cases by basing its ruling on a very narrow ground.”); Christine Emba, Opinion, *The Supreme Court Wasn’t Ready to Decide On the Wedding Cake. Neither Are We*, WASH. POST (June 5, 2018), [https://www.washingtonpost.com/opinions/the-supreme-court-wasnt-ready-to-decide-on-the-wedding-cake-neither-are-we/2018/06/05/55c890f8-6905-11e8-bea7-c8eb28bc52b1\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-wasnt-ready-to-decide-on-the-wedding-cake-neither-are-we/2018/06/05/55c890f8-6905-11e8-bea7-c8eb28bc52b1_story.html); Paul Waldman, *The Religious Right Didn’t Get the Supreme Court Victory if Hoped for. Yet.*, WASH. POST (June 4, 2018), <https://www.washingtonpost.com/blogs/plum-line/wp/2018/06/04/the-religious-right-didnt-get-the-supreme-court-victory-it-hoped-for-yet>.

<sup>5</sup> I use the term “Religious Right” as a term of art intended to describe a particular segment of the community of traditional Christians within the United States. I recognize that there are many people of all faiths, including Christians, who support full formal equality for lesbian, gay, bisexual, and transgender (“LGBT”) Americans. Thus, the term “Religious Right” as used herein describes a group of organizations that specifically harness their Christian faith to target the project of LGBT legal equality. Together, these organizations are the leading voice of the anti-LGBT rights movement in the United States. It is an alliance of evangelical Protestant Christians and American Roman Catholics, whose goal is to stop and reverse these civil rights victories. See generally Sarah Posner, *The Christian Legal Army Behind Masterpiece Cakeshop*, NATION (Nov. 28, 2017), <https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop>. I use this phrase as an umbrella term to describe organizations such as Focus on the Family, the Alliance Defending Freedom (“ADF”), the Becket Fund for Religious Liberty, the Liberty Counsel, the Freedom of Conscience Defense Fund, American Center for Law and Justice, United States Conference of Catholic Bishops, the Family Research Council, Concerned Women for America, the Faith & Freedom Coalition, the Council for National Policy, and the Liberty Institute. See generally FREDERICK CLARKSON, POLITICAL RESEARCH ASSOCS., WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT 10–12 (2016), <https://www.politicalresearch.org/sites/default/files/2019-05/When-Exemption-is-the-Rule-PRA-Report.pdf>. I place particular emphasis on the ADF because ADF attorneys litigated the *Masterpiece* case.

<sup>6</sup> *Masterpiece*, 138 S. Ct. at 1724.

<sup>7</sup> *Id.* at 1732.

Precedent comes in various forms. Legal precedent—the concept that the decisions in prior cases direct and dictate the outcomes in future cases—is not the focus of this Article. Many contend that the *legal* precedential value of *Masterpiece* is minimal—for both sides. Instead, this Article focuses on the *social* precedent created by the decision—the extent to which “law” (the decision) impacts the social setting in which people think about and reason through difficult subjects, like the proper balance between principles of antidiscrimination and religious liberty.<sup>8</sup> This Article contends that while the *Masterpiece* decision created little, if any, *legal* meaning, it created significant and consequential *social* meaning. In reaching this conclusion, this Article poses and addresses the following questions: What work does the decision do for the Religious Right in advancing its coordinated campaign for religious exemptions? What does the decision mean for the project of lesbian, gay, bisexual, and transgender (“LGBT”) formal equality as instantiated through antidiscrimination law? To answer these questions, this Article focuses on the impact—to both the Religious Right and the LGBT community—of the Court’s choice to postpone a decision on the merits. Put another way, while there is language suggesting that the Religious Right’s central First Amendment argument may not ultimately succeed as a matter of constitutional law,<sup>9</sup> the Court’s avoidance of a merits decision is, in fact, a positive, expressive act that will, at least in this interstitial period, benefit the Religious Right’s campaign for religious exemptions and may produce concrete harms to the LGBT community.

*Masterpiece* is thus an “ambivalent decision—not momentous, but rather transitional,”<sup>10</sup> one that will fuel the Religious Right’s efforts to normalize its extreme revisioning of the First Amendment. More specifically, the opinion’s failure to clearly and squarely disclaim the broader religious discrimination and speech arguments implicitly suggests that whether such broader arguments may have merit is not a fully settled

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<sup>8</sup> NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 31 (2017) (“Social setting impacts coherence reasoning in several ways. For on things, it provides precedents—not just judicial precedents, but political and social ones as well—and makes them salient.”).

<sup>9</sup> See Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. FORUM 201, 202 (2018) [hereinafter NeJaime & Siegel, *Religious Exemptions*] (arguing that the decision is “not narrow” and that it “supplied more guidance on the relationship between religious exemptions and antidiscrimination law than most have acknowledged. Passages of the majority opinion repudiate longstanding arguments advanced by exemption advocates and instead affirm an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector’s beliefs.”).

<sup>10</sup> Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 170 (2018).

issue—a suggestion that is both contrary to the precedent and one that lends such arguments credence. This suggestion is amplified by the majority’s failure to engage in its “duty of civility”—a requirement that judges “provide reasons others can accept solely in virtue as their status as free and equal citizens, and not as adherents of particular religious faiths.”<sup>11</sup>

This Article focuses on the social meaning created by the Court’s expressive act of lending credence to the Religious Right’s First Amendment arguments and the concrete consequences to the LGBT community that likely will follow as a result. Because “[m]eaning is contested and struggled for in the interstices,”<sup>12</sup> the Court’s mere act of avoiding the merits, coupled with its rhetoric in doing so, *in itself*, creates social meaning of constitutional consequence. The Court’s “punt” on the merits questions is thus more impactful to LGBT civil rights and the Religious Right’s campaign for religious exemptions than might first meet the eye. Postponement, then, creates social-meaning precedent. This Article describes that social meaning precedent, predicts its likely consequences, then offers concrete suggestions for the LGBT-rights movement to effectively contest that social meaning and prepare for the case in which the Court *does* reach the merits of the issue.

The Article proceeds in four parts. Part I summarizes the Court’s decision and the national conversation about the case. It briefly describes the Court’s prior LGBT-rights cases and the forces behind the Religious Right’s campaign for religious exemptions to situate the *Masterpiece* decision both historically and politically. Doing so frames and contextualizes the Article’s central proposition that the Court’s avoidance of the merits questions creates social meaning with harmful consequences to LGBT people.

Part II lays out the first part of the Article’s two-fold theoretical framework: The law’s expressive function and the resulting social meanings that are produced. This is the notion that the messages sent by a court’s decision are as impactful and significant as the decision’s regulatory function. Part II applies this expressive, social meaning theoretical framework to the *Masterpiece* opinion to answer the questions: What are the expressive functions of the majority opinion? What social meanings are constructed by these expressive functions?

Part III then sets forth the second aspect of the Article’s theoretical

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<sup>11</sup> *Id.* at 168.

<sup>12</sup> Margaret E. Montoya, *Border Crossings in an Age of Border Patrols: Cruzando Fronteras Metaforica*, 26 N.M. L. REV. 1, 4 (1996) (quoting Dwight Conquergood, *Rethinking Ethnography: Towards a Critical Cultural Politics*, 58 COMM. MONOGRAPHS 179, 184 (1991)).

framework: The theory of “constitutional culture”—a theory that social movements create “communicative pathways” between mobilized citizens and the Court that result in new constitutional meanings.<sup>13</sup> It posits that movement-counter movement conflict—of which *Masterpiece* is a paradigmatic example—is an engine of constitutional change.<sup>14</sup> Part III then applies this theory to the shifting narrative of the Religious Right to answer the questions: How did we get to a place where the Religious Right’s campaign to create quasi-theocratic zones of exemption, which would result in a caste system for LGBT people in the marketplace, has been normalized to the extent that it gets serious consideration at the United States Supreme Court? How does the postponement in *Masterpiece* fit into the constitutional conversation?

Part IV connects these two theoretical analyses to answer the question: What does all this mean for the fate of the Religious Right’s quest for religious exemptions? In answering that question, it describes the harms to LGBT that may accrue from these social meanings while we wait for the Court to address the merits. Part IV closes on a more optimistic note by observing that backlash is a normal and perhaps necessary piece of the project of full formal equality for LGBT people, so that the current moment’s social meaning struggle has the potential to conclude the cycle of social and legal change with a positive result for the LGBT community. With that cycle in mind, Part IV makes recommendations for the LGBT movement for preparing for the case in which the Court *does* reach the merits question.

## II. FROM SIZZLE TO FIZZLE

*“There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America.”*<sup>15</sup>

This Part tracks *Masterpiece* from its origins, through its “sizzle” period of the media frenzy build-up to the oral arguments and the

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<sup>13</sup> See Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 301–03 (2001).

<sup>14</sup> See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1329–30 (2006).

<sup>15</sup> Patrick Joseph Buchanan, “Culture War Speech: Address to the Republican National Convention” (17 August 1992), VOICES OF DEMOCRACY, <http://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text> (last visited Mar. 30, 2020).

widespread anticipation of the Court’s decision, to the “fizzle” that resulted from the Court’s ultimate decision to postpone the merits decision. Further, it describes the Court’s LGBT-rights constitutional canon, as well as the Religious Right’s highly organized social movement behind the national campaign for religious exemptions. This descriptive tracking sets the stage for the Article’s proposition that the decision creates social meaning precedent that has become an important part of the constitutional conversation currently ongoing among the Court, the mobilized citizens of the Religious Right, and the LGBT-rights movement as the country navigates the question of religious exemptions.

#### A. A BAKER’S REFUSAL

##### 1. The Case

The case originated in Denver, Colorado in 2012, when Charlie Craig and David Mullins, accompanied by Craig’s mother, visited Masterpiece Cakeshop, a family-run bakery owned by Jack Phillips.<sup>16</sup> Craig and Mullins requested a cake to celebrate their marriage—which would occur in Massachusetts because Colorado had not yet recognized marriage equality—at a reception that would take place in Colorado.<sup>17</sup> Phillips refused based on his religious opposition to same-sex marriage.<sup>18</sup>

Craig and Mullins filed a complaint of discrimination with the Colorado Civil Rights Division, the agency responsible for investigating such claims under the Colorado Anti-Discrimination Act (“CADA”), which prohibits discrimination in public accommodations based on several protected classes including sexual orientation.<sup>19</sup> After finding probable cause of discrimination, the Division referred the case to the Colorado Civil Rights Commission, which decided that a formal hearing before an administrative law judge (“ALJ”) was warranted.<sup>20</sup> The ALJ determined that there were no disputed material facts and thus decided the case on cross-motions for summary judgment.<sup>21</sup> In that proceeding, Phillips raised two defenses that became the constitutional questions on which the Supreme Court granted certiorari. First, he contended that compelling him to comply

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<sup>16</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724–25 (2018).

<sup>17</sup> *Id.* at 1724.

<sup>18</sup> *Id.* at 1725.

<sup>19</sup> *Id.* at 1725–26.

<sup>20</sup> *Id.* at 1726.

<sup>21</sup> *Id.*

with CADA would violate his First Amendment right to free speech because forcing him to sell a wedding cake to a same-sex couple would impermissibly compel him to send a message with which he disagreed based on his religious beliefs.<sup>22</sup> Second, he argued that mandating his compliance with CADA violated his First Amendment right to the free exercise of religion.<sup>23</sup> The ALJ rejected both constitutional defenses and held in favor of Craig and Mullins.<sup>24</sup>

A party that receives an adverse ruling from the ALJ may appeal that determination to the full Commission, which deliberates publicly before voting on a case.<sup>25</sup> Phillips appealed the ALJ's decision to the Commission, which held two public hearings on the matter. During those hearings, the following comments were made by two commissioners, comments that later became the central focus of Justice Kennedy's majority opinion.

[T]hat Phillips can believe “what he wants to believe,” but that he may not act on those beliefs “if he decides to do business in the state.” . . . “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.” . . . “I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me that is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”<sup>26</sup>

The Commission affirmed the ALJ's decision.<sup>27</sup> It ordered Phillips to cease and desist from discriminating against same-sex couples, to file quarterly compliance reports, and to train his employees about the mandates of CADA.<sup>28</sup>

Phillips appealed to the Colorado Court of Appeals, which affirmed

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1729.

<sup>27</sup> *Id.* at 1726–27.

<sup>28</sup> *Id.* at 1726.



the Commission's decision.<sup>29</sup> After the Colorado Supreme Court denied *certiorari*, Phillips sought *certiorari* at the United States Supreme Court.<sup>30</sup>

## 2. A Note on the Merits

Although this Article does not focus on the merits of the baker's legal arguments, the legal vitality of those argument nonetheless is an important backdrop to the positions taken in the Article. I, along with other scholars, have written at length about the merits of the baker's legal claims,<sup>31</sup> and those discussions will not be repeated here. For purposes of the positions taken in this Article, a brief summary will suffice.

The baker's two claims—first, that compliance with CADA impermissibly infringes on his First Amendment free exercise of religion, and, second that compliance with CADA unconstitutionally infringes on his First Amendment free speech and expression rights—are not equally situated in terms of their merits. The baker's free exercise claim is undoubtedly the weaker of the two claims based on the Court's decision in *Employment Division v. Smith*, in which the Court held that an individual's free exercise rights are *not* unconstitutionally thwarted when a neutral law of general applicability applies in a way to regulate particular conduct.<sup>32</sup> Like the neutral, generally applicable law in *Smith* (a state law ban on the possession of peyote that was not specifically targeted to conduct engaged in for a religious reason), CADA is a neutral, generally applicable law that does not target business owners of a particular religious faith, but instead applies to all business owners in Colorado regardless of their faith (or lack of faith).<sup>33</sup>

Moreover, the Court's decision in *Newman v. Piggie Park*<sup>34</sup> likely defeats the free exercise claim. In *Piggie Park*, the Court rejected as “not

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<sup>29</sup> See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015).

<sup>30</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

<sup>31</sup> See generally Louise Melling, *Will We Sanction Discrimination? Can “Heterosexual Only” Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); NeJaime & Siegel, *Religious Exemptions*, *supra* note 9; Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) [hereinafter NeJaime & Siegel, *Conscience Wars*]; Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2017–2018); Tebbe, *supra* note 8; Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016) [hereinafter Velte, *All Fall Down*].

<sup>32</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>33</sup> See COLO. REV. STAT. § 24-34-601 (2019).

<sup>34</sup> *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

even a borderline case” and “patently frivolous” the argument by a white owner of a BBQ joint that he need not comply with the Civil Rights Act of 1964 because the “Act was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the Defendant’s religion.’”<sup>35</sup> As a result of the baker’s uphill battle on the religious exercise claim in light of *Smith* and *Piggie Park*, the parties in *Masterpiece* focused primarily on the baker’s claim that compliance with CADA violates his free speech rights.

On the free speech claim, there is general consensus among First Amendment scholars and practitioners that the baker’s proposed interpretation of that clause—if accepted by the Court—would represent a sea-change in our collective understanding of what constitutes protected speech vis-à-vis antidiscrimination law.<sup>36</sup> The baker’s position on this claim has been described as a “radically revisionist idea: that laws protecting the civil rights of historically marginalized groups can violate the free-speech rights of the people who refuse to serve them.”<sup>37</sup> It is thus an exceptional characterization of First Amendment free speech protections, one that has the potential to gut civil rights law if fully embraced by the Court.<sup>38</sup> In fact, some scholars have boiled it down to just that—LGBT exceptionalism cloaked in the First Amendment with the intended and radical result of permitting metaphorical “we don’t serve your kind” signs in shop windows for LGBT people, but not for other protected classes, such as race, sex, and national origin.<sup>39</sup>

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<sup>35</sup> *Id.* at 402 n.5.

<sup>36</sup> Currently, there is a consensus that antidiscrimination laws regulate conduct rather than speech; thus any infringement on speech is incidental or is satisfied by the compelling interest test. *See, e.g.,* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61–63 (2006) (noting that the regulation of speech is always “incidental” to the enforcement of antidiscrimination laws”); Caroline Mala Corbin, *Speech or Conduct?: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 293–94 (2015) (contending that antidiscrimination laws “can be characterized as regulating conduct,” thus negating any free speech challenge and arguing that even if antidiscrimination law impacts speech, it satisfies a compelling state interest in “equal citizenship and equal dignity”); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 46 (2016) (arguing that “because antidiscrimination laws regulate non-expressive conduct in a manner that fulfills a compelling government interest, they do not impermissibly burden the free speech rights of corporations”); *But see* Daniel Koonz, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J. L. & LIBERTY 197, 203 (2008) (arguing that “the First Amendment protects much of the speech that hostile public accommodations law restricts.”).

<sup>37</sup> Posner, *supra* note 5.

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g.,* Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J.C.R. & ECON. DEV. 233, 239–42 (2018).

It is important to keep centered the extreme nature of the Religious Right's free speech claim when considering the positions taken below regarding the social meaning created by the Court's punt in *Masterpiece*. It is the extremeness of the Religious Right's position that gives the Court's decision such powerful social meaning in this particular historical and political moment in our country's reckoning on this issue.

### 3. The Masterminds Behind *Masterpiece*

An important contextual piece to understanding the case, its expressive impact, and its social meaning, is to recognize that it did not spring from the individual concerns of Mr. Phillips alone. Rather, the case is part of a nationally-coordinated campaign for religious exemptions being led, in large part, by the Alliance Defending Freedom ("ADF").<sup>40</sup> The Religious Right uses cases like the *Masterpiece* case as a tool for the larger movement, and does so through non-profit legal organizations like ADF,<sup>41</sup> as well as the Liberty Counsel,<sup>42</sup> Advocates for Faith & Freedom,<sup>43</sup> and the Becket Fund for Religious Liberty,<sup>44</sup> which provide counsel for anti-LGBT impact litigation.<sup>45</sup> If not lead counsel, attorneys trained by these organizations typically file an amicus brief in these cases.<sup>46</sup> ADF attorneys litigated the

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<sup>40</sup> See Posner, *supra* note 5 ("But no organization has played a more pivotal role than ADF in shaping and testing 'religious freedom' as the Christian right's latest legal strategy in the culture wars.").

<sup>41</sup> The Southern Poverty Law Center has designated the ADF a "hate group" because it has "supported the recriminalization of homosexuality in the U.S." and "defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and . . . works to develop 'religious liberty' legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion." *Alliance Defending Freedom*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited Sept. 20, 2017).

<sup>42</sup> See *About Liberty Counsel*, LIBERTY COUNSEL, <https://www.lc.org/about> (last visited Feb. 18, 2020).

<sup>43</sup> See *ADVOCATES FOR FAITH & FREEDOM*, <https://faith-freedom.com> (last visited Mar. 20, 2020).

<sup>44</sup> See *Our Mission*, BECKET FUND FOR RELIGIOUS LIBERTY, <https://www.becketlaw.org/about-us> (last visited Mar. 20, 2020).

<sup>45</sup> See, e.g., *Who We Are*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/about-us> (last visited Mar. 20, 2020) ("By funding cases, training attorneys, and successfully advocating for freedom in court, Alliance Defending Freedom changed that.").

<sup>46</sup> See, e.g., Brief of Amicus Curiae The Becket Fund for Religious Liberty in Support of Defendant, *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Aug. 30, 2007) (amicus brief in the Iowa marriage equality case, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)).

*Masterpiece* case.<sup>47</sup>

The ADF was founded in 1993 based on the fears of its founders that “the homosexual agenda threatens religious freedom.”<sup>48</sup> The ADF trains attorneys—more than 3000 of them so far—in the “organization’s ‘Christ-centered’ legal principles”<sup>49</sup> to infiltrate government offices at all levels of government, with an eye toward flooding state and federal court benches with like-minded jurists.<sup>50</sup> Their tactics are varied and include lobbying for laws to protect religious freedom, pressuring school districts to adopt anti-LGBT policies, and, of course, litigation.<sup>51</sup> The ADF “now rivals some of the nation’s top private law firms in Supreme Court activity”<sup>52</sup> and, since marriage equality became the law of the land, has become the most influential of the Religious Right’s cadre of public interest law organizations.<sup>53</sup> In fact, “no other conservative Christian legal organization has propelled so many attorneys into state and federal government, where they are now in positions to oversee the restructuring of civil-rights and First Amendment law in ADF’s mold.”<sup>54</sup> As described by journalist Sarah Posner:

The organization, which once aspired to be merely a Christian antidote to the secular ACLU, has fast become a training ground for future legislators, judges, prosecutors, attorneys general, and other government lawyers—including, notably, in the Trump administration. Noel Francisco, Trump’s solicitor general, in as ADF-allied attorney, and Attorney General Jeff Sessions consulted with ADF when drafting the Department of Justice guidance on religious-freedom issues. At the state level, at least 18 ADF-affiliated lawyers now work in 10 attorney-general offices; all of them were appointed or elected in the past five years. And in just one year, Trump has nominated at least four federal judges who have ties to ADF.

The ADF receives contributions of over \$50 million per year—much

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<sup>47</sup> *Client Story: Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig> (last visited July 20, 2019).

<sup>48</sup> See Posner, *supra* note 5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

of that through individual donors, most of whom remain anonymous.<sup>55</sup> It has fifty-eight staff attorneys and an international footprint.<sup>56</sup> One notable donor is the current Secretary of Education, Betsy DeVos, whose family foundation donated more than one million dollars to the ADF starting in 2002.<sup>57</sup> In addition to the more than three thousand allied attorneys who work on a pro bono basis (more than one million hours of time), the ADF's Blackstone Legal Fellowship summer program has one thousand and eight hundred graduates.<sup>58</sup> The mission of the summer program is to teach law students to apply the principles of the ADF in the public arena "to help break the stranglehold the ACLU and its allies have on our nation's law schools and judicial system."<sup>59</sup> There is evidence that these law students receive messages consistent with a goal of creating a conservative Christian quasi-theocratic state.<sup>60</sup>

As noted above, the free speech claim asserted by Jack Phillips is unprecedented in First Amendment law. The fact that the claim—asserted in multiple cases involving wedding services vendors currently being litigated by the ADF<sup>61</sup>—has gotten enough consideration by lower courts to not only pass the "laugh test" but also to warrant consideration by the U.S. Supreme Court is, in the words of one attorney a "dubious accomplishment," one that has required the ADF to "'take an extreme position' and mainstream it so thoroughly that it has become 'a viable theory at the Supreme Court.'"<sup>62</sup>

The Religious Right, in this instance given voice through the ADF, is thus a social movement—"an organized effort to make moral claims based

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<sup>55</sup> *Id.*

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

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ("Although they have since been removed from ADF's website, testimonials from Blackstone Fellows available as recently as 2014 hint at an ideology firmly opposed to secular government and law. One fellow praised the program for its focus on hewing to the 'orthodoxy of our Christendom in order to win back the rule of law.' Another said it 'unveiled the scale of the attack against truth, and through awesome presenters, also gave the battle plan and weapons necessary to fight back.' One fellow spoke of being encouraged that 'Christ's Truth will never fail or be defeated. It is these attitudes and practices that I will use in recovering the rule of law in America.'"); *see also id.* ("[W]e found just five instances in which ADF's lawyers weighed in on appellate cases involving religious plaintiffs who were not Christian. In only two of them did ADF express support for the religious-minority plaintiff . . .").

<sup>61</sup> *See, e.g.,* *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018); *Washington v. Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019).

<sup>62</sup> Posner, *supra* note 5.

on a constructed collective identity and public action.”<sup>63</sup> The Article will treat it as such, just as it will treat the LGBT-rights movement as a social movement. As described in more detail below, legal and social claims by social movements are an important part of the development of constitutional law. Social movements stake constitutional claims on both legal and social/normative grounds. Social movements thus shift “‘the boundaries of the reasonable, and the plausible’ and ‘open up space for new forms of constitutional imagination.’”<sup>64</sup> Social movements—like the ADF’s movement for religious exemptions—do so in part by creating “the rhetorical and ideological scaffolding that supports and legitimizes certain kinds of political resistance.”<sup>65</sup> Part III describes in more detail the historical trajectory of the Religious Right’s “rhetorical and ideological scaffolding,” erected over many years to support and legitimize their extreme legal (and social) positions.

#### B. THE COUNTRY’S ATTENTION

In each of the U.S. Supreme Court’s terms there are a small number of cases that become part of our national consciousness. *Masterpiece* was one of those cases in the October 2017 term.

The petition for *certiorari* in the *Masterpiece* case was filed July 22, 2016 and sat without a decision until it was granted—50 weeks later—on June 26, 2017. The average length of time between the filing of a petition for *certiorari* and a decision on that petition is just six weeks.<sup>66</sup> The *Masterpiece* petition was first distributed for discussion at the Justices’ weekly conference on February 24, 2018.<sup>67</sup> Then, after “a whopping 14 relists”<sup>68</sup> a vote was taken and *certiorari* was granted—leading Court

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<sup>63</sup> Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1068 (2012). Thus, a social movement is distinct from an “interest group” or “political organization” in that social movements “usually make their claims in ways that are more dynamic, contentious, and participatory than the usual interest group or civic association.” *Id.*

<sup>64</sup> *Id.* at 1068–69.

<sup>65</sup> Gerald Torres, *Some Observations on the Role of Social Change on the Courts*, 54 DRAKE L. REV. 895, 896 (2006).

<sup>66</sup> See PUBLIC INFORMATION OFFICE, SUPREME COURT OF THE UNITED STATES, A REPORTER’S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 16 (2017), <https://www.supremecourt.gov/publicinfo/reportersguide.pdf>.

<sup>67</sup> See Amy Howe, *Today’s Orders*, SCOTUSBLOG (June 12, 2017, 9:37 PM), <https://www.scotusblog.com/2017/06/todays-orders-67>.

<sup>68</sup> Amy Howe, *Today’s Orders (Part 1)*, SCOTUSBLOG (June 26, 2017, 7:17 PM), <https://www.scotusblog.com/2017/06/todays-orders-part-1>.

watchers to begin speculating about what was taking so long.<sup>69</sup>

This unusually long period, coupled with the noteworthy large number of times it was distributed for conference, suggests that the Justices considered it to be particularly controversial. The press certainly saw the case as a controversial blockbuster in the making—describing it as “the most closely watched case on their cert docket,”<sup>70</sup> tracking the number of times it was distributed for conference,<sup>71</sup> and the notably long time between the filing of the petition and the decision to grant it.<sup>72</sup>

After *certiorari* was granted, mainstream press coverage planted the case squarely within the nation’s consciousness through various media platforms. Described as a case that would be a “major test of a clash between laws that ban businesses open to the public from discriminating based on sexual orientation and claims of religious freedom”<sup>73</sup> that would “take the justices into a heated battle in the culture wars,”<sup>74</sup> the media noted that it was one of many such cases percolating around the country.<sup>75</sup> The frenzy over the case grew more fevered when the case was argued on December 5,

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<sup>69</sup> See Amy Howe, *Today’s orders – Two Grants, One CVSG, Still No Masterpiece Cakeshop*, SCOTUSBLOG (Mar. 27, 2017, 3:06 PM), <https://www.scotusblog.com/2017/03/todays-orders-two-grants-one-cvsg-still-no-masterpiece-cakeshop>;

<sup>70</sup> Amy Howe, *Two Grants, Still No Masterpiece Cakeshop (Again)*, SCOTUSBLOG (Apr. 3, 2017, 12:15 PM), <https://www.scotusblog.com/2017/04/two-grants-still-no-masterpiece-cakeshop>.

<sup>71</sup> See Amy Howe, *Today’s Orders*, SCOTUSBLOG (May 1, 2017, 6:55 PM), <https://www.scotusblog.com/2017/05/todays-orders-64> (“Going into last week’s conference, the justices had relisted the case seven times, with an eighth presumably to follow.”); see also Amy Howe, *Today’s Orders*, SCOTUSBLOG (May 15, 2017, 6:52 PM), <https://www.scotusblog.com/2017/05/todays-orders-65> (“For the ninth conference in a row, the justices did not act on the petition for review in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Colorado baker’s challenge to the state’s public accommodations law.”); Amy Howe, *Court Grants One New Case (With No Cakes, Guns or Cell Phones Involved)*, SCOTUSBLOG (May 30, 2017, 2:58 PM), <http://www.scotusblog.com/2017/05/court-grants-one-new-case-no-cakes-guns-cell-phones-involved> (“The justices did not act, however, on some of the highest-profile cases on their certiorari docket. One of those cases, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, will apparently be relisted for the 11th time.”).

<sup>72</sup> See Amy Howe, *Today’s Orders*, SCOTUSBLOG (Apr. 24, 2017, 12:47 PM), <https://www.scotusblog.com/2017/04/todays-orders-63> (“At this point, there is no way to know why the case has been relisted several times without any action from the justices, although two of the more likely possibilities are that one or more justices could be dissenting from the denial of review or that the justices are waiting for Gorsuch to weigh in.”).

<sup>73</sup> Adam Liptak, *Justices to Hear Case on Religious Objections to Same-Sex Marriage*, N. Y. TIMES (June 26, 2018), <https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html>.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*

2017.<sup>76</sup>

Once submitted, the case was one of the most anticipated decisions of the October 2017 term.<sup>77</sup> The decision, however, did not live up to its hype.

### C. THE DISAPPOINTING DENOUEMENT

While the Court granted *certiorari* on the question presented as “[w]hether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment[.]”<sup>78</sup> the opinion re-framed the question as “whether the Commission’s order violated the Constitution.”<sup>79</sup> Justice Kennedy determined that the baker would prevail, not because he proved up the merits of his free speech claim or even the true substance of his free exercise claim, but because the Colorado Civil Rights Commission failed to provide a neutral *process*, which violated his free exercise rights.<sup>80</sup> This pivot away from substance to decide the case on process grounds is the punt: “Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”<sup>81</sup>

Justice Kennedy’s opinion uses the words “difficult” and “difficulties” five times to describe the baker’s claims.<sup>82</sup> He characterized the case as one presenting “difficult questions as to the proper reconciliation of at least two principles”—a state’s authority to enact antidiscrimination law and First

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<sup>76</sup> See, e.g., Ariane de Vogue, *Supreme Court Set to Take Up LGBT Rights and Religious Liberty*, CNN POLITICS (Sept. 5, 2017), <https://www.cnn.com/2017/09/05/politics/supreme-court-lgbt-rights-religious-liberty/index.html>; Henry Gass, *Religious Liberty or Right to Discriminate? High Court to Hear Arguments in Wedding Cake Case*, CHRISTIAN SCI. MONITOR (Dec. 4, 2017), <https://www.csmonitor.com/USA/Justice/2017/1204/Religious-liberty-or-right-to-discriminate-High-court-to-hear-arguments-in-wedding-cake-case> (“As evidenced by the people who began camping outside the high court Friday for a seat at Tuesday’s oral arguments, it seems destined to be a historic ruling in a landmark term.”).

<sup>77</sup> See, e.g., Kenneth Craycraft, Opinion, *Masterpiece Cakeshop Case Tests Limits of Identity Politics*, CIN. ENQUIRER (Dec. 8, 2017, 1:34 PM) <https://www.cincinnati.com/story/opinion/contributors/2017/12/06/masterpiece-cakeshop-case-tests-limits-identity-politics/926795001>.

<sup>78</sup> Brief for Petitioners at i, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1721 (2018) (No. 16-111).

<sup>79</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* at 1723, 1728, 1732.



Amendment rights of all people.<sup>83</sup> He characterized the baker’s freedom of speech claim as “difficult, for few persons who have seen a beautiful wedding cake have thought of its creation as an exercise of protected speech.”<sup>84</sup> He next contended that the “same difficulties arise in determining whether a baker has a valid free exercise claim,”<sup>85</sup> a claim he described as “delicate.”<sup>86</sup> Justice Kennedy’s descriptions of the claims and their resolution set the stage for the expressive work done by the majority opinion.

As described herein, it is a reasonable conclusion—based on the Court’s LGBT-rights canon, *Smith* and *Piggie Park*—that this case is neither “difficult” nor “delicate.” By framing the case in these terms, Justice Kennedy sends a message that these claims arguably have merit, that they are open questions worthy of future review. His unwillingness to disavow the extreme and broad arguments put forth by the Religious Right implicitly indicates that these arguments may be meritorious by implying that the issue has not yet been settled. Justice Kennedy’s suggestion on both fronts is contrary to the precedent and sends a message—that these arguments have credence. This threshold legitimization of the Religious Right’s arguments thus does expressive damage to LGBT people and to the legacy of the *Romer-Lawrence-Windsor-Obergefell* line of cases.

Justice Kennedy’s next statement sets the stage for the expressive work done by his opinion: “This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.”<sup>87</sup> Kennedy relied on notably similar language in *Obergefell* when he held that same-sex couples share in the fundamental right to marry: “[I]n 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.”<sup>88</sup>

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<sup>83</sup> *Id.* at 1723.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1724.

<sup>87</sup> *Id.* at 1723.

<sup>88</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *see also id.* at 2596 (“These new insights [about marriage] have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.”); *id.* at 2602 (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”); *id.* at 2598 (“When new insight reveals discord between the Constitution’s central protections and a received legal

Deploying similar language in the marriage equality case and the religious exemption case sends a message that the equality claims of LGBT people (through claims to marriage and nondiscrimination) are on legal and normative par with the revisionist First Amendment claims of the Religious Right, which many contend they definitely are not.<sup>89</sup>

Even if one assumes that Justice Kennedy's use of the words "difficult," "difficulties," and "delicate" reflected his own authentic struggle with the doctrinal issues presented rather than an intent to send a message to the Religious Right, once an author's words are inserted into the public discourse, they will be interpreted by different constituencies in different ways. Therefore, whether Justice Kennedy considered his majority opinion to be one that would be protective of his legacy on LGBT-rights, or whether he intended to send a message to the Religious Right, is of no concern with regard to the expressive impact of the opinion.<sup>90</sup>

### III. MESSAGES SENT, SOCIAL MEANINGS CREATED

*"The most conflicted moments in American history may be the times when old social meanings about status are dissolving and new ones are taking*

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stricture, a claim to liberty must be addressed.").

<sup>89</sup> See, e.g., NeJaime & Siegel, *Religious Exemptions*, *supra* note 9; Tebbe, *supra* note 8.

<sup>90</sup> See generally Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1314 (2011) ("In law, . . . sometimes the meaning a speaker intends differs from the meaning an audience hears.") Moreover, rhetoric and writing scholars have long argued that language—far from being a clear "window pane" to knowledge—is ultimately a tool that requires interpretation and a means by which the reader, listener, or audience constructs their own knowledge. See generally Carolyn R. Miller, *A Humanistic Rationale for Technical Writing*, 40 College English 610, 611–612 (1979) (discussing relationship between science, rhetoric, and writing). Where scientific approaches to discourse might adopt a positivist view of language, wherein the author controls the message and wherein her intent and meaning is preserved, critical perspectives on language as forwarded by Foucault and more recently Warner suggest that as language circulates among audience members, its meaning shifts, blurs, and in so doing shapes and is shaped by those who interact with the language. See MICHEL FOUCAULT, *The Discourse on Language*, in THE ARCHAEOLOGY OF KNOWLEDGE 215, 215–37 (A. M. Sheridan Smith trans., Pantheon Books ed. 1972); Michael Warner, PUBLICS AND COUNTERPUBLICS (reprt. 2005); Michael Warner, *Publics and Counterpublics*, 88 Q. J. OF SPEECH 413, 413–25 (2002). Grabill and Sullivan make this point about the way risk communication functions: risk assessors may declare "minimal risk," but that language is interpreted and re-constructed by the public. See Jeffrey T. Grabill & W. Michele Simmons, *Toward a Critical Rhetoric of Risk Communication: Producing Citizens and the Role of Technical Communicators*, 7 TECHNICAL COMM. Q. 415, 415–41 (1998). In *Masterpiece Cakeshop*, the description of LGBTQ populations as difficult or delicate face similar interpretations and reconstructions: whatever Justice Kennedy's intent, the impact of these descriptions undeniably favors or affirms the Religious Right.

*their place.*"<sup>91</sup>

This Part lays out the first part of the Article's two-fold theoretical framework—the expressive function of the law (and its attendant construction of social meaning). It then describes the messages sent by the Court's prior LGBT cases before applying this analysis to the *Masterpiece* decision. That application reveals that postponement in this instance created expressive messages and social precedent.

#### A. THE LAW'S EXPRESSIVE FUNCTION

The law's primary function is regulatory: It tells us what the law "is" and what the law requires of the parties to the dispute. In those ways, it regulates behavior. It has secondary function, however, that is as important as its regulatory function: the law is expressive.<sup>92</sup> Part of its expressive functions comes from the fact that litigants draw courts into discursive exchanges against a backdrop of cultural struggles over social meaning.<sup>93</sup> Law thus sends messages that create social meanings and norms apart from the resolution of the particular controversy of the specific case. Put another way, courts carrying out their doctrinal function do so by regulating and directly controlling behavior,<sup>94</sup> whereas the expressive aspects of court opinions "go beyond telling specific parties how they must behave and make statements about social or political issues."<sup>95</sup>

This expressive power—the law's ability to influence norms and behavior separate and apart from the substantive component of the law itself—has been long recognized and discussed by legal scholars.<sup>96</sup> In fact, the popular rhetoric about law often is more about its expressive impact rather than its regulatory consequences.<sup>97</sup> A court's determination about

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<sup>91</sup> J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

<sup>92</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996).

<sup>93</sup> See Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, the Judiciary and Discursive Space in the Liberal Society*, 52 MERCER L. REV. 1003, 1015 (2001) ("Because courts constitute a discursive space, judges range across the discursive options presented to them by litigants. Some actively shape their language to incorporate new meanings brought forward by litigants, while others guard the existing meanings and conventions in which gender is discussed.").

<sup>94</sup> Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–40 (1999).

<sup>95</sup> *Id.* at 1040.

<sup>96</sup> See Sunstein, *On the Expressive Function of Law*, *supra* note 92, at 2022–23, 2051.

<sup>97</sup> See *id.*

what a law “says” about the legal issue gets translated into what that decision “means” at a normative level.<sup>98</sup> The expressive work accomplished by a court decision often carries more societal impact than the regulatory consequences imposed by the substantive law. Some scholars suggest that the law’s expressive function is the “most significant one that courts perform.”<sup>99</sup> U.S. Supreme Court opinions do distinctly powerful expressive work given that many Americans follow those decisions (particularly the widely-publicized, controversial cases), which often are viewed as “speaking on behalf of the nation’s basic principles and commitments.”<sup>100</sup>

Moreover, the litigants in a particular case are participants in a conversation with the Court that results in the Court’s expressive opinion. An opinion from the U.S. Supreme Court is thus not simply a statement of the law. Rather, it is “a written intervention, addressed to particular audiences, and designed to accomplish particular ends.”<sup>101</sup> While litigants before the Court lack the power to compel a particular result, they *do* possess the power to engage the Court in conversation about issues.<sup>102</sup> That power is meaningful because it “enlists courts to participate in moments of cultural transformation.”<sup>103</sup> This is exactly what the ADF has done through its coordinated, national campaign for religious exemptions from state antidiscrimination laws. Courts are thus speakers in the discursive sense, in addition to being rule-makers in the legal sense.<sup>104</sup> Just as “every judicial text that addresses the emerging quest for same-sex marriage “recognizes” gay marriage[.]” the Court’s engagement with the religious exemption movement in *Masterpiece* “recognizes” religious exemptions.<sup>105</sup>

Through the *Masterpiece* decision, the Court has thus become a “discursive space into which a vocabulary”<sup>106</sup> of religious exemptions and quasi-theocratic ideals became centered. As such, the Court became an arena in which messages were made and sent: “The obligation of the judge

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<sup>98</sup> *Id.* at 2024.

<sup>99</sup> Mazzone, *supra* note 94, at 1040 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1st ed. 1991)).

<sup>100</sup> Sunstein, *On the Expressive Function of Law*, *supra* note 92, at 2028.

<sup>101</sup> Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 *MINN. L. REV.* 1267, 1289 (2001).

<sup>102</sup> See Kuykendall, *Gay Marriages and Civil Unions*, *supra* note 93, at 1008. “As discussants subject to being drafted by litigants, courts remain responsible for answering questions propounded by litigants.” *Id.* at 2021.

<sup>103</sup> *Id.* 1008.

<sup>104</sup> *Id.* at 1009–10.

<sup>105</sup> *Id.* at 1011.

<sup>106</sup> *Id.* at 1014.

to speak immerses the judiciary in a struggle over public discourse and makes the court proceedings a depository of changing societal texts.”<sup>107</sup>

While all discussants in the legal dialogue generate messages and contribute to telling of the story, the Court’s role is unique because it is a “vital infrastructure in the development of a discourse fed by streams of linguistic and social change” and “a cultural discursive resource, contributing text no other author could write.”<sup>108</sup> Moreover, the Justices are cognizant of their expansive, wide-reaching audience in moments of historical import.<sup>109</sup> The messages and rhetoric contained in the Court’s opinions thus create both a case-specific narrative and a societal narrative.<sup>110</sup> It is the societal narrative—the messages sent—with which this Article is concerned.

Law—through its expressive function—is thus norm-constitutive: “Legal norms shape how individuals understand social relations.”<sup>111</sup> Thus when any court, but especially the U.S. Supreme Court, agrees that the demands of a social movement are included within an essential constitutional principle, then the goals and values of that social movement “have received the important symbols of legitimacy.”<sup>112</sup> In sum, the Court’s

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<sup>107</sup> *Id.* at 1019.

<sup>108</sup> *Id.*

<sup>109</sup> Kate Huddleston, *Depicting Minority Petitioners’ Lives in Appellate Opinions*, 164 U. PA. L. REV. Online 87, 91 (2016).

<sup>110</sup> *Id.*

<sup>111</sup> Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 960 (2011) [hereinafter NeJaime, *Winning*].

<sup>112</sup> *Id.* at 962 (quoting JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 217–218 (1978)). Silence, too, is expressive. See Mae Kuykendall, *Evaluating the Sociology of First Amendment Silence*, 42 HASTINGS CONST. L. Q. 695, 696 (2015). Kuykendall characterizes the Court’s holding *Boy Scouts of America v. Dale* as one that “expanded the right of silence” to a principle that “now serves as a malleable weapon of the powerful against the powerless.” *Id.* at 699. She points to *Dale* as an example of this trend, a case in which the Court permitted a powerful group—the Boy Scouts of America—to claim a right to silence on the issue of homosexuality by granting the Boys Scouts an exemption from New Jersey’s antidiscrimination law. *Id.* at 702. She notes that this trend continued in cases like *Burwell v. Hobby Lobby* and *Citizens United v. FEC*. *Id.* at 705–07. Her argument that the Court has turned the First Amendment’s right to silence on its head—to the detriment of both robust public discourses and the protection of historically marginalized groups through antidiscrimination law—would have applied with equal force to the merits question presented in *Masterpiece*, if the Court had addressed the issue and resolved it in favor of Jack Phillips. *Id.* at 707 (“Protection for vulnerable individuals becomes a privilege of opt out from general law for large enterprises, with little concern for the impact on individual needs for which the legislatures have otherwise provided.”). Although Kuykendall’s analysis addresses the Court’s holdings that bestow a right to silence upon litigant-organizations to the detriment of LGBT people who lose the protections of antidiscrimination law as a result, her analysis is also salient to describe the Court itself as the constitutional actor claiming the right to be silent. She aptly notes that the

opinions contain not only legal messages about the regulation of the parties' conduct, they also "contain expressive messages regarding how citizens should behave."<sup>113</sup>

#### B. THE LAW'S CONSTRUCTION OF SOCIAL MEANING

Closely related to the law's expressive function is the idea of law as a site of social construction and thus of social meaning. As used herein, "social meaning" describes "the semiotic content attached to various actions, or inactions, or statuses, within a particular context."<sup>114</sup> By way of example, if "an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning."<sup>115</sup> The meaning is described as "social" "to emphasize its contingency on a particular society or group or community within which social meanings occur."<sup>116</sup>

Another way to think about social meaning is to recognize that the "law creates and shapes information about the kinds of behavior that members of the public hope for and value, as well as the kinds they expect and fear."<sup>117</sup> Social norms create social meaning by imbuing actions with meaning—from the roles we play to the values we hold; all of these take on social meaning as they are mediated by shared social norms.<sup>118</sup> Thus, "the positions that the law takes become suffused with meaning."<sup>119</sup> For example:

What it punishes (drug possession, sodomy) can tell us what kind of life the community views as virtuous; how it punishes (imprisonment, corporal punishment, fines) can tell us what forms of affliction it views as appropriate to

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expressive meaning of silence "may differ depending on setting" as well as on who is performing the silence. See *id.* at 740. In *Masterpiece*, the Court's "choice of silence, as an abstraction, is expressive and empowering to" the Religious Right, a group that already holds social power. *Id.* at 754. The silence is a deliberate decision to present the Religious Right "in a certain light." *Id.* at 754–55. At the elite level of the U.S. Supreme Court, Justice Kennedy's opinion becomes "a form of expression through a tactic of meaningful silence." *Id.* at 755.

<sup>113</sup> I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 671–72 (2018) (internal footnotes omitted).

<sup>114</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–52 (1995) (internal footnotes omitted).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997).

<sup>118</sup> *Id.* at 362.

<sup>119</sup> *Id.* "Because norms construct the context within which action becomes meaningful, regulating norms can reinforce or suppress particular meanings." *Id.* at 363.

mark wrongdoers' disgrace; how severely it punishes (the death penalty for the killers of whites, life imprisonment for the killers of blacks) can tell us whose interests it values and how much.<sup>120</sup>

While there may be disagreement about the social meaning of a particular act, even then “there is a range or distribution of meanings,” which should be interrogated to ascertain *how* that range of meanings got made and *how* that range of meanings got changed.<sup>121</sup> How are social meanings used? As pertinent herein, they constitute, guide and restrain;<sup>122</sup> in some instances, they are tools leveraged by the government.<sup>123</sup> Thus, they must do their work of constituting, guiding and restraining “in a way that feels natural.”<sup>124</sup>

While often overlooked, the social construction function of the law creates social meanings that “constitute what is authority for a particular society.”<sup>125</sup> This is a circumstance in which the state itself creates social meaning. As part of the larger category of “law,” the Court’s opinions create social meaning, because they “indirectly communicate which behavior is inappropriate, orthodox, or should be rewarded. More importantly, they do so in ways that are often subtle and work below the surface.”<sup>126</sup>

The courts thus “have a role as social engineers, whether they acknowledge that fact or not.”<sup>127</sup> For example, courts’ decisions in early cases involving the adoption of children by same-sex parents—which required courts to interpret state statutes that were silent on the issue—had implications that went beyond to parties in the case.<sup>128</sup> “Indeed, by determining the legality of lesbian and gay families, the court is ruling on

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<sup>120</sup> *Id.* 362 (internal footnote omitted).

<sup>121</sup> Lessig, *supra* note 114, at 955.

<sup>122</sup> *Id.* at 956.

<sup>123</sup> *Id.* at 957 (“Governments trade on standing social meanings to advance state ends. If the nation suffers under a health craze, the government can use ‘healthy styles of life’ as arguments to fight drug usage. If the nation worships, then the government can use ‘family values’ to exclude homosexuals from social life. If a nation is trying to build national identity, then (tragically) it can use the constructed meaning of race and blood to carve up a nation.”).

<sup>124</sup> *Id.* at 959.

<sup>125</sup> *Id.* at 947.

<sup>126</sup> Capers, *supra* note 113, at 671–72 (internal footnotes omitted); *see also* Lessig, *supra* note 114, at 949–50 (noting that in some instances, the government prescribes what is “orthodox”).

<sup>127</sup> Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 766 (1999).

<sup>128</sup> *See id.* at 763–764 (citing and describing *Pleasant v. Pleasant*, *In re Appeal in Pima County Juvenile Action*, and *Weigand v. Houghton*, as examples of court narratives shaping law and society) (citations omitted).

the legitimacy of these ‘alternative’ family structures, and implicitly conveys its approval or disapproval of these arrangements.”<sup>129</sup>

In another example, *Brown v. Board of Education*, the Court’s primary role of lawmaking—applying the Equal Protection Clause to school segregation and finding it unconstitutional—paled in comparison to the role its opinion had in meaning-making. Schools remain largely segregated today (albeit it is *de facto* rather than *de jure* segregation), illustrating that the impact of the lawmaking function of *Brown* was limited. However, the social meanings created by *Brown*—that “separate” could never mean “equal” because *de jure* segregation cast African Americans as inferior and maintained a system of legalized white supremacy<sup>130</sup>—were transformative and enduring.<sup>131</sup> Similarly, anti-miscegenation laws were struck down largely because of the social meaning—that white Supremacy was a permissible regime—they created.<sup>132</sup>

A final example, *Obergefell v. Hodges*, rests on social meaning rationale, supported by the constitutional doctrines of due process and equal protection. The *Obergefell* Court emphasized the social meaning created by the exclusion of same-sex couples from the institution of civil marriage—that heterosexuality was superior to homosexuality in ways that caused the government to favor different-sex couples.<sup>133</sup> As a result, the denial of marriage equality would create social meaning of disrespect and subordination of same-sex couples, an outcome the Court found constitutionally impermissible.<sup>134</sup> The Court explicitly recognized the social meaning that would have resulted had it held that the fundamental right to marry does not include same-sex couples: “[W]hen sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put *the imprimatur of the State itself* on an exclusion that soon demeans and stigmatizes those whose own liberty is then denied.”<sup>135</sup>

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<sup>129</sup> *Id.* at 767.

<sup>130</sup> See, e.g., B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 508–09 (2005); see also James M. O’Fallon, *The Meaning of Justice*, 62 TEX. L. REV. 763 (1983).

<sup>131</sup> See, e.g., Tebbe, *supra* note 8, at 104 (“Even if the schools were equal in every material way, and even if students suffered no psychological harm, *Brown* was rightly decided because it prohibited the government from rendering African Americans inferior among the citizenry.”); see also Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 185 (2019) (describing Charles Black’s “seminal defense” of the *Brown* decision as the fact that segregation carries a social meaning of inequality and subordination).

<sup>132</sup> Tebbe, *supra* note 8, at 104.

<sup>133</sup> *Id.* at 106.

<sup>134</sup> *Id.*

<sup>135</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (emphasis added).



Excluding same-sex couples from marriage would amount to the government speaking its disapproval of such union. That, in turn, would create a social meaning of subordination, thus signaling that such subordination is acceptable in other areas of civil life and, indeed, in the notion of lesser citizenship rights for LGBT people.<sup>136</sup>

Finally, when the government creates social meaning through the Court it has special significance because the government has power over the lives of the citizenry in ways that social movements (and their messages) do not. Put another way, the messenger matters. When a movement like the ADF works to create social meaning through its messaging, the collective American citizenry may weigh those messages and determine their legitimacy. While such weighing is not necessarily precluded when the government is the message- and meaning-maker, the power and meaning of the messages are different in kind and degree private actors doing so through social movement mobilization. In short, because it is the government that establishes status regimes and doles out rights and responsibilities according to those statuses,<sup>137</sup> the messages and meanings created by the government about those statuses are more consequential than those created by social movements about those same statuses. While the messages and meanings created by social movements may bolster—and be bolstered by—similar government messages and meanings, they rarely, if ever, will have the same power as when the government itself prescribes the orthodoxy of status regimes.<sup>138</sup>

In sum, the Court's decisions construct social meaning by creating meanings about different status groups and weighing in on the appropriateness of status regimes. Notably, these regimes are hierarchies, not “mere separation of groups, where the members of each group hold the other in mutual disdain.”<sup>139</sup> Instead, a status hierarchy is “sustained by a system of social meanings in which one group receives relatively positive associations and another correspondingly negative associations.”<sup>140</sup>

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<sup>136</sup> Tebbe, *supra* note 8, at 108.

<sup>137</sup> See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* 11, 32 (South End Press 2011).

<sup>138</sup> See Lessig, *supra* note 110, at 946–47.

<sup>139</sup> Balkin, *supra* note 91, at 2322.

<sup>140</sup> *Id.* As a result, “their identities are not freestanding: The identity of one is defined in part by its relationship to the identity of the other, and a change in the meanings attributed to one will affect not only its own social identity, but the identity of the other group. In a hierarchy with many status groups, there can be many different ways of differentiating the various groups and their respective lifestyles, and hence the system of social meanings (and the results of changes in social meanings) can be quite complex.” *Id.* at 2323.

C. EXPRESSIVE FUNCTION AND SOCIAL MEANING IN *MASTERPIECE*

Before describing the social meaning created by *Masterpiece*, the expressive function of the Court’s LGBT-rights canon leading up to *Masterpiece* should be noted. Familiarity with the messages sent and social meanings created by these prior cases is necessary to situate the meaning created by *Masterpiece*.

## 1. Meaning in the Court’s Prior LGBT Precedent

In a series of four cases from 1996 to 2015, the Court has created a constitutional canon of LGBT jurisprudence that has created a largely positive social meaning for LGBT people; thus, the social meaning created by *Masterpiece* represents a notable shift in the messages sent by the Court and the social meaning created by those messages.

In *Romer v. Evans*,<sup>141</sup> the Court struck down an amendment to the Colorado Constitution, known as Amendment 2, which repealed all local and municipal antidiscrimination laws that prohibited discrimination based on sexual orientation and prohibited the future passage of any such laws.<sup>142</sup> The Court held that Amendment 2 violated the Equal Protection Clause because it was grounded in anti-LGBT animus, as evidenced by the fact that it “identifies persons by a single trait and then denies them protection across the board.”<sup>143</sup>

The message sent by *Romer* was made clear from the first sentence of the opinion, in which Justice Kennedy quoted from Justice Harlan’s dissent in *Plessy v. Ferguson*: “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’”<sup>144</sup> The Court concluded that Amendment 2 would enact “sweeping and comprehensive”<sup>145</sup> change in the legal status of LGBT Coloradans. It noted that the law would remove the protections of both specific antidiscrimination laws as well as general laws from LGBT people alone.<sup>146</sup> It held that Amendment 2 unconstitutionally withdrew from LGBT people alone that “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a

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<sup>141</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>142</sup> *Id.* at 624–26.

<sup>143</sup> *Id.* at 633.

<sup>144</sup> *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>145</sup> *Id.* at 627.

<sup>146</sup> *Id.* at 628–31.

free society.”<sup>147</sup> It concluded that the “inevitable inference”<sup>148</sup> that must be drawn from Amendment 2 is that the “disadvantage imposed is born of animosity toward the class of persons affected”<sup>149</sup> and held as a matter of constitutional law that animus is an impermissible rationale for law.<sup>150</sup> Because Amendment 2 classified LGBT people “not to further a proper legislative end but to make them unequal to everyone else,”<sup>151</sup> the Court ruled that it violated the Equal Protection Clause.<sup>152</sup>

*Romer* thus sent a message—the first of its kind from the Court—that LGBT people should be viewed as full and equal citizens under the law. The social meaning of these messages was that animus toward LGBT people was not warranted, thus suggesting that the law must reflect the equal integrity and dignity of LGBT people.

While equality was Justice Kennedy’s opener in *Romer*, dignity took center stage in his decision in *Lawrence v. Texas*.<sup>153</sup> The Court ended an era in which sodomy laws—held constitutional in *Bowers v. Hardwick*<sup>154</sup>—had been wielded to justify discrimination against LGBT people in *all* areas of life when it declared Texas’s sodomy law to be unconstitutional.<sup>155</sup> Justice Kennedy opened the opinion with: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>156</sup> His ultimate holding sent a clear message about the place of LGBT people in the law: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make

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<sup>147</sup> *Id.* at 631.

<sup>148</sup> *Id.* at 635.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>154</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>155</sup> See generally Kyle C. Velte, *Why the Religious Right Can’t Have Its (Straight) Wedding Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 LAW & INEQ. 67, 75–76 (2018) [hereinafter Velte, *Breaking the Preservation*] (noting that *Bowers*—a criminal law case—had been used to justify discrimination against LGBT people in other contexts, such as family law, public accommodations, and employment).

<sup>156</sup> *Lawrence*, 539 U.S. at 562.

this choice.”<sup>157</sup> The Court’s rejection of *Bowers*, as precedent that “demeans the lives of” LGBT people, reinforced the central expressive feat of *Lawrence*—to send the message that LGBT people’s relationships, and specifically the conduct that constitutes those relationships, are to be protected by law in the same way that the relationships of different-sex couples are protected.<sup>158</sup>

In mandating legal protection of this dignity-enhancing conduct, the Court necessarily implied that LGBT relationships *deserve* and are normatively *worthy* of such protections; to hold otherwise would result in social and legal stigma.<sup>159</sup> *Lawrence* thus built upon *Romer*’s message by conveying to the country that LGBT people are entitled to fully exercise their interests in liberty, in addition to being entitled to full equality. Being entitled to these aspects of full citizenship *as a matter of law* implies the correlative message that LGBT are deserving of such rights and protections *as a normative matter*, which in turn creates positive social meaning about what it means to be LGBT.

In *United States v. Windsor*,<sup>160</sup> the Court held, again through Justice Kennedy, that the Defense of Marriage Act’s (“DOMA’s”) exclusion of state same-sex marriages from federal recognition imposed a “disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages” and had “the purpose and effect of disapproval of that class.”<sup>161</sup> Through these words, Justice Kennedy sent the message that such stigma and disapproval are legally improper, and implicitly sent the message that same-sex couples are normatively worthy and deserving of social approval and equal social class status as different-sex married couples.<sup>162</sup> His references to separate status and stigma harken back to the messages sent by *Brown v. Board of Education*—that, in the context of race, “separate” cannot mean “equal” because such a regime in fact perpetuates a system of white supremacy that brands African Americans as inferior.

In fact, in *Windsor*, Justice Kennedy explicitly acknowledged that DOMA went beyond the stated purpose of legal regulation; it extended into the transmission of normative, social messages about the very worth of LGBT people generally and same-sex couples in particular: “DOMA

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<sup>157</sup> *Id.* at 567.

<sup>158</sup> *Id.* at 579 (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

<sup>159</sup> *Id.* at 575.

<sup>160</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>161</sup> *Id.* at 746.

<sup>162</sup> *Id.*

undermines both the public and private significance of state-sanctioned same-sex marriages” because it “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition” and “places same-sex couples in an unstable position of being in a second-tier marriage.”<sup>163</sup> Rejecting Congress’s “avowed purpose and practical effect” of DOMA “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages,” the Court held DOMA unconstitutional under the Equal Protection and Due Process Clauses. And, for the first time, the Court sent a message about the children of same-sex couples. It held that DOMA “humiliates tens of thousands of children now being raised by same-sex couples” by making “it even more difficult for the 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.”<sup>164</sup> For Justice Kennedy, the construction of social meaning about children with LGBT parents seemed as important as the legal rights and obligations that marriage equality would bring to same-sex couples.

Finally, and most recently, in *Obergefell v. Hodges*, Justice Kennedy again emphasized the dignity of LGBT identity in holding that the fundamental right to marriage includes same-sex couples.<sup>165</sup> Before addressing the merits of the legal question, the Court embarked on a lesson on the history of marriage in the United States, much of which touched on the *social* as opposed to *legal* significance of the institution.<sup>166</sup> Justice Kennedy explained that marriage “always has promised nobility and dignity to all persons, without regard to their station in life.”<sup>167</sup> He observed that marriage “ris[es] from the most basic human needs” and “is essential to our most profound hopes and aspirations.”<sup>168</sup>

The Court grounded its holding in four particular aspects of marriage: (1) “right to personal choice regarding marriage is inherent in the concept of individual autonomy[.]”<sup>169</sup> (2) “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals[.]”<sup>170</sup> (3) “[the right to marry] safeguards children

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<sup>163</sup> *Id.* at 772.

<sup>164</sup> *Id.*

<sup>165</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons . . . to define and express their identity.”).

<sup>166</sup> *Id.* at 2595–97, 2599–2601.

<sup>167</sup> *Id.* at 2594.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 2599.

<sup>170</sup> *Id.*

and families and thus draws meaning from related rights of childrearing, procreation, and education[.]”<sup>171</sup> and (4) “marriage is a keystone of our social order.”<sup>172</sup> These touch more on what it means to be married as a normative and social matter than what it means as a legal matter.

Importantly for this Article, the Court emphasized not just the legal harms of excluding same-sex couples from the institution of marriage, but also the social harms: “[E]xclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”<sup>173</sup>

In addressing sincere religious objections to same-sex marriage, the Court explicitly noted the connection between legal status and the messages and social meaning formed by the law: “[W]hen that sincere, personal opposition becomes enacted law and public policy, *the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes* those whose own liberty is then denied.”<sup>174</sup>

The messages of *Windsor* and *Obergefell* are clear: unequal status regimes regarding same-sex couples and their children are unlawful and normatively unwarranted. Instead, equality of legal status is compelled and, implies LGBT people and their families have integrity, dignity, and honor, and are deserving of all the rights of a full citizenship.

Together, the expressive output of the LGBT-rights canon at the time of the *Masterpiece* case—messages that LGBT people and their families are valued, equal, honorable, and normal—was equal to the legal output of those cases—that LGBT people and their families cannot, as a matter of constitutional law, be placed in an unequal status regime vis-à-vis heterosexual people and different-sex couples. Like the law touching on the First Amendment claims, this body of existing LGBT constitutional law—and in particular its messages—should remain centered as the Article describes the social meaning of *Masterpiece*. Because *Masterpiece* takes its place in a continuing constitutional conversation between the Court and citizens, the entirety of the Court’s pronouncements about LGBT people

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<sup>171</sup> *Id.* at 2600.

<sup>172</sup> *Id.* at 2601.

<sup>173</sup> *Id.* at 2602; see also Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463, 464–65 (2017) (noting that *Obergefell* “conveyed that mainstream acceptance of same-sex relationships had reversed decades of negative public sentiments” and “therefore underscored the recent ongoing transition away from unpopular views of same-sex relationships”).

<sup>174</sup> *Obergefell*, 135 S. Ct. at 2602 (emphasis added).

must be kept in mind to accurately situate *Masterpiece* in context.

## 2. Meaning in *Masterpiece*

In *Masterpiece*, the Court took a step back from its prior positive social meaning construction. If Justice Scalia were still alive, he likely would reprise his *Romer* dissent's refrain of "culture wars" and a "Kulturkampf."<sup>175</sup> That's because the issues presented (and left unresolved) in *Masterpiece* are, like the issues presented in *Romer*, indicators of a larger social circumstance, namely "a gradual but accelerating breakdown of a powerful hierarchy of social status buttressed by a system of social meanings."<sup>176</sup> This traditional, historical status regime situated "heterosexuality as normal, moral, and honorable, and homosexuality as abnormal, immoral, and stigmatizing by comparison."<sup>177</sup> As these status regimes have been successfully contested, they have started to deteriorate, rendering their social meanings uncertain and unstable.<sup>178</sup> As the hierarchy destabilizes, so to do the "status, authority, and moral prestige" attached to it.<sup>179</sup>

*Masterpiece*, and the coordinated wave of similar cases being shepherded through the courts by the ADF, is a direct response to the destabilization of what the Religious Right considers a central pillar of social, legal, and religious meanings: marriage. For, "groups whose worldviews are most undermined by such changes . . . will understandably seek to halt what they see as an accelerating slide toward moral degeneration."<sup>180</sup> *Obergefell* rang in a new era, in which the centrally significant institution of marriage no longer would signal clearly demarcated status hierarchies, with heterosexual couples on the top of the social-legal-religious hierarchy. In short, the Religious Right characterized marriage equality as an event that stripped its members of "status, authority, and moral prestige."<sup>181</sup> Thus, the religious exemption movement was the result of—and in reaction to—this shift in status hierarchies.

So, while *Obergefell* created social meaning that LGBT people are co-

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<sup>175</sup> *Romer v. Evans*, 517 U.S. 620, 636, 652 (1996) (Scalia, J., dissenting).

<sup>176</sup> Balkin, *supra* note 91, at 2318–19 (explaining that Kulturkampf is "applied more broadly to denote any struggle between groups over a common national culture").

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2319.

equal with heterosexual people, rather than inferior, and their relationships and families are normal, equal, valuable, and worthy of the institution of marriage, the Religious Right sought to chip away at that social meaning through its campaign for religious exemptions. The messages sent by the religious exemption cases—and the social meanings the Religious Right hopes to create—are that different-sex, traditional marriage *is* still superior to same-sex marriage, and that LGBT people and their relationships and family are in fact subordinate and inferior to different-sex marriages and families. The Religious Right does so, however, by a sleight-of-hand narrative technique: Instead of asserting an explicitly homophobic narrative against LGBT people and same-sex marriage (as had been deployed through the period of marriage equality litigation), it instead has crafted a narrative—that laws protecting the civil rights of historically marginalized groups violate the free speech rights of conservative Christians who refuse to serve them. Thus, it contends, “the advance of rights for LGBT[] people turns Christians into their victims”<sup>182</sup> and into victims of secular society generally.<sup>183</sup>

The “urgency and deep symbolic meaning”<sup>184</sup> of the Religious Right’s regressive efforts are palpable and conspicuous. As Balkin notes (referring to *Romer*) the “culture wars”—which is at its core what *Masterpiece* is—are contests about social structure and status: “The combatants are fighting over whether an existing form of social stratification will prevail or be transformed, whether an older social hierarchy will be problematized or perpetuated. These Kulturkamps are a special kind of group conflict—a group conflict whose prize is social status.”<sup>185</sup> The question thus becomes: What work does the *Masterpiece* opinion do to support the Religious Right’s expressive mission, which is an example of “a rearguard action in which an older order of social meaning tries to prevent the emergence of a newer one”?<sup>186</sup>

Justice Kennedy’s brief opinion in *Masterpiece* uses “difficult” and “difficulties” five times to describe the baker Philips’s claims. He framed the case as one presenting “difficult questions as to the proper reconciliation

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<sup>182</sup> Posner, *supra* note 5; *see also id.* (noting that the Religious Right originally believed that “churches would be forced to abandon their faith; once it became clear that the law does not force churches to perform or condone same-sex marriages, ADF expanded its universe of victimized Christians”).

<sup>183</sup> *See infra* Part III.

<sup>184</sup> Balkin, *supra* note 91, at 2320.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2319.



of at least two principles”—a state’s authority to enact antidiscrimination law and First Amendment rights of all people.<sup>187</sup> Then, he described the baker’s freedom of speech claim as “difficult, for few persons who have seen a beautiful wedding cake have thought of its creation as an exercise of protected speech.”<sup>188</sup> He next contended that the “same difficulties arise in determining whether a baker has a valid free exercise claim.”<sup>189</sup>

Justice Kennedy’s use of “difficult” and “difficulties,” rather than words that more accurately reflects the baker’s claims—extreme, unprecedented, predetermined by existing precedent, or even “patently frivolous”<sup>190</sup>—signals a tacit acceptance that the baker’s argument has met a baseline standard of acceptability and legitimacy. He later describes the free exercise merits question—when the free exercise of his religion must yield to an otherwise valid exercise of state power—as “delicate.”<sup>191</sup>

The Court’s “communications can expressively harm people by changing their relationship to the State.”<sup>192</sup> Thus Justice Kennedy’s kid-glove treatment of the baker’s “delicate” claims suggests to the world that the Religious Right has a doctrinal leg to stand on when the Court decides the merits issue in the future. It also suggests that the Court may be walking back from *Obergefell*: “The Court’s treatment of [a commissioner’s] comments reflects the more conciliatory approach taken in *Obergefell* toward those with traditional views of marriage. In a sense, *Masterpiece* is the retroactive application of *Obergefell*’s etiquette—its softened stance toward those opposed to gay and lesbian relationship.”<sup>193</sup>

The suggestion that the Religious Right has a doctrinal leg to stand on in *Obergefell* (which is contrary to precedent), in turn, creates social meaning and expressive harm by implying that LGBT consumers may have their relationship with the state definitively changed for the worse should the Court eventually hold that secular vendors may turn away LGBT people. Holding space for the possibility of a Gay Jim Crow sends a message, at best implicitly and at worse explicitly, that LGBT people’s lives just do not matter as much as heterosexual lives. And in the time period before the

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<sup>187</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Newman v. Piggie Park*, 390 U.S. 400, 402 n.5 (1968) (“Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable.”).

<sup>191</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

<sup>192</sup> Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1547 (2000).

<sup>193</sup> Kendrick & Schwartzman, *supra* note 10, at 143.

Court actually addresses the merits, the expressive harm of that suggestion will encourage and support continued material and dignitary harms to LGBT consumers—those who are being turned away by wedding vendors with the force of *Masterpiece* backing them up.<sup>194</sup> Postponement allows the social meanings of stigma, inferiority, and “otherness” to reattach to LGBT existence; meanings that the LGBT movement (and the Court) had been working to dismantle for many years.

The postponement also creates doctrinal uncertainty—will the canon created by *Romer-Lawrence-Windsor-Obergefell* survive the Religious Right’s campaign for religious exemptions? We cannot be sure, because the “principle that underwrites Justice Kennedy’s opinion in *Masterpiece* is the converse of a principle necessary to justify his gay rights decisions.”<sup>195</sup> In Justice Kennedy’s prior LGBT-right cases, the Court essentially rejected religious convictions as legitimate reasons for regulating the sexual relationships of LGBT people.<sup>196</sup>

The exclusion of religious convictions as a rationale could be justified as both a matter of law and political morality.<sup>197</sup> As a legal matter, “the principle of religious neutrality forbids the state from advancing religious reasons.”<sup>198</sup> As a matter of political morality, “the duty of civility requires public officials to provide reasons others can accept solely in virtue of their status as free and equal citizens, and not as adherents of particular religious faiths.”<sup>199</sup> However, if “neutrality and civility require officials to refrain from justifying their actions on the basis of religious convictions, then fairness and reciprocity require refraining from criticizing or expressing hostility toward those convictions.”<sup>200</sup> Thus, we can be sure that the doctrinal uncertainty created by *Masterpiece* and its message that the contestation of LGBT rights is permissible is meaningful in ways that *Masterpiece*’s limited doctrinal punch is not.

Lessig provides a powerful example of how law creates social meaning that intersects directly with notions of equality. He tells the story of a group of white business owners in the Jim Crow south who had supported and testified in favor of the Civil Rights Act of 1964.<sup>201</sup> While dismantling Jim

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<sup>194</sup> See *infra* Part IV.

<sup>195</sup> Kendrick & Schwartzman, *supra* note 10, at 167.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 167–68.

<sup>200</sup> *Id.* at 168.

<sup>201</sup> Lessig, *supra* note 114, at 965.

Crow made economic and business sense for these white business owners—it would have meant a larger labor pool, reduced wages, and an increased demand for goods and service—it only made sense if white customers continued to patronize their businesses.<sup>202</sup> In other words, those white business owners feared retaliation from other whites if they were to voluntarily ignore Jim Crow and serve black customers because that voluntary intermingling had *unambiguous social meaning*—that those white shopkeepers were either greedy, race traitors, or both, and thus would be stigmatized by other whites.<sup>203</sup> The Civil Rights Act of 1964 could shift that social meaning. By creating a legal obligation to serve black customers, the law shifted the social meaning of that act: “The businessman could be hiring or serving a black because of his concern for the status of blacks, or he could be hiring or serving blacks because of his concern to obey the law.”<sup>204</sup> The law thus embedded ambiguity into the social meaning of the act of serving black customers.

Lessig’s account can be connected to the current-day quest for religious exemptions from state antidiscrimination laws. In that context, the Religious Right is making the converse argument, namely that serving LGBT customers in compliance with the law is *not* an ambiguous act, but an affirmative expression of general support for same-sex marriage and LGBT people. The Religious Right thus contends that serving LGBT customers carries the social meaning of acceptance and celebration of same-sex marriage, and thus sends a message that religion is disfavored.<sup>205</sup> This, of course, is the center of the Religious Right’s First Amendment Free Expressions claims and tangled up in the merits question. As a result, the Court’s postponement of the merits question, by leaving open the possibility that such a position about the social meaning of serving LGBT customers may carry the day as a matter of law, tacitly supports the Religious Right.

The importance of both of these examples demonstrates “how a government can change social meaning without having control over [it].”<sup>206</sup>

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<sup>202</sup> *Id.* at 966.

<sup>203</sup> *Id.* (“In a context where voluntary integration was permitted, for a white to serve or hire blacks was for the white to mark him or herself as having either a special greed for money or a special affection for blacks.”).

<sup>204</sup> *Id.*

<sup>205</sup> Tebbe’s response to this contention is that to the contrary, requiring secular businesses to comply with antidiscrimination law “does not carry a social meaning of disfavored status on the basis of religion.” Tebbe, *supra* note 8, at 19.

<sup>206</sup> Lessig, *supra* note 114, at 967; *see also id.* (“Had the federal government had control over social meaning in the way Orwell speaks of such control, it would simply have decreed that blacks be considered equal to whites. Such a decree would have had—as some argue *Brown v Board of*

They illustrate that law can create social stigmatization because it sends a message to the public about the status of those that the law targets. In other words, law, through its social meaning, can “lower the social standing of those the State brands as inferiors. . . . [L]egal communications of status inferiority constitute their targets as second-class citizens.”<sup>207</sup>

Another way to think about social meaning is what Thomas Stoddard calls the “culture-shifting” capacity of law.<sup>208</sup> Stoddard posits that lawmaking has a least five general goals, three of which are “rule-shifting,”<sup>209</sup> and two of which are “culture shifting”—namely, the expression of a “new moral ideal or standard” and to “change cultural attitudes and patterns.”<sup>210</sup> These culture-shifting aspects of the law aim to change society—to create new social meaning, in extralegal ways, that improves the lives of historically marginalized groups.<sup>211</sup> Stoddard contends that to create new social meaning—for the law to engage in culture-shifting—four factors must exist: (1) a broad or profound change, (2) an awareness of the change by the public, (3) public acceptance of the change as evidenced by “a general sense of the legitimacy (or validity) of the change,” and (4) enforcement of the change that is complete and continuous.<sup>212</sup> Resistance, however, stymies culture-shifting because such a shift “requires, at a minimum, an aura of moral and cultural legitimacy to sustain widespread adherence to any new code of conduct.”<sup>213</sup> Professor Gerald Torres builds on Stoddard’s ideas by interrogating what is needed to produce a culture shift.<sup>214</sup>

The past two decades have seen LGBT people and their rights be seen, validated, and recognized at breakneck speed. Of the factors that allow law to create new social meaning—to culture-shift—the first factor has been present along with the tidal wave of LGBT civil rights. The societal changes have no doubt been profound, and the public is undoubtedly aware of these

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Education did have—little effect. But such powerlessness notwithstanding, the government does have the power to change the marginal social costs of various social actions by rendering certain meanings ambiguous.”).

<sup>207</sup> Anderson & Pildes, *supra* note 192, at 1544.

<sup>208</sup> Thomas B. Stoddard, *Bleeding Heart: Reflections on Using Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 973 (1997).

<sup>209</sup> These are (1) the creation of new rights and remedies for victims, and (2) the alteration of the government’s conduct. *Id.* at 972.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 973.

<sup>212</sup> *Id.* at 978.

<sup>213</sup> *Id.* at 983.

<sup>214</sup> See Torres, *supra* note 65, at 896.

changes—thus satisfying Stoddard’s first two steps for culture shifting. However, arguably, Stoddard’s third and fourth factors continued to be contested by the Religious Rights, and the Court’s decision in *Masterpiece* emboldens that contestation. The *Masterpiece* decision brings into doubt whether the sweeping pro-equality changes will be enforced thoroughly and continuously. Permitting same-sex marriages as a matter of constitutional law, then suggesting (and perhaps ultimately holding) that these same couples may be denied goods and services for such marriages, is incomplete and disjointed enforcement of that right. Thus, the social meaning created by *Masterpiece* likely will slow down the steps needed to attain culture-shifting.

Further, the *Masterpiece* decision holds space for the Religious Right to continue resisting the legal changes and their attendant social meaning/culture-shifting. The notion that government can cause constitutional harm through its expression is not limited to its own expression; rather, the government may work constitutional harm through “purposive government action that telegraphs unconstitutional messages.”<sup>215</sup> Postponing a merits decision does exactly that—it is “purposive government action” in the form of a judicial opinion that “telegraphs unconstitutional messages” by creating space and judicial permission for the Religious Right to continue to act in ways contrary to established case law.<sup>216</sup>

State antidiscrimination laws aim to ensure equality in economic opportunity. They also aim to create social meaning that the equality

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<sup>215</sup> Tebbe, *supra* note 8, at 169.

<sup>216</sup> Coverage of the decision by the conservative press demonstrates that the Religious Right has, in fact, received the message sent by the decision. These news outlets framed the decision as a victory for the Religious Right. See, e.g., Sarah Kramer, *VICTORY: Win for Cake Artist Jack Phillips at the Supreme Court*, ALL. DEFENDING FREEDOM (June 4, 2018), <https://adflegal.org/detailspages/blog-details/allianceedge/2018/06/04/victory-win-for-cake-artist-jack-phillips-at-the-supreme-court> (“After more than five years of litigation, the Supreme Court has ruled in Jack’s favor. Praise God! . . . If we want to be a truly tolerant society, we must provide room for everyone to peacefully live and work according to their beliefs—regardless of whether we agree with their views. As Justice Anthony Kennedy stated during oral arguments in Jack’s case: ‘[T]olerance is essential in a free society. And tolerance is most meaningful when it’s mutual.’ Jack’s win is a step toward greater tolerance. And that is something we should all celebrate.”); Ken Klukowski, *Supreme Court Sides with Masterpiece Cakeshop in Same-Sex Wedding Ruling*, BREITBART (June 4, 2018), <https://www.breitbart.com/politics/2018/06/04/supreme-court-sides-with-masterpiece-cakeshop-in-same-sex-wedding-ruling> (describing the decision as a “narrow victory for people of faith”); Kristen Waggoner, *Colorado’s Second Case Against Masterpiece Cakeshop and Jack Phillips Crumbles*, FOX NEWS (Mar. 11, 2019), <https://www.foxnews.com/opinion/colorados-second-crusade-against-jack-phillips-crumbles> (describing the decision as “Jack Phillips’ victory at the Supreme Court” and as a “decisive 7-2 victory for Jack”).

principle, rather than the subordination of protected classes that would result if religious exemptions to public accommodations are permitted, is the governing social norm.<sup>217</sup> Put simply, the social meaning of antidiscrimination laws is that both the government and private actors “stand[] against the formation of caste differences.”<sup>218</sup> Discrimination—what the baker in *Masterpiece* is seeking permission to do—is itself highly expressive. That expressiveness “is one of its evils. It is one of the most effective means available—perhaps the most effective means—by which people can communicate their views about the relative superiority and inferiority of particular groups.”<sup>219</sup>

Thus, the social meaning that would be created by granting religious exemptions to these laws is that such subordinating caste systems are permissible as a normative matter. The Court’s silence in *Masterpiece* on the merits issue will allow this social meaning to continue to be cultivated, expressed and litigated—to the detriment of LGBT people. Allowing such expressive activity to continue layers expression upon expression and creates meaning on top of meaning. Thus, the judicially-endorsed fueling of the Religious Right’s resistance allows the historical social meaning attached to LGBT people—that LGBT people are inferior and thus undeserving of full citizenship—and their rights to continue to fester. In failing to forcefully reject this retrenchment in its *Masterpiece* postponement, the Court simultaneously “telegraphs the unconstitutional messages” of inequality and subordination to the Religious Right, and suppresses the emerging social meaning—that LGBT people are entitled to full citizenship and are “normal in the ways that count”<sup>220</sup>—sought by the LGBT community (and created by the Supreme Court’s prior LGBT cases).

Because the Court’s opinions have an expressive function, the Court itself “establish[es] the parameters of cultural discourse.”<sup>221</sup> Importantly, for purposes of this Article, the paradigms that the Court helps to shape are not just legal paradigms, but also include epistemological, political, and moral ones. Through these paradigms, the Court participates in establishing a “national mood.”<sup>222</sup>

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<sup>217</sup> Tebbe, *supra* note 8, at 119–20.

<sup>218</sup> *Id.* at 119.

<sup>219</sup> Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 299 (2001).

<sup>220</sup> *Hively v. Ivy Tech Comm. College in Indiana*, 853 F.3d 339, 356 (7th Cir. 2017) (Poser, J., concurring).

<sup>221</sup> Robert L. Hayman, Jr., & Nancy Levitt, *The Tales of White Folks: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CALIF. L. REV. 377, 378 (1996).

<sup>222</sup> *Id.* (“[The Court] confirmed or denied the citizenry’s sense of what is real and what is right.”).

Through its prior LGBT-rights cases, the Court had unequivocally established the “parameters of cultural discourse” and set the “national mood” by embracing notions of equality, dignity, and full citizenship for LGBT people. While *Romer* established that LGBT people may not be deemed a stranger to the Constitution, and *Lawrence* established that LGBT people’s intimate conduct may not be disaggregated from their identity, *Windsor* and *Obergefell* established that LGBT people may partake in the institution of marriage—an institution integral and foundational to full citizenship and equality. Together, these cases formed not only the legal canon of LGBT rights and lives, they also created a social meaning that LGBT are worthy of full participation in American society and that their sexual orientation is on par with heterosexuality.

*Masterpiece*’s postponement renders this pro-LGBT social meaning created over the past two decades unstable and contingent. It suggests that the movement for religious exemptions has a doctrinal leg to stand on in its proposed radical re-visioning of the First Amendment, notwithstanding the Court’s precedents. It creates time and space for the Religious Right to continue promoting the social meaning of LGBT people that *it* prefers: one in which unequal status regimes continue to exist, because heterosexuality is inherently better—and thus should be privileged in the law and in society—than homosexuality; one in which LGBT people are undeserving of full and equal citizenship. The Court’s imprimatur of this regressive social meaning thus leaves open an opportunity for the Religious Right—in future cases—to constitutionalize anti-LGBT bigotry and discrimination, and threaten civil rights protections for everyone, while continuing to permit private businesses to flout antidiscrimination laws until the Court decides the merits question.

Because government-created social meanings have a unique power, the social meaning created by *Masterpiece* should not be taken lightly or considered only tangential to its legal holding. The Court’s punting on the merits sends a normative message that the Religious Right’s position—rejected by many First Amendment scholars<sup>223</sup> and judges who have considered similar cases<sup>224</sup>—have a place in American law and society alongside the LGBT equality movement.<sup>225</sup> Saving the resolution of the

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<sup>223</sup> See, e.g., Rubinfeld, *supra* note 219, at 297 (“For better or worse, the First Amendment never has been held to create a constitutional right to civil disobedience.”).

<sup>224</sup> See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

<sup>225</sup> But see NeJaime & Siegel, *Religious Exemptions*, *supra* note 9, at 213–14 (arguing that the Court’s “citation to *Piggie Park* provides more than doctrinal authority. It reaffirms the concept of public accommodations against conservative challenge. . . . By invoking *Piggie Park*,

merits question for another day sends a strong message that gives normative value to the Religious Right's extreme position and its social meaning. Put another way, if the merits issue is worth returning to in the future, it must have some validity. Equality advocates should heed this social meaning created by the Court to be prepared to fight the Religious Right preparing for when and how the Court address the merits later.

#### IV. CONSTITUTIONAL CONVERSATIONS

*“We can all speak constitutional truth, but the only constitutional truth that matters is that which is backed by power.”*<sup>226</sup>

This Part describes and applies the theory of “constitutional culture” to answer the questions: How did we get here, to a place where the Religious Right's campaign to create quasi-theocratic zones of exemption has been normalized to the extent that it gets serious consideration at the United States Supreme Court? How does the postponement in *Masterpiece* fit into the constitutional conversation?

##### A. THE THEORY OF CONSTITUTIONAL CULTURE

Constitutional culture is a theory that embraces the idea that citizens and officials interact with each other through various vehicles, both formal (constitutional amendment, for example) and informal (protests and marches, for example), to form communicative pathways that “create new forms of constitutional understanding.”<sup>227</sup> Because it emphasizes the dialogic relationship between citizens and officials, rather than just the impact of social movement on officials, its focus is on citizens as agents of change; and it hypothesizes that the “constitutional culture” that results from this dialogue “shapes both popular and professional claims about the

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*Masterpiece Cakeshop* asserts that public accommodations laws continue to serve important social ends. In the wake of the sit-ins of the mid-twentieth century, the nation no longer allows business owners to invoke property rights as a reason to refuse service to minorities, as they once commonly did. After the searing debates that led to passage of Title II of the 1964 Civil Rights Act, the nation has come to judge such refusals of service as ‘humiliating.’ It now enforces public accommodations laws on terms that require business owners, whatever their personal convictions, to run their business in a nondiscriminatory fashion. A framework of this kind facilitates unimpeded access to the market for those who have long been subject to discrimination and who do not share the business owners’ beliefs. That is a primary aim of public accommodations laws—an aim the Court has repeatedly recognized as ‘compelling.’”

<sup>226</sup> Torres & Guinier, *The Constitutional Imaginary*, *supra* note 63, at 1064.

<sup>227</sup> Siegel, *supra* note 14, at 1324.



Constitution and enables the forms of communication and deliberative engagement among citizens and officials that dynamically sustain the Constitution's democratic authority in history."<sup>228</sup> Of course, this theory of constitutional development is not without discomfort, given the historical understanding of law as a natural, closed system that provides answers to legal questions without need to resort to the subjective reasoning of men.<sup>229</sup> Thus, we are largely "ambivalent about acknowledging the influence of [social] movements on constitutional meaning."<sup>230</sup>

This theory thus pushes back against the established explanation that there is a singular pathway through which citizens, organized through social movements, may secure constitutional change—through a formal constitutional amendment.<sup>231</sup> It criticizes an "explanatory framework that is bifurcated between lawmaking and adjudication" as "not well suited to chronicling interaction between courts and legislatures, or between government and actors in civil society."<sup>232</sup> Constitutional culture theory instead proposes that mobilized citizens are empowered to make constitutional change through "informal pathways," and that such change can—and does—occur in such a way that keeps intact our confidence in the Constitution itself.<sup>233</sup>

Professor Reva Siegel proposes that this dynamic and dialogic exchange between citizens and the officials tasked with construing the constitution becomes a normatively positive one by "suggesting that the constitutional order's openness to change may invite the engagement and inhibit the estrangement of a normatively divided polity, and so enable forms of solidarity that dispute resolution cannot."<sup>234</sup> Constitutional culture thus "sustains the law/politics distinction dynamically, as the Constitution changes in history."<sup>235</sup>

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<sup>228</sup> *Id.* at 1325.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1326; *see also id.* at 1327 ("Acknowledging the pathways through which constitutional mobilizations influence constitutional meaning threatens the distinction between law and politics, creating uncertainty about the legitimacy of social movement influence that has in turn produced uneasy silence, internal to constitutional law, about the role of constitutional mobilizations in constitutional change."); *id.* at 1344–45 ("In this conventional, lawmaking paradigm, judicial attention to the constitutional beliefs of current generations appears as infidelity to the lawmaking of past generations, as law-making from the bench, as a corruption of judicial judgment.") (internal footnote omitted).

<sup>231</sup> *Id.* at 1327.

<sup>232</sup> *Id.* at 1340.

<sup>233</sup> *Id.* at 1327.

<sup>234</sup> *Id.* at 1328.

<sup>235</sup> *Id.*

Professor Siegel and Professor Robert Post have proposed that controversy is part of constitutional lawmaking, and suggest that progressives need to embrace controversy to stay in the social-movement-change game.<sup>236</sup> They take the position that “interpretive disagreement [is] a normal condition for the development of constitutional law.”<sup>237</sup> Because the “authority of the Constitution depends on its democratic legitimacy,” the Court’s authority to enforce its decisions relies on the confidence of the citizenry.<sup>238</sup> Thus, “[i]f courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.”<sup>239</sup>

According to Post and Siegel, these objections and resistance are—often described as backlash—a good and necessary part of Constitutional development.<sup>240</sup> Backlash is best understood as “one of many practices of norm contestation through which the public seeks to influence the content of constitutional law.”<sup>241</sup> As noted above, the rise of organizations like the ADF and the coordinated campaign for religious exemptions are just the type of backlash that Siegel and Post describe and would expect. Thus, this backlash—the moment of legal contestation and its attendant social meaning—is but a step along the journey of constitutional development.

Social movements like the ADF engage in the political contestation that feeds and sustains backlash.<sup>242</sup> The continued contestation brought on by the backlash can cause constitutional principles to become “unstuck.”<sup>243</sup> The Religious Right is trying to “unstick” the now-established constitutional principle that LGBT people are full citizens who must be treated equally under the law, while trying to “restick” the prior status regime, in which LGBT people were subordinated and inferior to heterosexual people in both law and society, at least in the marriage context. As a result, social movements give nongovernmental actors a chance to

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<sup>236</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism at Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 377, 430 (2007) (“If progressives shun controversy, either in adjudication or politics, they abandon the hope of shaping the content of constitutional law.”).

<sup>237</sup> *Id.* at 374.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 375; *see also id.* at 377 (“Backlash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation.”).

<sup>241</sup> *Id.* at 382–83.

<sup>242</sup> Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006).

<sup>243</sup> *Id.* at 929.

“talk back to institutions of power and to have a voice in the development of constitutional norms. Social movement contestation provides informal channels through which people can engage formal legal institutions about the direction and pace of constitutional development.”<sup>244</sup> The Religious Right embodies this dynamic in America’s current political moment.

Social-political movements like the ADF cannot, however, move the constitutional needle alone.<sup>245</sup> Rather, these movement frequently leverage “broad-based social . . . changes that unsettle conventional understandings about the jurisdiction of constitutional principles so as to assert new claims about the correct application of such principles.”<sup>246</sup> The Religious Right attempts to harness the broad-based social change of LGBT equality, which in its mind unsettles conventional understandings about what the constitution does and should protect, and to assert new claims—ones that radically revision the First Amendment.<sup>247</sup>

Siegel and Post thus provide a theoretical frame for the push-and-pull over the LGBT-rights that the United States has observed over the past several decades. The next sub-part turns to that push-and-pull to situate the current *Masterpiece* moment.

## B. THE LGBT CONSTITUTIONAL CONVERSATION

How did the United States get here, to a place where the Religious Right’s campaign to create quasi-theocratic zones of exemption has been so normalized that it gets serious consideration at the Supreme Court? This part describes the trajectory of the LGBT rights movement vis-à-vis the Religious Right, framed by the theory of constitutional culture. Specifically, it traces the shifting narrative of the Religious Right from the 1950s through the present.

The Religious Right has deployed a variety of narrative devices throughout its history of opposing LGBT civil rights.<sup>248</sup> Review of the

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<sup>244</sup> *Id.* at 946–47.

<sup>245</sup> *Id.* at 929.

<sup>246</sup> *Id.*

<sup>247</sup> *See, e.g., id.* at 943 (“Often such challenges are motivated and enabled by changes in law or technology that affect the ecology of a principle’s proper application. Contending social groups avail themselves of the opportunity such changes present to propose new claims about the meaning and practical implications of constitutional principles.”).

<sup>248</sup> The history of LGBT rights in American law and the history of LGBT organizing in American society is long and rich, stretching back to the 1900s. Professor Patricia Cain has provided a comprehensive summary of this history up to 1993. *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). The intentionally narrow focus of this essay on just one small piece of that history is not meant to diminish the victories won along

history demonstrates the following pattern: from (1) explicit moral disapproval of homosexuality, to (2) a purported distinction between the status of being gay, lesbian, or bisexual and the conduct associated with a sexual orientation, though still framed by moral disapproval, to (3) a narrative of “protect the children,” to (4) the current-day focus on framing Christian business owners, as benevolent toward LGBT people and the victims of a secular society, in need of protection. Each period builds upon the previous one. As LGBT people began to win equality, the next period’s narrative took a different form, intended to absorb the gains and freeze them.<sup>249</sup>

#### 1. The 1950s–1970s Period: Explicit Homophobia Results in Expressly Homophobic Laws

The Religious Right of this period espoused an explicitly and voraciously homophobic narrative. With a maligning narrative grounded in Christianity, it characterized homosexuals as pedophiles, mentally ill, and child molesters.<sup>250</sup> Public policy, laws, and regulations followed this degrading rhetoric. In the 1950s, the federal government fired five thousand government employees that it suspected or knew were LGBT; and Congress issued a report contending that LGBT people “engage in overt acts of perversion” and “lack the emotional stability of normal persons.”<sup>251</sup> In 1953, President Eisenhower issued an executive order banning LGBT people from being employed by the federal government and its contractors, reasoning that LGBT people—along with alcoholics and neurotics—presented a national security risk.<sup>252</sup> The American Psychiatric Association also echoed the Religious Right’s pathologizing rhetoric: In 1952 it included homosexuality as a “sociopathic personality disturbance” in the first-ever version of its diagnostic handbook, the Diagnostic and Statistical Manual.<sup>253</sup>

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the way or minimize the sting of the other defeats suffered by the LGBT community.

<sup>249</sup> See Velte, *Breaking the Preservation*, *supra* note 155, at 71.

<sup>250</sup> DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 47–48, 76–78 (1997).

<sup>251</sup> See S. DOC. NO. 81-241, at 2, 4 (1950), <https://stacks.stanford.edu/file/druid:fd720pb8753/employment-homosexuals-serialset.pdf>.

<sup>252</sup> See *A History of Gay Rights in America*, CBS NEWS, <http://www.cbsnews.com/pictures/a-history-of-gay-rights-in-america/8> (last accessed Mar. 27, 2020).

<sup>253</sup> See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 38–39 (1st ed. 1952), <http://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf>. The American Psychiatric Association did not remove this language until 1973. See *Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> (last accessed Mar. 27, 2020).

The modern-day LGBT-rights movement emerged in the late 1950s and into the 1960s, with the riots at the Stonewall Inn in 1969 setting off the modern LGBT rights movement.<sup>254</sup> The Religious Right responded by increasing its efforts to vilify LGBT Americans. For example, in the 1960s, the Religious Right regularly associated the LGBT rights movement with sexual crimes by contending that the movement sought to place LGBT teachers in schools to sexually molest or force their “lifestyle” on schoolchildren.<sup>255</sup>

The Religious Right emerged as a powerful political force in the 1970s.<sup>256</sup> Anita Bryant, a nationally-known beauty queen and television commercial star, successfully campaigned to repeal a Dade City, Florida antidiscrimination ordinance that prohibited discrimination based on sexual orientation.<sup>257</sup> Known as the “Save Our Children” campaign, it contended that homosexuals planned to recruit children in order to molest them.<sup>258</sup> The campaign’s success led to state-wide anti-LGBT action: just two days after the vote repealing the ordinance, Florida banned adoption by LGBT people.<sup>259</sup>

Thus, in this period, anti-LGBT laws, regulations, and court decisions were grounded in an understanding of homosexuality as immoral, deviant, and unhealthy. These anti-LGBT laws were reinforced by the criminalization of sodomy in all fifty states through the 1950s.<sup>260</sup> The criminalization of LGBT conduct reinforced the Religious Right’s rhetoric

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<sup>254</sup> See Stonewall Riots, HISTORY.COM (OCT. 4, 2019), <https://www.history.com/topics/gay-rights/the-stonewall-riots>; see also Jasmine Foo, “*In Sickness and in Health, Until Death Do Us Part*”: An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on *Obergefell v. Hodges*, 36 J. NAT’L ASS’N ADMIN. L. JUDGES 638, 642 (2016).

<sup>255</sup> Herman, *supra* note 250, at 48, 50; see *History of the Anti-Gay Movement Since 1977*, INTELLIGENCE REP., Spring 2005, at 117, <https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977> (noting California State Sen. John Briggs stated: “One third of San Francisco teachers are homosexual,” and “I assume most of them are seducing young boys in toilets.”).

<sup>256</sup> Herman, *supra* note 250, at 50.

<sup>257</sup> See *Anita Bryant and the Save Our Children Campaign*, GAY HISTORY (Aug. 13, 2009, 9:44 AM), <https://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html>.

<sup>258</sup> *Id.*

<sup>259</sup> See Rebecca M. Solokar, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 FLA. INT’L U. L. REV. 473, 477–78 (2009); see generally FLA. STAT. § 63.042(3) (1977) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”), *invalidated by Fla. Dep’t of Children & Families v. X.X.G. (In re Adoption of X.X.G. and N.R.G.)*, 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

<sup>260</sup> See *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, ACLU, <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> (last accessed Mar. 27, 2020).

that LGBT people were pathological, deviant, and criminals. This criminalization of homosexuality supported the Religious Right's homophobic rhetoric and thwarted attempts to secure LGBT civil rights in employment and public accommodations.<sup>261</sup>

## 2. The 1980–1992 Period: The Sodomy Era

In 1986, the Court delivered a trenchant loss to the LGBT community when it upheld Georgia's sodomy law in *Bowers v. Hardwick* as constitutional.<sup>262</sup> In *Bowers*, morality was the Religious Right's central argument for upholding the sodomy law.<sup>263</sup> The State and its amici relied on morality as defined by Judeo-Christian values to resolve the issue. The merits brief argued that the Eleventh Circuit Court of Appeals, which struck down the Georgia statute, took an "activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral, and labeled that activity as a fundamental liberty protected by the Constitution."<sup>264</sup> Various amici reiterated the morality theme, describing the right sought by Michael Hardwick as "flatly contrary to centuries of Anglo-American tradition"<sup>265</sup> and "an activity which has been traditionally condemned rather than considered a foundation of our society."<sup>266</sup>

In 2003, the Court overruled *Bowers* in *Lawrence v. Texas*.<sup>267</sup> With the sodomy fight concluded, the marriage equality fight took center stage, as did a new rhetoric.

## 3. The 1993–2015 Period: The Marriage Equality Era and Children Take Center Stage

The national marriage equality debate raged in the United States from 1995, when Utah passed a law prohibiting same-sex marriage, until 2015,

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<sup>261</sup> See BRAD SEARS, NAN D. HUNTER & CHRISTY MALLORY, WILLIAMS INST., *Chapter 5: The Legacy of State Laws, Policies, and Practices, 1945-Present*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT, 5-2 (2009) [https://williamsinstitute.law.ucla.edu/wp-content/uploads/5\\_History.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/5_History.pdf).

<sup>262</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>263</sup> Brief of Petitioner Michael J. Bowers Attorney General of Georgia at 5, 20–21, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939.

<sup>264</sup> *Id.* at 19.

<sup>265</sup> Brief for the Catholic League for Religious and Civil Rights, Amicus Curiae, in Support of Petitioner at 2, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667940.

<sup>266</sup> *Id.* at 14.

<sup>267</sup> *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

when *Obergefell* was decided.<sup>268</sup> Throughout those two decades, the Religious Right vigorously opposed marriage equality, primarily through litigation.<sup>269</sup> However, it embraced a decidedly different narrative than it relied on in the early years. The anti-marriage equality rhetoric focused on children, although still framed with a narrative of morality and tradition.<sup>270</sup>

For example, in the California marriage equality cases, the Religious Right characterized the State's interest in banning same-sex marriage as advancing "responsible procreation" to make certain that children of heterosexual parents would be "raised by both of their biological parents in one household—the optimum setting for child rearing."<sup>271</sup> They even argued that same-sex parents are harmful to children.<sup>272</sup>

In *Windsor*, the Religious Right again argued that same-sex parents harm children.<sup>273</sup> It warned that if the Court struck down the challenged DOMA provision, it would "be making a powerful statement that our government no longer believes children deserve mothers and fathers. In effect, it would be saying: 'Two fathers or two mothers are not only just as good as a mother and a father, they are just the same.'"<sup>274</sup>

In *Obergefell*, the ADF filed an amicus brief contending that married opposite-sex parents create the "optimal" environment in which to raise children.<sup>275</sup> In the Sixth Circuit marriage equality case, the ADF filed an amicus brief arguing that "the family structure that helps children the most

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<sup>268</sup> See Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 862 (1998); *Looking Back at the Legalization of Gay Marriage in Mass.*, BOSTON GLOBE (June 26, 2015, 12:26 PM), <https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html>.

<sup>269</sup> See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 U.C.L.A. L. REV. 1235, 1308 (2010); see also Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1182 (2012) [hereinafter NeJaime, *Marriage Inequality*].

<sup>270</sup> Butler, *supra* note 268, at 864.

<sup>271</sup> Appellant Proposition 22 Legal Def. & Educ. Fund's Opening Brief at 31, Proposition 22 Legal Defense and Education Fund v. City & County of San Francisco, No. 503943, 2004 Cal. Super. LEXIS 1110 (No. A110651), 2005 WL 3955027 ("Every child raised in a same-sex home has been deliberately made to be motherless or fatherless. . . . [T]here is no generally applicable, generally accepted social science evidence that children raised by a same-sex couple do as well as children raised by their own biological parents.").

<sup>272</sup> *Id.* at 31–32.

<sup>273</sup> Brief of Amicus Curiae Liberty Counsel in Support of Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits Brief) at 3–4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390994.

<sup>274</sup> *Windsor*, 133 S. Ct. at 2658.

<sup>275</sup> See Brief of Amicus Curiae State of Alabama in Support of Respondents at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 12-556, 14-562, 14-571 & 14-574), 2015 WL 1534344.

is a family headed by two biological parents in a low-conflict marriage.”<sup>276</sup> It further contended that children conceived using anonymous sperm donors—the method most commonly used by lesbian couples to conceive a child—“experience profound struggles with their origins and identities.”<sup>277</sup> It argued that redefining marriage as a “genderless” institution would “pose a significant risk of negatively affecting children and society.”<sup>278</sup>

#### 4. Post-Marriage Equality Period: The Victimization Narrative

Thus, until recently, the ADF “routinely trafficked in slurs against” LGBT people, consistently characterizing LGBT people as “promiscuous, uncommitted, and unfit to parent in dozens of its briefs opposing marriage equality.”<sup>279</sup> Since *Obergefell*, however, the Religious Right has continued to contest LGBT equality by shifting its campaign to one pursuing religious exemptions from nondiscrimination laws. Today, it frames its legal argument with a new narrative that situates itself as a victim of secularism, as opposed to its prior framing as a protector of children and a defender of American values and morals.<sup>280</sup>

This victimization, goes the argument, is a result of an increasing secularism that positions members of the Religious Right as prejudiced and intolerant.<sup>281</sup> The ADF has constructed, “case by case and argument by argument,” a “legal narrative asserting that Christians are under threat of persecution from the advance of LGBTQ and reproductive rights, as well as from secular schools and universities,” to support its demand “that the law

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<sup>276</sup> Brief of Amicus Curiae the Family Trust Foundation of Kentucky, Inc., in Support of Defendants-Appellants and Reversal, *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (No. 14-5297), 2014 WL 2154833 (citing KRISTIN ANDERSON MOORE ET AL., MARRIAGE FROM A CHILD’S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT?, CHILD TRENDS RESEARCH BRIEF 6 (2002)).

<sup>277</sup> *Id.* at 17 (internal citations omitted).

<sup>278</sup> *Id.* at 25–26. Identical arguments were made by ADF attorneys in its amicus brief in the Tennessee marriage equality case that was consolidated with *Obergefell*, as well as in the Sixth Circuit in *Obergefell* itself. See Brief for Individual Tennessee Legislators as Amici Curiae Supporting Defendants-Appellants, *Tanco v. Haslam* 135 S. Ct. 1040 (2015), (No. 14-5297), 2014 WL 2154833; Brief for Citizens for Community Values as Amici Curiae Supporting Defendants-Appellants at 4, *Obergefell v. Himes*, No. 14-3057 (6th Cir. Jan. 16, 2014), 2014 WL 1653834.

<sup>279</sup> Posner, *supra* note 5.

<sup>280</sup> See NeJaime & Siegel, *Conscience Wars*, *supra* note 31, at 2561 (describing, in the face of marriage equality, the narrative shift by the Religious Right “from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity”).

<sup>281</sup> See generally *id.* at 2560 (noting that the Religious Right’s older morality-based arguments against marriage equality “now sound illegitimate—like ‘bigotry’”).



must allow Christians to disregard, disobey, or even dismantle laws protecting those rights in order to protect their own rights to free speech and the free exercise of religion.”<sup>282</sup> Prominent ADF attorneys make public statements contending that “nondiscrimination laws were actually being used ‘to silence Christians, to force them to not live out their convictions’ and ‘instead to cower in silence.’”<sup>283</sup>

### 5. Bringing It Back to Today

In each of these periods, the Religious Right created social meaning through the expression—both in courts and society—of its narrative. These shifting narratives and social meanings are part of the larger historical conversation among the Court, the Religious Right, the LGBT-rights movement, and the citizenry.

In each period, a microcosmic illustration of Siegel’s constitutional culture theory can be seen at work—the Religious Right social movement creating social meaning of LGBT people as inferior, and the response of the Court (*Bowers*); then, the countermovement of the LGBT-civil rights movement contesting that legal rule and social meaning, and the response of the Court (*Lawrence*); then, the LGBT-rights movement continuing its contestation of marginalization by creating social meaning of the normalcy of LGBT relationships and families, contested by the Religious Right (DOMA and mini-DOMA laws), and the Court siding with the LGBT-rights movement (*Windsor* and *Obergefell*). This social and legal history is constitutional culture in action; and this constitutional conversation is ongoing—the communicative pathways remain open and the contestation over LGBT equality continues.

Today, the tables have likely permanently turned against the acceptance (by society or the courts) of openly homophobic narratives and social meanings. The era of accepting open and gratuitous denigration and disparagement of LGBT people seems to have largely passed; *and* it is “no longer clear that constitutional law should treat religious belief as special, as compared to nonreligious or nonbelief.”<sup>284</sup>

As a result, the Religious Right has been forced to completely turn its narrative into one that positions them as victims of a secular society rather than positioning LGBT people as evil forces that must be contained—or even criminalized. Thus, what was once a proudly attacking anti-LGBT

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<sup>282</sup> Posner, *supra* note 5.

<sup>283</sup> *Id.*

<sup>284</sup> Tebbe, *supra* note 8, at 4.

rhetoric has become an inwardly protective one, framed in victimhood and couched in the narrative of “religious liberty,” and instantiated in the quest for religious exemptions.<sup>285</sup> In short, the Religious Right has pivoted from an attacker to a victim in the national dialogue about LGBT equality, and seeks to characterize itself with a forceful social meaning which it can then deploy in its constitutional conversation with the Court. By positioning its members as victims of religious persecution, the Religious Right can create social meaning through engagement in a national dialogue with the media, the courtroom, and legislatures with a legitimacy that would be absent under its old narrative.<sup>286</sup>

It is this national narrative of the victimhood of the Religious Right—crafted and cultivated by the ADF over many years and many cases—that the Court found itself a part of in *Masterpiece*. Through *Masterpiece*, the ADF brought “its foundational fear—that the advance of rights for LGBT[] people turns Christians into their victims—to the Supreme Court.”<sup>287</sup> It is in this social-meaning context in which the Court considered the claims in *Masterpiece*.

### C. WHAT IS THE COURT’S ROLE IN THIS CONVERSATION?

As the foregoing demonstrates, the shifting narrative of the Religious Right illustrates its attempt to transform the social meaning of being both LGBT and a member of the Religious Right to more effectively make social and legal arguments in support of their religious exemption claims. This is where the *Masterpiece* postponement enters the constitutional conversation—and where the social meaning of the opinion does work in support of the Religious Right.

The theory of constitutional culture recognizes that while courts “play an important and creative role in the process,” that role “is largely a reactive role.”<sup>288</sup> This is because social movements initiate the process through social disruption, leaving courts in a position to respond.<sup>289</sup> Thus, courts “reconstitute and reformulate law in the light of political contestation, rationally reconstructing and synthesizing changes in political norms with

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<sup>285</sup> Put another way, equality gains for LGBT people have “contributed to a sense among some religious traditionalists that there has been an inversion. They now feel like they are the minorities who require protection from an overwhelming liberal orthodoxy.” Tebbe, *supra* note 8, at 1.

<sup>286</sup> See Velte, *Breaking the Preservation*, *supra* note 155, at 86.

<sup>287</sup> Posner, *supra* note 5.

<sup>288</sup> Balkin & Siegel, *supra* note 242, at 947.

<sup>289</sup> *Id.*

what has come before.”<sup>290</sup>

As Professor Balkin notes, when a particular “set of social meanings starts to weaken, so too does the status hierarchy, and new forms of status competition become possible between superordinate and subordinate groups. This movement from relatively taken-for-granted status hierarchies to relatively contestable ones is an important source of cultural struggles.”<sup>291</sup> That is what is happening now, and the Court’s postponement in *Masterpiece* props up the taken-for-granted status of the Religious Right to see another day in court.

The United States is in an historical moment, one in which long-established social meanings are unclear, contested and in flux. LGBT people have been contesting the social meaning to which they have been tethered, largely by the Religious Right—as criminals, mentally ill, pedophiles, and “others” to be marginalized—and have demanded “higher status and a greater share of respect.”<sup>292</sup> The Court has responded to this contestation largely by giving LGBT people that higher status and greater respect through the LGBT constitutional canon spanning from *Romer* to *Obergefell*. When this happens, “there is likely to be great confusion, discord, strife, even violence” as status regimes shift, not “because a perfect harmony has been shattered, but because the chains of a particularly egregious hierarchy have begun to be loosened.”<sup>293</sup>

In this moment of “confusion, discord, and strife,” the Court must navigate that moment with us, if not *for* us. Whether as a participant or a leader, the postponement of a merits decision in *Masterpiece* is consequential. In allowing *Masterpiece*’s claim to live on for another day, the Court implies that such claims are not meritless as they are not fully settled, giving a credence to the Religious Right’s arguments. In implying that the claims have merit, the Court implicitly legitimizes the narrative behind the claims—a narrative that is trying to tilt the social meaning of what it means to LGBT people backward while trying to tilt the narrative of what it means to be a member of the Religious Right forward, thus maintaining an unequal status regime.

“Higher status groups employ whatever muscle they can offer—whether cultural, legal, or physical—to replenish their diminishing status

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<sup>290</sup> *Id.*

<sup>291</sup> Balkin, *supra* note 91, at 2332.

<sup>292</sup> *Id.* at 2334.

<sup>293</sup> *Id.*

capital and to put things back the way they were.”<sup>294</sup> *Masterpiece* gives the Religious Right a little more muscle by postponing the merits decision; it holds open the space that will be filled with continued efforts by the Religious Right to re-establish its place at the top of the social hierarchy and status. In the meantime, LGBT people will suffer.

To fully defend a constitutional regime in which private businesses are granted religious exemptions from antidiscrimination laws, a coherent theory must explain that result.<sup>295</sup> Such coherence results when several axes align to explain that the result is the “right” result. Those axes include law, morality, and society, among others.<sup>296</sup> For example, as Tebbe points out, those who oppose racial and gender equality “will not be able to successfully resist the charge that their claims are incoherent as interpretations of the Constitution because they contravene basic legal principles” such as those laid out in *Brown v. Board of Education*, that are “uncontroverted features of the jurisprudence.”<sup>297</sup> While many scholars,<sup>298</sup> including myself,<sup>299</sup> contend that well-established “uncontroverted features of the jurisprudence” already provide a clear answer to the merits question postponed by the Court in *Masterpiece*,<sup>300</sup> and the punt in *Masterpiece* suggests that the outcome is still contestable—and it is *that* message that creates the social meaning that it harmful to LGBT people. The message is that the state of the law may not be such that while white supremacy and the subjugation of women are prohibited, homophobia and heteronormativity are legally condoned.<sup>301</sup>

While we do not yet know the ultimate answer to the merits question, the fact that the *Masterpiece* Court allowed the question to remain unanswered creates social meaning in another way—by “imposing the costs of one religion on others, it takes sides on a basic matter of identity that divides citizens.”<sup>302</sup> Leaving the merits issue open takes sides with the

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<sup>294</sup> *Id.* at 2313, 2335.

<sup>295</sup> Tebbe, *supra* note 8, at 26–27.

<sup>296</sup> *Id.* at 9–11.

<sup>297</sup> *Id.* at 43.

<sup>298</sup> *Id.* at 52–53.

<sup>299</sup> See Velte, *All Fall Down*, *supra* note 31; Velte, *Breaking the Preservation*, *supra* note 155.

<sup>300</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When follower of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).

<sup>301</sup> See Tebbe, *supra* note 8, at 43.

<sup>302</sup> *Id.* at 54.

bakers, florists, and photographers, who wish to—and now will continue to—discriminate against LGBT customers, and thus create a social meaning that such religious discriminators have a legitimate place at the metaphorical table, and that as a matter of politics and identity, these religious actors are legitimate in their efforts to impose unequal citizenship upon LGBT people.<sup>303</sup>

Importantly, this is “not a matter of how disfavored citizens feel, subjectively; it is a matter of their legal standing before the government and relative to one another.”<sup>304</sup> By postponing a decision on the merits, the Court has signaled that LGBT people’s standing before the government may at best be contested, and may at worst be legally compromised, vis-à-vis the government *and* others. This relative subordination vis-à-vis others creates social meaning—that LGBT people in fact *are* subordinate and thus may be discriminated against in the private marketplace.

At this juncture—in which the merits question remains open at the Court’s insistence—it is reasonable to say that a message has been sent by the Court that the government may favor religion over equality? That message creates social meaning “because of the role that religious identity plays in membership or belonging[?]”<sup>305</sup> The Court has imbued a particular, favorable social meaning to the identity of the Religious Right, a meaning that in turn sends a message that LGBT people might not enjoy full citizenship—the “ability to exercise basic social and political freedoms.”<sup>306</sup> By permitting the Religious Right to continue the quest to create quasi-theocratic zones of exemption, the Court’s postponement takes on the character of government speech; by holding space for continuation of these claims, the Court has spoken. And that speech creates social meaning because it is constitutive—“Government communications that offend equal citizenship constitute citizens as a matter of law.”<sup>307</sup> Postponement creates precedent through the creation of social meaning: “government speech alone can interfere with the ability of citizens to stand before the government not simply as Americans but as differentiated or disfavored members of the political community.”<sup>308</sup>

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<sup>303</sup> *Id.* (“[G]overnment favoritism with regard to belief risks deep divisions in the *political* community. It creates classes of Americans along religious lines, and it advantages some of these classes over others. . . . [R]eligious stratification presents a paradigmatic example of American concerns about unequal citizenship.”).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 73. Tebbe continues: “This is a matter of social meaning.” *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 101.

<sup>308</sup> *Id.* at 101.

In *Masterpiece*, the ADF has launched a coordinated campaign of resistance to LGBT equality that seeks to legitimize a system of Gay Jim Crow by attempting to “transform the range of legitimate claims for change” and by engendering a “transformation in the way the basic relationships [are] understood.”<sup>309</sup> The Court’s postponement of a merits decision gives credence to these arguments and thus create social precedent—an “act, decision, or case that serves as a guide or justification for subsequent situations.”<sup>310</sup> The *Masterpiece* precedent will serve as a guide and justification that may empower the Religious Right to continue its social and cultural battle against LGBT equality while it continues to pursue its not-yet-decided legal battle against that equality. The next Part considers what concrete consequences to the LGBT equality project result from the *Masterpiece* postponement precedent.

## V. POSTPONEMENT AS PRECEDENT

*“The Constitution cannot be neutral in cultural struggles because democracies will not always dismantle unjust status hierarchies on their own.”*<sup>311</sup>

This Part describes the possible impact of *Masterpiece*’s postponement as precedent. The precedent and its social meaning likely will lead to concrete, collateral harms to LGBT consumers. This Part then reflects on the social meanings created by *Masterpiece*’s postponement as precedent to look ahead to the future—to the time when the Court finally addresses the merits—and offers some suggestions to the LGBT-rights movement to prepare for that future.

### A. PRACTICAL HARMS FROM POSTPONEMENT

As the nation waits for the Court to address the merits questions, several possible harms may emerge.

#### 1. The Continued Denial of Goods and Services to LGBT People

As long as the legal question remains unanswered, the expressive work of the decision is to normalize the ADF’s extreme interpretation of the First

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<sup>309</sup> Torres, *supra* note 65, at 897, 900.

<sup>310</sup> DICTIONARY.COM, *supra* note 2.

<sup>311</sup> Balkin, *supra* note 91, at 2367.

Amendment, or, at minimum imply it has some credence, which in turn permits businesses to continue to flout antidiscrimination laws.<sup>312</sup> These denials feed into the Religious Right's narrative, thus continuing the build and bolster that narrative, shoring it up before the Court ultimately addresses the merits.

With postponement, the social meaning of religious exemptions sought

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<sup>312</sup> Press accounts confirm that such discrimination continues after *Masterpiece*. For example, in Pennsylvania, the owner of an historic venue refused to host wedding ceremonies or receptions of same-sex weddings due to his Roman Catholic convictions. See Associated Press, *Historic Venue's Ban on Same-Sex Weddings Prompts Outcry*, NBC NEWS (Apr. 9, 2019, 2:24 PM), <https://www.nbcnews.com/feature/nbc-out/historic-venue-s-ban-same-sex-weddings-prompts-outcry-n992451>. In Texas, a same-sex couple who wanted to tour a venue for a country wedding was turned away by the owners of the venue, who claimed that hosting a same-sex wedding would violate their religious beliefs. See Meredith Yeomans, *Wedding Venue Under Scrutiny for Refusing Service to Gay Couple*, NBC DFW (Jan. 27, 2019, 6:57 AM), <https://www.nbcdfw.com/news/local/wedding-venue-under-scrutiny-for-refusing-service-to-gay-couple/203>. In Colorado, a same-sex couple that attempted to book a wedding videographer was turned away; the owner told them that "they were not serving the LGBT community," and that they did not film "gay ceremonies or engagements," due to personal religious beliefs. See Maria Perez, *Wedding Videographer Refuses to Shoot Same-Sex Wedding, Says It's 'Against My Beliefs'*, Newsweek (Feb. 25, 2019, 11:16 AM), <https://www.newsweek.com/wedding-videographer-refuses-same-sex-wedding-religious-beliefs-1342897>. In California, a same-sex couple was refused a wedding cake by a baker based on the baker's religious beliefs. See *Trial Date Set for Discrimination Suit Against Tastries Bakery*, 23ABC NEWS (Apr. 15, 2019, 6:25PM), <https://www.turnto23.com/news/local-news/trial-date-set-for-discrimination-suit-against-tastries-bakery>. In Indiana, a same-sex married couple were denied tax services based on the accountant's religious objections to marriage equality. See Mary Milz, *Gay Couple Denied by Indiana Tax Preparer Seeing Support*, WTHR (Feb. 21, 2019, 2:21 AM), <https://www.wthr.com/article/gay-couple-denied-indiana-tax-preparer-seeing-support>. A transgender man in California was denied medical services based on a hospital's religious views. See Staff Reports, *Transgender Californian Denied Healthcare Based on Hospital's Religious Views*, L.A. BLADE (Mar. 21, 2019, 7:07 PM), <https://www.losangelesblade.com/2019/03/21/transgender-californian-denied-healthcare-based-on-hospitals-religious-views>. In Missouri, a married lesbian couple was denied housing in a retirement community because to admit them "would violate a cohabitation policy that defines marriage as "the union of one man and one woman, as marriage is understood in the Bible." Jacob Ogles, *Federal Judge Allows Retirement Community to Reject Lesbian Couple*, ADVOCATE (Jan. 17, 2019, 2:46 PM), <https://www.advocate.com/marriage-equality/2019/1/17/judge-allows-retirement-community-reject-lesbian-couple>. A St. Louis based lesbian couple was denied services by a wedding dress designer in New York, who stated: "I wouldn't be able to make a piece for a same-sex wedding. It goes against my faith in Christ. I believe Jesus died for our sins so that we would live for him according to His Holy Word." Ewan Palmer, *Wedding Dress Designer Refuses to Make Garment for Lesbian Couple: 'It Goes Against My Faith'*, NEWSWEEK (July 11, 2019, 7:55 AM), <https://www.newsweek.com/lesbian-couple-refused-wedding-dress-1448689>; see also Zack Ford, *Same-Sex Couples Are Being Refused Service by Wedding Vendors*, Think Progress (July 24, 2018, 10:42 AM), <https://thinkprogress.org/same-sex-wedding-discrimination-masterpiece-cakeshop-b640fba89225> ("Two different same-sex couples over the past week have publicly shared stories of wedding vendors refusing to serve them—demonstrating that anti-LGBTQ discrimination continues in the wake of the Supreme Court's Masterpiece Cakeshop decision.").

by the Religious Right has just gotten its first nod from the Supreme Court. In postponing a merits decision, the Court has allowed businesses to continue to deny goods and services to LGBT consumers and thus perpetuate economic, dignitary and other harms on the LGBT community. Postponement equals perpetuation; now that will happen with the Court's implicit suggestion that such actions, and the legal theories that underlie those actions, have credence. The Court has been fully informed of this issue of discrimination. Its postponement of resolving the issue means that the government will be standing by, aware of the issue, while LGBT customers continue to be denied goods and services in the secular economy.

Postponing the merits decision also sends the message that the Court might one day bless such discrimination as a matter of constitutional law, either by upending decades of well-settled frameworks to resolve claims for religious exemptions from antidiscrimination law or by adopting an exceptionalism frame—one that deems LGBT discrimination “special” or “different” from gender and race discrimination,<sup>313</sup> such that those well-worn frameworks simply will not be applied in the LGBT context.<sup>314</sup>

In the meantime, “when a . . . retailer discriminates against protected groups with the government standing by, that sends a message of disfavored membership in society and in the political community.”<sup>315</sup> This at a time when “support for religiously based service refusals have increased across virtually every demographic group since 2014.”<sup>316</sup> It was only a matter of

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<sup>313</sup> See, e.g., Ball, *supra* note 39, at 237 (“[B]ehind the call for expansive religious exemptions in the context of LGBT equality that go beyond the scope of past religious accommodations is the notion of ‘same-sex marriage exceptionalism,’ that is the contention that marriage equality presents us with novel questions about the intersection of religious freedom and the scope of antidiscrimination laws that demand new forms of religious exemptions from the application of antidiscrimination laws—such as, for example, immunity from the application of antidiscrimination laws benefitting for-profit corporations and government employees. I believe we should reject the notion of LGBT rights exceptionalism, including that which is applicable to marriage equality issues.”).

<sup>314</sup> *Id.* at 239 (“The ways in which our country, through the decades, has balanced the pursuit of equality for marginalized groups against the religious freedom rights of equality opponents constitute time-tested, reasonable, and workable compromises that we should use as guides in addressing contemporary disputes arising from the tension between the attainment of LGBT equality and the protection of religious freedom. At the end of the day, there is no good reason, in the context of LGBT issues, to depart in significant ways from how anti-discrimination law has in the past accommodated religious dissenters in the context of race and gender.”).

<sup>315</sup> Tebbe, *supra* note 8, at 35.

<sup>316</sup> Daniel Greenberg et al., *Increasing Support for Religiously Based Service Refusals*, PRRI (June 25, 2019), <https://www.pri.org/research/increasing-support-for-religiously-based-service-refusals>; see also Paul Waldman, *Why Republicans Are Growing More Willing to Embrace Discrimination*, WASH. POST (June 25, 2019, 12:23 PM), <https://www.washingtonpost.com/opinions/2019/06/25/why-republicans-are-growing-more->



days after the *Masterpiece* decision until a store owner harnessed the Court's decision to express one's belief that LGBT people are and should be disfavored: A Tennessee hardware store owner posted a "No Gays Allowed" sign on his store to celebrate the Court's decision.<sup>317</sup> The day after the *Masterpiece* decision, the baker's attorney "said her client can resume his refusal to make cakes for same-sex marriages without fear of a new legal fight."<sup>318</sup> Thus, "[u]nless and until the government disallows that kind of discrimination, the risk of unequal citizenship remains real."<sup>319</sup> This is because even if LGBT customers can find another wedding vendor—a florist, photographer, or baker—who will provide needed goods and services, these customers "still experience social subordination when they suffer the sorts of exclusion that LGBT people still regularly encounter in parts of the country."<sup>320</sup>

## 2. Expanded Claims for Religious Exemptions

The postponement precedent likely will embolden the Religious Right to expand the scope of their First Amendment arguments to contexts beyond wedding goods and services. For example, a so-called "License to

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willing-embrace-discrimination. Waldman discusses the PRRI data, noting that "[s]upport for discrimination against gay customers among Republicans more than doubled from 21 percent to 47 percent," and asks "What could have caused this change?" *Id.* His answer:

I'm going to argue that it was the Supreme Court and the Republican Party. . . . The critical follow-up to the Hobby Lobby case was the *Masterpiece Cakeshop* case . . . [P]retty much every Republican politician loudly proclaimed that, in the name of "religious freedom," bakers should be able to refuse service to gay people. This sent an obvious message to rank-and-file Republicans, one that may well have bled over into increasing support for the right to discriminate against not just gay people but Muslims, or Jews, or atheists as well. It essentially replaced the old story about businesses refusing to serve people with a new story. The old story, the one you learned in school, was about the civil rights era, about sit-ins at lunch counters and racist business owners. The new story is about god-fearing business owners besieged by angry liberals trying to destroy their way of life and banish Jesus from America.

*Id.*

<sup>317</sup> See Ewan Palmer, 'No Gays Allowed' Sign Returns to Tennessee Store Following *Masterpiece Cakeshop* Supreme Court Ruling, NEWSWEEK (June 8, 2018, 9:43 AM), <https://www.newsweek.com/no-gays-allowed-sign-returns-tennessee-store-following-masterpiece-cakeshop-966352>.

<sup>318</sup> Mark Sherman, *Justices Side with Colorado Baker on Same-Sex Wedding Cake*, Associated Press (June 4, 2018), <https://apnews.com/459b5e723c4c47ffa40df839097503c9/Justices-side-with-Colorado-baker-on-same-sex-wedding-cake>.

<sup>319</sup> Tebbe, *supra* note 8, at 35.

<sup>320</sup> *Id.* at 22.

Discriminate Bill” was introduced in Texas in the wake of *Masterpiece*.<sup>321</sup> That bill would permit licensed professionals to deny services on religious grounds and prohibit state license-granting agencies from taking action against an occupational license holder based on sincerely held religious beliefs.<sup>322</sup> If signed into law, it is speculated to allow “mental health professionals, teachers, and others to discriminate against LGBTQ people without fear of losing their occupational licenses.”<sup>323</sup>

In April 2019, the U.S. Department of Health and Human Services issued a new rule, titled Protecting Statutory Conscience Rights in Health Care, permitting health care professionals to decline to treat LGBT patients based on the health care professional’s religious beliefs.<sup>324</sup> Additionally, there has been a “snowballing” of religious exemption bills introduced or passed since *Masterpiece* that permit adoption agencies to turn away LGBT prospective foster and adoptive parents based on the agency’s religious beliefs.<sup>325</sup> All told, eleven state legislatures considered religious exemption “license to discriminate” bills in 2020.<sup>326</sup>

### 3. Continued Litigation

The postponement will result in more costly and time-consuming litigation across the country.<sup>327</sup> This will continue to build the Religious

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<sup>321</sup> See Silas Allen, *Religious Refusal Bill Passes Texas Senate Committee*, DALLAS OBSERVER (Mar. 26, 2019, 4:00 AM), <https://www.dallasobserver.com/news/anti-lgbt-bill-allowing-religious-exemption-for-discrimination-clears-texas-senate-committee-11621199>.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> See Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2018).

<sup>325</sup> See, e.g., Julie Moreau, *Anti-LGBTQ Adoption Bills ‘Snowballing’ in State Legislatures, Rights Group Says*, NBC NEWS (Apr. 4, 2019, 3:31 PM), <https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-adoption-bills-snowballing-state-legislatures-rights-group-says-n991156>.

<sup>326</sup> See *Legislative Tracker: Religious Refusal Bills*, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/2020-legislative-tracker/2020-religious-exemption-bills> (last visited Mar. 27, 2020).

<sup>327</sup> See generally Allison Sherry & Will Stone, *Can Businesses Turn Away LGBT Customers? Court Battles Bubbling Back Up*, NPR (Feb. 10, 2019), <https://www.npr.org/2019/02/10/692748335/can-businesses-turn-away-lgbt-customers-court-battles-bubbling-back-up> (“But because [the *Masterpiece* decision] didn’t settle the looming question on whether the First Amendment guarantees of religious freedom are more important than a state or city’s anti-discrimination laws, similar cases are again simmering in lower courts—including Arizona and Colorado.”); Ryan Warner, *The Latest Masterpiece Cakeshop Case Didn’t Resolve The Big Questions. These Ones Could*, CPR (Mar. 7, 2019), <https://www.cpr.org/show-segment/the-latest-masterpiece-cakeshop-case-didnt-resolve-the-big-questions-these-ones-could> (discussing ongoing litigation presenting the merits issue punted in *Masterpiece*).

Right's legal theories, which the Court has now suggested have credence. In addition, it will create doctrinal uncertainty, take resources away from other pressing issues of LGBT equality, and exact an emotional toll on the litigants (justice delayed is justice denied). These legal arguments will thus "persist—as will the quandaries they raise."<sup>328</sup> One of the quandaries, a persistent theme during the *Masterpiece* oral arguments, is line-drawing on the issue of what constitutes speech:

The cases involve photographers, bakers, florists, owners of wedding venues, and more. Which of these is "speech"? If all are, what about limousine driving or catering? Is baking "speech" only when the cake is custom made or for any baked good? If the wedding venue is a hotel or restaurant, can it deny service to same-sex couples only for their weddings, or all the time?<sup>329</sup>

Justice Kennedy recognized these dilemmas but demonstrated no desire to undertake to resolve them. These line-drawing questions are "vexing in themselves and underscore a larger problem: recognizing compelled speech claims for the many activities that might be characterized as 'speech' would effectively immunize large swaths of the economy from regulation."<sup>330</sup> If the Court were to extend the free speech doctrine in the way that the Religious Right proposes, it would "threaten[] to undo longstanding settlements—to reopen the Supreme Court's definitive rejection of constitutional challenges to civil rights laws in the 1960s and to revive the deregulatory project of the *Lochner* era under the guise of the First Amendment."<sup>331</sup> What will become of these arguments in future is unknown.<sup>332</sup> But what is known is that the time and cost—financial and emotional—of this protracted legal fight will be significant.

In the time period since Court handed down the *Masterpiece* decision, two appellate courts have issued opinions siding with wedding vendors in their claims for religious exemptions from antidiscrimination laws.<sup>333</sup> Prior

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<sup>328</sup> Kendrick & Schwartzman, *supra* note 10, at 163.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 164.

<sup>332</sup> *Id.* at 163–64.

<sup>333</sup> See *Telescope Media Group v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (holding that Christian videographers have a First Amendment free speech right to make videos for only opposite-sex weddings; citing *Masterpiece*); *Brush & Nob Studio, LC v. City of Phoenix*, 448 P.3d 890, 924 (Ariz. 2019) (holding, in a pre-enforcement suit filed by Christian owners of a business that makes custom wedding invitations, that the City of Phoenix's antidiscrimination ordinance did not survive strict scrutiny as required by the Arizona constitution and Arizona Free

to *Masterpiece*, every state supreme court that had considered that the First Amendment free speech and free exercise claims were *not* valid defenses to compliance with state antidiscrimination laws. Thus, the turning of the doctrinal tide after the *Masterpiece* decision illustrates that social meaning precedent may—and often does—lead to legal precedent in ways that will continue to harm LGBT consumers until the Court finally decides the merits.

#### 4. Collective Anxiety Continues

Finally, the postponement will feed into a collective anxiety and fear within the LGBT community about participating in the public marketplace. The expressive work done by the *Masterpiece* opinion is especially compelling given that the opinion was authored by Justice Kennedy—seen by the LGBT community and the larger society as the Court’s LGBT-rights hero—at a time in which he surely knew he was stepping down from the Court and would be replaced by a more conservative justice. Thus, both expressively and in reality, the *Masterpiece* opinion perpetrates real harms—through the messages it sends, the social meaning it creates, and by leaving the doctrinal issue sufficiently unclear that it does not necessarily foreclose a future (more conservative) court from endorsing the Religious Right’s primary religion argument or the speech argument.

The social meaning created by the postponement precedent empowers anti-LGBT advocates to once again become outwardly attacking in their rhetoric. For example, in a social media post about the *Masterpiece* decision, a Republican Party official in Alabama exclaimed: “This poor guy [Jack Phillips] needs to move to a place he is wanted. Freaking queers have gotten too much sympathy. A real abomination.”<sup>334</sup> As one columnist noted just days after the opinion:

In recent weeks, a lesbian couple in New York City reported that they were kicked out of an Uber taxi after the driver became disgusted when they kissed (a “peck” as they described it); a hardware store owner in Tennessee who’d put a “No Gays Allowed” sign in his shop window a few years ago was back talking about a “ray of sunshine”

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Exercise of Religion Act; “*Masterpiece Cakeshop* did not hold that public accommodations laws were immune from free exercise exemptions; rather, it clearly contemplated that some exemptions, if narrowly confined, were permissible.”).

<sup>334</sup> Daniel Villarreal, *Alabama Republican Party Official Calls LGBTQ People ‘Freaking Queers’*, LGBTQ NATION (June 23, 2019), <https://www.lgbtqnation.com/2019/06/alabama-republican-party-official-calls-lgbtq-people-freaking-queers>.

in America for those who want to discriminate against LGBTQ people; and the U.S. Supreme Court refused to stop the execution of a South Dakota man likely sentenced to death because he is gay.

These actions and expressions are unrelated, and each represents the kind of injustice that LGBTQ people have experienced for decades. But what they have in common is that each one may not have happened if the Supreme Court hadn't ruled for the baker who turned away a gay couple in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* earlier this month.<sup>335</sup>

These concrete expressions of disfavored status by individuals, emboldened by the Court's postponement precedent, fuels uncertainty and anxiety in the LGBT community. That anxiety is both about the ultimate legal resolution of the issue and the day-to-day lives of LGBT consumers, who are forced to live with fear and anxiety when seeking to purchase goods or services, because they have to ask themselves: Will I be turned away by this wedding vendor? Is it safe to shop here? How will it feel to be turned away? What if other customers observe me being denied goods or services? Thus, anxiety and unease manifests at the micro and macro levels in the LGBT community.<sup>336</sup>

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<sup>335</sup> Michelangelo Signorile, Opinion, *We Can Already See the Damage From the Masterpiece Cakeshop Ruling*, HUFFINGTON POST (June 22, 2018), [https://www.huffpost.com/entry/opinion-signorile-masterpiece-cakeshop\\_n\\_5b1df203e4b0adfb826b0b78](https://www.huffpost.com/entry/opinion-signorile-masterpiece-cakeshop_n_5b1df203e4b0adfb826b0b78). He continued: "But we do ourselves a major disservice—and succumb to victory blindness—when we neither grasp the magnitude of a ruling that sends a strong message of support to enemies of queer equality nor acknowledge that the Supreme Court appears to treat LGBTQ people differently than other minorities." *Id.*

<sup>336</sup> See, e.g., Clayton Howard, *Is It Safe to Leave the 'Gayborhood?'*, U.S. NEWS & WORLD REP. (Sept. 18, 2018, 2:19 PM), <https://www.usnews.com/news/cities/articles/2018-09-18/how-lgbt-families-moving-to-the-suburbs-shapes-the-fight-for-equality> ("The confrontation at Masterpiece Cakeshop, therefore, reflects more than a showdown over abstract notions of discrimination and religious liberty. It also reveals an ongoing struggle to define suburban life. As areas outside central cities grow increasingly diverse, the seemingly trivial setting of wedding cake shops have become important battlegrounds over the meaning of belonging and respect."); see also Nico Lang, *Survey: More Americans OK With Refusing Services to Gay Weddings After Masterpiece Ruling*, INTO (Aug. 2, 2018), <https://www.intomore.com/culture/survey-more-americans-ok-with-refusing-services-to-gay-weddings-after-masterpiece-ruling> ("Interestingly, more people are in favor of religiously based refusals by wedding-based businesses in PRRI's 2018 survey than when the nonpartisan research firm polled Americans on the subject one year ago. . . . What's changed over the past year to inspire such a dramatic shift in opinion? In June, the Supreme Court sided narrowly in favor of Jack Phillips in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.").

## B. PREPARING FOR THE FUTURE

When high-stakes social justice cases like *Masterpiece* have a clear loser, that clear loss often results in shifts in a movement's overall strategy.<sup>337</sup> While the LGBT-rights social movement did not lose in *Masterpiece*, it did not win either.<sup>338</sup> Rather than declare a winner, the Court postponed the decision for another day—and for another Court—given that Justice Kennedy likely knew of his impending retirement when he authored the majority decision.

While the social meaning created by the postponement continues to build on the backs of LGBT people, LGBT-rights advocates have their work cut out for them. This question will ultimately be answered by the Court. Until that time comes, LGBT-rights advocates ought to turn their attention to what they can learn from the Court—through the messages its opinions send and the social meaning it creates—to successfully frame and litigate the case when the Court does address the merits of the issue.

LGBT-rights advocates should take a two-pronged tactical approach to inform their strategy for the next case. The first tactic is a deep analysis of the *Masterpiece* opinions. What can be gleaned from the different opinions in the case? How can the specific concerns laid bare in those opinions, both from a legal standpoint and from a social-meaning standpoint, be addressed?

The second tactic is a corresponding deep analysis of the transcript of the oral arguments in *Masterpiece*. This tactic may prove more fruitful than the first tactic because much of what occurred at oral argument does not appear in the language of the written decision. Yet the questions asked in oral argument give an important window into the minds of the Justices. Thoughtful consideration of their concerns, fears, worries, and questions

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<sup>337</sup> Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, *Amici*, NEWSL. OF THE SOC. OF L. SEC. OF THE AM. SOC. ASS'N, at 9 (Fall 2005).

<sup>338</sup> *But see* NeJaime & Siegel, *Religious Exemptions*, *supra* note 9, at 204. NeJaime and Siegel note:

“Passages of the majority opinion repudiate longstanding arguments advanced by exemption advocates and instead affirm an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector's beliefs. These portions of the majority opinion were necessary for the Court's decision.”

*Id.* at 202. They proceed to contend: “Rather than carve out a special (and lesser) place for sexual orientation, *Masterpiece Cakeshop* treats lesbian and gay individuals as full members of the national community deserving of equal protection from discrimination. The Court accomplishes this by analyzing the case as presenting an ordinary question of public accommodations law.” *Id.* at 208.

can help LGBT-rights advocates go back to the drawing board—if necessary—on the issues that seem most troubling to the Court’s more conservative Justices. Shoring up the vulnerable spots and weak arguments—as defined by the Supreme Court Justices themselves through their questions—is a pressing task for LGBT-rights advocates. They should consider the messages relayed and signals sent by the different Justice’s questions and comments.

While of course there is no certainty in making predictions based on questions at oral argument, or even by parsing words in the Court’s opinion, these two sources do give advocates a glimpse into the concerns of certain justices. The peek behind the curtain mustn’t be squandered during this interim period in which the question of the propriety of religious exemptions remains unanswered. Specific areas for strategic focus include:

### 1. The Race Analogy

There is no consensus among LGBT-rights scholars on the issue of whether a race analogy should be used in fighting against religious exemptions.<sup>339</sup> That analogy is as follows: If a shopkeeper is not exempt from antidiscrimination law in selling a wedding cake to an interracial different-sex couple, then the same result should be reached for the shopkeeper who seeks an exemption from selling goods or services to a white same-sex couple. Put another way, is race just different than sexual orientation when it comes to religious exemptions? The Court’s answer to the question is momentous: If the Court determines that the race analogy is appropriate, then *Piggie Park* resolves the religious exemption claim based on Free Exercise Clause. The free-speech-based religious exemption claim also should be rejected if a race analogy is accepted.<sup>340</sup>

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<sup>339</sup> Compare Tebbe, *supra* note 8, at 131 ( nothing that “although biological objections to interracial marriage are also familiar, having played a prominent role in litigation over bans on interracial marriage in the 1960s, it might be best to put the race analogy aside”), with Ball, *supra* note 39, at 239 (“At the end of the day, there is no good reason, in the context of LGBT issues, to depart in significant ways from how anti-discrimination law has in the past accommodated religious dissenters in the context of race and gender. I am therefore not so quick, as Tebbe does in his book, to put the race analogy aside in grappling with the question of how broad religious exemptions should be in the area of sexual orientation equality.”).

<sup>340</sup> See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 20–21, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302 (“Petitioners cannot distinguish *Piggie Park* by advancing a speech claim in addition to a free exercise claim. . . . Nor does Petitioners’ speech claim distinguish *Piggie Park*’s central holding, which is that the First Amendment does not create a constitutional right to discriminate. . . . [I]t cannot be that *Piggie Park* would have reached the opposite conclusion if [the BBQ joint’s owner] had tacked on a theory of compelled speech.

The Religious Right is adamant in its position that race is different—that courts should not analogize to race in religious exemption cases involving sexual orientation and gender identity. The crux of the Religious Right’s position seems to be that shopkeepers, who sought to turn away African-Americans in the 1960s, as well as those who would seek to turn away African-Americans or interracial couples today, did so because they were racists and not because they actually held a sincere religious belief about race.<sup>341</sup> In contrast, the Religious Right argues, today’s shopkeepers seeking religious exemptions vis-à-vis sexual orientation are not homophobic and thus cannot—and should not—be characterized as bigots and lumped together with the racist shopkeepers of yesteryear.<sup>342</sup>

The Court in *Masterpiece* asked about the race analogy during oral argument. The ADF attorney representing the baker, as well as the Solicitor General, agreed that the baker’s claim would fail if his decision had been based on race rather than sexual orientation. The baker’s attorney stated, unequivocally, that race is just different:

JUSTICE KAGAN: . . . Same case or not the same case, if your client instead objected to an interracial marriage?

MS. WAGGONER: Very different case in that context.

JUSTICE KAGAN: You are just saying race is different?

MS. WAGGONER: I think race is different for two reasons: one, we know that that objection would be based to who the person is, rather than what the message is. And, second, even if that were not the case, the Court could find a compelling interest in the race inquiry . . . .<sup>343</sup>

The Solicitor General took a similar position when he argued on behalf of the government:

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Nothing in the First Amendment suggests that identical discrimination, motivated by the very same beliefs, is exempt from public accommodations laws so long as it is framed as a free speech claim rather than a free exercise claim. Indeed, many religious acts feature public expressions of faith and communicative symbolism.”)

<sup>341</sup> See Ball, *supra* note 39, at 239 (“Supporters of expansive religious exemptions in the context of LGBT rights often take offense when egalitarians argue that religious exemptions in the context of sexual orientation should not be significantly broader than those in the context of race—race is different, they insist, because essentially all religious actors who believe it is proper to make racial distinctions always act in bad faith (i.e., they are racists.)”).

<sup>342</sup> *Id.* at 240 (“On the other hand, it is argued, many of those who, on conscience grounds, believe it is proper to make distinctions on the basis of sexual orientation, in particular when it comes to marriage, act in good faith (i.e., they are not homophobic.)”).

<sup>343</sup> Transcript of Oral Argument at 22–23, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).



JUSTICE GINSBURG: So you—you have already said that you put—might put race in a different category, right?

GENERAL FRANCISCO: Yes, Your Honor. . . . I think pretty much everything but race would fall in the same category, but as this Court made clear in the Bob Jones case, the IRS could withdraw tax-exempt status from a school that discriminated on the basis of interracial marriage, but I'm not at all sure that it would reach the same result if it were dealing with a Catholic school that limited married student housing to opposite-sex couples only.<sup>344</sup>

Chief Justice Roberts recognized the importance of the race analogy, as well as its power, before expressing skepticism that it is applicable. In doing so, he seemed to adopt the Religious Right's position that race-based exemptions are racist rather than faith-based, but sexual-orientation-based exemptions are faith-based rather than bigoted:

And the racial analogy obviously is very compelling, but when the Court upheld same-sex marriage in *Obergefell*, it went out of its way to talk about the decent and honorable people who may have opposing views. *And to immediately lump them in the same group as people who are opposed to equality in relations with respect to race*, I'm not sure that takes full account of that—of that concept in the *Obergefell* decision.<sup>345</sup>

LGBT-rights scholars and advocates should continue their dialogue about the usefulness and suitability of the race analogy, keeping in mind the skepticism of at least one of the Justices. I am a proponent of utilizing the race analogy in a thoughtful and historically-mindful way, as well as in a way that responds to Chief Justice Roberts's concerns.<sup>346</sup>

## 2. The Concern about Neutral Adjudication

The outcome of the *Masterpiece* case hinged on a majority of Justices agreeing that Mr. Phillips was not afforded procedural fairness by the Colorado Civil Rights Commission. It was on this procedural ground alone—that the Commission exhibited hostility to religion and thus denied

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<sup>344</sup> *Id.* at 32–33.

<sup>345</sup> *Id.* at 73–74 (emphasis added).

<sup>346</sup> I will address the race analogy vis-à-vis the fight for SOGI religious exemptions in a forthcoming article.

Mr. Phillips his right to a neutral decisionmaker in violation of the Free Exercise Clause—that the Court ruled in favor of the baker.<sup>347</sup>

Oral argument foreshadowed this result. Two Justices expressed concern about statements made by some commissioners, which the Justices interpreted as expressing religious hostility:

JUSTICE KENNEDY: Well, suppose we—suppose we thought there was a significant aspect of hostility to a religion in this case. Could your judgment stand?<sup>348</sup>

JUSTICE KENNEDY: Counselor, tolerance is essential in a free society. And tolerance is most meaningful when it’s mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips’ religious beliefs.<sup>349</sup>

JUSTICE GORSUCH: Mr. Yarger, you actually have a second commissioner who also said that he’s—if someone has an issue with the laws impacting his personal belief system, he has to look at compromising that belief system presumably, as well, right? . . . [S]o we have two . . . commissioners out of seven who’ve expressed something along these lines.<sup>350</sup>

Two lessons may be taken from these statements and the ultimate holding: one practical and the other tactical. Practically, the LGBT-rights advocates should ensure that the adjudicative bodies considering these kinds of claims are properly trained in providing a neutral proceeding in all claims, and specifically in claims in which the defense of a religious exemption is raised.

Tactically, the LGBT-rights community can, and should, emphasize its agreement with the guarantee of a neutral adjudicator. First, this position

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<sup>347</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (2018) (“When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.”). *Id.* at 1729 (“The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”). *Id.* at 1731 (“the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”). *Id.* at 1732 (“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 affirmation of the order—were inconsistent with what the Free Exercise Clause requires.”).

<sup>348</sup> Transcript of Oral Argument at 53, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>349</sup> *Id.* at 62.

<sup>350</sup> *Id.* at 55–56.

deserves support because it is a cornerstone of the American legal system. Second, the LGBT community is uniquely situated to weigh in on this issue in a deeply authentic way because it has lived through a time when its members did not always receive the neutral decisionmakers they were due.

For example, LGBT litigants have been called disparaging names, such as “homos” by judges presiding over their cases.<sup>351</sup> Litigants sought to remove a judge from a case after the judge made the comment: “I don’t care much for queers running around on the weekends picking up teenage boys.”<sup>352</sup> A Florida judge described as a “sick situation” the living situation of a lesbian litigant.<sup>353</sup> A local newspaper in Mississippi printed a letter from a judge, who stated that “gays and lesbians should be put in some type of a mental institute,” and are “sick.”<sup>354</sup> Then-Alabama Supreme Court Justice Roy Moore wrote in a concurring opinion in a custody case involving a lesbian mother that “homosexuality is ‘detestable,’ an ‘abominable sin,’ ‘abhorrent,’ ‘immoral,’ ‘an inherent evil,’ and ‘inherently destructive to the natural order of society.’”<sup>355</sup> Biased judging was particularly prevalent in child custody and visitation cases through the 1990s involving mothers who came out as lesbians after marrying and having children with men; during the divorce and child custody proceedings that typically followed, judges frequently refused to grant custody to the lesbian mothers.<sup>356</sup>

In sum, because the LGBT community experienced an “historical lack of independence exercised by judges that resulted in unjust decisions and

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<sup>351</sup> See Jennifer Gerarda Brown, *Adjudication According to Codes of Judicial Conduct*, 11 AM. U. J. GENDER SOC. POL’Y & L. 67, 70 n.14 (2002) (“District Court Judge Oliver Gasch referred to a gay plaintiff as a ‘homo’ and other gay men as ‘homos.’”) (citing *Steffan v. Cheney*, No. 88-3369 (OG), 1991 U.S. Dist. LEXIS 4852, at \*10 (D.D.C. Apr. 12, 1991)).

<sup>352</sup> *Id.* at 70, n.15.

<sup>353</sup> *Id.* at 70, n.17.

<sup>354</sup> *Id.* at 70–71, n.20, n.22.

<sup>355</sup> *Id.* at 76, n. 62.

<sup>356</sup> See generally Bruce D. Gill, *The Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361, 362 (2001) (“[T]he denial of custody to the gay parent, justified by a judge presenting seemingly valid reasons, often is a pretext for the court’s own bias or political agenda regarding homosexuality. Consequently, judges’ focus on a parents’ homosexuality distracts them from focusing on the actual interests of the child, and they may even disregard the best interest of the child. Particularly alarming are cases when courts remove children from the custody of the gay parent after years of successful rearing and a shared home.”) (internal citations omitted); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 694 (1976) (discussing judicial bias in child custody disputes between lesbian mothers and heterosexual fathers).

perpetuated negative stereotypes of LGBT persons[.]”<sup>357</sup> it is in a unique position to empathize and agree with the Court’s concern about neutral decisionmakers.

### 3. Identity/Status—Conduct Distinction Must be Addressed and Defeated

As discussed earlier, the Religious Right’s quest for religious exemptions includes an attempt to resurrect the “status-conduct” that once formed the bedrock of anti-LGBT discrimination in all areas of the law.<sup>358</sup> This argument maintains that wedding vendors are not discriminating on the basis of sexual orientation (status/identity) when denying services, but rather are only refusing to participating in a conduct—a same-sex wedding.<sup>359</sup> Thus, they conclude, there is no identity-based discrimination and no violation of the antidiscrimination statute.<sup>360</sup> While the Court’s precedent clearly has rejected the status-conduct argument,<sup>361</sup> the Religious Right nonetheless has revamped it in *Masterpiece*,<sup>362</sup> where it seemed to gain some traction at oral argument:

JUSTICE KENNEDY: Well, but this whole concept of identity is a slightly—suppose he says: Look, I have nothing against—against gay people. He says but I just don’t think they should have a marriage because that’s contrary to my beliefs. It’s not— . . . [i]t’s not their identity; it’s what they’re doing. . . . I think it’s—your identity thing is just too facile.<sup>363</sup>

MS. WAGGONER [counsel for Mr. Phillips]: Mr. Phillips is looking at not the “who” but the “what” in these instances, what the message is. And for 25 years -

JUSTICE GORSUCH: Well, actually, counsel, that seems to be a point of contention. The state seems to concede that

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<sup>357</sup> Susan J. Becker, *The Evolution Toward Judicial Independence in the Continuing Quest for LGBT Equality*, 64 CASE W. RES. L. REV. 863, 866 (2014); Nadine A. Gartner, *Lesbian (M)otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 LAW & SEXUALITY 45, 57, (2007) (“Even when the parties present evidence that lesbian and gay parenting is no more harmful than heterosexual parenting, ‘it tends to be disregarded or is outweighed by a judicial preference for other factors involved in the child’s welfare.’”).

<sup>358</sup> See Velte, *Breaking the Preservation supra* note 155, at 69–70.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 87–90.

<sup>362</sup> *Id.* at 81–83.

<sup>363</sup> Transcript of Oral Argument at 86–87, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

if it were the message, your client would have a right to refuse. But if it—the objection is to the person, that’s when the discrimination law kicks in. . . . So what do you say to that, that actually what is happening here may superficially look like it's about the message but it's really about the person’s identity?<sup>364</sup>

MR. YARGER [counsel for Colorado]: . . . Your Honor—is decide that he won’t sell somebody a product that he would otherwise sell because in his view the identity of the customer changes the message.

JUSTICE ALITO: No, he didn’t say the identity.

MR. YARGER: That is discrimination under our law.

JUSTICE ALITO: He said the message. He said the message.<sup>365</sup>

The apparent willingness of some Justices to be open to revitalizing the already-rejected status (identity)-conduct distinction should trouble LGBT-rights advocates. That distinction is contrary to the Court’s precedent.<sup>366</sup> It is also contrary the concept of an integrated identity. As scholars such as Kenji Yoshino and Douglas NeJaime have noted, sexual orientation identity is relationship-based; the conduct associated with sexual orientation constitutes the identity.<sup>367</sup>

Moving forward, then, LGBT-rights scholars and advocates must continue to educate the Court about the ways in which LGBT conduct is constitutive of LGBT identity and why the denial of services for an act of “conduct” (a wedding) is inextricably linked to LGBT identity.

### C. ALL IS NOT LOST

If advocates heed the signals from the oral arguments and address head-on the concerns of the majority and concurring opinions, it is possible, perhaps likely, that the give-and-take of the constitutional dialogue described by Post and Siegel may in fact reach an equality-informed

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<sup>364</sup> *Id.* at 24.

<sup>365</sup> *Id.* at 60.

<sup>366</sup> See Velte, *Breaking the Preservation*, *supra* note 155, at 87–90.

<sup>367</sup> *Id.* at 91–92 (citing NeJaime, *Marriage Inequality*, *supra* note 269, at 1175) (noting that LGBT people “enact their sexual orientation through same-sex relationships”); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 778 (2002) (noting that “homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status”).

decision: that religious exemptions from antidiscrimination laws are not required by the First Amendment’s Speech or Free Exercise Clauses.

As Balkin notes, “the Constitution cannot always be neutral in cultural struggles. It places itself on the side of the values of some groups and in opposition to the values of others, even (and especially) if the grounds of dispute include disagreements about religion, custom, tradition, or morality.”<sup>368</sup> Because the Constitution is concerned with achieving a democracy, it does not always bend to majority rule.<sup>369</sup> Instead, it “is a commitment to a democratic culture: one devoted to the dismantling of unjust hierarchies of social status and the gradual realization of social equality for all citizens.”<sup>370</sup>

Moreover, Siegel and Balkin have persuasively posited that backlash is a natural part of constitutional evolution. They note that “the substance of constitutional law emerges from the furnace of political controversy.”<sup>371</sup> Thus, “some degree of conflict may be an inevitable consequence of vindicating constitutional rights.”<sup>372</sup> Moreover, As Stoddard observes, sometimes a long struggle is what is necessary to harness the law’s culture-shifting capacity.<sup>373</sup>

While “judicial opinions may codify gains or losses in such struggles,”<sup>374</sup> “courts rarely have either the first or last word.”<sup>375</sup> Thus, “[r]ather than constituting endpoints in social-change campaigns, court decisions are merely points along the ongoing process of constitutional meaning-making.<sup>376</sup> Viewed through this lens, *Masterpiece*’s postponement precedent—along with its message, social meaning, and likely concrete consequences for the LGBT community—is not the last word. While the Religious Right may lose the war,<sup>377</sup> the postponement precedent is a battle

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<sup>368</sup> Balkin, *supra* note 91, at 2320.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> Post & Siegel, *supra* note 236, at 429.

<sup>372</sup> *Id.* at 390.

<sup>373</sup> Stoddard, *supra* note 208, at 982 (“The fifteen years of struggle [to pass New York City’s gay rights bill] . . . [m]ade the subject ultimately inescapable to New Yorkers—and led to genuine and deep ‘culture-shifting.’”).

<sup>374</sup> Balkin & Siegel, *supra* note 242, at 947.

<sup>375</sup> *Id.*

<sup>376</sup> NeJaime, *Winning*, *supra* note 111, at 967.

<sup>377</sup> Balkin, *supra* note 91, at 2335 (“But often, perhaps usually, it is already too late. The system of social meanings has changed, and all of us are carried along by its powerful tides. Faced with dissensus, open conflict, and even violence, people often harken back to the “good old days” when people were moral, social expectations were preserved, social deviance was invisible, overt enforcement of status norms was unnecessary, and everybody knew their place. I call this

it has won. *Masterpiece* gives the Religious Right time to fight more battles. Even though the Religious Right is fighting to maintain a “status nostalgia”<sup>378</sup> that may never be reinstated, the fight’s continuation has social meaning here and now. However harmful the consequences of this battle are for LGBT people, though, the movement-counter movement dynamic will continue to move forward.

## VI. CONCLUSION

While it did not make any new legal precedent with its postponement of the merits question, the Court’s *Masterpiece* punt created a social meaning precedent. That precedent sends a message to the country that the question of religious exemptions, for the provision of goods and services, is legitimately contestable. This message is contrary to the established precedents and is thus destabilizing in several ways. It destabilizes the Court’s LGBT canon, established over twenty years, that produced concrete legal and normative gains for LGBT people by dismantling sexual orientation status hierarchies. It empowers and emboldens anti-LGBT vendors in the public square to harness a homophobic narrative of earlier eras and impose concrete economic and dignitary harms on LGBT customers. It provides space for legislators to further destabilize LGBT equality through regressive anti-LGBT legislations in areas beyond public accommodations. It creates community-wide anxiety for LGBT Americans. In these ways, *Masterpiece*’s postponement precedent creates social meaning on several legal and normative levels.

If the theory of constitutional culture holds, however, the United States is in but one part of the movement-counter movement cycle that can—and may—lead to the Court holding that “compliance with antidiscrimination law does not alter the citizenship status of member of the Religious Right in the way that allowing discrimination by such members by granting them an exemption from such laws alters the citizenship status of LGBT consumers.”<sup>379</sup> Because “the purpose and social meaning of equality law does not target religious people,”<sup>380</sup> even though many in the Religious Right “feel the denial of an exemption acutely and sincerely[.]”<sup>381</sup> such exemptions should be denied as a legal matter once the Court decides to

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phenomenon status nostalgia.”).

<sup>378</sup> *Id.*

<sup>379</sup> Tebbe, *supra* note 8, at 118.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

address the issue head-on.

The postponement precedent of *Masterpiece*, however, does not guarantee such an outcome. As a result, LGBT-rights scholars and advocates should heed the social meaning postponement precedent of *Masterpiece* and learn as much as possible from its oral argument to adequately prepare to meet the Court's concerns when it finally decides the issue of religious exemptions on its merits.