

RECONCILING RELIGIOUS FREEDOM AND LGBT RIGHTS:
THE PERILS AND PROMISES OF *MASTERPIECE CAKESHOP*

*Brian K. Miller**

INTRODUCTION

The gradual acceptance of marriage equality over the last several decades has gone hand-in-hand with concerns about its implications for religious freedom. From *Romer v. Evans*, where Colorado banned discrimination protections for LGBT individuals and justified doing so on the grounds that it protected the rights of religious landlords and business owners,¹ through the many individual state efforts to recognize marriage equality,² the question of how marriage equality will affect religious freedom—and *vice versa*—has been ever present. The conflict between religious freedom and civil rights protections for LGBT couples seemed to culminate in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*,³ a case which presented the conflict in stark terms.

Masterpiece gave the Supreme Court of the United States an opportunity to settle the long running and largely unnecessary tension between religious freedom and marriage equality. And indeed, the majority opinion authored by Justice Kennedy attempted to do just that.⁴ Justice Kennedy’s opinion called for mutual toleration, urging states to recognize that “these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and with-

* A graduate of George Mason University School of Law, the Director of Legal and Public Affairs at the Center for Individual Rights, and a Regular Opinion Contributor to *Forbes Magazine*. For the sections dealing with *Mitchell County v. Zimmerman* and the history of RFRA, I would like to thank Paul Baumgardner, a longtime friend and collaborator who has co-authored another paper with me on those issues.

¹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

² See Part I for examples.

³ See *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n.*, 138 S. Ct. 1719, 1723 (2018) (explaining that a same-sex couple challenged a religious baker’s decision not to make their wedding cake because it violated the baker’s religious beliefs).

⁴ *Id.*

out subjecting gay persons to indignities when they seek goods and services in an open market.”⁵

This Article will argue that the Court’s *Masterpiece* opinion—while reaching the right result and striving for the right ends—failed in its mission to reconcile the legal conflict between religious freedom and marriage equality. The Court’s minimalist holding seems completely unaware of its own fraught role in fomenting this divide, and its stirring calls for toleration are hardly comforting given that the opinion leaves too many questions unanswered. In the aftermath of *Masterpiece*, religious business owners, LGBT persons, and state policymakers are all in the dark regarding their legal standing.⁶

This Article will also attempt to do what the *Masterpiece* opinion did not. It will argue that the tension and legal conflict between marriage equality and religious freedom can be avoided and will suggest proposals to achieve that end. Part I will provide a brief history of the conflict between religious rights advocates and marriage equality advocates. Part II will analyze the *Masterpiece* opinion in light of that history. Part III will evaluate proposals for reconciling marriage equality and religious freedom that have met some success in the states, the lower courts, and the general public.

I. A BRIEF HISTORY OF THE CONFLICT BETWEEN LGBT RIGHTS AND RELIGIOUS FREEDOM

The persecution of LGBT individuals has a long and infamous history. Often, this persecution has been carried out in the name of religion. When Henry Gerber—the founder of the first gay rights organization in the United States—was arrested in 1924, one of the officers proclaimed they had come after him “for infecting God’s own country.”⁷ Some sixty years later, as the AIDs epidemic swept the country, Ronald Godwin, the Director of Jerry Falwell’s Moral Majority, argued that tax dollars should not be spent on AIDs research

⁵ *Id.* at 1732.

⁶ This is perhaps best evidenced by the fact that Jack Phillips is already back in court. Brooke Sopelsa, *Colorado baker back in court after turning away transgender woman*, NBC NEWS (Aug. 15, 2018), <https://www.nbcnews.com/feature/nbc-out/colorado-baker-back-court-after-turning-away-transgender-woman-n901041>.

⁷ GEOFFREY R. STONE, *SEX AND THE CONSTITUTION* 232 (1st ed. 2017).

because it would “allow these diseased homosexuals to go back to their perverted practices without any standards of accountability.”⁸

If this indifference to physical suffering was not bad enough, gays and lesbians had few legal protections well into the late twentieth century.⁹ In 1986, twenty-four states still imposed criminal penalties for sodomy.¹⁰ Further, the Supreme Court upheld a state’s power to prosecute sodomy in *Bowers v. Hardwick*, where Justice White reasoned that the moral sensibilities of the citizens of Georgia was a sufficient reason to sustain the criminal ban.¹¹

But even in the 1980s, the tide was already beginning to turn in favor of the LGBT community.¹² The *Bowers* decision was inconsistent with the modern drift in family law that was already enshrined in *Griswold v. Connecticut*,¹³ *Eisenstadt v. Baird*,¹⁴ and *Roe v. Wade*.¹⁵ Each of these cases challenged the traditional notion that sex was legally linked to childbearing, family, and procreation.¹⁶ The Supreme Court in *Bowers* dismissively argued that there was no right to engage in homosexual activity because “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”¹⁷ But by the time of *Bowers*, sex for heterosexual couples was already legally divorced from family and

⁸ CASSIE J. E. H. TRENTAZ, *THEOLOGY IN THE AGE OF GLOBAL AIDS & HIV: COMPLICITY AND POSSIBILITY* 33 (Mary Jo Iozzio ed., 2012).

⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986).

¹⁰ *Id.*

¹¹ *Id.* at 196 (“The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

¹² See STONE, *supra* n. 7, at 445 (explaining how LGBT culture gained more public visibility in the early 1990’s after cultural changes beginning in the 1980s).

¹³ *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding a right for married couples to access contraceptives).

¹⁴ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding a right for unmarried people to access contraceptives).

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973) (finding state limits to abortion unconstitutional).

¹⁶ See Helen M. Alvaré, *Marriage and Family As the New Property: Obergefell, Marriage, and the Hand of the State*, 28 *REGENT U. L. REV.* 49, 69 (2016) (“The individualistic terms of the same-sex marriage right were also inevitable because the cultural and legal understanding of opposite-sexed marriage had decisively moved in that direction for decades.”); Brian K. Miller, *Justice Anthony Kennedy’s Legacy on Family Law*, *THE INST. FOR FAMILY STUDIES* (July 11, 2018), <https://ifstudies.org/blog/justice-anthony-kennedys-record-on-family-law>.

¹⁷ *Bowers*, 478 U.S. at 191.

marriage¹⁸ and from procreation.¹⁹ *Bowers* was a house built on sand.²⁰

Some cities responded to *Bowers* by enacting antidiscrimination ordinances to protect LGBT individuals in housing and employment.²¹ Religious conservatives mobilized against these antidiscrimination ordinances from the start.²² One of their principal reasons for doing so was a concern for how antidiscrimination ordinances would affect religious freedom.²³ At the time, several conservative Christian organizations argued, “[t]here is a veritable explosion of instances where either individuals of faith or religious organizations are being forced to comply with gay-rights ordinances and other nondiscrimination regulations where sexual orientation describes a protected class.”²⁴

The religious freedom concerns about antidiscrimination laws were valid and remain relevant two decades later. Yet, instead of lobbying for broad religious exemptions to antidiscrimination laws, religious conservatives attempted to completely annihilate the threat.²⁵ In Colorado, they rallied behind Colorado State Constitution Amendment 2, which forbade the state from enforcing any antidiscrimination protections for LGBT individuals.²⁶ The Amendment—passed in 1992 with 53% of the vote—effectively overturned the ordinances passed by major Colorado cities.²⁷

Amendment 2 was challenged immediately, and the case made it to the Supreme Court in 1996.²⁸ By this time, six of the nine Justices who had participated in *Bowers* were gone, and four of the new Jus-

¹⁸ See *Eisenstadt*, 405 U.S. at 453.

¹⁹ See *Roe*, 410 U.S. at 159; *Griswold*, 381 U.S. at 485-86.

²⁰ Justice Blackmun’s dissent in *Bowers* relied heavily on *Griswold*, *Eisenstadt*, and *Roe*. “The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.” *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

²¹ STONE, *supra* note 7, at 477.

²² *Id.*

²³ Linda C. McClain, *From Romer v. Evans to United States v. Windsor: Law As A Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL’Y 351, 385 (2013).

²⁴ *Id.* at 385-86 (citing Brief for Christian Legal Society et al. as Amicus Curiae Supporting Petitioners at 1-2, *Romer v. Evans*, 517 U.S. 620 (1996)).

²⁵ *Id.* at 386 (providing examples of various religious freedom arguments).

²⁶ STONE, *supra* note 7, at 478.

²⁷ *Id.*

²⁸ *Romer v. Evans*, 517 U.S. 620, 623 (1996).

tices had been appointed by the Ronald Reagan and George H.W. Bush administrations. With a newly conservative Court, and with *Bowers* looming in the not-too-distant past, there seemed to be no reason to overturn Amendment 2. Yet despite the odds, the Court held 6-3 that Amendment 2 violated the Constitution.²⁹ Justice Kennedy's majority opinion found that Amendment 2 imposed a unique disability on homosexuals by requiring them to change the state constitution if they desired to enact antidiscrimination ordinances to protect their community.³⁰

Justice Kennedy's opinion, however, did not stop there. He went on to reason that Amendment 2 could not be justified by any legitimate state interest and was "inexplicable by anything but animus toward the class it affects."³¹ This accusation that religious conservatives were motivated solely by animus was not well received, as best evidenced by Justice Scalia's scathing dissent.³² Justice Scalia chastised the Court for its "grim, disapproving hints that Coloradans have been guilty of 'animus' or 'animosity' toward homosexuality, as though that has been established as un-American."³³ Justice Scalia also pointed out that the Court made official "the proposition that opposition to homosexuality is as reprehensible as racial or religious bias" instead of a "reasonable effort to preserve traditional American moral values."³⁴

The accusation of animus undeniably had elements of truth to it, but by relying on a finding of animus to reach its holding, the *Romer* Court threw water onto a grease fire. The controversy over marriage equality had been brewing slowly throughout the 1990s. When the Supreme Court of Hawaii found in 1993 that the state's refusal to grant marriage licenses to same-sex couples was discriminatory, the rest of the country first came to the realization that marriage equality was a real political possibility.³⁵ Conservatives responded by urging states to pass constitutional amendments ensuring that marriage

²⁹ *Id.* at 622, 635-36.

³⁰ *Id.* at 631, 633 ("A law [Amendment 2] declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

³¹ *Id.* at 632.

³² *Id.* at 644 (Scalia, J., dissenting).

³³ *Id.*

³⁴ *Romer v. Evans*, 517 U.S. 520, 651 (1996) (Scalia, J., dissenting).

³⁵ *Baehr v. Lewin*, 74 Haw. 530, 562, 564 (1993).

would be limited to heterosexual couples.³⁶ As a result, Congress passed—and President Bill Clinton signed into law—the Defense of Marriage Act in 1996.³⁷

These efforts were galvanized by the Court’s insinuation that the majority of Americans who backed these measures were bigots.³⁸ By comparing defenders of traditional marriage to racists, the Court gave that population even more reason to fear that they too would be socially and legally ostracized.³⁹ Religious conservatives believed that losing the battle over marriage equality would erect significant barriers to their ability to exercise their beliefs through religious institutions like universities and charities.⁴⁰ In a way, *Romer* raised the stakes for a winner-take-all fight between the LGBT community and religious conservatives.

Of course, even if the Court had not raised the stakes for conservatives, mistrust and animosity would still have played a large role in any discussion going forward. The LGBT community had little reason to trust conservatives after their stark indifference to its suffering in the 1980s.⁴¹ Yet religious opposition to marriage equality may have been dampened if religious conservatives could have been reassured that their religiously informed practices would remain protected.⁴² It was a common trope for equality advocates to mock religious conserv-

³⁶ State efforts to pass constitutional amendments banning same-sex marriage did not truly get off the ground until 2004, when Massachusetts became the first state to fully legalize same-sex marriage. Before 2004, only three states had amended their constitutions to ban same-sex marriage. In the five years after 2004, twenty-five states followed their example. See STONE, *supra* note 7, at 499.

³⁷ Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 1996 U.S.C.A.N. (110 Stat.) 2419, invalidated by *United States v. Windsor*, 570 U.S. 744, 769-71 (2013) (holding that withholding marriage from same-sex couples was an unconstitutional deprivation of liberty under the Fifth Amendment).

³⁸ See *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting) (pointing out that the Court disapproved of animosity toward homosexuality).

³⁹ *A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, THE PEW RESEARCH CENTER (May 21, 2009), <http://www.pewforum.org/2009/05/21/a-clash-of-rights-gay-marriage-and-the-free-exercise-of-religion>.

⁴⁰ *Id.*

⁴¹ See STONE, *supra* note 7, at 447-48 (describing the LGBT community’s response to “[T]he Reagan administration’s indifference to the plight of homosexuals.”).

⁴² Evidence for this thesis is found in the fact that, in the decade prior to *Obergefell*, marriage equality was legalized via the political branches in states that offered somewhat generous religious freedom protections. In the nine states that attempted to legalize marriage equality while only offering basic (and redundant) protections for clergy, the measures were defeated. See Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in 1 RELIGIOUS FREEDOM AND GAY RIGHTS:

atives for thinking that the ability of homosexuals to marry would affect their lives.⁴³ But if religious objection to same-sex marriage was legally compared to racism, religious conservatives would have been affected in a myriad of ways.⁴⁴

As states began gradually recognizing marriage equality, their efforts were framed by these specific concerns for religious liberty. When Massachusetts became the first state to recognize marriage equality in 2004, the Supreme Judicial Court of Massachusetts went out of its way to clearly state that the “decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.”⁴⁵ The Iowa Supreme Court followed suit when Iowa became the third state to recognize same-sex marriage.⁴⁶ The Supreme Court in Iowa assured that “[r]eligious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views.”⁴⁷ The courts, of course were not the only bodies aware of the problem. When legislation recognizing same-sex marriage swept through the states, a majority of the bills included language that guaranteed religious freedom.⁴⁸ In Vermont, for instance, the legislation that finally recognized marriage equality was titled “An Act to Protect Religious Freedom and Promote Equality in Civil Marriage.”⁴⁹

It is unsurprising, then, that when the Supreme Court finally decided *Obergefell v. Hodges*, it followed this pattern set by the states.

EMERGING CONFLICTS IN NORTH AMERICA AND EUROPE 137 (Timothy Samuel Shah & Thomas F. Farr eds., 2015).

⁴³ See *Parks and Recreation: Pawnee Zoo* (NBC television broadcast September 17, 2009) (showing a conservative religious activist saying “[W]hen gays marry, it ruins marriage for the rest of us” about a penguin couple getting married at the local zoo).

⁴⁴ See Ryan T. Anderson, *Disagreement is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 *GEO. J.L. & PUB. POL’Y* 123, 135-41 (2018) (explaining the social costs of protecting racist interests versus the social costs of protecting religious interests).

⁴⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003).

⁴⁶ *Iowa Supreme Court legalizes gay marriage*, MSNBC NEWS (Apr. 3, 2009), http://www.nbcnews.com/id/30027685/ns/politics-more_politics/t/iowa-supreme-court-legalizes-gay-marriage/#.XHCv3uhKiUk.

⁴⁷ *Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009).

⁴⁸ See Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 *Nw. J. L. & Soc. POL’Y* 274 (2010) (“The institutional venue for [the fight over legalizing same-sex marriage] changed as legislatures replaced courts as primary decision-makers on the issue.”).

⁴⁹ VT. STAT. ANN. tit. 15, §§ 1-10 (2009).

Perhaps learning from the aftermath of *Romer*, the *Obergefell* Court spoke respectfully of religious objections to same-sex marriage.⁵⁰ Writing for the Court, Justice Kennedy wrote that “it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”⁵¹ The implication was that the recognition of same-sex marriage would change nothing for religious believers. In fact, the Court went so far as to reiterate that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”⁵²

Despite the many promises that religious freedom would be left unchanged, doubts about the veracity of these assurances arose from the very beginning. Three of the four dissenting opinions in *Obergefell* directly questioned the majority’s commitment to religious freedom.⁵³ In his dissent, Chief Justice Roberts warned that the decision “creates serious questions about religious liberty.”⁵⁴ For the Chief Justice, the majority’s assurances did not go far enough: “The majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage. The First Amendment guarantees, however, the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”⁵⁵ Behind this concern loomed the question of how religious organizations—such as universities—would be treated when their beliefs inevitably conflicted with antidiscrimination laws. Chief Justice Roberts recalled that, during oral arguments, the Solicitor General had indicated that religious institutions might indeed face problems in the future.⁵⁶ In that light, the majority’s nod to religious freedom was not enough. With those

⁵⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2625 (Roberts, C.J., dissenting). *Id.* at 2638 (Thomas, J., dissenting) (“Aside from undermining political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect.”). *Id.* at 2643 (Alito, J., dissenting) (“By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas.”).

⁵⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

⁵⁵ *Id.* (citation omitted).

⁵⁶ *Id.* at 2626.

looming questions unanswered, the Chief Justice concluded that “people of faith can take no comfort in the treatment they receive from the majority.”⁵⁷

Justices Thomas and Alito echoed the Chief Justice’s concerns. Justice Thomas warned that “the majority’s decision threatens the religious liberty our Nation has long sought to protect.”⁵⁸ As for the majority’s assurances otherwise, Justice Thomas wrote them off as “only a weak gesture” that misunderstands the scope of religious liberty and underestimates inevitable conflicts.⁵⁹ Further, Justice Thomas argued for a broad conception of religious liberty that protects “freedom of action in matters of religion generally.”⁶⁰

Justice Alito similarly feared that the majority’s decision would be “used to vilify Americans who are unwilling to assent to the new orthodoxy.”⁶¹ By likening opposition to same-sex marriage to racism, the majority had undermined its passing nod to the “sincere conviction” of religious believers and empowered states to treat any dissent as unlawful discrimination.⁶² Justice Alito worried “that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”⁶³

The situation for religious freedom on the ground seemed to confirm the fears of the *Obergefell* dissenters. The transformation of the Religious Freedom Restoration Act (RFRA) from bipartisan achievement to political pariah is illustrative.⁶⁴ The RFRA originated in the early 1990s—completely independent of concerns over marriage equality—and was a bipartisan response to the Supreme Court’s decision in *Employment Division v. Smith*.⁶⁵ In its early years, the RFRA

⁵⁷ *Id.*

⁵⁸ *Id.* at 2638 (Thomas, J., dissenting).

⁵⁹ *Id.* at 2638; *see also id.* at 2638 n.7 (“Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies.”).

⁶⁰ *Obergefell v. Hodges*, 135 S. Ct. at 2584, 2638 (2015).

⁶¹ *Id.* at 2642 (Alito, J., dissenting).

⁶² *Id.* at 2642-43.

⁶³ *Id.*

⁶⁴ Brian K. Miller, *The Age of RFRA*, FORBES (Nov. 16, 2018, 3:46 PM), <https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/#7f5916a277ba>.

⁶⁵ 494 U.S. 872 (1990); H.R. Rep No. 103-88, at 1 (1993).

was adopted by both Democrat and Republican states.⁶⁶ But into the 2000s, the RFRA became linked with efforts to push back against discrimination protections for LGBT couples.⁶⁷ Commentators came to associate the RFRA with conservative states, and discussions about the law placed religious liberty in “scare quotes” and accused conservatives of “weaponizing” the First Amendment.⁶⁸

These accusations from the left were not without some merit. Mississippi, for example, passed a religious freedom law in 2014 that exempted religious objectors from antidiscrimination ordinances for LGBT individuals.⁶⁹ The only problem was that there were no discrimination protections for LGBT individuals on the books in Mississippi at the time.⁷⁰ Mississippi was certainly an extreme example, but it was indicative of a trend throughout the rest of country where states began to balkanize into those that offered broad protections for LGBT individuals and those that offered broad protections for religious freedom. Currently, twenty-one states have enacted employment discrimination protections for sexual orientation and gender identity.⁷¹ Another twenty-one states have enacted state Religious Freedom Restoration Acts.⁷² Only four states overlap, providing protections

⁶⁶ Connecticut, Rhode Island, Illinois, South Carolina, Florida, Texas, and Arizona, for instance, all enacted legislation modeled on the federal RFRA in the 1990s. See *Federal & State RFRA Map*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <https://www.becketlaw.org/research-central/rfra-info-central/map/>.

⁶⁷ Jeff Guo, *How religious freedom laws were praised, then hated, then forgotten, then, finally, resurrected*, THE WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/blogs/gov-beat/wp/2015/04/03/how-religious-freedom-laws-were-praised-then-hated-then-forgotten-then-finally-resurrected/?utm_term=.9daaab1be259.

⁶⁸ Examples of scare quoting abound. See e.g., Ralph Ellis and Emanuella Grinberg, *Georgia Gov. Nathan Deal to veto ‘religious liberty’ bill*, CNN NEWS (Mar. 28, 2016 5:46 PM), <https://www.cnn.com/2016/03/28/us/georgia-north-carolina-lgbt-bills/index.html>; Tony Cook and Tom LoBianco, *Indiana governor signs amended ‘religious freedom’ law*, USA TODAY (Apr. 2, 2015), <https://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>. And for a weaponizing/scare-quoting twofor, see Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing “Religious Liberty” to Allow Institutions to Discriminate*, GUTTMACHER POLICY REVIEW 21 (May 16, 2018).

⁶⁹ MISS. CODE ANN. § 11-61-1 (2014).

⁷⁰ Jonathan Rauch, *Nondiscrimination for All*, NATIONAL AFFAIRS (Summer 2017), <https://www.nationalaffairs.com/publications/detail/nondiscrimination-for-all>.

⁷¹ *State Maps of Laws & Policies: Employment*, THE HUM. RTS. CAMPAIGN (Jan. 28, 2019), <https://www.hrc.org/state-maps/employment>. Twelve more states have enacted protections for public employees that cover either sexual orientation or both sexual orientation and gender identity.

⁷² See *Federal & State RFRA Map*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <https://www.becketlaw.org/research-central/rfra-info-central/map/>.

for both the LGBT community and the religious community.⁷³ These ten are the outliers. For the rest of the states, the question of civil rights is largely one of winner-take-all.

Still, cooler heads on the political left should have prevailed regarding the merits of state-based RFRA. But instead, organizations like the ACLU, which had been instrumental in passing the original RFRA in the 1990s, argued strenuously against the law.⁷⁴ Religious conservatives looked on as, in state after state, courts found religious business owners to be in violation of antidiscrimination ordinances—even where those ordinances applied to small businesses who specialized in creative products.⁷⁵ The logic of the cases was hard to deny. If same-sex marriage was a constitutional right, then surely there is no constitutional issue in ending all discrimination against LGBT persons. It seemed that some religiously-inspired expressions against same-sex marriage could, indeed, be curtailed in a post-*Obergefell* world.

II. CULMINATION OF THE CONFLICT: ANALYSIS OF *MASTERPIECE*

The fact Colorado was at the center of both *Romer* and *Masterpiece* is perhaps the first clue that the historic approach to marriage equality and religious freedom is simply not working. In each case, Colorado defended the winner-take-all approach to civil rights. In *Romer*, Colorado defended religious freedom at the expense of LGBT rights.⁷⁶ In *Masterpiece*, it defended LGBT rights at the

⁷³ *Compare State Maps of Laws & Policies: Employment*, THE HUM. RTS. CAMPAIGN (Jan. 28, 2019), <https://www.hrc.org/state-maps/employment> and *Federal & State RFRA Map*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <https://www.becketlaw.org/research-central/rfra-info-central/map/>.

⁷⁴ Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, THE WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.6864777031cd. It is also ironic to note that while the ACLU now officially condemns RFRA, it continues to rely on the law in its litigation, and has provided a number of RFRA success stories, demonstrating that the law is instrumental in protecting the rights of minority religions. See e.g., *Singh v. McHugh*, 109 F. Supp. 3d 72, 75 (D.D.C. 2015).

⁷⁵ See *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 568 (2017) (finding that a florist's refusal to design custom arrangements for a same-sex wedding was not protected by the First Amendment); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (finding no First Amendment problem with applying antidiscrimination laws to religious wedding photographers).

⁷⁶ 517 U.S. 620, 635.

expense of religious freedom.⁷⁷ In each instance, the Court reprimanded the winner-take-all approach. Yet each decision left the states with more questions than answers.

A. Masterpiece *Background*

After *Romer*, Colorado continued to resist the move towards marriage equality for another decade. In 2006, Colorado voters approved another amendment to the state constitution, which stipulated that “[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state.”⁷⁸ But in the late 2000s, the state began to slowly offer more protections to LGBT couples. In 2007, Colorado extended employment discrimination protections to same-sex couples.⁷⁹ The following year, the same protections were extended to cover housing and public accommodations.⁸⁰ A 2009 law allowed same-sex couples to designate their own beneficiaries.⁸¹ Finally, in 2013, Colorado began recognizing civil unions.⁸²

Colorado’s civil rights laws offered few exemptions. The statute governing employment discrimination makes no exceptions for small businesses.⁸³ In comparison, federal law exempts businesses that employ fewer than fifteen employees.⁸⁴ Additionally, Colorado’s ban on discrimination in public accommodations only offers a narrow exemption for places that are “principally used for religious purposes.”⁸⁵

It was under this absolutist approach to non-discrimination that Jack Phillips, the owner of Masterpiece Cakeshop, first found himself in legal trouble. Phillips started Masterpiece Cakeshop in 1993—just one year after Colorado voters approved Amendment 2.⁸⁶ As an evangelical Christian, he believes marriage can only be between a man and a woman.⁸⁷

⁷⁷ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

⁷⁸ COLO. CONST. ART. II, § 31 (2006).

⁷⁹ COLO. REV. STAT. § 24-34-402 (2007).

⁸⁰ John Ingold, *Ritter Signs Controversial Anti-Discrimination Bill*, DENV. POST (May 29, 2008), <https://www.denverpost.com/2008/05/29/ritter-signs-controversial-anti-discrimination-bill/>.

⁸¹ 2009 Colo. Legis. Serv. Ch. 107 (West).

⁸² COLO. REV. STAT. § 14-15-101 (2013).

⁸³ COLO. REV. STAT. ANN. § 24-34-601 (West).

⁸⁴ 42 U.S.C. § 2000e(b).

⁸⁵ COLO. REV. STAT. ANN. § 24-34-601(1) (West).

⁸⁶ 138 S. Ct. at 1724.

⁸⁷ *Id.*

In 2012, Charlie Craig and Dave Mullins, a gay couple who had been married in Massachusetts, visited Masterpiece to inquire about a cake for their wedding.⁸⁸ At the time, Colorado still did not recognize same-sex marriages.⁸⁹ Phillips turned them away, explaining, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.”⁹⁰ Craig and Mullins responded by filing a complaint with the Colorado Civil Rights Division.⁹¹ The Division found probable cause that Phillips was in violation of Colorado law.⁹² The initial findings alleged that he declined to serve LGBT couples on at least six other occasions.⁹³ The Division referred Phillips’ case to the Colorado Civil Rights Commission, which held a formal hearing in 2014.⁹⁴

Phillips argued that he had only declined to bake the cake because he objected to participating in a same-sex wedding, not because of Craig and Mullin’s sexual orientation.⁹⁵ Furthermore, Phillips argued that application of Colorado law to his business would violate his First Amendment rights to free speech and free exercise of religion.⁹⁶ Phillips considered creating and designing a custom wedding cake to be an artistic expression—something that, by definition, could not be compelled and that was protected under the First Amendment.⁹⁷ The Commission rejected all of his arguments, finding that Phillips’ distinction between gay persons and gay marriage was untenable.⁹⁸ The Commission reasoned that but for Craig and Mullin’s orientation, Phillips would not have denied them service.⁹⁹ After all, the record indicated that “Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake’s design.”¹⁰⁰ This would later lead the Colorado Court of Appeals to affirm the Commission’s finding and concluding that, for all Phillips knew at the time,

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1725.

⁹² *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1726 (2018).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1726 (2018).

⁹⁹ *Id.* at 1727.

¹⁰⁰ *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 285 (2015).

Craig and Mullins may have requested a generic cake that would have been suitable for any wedding.¹⁰¹ The fact that Phillips had refused service to other LGBT couples—including one couple who only asked for cupcakes—also undercut his argument.¹⁰²

Despite the flaws in Phillips’ arguments, the Commission simply failed to consider his case dispassionately. Some commissioners spoke disparagingly of Phillips’ beliefs.¹⁰³ One even suggested that Phillips could not act on his religious beliefs “if he decides to do business in the state.”¹⁰⁴ Another commissioner dismissed the religious freedom arguments because “[f]reedom 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.”¹⁰⁵ That commissioner went on to describe claims of religious freedom as “one of the most despicable pieces of rhetoric that people can use.”¹⁰⁶

The Commission ordered Phillips to cease and desist discriminating against same-sex couples and to implement “comprehensive staff training” on Colorado’s public accommodations laws.¹⁰⁷ Phillips appealed to the Colorado Court of Appeals, which upheld the Commission’s decision.¹⁰⁸ Then, Phillips appealed to the Colorado Supreme Court, which denied cert.¹⁰⁹ Finally, Phillips appealed to the United States Supreme Court, which granted cert and heard oral arguments on December 5, 2017.¹¹⁰ The Court released its opinion the following June.¹¹¹

B. *The Masterpiece Decision*

Regardless of the outcome, the *Masterpiece* decision was bound to be monumental. As Professor Douglas Laycock put it, to refuse

¹⁰¹ See *id.* at 279, 285, 288.

¹⁰² *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1726.

¹⁰³ *Id.* at 1729.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1726.

¹⁰⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1726-27 (2018).

¹⁰⁹ *Id.* at 1727.

¹¹⁰ *Id.* at 1724.

¹¹¹ *Id.* at 1727.

“an exemption on even these facts would have made further federal litigation essentially impossible.”¹¹² The nods to religious freedom in *Obergefell* would be forgotten as meaningless after all.¹¹³ On the other side of coin, LGBT advocates worried that a finding for Phillips could effectively gut antidiscrimination laws.

But the Court charted a different path. Or at least attempted to. Writing for the majority, Justice Kennedy described the issues as raising:

. . . difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.¹¹⁴

Justice Kennedy’s approach attempted to find a balance between the competing claims. He noted that “[t]he Court’s precedent makes clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws.”¹¹⁵ He also noted that Phillips declined to bake the cake before discussing any customized designs, and that Phillips had declined to provide other baked goods to same-sex couples in the past.¹¹⁶ Justice Kennedy conceded that “[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”¹¹⁷ Finally, Justice Kennedy noted that “it is a general rule” that religious objections “do not allow business owners and other actors in the economy and in society to deny pro-

¹¹² Douglas Laycock and Thomas Berg, *Symposium: Masterpiece Cakeshop — not as narrow as may first appear*, SCOTUSblog (Jun. 5, 2018, 3:48 PM), <http://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/>.

¹¹³ *Id.*

¹¹⁴ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. at 1723.

¹¹⁵ *Id.* at 1723-24.

¹¹⁶ *Id.* at 1724, 1726.

¹¹⁷ *Id.* at 1728.

tected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”¹¹⁸

Yet despite all these concessions, the Court rendered a decision in favor of Phillips.¹¹⁹ Phillips had two crucial points working for him. First, there was the almost unbelievable hostility that the Commission exhibited against Phillips’ religious beliefs. On this point, the Court held that “[t]he neutral and respectful consideration to which Phillips was entitled was compromised” and that the hostile remarks “cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.”¹²⁰ The comments were “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law.”¹²¹

The second point in Phillips’ favor was that Colorado had allowed other small business owners to be exempt from discrimination laws for secular reasons.¹²² On at least three other occasions, the Colorado Civil Rights Division had allowed storekeepers to decline to create products that featured religious messages that disparaged LGBT persons.¹²³ The Commission’s allowance of exceptions for secular reasons, but not religious reasons, was “another indication of hostility.”¹²⁴ Thus, the Court concluded that Colorado had been “neither tolerant nor respectful of Phillips’ religious beliefs” and had violated its constitutional obligation to treat Phillips’ religion with neutrality.¹²⁵

C. *What Masterpiece Means*

What, exactly, *Masterpiece* means for the future was a contested issue before the opinion was even published. Justice Gorsuch and Justice Kagan, who both joined the majority opinion, wrote a set of dueling concurrences that charted differing interpretations of the decision.¹²⁶ Despite the holding in favor of Phillips, Justice Kennedy

¹¹⁸ *Id.* at 1727.

¹¹⁹ *Id.* at 1732.

¹²⁰ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729, 1730 (2018).

¹²¹ *Id.* at 1729.

¹²² *Id.* at 1728.

¹²³ *See id.*

¹²⁴ *Id.* at 1730.

¹²⁵ *Id.* at 1731.

¹²⁶ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732-40 (2018).

had written that “the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality.”¹²⁷ Further, Justice Kennedy hedged that “cases like this in other circumstances,” and any “future controversy involving facts similar to these,” will have to “await further elaboration in the courts.”¹²⁸ This seemed to indicate that there was nothing wrong with compelling Phillips to create a message with which he disagreed. Instead, the real problem was how Colorado went about compelling him.

Justice Kagan latched onto this view.¹²⁹ Justice Kagan emphasized the point that religious objectors are not entitled to receive an exemption from neutral and generally applicable laws.¹³⁰ Her problem with *Masterpiece* was not that Phillips had been compelled to speak a message to which he objected, nor was it that Colorado had offered exemptions to other bakers for secular reasons. The problem was, simply, that Colorado had been expressly biased in its treatment of Phillips’ faith.¹³¹ Justice Kagan believed that Colorado could, in fact, treat Phillips differently from the other bakers without running afoul of the First Amendment.¹³² The case against Phillips could be “justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.”¹³³

Justice Gorsuch, however, took the opposite view. For Gorsuch, the problem is “that the Commission failed to act neutrally by applying a consistent legal rule” between Phillips’ case and similar cases in which the Commission approved exemptions.¹³⁴ He considered the Commission’s willingness to “apply a more generous legal test to secular objections than religious ones” to be constitutionally fatal.¹³⁵ While Justice Kagan thought Colorado could find an unbiased reason for treating Phillips differently from the other bakers, Justice Gorsuch

¹²⁷ *Id.* at 1732.

¹²⁸ *Id.* at 1724, 1732.

¹²⁹ Before her appointment, Justice Kagan was well known for her description of First Amendment analysis as “motive hunting.” See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

¹³⁰ *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1732 (Kagan, J., concurring).

¹³¹ *Id.*

¹³² *Id.* at 1734.

¹³³ *Id.* at 1733.

¹³⁴ *Id.* at 1736 (Gorsuch, J., concurring).

¹³⁵ *Id.* at 1737.

thought the different treatment itself would always be proof of unconstitutional hostility toward religion.¹³⁶

This potential divide over the future of *Masterpiece's* application was not lost on the broader public. States knew they could not be overtly biased, but whether they could continue to apply their antidiscrimination laws to religious business owners remained an open question. Religious conservatives were also left in the dark as to the extent of their religious freedom. And LGBT individuals were still left wondering if the Court had punted, only to potentially gut antidiscrimination laws in the future. Colorado, for its part, took Justice Kagan's route. When another complaint was filed against Jack Phillips, the Commission—once again—found him to be in violation of Colorado's antidiscrimination law.¹³⁷

III. ALTERNATIVES FOR COURTS, STATES, AND THE REST OF US

The uncertainty bred by *Masterpiece* is unnecessary and intolerable. Politically opposed groups who are often harassed for their innate characteristics are completely in the dark about how they legally relate to each other and to the broader public. As Justice Kennedy himself once recognized, "Liberty finds no refuge in a jurisprudence of doubt."¹³⁸ Yet doubt about the future of LGBT rights and religious freedom persists in the wake of *Masterpiece*, and one reason for this is the sheer irony at the heart of the case. In 1996, the Court chastised Colorado for acting with animus against gays and lesbians. In the aftermath of that case, states could surely be forgiven for thinking that opposition to same-sex marriage could be legally compared to racism. But when Colorado then embraced the logical extension of *Romer's* reasoning, it was for naught. The Court chastised Colorado again.¹³⁹ While the *Masterpiece* opinion never uses the word "animus," the implication is there.

The reasons for taking a minimalist approach to such a controversial issue are understandable but considering the well-known backlash against the Court's decision in *Romer*, and the decades of conflict

¹³⁶ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737-38 (2018) (Gorsuch, J., concurring).

¹³⁷ See Sopelsa, *supra* note 6.

¹³⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (O'Connor, J., Kennedy, J., and Souter, J., maj.).

¹³⁹ *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1719.

between LGBT advocates and religious freedom advocates, one hoped the Court would avoid those same mistakes. History is already repeating itself. Liberals and progressives were just as aghast as Justice Scalia was to discover that the Supreme Court labelled their efforts hostile. The conflict over religious freedom and marriage equality has no end in sight.

While previous approaches have not worked smoothly, there are some proposals that could be adopted to ease the conflict. First, there is a judicial solution that would make religious conservatives feel more secure in their standing without gutting antidiscrimination laws. Second, there is a legislative solution that could be adopted even if the judiciary persists in its obscure and minimalist approach. Lastly, a public solution—directed at the general public, journalists, and politicians who (often carelessly) discuss religious freedom issues—provides recommendations for how to analyze conflicts between marriage equality and religious freedom with respect and mutual toleration in mind.

A. *A Judicial Solution*

The Court's holdings in *Romer* and *Masterpiece* leave onlookers largely clueless. Merely instructing states to refrain from hostility and animus leaves many questions unanswered and often provokes intense partisan fights over constitutional rights. In *Masterpiece*, the Court could have provided greater clarity about the state of religious freedom without endangering the status of LGBT individuals.

To understand the uneasiness that religious communities feel about current religious freedom law, it is important to recognize that their concerns originate with *Employment Division v. Smith*, decided in the 1990s.¹⁴⁰ Frustration with *Smith* would persist in religious communities even if marriage equality had not come to dominate the conversation surrounding religious freedom. Courts could easily alleviate that frustration.

The *Smith* majority held that the First Amendment did not require religious exemptions to laws that were neutral and generally applicable.¹⁴¹ This was a limitation of earlier religious freedom prece-

¹⁴⁰ See 494 U.S. 872 (1990).

¹⁴¹ *Id.* at 878, 879.

dents. Prior to *Smith*, the Court held in *Sherbert v. Verner*¹⁴² and in *Wisconsin v. Yoder*¹⁴³ that the government could only burden the exercise of religion if: (1) the burden was necessary in order to achieve a compelling state interest, and (2) the government had used the least restrictive means in pursuing that compelling interest.¹⁴⁴ This standard, which the Supreme Court applied for several decades, required the government to broadly accommodate religious objections.

When *Smith* restricted this broader standard, the backlash was swift and fierce.¹⁴⁵ One legal commentator recalls, “God may not have died in 1990, but from the uproar in the legal community that year, His chances of survival in the American polity appeared rather slim.”¹⁴⁶ A large and bipartisan coalition quickly formed to push Congress to pass legislation that would better protect religious freedom.¹⁴⁷ One especially diverse interest group—the “Coalition for the Free Exercise of Religion”—consisted of sixty-six different organizations, including the ACLU, the Southern Baptist Convention, the American Humanist Association, and the Christian Legal Society.¹⁴⁸

Congress responded with the enactment of the Religious Freedom Restoration Act in 1993.¹⁴⁹ RFRA passed the U.S. House of Representatives unanimously and was approved by the U.S. Senate in a 97-3 vote.¹⁵⁰ Signed into law by President Clinton, this federal statute restored the “substantial burden” and “compelling interest” standard that the Supreme Court first articulated in *Sherbert* and ensured that the government would have to take an accommodationist approach to religious objectors.¹⁵¹

¹⁴² 374 U.S. 398 (1963).

¹⁴³ 406 U.S. 205 (1972).

¹⁴⁴ *Id.* at 235; *Sherbert*, 374 U.S. at 403.

¹⁴⁵ The Court had actually hinted at rolling back the *Sherbert/Yoder* standard several years earlier in both *Bowen v. Roy*, 476 U.S. 693, 700-01, 711-12 (1986) (finding no First Amendment right for Native Americans to opt out of social security registration based on religious beliefs) and *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988) (finding no First Amendment right for Native American sacred sites to be spared from timber harvesting and road constructions).

¹⁴⁶ Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 235 (1998).

¹⁴⁷ Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 416, 418, & 416 n.2 (2016).

¹⁴⁸ *Id.* at 416 n.2.

¹⁴⁹ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

¹⁵⁰ Miller, *supra* note 64.

¹⁵¹ 42 U.S.C. § 2000bb(b) (1993).

For two decades, RFRA retained its reputation as a bipartisan achievement for civil rights. Twenty-one states adopted the law, and fourteen more state courts have interpreted their constitution in accordance with the RFRA standard.¹⁵² However, as discussed in Part I, the RFRA became embroiled in the culture war over marriage equality. In 2015, Indiana Governor Mike Pence signed the last state-based RFRA to be enacted.¹⁵³ The Indiana bill passed only after a harsh debate and concessory modifications were made to the text.¹⁵⁴ By this point, the damage to RFRA's reputation was already fatal. Even deeply conservative states, like Arizona and Georgia, began to reject proposed RFRA legislation.¹⁵⁵ Now, it is highly unlikely that any of the twenty-nine remaining states without a state RFRA will muster the political will to enact one in the future.¹⁵⁶

With RFRA now being a political non-starter, religious freedom advocates rightly fear a return to *Smith* should a hostile political majority ever rescind the currently enacted legislation. In *Masterpiece*, the Court could have signaled that religious freedom will remain protected, not by overturning *Smith*, but by reading it expansively.

In the decades since *Smith*, courts have diverged on how to apply the decision. Some have applied the decision as narrowly as possible, finding that laws impacting religious exercise are only unconstitutional where they single out religion or display overt hostility.¹⁵⁷ This is the limited application of *Smith* that religious communities fear most, as it gives the government broad power to affect religious exercise so long as the law is generally applicable and facially neutral. But there is another way to interpret *Smith* that favors religious claimants. One of

¹⁵² Douglas Laycock, *Religious Liberty and the Culture Wars*, U. ILL. L. REV. 839, 844 & 859 n.123 (2014).

¹⁵³ Wesley Lowery, *Gov. Pence signs revised Indiana religious freedom bill into law*, THE WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law/?utm_term=.ec1f43418a6e.

¹⁵⁴ *Id.*

¹⁵⁵ Sandhya Somashekhar, *Georgia governor vetoes religious freedom bill criticized as anti-gay*, THE WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.6fb8f45c2cb6; Mackenzie Weinger & Lucy McCalmont, *Brewer Vetoes Arizona SB 1062*, POLITICO (Feb. 27, 2014, 7:59 PM) <https://www.politico.com/story/2014/02/jan-brewer-vetoes-arizona-sb-1062-104018>.

¹⁵⁶ Miller, *supra* note 64.

¹⁵⁷ See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 701-02 (9th Cir. 1999), vacated on ripeness grounds, 220 F.2d 1134 (9th Cir. 2000) (en banc).

the best examples of this interpretation is in a case decided by the Supreme Court of Iowa.¹⁵⁸

Iowa is one of the twenty-nine states that never embraced the RFRA.¹⁵⁹ Iowa's Supreme Court applies the *Smith* test to religious freedom cases.¹⁶⁰ But in *Mitchell County v. Zimmerman*, decided in 2012, the Iowa Supreme Court issued a remarkable opinion invalidating a seemingly neutral ordinance.¹⁶¹ The case arose when Mitchell County passed an ordinance banning vehicles with steel cleats from driving on public highways.¹⁶² The County had found that steel-cleated wheels caused greater wear and tear on public roads than the rubber wheels of most automobiles.¹⁶³ But Mitchell County is home to a large number of members of the Old Order of Groffdale Conference Mennonite Church.¹⁶⁴ The Groffdale Mennonites do not approve of most modern technology, but the sect does permit the use of tractors—so long as the tractors are equipped with steel-cleated wheels.¹⁶⁵ The cleats prevent the tractors from being an effective means of transportation—the Groffdale Mennonites are required to use the traditional horse and buggy for transportation—and help ensure the tractors will only be used for community farming.¹⁶⁶

Several months after the Mitchell County ordinance was enacted, a Mennonite named Matthew Zimmerman was ticketed for driving a tractor with steel lugs on a public road.¹⁶⁷ He challenged the ticket, alleging that the ordinance violated his free exercise of religion.¹⁶⁸ In an incredible opinion, the Iowa Supreme Court asserted that the ordinance failed both the *Smith* and the *Sherbert* standards.¹⁶⁹ In *Smith*, Justice Mansfield wrote, “the Supreme Court did not define general applicability or expressly distinguish it from neutrality, but merely ref-

¹⁵⁸ *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 3-4 (Iowa 2012).

¹⁵⁹ *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

¹⁶⁰ *Mitchell Cty. v. Zimmerman*, 810 N.W. 2d 1, 8 (Iowa 2012).

¹⁶¹ *Id.* at 3-4.

¹⁶² *Id.*

¹⁶³ *Id.* at 5.

¹⁶⁴ See Dennis Magee, *Culture Clash: Mennonites Battle Mitchell County Steel Wheel Ban*, THE COURIER (Feb. 28, 2010), https://wfcourier.com/news/local/culture-clash-mennonites-battle-mitchell-county-steel-wheel-ban/article_c29d45bc-242f-11df-89da-001cc4c03286.html.

¹⁶⁵ *Mitchell Cty.*, 810 N.W.2d at 3.

¹⁶⁶ *Id.* at 4.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 3-4, 9.

erenced ‘neutral law of general applicability’ and ‘neutral, generally applicable law’ as valid limits on free exercise.”¹⁷⁰ The Iowa Supreme Court claimed that *Smith* left the parameters of neutrality and general applicability open to judicial interpretation.¹⁷¹ After evaluating the history and application of the road ordinance, the Iowa Supreme Court deemed the ordinance to be an unfair encumbrance on Mennonite citizens.¹⁷² The Court observed that “the Free Exercise Clause appears to forbid the situation where the government accommodates secular interests while denying accommodation for comparable religious interests.”¹⁷³ The Mitchell County ordinance, however, offered secular accommodations while excluding comparable accommodations for Mennonites.¹⁷⁴

The parallels to the Supreme Court’s decision in *Masterpiece* should be obvious. Both cases presented generally applicable laws that appeared to be largely neutral. It is also difficult to see how *Smith*, strictly applied, would grant the religious objectors a win in either case. Yet, in each of these cases, the Courts found that disparate treatment of religious exemptions and secular exemptions is enough for a finding that the law is not truly neutral. But the *Zimmerman* case did something that *Masterpiece* did not: it made clear to everyone that *Smith* would be read in a protective manner regarding religious freedom, rather than in a restrictive one.

The *Masterpiece* decision—though it leans toward a similarly protective reading of *Smith*—does not make it clear that *Smith* must, indeed, be read in a protective manner. Justice Kennedy’s opinion repeatedly references the principle that there is no constitutional right to be exempt from neutral, generally applicable laws.¹⁷⁵ As discussed, at least two Supreme Court Justices and the state of Colorado have read the *Masterpiece* decision to fall in line with the restrictive reading of *Smith*.¹⁷⁶ If the Court had made clear that *Smith* would be read in a protective manner, and had made clear that future application of the *Smith* standard would take into account a law’s disparate effect on

¹⁷⁰ *Id.* at 9.

¹⁷¹ *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 9 (Iowa 2012).

¹⁷² *Id.* at 16.

¹⁷³ *Id.* at 11.

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723-24.

¹⁷⁶ *See id.* at 1732 (Kagan, J., concurring).

religious practice as compared with secular practices, the Court could have killed at least three birds with one stone.

First, such a decision would assure religious communities that even in a post-*Obergefell* and post-RFRA landscape, they would have a fighting chance in court. *Smith* would no longer be the burden that has overshadowed them for three decades. Second, applying *Smith* in this manner to antidiscrimination laws would make it clear that antidiscrimination laws will be preserved. Such laws would not be invalidated under this reading of *Smith*, so long as they treat religious objectors the same as they treat secular objectors. This, in turn, would force states to create clear guidelines about their discrimination laws—which would illuminate how religious business owners and LGBT individuals relate to each other and to the broader public.

To have applied this reading of *Smith* in *Masterpiece* explicitly may have cost the majority some votes but doing so would have gone a long way toward clarifying the relative legal positions of religious communities, LGBT individuals, and the states.

B. *A Legislative Solution*

Until the Court clarifies the future of *Smith*, however, the states can take some steps to break the deadlock of the winner-take-all approach to civil rights. Part I discussed how the states have balkanized into pro-LGBT states and pro-religious freedom states, with very little overlap. State debates over religious freedom and marriage equality seem to give credence to Alexander Hamilton's scathing description of states as "wretched nurseries of unceasing discord."¹⁷⁷ More hopefully, however, the debate within some states has lived up to Justice Louis Brandeis's vision of states as laboratories of democracy.¹⁷⁸

Utah is one of those states. Utah is deeply conservative, and incredibly religious.¹⁷⁹ The majority of the state's population belongs to The Church of Jesus Christ of Latter-day Saints (LDS), and the

¹⁷⁷ THE FEDERALIST NO. 9 (Alexander Hamilton).

¹⁷⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

¹⁷⁹ In fact, it is the second most religious state in the country, trailing only Mississippi. See Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1239 (2014).

LDS Church officially condemns homosexual behavior.¹⁸⁰ Utah, in other words, had everything to gain from the winner-take-all approach to religious freedom. Indeed, Utah had already banned same-sex marriage in 2004.¹⁸¹ And the LDS Church, headquartered in Utah, had also been instrumental in backing California's Proposition 8 and other measures that opposed marriage equality.¹⁸²

Yet in January 2015, months before the Supreme Court would even hear arguments in *Obergefell v. Hodges*, leaders of the LDS Church held a news conference and urged "a way forward in which those with different views on these complex issues can together seek for solutions that will be fair to everyone."¹⁸³ The Utah legislature answered their call.¹⁸⁴ The legislature passed two bills that were signed into law later in 2015.¹⁸⁵ The first bill protected LGBT individuals from discrimination in housing and employment, and offered generous exemptions to religious institutions.¹⁸⁶ The second bill required the offices of every county clerk to establish procedures to ensure that LGBT couples could obtain a legal marriage even if local officials objected to taking part in same-sex marriages.¹⁸⁷ The bill allowed local officials to outsource their duties to ensure that no one would need to be fired or forced out of their job for their religious beliefs.¹⁸⁸

¹⁸⁰ *Same-Sex Attraction*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/topics/same-sex-attraction?lang=eng>.

¹⁸¹ *Kitchen v. Herbert*, 755 F.3d 1193, 1198 (10th Cir. 2014).

¹⁸² Jesse McKinley and Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008), <https://www.nytimes.com/2008/11/15/us/politics/15marriage.html>.

¹⁸³ The Church of Jesus Christ of Latter Day Saints, *News Conference on Religious Freedom and Nondiscrimination*, NEWSROOM (Jan. 27, 2015), <https://www.mormonnewsroom.org/article/publicstatement-on-religious-freedom-and-nondiscrimination> ("We call on local, state and the federal government to serve all of their people by passing legislation that protects vital religious freedoms for individuals, families, churches and other faith groups while also protecting the rights of our LGBT citizens in such areas as housing, employment and public accommodation in hotels, restaurants and transportation—protections which are not available in many parts of the country.").

¹⁸⁴ Steve Inskip and Ailsa Chang, *How Utah's Compromise Could Serve As A Model For Other States*, NPR MORNING EDITION (June 1, 2016), <https://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states>.

¹⁸⁵ ROBIN FRETWELL WILSON, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 132, 142 (Timothy Shah, Thomas Farr & Jack Friedman ed., OXFORD UNIVERSITY PRESS, 2016).

¹⁸⁶ *Id.* at 142-44.

¹⁸⁷ *Id.* at 143-44.

¹⁸⁸ *Id.*

Perhaps most importantly, the bill offered employment protections for both LGBT individuals and religious traditionalists.¹⁸⁹ Under the new law, most employees cannot be fired for expressing a religious or political view about same-sex marriage outside the workplace.¹⁹⁰ This provision addresses a central fear prevalent in both the LGBT and religious communities: that they will lose their livelihood over their beliefs. After decades of fierce debate and news stories about religious conservatives hounded out of their jobs, and about LGBT persons discriminated against for their identity, members of both communities feared they could lose their livelihood for acting upon their beliefs or for their innate characteristics.¹⁹¹ The Utah bills understood this common fear as serious and worthy of addressing.

The Utah Compromise was not perfect. It did not, for instance, address the issue of discrimination in public accommodations that would cause such bitter fights as those in *Masterpiece*.¹⁹² But the spirit in which the Utah legislation was achieved could be carried on to address those concerns. Other states could ban discrimination in public accommodations while allowing religious exemptions for small business owners or for small businesses that provide creative services, such as florists, photographers, and bakers. The specifics may be debated and revised, but the effort in Utah did show that compromise was possible. Compromise was even possible in a deeply partisan state.

This conciliatory approach to civil rights legislation must be carried forward. Too often, antidiscrimination laws are touted as means of social correction. The 1964 Civil Rights Act is offered up as a model for its role in helping to end racism.¹⁹³ Modern-day advocates likewise believe that absolutist legislation is needed to end anti-LGBT bigotry. The current situation, however, is different from the battles fought in the 1960s, and the solution should be different too. The

¹⁸⁹ *Id.* at 144.

¹⁹⁰ *Id.*

¹⁹¹ Mary Hamilton, *Brendan Eich has the right to fight gay rights, but not to be Mozilla's CEO*, THE GUARDIAN (Apr. 7, 2014), <https://www.theguardian.com/commentisfree/2014/apr/07/brendan-eich-has-the-right-to-fight-gay-rights-but-not-to-be-mozillas-ceo>; Courtney Hodrick, *5 People Who Were Fired for Being Gay, and the 29 States Where that is Still Legal*, MIC (July 24, 2012), <https://mic.com/articles/11738/5-people-who-were-fired-for-being-gay-and-the-29-states-where-that-is-still-legal#.palweM0Db>.

¹⁹² WILSON, *supra* note 185 at 147.

¹⁹³ Jonathan Rauch, *Nondiscrimination for All*, NATIONAL AFFAIRS (Summer 2017), <https://www.nationalaffairs.com/publications/detail/nondiscrimination-for-all>.

Utah legislation started with a call to recognize both religious traditionalists and LGBT persons as members of the community and to craft legislation based upon that reality. The subsequent legislation did not seek to correct anyone's views—instead, it attempted to address the very real fears of all parties and to give them the security needed to fully participate in public life.

C. *A Public Solution*

The success of the judicial and legislative proposals will depend on some public goodwill on the part of religious conservatives and LGBT advocates. That goodwill is in incredibly short supply. Even the Utah Compromise, which garnered the support of both religious traditionalists (like the LDS Church) and progressive organizations (like Equality Utah and the American Civil Liberties Union of Utah), still faced significant criticism from progressives and religious conservatives. *Slate* called the religious exemptions “troubling.”¹⁹⁴ *Think-Progress* blasted the law as a “trojan horse” tactic of the religious right.¹⁹⁵ Many religious conservatives reiterated their opposition to discrimination protections entirely.¹⁹⁶ Princeton professor and prominent social conservative Robert P. George called the supposed compromise “unsustainable.”¹⁹⁷ Russell Moore, the president of the Southern Baptist Ethics and Religious Liberty Commission, told the *New York Times* that supporting antidiscrimination legislation “is not the right strategy” for religious communities.¹⁹⁸

¹⁹⁴ Nelson Tebbe, Richard C. Schragger, & Micah Schwartzman, *Utah “Compromise” to Protect LGBT Citizens From Discrimination Is No Model for the Nation*, SLATE (Mar. 18, 2015, 3:18 PM), <https://slate.com/human-interest/2015/03/gay-rights-the-utah-compromise-is-no-model-for-the-nation.html>.

¹⁹⁵ Zack Ford, *The ‘Utah Compromise’ Is A Dangerous LGBT Trojan Horse*, THINK-PROGRESS (Jan. 29, 2016, 1:00 PM), <https://thinkprogress.org/the-utah-compromise-is-a-dangerous-lgbt-trojan-horse-db790ad3b69e/>.

¹⁹⁶ Kate Shellnutt, *No Middle Ground: Evangelical Leaders Reject Compromise on LGBT and Religious Rights*, CHRISTIANITY TODAY (Jan. 12, 2017, 8:02 AM), <https://www.christianitytoday.com/news/2017/january/evangelical-leaders-reject-compromise-lgbt-rights-sogi.html>.

¹⁹⁷ Ryan T. Anderson & Robert P. George, *Liberty and SOGI Laws: An Impossible and Unsustainable “Compromise,”* THE PUBLIC DISCOURSE (Jan. 11, 2016), <https://www.thepublicdiscourse.com/2016/01/16225/>.

¹⁹⁸ Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. TIMES (Mar. 12, 2015), <https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html>.

This rhetoric makes it difficult to believe that the Utah Compromise can be expanded, or that any common ground will be found. But this result need not be the case. Despite decades of mutual animosity, religious conservatives and LGBT individuals have similar experiences before the law and the broader public that could provide the foundation for mutual empathy. As Professor Thomas Berg has shown, both “argue that the government should not act against a fundamental feature of their identity,” both argue “that their identity cannot be separated from their conduct,” and both “claim the right to live their identities in public settings.”¹⁹⁹ These similarities are certainly not enough to unite the two communities culturally, but their legal struggles are similar enough that each side should be able to empathize with the other’s fears and both sides should be able to work together to ensure that each community is protected. Both sides fear public discrimination and government regulation, and—as the Utah Compromise shows—addressing these fears on behalf of each community is possible.

There is, however, another common quality that religious conservatives and LGBT persons share: both are politically powerful as a group, but individual members of each group are still often subject to harassment and discrimination for their identity. A source of much conflict between the two groups is that each group can recognize the other’s power but fails to recognize the other’s vulnerabilities. That flaw, on both sides, has kept the unnecessary and unfortunate political battles between the two communities going. In order to end those battles, public rhetoric about religious freedom and LGBT rights needs to change.

LGBT advocates and their allies on the political left should begin by stopping the habit of “scare quoting” religious liberty, unless the situation expressly warrants it. For instance, comparing Jack Phillips with someone like Kim Davis—the Kentucky clerk who attempted to bar LGBT couples from marrying—is illustrative.²⁰⁰ Phillips’ claims were subject to scare quoting, and he was berated by public officials who demonstrated an adolescent understanding of religion. But Phillips’ only request was to be left alone. Contrast this with Kim Davis,

¹⁹⁹ Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?* 2017-2018 *CATO SUP. CT. REV.* 139, 159-60 (2018).

²⁰⁰ Robin Fretwell Wilson, *In Kentucky gay marriage case, everyone can win*, *CONSTITUTION DAILY* (Sept. 3, 2015), <https://constitutioncenter.org/blog/in-kentucky-gay-marriage-case-everyone-can-win/>.

whose power as a local official meant that her refusal to issue marriage licenses to LGBT couples effectively denied LGBT couples the ability to marry.²⁰¹ Davis claimed the mantle of “religious freedom,” but she asked for more than to be left alone.²⁰² Her actions did impose her beliefs onto others. The distinction between these two cases could serve as a useful guide for analyzing claims of religious freedom. When someone truly only asks to be left alone—instead of imposing beliefs onto others—those claims should be given the benefit of the doubt.²⁰³

Religious conservatives, for their part, should do two things.²⁰⁴ First, they should recognize that marriage equality is here to stay. Second, they should concede that their behavior in the culture war over marriage equality has been less than hospitable. Considering the long history of the sexual revolution, conservative Christians have embraced all the revolution’s aspect that benefit heterosexual couples. Past Christian teaching against contraception, for instance, is now completely forgotten.²⁰⁵ Churches are, of course, free to draw the line at LGBT marriage if they wish, but they should at least recognize that their position on the law has been to say to the LGBT community “the sexual revolution for me, but not for thee.”²⁰⁶ There may be theological justifications for that position, and it is certainly a position that is protected by the First Amendment. But no one holding that

²⁰¹ The Davis controversy could have possibly been avoided if Kentucky had implemented elements of the Utah compromise.

²⁰² Wilson, *supra* note 200.

²⁰³ On this point, progressives will no doubt argue that religious liberty claims to be left alone can, in fact, cause harm, as some commentators argued that the owners of Hobby Lobby harmed their employees and that Phillips harmed LGBT customers who walked into his shop. The only response to this line of thinking is to say that, in a society that values civil rights, some inconvenience and discomfort must necessarily be tolerated. In each case, it was conceded that other solutions were available. In *Hobby Lobby*, the government conceded that it could provide contraception to any affected women via other means. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014). And in *Masterpiece*, it was well known there were other bakeries nearby.

²⁰⁴ I write this advice as someone who, broadly speaking, identifies as a religious conservative.

²⁰⁵ For example, prior to 1930, every major Christian denomination opposed the use of contraception. T.S. Eliot, *Thoughts After Lambeth* (1931). Today, less than a century later, 98% of religious women of all denominations use contraceptives. See Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, THE GUTTMACHER INST. (Apr. 2011), <https://www.guttmacher.org/report/countering-convention-al-wisdom-new-evidence-religion-and-contraceptive-use>.

²⁰⁶ This point was made by Elizabeth Anscombe in *Contraception and Chastity* (1975).

position should expect that it will be understood in the broader culture or that it will make a sound basis for law.

Recognizing the legal validity of marriage equality or the legal validity of religious liberty may seem like a basic request. But it will be the starting point for building common ground for these principles to coexist. If the LGBT community and religious conservatives could each take these initial steps in good faith, it would make legislation built around a common sense of community more likely, and it would lower the stakes in cases like *Masterpiece*.

CONCLUSION

In a 1966 case where an argument turned into a property dispute, trial judge Daniel Fitzpatrick sent both parties away with his holding that “[t]hey are all nice people and a little mutual forbearance and understanding of each other’s problems should resolve the issues to everyone’s satisfaction.”²⁰⁷ It is perhaps too much to have hoped that the Supreme Court could issue a similar opinion in *Masterpiece*. But such an opinion, at least, would have been better than sending contrary signals about who acted with more animus in this long-running and unnecessary political debate. While the Court’s opinion left much to be desired, substantive and hopeful alternatives exist. Those alternatives should be at the center of conversations going forward.

²⁰⁷ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 33 (1991).