Masterpiece Cakeshop: A *Romer* for Religious Objectors?

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Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission[1] seemed set to rank among the major rulings of the Supreme Court's 2017 term. Reviewing the case of the baker who declined on religious grounds to "design and create a custom cake to celebrate [a] same-sex wedding,"[2] the Court seemed primed to address multiple issues affecting other wedding vendors (florists, photographers, wedding planners) and religious objectors (colleges, adoption agencies, etc.) facing penalties for sexual-orientation discrimination arising from their traditional beliefs. When does a commercial product or service—for example, creating a cake—embody a message such that the Free Speech Clause protects a business against being compelled to provide it? Is there a compelling governmental interest in prohibiting refusals of service based on sexual orientation and, if so, does that interest remain sufficiently compelling when a small proprietor refuses to provide personal services for a wedding and many other providers are readily available?

But the unveiling of *Masterpiece* proved to be less dramatic, as the decision put off those questions. Instead the Court, by a 7-2 vote, overturned the state commission's ruling against the baker on the ground that the commission, in adjudicating the case, had displayed "hostility" and bias against his religious belief in limiting marriage

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[1] 138 S. Ct. 1719 (2018).

[2] Craig v. Masterpiece Cakeshop Inc., 370 P.3d 272, 276 (Colo. App. 2015).

to one man and one woman.[3] The commission thus violated the Free Exercise Clause requirement that "laws be applied in a manner that is neutral toward religion."[4] In concluding that the state had acted with hostility, the Court found a violation of what it had previously called "the minimum standard" of free exercise rights.[5] It therefore reached no conclusion whether, in a proceeding untainted by official hostility, the objectors' speech or religious rights, or the government's nondiscrimination interests should prevail.

The ruling left LGBT-rights activists disappointed and, in some cases, angry that the Court had labeled criticism of the baker's belief as hostility. But many also expressed relief that the holding appeared so narrow.[6] Activists on the baker's side had inverse reactions: tempered cheering for a narrowly grounded win.[7] And everyone moved on. Until three weeks later—when Justice Anthony Kennedy, author of the *Masterpiece Cakeshop* majority opinion, announced his retirement, giving Republicans a chance to solidify a conservative majority on the Court. The scope of religious liberty for traditionalists objecting to facilitating same-sex relationships is among the issues that splits the Court ideologically, with Kennedy the swing vote.[8] So the question arises whether *Masterpiece Cakeshop*'s holding based on case-specific strains of hostility will serve as prelude to broader protection for religious dissenters whose beliefs clash with sexual-orientation nondiscrimination laws.

[3] Masterpiece, 138 S. Ct. at 1729–32.

[4] *Id.* at 1732.

[5] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993) (holding that ordinances targeting Santeria animal-sacrifice rituals "f[e]ll well below the minimum standard necessary to protect First Amendment rights").

[6] For examples of both reactions, see *infra* notes 50, 82–84 and accompanying text.

[7] See, e.g., Rod Dreher, Religious Liberty Wins Small, The American Conservative, June 4, 2018, https://bit.ly/2M3XAk1 (describing result as "a big deal . . . but not as big a deal as I would have liked"); Editorial, Broad Enough to Matter, National Review, June 4, 2018, https://bit.ly/2Hkofmg (although "the Court should have issued a broader ruling," "Phillips's victory is broad enough to earn our applause").

[8] Kennedy's vote was decisive in 5-4 rulings in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (requiring federal government to consider further accommodations of religious nonprofits that objected to insuring contraception); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (ruling for closely held businesses that objected to Obama administration's contraception-insurance mandate); Christian Legal Society v. Martinez, 561 U.S. 661 (2010) (ruling against Christian student group denied recognition by state law school).

Such a progression in a civil right, from narrow holdings condemning government hostility in a particular instance to broader recognition of a key liberty, has appeared at least once before—with gay rights themselves. The Court's first ruling for gay rights, *Romer v. Evans* in 1996, held that a Colorado constitutional amendment, adopted by voters, was so broad, withdrawing such a wide range of gay-rights legal claims, that it showed a "bare desire to harm"—"animus" toward—the state's gay and lesbian persons.[9] The opinion, written (like *Masterpiece Cakeshop*) by Justice Kennedy, avoided deciding whether government discrimination against gays and lesbians was a suspect classification triggering heightened equal protection scrutiny. And the Court continued to avoid that question as it issued further gay-rights rulings, written by Kennedy, striking down state anti-sodomy laws in *Lawrence v. Texas*[10] and Section 3 of the federal Defense of Marriage Act (DOMA) in *United States v. Windsor*.[11] *Windsor* continued the pattern of deciding such cases narrowly by holding that DOMA reflected animus toward gays and lesbians. Only when the Court finally invalidated state denials of same-sex civil marriage in 2015[12]—Kennedy again—did it change its focus from government's anti-gay animus to same-sex couples' fundamental right to marry.

This article examines *Masterpiece Cakeshop* and the unresolved religious-liberty questions through the lens of the similarities with *Romer* and, potentially, with the later rulings that expanded and solidified gay rights. Part I describes the resemblances between the two cases, suggesting how *Masterpiece* can be seen as a "*Romer* decision" in the context of religious objectors to gay-rights laws. In particular, both opinions find animus or hostility as a "minimalist" holding that avoids committing to broad implications for future cases. But that modesty comes with a cost: To find animus, the Court must denounce the decisionmakers in the immediate case as especially unjustified, even malicious, and that conclusion can cause equal or greater anger compared with broader holdings, such as declaring a suspect classification or fundamental right. In the final parallel with

[9] Romer v. Evans, 517 U.S. 620, 634, 644 (1996).

[10] 539 U.S. 558 (2003).

[11] 570 U.S. 744 (2013).

[12] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Romer, I sketch how the finding of unequal, hostile treatment in *Masterpiece* can develop into broader protection of religious traditionalists' right to decline to facilitate same-sex marriages.

I then turn to general parallels between gay-rights and religious-freedom claims—parallels that call for sympathizing with and protecting both sides. Those parallels depend less on the improper motives or attitudes (animus/hostility) of the regulators, and more on the seriousness of the interests and predicaments of those harmed by government action (same-sex couples denied marriage rights, religious objectors penalized for following their beliefs). Developing sympathy for their respective predicaments, I argue, is more likely to calm our society's serious problem of negative polarization—while condemning others for animus is more likely to aggravate such polarization. That in turn, I suggest, makes an argument for relying on heightened-scrutiny rationales in these cases, rather than findings of animus or hostility.

I. The Parallels in *Romer* and *Masterpiece*

A. Animus/Hostility, Inferred from the Government Action

Both *Romer* and *Masterpiece Cakeshop* found that the government action rested on animus or hostility, inferred from, at least in part, the action's terms and operation. *Romer* invalidated, by a 6-3 vote, Colorado's Amendment 2, by which referendum voters had added a provision to the state constitution to overturn gay-rights ordinances that had passed in Aspen, Boulder, Denver, and other localities. The amendment provided that no state or local government or agency could "adopt or enforce" any law or other policy "whereby homosexual . . . orientation, conduct, practices, or relationships" could be the basis for anyone "to have or claim any minority status, quota preferences, protected status or claim of discrimination."[13] The Court inferred animus from the "sheer breadth" of Amendment 2: Its ban on all gay-rights laws, state or local, in Colorado was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[14]

The state had offered two justifications for the provision: respecting freedom of association, "in particular the liberties of landlords

[13] Romer, 517 U.S. at 624 (quoting Colo. Const. art. II, § 30(b)).

[14] *Id.* at 632.

or employers who have personal or religious objections to homosexuality," and "conserving resources to fight discrimination against other groups."[15] But the Court said that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them"; it was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."[16] The broad disadvantage imposed raised an "inevitable inference" that the amendment rested on "a bare desire to harm a politically unpopular group," which even under the lowest level of judicial scrutiny, "cannot constitute a *legitimate* governmental interest."[17] Amendment 2 flunked that lowest level, rational-basis scrutiny.[18]

In *Masterpiece Cakeshop*, the Court invalidated the state order against Jack Phillips, the baker who refused to design the same-sex wedding cake, without ruling on whether his cake involved protected speech or whether requiring him to provide it served a compelling government interest against discrimination. Instead, the Court said that whatever the proper result on those "difficult to resolve" issues,[19] the commission in adjudicating the case had displayed hostility toward Phillips's religious belief in traditional marriage. It had therefore violated "the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[20]

The finding of hostility rested on two kinds of evidence. The first involved hostile on-record statements by two of the seven commissioners. Most aggressively, one commissioner compared Phillips's actions to slavery and the Holocaust—asserting that religion and

[15] *Id.* at 635.

[16] *Id.* Although the Court provided no further analysis, presumably religious objections could receive protection through exemptions to nondiscrimination laws, instead of through total bans on enacting such laws.

[17] *Id.* at 634 (cleaned up).

[18] The *Romer* opinion suggested, in an unsystematic way, other possible rationales. Amendment 2 attacked statutory protections not merely for same-sex conduct, but for orientation itself; it restricted gays and lesbians' political rights by requiring a constitutional amendment to pass any gay-rights legislation, *id.* at 627–29; and it arguably withdrew such a wide range of protections that it was "a denial of equal protection of the laws in the most literal sense," *id.* at 634. But those rationales (valid or not) were inapplicable in *Windsor*, which relied only on animus.

[19] Masterpiece, 138 S. Ct. at 1732.

[20] *Id.*

religious freedom had been used to justify both evils—and added that "it is one of the most despicable pieces of rhetoric that people can use[:] to use their religion to hurt others."[21] The Supreme Court held such statements "inappropriate" for an adjudicatory body charged with "fair and neutral enforcement of Colorado's anti-discrimination law."[22]

The other evidence of anti-religious hostility in *Masterpiece* involved not statements but official action: the commission's disparate treatment of a separate set of cases, in which three bakers had refused a conservative Christian's request that they bake cakes with religious symbols and quotations hostile to same-sex relationships.[23] The Christian customer brought claims of religious discrimination, but the commission rejected them, protecting the bakers' refusals. As the Supreme Court found, the state's treatment "of Phillips' religious objection did not accord with its treatment of these other objections."[24] For example, the commission said that any message from the same-sex wedding cakes "would be attributed to the customer, not to [Phillips], but it did not address that point" with respect to the protected bakers. The commission also had treated the protected bakers' willingness to make other cakes with Christian themes for Christian customers as exonerating, but had treated "Phillips' willingness to sell [other cakes] to gay and lesbian customers as irrelevant."[25]

Masterpiece Cakeshop held that this inconsistent treatment of Phillips and the protected bakers showed hostility towards Phillips's religious faith: The state had been neither "neutral [nor] tolerant," as free-exercise

[21] *Id.* at 1729 (citing transcript of commission's hearing from July 25, 2014, see Transcript of Oral Arg. at 11–12).

[22] *Id.* By contrast, *Romer* cited no such "smoking-gun" statements, perhaps because none could be remotely probative of the intent of a million-plus referendum voters. But in later striking down DOMA Section 3, the *Windsor* Court did cite animus it said was reflected in the House committee report on the statute. 570 U.S. at 770; see also Dale Carpenter, *Windsor* Products: Equal Protection from Animus, 2013 Sup. Ct. Rev. 183, 264–75 (cataloging statements in DOMA's legislative history showing "malice" or indifference toward gay-lesbian persons and relationships).

[23] Masterpiece Cakeshop, 138 S. Ct. at 1732; *id.* at 1730 (citing Jack v. Gateaux, Ltd., Charge No. P20140071X; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X; Jack v. Azucar Bakery, Charge No. P20140069X).

[24] *Id.* at 1730.

[25] *Id.* There were several other inconsistencies, as the amicus brief that Professor Laycock and I filed detailed. See Masterpiece Amicus Brief, *supra* n.*, at 18–21.

principles require, but had acted on "a negative normative 'evaluation of the particular justification' for his objection."[26]

B. The Minimalist Rationale for Animus/Hostility Holdings

In both *Romer* and *Masterpiece Cakeshop*, attributing animus was not necessarily the most convincing basis for the decision. Still, the Court decided to write the two opinions that way, and probably for similar reasons. What Cass Sunstein said of the *Romer* case could also be said of *Masterpiece*: The holding of animus or hostility was "more minimalist" than the alternative grounds for decision.[27] The Court wanted to step gingerly in its early confrontation with a topic to avoid a holding that announced broad implications.

1. *Romer*

As to *Romer*, it was unusual for the Court to infer animus under rational-basis scrutiny. It was not unheard of, as *Romer*'s cite to *Dept. of Agriculture v. Moreno* shows.[28] But it was very much the exception: Countless decisions had held that unless the classification triggered heightened scrutiny, a state "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[29] Even if the classification is "both underinclusive and overinclusive, . . . 'perfection is by no means required.'"[30]

The Court had allowed government bodies—regardless of an individual's circumstances—to exclude all persons over age 60 (or sometimes even 50) from specific government jobs,[31] exclude all persons undergoing

[26] *Id.* at 1731 (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537 (1993)).

[27] Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 53–54 (1996).

[28] See Romer, 517 U.S. at 634 (quoting Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973), as stating "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

[29] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[30] Vance v. Bradley, 440 U.S. 93, 108 (1979) (quotation omitted).

[31] *Id.* at 111 (excluding persons over 60 from foreign-service jobs) ("In an equal protection case [under rational basis scrutiny], those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true."); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314–17 (1976) (per curiam) (exclusion of persons over 50 from police jobs).

methadone treatment from any government job,[32] and exclude persons from retirement benefits (despite their longstanding reliance on those benefits) because they no longer currently worked in an industry.[33] The Court did not find that there was hostility or prejudice toward, for example, older Americans in the workplace.[34] The Court recently reiterated that it "hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[35] Under classic low-level, near-"rubber stamp" rationality review, the fact that some Colorado businesses or individuals had objections to same-sex conduct or relationships might have supported even a severely overbroad provision like Amendment 2.[36]

A prime objection to the courts' reluctance to infer animus is that laws discriminating against gays and lesbians are "invidious": They "circumscribe a class of persons characterized by some unpopular trait or affiliation" and thus "create or reflect [a] special likelihood of bias on the part of the ruling majority."[37] But that feature typically contributes to treating the classification involved as suspect or semi-suspect, triggering heightened scrutiny rather than rationality review. Neither *Romer* nor its successors, *Lawrence* and *Windsor,* declared sexual-orientation classifications suspect. By the time of *Windsor,* lower courts had fully articulated the grounds for adopting heightened scrutiny,[38] yet the Court held back from that step even as it kept ruling for gay-rights claimants. *Windsor* held, again, that DOMA reflected a "bare desire to harm" gays and lesbians.[39] The "animus" approach was idiosyncratic to Justice Kennedy, the key vote; other justices might have been happy to declare sexual-orientation classifications suspect. But that raises the question of what motivated Kennedy to prefer "animus" holdings.

[32] N.Y. Transit Authority v. Beazer, 440 U.S. 568 (1979).

[33] R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

[34] This despite later congressional action based on just such a finding via the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34.

[35] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

[36] See Carpenter, *supra* note 22, at 247 ("In *Romer,* an attempt to conserve state resources for combatting other forms of discrimination could have saved Amendment 2 [under low-level rational-basis scrutiny].").

[37] Beazer, 440 U.S. at 593 n.40.

[38] See, e.g., Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012), aff'd on other grounds, 570 U.S. 744; Varnum v. Brien, 763 N.W.2d 862, 885–96 (Iowa 2009); Kerrigan v. Comm'r of Public Health, 289 Conn. 135, 174–214, 957 A.2d 407, 431–54 (2008); In re Marriage Cases, 43 Cal. 4th 757, 840–44, 183 P.3d 384, 441–44 (2008).

[39] 570 U.S. at 769–70.

Setting aside inquiries into Justice Kennedy's psyche, the best explanation of the approach from *Romer* through *Windsor* is minimalism: The Court proceeded cautiously, seeking to send incremental signals. Making sexual orientation a suspect classification would have suggested that multiple other discriminatory provisions might fall: "don't ask, don't tell" for gay and lesbian military personnel, and ultimately the denial of civil marriage to same-sex couples.[40] In 1996, when *Romer* was decided, there were significant pragmatic concerns about the responses to such rulings. Likewise, in 2003, in striking down sodomy prohibitions on personal privacy grounds, the Court noted that it was not addressing "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[41]

In Sunstein's assessment, the Court proceeded slowly beginning in 1996 partly because the justices were unsure "exactly what the Constitution require[d]" concerning sexual orientation, as to which societal understandings were steadily changing, "and partly because of strategic considerations having to do with the timing of judicial interventions into politics."[42] In Dale Carpenter's view, animus holdings were a "minimalist alternative" to "more adventurous theories of constitutional substance" such as declaring sexual orientation a suspect classification or same-sex partnerships a fundamental right.[43] Even in 2013, when the trend for gay rights was clear, the biggest issue of all remained undecided: same-sex marriage in the states. By continuing to apply a form of rationality review in *Windsor*, the Court could still signal an incremental approach, preserving the possibility of saying that states' traditional powers allowed them to limit marriage to opposite-sex couples even if Congress's unusual intervention into the subject in DOMA was invalid.[44]

[40] See Carpenter, *supra* note 22, at 231 ("[Holding] that classifications based on sexual orientation always warrant heightened scrutiny . . . would immediately have called into question all marriage laws and the ban on military service by openly gay people codified under 'Don't Ask, Don't Tell.'").

[41] Lawrence, 539 U.S. at 578.

[42] Sunstein, *supra* note 27, at 64.

[43] Carpenter, *supra* note 22, at 230.

[44] For example, Carpenter, writing immediately after *Windsor* in 2013, argued, "The Court's decision does not necessarily condemn all laws limiting marriage to opposite-sex couples. . . . The animus holding . . . is so closely tied to federalism concerns that it is not obvious the Court would come to the same conclusion about a *state* law defining marriage as one man and one woman." Carpenter, *supra* note 22, at 284.

2. *Masterpiece Cakeshop*

Masterpiece Cakeshop shows the same pattern in the free-exercise context: a ruling based on official "hostility"—that is, animus—in the particular case. The majority opinion again, by Kennedy, punted on the key underlying issues, saying only that however they should be resolved, "Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case."[45]

The opinion indeed suggested that all the circumstances of the case mattered. It said that some of the commissioners' statements could be read as non-hostile to religious beliefs—but not when combined with the more egregious statements calling Phillips's acts "despicable" and analogizing them to slavery and the Holocaust.[46] The opinion said that the disparate treatment of Phillips compared with the protected bakers was "[a]nother indication of hostility,"[47] leaving open whether a change in any of the facts might change the conclusion. The majority even avoided saying that the disparate treatment could have no justification.[48] It pointed out that the state's actual reasoning in the two sets of cases either was inconsistent—for example, attributing the message to the customer one time, but implying it would be attributed to the baker the other—or rested on a judgment about the "offensiveness" of the requested message.[49] Commentators on both left and right took *Masterpiece* as narrow.[50] Precisely because the majority left open whether there was a way to

[45] 138 S. Ct. at 1729.

[46] One commissioner said twice that Phillips would have to set aside his religious beliefs if he wanted to "'do business in this state'"; the Court said this could be read as denigrating Phillips's interest in following his faith, or as merely asserting that the state's interest in nondiscrimination was overriding in commercial contexts. *Id.* (quoting commission Transcript of Oral Arg. at 23, 30).

[47] *Id.* at 1730.

[48] *Id.* at 1728 ("[t]here were, to be sure, responses to the[] argument[]" that the treatment of the two sets was inconsistent).

[49] *Id.* at 1731.

[50] Amanda Marcotte, Supreme Court Dodges the Big Issue in *Masterpiece Cakeshop* Ruling: Is There a loophole for Bigots?, Salon, June 4, 2018, https://bit.ly/2JlyWa6 ("it's fair to say the high court punted"); Jeff Jacoby, The Real Significance of the Masterpiece Cakeshop Decision, Boston Globe, June 4, 2018, https://bit.ly/2MLQWLX ("[the] majority opinion sidestepped the hard questions posed by this litigation") (citing commentators on both sides).

justify treating the bakers differently, the concurrences by Justices Elena Kagan and Neil Gorsuch rushed in to debate the issue.[51]

As in *Romer*, one could question *Masterpiece*'s conclusion of hostility. For one thing, the reliance on contemporaneous statements by the commissioners sits uneasily with the jurisprudence of the majority's conservative members, who tend to focus on text rather than intent.[52] (The Court's opinion answered this objection by noting that the case involved adjudicators,[53] whose displays of bias are typically matters of especially serious concern.) One could also question whether the statements were so plainly hostile as to be impermissible. Even the commissioner who compared Phillips's acts to slavery and the Holocaust arguably meant only that religious motivation cannot justify impositions on others' rights.[54]

Yet the inference of improper hostility was justified. There is no other explanation for the statement labeling Phillips's position a "despicable . . . use [of] religion." As the Court said, that label "disparage[d] his religion" not just by calling it despicable, but by "characterizing it as merely rhetorical—something insubstantial and even insincere."[55] As for comparisons to the Holocaust, we call the tendency to resort to them "Godwin's Law";[56] the eponymous creator of that term aimed it at "poorly reasoned [and] hyperbolic invocations of Nazis or the Holocaust" that "usually [operate] as a kind of rhetorical hammer to express rage or contempt for one's opponent."[57]

[51] Cf. 138 S. Ct. at 1733–34 (Kagan, J., concurring); with *id.* at 1734–40 (Gorsuch, J., concurring); see *infra* Part I.C.

[52] For example, in *Lukumi*, which involved a city's nonneutral ordinances prohibiting animal sacrifices by the Santeria sect, only two justices had considered contemporaneous statements of city councilmen to show the council's anti-Santeria hostility. 508 U.S. at 542 (Kennedy and Stevens, JJ.). And Justice Antonin Scalia wrote separately to criticize reliance on those statements. *Id.* at 558-59 (Scalia, J., concurring in the judgment).

[53] Masterpiece Cakeshop, 138 S. Ct. at 1730.

[54] Overwhelming as those two evils were, one could make analogies to them for limited points without equating them in every way.

[55] 138 S. Ct. at 1729.

[56] "As an online discussion grows longer, the probability of a comparison involving Hitler approaches 1." Godwin's Law, Wikipedia, https://bit.ly/1k8wXqb (last visited Aug. 20, 2018).

[57] Mike Godwin, Sure, Call Trump a Nazi. Just Make Sure You Know What You're Talking About, Wash. Post, Dec. 14, 2015, https://bit.ly/2LWSKG9; see Mike Godwin, I Seem to Be a Verb: 18 Years of Godwin's Law, Jewcy, Apr. 30, 2008 (claiming that his aim was to challenge people who "glibly compared someone else to Hitler or to Nazis to think a bit harder about the Holocaust").

Comparing Phillips's act with overwhelming evils was hyperbolic—sufficiently so to support an inference of hostility. Above all, the hyperbole, even if tolerable in other contexts, was "inappropriate for [adjudicators] charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."[58]

The Court in *Masterpiece Cakeshop*, as in *Romer*, likely focused on case-specific animus in order to proceed cautiously and avoid broader questions in its early ruling on a subject—here, on the clash between religious freedom, expressive speech, and nondiscrimination in relatively public settings like commercial businesses. The Court avoided directing substantive resolutions for the disputes and simply admonished that they be decided "with tolerance" and respect for both sides.[59] In ruling for Phillips, the Court avoided suggesting that a wide range of refusals of service would be protected—as in *Romer*, ruling for gays and lesbians, it had avoided suggesting that a wide range of laws discriminating against same-sex conduct or relationships might fall. The Court perhaps hoped that after its admonition for tolerance and respect, objectors like Phillips might win in a limited set of circumstances, or at least that decisionmakers would consider their predicament seriously—as Court in *Romer* perhaps hoped in 1996 that an admonition to social conservatives might have prompted greater consideration for the lives and interests of same-sex couples.

In *Romer*, it appeared the Court felt constrained to adopt a narrow holding because it did not wish to adopt a new rule that sexual-orientation classifications were suspect. In *Masterpiece Cakeshop*, the Court was constrained by its free-exercise precedents. It had held in *Employment Division v. Smith* that a law or regulation did not violate the Free Exercise Clause if it was "neutral [toward religion and] generally applicable";[60] it applied that same general standard in its other leading decision, *Church of the Lukumi Babalu Aye v. City of Hialeah*.[61] The Court was also somewhat constrained—albeit with substantial wiggle room—in addressing Phillips's expressive speech claim. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, for

[58] Masterpiece Cakeshop, 138 S. Ct. at 1729.

[59] *Id.* at 1732.

[60] 494 U.S. 872, 879–80 (1990).

[61] 508 U.S. at 533–34.

example, the Court had rejected a law school's argument that allowing military recruiters implied approval of "Don't Ask, Don't Tell."[62]

Still, despite such constraints, *Masterpiece Cakeshop* creates (as *Romer* created) seeds for later decisions to expand the rights they recognized. Louis Michael Seidman correctly predicted that *Romer*'s "lack of technical discussion of precedent and doctrine" created a pervasive "ambiguity" that would make the opinion "generative" of broader holdings.[63] One might say the same of *Masterpiece Cakeshop*'s holding that the state violated neutrality given all the facts of the case. That holding too could have broad implications, as the next section discusses.

C. The Next Parallel? Expanding Protection of Religious Objectors

Romer proved be the first of several gay-rights rulings, culminating in the declaration of same-sex marriage rights in *Obergefell*. We do not know whether *Masterpiece Cakeshop* will start a similar series recognizing religious-conscience rights to decline to facilitate same-sex marriages or relationships. Will bakers, florists, or photographers prevail in cases where the initial decisionmaker does not display hostility or bias against their beliefs and claims? How will courts handle the many cases involving objections to nondiscrimination laws by religious nonprofit organizations—for example, when adoption agencies decline to place children in same-sex families, colleges decline to provide same-sex married housing or accept transgender students' chosen identity, or religious entities require employees to limit sexual intimacy to male-female marriage?

Strict scrutiny will govern these cases if they involve federal regulation—triggering the Religious Freedom Restoration Act (RFRA)[64]—or arise in a state that has its own religious-liberty statute or broad constitutional guarantee (which Colorado does not). But in other situations, the First Amendment precedents, including *Masterpiece*, will determine the courts' analysis.

As already noted, the *Masterpiece Cakeshop* majority sent some signals that the decision should be construed narrowly. For example,

[62] 547 U.S. 47 (2006) (Students "can appreciate the difference between speech a school sponsors and speech that the school permits because [it is] legally required to do so.").

[63] Louis Michael Seidman, *Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism, 1996 Sup. Ct. Rev. 67, 69–70.

[64] 42 U.S.C. § 2000bb et seq.

insofar as the Court's finding of hostility rested on "smoking gun" statements by commissioners, future decisionmakers can easily evade it. They will now be more careful to conceal their hostile attitudes toward traditionalist religious beliefs. But those attitudes can still drive decisions silently, and the attitudes are widespread.

But there are potentially broad religious-freedom implications in the other ground for finding hostility in *Masterpiece Cakeshop*: the inconsistent treatment of Phillips versus the bakers who were permitted to refuse the "anti-gay" cake.[65] To say that inconsistent, more favorable treatment of analogous secular claims shows unconstitutional hostility toward religion is potentially a powerful principle. Left-leaning states and cities will be unwilling to force socially liberal vendors to produce goods with conservative religious messages in violation of their consciences. Those states cannot then turn around and require religiously conservative vendors to produce goods in violation of their consciences. Religious objectors facing litigation can send testers to smoke out such uneven enforcement of anti-discrimination law.

Of course, states will try to manipulate rules to rationalize unequal treatment of objectors with whom they agree and disagree. In *Masterpiece*, four justices accepted such a rationalization. Justice Kagan's concurrence argued (and Justice Ruth Bader Ginsburg's dissent agreed) that the state could treat the cases differently because the protected bakers refused "to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer," while Phillips refused to sell same-sex couples "a wedding cake that [he] would have made for an opposite-sex couple."[66]

As Justice Gorsuch explained in his concurring opinion, this reaches a preordained result by manipulating categories: saying that the "anti-gay" cake had a distinctive message, but treating the cake for the same-sex wedding as merely generic.[67] If the category is cakes with a message, as the protected bakers' cases show, then one must consider the message of a custom cake designed for a same-sex wedding. Often such a cake will have some indication, even if symbolic

[65] See Douglas Laycock & Thomas C. Berg, *Masterpiece Cakeshop*—Not as Narrow as May First Appear, SCOTUSblog, June 5, 2018, https://bit.ly/2xQBhbK.

[66] 138 S. Ct. at 1733 (Kagan, J., concurring, joined by Breyer, J.); accord *id.* at 1750–51 (Ginsburg, J., dissenting, joined by Sotomayor, J.).

[67] *Id.* at 1735–40 (Gorsuch, J., concurring).

or implicit, indicating approval of the marriage—two brides, the couple's names, a rainbow—and that is a cake that Phillips would not sell to anybody. Justice Ginsburg's dissent—as well as Justice Kagan's concurrence—made much of the fact that the same-sex couple, Charlie Craig and David Mullins, "were turned away before any specific cake design could be discussed."[68] But if Phillips's conversation with them had continued a little longer, symbolism in the design almost certainly would have arisen. Phillips testified that his regular process involved learning about the customers' "desires, their personalities, their personal preferences and . . . their wedding ceremony and celebration" so as to "design the perfect creation for the specific couple."[69] It is hard to imagine how such a design would not affirm the goodness of their marriage, which is a message that Phillips says he cannot affirm.

If Phillips had lost because of the brevity of the conversation, the meaning of the ruling would have been extremely narrow. Under that rationale, he would prevail if he had begun discussing the "perfect creation for the specific couple" and then withdrawn.

Even without explicit symbols, the cake still sends an affirming message. As the Colorado appeals court tellingly put it, Craig and Mullins asked Phillips to "design and create a cake to celebrate their same-sex wedding."[70] The cake says, explicitly or implicitly, "this marriage is to be celebrated," and, in context, that celebration is of a same-sex marriage.[71] Context is critical: As Justice Samuel Alito observed at oral argument, a cake saying "November 9, the best day in history" means something different when provided for a birthday party instead of a Kristallnacht anniversary celebration.[72] It is irrelevant that "[t]he cake requested was not a special 'cake celebrating

[68] *Id.* at 1751 n.9 (Ginsburg, J., dissenting) (distinguishing "between a cake with a particular design and one whose form was never even discussed"); *id.* at 1733 n.* (Kagan, J., concurring) ("Phillips did not so much as discuss the cake's design before he refused to make it").

[69] Joint Appendix ["J.A."] at 161.

[70] Craig, 370 P.2d at 276.

[71] See Sherif Girgis, Filling in the Blank Left in the *Masterpiece* Ruling: Why Gorsuch and Thomas Are Right, The Public Discourse, June 14, 2018, https://bit.ly/2M5ebUC.

[72] Transcript of Oral Arg. at 68, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111). The hypothetical does not violate Godwin's Law (*supra* notes 56–57)—it compares Nazism for only a limited purpose, and not for rhetorical or emotional impact.

same-sex marriage.'"[73] Phillips's convictions about the general issue of marriage are strong enough that he objects to celebrating any particular same-sex marriage, no matter the couple's virtues. Right or wrong, he is entitled to that belief.

Three justices in *Masterpiece Cakeshop*, including Gorsuch, said the two sets of bakers' refusals should have been treated the same.[74] Justice Kennedy was not among those three, but his seat on the Court will now likely go to Brett Kavanaugh, who has shown sympathy to religious liberty claims by (among others) social conservatives.[75] So too has Chief Justice John Roberts,[76] even though he kept his cards close to the vest in *Masterpiece Cakeshop* by joining only Kennedy's majority opinion. The prospects seem good for a solid 5-4 majority that will give significant weight in religious-objector cases to the fact that other objectors were permitted to refuse to sell products whose message they opposed.

D. The Problem with Animus/Hostility Holdings in a Polarized Society

Although a holding of animus or hostility can have broader implications, it usually remains a strategy for ruling narrowly in the immediate case. But that strategy creates its own problems. To rule narrowly, the court must portray the decisionmakers in that case as exceptionally unjustified, insensitive, or even malicious. If their action were not exceptionally bad, the ruling invalidating it would have broad rather than narrow implications. Thus, although an "animus" holding may avoid suggesting broad further consequences, it is aggressive in another way: denouncing the decisionmakers for their hostility.

[73] 138 S. Ct. at 1733 n.* (Kagan, J., concurring).

[74] Masterpiece, 138 S. Ct. at 1734–40 (Gorsuch, J., concurring, joined by Alito, J.); *id.* at 1740 (Thomas, J., concurring in part and in the judgment) (joining Gorsuch's analysis).

[75] See Priests for Life v. U.S. Dept. of Health & Human Servs., 808 F.3d 1, 14–26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) (arguing that nonprofit objectors to Obama administration's contraception mandate should prevail under RFRA).

[76] See Obergefell, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) ("Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike [same-sex marriage rights]—actually spelled out in the Constitution.").

Those who are denounced take umbrage, as they did in response to *Romer, Windsor,* and *Masterpiece*. Justice Scalia's dissent in *Romer* said the Court had "verbally disparage[d] as bigotry adherence to traditional attitudes" and thereby ruled in a way that was "nothing short of insulting."[77] After *Windsor* similarly found animus behind DOMA, conservative commentator Hadley Arkes complained that the Court had denigrated arguments for the centrality of male-female marriage as "so much cover for malice and blind hatred"—that denigration, Arkes claimed, was itself "hate speech" against traditionalists.[78] Other commentators, like Rick Garnett, worried about the consequences for rights to dissent from same-sex marriage. A holding of animus, he warned, suggested that traditionalists "are best regarded as backward and bigoted, unworthy of respect. Such a view is not likely to generate compromise or accommodation and so it poses a serious challenge to religious freedom."[79]

Even Michael Perry, who supported *Windsor* based on same-sex couples' fundamental freedom to marry, criticized the Court's finding of animus as "tendentious in the extreme, and demeaning to all those who for a host of non-bigoted reasons uphold the traditional understanding of marriage as an essentially heterosexual institution."[80] In short, to accuse traditionalists of demeaning LGBT people can itself be demeaning. "Perhaps animus doctrine is animus based."[81]

Now *Masterpiece* has accused pro-gay-rights officials of showing "hostility" and intolerance toward religious conservatives, and progressives have likewise taken umbrage. The shoe is on the other foot, and progressives dislike how it feels. One law professor excoriated the Court for "an utterly absurd finding of 'taint' and supposed religious animus."[82] Another commentator wrote that the majority

[77] Romer, 517 U.S. at 652 (Scalia, J., dissenting).

[78] Hadley Arkes, Worse Than It Sounds, and It Cannot Be Cabined, Bench Memos, Nat'l Rev. Online, June 26, 2013, https://bit.ly/2nnhA3j.

[79] Richard W. Garnett, Worth Worrying About?: Same-Sex Marriage & Religious Freedom, Commonweal, Aug. 5, 2013, https://bit.ly/2Mt3x7e.

[80] Michael J. Perry, Right Result, Wrong Reason: Same-Sex Marriage & The Supreme Court, Commonweal, Aug. 5, 2013, https://bit.ly/2vv10D5.

[81] Carpenter, *supra* note 22, at 185 (considering but rejecting the argument).

[82] Neil H. Buchanan, Kennedy's Sadly and Unnecessarily Tainted Legacy, Verdict: Justia, July 3, 2018, https://bit.ly/2voFY8Z ("Somehow, [the Court] found anti-religious bigotry in a person's revulsion at the thought of using religion to justify bigotry. That is an impressive feat of thinking backward (and backward thinking).").

acted as if "conservative Christians are special snowflakes who have to be given a safe space"—"as if the central matter [in the case] . . . was an urgent need to police the tone of civil rights commissioners."[83] In yet another view, Justice Kennedy had "assiduously . . . labored to find government 'hostility' to Phillips' religion" based on "tepid evidence" of "a 'slip-up' by a public official."[84]

We can see the difficulty with animus holdings through the prism of the nation's current ideological and cultural polarization. Kennedy seemingly intended the *Masterpiece Cakeshop* majority opinion to address the angry divide over traditional religion and LGBT rights; he admonished progressives to treat traditionalist believers with respect, the same way he had previously admonished conservatives to treat same-sex couples. Thus the opinion's summation that "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[85]

Calming conflict is an understandable aim, for American politics and society are deeply polarized. Even before the inflammatory election and presidency of Donald Trump, polls reported that "[m]embers of the two parties are more likely today [than any time in 50 years] to describe each other . . . as selfish, as threats to the nation, even as unsuitable marriage material."[86] Polarization has become so much more poisonous because it is increasingly "negative." "Americans increasingly are voting against the opposing party more than they are voting for their own party."[87] In that environment, "politicians need only incite fear and anger toward the opposing party to win and maintain power."[88] The conflict between LGBT people and religious traditionalists is a prime locus of

[83] Ian Millhiser, Supreme Court Holds that Religious Conservatives Are Special Snowflakes Who Need a Safe Space, ThinkProgress, June 4, 2018, https://bit.ly/2M2Kdxx.

[84] Sarah Posner, The 'Masterpiece Cakeshop' Decision Is Not as Harmless as You Think, The Nation, June 4, 2018, https://bit.ly/2Jaw0AX.

[85] 138 S. Ct. at 1732.

[86] Emily Badger and Niraj Chokshi, How We Became Bitter Political Enemies, N.Y. Times, June 15, 2017, https://nyti.ms/2OPPvOf (describing polls up to and through 2016).

[87] Alan Abramowitz and Steven Webster, 'Negative Partisanship' Explains Everything, Politico, Sept./Oct. 2017, https://politi.co/2MeAlny.

[88] *Id.*

fear-based polarization; the two groups remain today, as a 1990s book called them, "perfect enemies."[89]

To mitigate such conflict, our constitutional tradition relies heavily on civil liberties, including the rights both to form families and to exercise religion. As Madison wrote in his *Memorial and Remonstrance against Religious Assessments*, "equal and compleat liberty" in matters of conscience is the best solution for "religious discord": "if [such liberty] does not wholly eradicate [such conflict, it] sufficiently destroys its malignant influence on the health and prosperity of the State."[90] Civil rights and liberties ideally reduce the stakes in sociocultural conflict; they reduce each side's existential fear that a hostile majority will successfully attack their core commitments. If same-sex couples can marry and religious opponents of same-sex marriage can live according to their beliefs, their deep disagreement will generate less in "malignant" bitterness and alienation.

But is condemning improper hostility an effective means of countering negative polarization? Admittedly, in some cases hostility is so clear and so damaging that condemnation is necessary. Arguably *Romer* and *Masterpiece* were such cases, the former because the disability imposed on gays and lesbians was especially wide-ranging, the latter because hostile expression by adjudicators is especially improper.

And yet, as already noted, relying on condemning animus or hostility creates its own problems. Labeling the contenders in a legitimate socio-cultural-political dispute as "bigots" may inflame rather than calm the situation; it may simply add further charges and countercharges, in a vicious cycle. Dahlia Lithwick described the irony of *Masterpiece*: "[A] case that was ultimately decided in large part on the basis of how we speak to one another about religion and discrimination further polarized and distorted the national discourse about religion and discrimination."[91]

Moreover, conclusions of animus can come too easily. Even Dale Carpenter, who defends the anti-animus principle at length,

[89] Chris Bull and John Gallagher, Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s (1996).

[90] James Madison, Memorial and Remonstrance against Religious Assessments (June 20, 1785), ¶ 11, https://bit.ly/1MHiLmr.

[91] Dahlia Lithwick, Anthony Kennedy's Suffering Olympics, Slate, June 6, 2018, https://slate.me/2McVQF0.

acknowledges the "substantial concerns" that it "is prone to judicial abuse [and] is difficult to apply even when not abused"—that it risks becoming "an attempt to hush debate about deeply contested moral and legal controversies" such as, for example, over the nature of marriage.[92] He answers that the principle "should be used sparingly, and only in extraordinary cases," such as against the broad attacks on same-sex relationships in *Romer* and *Windsor*, or when there is an "utter failure of alternative explanations" to justify the law.[93] But if animus/hostility is the only doctrinal ground for constitutional attack, there will be pressure for the courts to expand the category. They will have incentives to stretch and reach conclusions of hostility in order to provide relief on the only available theory. Progressives may appreciate that danger after the Court's controversial attributions of hostility in *Masterpiece Cakeshop*.

The limits of animus holdings became plain when the Court finally struck down state exclusions of same-sex marriage in *Obergefell*. That decision relied overwhelmingly on the fundamental right to marry, holding that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[94] Only one section of the opinion suggested a finding of animus or hostility: The Court said that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."[95] But that passage is brief compared with the fundamental-right discussion, and it focuses only on the demeaning effect, drawing no conclusion about hostile purpose.

Obergefell, I'd suggest, reflected the Court's sense that to call states' opposite-sex-only marriage laws the product of "animus" would have hurt the cause of getting acceptance for the decision. If the Court needed to calm a polarized public's response, an animus conclusion would have been disastrous and insulting—especially if it had rested on "the utter failure of alternative explanations"[96] to make out even a rational basis for the same-sex exclusion. Instead, the Court went out of its way to say that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and

[92] Carpenter, *supra* note 22, at 233, 185.

[93] *Id.* at 232, 246.

[94] Obergefell, 135 S. Ct. at 2599.

[95] *Id.* at 2602.

[96] Carpenter, *supra* note 22, at 246.

honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[97] In other words, an animus holding would itself have been disparaging.

Having discussed the parallels between *Romer* and *Masterpiece Cakeshop*, especially in the advantages and disadvantages of their focus on animus/hostility, I now discuss a set of parallels between gay rights and religious freedom generally.

II. Parallels between Gay Rights and Religious Freedom

It is right to give strong constitutional protection to both the commitments of same-sex couples and the religious exercise of objectors to same-sex marriage. The classic American response to deep conflicts like that between gay rights and free exercise is to protect the liberty of both sides. The very arguments that underlie protection of same-sex marriage also support strong protection for religious liberty.[98] Religious traditionalists and same-sex couples each argue that the government should not act against a fundamental feature of their identity: faithfulness to the demands of the divine (as understood by the believer) for the former, and love and commitment to a life partner for the latter.

Moreover, both groups argue that their identity cannot be separated from their conduct so as to give government *carte blanche* to regulate their conduct. Courts have rejected a distinction between sexual orientation and marital conduct, finding that both the orientation and the conduct that follows from it are central to a person's identity.[99] Status and conduct are equally intertwined for the religious believer: "[B]elievers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity."[100]

[97] Obergefell, 135 S. Ct. at 2602.

[98] The arguments following appear at greater length in, e.g., Masterpiece Amicus Brief, *supra* n.*, at 8–12; Douglas Laycock and Thomas C. Berg, Protecting Religious Liberty and Same-Sex Marriage, 99 Va. L. Rev. Online 1, 3–5 (2013), https://bit.ly/2vKimen; Thomas C. Berg, What Same-Sex Marriage and Religious Liberty Claims Have in Common, 5 Nw. J. L. & Soc. Pol'y 206, 212–26 (2010).

[99] See, e.g., Marriage Cases, 43 Cal. 4th at 841-42, 183 P.3d at 442–43; Kerrigan, 289 Conn. at 185–86, 957 A.2d at 438; Varnum, 763 N.W.2d at 885, 893.

[100] Laycock and Berg, *supra* note 98, at 4.

Both groups also claim the right to live their identities in public settings. Same-sex couples, once wrongly told to keep their relationships closeted, now have the right to participate in the institution of civil marriage. And because of public-accommodation laws, they rightly have full access to most goods and services in the marketplace, including wedding-related goods. But religious believers likewise have strong interests in being able to live according to their religious identity in their workplaces, where people "spend more of their waking hours than anywhere else except (possibly) their homes."[101] We can reconcile these two claims by recognizing religious exemptions for small businesses that conscientiously object to providing personalized goods and services directly to same-sex marriages (primarily through weddings) when other providers are readily available.

Masterpiece Cakeshop fits, at a general level, with this project of protecting both sides. The majority opinion sets the right tone, reaffirming the right of same-sex couples to dignity and equality and the right of objecting religious believers to tolerance and respect. The opinion presents each side's claims and perspectives in some detail. It emphasizes that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and that frequent refusals of service in the market would impose "a community-wide stigma."[102] As to Phillips's perspective, the opinion explains that because his cakes involved personal artistic design, "the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs."[103] Although the opinion avoids deciding between these claims, the very act of presenting them can engender sympathy for the real human concerns on both sides. The opinion thus has a "performative" character by, in Joshua Matz's words, "seek[ing] to model a conception of civility that takes seriously the claims on both sides" given "our pluralistic society."[104]

[101] Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1849 (1992).

[102] 138 S. Ct. at 1727.

[103] *Id.* at 1728.

[104] Joshua Matz, Fury and Despair over the Masterpiece Cakeshop Ruling Are Misplaced, The Guardian, June 6, 2018, https://bit.ly/2M5WhB1.

With that said, we should note that the above parallels between same-sex couples and religious objectors concern the strength of their interests and the depth of their predicament when faced with burdensome laws. The parallels lie in the fundamental feature of identity for both, the intertwining of that identity with conduct (marrying a partner, acting consistently with God's will), and the painfulness or impossibility of changing that identity or the conduct that necessarily flows from it. Both same-sex couples and religious believers also face hostility from others—the focus of the holdings in *Romer* and *Masterpiece*—but that is a distinct point from the strength of the interests that the couples and the believers have.[105]

There are advantages to focusing on how important these interests are to the persons affected by regulation—the same-sex couples, the religious objectors—and disadvantages to focusing on the hostility of the regulators. As already discussed in Part I.D., emphasizing the regulators' animus/hostility or the "utter failure" of the case for regulation runs the risk of perpetuating a cycle of accusations and counter-accusations. But the dynamic can be different if the court instead holds that even if the decisionmakers' motives are pure, and even if the regulation is rational, the case for applying the regulation is not strong enough to overcome the important interests of those whom the regulation harms. Focusing on the important interests of the regulated persons more closely resembles heightened scrutiny than "animus" analysis. Thus, the final part of this essay discusses heightened scrutiny as an alternative to "animus."

III. Beyond Animus/Hostility: Protecting Both Rights

Heightened scrutiny, based on either a suspect classification or a fundamental interest, avoids certain problems that an animus holding creates. The Court applying heightened scrutiny need not reach to condemn the asserted justifications for the regulation in question as irrational or an "utter failure"—it need only conclude they are

[105] Animus/hostility analysis can take some account of the seriousness of the effect on the disadvantaged person. In race-discrimination cases, "[t]he impact of the official action whether it 'bears more heavily on one race than another,' may provide an important starting point" in showing intent. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)). But as a general matter, impact is only one among many factors contributing to finding animus or hostility, and the focus will be elsewhere.

not strong enough to meet the higher level of scrutiny. And heightened scrutiny rests on far more than a negative judgment about the regulators' prejudice or hostility. It also typically rests on factors that will more likely evoke positive sympathy for the affected persons. As such, heightened scrutiny may be better suited to counter our age of negative polarization.

A. Heightened Scrutiny of Sexual-Orientation Discrimination

Were the Court to declare that classifications based on sexual orientation trigger heightened (say, intermediate) scrutiny, that determination would rest on several factors. True, one criterion for calling the classifications suspect overlaps with an animus holding: that they "are so seldom relevant to the achievement of any legitimate state interest that [they] are deemed to reflect prejudice and antipathy."[106] But there are several other relevant criteria, including whether the class characteristic is "beyond the individual's control" and would be painful or impossible to change.[107] For example, before *Obergefell*, lower courts distilled and followed these factors in deciding whether excluding same-sex couples from civil marriage violated their equal-protection rights.[108]

State supreme courts, in addition to finding that gays and lesbians have been subject to "invidious discrimination" resting on "historical prejudice," have laid out the other reasons for intermediate scrutiny:

> The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens. Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so.[109]

[106] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[107] *Id.* at 441 (quotation omitted).

[108] See Varnum, 763 N.W.2d at 887–88 ("The Supreme Court has considered: (1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4) the political power of the subject class.").

[109] *Id.* at 895–96 (quoting Kerrigan, 957 A.2d at 432).

Much of the case for calling the classification suspect, then, rests on how essential the feature is to personhood, and how difficult or disorienting it would be for the person to try to change it or act inconsistently with it. These criteria support heightened scrutiny positively, by recognizing how gay and lesbian people are situated and the interests they have at stake, rather than negatively, by attributing animus or bigotry to the other side. The positive case is suited to generate understanding for the lives and claims of gay people, not merely anger at those who fail to show such understanding. That positive focus is less likely to perpetuate the polarizing cycle of condemnations and counter-condemnations.

The features justifying heightened scrutiny also overlap substantially with the commonalities or parallels between same-sex couples and religious conservatives. In addition to the existence of prejudice—against religious conservatives in some degree as well as against same-sex couples—there is the parallel of "an essential component of personhood,"[110] whether in committed intimate relationships or having a committed religious faith. There is also a parallel in the difficulty of changing such a core component of personhood—a difficulty that makes it "wholly unacceptable for the state to require" or pressure such change,[111] either significantly disfavoring same-sex relationships or significantly penalizing religious commitments, without very strong reasons.

B. Stronger Scrutiny for Free-Exercise Claims

To protect both sides, the Court could also solidify the protection of free exercise—resting it on something more than accusing decisionmakers of hostility or bias against religion. There are two ways forward.

1. Forbidding devaluing religion compared with secular analogues

First, the Court could adhere to the free-exercise test of "neutrality and general applicability" from *Employment Division v. Smith* and *Church of the Lukumi*,[112] but read it in a protective rather than nonprotective way. Some lower courts have confined unconstitutionality under the *Smith*/*Lukumi* test to cases in which the government

[110] *Id.* (quoting Kerrigan, 957 A.2d at 432).

[111] *Id.*

[112] See *supra* notes 60–61 and accompanying text.

targets or singles out religion (or a particular faith) or displays animus or hostility toward it.[113] But other courts have read the test more broadly. Under their approach, free exercise prevents the state not just from showing active "animus" toward religion, but also from "devaluing" it—that is, treating it as less important than analogous secular claims. These decisions hold that when the state recognizes even one or a few exceptions to a law for secular conduct, it must recognize an analogous religious exception. Without the exception, the law would burden religion in a way neither neutral nor generally applicable.

In the most prominent case invoking this principle, the U.S. Court of Appeals for the Third Circuit held that two Muslim police officers must be permitted to wear beards for religious reasons, despite a police department's no-beard policy, when other officers were permitted an exception for medical reasons.[114] The court held that the "department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[115] The policy had to survive strict scrutiny because it "devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[116] Other courts have applied the same rationale in several other situations, including to protect Native Americans seeking to possess bird feathers when the law barring such possession already contained exemptions for taxidermists and others[117] and to protect Orthodox Jews building a synagogue when the zoning laws made an exception for "private clubs and lodges."[118] The cases applying this approach come from, at a minimum, four federal circuits, two federal district courts, and two state appellate courts.[119]

[113] 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).

[114] Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (Alito, J.).

[115] *Id.* at 366.

[116] *Id.* at 365.

[117] Horen v. Commonwealth, 479 S.E.2d 553 (Va. App. 1997).

[118] Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1234–35 (11th Cir. 2004).

[119] See Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 19–23 (2016).

These decisions did not find full-fledged "hostility" toward religion, but simply a devaluation of its importance when compared with analogous secular interests that the government values. Those secular interests can be relatively few, or even just one, as in the medical exception for the no-beard policy.

The more protective approach best explains the Supreme Court's cases. True, the facts of *Lukumi* involved laws targeting and singling out a religion. The ordinances struck down there were manipulated to such a degree that they applied to "Santeria adherents but almost no others."[120] But that, the Court said, made the case unusual and extreme: The ordinances fell "well below the minimum standard necessary to protect First Amendment rights," and it was therefore unnecessary to "define with precision the standard used to evaluate whether a prohibition is of general application."[121] That is, targeting and animus were merely obvious instances of free-exercise violations; they did not exhaust the category. Moreover, the protective interpretation of *Smith* is the only one that can explain *Sherbert v. Verner*[122] and other decisions holding that religious minorities cannot be denied unemployment benefits when they refuse particular work for sincere religious reasons.[123] Those decisions protected religious reasons for refusing work, without any finding that the state had singled out religious reasons alone or was hostile to them. Rather, religious reasons had to be protected because state law already protected a few secular reasons for refusing work (but far from all secular reasons).[124]

This broader protection follows not just from precedent but from constitutional logic. Treating religious interests as less important than the analogous secular interests that are exempted is inconsistent with the status of religious exercise as a constitutional right. If free exercise protects only against "animus" directed uniquely at religion, it allows religion to be treated as badly as other interests the state regards as unimportant. But the Constitution's text deems

[120] 508 U.S. at 536.

[121] *Id.* at 543.

[122] 374 U.S. 398 (1963).

[123] See also Frazee v. Dept. of Employment Security, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

[124] See Smith, 494 U.S. at 884 (explaining *Sherbert* on this basis).

religious exercise as an important interest, and free exercise should be treated as well as the state treats other interests that it values. When the government deems some private interests and activities sufficiently important to protect and others insufficiently important, religious exercise should be treated like the important interests, not the unimportant ones.

It would not be surprising if the Court, after experience with the *Smith* rule, decided explicitly to read the rule in a protective way rather than a wholly unprotective way. The Court has already announced an important limit on *Smith*'s reach: strong protection for religious organizations, even against generally applicable laws, when the organizations employ ministers and resolve "internal governance" issues.[125] Many thought that a constitutionally mandated exception for organizations' governance was inconsistent with *Smith*; the Court unanimously held otherwise.[126]

Masterpiece Cakeshop itself should come out the same way under either an "animus" or a "devaluing" standard. True, the Court found for Phillips on the basis of a single situation where analogous secular objections were protected (the other bakers' refusals of anti-gay cakes). But those cases made for evidence of animus toward his beliefs—not just devaluing of them—because those protected objections were squarely on the opposite side from Phillips on the divisive question of same-sex marriage. The commission targeted Phillips's belief for disfavor; it did not merely treat it as less than vitally important. But for other cases protecting religious minorities, it matters whether free-exercise protection is narrowly confined to targeting and hostility or extends further to prevent devaluing.

2. Overruling *Smith*

The more consequential step would be for the Court to overrule *Smith* and hold that laws substantially burdening religious exercise must satisfy heightened scrutiny even if they are neutral and generally applicable. This is not the place to review the voluminous claims (and responses to them) that *Smith* is in tension with the constitutional

[125] Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 188 (2012).

[126] *Id.* at 190 (confining *Smith* to regulation "of only outward physical acts," versus as "internal church decision").

text,[127] the original understanding,[128] counter-majoritarian protection of unfamiliar or unpopular religious minorities,[129] or other criteria of constitutional interpretation.

As Professor Laycock and I argued in the amicus brief we filed in *Masterpiece Cakeshop*,[130] *Smith* can be reconsidered because it has not become embedded in the law; its rule about generally applicable laws has been interpreted only in *Lukumi* and now in *Masterpiece*, both of which would have come out the same way under either standard. *Smith* was not applied in *Hosanna-Tabor*, which stated a separate doctrine about internal church governance, nor was it applied in other major religious-exercise cases that were decided under federal religious-liberty legislation.[131]

Overturning *Smith* would shift the focus in free-exercise cases to the impact a law has on the important, constitutionally recognized interest in religious exercise. It would shift focus away from the question whether the relevant regulation was hostile—a focus that invites the cycle of charges and counter-charges of bigotry and intolerance. Turning focus away from a law's "general applicability" would also remove the element of "constitutional luck" in which a person's religious practice is protected only because the government happens to have protected someone else.[132]

[127] Cf. Stephanie H. Barclay & Mark L. Rienzi, Constitutional Anomalies or As-Applied Challenge? A Defense of Religious Exemptions, 59 B.C. L. Rev. 1595, 1608–31 (2018) (defending free-exercise exemption claims as "as applied" challenges), with Nicholas Quinn Rosenkrantz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209, 1263–68 (2010) (arguing that the phrase "make no law prohibiting" excludes as-applied challenges).

[128] Cf. Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Philip A. Hamburger, A Constitutional Right of Religious Exemption: An historical perspective, 60 Geo. Wash. L. Rev. 915 (1992).

[129] See, e.g., Thomas C. Berg, Minority Religions and the Religion Clauses, 82 Wash. U.L.Q. 919, 964–72 (2004); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1130–32 (1990).

[130] Masterpiece Amicus Brief, *supra* n.*, at 35.

[131] Holt v. Hobbs, 135 S. Ct 853 (2015) (Religious Land Use and Institutionalized Persons Act); Burwell v. Hobby Lobby, 134 S. Ct. 2751 (RFRA); Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) (RFRA).

[132] Christopher C. Lund, A Matter of Constitutional Luck: The General Applicability Requirement in Constitutional Jurisprudence, 26 Harv. J. L. & Pub. Pol'y 627 (2003).

Heightened scrutiny would provide a means of protecting the essential interests of both same-sex couples and religious dissenters. As the next subsection briefly discusses, nondiscrimination rules in the commercial sphere usually serve important or even compelling interests and thus prevail even under heightened scrutiny. But in a few cases they do not. A rule of strict (or at least heightened) scrutiny takes account of the weight of the competing constitutional interests and thus would do justice more often than a rule like *Smith*'s, which ignores those interests if the law in question is neutral and generally applicable.

When the Court decided *Smith*, it expressed confidence that the political branches would protect religious minorities.[133] But that confidence rested on the premise that American society "believes in the negative protection accorded to religious belief,"[134] a premise that is being undercut by today's intensifying polarization in which beliefs in and about religion lie at the heart of the divide. Polarized politicians and interest groups are increasingly unwilling to consider how to avoid imposing burdensome penalties on religious practice. Sometimes progressives have little regard for the effect of penalties on conservative believers; sometimes, as in the case of President Trump's travel ban,[135] conservatives have little regard for the effect of penalties on Muslims. Whether the majority in a jurisdiction minimizes the importance of religious practice to religious believers in general, or just to those in a particular faith, the result is that the majoritarian branches are insensitive to particular free-exercise claims. That's when the courts must play an important, although obviously not exclusive, role.

3. The scope of exemptions

Finally, it is worth emphasizing that broadened protection for religious objectors will by no means be absolute, especially in the commercial marketplace. While dodging all the ultimate issues, the

[133] Smith, 494 U.S. at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

[134] *Id.*

[135] Cf. Trump, 138 S. Ct. 2392 (upholding travel ban based on deference to executive's immigration power, despite president's clear statements of anti-Muslim animus).

Court in *Masterpiece Cakeshop* did say that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons [be able to refuse], something that would impose a serious stigma on gay persons."[136] This is indeed right, for there are important interests in ensuring, first, that gay persons have access to goods and services and, second, that they not face repeated refusals.

As such, protections for religious objectors in commercial cases should be limited to those situations (primarily weddings) where the objector provides personal services directly to facilitate the marriage and other providers are readily available.[137] This principle covers the facts of *Masterpiece*, where the baker would provide cakes to same-sex couples for any other event besides a wedding,[138] and where close to 70 bakeries in the Denver metro area (including one a tenth of a mile from the Masterpiece Cakeshop store) listed themselves as serving same-sex weddings.[139] In cases involving religious nonprofits, protection should apply as long as clients, students, or employees have notice of the organization's religious character and its adherence to religious norms, as well as adequate alternatives.[140]

Such limited protection for religious objectors in the commercial sphere means that same-sex couples will very occasionally be referred elsewhere and feel insulted and demeaned. But some dignitary harms must be tolerated in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[141]

[136] Masterpiece, 138 S. Ct. at 1728–29.

[137] My defense here of this scope of exemption is brief. For fuller defenses, see, e.g., Masterpiece Amicus Brief, *supra* n.*, at 29–34; Thomas C. Berg, Religious Exemptions and Third-Party Harms, 17 J. Fed. Soc'y 50, 53–56 (Oct. 2016), https://fedsoc.org/commentary/publications/religious-exemptions-and-third-party-harms); Thomas C. Berg, Religious Accommodation and the Welfare State, 38 Harv. J. L. & Gend. 103, 128–30, 137–39, 141–42 (2015).

[138] 138 S. Ct. at 1724.

[139] Brief of Law and Economics Scholars as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, at 15–16, 138 S. Ct. 1719 (2018) (No. 16-111).

[140] For more detailed discussion, see Thomas C. Berg, Partly Acculturated Religion: A Case for Accommodating Religious Nonprofits, 91 Notre Dame L. Rev. 1341, 1369–73 (2016).

[141] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

Although *Masterpiece Cakeshop* correctly expresses concern for the dignity of same-sex couples, it should not be read to say that such referrals elsewhere are never protected. Without such an exemption, conscientious objectors like Jack Phillips must permanently surrender either their conscience or their livelihood. That permanent harm outweighs the real but short-term dignitary harm to same-sex couples. A narrow exception to gay-rights laws, in a religiously significant context of intense importance to conscientious objectors, holds the best hope of protecting both sides.

Conclusion

Courts were correct to protect same-sex couples in *Romer* and subsequent cases, and they are also right to protect religious objectors to same-sex marriage in defined circumstances. *Masterpiece Cakeshop* starts that project, which may expand just as gay-rights holdings expanded after *Romer*. It seems doubtful, however, that condemning the regulators' "animus" or "hostility" provides the best ground for protecting both sides, since it may simply increase negative polarization. We should give more weight to doctrines, like heightened scrutiny, that directly portray the important interests of the regulated parties—same-sex couples and religious believers—and directly encourage sympathy for their predicaments.