MASTERPIECE CAKESHOP AND TOLERANCE AS A CONSTITUTIONAL MANDATE: STRATEGIC COMPROMISE IN THE ENACTMENT OF CIVIL RIGHTS LAWS

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ABSTRACT

The Supreme Court's 2018 decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission *took up the question whether a state law barring discrimination on the basis of sexual orientation could be applied to a business whose owner had religious objections to participating in a same-sex wedding. The decision turned on the majority's finding that the Commission's ruling against Masterpiece Cakeshop was tainted by anti-religious animus, an impermissible basis for government action. The Court did not need to reach the broader question of whether a law like Colorado's could constitutionally be applied if the agency acted without the impermissible animus. In this article I argue that the Court's emphasis on animus was consistent with principles deeply embedded in constitutional jurisprudence, from several provisions of the First Amendment, to the Equal Protection Clause of the Fourteenth Amendment. For this reason, it is critical that government actors base their decisions on grounds other than animus. This includes legislators. While* Masterpiece Cakeshop *involved animus at the enforcement stage, a similar result is likely if hostility to religion played a substantial role in the legislature's passage of the law. I examine the*

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passage of a Utah law barring discrimination on the basis of sexual orientation and gender identity, and the consideration of a similar law in Kentucky, as models for demonstrating compromise with, and respect for, religious views. This process can insulate these laws from claims that they were the product of anti-gay animus.

TABLE OF CONTENTS

INTRODUCTION

The Supreme Court's 2018 decision in *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission* raised profound and complex questions about how to balance competing civil rights claims.[1] On the one hand, the petitioners—a bakery and its owner (Jack Phillips) who had refused to prepare a cake for a same-sex couple's wedding—argued that their rights of free speech and free exercise were infringed by the order of the respondent (the Colorado Civil Rights Commission) finding that they had violated the Colorado Anti-Discrimination Act ("CADA").[2] On the other hand, the Commission sought to vindicate

1. 138 S. Ct. 1719 (2018).
2. *Id.* at 1723.

the right of the couple who filed the complaint against the bakery to be free from discrimination.[3] Justice Kennedy's opinion for the Court drew on the core concept of tolerance to reconcile these competing claims, holding that the government may not act from a place of intolerance towards the religious beliefs of one citizen—the bakeshop owner, in this case—in the course of enforcing the rights of another—here, the gay couple.

The decision in *Masterpiece Cakeshop* has important implications for the development and enforcement of anti-discrimination laws, particularly in their protection of sexual and gender minorities. This is not the first time the Court has found that the First Amendment imposes limits on the ability of state and local governments to afford such protections,[4] making it all the more important to understand exactly where the line is, and thus what those governments may and may not do in enforcing anti-discrimination laws.

In my view, *Masterpiece Cakeshop* is consistent with other decisions, some recent and some venerable, which draw a constitutional line between tolerance and intolerance.[5] In particular, while the opinion may seem at first glance to be in tension with the Court's decisions establishing constitutional protection of the right of same-sex couples to marry,[6] *Masterpiece Cakeshop*, *Windsor*, and *Obergefell* actually reflect the same principle: governments may not make decisions affecting a fundamental right on the basis of intolerance of or hostility towards the group exercising the right. This principle is apparent in

3. *Id.* ("The case presents 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.").

4. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (striking down application of the New Jersey Law Against Discrimination, under which the state sought to prohibit the Boy Scouts from applying its policy barring gay men from being scoutmasters, as a violation of the Scouts' right of expressive association).

5. In using the terms "tolerance" and "intolerance," I will define them in the way I believe the Court has in marking the line between permissible and impermissible government action. Such action is based on impermissible intolerance when a particular group is singled out based simply on the disapproval of some aspect of the group's identity or constitutionally protected status or conduct. For example, intolerance may be directed at a group's racial identity, see Palmore v. Sidoti, 466 U.S. 429 (1984), religious practice, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), or speech, see Texas v. Johnson, 491 U.S. 397 (1989).

6. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (striking down state laws denying same-sex couples marriage licenses and refusing to recognize validity of out-of-state marriages); United States v. Windsor, 133 S. Ct. 2675 (2013) (striking down the federal Defense of Marriage Act's section denying federal recognition to marriages valid in the state where they were celebrated).

much of the Court's constitutional jurisprudence of the last three decades. For example, in the case of the Free Exercise Clause, the Court has distinguished between neutral laws that happen to affect religion or religious practice (which do not violate the First Amendment), and laws that discriminate against religion and thus manifest bias . . . or intolerance.[7]

To pass antidiscrimination statutes and ordinances in line with *Masterpiece Cakeshop*, legislatures must ensure that their regulations do not reflect governmental hostility towards the religious views of those who refuse to comply with those laws. What is less clear, however, is the relevance of the motives of those who enact the laws in the first place. In this article, I suggest that those who seek to enact such laws and give them their maximum effect must take care to ensure that the legislative process is not tainted by the sort of anti-religious animus that doomed the enforcement actions of the Colorado Civil Rights Commission in *Masterpiece Cakeshop*.

Part I of this Article seeks to contextualize *Masterpiece Cakeshop* within the Court's broader jurisprudence establishing the principle that the government may not enforce laws due to hostility to religion or intolerance more generally. Part II will assess the applicability of this principle to the enactment stage and argue that legislators must be as careful as executive branch officials to avoid basing their actions on animus—particularly anti-religious animus. Courts will find it constitutionally problematic if legislation either singles out religion for differential treatment or if the legislative record shows that a substantial number of legislators were motivated by anti-religious bias.

To illustrate how the legislative process can operate to minimize the risks that a statute will run afoul of *Masterpiece Cakeshop*, Part III will discuss two instances in which the legislative process operated while considering anti-discrimination laws in ways that were cognizant of, and attempted to balance, religious concerns. Such a process is far more likely to insulate the resulting legislation from constitutional scrutiny while also decreasing the likelihood that the law will be enforced in a constitutionally suspect way. In short, taking care in the legislative process will protect an anti-discrimination law from being overturned

7. *Compare* Emp't Div. v. Smith, 494 U.S. 872 (1990) [hereinafter "*Smith II*"] (holding that neutral laws of general applicability do not violate the Free Exercise Clause even if they impose a substantial burden on religious exercise), *with Hialeah*, 508 U.S. at 521 (holding that a city ordinance prohibiting ritual slaughter of animals was not neutral, but instead singled out religious practice and violated the First Amendment).

on its face, as well as prevent enforcement actions that are unconstitutional applications of those laws.

I. *MASTERPIECE CAKESHOP* AND THE JURISPRUDENCE OF TOLERANCE

A consistent theme in the Supreme Court's First Amendment jurisprudence—and even in some important areas of constitutional interpretation outside the First Amendment—is that governmental action based on intolerance is suspect and very likely to be unconstitutional. This can be seen in cases decided under the Religion Clauses[8], the Free Speech Clause,[9] and, outside the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[10]

It is important to note here that I intend no value judgments about whether the Court should have built so much of modern constitutional jurisprudence around the concept of tolerance, or even whether tolerance is really a virtue, at least without reference to a clear-eyed understanding of what is commanding our tolerance.[11] It may well be that tolerance should not occupy the central place it does in the Supreme Court's jurisprudence, or at the very least that it should be treated with more nuance. But my approach in this article is not to critique the place of tolerance or suggest a shift. It is instead to describe how the Court has elevated it to a core focus of a vast swath of

8. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); *see* Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va., 515 U.S. 819 (1995) (Establishment Clause); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Free Exercise Clause).

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *see* Texas v. Johnson, 491 U.S. 397 (1989).

10. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* Romer v. Evans, 517 U.S. 620 (1996).

11. For instance, if the purpose of this article were to assess the merits of the Court's choice to make tolerance a centerpiece of its jurisprudence, it would be essential to evaluate the undeniable costs associated with the idea of tolerating hate speech, given its impact on the ability of racial and other minorities to enjoy the promise of equality that is embodied in the Fourteenth Amendment. *See* Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of a "Just Balance" Changes So Slowly*, 82 CALIF. L. REV. 851, 852 (1994) ("For [advocates of hate speech regulation], the relevant issue is whether campuses are free to impose reasonable rules to protect the dignity and self-regard of vulnerable young African American undergraduates and other targets of hate speech. These advocates place equality at the center of the controversy and portray the defenders of racist invective as seeking to attack values emanating from the equality-protecting Constitutional amendments.").

constitutional law, and then argue that Justice Kennedy's opinion in *Masterpiece Cakeshop* fits comfortably within that tradition.

A. Intolerance and the Religion Clauses

1. The Free Exercise Clause

One of the most important themes of the Supreme Court's decisions under the Free Exercise Clause has been that government actions are unconstitutional if they specifically target or discriminate against religiously-motivated conduct. This was the fundamental point of Justice Antonin Scalia's opinion for the Court in *Smith II*, which dealt with an Oregon policy denying unemployment compensation to two individuals who had been fired because of their sacramental use of a drug (peyote) whose use was illegal under the state's drug possession laws.[12] The Court distinguished between laws that are neutral and generally applicable and those which target religion for less favorable treatment. According to Justice Scalia, the former do not violate the Free Exercise Clause because

> the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[13]

Smith II involved a "neutral law of general applicability": Oregon's law prohibiting the use of peyote, which did not specifically bar only the *religious* use of peyote as a sacrament.[14] Thus, the Free Exercise Clause was of no use to the respondents in their effort to shield themselves from the effects of the law—in this case, application of Oregon's rule that state employees discharged for work-related misconduct are ineligible for unemployment compensation.[15]

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12. *Smith II*, 494 U.S. at 890 (1990) (Oregon statute criminalizing use of peyote, which was neither directed specifically at religious use nor animated by anti-religious prejudice, may be applied to sacramental use without violating the Free Exercise Clause).

13. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

14. *Smith II*, 494 U.S. at 875–76. In fact, the question about the scope of Oregon's law was not whether it covered only sacramental use of peyote, but whether its general bar on peyote included religion—i.e., whether there was a religious exemption. The first time the case was before the Supreme Court, it remanded the case for the Oregon Supreme Court to determine whether the state law made religious use of peyote illegal. *See* Employment Division v. Smith, 485 U.S. 660 (1988) [hereinafter "*Smith I*"]. In short, there was never any doubt that the state had not singled out religion for disfavored treatment, but only whether it had given religious use of peyote more favorable treatment via an exemption.

15. *Smith II*, 494 U.S. at 874 (noting that the respondents were "determined to be ineligible

Imagine, by contrast, that the Oregon law had rendered peyote illegal *only* when it was used for sacramental purposes, and that the respondents in *Smith* had been discharged for the same conduct and then denied unemployment compensation. That hypothetical would not alter the Court's statement in *Smith I* that the illegality of the underlying conduct is relevant to the constitutional claim,[16] but it would make it harder for the state to defend the statute's constitutionality. That is because the determination that the underlying conduct is illegal (the key premise of the state's argument) requires that the law making it so be constitutional. If not—if the law singles out religion for disfavored treatment—then the Court would revert to its holding that the Free Exercise Clause bars the state from denying unemployment compensation to "an employee who is required to choose between fidelity to religious belief and cessation of work [and chooses to be] faithful to the tenets of his or her church."[17]

This point was reinforced shortly after *Smith II*, when the Court dealt with city ordinances that barred "sacrifice" and "ritual" in the slaughtering of animals in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[18] The ordinances were challenged by a church and its members who were adherents of the Santeria faith, one of whose tenets was the practice of ritual animal sacrifice.[19] They alleged that the ordinances operated to single out the practice of slaughtering animals only when it was done as part of a religious rite, and that members of the Hialeah City Council were motivated by hostility towards the Santeria faith.[20] The City, for its part, argued that the ordinances were neutral and generally applicable, and did not single out Santeria religious practice.[21]

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for benefits because they had been discharged for work-related 'misconduct'").

16. *Smith I*, 485 U.S. at 670 ("[I]f a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.").

17. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

18. 508 U.S. 520 (1993).

19. *Id.* at 525.

20. *Id.* at 527–28.

21. Brief of the Respondent at 13, Church of Lukumi Babalu Aye, Inc. v. Hialeah, Florida, 508 U.S. 520 (1993) (No. 91-948) ("Hialeah's four ordinances are non-discriminatory, broadly applicable regulations which protect animals from cruel treatment and protect people from the health hazards attendant to the slaughter of large numbers of chickens, goats, and other animals. Whether viewed separately or together, the ordinances are not targeted at animal sacrifices for religious purposes, but all ritualistic killings of animals.").

In its decision, the Court made clear that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[22] In applying that principle, the Court noted that a statute or ordinance might impermissibly target religion *either* if it discriminates on its face *or* if the object of those who enacted it was to disadvantage religious practice.[23] This point was significant in the Court's analysis of the ordinance at issue in *Hialeah*, because the majority found plausible readings of the text of the law—which barred "sacrifice" and "ritual" in the slaughtering of animals—which either singled out religion or rendered the ordinance neutral.[24] The city argued that if the text did not on its face discriminate, the free exercise inquiry was at an end, but the Court was unpersuaded.[25] In critical language, Justice Kennedy wrote:

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality" . . . and "covert suppression of particular religious beliefs . . . ." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.[26]

In short, the constitutional validity of a law under the Free Exercise Clause[27] depends in large measure on whether that law singles out religion because of intolerance for the religious basis for a behavior.

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22. *Hialeah*, 508 U.S. at 532.

23. *Id.* at 533–35.

24. *Id.* at 533–34 (agreeing with the petitioners that "these words are consistent with the claim of facial discrimination, but the argument is not conclusive").

25. *Id.* at 534 ("We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue.").

26. *Id.* (citations omitted).

27. It is important to note here that I am not referring to whether a law is valid under the federal Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, or one of its many state-law equivalents. As the Court noted in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), Congress created a statutory right to be protected from laws that burden religious exercise that is broader than the constitutional right as the Court had defined it in *Smith II*. *Burwell*, 134 S. Ct. at 2761. Under RFRA, it is enough that even a neutral statute substantially burdens religion to compel the government to defend the law under strict scrutiny; it need not single out or discriminate against religion. Since even a neutral law can create a violation of RFRA, it is less significant whether a government policy or act is motivated by anti-religious animus than it is under the Free Exercise Clause. Nevertheless, it is not a trivial matter, since the government's task to justify a law that either facially discriminates against religion or whose passage was motivated by anti-religious bias will be immeasurably harder.

2. The Establishment Clause

Many of the Supreme Court's Establishment Clause cases similarly focus on the motivation for the enactment of a law or policy. Government actions that are truly neutral towards religion are extremely unlikely to be found to constitute an establishment, while those that either show favoritism or hostility towards religion have been struck down.[28]

The importance of neutrality is evident in a long line of the Court's decisions, set forth in *Rosenberger v. Rector & Board of Visitors of the University of Virginia*.[29] In *Rosenberger*, the University of Virginia provided funding for student publications, thus creating a forum for student speech.[30] However, a religious student group had been excluded from participation.[31] When the students challenged the exclusion as a viewpoint-based violation of their free speech rights, the University argued that it had a compelling interest in the policy: avoiding a violation of the Establishment Clause.[32] The Court rejected this claim; since non-religious student groups could participate, the program was entirely neutral and there was no Establishment Clause

28. In my view, the Court's 2018 decision in Trump v. Hawaii, 138 S. Ct. 2392 (2018), is a marked and troubling departure from this rule. There, the plaintiffs adduced powerful proof that the real motivation behind Executive Order 2 was the Trump Administration's anti-Muslim animus. *See id*. at 2417 (summarizing the many statements made by candidate and then President Trump that the motivation for the order was to target Muslims). Instead of finding this a basis for overturning the order, the Court gave deference to the President's "extraordinary power to speak to his fellow citizens and on their behalf." *Id.* at 2417–18. As to the statements, the Court dismissed the argument that "this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition," by saying that "the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility." *Id.* at 2418. Simply because of this context, the Court utilized circumscribed, rational basis review, a choice Justice Sotomayor's dissent criticized as showing the majority was willing "to throw the Establishment Clause out the window." *Id.* at 2441 n.6 (Sotomayor, J., dissenting). As Justice Sotomayor rightly recognized, "[t]hat approach is perplexing, given that in other Establishment Clause cases, *including those involving claims of religious animus* or discrimination, this Court has applied a more stringent standard of review." *Id.* at 2441 (emphasis added). It is noteworthy that, in upholding Executive Order 2, the majority never reckoned with the dissent's claim that the order was deeply inconsistent with the Court's tradition of emphasizing intolerance as a basis for striking down government action. While Trump v. Hawaii does not alter the conclusion that the tolerance tradition is long and powerful, it does demonstrate that the Court can ignore or depart from that tradition in isolated cases.

29. 515 U.S. 819 (1995).

30. *See id.* at 823–25 (describing the funding mechanism).

31. *Id.* at 827.

32. *Id.* at 837 (describing the University's argument from the time the students filed their complaint until its brief on the merits in the Supreme Court as having been that "inclusion of WAP's contractors in SAF funding authorization would violate the Establishment Clause").

violation to avoid.[33] As Justice Kennedy's opinion declared, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[34] The Court noted that the government may extend benefits to religious entities as long as they are general in nature and religion does not uniquely benefit from the program at issue.[35]

While earlier in the litigation the University of Virginia had pressed the claim that it needed to exclude the religious group,[36] the University dropped the argument in its briefing for the Supreme Court.[37] This might have been because the argument's strength had been deeply, if not fatally, compromised by the Court's decision two years earlier in *Lamb's Chapel v. Center Moriches Union Free School District.*[38] In *Lamb's Chapel*, the school district, acting pursuant to state educational law, made available school facilities for use after school hours by non-religious community groups.[39] In *Rosenberger,* the Court succinctly described its earlier holding in *Lamb's Chapel,* saying that a government entity could not create a forum and discriminate against religious groups by "enact[ing] a formal policy against opening [those] facilities to groups for religious purposes."[40] Such anti-religious policies could not be justified, the Court held, by concern that allowing the religious group to use the forum would violate the Establishment Clause: neutrality does not violate the Establishment Clause.[41]

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33. *Id.* at 839.

34. *Id*.

35. *Id.* (citing Everson v. Bd. of Ed. of Ewing, 330 U.S. 1 (1947)).

36. *See* Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va., 18 F.3d 269, 285–86 (4th Cir. 1994) (discussing and adopting University's argument that, even though its exclusion of religious group from funding program infringed on the speech of the group, infringement was justified by need to avoid advancing religion and becoming entangled with religious message), *rev'd and remanded*, 515 U.S. 819 (1995).

37. *Rosenberger*, 515 U.S. at 837–38 (noting that the University "itself no longer presses the Establishment Clause claim," giving "some indication that it lacks force," but addressing the issue because "the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative").

38. 508 U.S. 384 (1993).

39. *Id.* at 386–87.

40. *Rosenberger,* 515 U.S. at 830 (discussing *Lamb's Chapel*, 508 U.S. 384).

41. *Lamb's Chapel*, 508 U.S. at 394–95 (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981)) (rejecting the school district's argument that excluding the religious group was necessary to avoid violating the Establishment Clause because an "open access policy" is not "incompatible" with the Clause).

In short, while most Establishment Clause cases focus on avoiding an *endorsement* of religion,[42] there is a significant thread in the Court's Establishment Clause jurisprudence stressing that government may not disfavor religion, either. As the Court said in *McCreary County*, "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[43]

B. Intolerance and Free Speech

In numerous ways, the Court's interpretation of the Free Speech Clause reflects the same principle that the religion cases do: government actions which reflect intolerance by singling out unpopular viewpoints are presumptively, if not automatically, unconstitutional. Indeed, some of those cases involve religious speech.

The prior section discussed some of the cases involving religious speech, such as *Rosenberger* and *Lamb's Chapel*. Typically, those cases are brought by plaintiffs alleging a violation of their right to free speech because a government policy excluded their religious speech from a forum.[44] The Court has been resolute that attempts to exclude religious speech constitute viewpoint-based discrimination, subject to strict scrutiny analysis that is virtually always fatal.[45] In doing so, the Court

42. *See, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844, 860 (2005) (holding that the religious content of a Ten Commandments display, and the openly expressed motivation of government officials to promote religion in adopting it, violated the Establishment Clause); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that a policy promoting school prayer would be seen by a reasonable observer as endorsing religion, violating Establishment Clause).

43. *McCreary Cty.*, 545 U.S. at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

44. *See Rosenberger*, 515 U.S. at 828 (discussing the court of appeals' determination of student group's free speech claim and noting that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"); *Lamb's Chapel*, 508 U.S. at 387 (noting that the issue in the case was whether "it violates the Free Speech Clause of the First Amendment . . . to deny a church access to school premises" when access to those facilities had been granted to other, non-religious community groups). As noted above, the Establishment Clause was relevant in those cases because the governments asserted that avoiding a violation of the Clause was a compelling interest, and that it was necessary to exclude religious speakers from the fora they had created to serve that interest. *See supra* text accompanying notes 28–41.

45. *Rosenberger*, 515 U.S. at 829–30 (discussing the distinction between content-based exclusions and viewpoint-based exclusions in forum cases, because a content-based exclusion "may be permissible if it preserves the purposes of that limited forum," whereas a viewpoint-based exclusion "is presumed impermissible when directed against speech otherwise within the forum's limitations"); *see also Widmar*, 454 U.S. at 268–69 (finding that the University had created an open forum by allowing student groups to use university facilities for meetings, and then engaged in impermissible discrimination against religious speech by denying religious student group access).

has rejected the claim of some of its members that a policy excluding religious speech across the board is content-based (i.e., based on religious content as a category) rather than viewpoint-based.[46] In response to Justice Souter's dissent in *Rosenberger*, Justice Kennedy explained: "[t]he dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of [religious] viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech."[47]

Intolerance of unpopular speech that translates into viewpoint-based restrictions on that speech has been the subject of many of the Court's First Amendment decisions. Most recently, the Court in *Iancu v. Brunetti* struck down a provision of the Lanham Act that prohibited the registration of "immoral or scandalous" trademarks.[48] In *Iancu*, the trademark at issue was the term "FUCT" for a line of clothing.[49] The Patent and Trademark Office Trial and Appeal Board found that the mark was "'highly offensive' and 'vulgar,' and that it had 'decidedly negative sexual connotations.'"[50] These conclusions formed the basis for denying registration.[51] The Court held—following on its decision two years earlier in *Matal v. Tam*[52]—that it is only possible to judge what

46. *See Rosenberger*, 515 U.S. at 895 (Souter, J., dissenting) ("If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian.").

47. *Id.* at 831.

48. 139 S. Ct. 2294 (2019).

49. *Id.* at 2297.

50. *Id.* at 2298 (quoting Pet. App. at 59a, 64a–65a).

51. *Id.*

52. 137 S. Ct. 1744, 1751 (2017) (quoting the Lanham Act, 15 U.S.C. § 1502(a)) (striking down a Lanham Act provision "prohibiting the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead'"). Justice Alito's opinion for the Court in *Tam* contained a fair amount of irony, since it relied on the proposition that the government may not be intolerant towards speech it disagrees with because the First Amendment protects intolerant speech. Indeed, the plurality explicitly characterized the viewpoint-based restriction created by the Lanham Act's "disparagement clause" by saying, "[g]iving offense is a viewpoint." *Id*. at 1763 (plurality opinion); *see also id*. at 1766 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as 'persons, living or dead, institutions, beliefs, or national symbols.' 15 U.S.C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination."). But if there is irony there, it should not be all that surprising, since the speech whose viewpoint is most likely to make it the target of government regulations is that which gives offense to others, who then persuade the government to ban or discriminate against it. As the

is immoral or scandalous by reference to those concepts as viewpoints. Since the regulations were inherently based on the viewpoint reflected in the mark, the Lanham Act ran afoul of the First Amendment's tolerance mandate.[53]

This was also the case in *Texas v. Johnson,* where the Court afforded protection to the decidedly unpopular—and to many, offensive—expressive conduct of burning the U.S. flag as a means of protest.[54] In short, the demands of tolerance extend to ideas or modes of expression the majority finds repugnant. The fact that even a majority of the Court might be loath to tolerate speech does not strip that speech of the First Amendment's protection. To the contrary, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[55]

Just as the government must tolerate unpopular speech, it may not compel those whose views are unpopular or outside the mainstream to utter a government-approved message with which they disagree. The Court's landmark decision in *West Virginia Board of Education v. Barnette* established as much, striking down a West Virginia law compelling school children to participate in the Pledge of Allegiance.[56] The law was challenged by Jehovah's Witnesses, who alleged that reciting the pledge would violate their faith.[57] In ruling against the state law, the Court held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and

Tam opinion noted: "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* (quoting Street v. New York, 396 U.S. 576, 592 (1969)).

53. *Iancu*, 139 S. Ct. at 2299 ("The government may not discriminate against speech based on the ideas or opinions it conveys.").

54. 491 U.S. 397 (1989).

55. *Id.* at 414. *See also* Spence v. Washington, 418 U.S. 405, 408 (1974) (striking down a state statute "forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material" as applied to a student who affixed a peace sign to a flag to protest U.S. foreign policy and the Kent State massacre).

56. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

57. *Id.* at 629 (asserting the claim that reciting the pledge and saluting the flag would violate the Jehovah's Witnesses' reading of the Biblical prohibition of making a "graven image").

> assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[58]

When the government attempts to force someone to speak a message that violates his or her actual beliefs, it is often because those beliefs are out of the mainstream and unpopular. This is impermissible: the government must respect the dissenter's right to remain silent rather than expressing the government's preferred message.[59]

The theme of tolerance also emerges from the Court's "heckler's veto" jurisprudence. In these cases, the Court has consistently held that when a speaker's views are met with a hostile response from his or her audience, it is the government's responsibility to protect the speaker, rather than use its authority to censor or silence the message, which would place the state's power behind the hecklers who disapprove of the speaker's message.[60] This principle was also applied in a series of cases the Court decided which afforded protections to civil rights activists in the 1960s.[61] As Professor Brett Johnson explained:

> All three cases involved groups of African-Americans who marched on public property to protest segregation. In each case, the protestors confronted large crowds of angry whites. In each case, some protestors were arrested and charged with violating disorderly conduct or breach of the peace statutes, with police officers testifying that they made the arrests because the crowds were growing restive and the protestors repeatedly disobeyed the

58. *Id.* at 638.

59. *Id.* at 642 ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

60. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (overturning disorderly conduct conviction of a high-profile priest who delivered a racist, anti-Semitic speech that incited a hostile reaction from his audience, because speech that is "provocative and challenging" is protected speech, even if it has "profound unsettling effects").

61. *See generally* Gregory v. Chicago, 394 U.S. 111, 111–12 (1969) (reversing disorderly conduct convictions of fair housing demonstrators where there was no evidence they were disorderly, and it was hostile onlookers who had become unruly); Cox v. Louisiana, 379 U.S. 536, 538–39 (1965) (reversing defendant's convictions for disturbing the peace, obstructing public passage, and picketing before a courthouse struck down as a violation of his free speech rights, where he had been leading and speaking at a mass demonstration to protest segregation and earlier arrests of other leaders); Edwards v. South Carolina, 372 U.S. 229, 235–36 (1963) (overturning demonstrators' convictions for breach of the peace during their protest at the state house, where they were merely exercising core constitutional rights of speech and peaceable assembly).

> officers' orders to disperse. In each case, the African-American protestors prevailed.[62]

Those cases lie at the intersection of the Constitution's requirement for tolerance under the First Amendment—since they protect unpopular expression from being silenced by intolerance—and under the Equal Protection Clause of the Fourteenth Amendment—since the specific context involved protecting those protesting against segregation from intolerant racism.

C. Intolerance and the Fourteenth Amendment: The Bare Desire to Harm

At the heart of the Equal Protection Clause is the notion that the government may not give private prejudices the force of law nor subject any individual or group to discriminatory treatment based on intolerance. Putting aside the question of whether the government has a further obligation to eradicate private bias and intolerance, it certainly cannot enact them into law by acting on the "bare desire to harm" an unpopular group.[63]

Perhaps the Court's clearest explication of this principle came in *Palmore v. Sidoti*,[64] where state courts in Florida had taken racial prejudice into consideration in modifying a custody decree based on changed circumstances.[65] Essentially, the state courts decided to remove a child from the mother and give custody to the father, at least in part because the courts were concerned that the mother's interracial relationship would subject the child to race-based private bigotry.[66] The Court emphatically made clear that merely because racial prejudice exists in the world does not mean that the government can give it legal effect:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a

62. Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 186–87 (2016).

63. United States Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

64. 466 U.S. 429 (1984).

65. *Id.* at 432.

66. *Id.* at 430–31 (noting that the father sought modification because "the child's mother was then cohabiting with a Negro," and the family court found "that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus [becomes] more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come").

> different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[67]

More than 60 years earlier, the Court had relied on nearly identical reasoning in striking down a Louisville ordinance that—like the state court's decision in *Palmore*—gave legal effect to private prejudice. In *Buchanan v. Worley*, the racial intolerance the Court confronted took the form of popular opinion favoring residential segregation.[68] The ordinance "made [it] unlawful for any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses are occupied as residences . . . by white people than are occupied as residences . . . by colored people."[69] As the Court aptly noted:

> [T]his interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.[70]

The law was defended on the ground that it would "promote the public peace by preventing racial conflict"[71]—giving legal effect to private prejudice that favored segregating people by race. As the Court explained in striking down the law,

> [t]hat there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.[72]

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67. *Id.* at 433 (footnote omitted).

68. Buchanan v. Worley, 245 U.S. 60 (1917).

69. *Id. at* 70–71. The ordinance also contained a reciprocal section, barring whites from occupying a residence on a block where there were more black residents than white. *Id.* at 71.

70. *Id.* at 73.

71. *Id.*

72. *Id.* at 80–81. It is ironic that in the period during which Plessy v. Ferguson, 163 U.S. 537

The same core anti-animus principle was at the heart of each of the Court's decisions over the last 25 years in cases dealing with claims that government actors discriminated on the basis of sexual orientation. The context differed, since the intolerance in the earlier cases involved private racial prejudice and the issue was whether government could give it effect, while the focus in the sexual orientation cases has been the government's own animosity. But this is a blurry line at best, since intolerance by a legislature may be a function of both the actual personal intolerance of its members, their beliefs about the intolerance of the members of the public who elected them, or some combination of both. Ultimately, the principle that government may not give legal effect to intolerance is the same. In the sexual orientation context, the expression of that idea began with the critical 1996 decision in *Romer v. Evans*.[73] Since then, the Court's decisions have indicated a consistent theme that animosity towards sexual minorities is not a permissible basis for government actions. These have included striking down a state constitutional amendment stripping gay men, lesbians, and bisexuals of protections under state and local antidiscrimination laws and barring the enactment of such laws in the future,[74] a same-sex sodomy law,[75] the federal Defense of Marriage Act (DOMA) denying recognition under federal law to same-sex couples' marriages valid under state law,[76] and state laws prohibiting same-sex couples from marrying or having their out-of-state marriages recognized.[77]

(1896), was ascendant, and the state itself could maintain segregated facilities and require segregation in public accommodations, the Court drew the line at allowing racial prejudice to be the basis on which the state could infringe right of private parties to enter into an otherwise valid contract to convey property.

73. 517 U.S. 620 (1996).

74. *Id.* at 634–35 (explaining why animosity was the underlying basis for Amendment 2, and why this cannot be a legitimate government interest sufficient even to satisfy rational basis scrutiny); *see also* David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 510 (1994) (prior to *Romer*, proposing an anti-intolerance theory as the basis for overturning anti-gay ballot initiatives and arguing, "[t]he traditional moral condemnation of homosexuality was, in its historical nature, a form of intolerance that should have been subject to appropriate political and constitutional assessment in light of the argument for toleration").

75. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (criticizing the Court's 1986 decision in Bowers v. Hardwick, 478 U.S. 186 (1986), as imposing a particular moral code disapproving of homosexual conduct).

76. *See* United States v. Windsor, 570 U.S. 744, 775 (2013) (striking down Section 3 of DOMA using the animus principle of *Romer* because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

77. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (noting that state laws denying recognition to same-sex marriages must be measured "against a long history of disapproval of

The *Romer*/*Obergefell* line of cases has its roots in equal protection decisions that had nothing to do with sexual orientation discrimination. The Court has long held that animus towards an unpopular group—intolerance by another name—does not constitute a legitimate government interest sufficient to satisfy even the lowest level of constitutional inquiry, rational basis scrutiny. As the Court stated in *United States Department of Agriculture v. Moreno*:

> [I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.[78]

The marriage decisions are critical to understanding the Court's abiding concern with tolerance as a central constitutional virtue. For its part, Justice Kennedy's opinion for the Court in *Windsor* pointed to anti-gay statements in the congressional record surrounding DOMA as particular evidence of unacceptable intolerance:

> The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage . . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H.R. Rep. No. 104-664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality."[79]

Obergefell demonstrates the extent to which the Court stresses tolerance by reference not to intolerance of same-sex marriage, but by observing that the competing perspective of those who hew to the traditionalist view of marriage must also be tolerated. Of course, the Court's primary focus in *Obergefell* was on the importance of marriage

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their relationships," and in that light, the "denial to same-sex couples of the right to marry works a grave and continuing harm").

78. 413 U.S. 528, 534 (1973). The Court cited this aspect of *Moreno* in *Romer*, 517 U.S. at 634–35, *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring), and *Windsor*, 570 U.S. at 770.

79. *Windsor*, 570 U.S. at 770–71 (citation omitted).

as a fundamental right[80] and of extending this right on an equal basis to same-sex couples.[81] But the Court suggested that although contrary views may not be the basis for government policy restricting marriage, they are owed tolerance and must be considered in the constitutional analysis:

> [I]t 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. *The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered*. The same is true of those who oppose same-sex marriage for other reasons.[82]

Of course, the Court did not go into detail about the protections the First Amendment provides for those with religious beliefs that reject the validity of same-sex marriage. Such a discussion would have been far beyond the scope of the issues presented in the case. But the clear implication was that the Constitution requires *some* tolerance for such private views, even in a world where state and federal governments must recognize marriages that some private actors might oppose. *Obergefell* did not need to tell us precisely where the constitutional line is between requiring equal recognition of same-sex marriages and tolerating dissenting views, but it told us that such a line exists, and that the Court anticipated having to define and police it in future cases.

This should not have come as a surprise. The Court's 2000 decision in *Boy Scouts of America v. Dale*[83] came 15 years before *Obergefell*, and established the premise that private anti-gay views are constitutionally protected—in that case, by the First Amendment right of expressive association[84]—and can be asserted to avoid the requirement that private individuals or groups with such views refrain from discriminating on the basis of sexual orientation.

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80. *Obergefell*, 135 S. Ct. at 2604 (discussing the fundamental nature of marriage and the rights it affords).

81. *Id.* at 2603 (citing Zablocki v. Redhail, 434 U.S. 374, 383 (1978), for the proposition that if the state unequally burdens a fundamental right, the equal protection violation is more pronounced).

82. *Id.* at 2607 (emphasis added).

83. 530 U.S. 640 (2000).

84. *Id.* at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

Perhaps the most interesting aspect of *Dale* was that the Court never actually discussed whether the New Jersey Law Against Discrimination was necessary to serve a compelling interest, either on its face or as applied in the specific context of the ban on sexual orientation discrimination and to the Boy Scouts in particular.[85] This omission was particularly striking because the majority recognized that the right of expressive association is not absolute, and that a state may burden it in the service of a compelling interest.[86]

The closest the Court came to actually discussing what should have been a key aspect of its constitutional analysis was to observe that in prior cases it had found that anti-discrimination laws serve a compelling purpose when they bar sex discrimination,[87] but that those cases were inapposite because the laws at issue were found not to "materially interfere with the ideas that the organization sought to express."[88] Of course, that is a distinction. Its significance *should* have been that, once the Court concluded that the New Jersey law at issue in *Dale* did "materially interfere" with the expression of the Boy Scouts, the Court would then apply strict scrutiny to the law and its application. That, after all, is what the Court did in *Roberts v. United States Jaycees*.[89] Instead, this was the entirety of the Court's "analysis" of this point:

> The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.[90]

85. *Id.* at 653–56 (determining that application of the New Jersey law would "significantly burden" the Boy Scouts' views, and then finding this sufficient to violate the First Amendment without any inquiry into the government's interest and the narrow tailoring of the law).

86. *Id.* at 648 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)) ("[T]he freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'").

87. *Id.* at 657 ("We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations.").

88. *Id.*

89. *Roberts*, 468 U.S. at 628–29 (noting that even if Minnesota's anti-discrimination law caused "some incidental abridgement of the Jaycees' protected speech," the law was constitutional because it "abridge[d] no more speech or associational freedom than is necessary to accomplish that purpose").

90. *Dale*, 530 U.S. at 659.

The Court substituted bald assertion for analysis, simply declaring that New Jersey's interests "d[id] not justify" the "intrusion."[91] The Court never said whether its holding was limited to the law's coverage of sexual orientation, and thus that the case would have come out differently if the Boy Scouts had sought to discriminate on the basis of race, sex, or religion, or whether it was because the organizational nature of the Scouts themselves gave them greater rights than other places of public accommodation might enjoy. Either way, it was an extraordinary example of the Court requiring that a government tolerate positions it disagreed with, to the point of not even applying the test that would ordinarily give that government an opportunity to justify regulating the expression of that position.

Such a departure from the normal framework for evaluating First Amendment cases is a clear sign of the Court's determination to create and maintain a clear constitutional space in which anti-gay views must be tolerated, even in an era of growing constitutional protections for LGBTQ rights. The exact same Justices who decided *Romer* and *Lawrence* decided *Dale*. It was (and remains, despite changes in membership) a Court that demands equality for LGBTQ Americans but at the same time insists on tolerance of private views that differ.

D. Intolerance and Masterpiece Cakeshop

It is against this backdrop that the Court's decision and reasoning in *Masterpiece Cakeshop* can best be understood. Importantly, the Court did not broadly hold that state and local anti-discrimination laws violate the free exercise and free speech rights of business owners whose religious convictions impel them to discriminate, as the petitioners and some of their *amici* urged.[92] Indeed, the Court was quite explicit that the "general rule" is that religious views do not permit those who hold them to violate public accommodations laws:

> Nevertheless, while those religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such

91. *Id.*

92. *See* Opening Brief of Masterpiece Cakeshop, Inc., et al. at 16–46, Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018) (No. 16-111) (arguing that applying the Colorado Anti-Discrimination Act (CADA) to require the bakery to supply a wedding cake for a same-sex couple would constitute compelled speech and impermissibly infringe on their religious freedom); Brief of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, et al., as Amici Curiae Supporting Petitioners at 22–25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that CADA operates as a "de facto religious test" and thus a per se violation of the Free Exercise Clause of the First Amendment).

> objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[93]

Instead, the Court held that it was *how* the Colorado Civil Rights Commission had enforced the law that rendered its treatment of Masterpiece Cakeshop unconstitutional. As Justice Kennedy's opinion framed the state's failure, "Phillips [the owner and operator of Masterpiece Cakeshop] was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case . . . . [But t]he Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[94] In other words, the Commission's intolerance of the religious views of Masterpiece Cakeshop's owner, which was exhibited by commissioners at public hearings, rendered the Commission's holding unconstitutional.

Justice Kennedy acknowledged that some of the statements made by the Commissioners were susceptible of interpretations that did not indicate anti-religious bias.[95] Nevertheless, the Court found that others more explicitly referenced religion in a way that was unacceptable. For example, one commissioner stated at a hearing on July 25, 2014:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[96]

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *see also id.* at 1728–29 ("[A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons.").

94. *Id.* at 1729.

95. *Id.* (discussing statements made at a May 30, 2014 meeting, stating: "Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views.").

96. *Id.*

In the Court's view, this was an example of government intolerance in the enforcement of the law:

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.[97]

The Court found further evidence of anti-religious intolerance in the Commission's differential treatment of discrimination claims where bakers had refused to serve customers based on non-religious objections to the messages on the cakes. In those instances, the requested cakes expressed anti-gay marriage sentiments, and the Commission rejected the claims that the bakers' refusals to fill the orders were discriminatory.[98] As a result, "the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections,"[99] and "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[100]

In short, the Court's decision in *Masterpiece Cakeshop* sounded in the tolerance theme that has long been common to its constitutional jurisprudence.[101] Intolerance of unpopular views cannot be the basis of

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97. *Id.* The Court found the remarks unquestionably relevant, since they "were made . . . by an adjudicatory body deciding a particular case." *Id.* at 1730. It was thus able to avoid wrestling with the question of whether similar comments would have been relevant to the Court's discrimination analysis if they had been made by a legislator during the law's enactment—an issue on which "[m]embers of the Court have disagreed." *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540–42 (1993)); *Hialeah*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in judgment). This will be the focus of Section III, *infra*.

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

99. *Id.*

100. *Id.* at 1731.

101. Justice Kagan's separate concurrence, joined by Justice Breyer, also relied on the conclusion that the facts suggested religious intolerance was at play in the Commission's actions, but she added a further justification. She was troubled that the Commission failed to utilize what she believed was a clear and simple basis for rejecting the claims of anti-gay customers, while still finding that Masterpiece had discriminated. *Id.* at 1733–34 (arguing that the bakers who rejected the anti-gay customers did not, in fact, discriminate because they would have treated anyone

governmental decision-making without running afoul of constitutional protections contained in the First and Fourteenth Amendments.

II. FROM ENFORCEMENT TO ENACTMENT: APPLYING THE TOLERANCE MANDATE TO LEGISLATIVE ACTION

As noted above, Justice Kennedy's opinion in *Masterpiece Cakeshop* pointedly left open a key question: whether CADA's hostility towards religion would have also been constitutionally impermissible had it been expressed by members of the legislature that enacted the law, rather than the executive agency charged with enforcing it. Kennedy wrote:

> Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion . . . . In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.[102]

The disagreement Justice Kennedy alluded to in *Masterpiece Cakeshop* was between himself and Justice Scalia in *Church of Lakumi Babalu Aye, Inc. v. City of Hialeah*.[103] Although most of Justice Kennedy's opinion was for a majority, one section was not; there, he wrote only for himself and Justice Stevens. He wrote:

> Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, *and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body*.[104]

In *Hialeah*, Justice Kennedy found abundant proof of impermissible legislative intolerance towards the Santeria religion that the ordinance singled out. "The minutes and taped excerpts of the June 9 session, both of which are in the record," he wrote, "evidence significant hostility exhibited by residents, members of the city council,

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asking for a cake with those messages the same, while Masterpiece Cakeshop did discriminate because it was willing to prepare wedding cakes for opposite-sex couples, but not same-sex couples). Justice Kagan's view suggested the Commission *could* have found for the claimants—simply not on the basis of the hostility to religion that infected its analysis.

102. *Id.* at 1730 (citations omitted).

103. 508 U.S. 520 (1993).

104. *Id.* at 540 (plurality opinion) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977)) (emphasis added).

and other city officials toward the Santeria religion."[105] He proceeded to give several examples of anti-Santeria comments made by members of the Hialeah City Council.[106]

Justice Scalia, on the other hand, did not believe such comments were relevant to the question of whether a law discriminates against religion. He argued this question should be answered based on the content of the law itself.[107] His position was stated best in this passage:

> The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.[108]

In light of this disagreement, it may be unclear whether anti-religious motives expressed by legislators are relevant to a law's constitutionality.[109] But the better answer is that they are, in fact, critical. To see why, consider the mirror image case: situations where legislators express *pro-religious views* as the motive for their decisions. In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,[110] the Court held that government officials' pro-religious purpose was relevant to deciding whether their action—posting the Ten Commandments—violated the Establishment Clause.[111] The Petitioner

105. *Id.* at 541.

106. *Id.* at 541–42.

107. *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment) ("I do not join [Section II(A)(2)] because it departs from the opinion's general focus on the object of the laws at issue to consider the subjective motivation of the *lawmakers, i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular 'motive' of a collective legislative body . . . and this Court has a long tradition of refraining from such inquiries." (citations omitted and emphasis in original)).

108. *Id.* at 558–59.

109. *See* Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMM. 171, 177 (2019) (discussing the question of whether evidence of religious intolerance by an administrative body has the same effect in the constitutional inquiry as such evidence by a legislature).

110. 545 U.S. 844 (2005).

111. *Id.* at 861–62 ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . and governmental purpose is a key

counties argued—as Justice Scalia had in his *Hialeah* concurrence[112]—that legislative purpose is essentially unknowable.[113] The Court noted that while in some instances "the government action itself bespoke the purpose,"[114] in others the Court has "relied on a statute's text *and the detailed public comments of its sponsor*, when [it] sought the purpose of a state law requiring creationism to be taught alongside evolution."[115] Thus, the Court has found that legislative purpose is indeed knowable, that it can be discerned from the statements of supportive legislators, and that it can render the government's actions a violation of the Establishment Clause.[116]

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element of a good deal of constitutional doctrine." (citations omitted)). It is true that the Supreme Court has shifted its views on Establishment Clause matters since *McCreary County*, but if anything there are indications that the Court is likely to place *more* emphasis on the government's purpose in finding violations of the Establishment Clause, rather than less. In OT 2019, the Court is considering Espinoza v. Montana Department of Revenue, No. 18-1195, which raises the issue of the constitutionality of a school vouchers program that excludes religious schools. At oral argument, Justice Alito suggested that the state would violate the Establishment Clause if it does something for an unconstitutional reason, even if it is doing something it could constitutionally do for a good reason. Official Oral Argument Transcript, Espinoza v. Montana Department of Revenue, No. 18-1195, at 18, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1195_g314.pdf. *See also id.* at 43–44 (Justice Kavanaugh discussing the question of whether provisions like Montana's barring aid to religious schools were "rooted in—in grotesque religious bigotry against Catholics" and opining that "was the clear motivation for this").

112. *Hialeah*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment) ("As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body . . . .").

113. *McCreary Cty.*, 545 U.S. at 861 ("Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent.").

114. *Id.* at 862 (citing Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 223–24 (1963)).

115. *Id.* (citing Edwards v. Aguilard, 482 U.S. 578, 586–88 (1987)).

116. *See also* Rogers v. Lodge, 458 U.S. 613 (1982) (upholding lower court findings that a county's at-large voting for its Board of Commissioners was maintained with a discriminatory intent in violation of the Equal Protection Clause, and rejecting Justice Stevens's argument in dissent that it should not consider the subjective intent of government officials in enacting policies). Many of the Justices have eschewed the use of legislative history in recent years, following Justice Scalia's lead and his criticisms of the validity of legislative history. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring in part and concurring in the judgment). That critique is strongest against the indiscriminate use of committee reports which may only loosely, if at all, reflect Congress' intent. *Id.* at 98–99 ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction."). On the other hand, when actual statements of legislators support the conclusion that they acted on the basis of animus or intolerance, that history is powerfully relevant to any constitutional inquiry in which discriminatory purpose is the

Legislative purpose has, of course, been an explicit prong of the Court's Establishment Clause test for decades: under *Lemon v. Kurtzman*, a government action must "have a secular legislative purpose."[117] And even under the "endorsement" test that the Court has sometimes employed in lieu of (or as a supplement to) *Lemon*,[118] the Court investigates purpose as a key part of determining whether a "reasonable observer" would perceive the government action to be an endorsement of religion.[119] If it is possible to discern legislative purpose and make it the basis for Establishment Clause decisions, there is no reason it cannot be done so when the claim revolves around the Free Exercise or Free Speech Clauses of the First Amendment.

The Court has made purpose analytically significant even in areas of constitutional law where it is not an explicit prong of a test. For example, a state's purpose to provide advantages to its own businesses over out-of-state entities can be the basis for declaring its actions a violation of the Dormant Commerce Clause.[120] And in Fourteenth Amendment doctrine, a finding of discriminatory purpose is required for a plaintiff to prove a violation of the Equal Protection Clause, as disparate impact alone is not enough.[121]

Thus, there is substantial support for the proposition that a legislature's illegitimate purpose is either central or at least relevant to constitutional decision-making.[122] Since religious intolerance voiced

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focus, including—as discussed earlier—viewpoint-based discrimination under the First Amendment, endorsement of religion under the Establishment Clause, or racial or other bigotry under the Equal Protection Clause.

117. 403 U.S. 602, 612 (1971).

118. *See* Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."), *abrogated in part*, Town of Greece v. Galloway, 572 U.S. 565, 579–80 (2011).

119. *Id.* at 630 (O'Connor, J., concurring) (defending the endorsement test as workable in practice in part because of its reference to whether a reasonable observer would find that the government action endorses or favors one religion).

120. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977) (noting that, while it was unnecessary to decide whether a North Carolina statute that discriminated against Washington apples was enacted with a discriminatory purpose, there were "indications in the record" that the statute's "discriminatory impact on interstate commerce was not an unintended byproduct" but actually the state's purpose).

121. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

122. Although it did not involve a legislature's actions, the same basic principle was also on display in Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down a voter-passed initiative as a violation of the Equal Protection Clause). As I discussed earlier, a central feature of the Court's analysis was that Amendment 2 was motivated by animus, a conclusion that the Court based on how "discontinuous" Amendment 2's "sheer breadth" was with the reasons offered for it.

and acted upon by members of the Colorado Civil Rights Commission was critical to the constitutionality of the Commission's actions, similar intolerance should also be relevant to the constitutionality of legislative action. The question that remains is what is necessary to insulate a law from being struck down because of anti-religious hostility on the part of some or all of the members of the legislature.

III. A MODEL LEGISLATIVE PROCESS: HOW COMPROMISE TILTS THE CONSTITUTIONAL BALANCE

Given that courts should consider legislative purpose when assessing a law's constitutionality, legislators must be aware of potential scrutiny when drafting anti-discrimination laws.[123] Of course, the simplest piece of advice for a legislature aiming to protect its handiwork from accusations of anti-religious intolerance is not to engage in anti-religious intolerance. Explicit comments manifesting hostility to religion are the most direct evidence that a court would use to find forbidden motives.

But that is not the end of the story. The safest harbor for an anti-discrimination law comes from taking steps in the legislative process to affirmatively show *respect* for religious views. Two legislatures have provided prevalent examples as to how this might look: Utah in 2015 when it attempted to provide statewide protection against housing and employment discrimination on the basis of sexual orientation and gender identity, and Kentucky attempting to do the same in 2019.

Before embarking on that discussion, it is worth pausing to acknowledge that some supporters of LGBTQ rights, and of the laws that seek to protect them, have questioned the legitimacy of religious objections and argued that the Court was wrong in *Masterpiece Cakeshop* to give any currency to religious beliefs that would consign sexual minorities to unequal status.[124] While I am sympathetic to this

123. It is worth noting that even if Justice Scalia's objection in *Hialeah* to looking at legislative purpose has merit and may lead some courts to disregard purpose and instead look only at whether a statute discriminates on its face, it would still be prudent for legislators to avoid creating a legislative record that demonstrates anti-religious animus. After all, they cannot be certain what judges will deem relevant in a challenge to a statute, and there is little, if any, reason to take the risk that anti-religious statements in the legislative history will have the same effect they did in *Masterpiece Cakeshop*.

124. *See* Stephen M. Feldman, *Having Your Case And Eating It Too? Religious Freedom and LGBTQ Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 38–39 (2018) ("[D]iscrimination against a marginalized group or its members, such as LGBTQ individuals, inevitably undermines the standing of that group and its members in the political community. Therefore, discrimination

argument, it is clear that the Supreme Court majority is not. The Court interprets the Constitution to require that governments balance competing equality and religious liberty interests in a way that avoids religious intolerance. In other words, religious beliefs and practices—even anti-gay ones—are worthy of constitutional protection. This is precisely because they are religious, and religion holds status as a constitutional value expressed in the Free Exercise Clause.[125] In short, compromise is a constitutional imperative.

A. The "Utah Collaboration": Finding a Compromise Between Anti-Discrimination Norms and Religious Values

In 2015, the Utah Legislature passed SB 296, which added protections for sexual orientation and gender identity to the state's existing Antidiscrimination and Fair Housing Acts.[126] The passage of SB 296 was the culmination of work undertaken by the LGBT advocacy group Equality Utah, which in 2004 became principally responsible within the statewide organizational structure for "draft[ing] legislation and coordinat[ing] lobby efforts to ensure its passage."[127] The outcome came as a surprise to some given the landscape in Utah and elsewhere. Utah is one of the most conservative states in the country, with a Republican-dominated legislature.[128] Nationwide, 2015 was dominated

against same-sex couples and LGBTQ individuals, even if arising from religious beliefs, cannot be deemed of constitutional value.").

125. *See* Sam Marcosson, *The Special Status of Religion Under the First Amendment . . . And What It Means For Gay Rights and Antidiscrimination Laws*, *in* MORAL ARGUMENT, RELIGION, & SAME-SEX MARRIAGE 135–36 (Gordon A. Bapst, et al., eds., 2009) (arguing that "religious arguments are special in our discourse," because the Religion Clauses of the First Amendment serve a "constitutive function—defining the core values and shared assumptions that govern the ways in which we related to each other").

126. Section 5, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-106(a)(i)(I & J) (West 2019) (amending UTAH CODE ANN. 1953 § 34A-5-101 (West 2019)); *see Nondiscrimination*, EQUALITY UTAH, https://www.equalityutah.org/issues/nondiscrimination ("On March 12, 2015, Governor Herbert signed SB 296 into law. This milestone legislation added the words 'sexual orientation' and 'gender identity' to Utah's Anti-Discrimination and Fair Housing Acts, which has helped protect LGBTQ Utahns against discrimination at work and in the housing market.").

127. *See Mission and Vision*, EQUALITY UTAH, https://www.equalityutah.org/about/mission-and-vision.

128. *See* Mark Saal, *One Year Later, Utah LGBT Anti-discrimination Law Continues to Resonate*, OGDEN STANDARD-EXAMINER (June 17, 2016), https://www.standard.net/news/one-year-later-utah-lgbt-anti-discrimination-law-continues-to/article_a69fb281-1757-52c7-97baa20e387fca07.html (quoting State Senator Stuart Adams noting that "it's no secret" Republicans hold 87 of 104 seats in the Utah Legislature).

by "anti-gay" bills in state legislatures rather than "pro-gay" ones.[129] As a result, "Troy Williams [the Executive Director of Equality Utah] likened [the bill] to an earthquake. [State Senator] Stuart Adams called it nothing short of a miracle."[130]

This feat required, more than anything, a deliberate strategy of compromise on the key question of how to balance protection from housing and employment discrimination against the religious tenets of some employers and housing providers.[131] This was a particularly sensitive issue because of the Mormon Church's political influence in Utah[132]—specifically, its involvement in the debates over SB 296.[133]

To strike this balance, SB 296 included sections that carved out exemptions for religious reasons and Boy Scout troops, protected religious expression, carefully compromised on transgender rights, and provided for non-severability. First, Section 1(i)(ii) was the most direct nod towards ensuring that the bill would not infringe on protected religious liberty interests. This section exempted from the definition of "employer" any "religious corporation sole, a religious association, a religious society, a religious educational institution, or a religious

129. *Id.* ("Troy Williams, executive director of the LGBT rights group Equality Utah, says the measure was the only 'pro-LGBT' bill of 2015, while there were 80 bills he described as 'anti-LGBT' proposed throughout the country.").

130. *Id.*

131. One element of compromise was built into the scope of SB 296 itself: it covered housing and employment, but not public accommodations. *See LGBT Non-Discrimination in the States: Utah*, FREEDOM FOR ALL AMERICANS, https://www.freedomforallamericans.org/category/states/ut/ ("Since 2015, Utah has protected people from discrimination in housing and employment on the basis of sexual orientation and gender identity. However, these non-discrimination laws do not cover public accommodations.").

132. *See* Lee Davidson, *Who Has a Bigger Supermajority Than Even Republicans in Utah's Legislature? Latter-day Saints*, SALT LAKE TRIB. (Jan. 22, 2019), https://www.sltrib.com/news/politics/2019/01/21/who-has-bigger/ ("Nine of every 10 legislators are members of The Church of Jesus Christ of Latter-day Saints."). LDS members had an overwhelming 91–13 majority of LDS members in the Legislature beginning in 2019, but in fact that represented an *increase* by one of the number of non-LDS members who had been in the Legislature as of 2016. *Id.* By any measure, the LDS influence in the Utah Legislature is vast.

133. *See* Saal, *supra* note 128 ("A common criticism is that the LDS Church is too involved with the political process in Utah. Although Adams insists the church rarely gets directly involved with the laws in the state, he said this anti-discrimination law was a notable exception."); Michelle L. Price, *Mormon Church Backs Utah LGBT Anti-Discrimination Bill*, BOS. GLOBE (Mar. 5, 2015), https://www.bostonglobe.com/news/nation/2015/03/04/mormon-church-backs-utah-lgbt-anti-discrimination-bill/t4WJzYlHWo1JR0cdQ61gxJ/amp.html ("Utah lawmakers introduced a landmark bill Wednesday that bars housing or workplace discrimination against gay and transgender individuals, while protecting the rights of religious groups and individuals. The measure has a rare stamp of approval from the Mormon church and appears likely to pass in Utah, where the church is based and many state lawmakers and the Republican governor are members of the faith.").

leader, when that individual is acting in the capacity of a religious leader."[134]

Second, SB 296 also exempted the Boy Scouts,[135] who at the time banned gay Scout leaders.[136] The decades-long importance of the Boy Scouts to the LDS Church, certainly up to and including 2015, can hardly be overstated.[137] It was a priority for the legislature to ensure that any statewide antidiscrimination law would not be used to upset the ability of the Scouts to operate or compel the organization to change its policies—as shown by the fact that when the Scouts did later eliminate the ban, the LDS ended its more than 100 year old affiliation with the Scouts.[138]

In perhaps the clearest demonstration of the Legislature's solicitude for religion, SB 296 went out of its way to protect the expression of religious views in the workplace. It did so in two ways, one more significant than the other. Section 9 stated, "This chapter may not be interpreted to infringe upon the freedom of expressive association or the free exercise of religion protected by the First Amendment of the United States Constitution and Article I, Sections 1, 4, and 15 of the Utah Constitution."[139] This provision is largely symbolic, since if anything in the chapter *did* infringe on constitutionally protected free exercise of religion, it would be struck down on that basis or interpreted to avoid the constitutional infirmity. Either way, the infringement would not occur.

Section 10, however, was more meaningful and provided deep protection for religious expression both inside and outside the

134. Section 1, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-102(1)(i)(ii)(A) (West 2019).

135. Section 1, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-102(1)(i)(ii)(C) (West 2019).

136. Price, *supra* note 133 ("Religious groups would be exempt . . . as would Boy Scouts of America, which has a ban on gay adult Scout leaders.").

137. *See* Laurie Goodstein and Christine Hauser, *Mormon Church Ends Century-Old Partnership With Boy Scouts of America,* N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/us/boy-scouts-mormon-church.html ("The Mormon Church and the Boy Scouts of America formed a partnership 105 years ago based on shared beliefs in God, country and the necessity of teaching morals and responsibility to boys. The groups became so intertwined that one of every five Boy Scouts in the United States is Mormon, and all Mormon boys were expected to participate in scouting.").

138. *Id.* (describing LDS's decision to "sever[] ties with the Boy Scouts and . . . design its own youth programs that could be implemented in its congregations around the world," in part because "the two organizations . . . had begun charting different paths," including LDS disagreement with "the Boy Scouts . . . end[ing] its ban on openly gay adult leaders").

139. Section 9, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-111 (West 2019).

workplace. The first part of Section 10 guaranteed a worker the right to "express [his or her] religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace."[140] The second part of Section 10 was even more striking: it barred employers from taking adverse employment actions against employees or applicants for their "lawful expression or expressive activity *outside of the workplace* regarding the person's religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer."[141] The Utah legislature was deeply committed to protecting workers with religious beliefs that may differ from the employer's, including, for example, opposition to marriage equality, whether the expression of those beliefs came within or out of the workplace.

Next, Sections 7 and 8 added provisions that gave employers leeway in structuring their workplace policies, which some would exercise in fulfillment of their religious scruples. Section 7 provided:

> This chapter may not be interpreted to prohibit an employer from adopting reasonable dress and grooming standards not prohibited by other provisions of federal or state law, provided that the employer's dress and grooming standards afford reasonable accommodations based on gender identity to all employees.[142]

This was a carefully drawn compromise on an issue that has been a lightning rod when it comes to discrimination based on gender identity: whether an employer may prohibit or strictly limit a transgender employee's ability to transition by presenting him or herself in clothing and grooming manners that conform to their gender.[143] This provision was not as favorable from the transgender employee's point of view as provisions like California's, which states:

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140. Section 10, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953, § 34A-5-112(1) (West 2019).

141. *Id.* § 34A-5-112(2) (emphasis added).

142. Section 7, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953, § 34A-5-109 (West 2019).

143. *See* Mary Anne Case, *Legal Protections For the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1367–72 (2014) (discussing parallel, though not identical, language in the proposed federal Employment Nondiscrimination Act (ENDA) to balance right to gender expression against permitting employer grooming and dress policies).

> Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, *provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity or gender expression*.[144]

While both the Utah and California laws permit employers to enforce appearance requirements, California's gives employees the explicit right to "appear or dress consistently with the employee's gender identity or expression," while Utah's provides only the more ambiguous right to a reasonable accommodation. In this way, Section 7 struck a balance that achieved as much as the LGBTQ coalition believed it could realistically attain while satisfying the objections of those who either favored employer prerogatives or had concerns about permitting freedom of gender expression in the workplace.[145]

Section 8 struck a similar balance on another controversial issue in the debate over transgender rights: restrooms. It provided:

> This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing

144. Cal. Gov't Code § 12949 (West 2019).

145. The "reasonable accommodation" provision mirrors the language used in the federal Americans With Disabilities Act (ADA). *See* 42 U.S.C. § 12112(b)(5) (defining "discrimination on the basis of disability" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"). Although it cannot be said with certainty that the language in the Utah law would be applied in the same way it has under the ADA, the fact that parallel language is used in similar statutory schemes (anti-discrimination laws) suggests that outcomes under the ADA provide some clues about how these provisions would be interpreted in Utah and elsewhere. In particular, it suggests that Section 7 will provide meaningful opportunity for employees to claim that they have been denied accommodations from otherwise permissible dress and grooming standards, but that their success will come more through negotiating with employers to reach agreed-upon compromises than through litigation. *See* Sharona Hoffman, *Settling The Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 327 (2008) (noting that the extreme lack of success for plaintiffs in ADA cases may occur because "judges are simply uncomfortable placing such [accommodation] demands on employers, and, therefore, rarely rule in the plaintiffs' favor"); *id.* at 334–36 (reporting on studies showing that employers often provide accommodations without any dispute or as part of conciliation process). This, in turn, indicates that the Utah compromise is just that: a compromise that will allow both religious employers and employees who seek accommodations for their gender identity and expression to have substantial opportunities to have their interests considered. In short, there is nothing in the ADA experience that suggests the accommodation requirement will "swallow the rule" allowing employers to set dress and grooming standards. It will simply make that rule less absolute.

> facilities, provided that the employer's rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.[146]

Just as with Section 7, this provision allowed employers to maintain policies relating to sex-specific facilities, but required them to provide reasonable accommodations, which are not defined. In essence, both sections left it to courts to draw the line between the policies employers are free to adopt and the ways in which they must adjust those policies to afford equal protection to their transgender employees.

A final key compromise was contained in Section 3 of SB 296,[147] where the Legislature asserted in a definitive non-severability clause that the statute's balance between anti-discrimination protections and religious freedom had to be preserved:

> This bill is the result of the Legislature's balancing of competing interests. Accordingly, if any phrase, clause, sentence, provision, or subsection enacted or amended in this chapter by this bill is held invalid in a final judgment by a court of last resort, the remainder of the enactments and amendments of this bill affecting this chapter shall be thereby rendered without effect and void.[148]

The Utah Legislature was determined to not only provide robust protections for religion, but to ensure that if those protections did not remain in place, the sections barring discrimination would not survive either. It is not difficult to imagine the scenario in which this might happen. Imagine a business owner asserting the statute's religious exemption in a motion to dismiss a suit alleging that an employer refused to hire the plaintiff because she is a lesbian. The plaintiff could well assert that the exemption constitutes an unconstitutional establishment of religion on the theory that it favors a religious basis for an employment practice over non-religious reasons for the same practice. Section 3 of SB 296 means that such an argument would be unavailing; even if the plaintiff prevailed on the constitutional argument, the end result would be that the substantive protections she seeks to invoke would be "rendered without effect and void."[149] It is

146. Section 8, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-110 (West 2019).

147. Section 3, 2015 Utah Laws Ch. 13 (S.B. 296), *codified at* UTAH CODE ANN. 1953 § 34A-5-102.7 (West 2019).

148. *Id.*

149. Legislators employ severability clauses (provisions that instruct courts to preserve the constitutional portions of a statute when striking down another section or sections) in statutes much more frequently than the converse non-severability clause (calling for the whole statute to

thus unlikely that any plaintiff would make that argument, and instead would contend that the defendant in her case is simply ineligible for the exemption.

The sections of SB 296 aimed at protecting religious views may not have gotten the balance exactly right. My own view is that SB 296 went further than a state legislature should to insulate an anti-discrimination law from an accusation of anti-religious animus. In particular, the Boy Scouts provision of Section 1 was unnecessary because it exempted a secular organization on account of the religious beliefs of a powerful interest group in the state and in the legislature. Such an exemption is qualitatively distinct from an exemption for a religious entity and is much harder to defend as the product of solicitude for religious freedom.[150] The point, however, is not whether the specifics of the Utah law draw the right balance. The point is the importance of the effort to draw a balance, both to insulate the resulting legislation from constitutional attack under the *Masterpiece Cakeshop* paradigm, and because of the political importance of balance for achieving legislative success. It is apparent that the Utah legislature's actions in enacting SB 296 are the precise opposite of the anti-religious intolerance that bothered the Court in *Masterpiece Cakeshop*. Indeed, it is unimaginable that a court examining SB 296 would—or even could—rule that the law is tainted by animus against religion. Some employers with religious beliefs might be strongly opposed to being compelled to hiring a lesbian or a transgender applicant, but it would be futile for them to argue that the legislature showed disrespect, much less intolerance, for their position.

B. Kentucky Drafting & Lobbying: Seeking Common Ground

Unlike Utah's law, Kentucky's statewide anti-discrimination law[151] does not cover sexual orientation or gender identity. For well over a decade, the principal goal of the state's Fairness Campaign[152]

be struck down if any part is), as Utah enacted in Section 3. Nevertheless, the technique is not unheard of. *See* Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 904 (1997) (arguing that courts should show "greater deference" to inseverability clauses than to severability clauses).

150. *Compare with* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 190 (2012) (interpreting Title VII's "ministerial exemption" broadly, but applying it specifically to "government interference with an internal church decision that affects the faith and mission of the church itself").

151. KY. REV. ST. ANN. § 344.040 (2019).

152. *See About Us*, FAIRNESS CAMPAIGN, https://www.fairness.org/about-us/ ("The Fairness Campaign is Kentucky's LGBTQ advocacy organization founded in 1991 by 10 Louisvillians. Its

("Fairness") has been to change this omission by persuading the state's General Assembly to include sexual orientation and gender identity within the law's protection.[153] While Fairness has been successful in persuading city officials in eighteen jurisdictions to pass local ordinances,[154] these laws together protect less than 30% of the state's residents from sexual orientation and gender identity discrimination.[155]

For many of the years Fairness lobbied the General Assembly to pass a statewide law it could not even get a hearing from a legislative committee[156] and only garnered a limited number of sponsors in either chamber.[157] Although there has been progress, it has been slow, and the organization's most important accomplishments have often been in stopping the passage of anti-gay bills rather than advancing civil rights legislation.[158] Thus, it has been imperative for Fairness and its leaders to strategize ways to remove barriers to passage of certain laws and move ever closer to success.

One of these barriers is the same as the one that had to be navigated in Utah: the fear that compelling non-discrimination on the basis of sexual orientation and gender identity would infringe on the rights of religious employers and housing providers.[159] For this reason, the same

primary goal is comprehensive civil rights legislation prohibiting discrimination on the basis of sexual orientation and gender identity and to dismantle systemic racism.").

153. *See LGBT Non-Discrimination Laws*, FAIRNESS CAMPAIGN (Nov. 9, 2017), https://www.fairness.org/issues/lgbtq-non-discrimination-laws/ (noting that "it is still legal in most of Kentucky and the United States to discriminate against lesbian, gay, bisexual, transgender, and queer (LGBTQ) people," and that "[t]he Fairness Campaign advocates for passage of a Statewide Fairness Law in the Kentucky General Assembly").

154. *See* Sarah Ladd, *Woodford County Becomes the First Kentucky County in 20 Years To Pass A Fairness Ordinance*, LOUISVILLE COURIER-JOURNAL (Jan. 14, 2020), https://www.courier-journal.com/story/news/politics/2020/01/14/woodford-county-kentucky-passes-fairness-ordinance/4471655002/ (noting that Woodford County is "now the 18th municipality in the commonwealth with protections for LGBTQ persons").

155. *See* Chris Hartman, *Until We Reach Equality, The Fairness Campaign Will Continue its Fight*, LOUISVILLE COURIER-JOURNAL (Jan. 25, 2019), https://www.courier-journal.com/story/opinion/2019/01/25/lgbtq-rights-fight-fairness-kentucky-continues/2668983002/.

156. *Id.* (noting that the statewide bill has never received a vote and has been the subject of only two "informational hearings" before legislative committees).

157. *See Legislative Action*, FAIRNESS CAMPAIGN, https://www.fairness.org/legislativeaction/ (noting that in the 2019 legislative session, the bill had a record number of co-sponsors, but those records were only eight in the 38 member Senate and 21 in the 100 member House).

158. *See* Hartman, *supra* note 155 ("Each year, including this one, we fight against a flurry of anti-LGBTQ laws in Frankfort, including invasive "bathroom bills" targeting transgender kids and "license to discriminate" laws that could eradicate Fairness Ordinances where we have them.").

159. *See* Richard Nelson, *Fairness Laws OK Intolerance, Create More Problems Than They Solve*, LEXINGTON HERALD-LEADER (June 22, 2015), https://www.kentucky.com/opinion/op-ed/article44606205.html (arguing against passage of anti-discrimination protections on the basis

imperative that presented itself in Utah faces the Fairness Campaign in Kentucky: it must demonstrate a sensitivity and respect for religious concerns, which will both make passage of the bill easier and—in light of *Masterpiece Cakeshop*—insulate it from later attack on the basis of alleged anti-religious intolerance.

I have already explained my view that *Masterpiece Cakeshop* makes compromising with religious objections important, even if it may be anathema to many proponents of LGBTQ civil rights.[160] In a state like Kentucky, compromise is also a political imperative, just as it was in Utah.[161] That was why members of the General Assembly worked with leaders of the Fairness Campaign to make the bill[162] less vulnerable to claims that it would infringe on religious beliefs and practices.[163] The core idea was to merge the Fairness bill with elements of a religious freedom bill that was introduced in 2018,[164] proposing what amounted to a "grand compromise," one that could garner support on both sides. Religious conservatives would find the opportunity to bolster protections for religious liberty appealing, even if some argued they were unnecessary in light of Kentucky's existing Religious Freedom Restoration Act.[165]

The primary virtue of a grand compromise was, of course, political. Neither side could get what it wanted from the legislature, which had rejected the religious freedom bill and the Fairness bill separately. If both sides supported a merged bill, however, it could pass the General Assembly, even if neither side would get everything it wanted.[166] Moreover, beyond the political calculation, *Masterpiece Cakeshop*

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of sexual orientation and gender identity because it would affect "employers publicly known for embracing high moral standards in their workplace," and it lacks an exemption for "clergy operating in pastoral capacity outside their church facility").

160. *See supra* text accompanying notes 124–125.

161. *Id.*

162. H.B. 164, 2019 Gen. Assemb., Reg. Sess., (Ky. 2019) (introduced).

163. *See* Personal Interview with State Representative Jason Nemes (Mar. 15, 2019) (describing proposal to begin work on a "Grand Compromise" to achieve passage of an antidiscrimination bill that the Fairness Campaign has been seeking, modified to include religious protections that conservative groups had been lobbying to pass).

164. H.B. 372, Gen. Assemb., 2018 Reg. Sess., (Ky. 2018) (died in committee).

165. KY. REV. ST. ANN. § 446.350 (2019).

166. This carries echoes of the Utah effort, in which both sides recognized that they could achieve their goals if they did not insist on getting everything they wanted. *See* Saal, *supra* note 128 ("LDS Church spokesman Michael Purdy said these sorts of issues are so polarizing that it becomes a zero-sum game—one side has to lose everything in order for the other side to gain anything. 'And we just came into this with a different idea,' he said. 'It was much better for everybody to get 90 percent of what they needed, than for somebody to get zero and another side get 100 percent.'").

gives proponents of the Fairness bill an additional reason to compromise: showing solicitude for religious beliefs and practices helps insulate a law from attacks alleging that it promoted or was based on religious intolerance.[167]

The remaining question is what language might be offered to enlist the support of those who have previously been unwilling to support the bill, and to craft a bill that shows solicitude for religious objections. Much of this language would be familiar in light of the Utah provisions discussed earlier.[168] To begin with, the bill might state that the term "employer" "does not include a religious organization or association, a religious society, or a religious leader, when that individual is acting in

167. As of this writing, the proposed compromise legislation has not yet been passed, or even formally introduced, in the General Assembly. Interview with Rep. Nemes, *supra* note 163. In 2019, this was due in part to a peculiarity in the Kentucky legislative calendar. The General Assembly meets for only 30 legislative days in odd-numbered years, KY. CONST., § 36(1), and a more robust 60 days in even-numbered years. *Id.* § 42. It is thus more difficult to pass legislation in an odd-numbered year like 2019, especially legislation requiring delicate negotiation and compromise. In this case, the difficulty was enhanced by reasonable differences of opinion over how best to navigate the legislative labyrinth. One view was that it would be best to introduce the compromise version of the Fairness bill from the outset (i.e., include the religious exemptions in the initial text, making it different from the bill as it has been introduced in past sessions). This would enable the sponsors, they hoped, to garner a record number of co-sponsors, have an impressive array of community groups and leaders issue endorsements, and use that momentum to spur the bill's passage. A second group, however, believed that a better strategy would be to introduce the Fairness bill with the provisions it had in the past and wait until a committee hearing to introduce amendments. The concern was that if the amended version became the starting point and did not pass, it would in future years be the starting point, with even more compromises demanded by opponents. This would weaken the bill's anti-discrimination protections and perhaps lead supporters to abandon it as not worth the effort. *See* Personal Interview with Chris Hartman, Director, Kentucky Fairness Campaign (February 28, 2020). The upshot of all this was that, while the core Fairness bill was introduced in both the House, H.B. 164, Gen. Assemb., 2019 Reg. Sess., (Ky. 2019) (introduced), and the Senate, S.B. 166, Gen. Assemb., 2019 Reg. Sess., (Ky. 2019) (introduced), nothing more happened in the 2019 session. The bill did not include the additional language reflecting an attempt to deal with religious-based objections, nor did it receive a hearing where amendments to add such language could have been introduced to garner support. The legislators who support the end goal—whichever strategy they favor—remain optimistic that the concept of combining the Fairness bill with protective religious freedom language, somewhat akin to the Utah approach, could do much to increase the ultimate chances of success in future sessions. *See* Interview with Rep. Nemes, *supra* note 163. The 2020 session has only just begun, and decisions about when to introduce the bill, and in what form, have not yet been made.

168. The provisions I will outline are offered in the context of consideration of a Kentucky bill, but would be useful in seeking a compromise outcome in any of the 26 states that currently lack a statute barring discrimination on the basis of sexual orientation and gender identity. *See Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Jan. 30, 2020), https://www.lgbtmap.org/equality-maps/non_discrimination_laws (surveying the states that do and do not provide statutory protections).

the capacity of a religious leader."[169] In addition, to deal with the fact that the Fairness bill includes protection against discrimination in services provided by places of public accommodation, the compromise would define such places to "not include a religious organization or association, or a religious society."

Since definitions of religious leaders include those who represent "religious organizations," and since the compromise being discussed would require that the definition of public accommodations *exclude* "religious organizations," it is important to provide a statutory definition of a religious organization. The bill might do that by saying:

> For purposes of this chapter, "religious organization," "religious society," and "religious association" include, but are not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, and other entities whose principal purpose is the study, practice, or advancement of religion.

Critically, the language would state that "a for-profit corporation shall not qualify as a 'religious organization,' 'religious association,' or 'religious society.'"

This limitation on religious exemptions is essential so that the exemptions do not entirely swallow the anti-discrimination rule created by the statute. As Professors NeJaime and Siegel point out, at the same time that the Court in *Masterpiece Cakeshop* demanded that government act with respect for religious beliefs, the Court also made clear that the framework of antidiscrimination laws applies equally to sexual orientation and gender identity as it does to race.[170]

The bill would also provide protection for religious educational institutions to "hire and employ persons of a particular religion," so long as the institution meets either of two criteria: the institution is "in whole or in substantial part owned, supported, controlled, or managed

169. "Religious leader," in turn, would be defined as "an individual who is an authorized representative of a religious organization as defined in this chapter, including a member of clergy, a minister, a pastor, a rabbi, an imam, or a spiritual advisor."

170. Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 208 (2018) (quoting Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728 (2018)) (footnotes omitted) ("The Court, then, does not endorse a two-tiered system of antidiscrimination law in which some groups get full protection and others get less. Instead, it adopts one public accommodations framework in which government '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.'").

by a particular religious corporation, association, or society," or the "curriculum of the school . . . is directed toward the propagation of a particular religion."

Like the Utah bill, an explicit non-severability clause would be necessary to assure those on both sides of the issue that, if the sections that are important to them are struck down, they will not be left only with the unpalatable parts. The Utah language could easily be utilized in a parallel Kentucky bill:

> This bill is the result of the General Assembly's careful balancing of competing interests. Accordingly, if any phrase, clause, sentence, provision, or subsection enacted or amended in this chapter by this bill is held invalid in a final judgment by a court of last resort, the remainder of the enactments and amendments of this bill affecting this chapter shall be thereby rendered without effect and void.

Adding provisions like these to the Fairness bill in Kentucky would do much to arm its defenders in court with arguments that, far from reflecting anti-religious bias, the law demonstrates the General Assembly's considered desire to avoid infringing on or burdening religious practice.

It is important to stress that I am *not* arguing that such language is *necessary* to defend the Fairness bill against constitutional attack. In this respect, I agree with Professors NeJaime and Siegel that "the requirement of evenhandedness [announced in *Masterpiece Cakeshop*] does not translate into a mandate for exemptions."[171] While I agree with Professor Hart[172] in principle that the First Amendment's Free Speech Clause protects at least some providers of public accommodations—those whose services can persuasively be shown to send a message—he is far too vague in discussing the breadth of that category and how such protection would affect the effectiveness of antidiscrimination laws. As Professors NeJaime and Siegel suggest, "Often, advocates seek such broad exemptions when they have the political power to extract them.

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171. *Id.* at 204; *see also* Sager & Tebbe, *supra* note 109, at 175 ("[T]he Court reaffirmed that religious actors are not constitutionally entitled to exemptions from public accommodations laws under normal circumstances. These laws, which protect members of vulnerable groups against discrimination by those who choose to provide goods and services to the public, are too important to equal citizenship to allow for exemptions based on conscience."). *But see* James Hart, *When The First Amendment Compels An Offensive Result:* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 79 LA. L. REV. 419, 427–37 (2018) (arguing that compelling a baker to prepare a cake for a same-sex wedding constitutes compelled speech in violation of the First Amendment, especially when the compulsion is not imposed on a viewpoint-neutral basis).

172. Hart, *supra* note 171, at 427–37.

But *Masterpiece Cakeshop* suggests that *our Constitution does not require these broad exemptions*."[173] Instead, I am arguing that such compromises may be politically necessary to ensure an antidiscrimination bill's passage, and that they can be important insurance to such a bill's constitutionality under some conditions. Posit a situation, for example, in which a handful of supporters of the bill make comments on the floor or in a committee hearing, disparaging the religious views of opponents who espouse anti-gay or anti-transgender views. It is not difficult to imagine this scenario unfolding; there is a particularly high risk that it would arise in "red states." Debates over issues relating to LGBTQ rights typically bring out strong condemnations, often from religious sources, of the so-called "gay lifestyle."[174] Understandably, these comments often produce equally strong statements from supporters of LGBTQ-friendly legislation lashing out at their opponents—the very sort of commentary that can later be cited as evidence of religious intolerance.[175]

Such comments could supply the basis for a claim, parallel to the one made in *Masterpiece Cakeshop*, that the bill was the product of anti-religious intolerance. In light of the ample precedent in which the Court has taken account of legislative purpose,[176] challengers of the law would have a powerful basis to argue that such expressions of legislative intolerance are just as damaging as the expressions of

173. NeJaime & Siegel, *supra* note 170, at 221–22.

174. *See, e.g.*, Tina Indalecio, *Persuaders of Hate: Anti-Gay Rhetoric From the Christian Reich,* PSYCHOLOGY TODAY (May 4, 2010), https://www.psychologytoday.com/us/blog/curious-media/201005/persuaders-hate-anti-gay-rhetoric-the-christian-reich (last visited Mar. 25, 2019) (detailing religious rhetoric "trying to link homosexuality to child molestation and to criticize activist groups, who in their eyes, are trying to promote the homosexual agenda"). As Indalecio notes, "Some fundamentalists have even asserted that the Scriptures allow them, since they're on the side of righteousness, to mislead people intentionally." *Id.* (quoting Irvine, J.M., 13 The Gay and Lesbian Review Worldwide 15 (2006)).

175. It is for exactly this reason that proponents of a "persuadable middle" narrative have urged that a key dimension of winning support for LGBTQ rights (such as marriage equality) is to avoid anti-religious rhetoric; it is seen as evidence of intolerance in the eyes of those who might otherwise be sympathetic to arguments for LGBTQ rights. *See* Michael R. Woodford, et al., *The "Persuadable Middle" on Same-Sex Marriage: Formative Research to Build Support among Heterosexual College Students*, SEX RES. SOC. POL'Y at 9–12 (2012) (noting that those with neutral views on same-sex marriage are more likely to be religious than those who support it, and that "[p]urposeful outreach to students who . . . consider religion to be important in their lives may help to foster allies for same-sex marriage"); Mathew Stange & Emily Kazyak, *Examining the Nuance in Public Opinion of ProLGB Policies in a "Red State"*, SEX RES. SOC. POL'Y, at 9–10 (2016) (noting correlation between the strongest religious beliefs and opposition to same-sex marriage and/or support for civil unions only).

176. *See supra* note 111 (discussing *McCreary Cty.* and other cases in which the Court accorded substantial weight to legislative purpose in finding government action to be unconstitutional).

administrative intolerance were in *Masterpiece Cakeshop*. In such a scenario, those defending the law would be in a stronger position if they could point out that the substance of the law actually demonstrates an abiding respect for religious freedom. Of course, it would also be helpful if there is clear legislative history *apart* from the offensive comments, indicating the General Assembly's intent to achieve the sort of balance Justice Kennedy suggested in *Masterpiece Cakeshop* is the lynchpin of the analysis.[177] In short, a two-pronged approach that anticipates and heads off accusations of religious bias is critical: substantive compromise, and religious tolerance in the legislative process.

Adding provisions like these to the Fairness bill in Kentucky and similar states would do much to arm its defenders in court with arguments that, far from reflecting anti-religious bias, the law demonstrates the General Assembly's considered desire to avoid infringing on or burdening religious practice.

CONCLUSION

Masterpiece Cakeshop seems to reflect the Court's decision to put off for another day what it could not decide that day: the proper balance between anti-discrimination laws and claims of religious freedom to discriminate.[178] While it may be troubling that the Court was unable or unwilling to reaffirm its long-standing position that anti-discrimination laws are not subject to any sort of constitutionally-required religious exemption,[179] there is a silver lining. The Court

177. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018) ("The case presents 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."); *see also* NeJaime & Siegel, *supra* note 170, at 203 (arguing that the balance the Court drew in *Masterpiece Cakeshop* "reaffirm[ed] the public accommodations settlement forged over a half-century ago," and "recognize[d] that the government's interest in securing equal opportunity is as important as the government's responsibility to ensure neutrality in adjudication").

178. *See* Ira C. Lupu and Robert W. Tuttle, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*: A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions*, GEO. WASH. L. REV. (June 7, 2018), https://www.gwlr.org/masterpiece-cakeshop-a-troublesome-application/ ("The majority's emphasis in *Masterpiece* on government animus to Phillips's religious convictions . . . was an artifice that allowed the Court to avoid the substantive merits of the case.").

179. Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 n.5 (1968) (characterizing as "patently frivolous" the "defendants' contention that the Act was invalid because it 'contravenes

provided helpful guidance in how to insulate legislative action from claims of anti-religious bias or intolerance of the kind that doomed the Colorado Civil Rights Commission's enforcement effort. Careful attention to that guidance gives advocates for LGBTQ rights another reason, grounded in constitutional concerns, to do that which is politically savvy anyway.

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the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'").