

# MASTERPIECE CAKESHOP AND THE FUTURE OF RELIGIOUS FREEDOM

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## INTRODUCTION

Last term, the Supreme Court decided *Masterpiece Cakeshop*, one of several recent cases in which religious believers have sought to avoid the application of public accommodations laws that ban discrimination on the basis of sexual orientation.<sup>1</sup> Like most such disputes, the case involved a small business that declined, because of the owner's religious convictions, to provide a service for a same-sex wedding—in this case, Colorado cake designer Jack Phillips's convictions against designing and baking a cake for a gay couple, Charlie Craig and Dave Mullins.<sup>2</sup> In most of these cases, courts have been unwilling to exempt businesses from the anti-discrimination laws on religious grounds and have ruled in favor of the customers. One might have thought Jack Phillips would lose in

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1. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719 (2018). For other recent cases, see, e.g., *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018); *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018).

2. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

*Masterpiece Cakeshop* as well. Indeed, many observers were surprised that the Court had granted cert in his case at all.<sup>3</sup>

Somewhat surprisingly, though, the Supreme Court ruled in his favor, on the basis of an argument few observers had credited before the Court heard the case.<sup>4</sup> In a 7-2 opinion by Justice Kennedy, the Court held that, in deciding that Phillips's refusal to create a cake for a same-sex wedding violated the state's anti-discrimination laws, the Colorado Civil Rights Commission had violated Phillips's free exercise rights.<sup>5</sup> The Commission, the Court wrote, had failed to treat Phillips's religious convictions in a neutral and respectful way.<sup>6</sup> At least two of the commissioners had publicly disparaged Phillips's religious convictions and none of the other commissioners present had objected.<sup>7</sup> Moreover, the Commission had acted inconsistently in at least three prior cases involving other bakers who had refused, on grounds of conscience, to create cakes with anti-gay marriage sentiments. The Commission had ruled that those bakers had acted lawfully in refusing service. This inconsistency suggested that the state had not been neutral with respect to the substance of Phillips's convictions. Punishing Phillips for refusing, on grounds of conscience, to create a *pro*-gay marriage cake, while failing to punish other bakers who declined, on grounds of conscience, to create *anti*-gay marriage cakes, suggested that the state simply disfavored the content of Phillips's convictions.<sup>8</sup>

Because the Commission had failed to treat Phillips's religious convictions in a neutral and respectful way, the Court

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3. See Amy Howe, *Argument preview: Wedding cakes v. religious beliefs?*, SCOTUSBLOG (Nov. 28, 2017, 3:14 PM), <http://www.scotusblog.com/2017/11/argument-preview-wedding-cakes-v-religious-beliefs/> [<https://perma.cc/H643-JXRH>]

4. See Robert W. Tuttle & Ira C. Lupu, *Masterpiece Cakeshop—A Troublesome Application Of Free Exercise Principles By A Court Determined To Avoid Hard Questions*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions> [<https://perma.cc/3Z67-WWY4>] (“[M]ost observers believed that the Free Exercise Clause issues would not be crucial to the disposition of the case.”).

5. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

6. *Id.* at 1729.

7. *Id.* at 1729–30.

8. *Id.* at 1730–31. I discuss the Court's reasoning on this point further below. See *infra* pp. 720–21.

held, its action against him violated the Free Exercise Clause of the U.S. Constitution.<sup>9</sup> The Court stressed that future cases, in which state authorities had not demonstrated overt hostility to a claimant's religious convictions, might well reach a different result—a fact that Justice Kagan stressed in a concurring opinion.<sup>10</sup> *Masterpiece Cakeshop* thus does relatively little to resolve the conflict between anti-discrimination laws and the right of business owners to decline, out of sincere religious conviction, to provide services in connection with same-sex weddings.<sup>11</sup>

*Masterpiece Cakeshop* is nonetheless important for what it reveals about deeper cultural and political trends, all related, that will affect the future course of the law. Two cultural trends are important: religious polarization and an expanding concept of equality. Over the past two decades, American religion has become polarized between two groups, the Nones, who reject organized religion as authoritarian and hypocritical, especially with respect to sexuality, and the Traditionally Religious, who continue to adhere to organized religion and to traditional religious teachings, especially with respect to sexuality.<sup>12</sup> Each group views the other's values as threatening and incomprehensible. Neither is going away, and neither seems in a mind to compromise—including in commercial life.<sup>13</sup> This religious polarization has figured very prominently in the public's response to *Masterpiece Cakeshop* and similar controversies.

*Masterpiece Cakeshop* also reflects a second cultural trend, one that Alexis de Tocqueville—whose work runs like a red thread through our story—saw long ago: an expanding notion of

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9. *Masterpiece Cakeshop*, 138 S. Ct. at 1731–32.

10. *Id.* at 1732; *id.* at 1732–34 (Kagan, J., concurring).

11. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) (noting that the *Masterpiece Cakeshop* Court “ducked central questions” in the case).

12. On the Nones generally, see Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* (Robert Schuman Ctr. for Advanced Studies, Research Paper No. 2014/19, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2399470](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470) [<https://perma.cc/8AMF-H3AW>].

13. See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 183 (2014) (observing that, with respect to LGBT issues, “the marketplace itself has become a site of social contestation rather than a refuge from the culture wars”).

equality.<sup>14</sup> Increasing numbers of Americans endorse a capacious concept of equality—“equality as sameness”—that treats social distinctions, especially religious distinctions, as arbitrary and unimportant.<sup>15</sup> Asserting the importance of religious boundaries, as Jack Phillips did, seems unreasonable to growing numbers of our fellow citizens. Asserting such boundaries strikes them—as it did Charlie Craig and Dave Mullins, and at least some of the Colorado commissioners—as deeply insulting, an affront to human dignity. That so many of the actors in *Masterpiece Cakeshop* could not credit Jack Phillips’s assertions of good faith explains much of what happened in the case, and much of what is likely to happen in future cases.

Finally, *Masterpiece Cakeshop* reflects an important political trend: the steady growth of an activist state committed to the idea of equality as sameness. At both the federal and state level, administrative agencies work to promote equality in all areas of life. Their actions increasingly impinge on the Traditionally Religious, who face an expanding set of rules and policies, backed by serious sanctions, which promote new understandings of equality, particularly with respect to sex and gender. The actions of the Colorado Civil Rights Commission offer a very good example. Although state officials will not likely demonstrate the same overt hostility to traditional religious beliefs in future cases, they will likely remain committed to the same expansive view of equality. As a result, conflicts between our anti-discrimination laws, on the one hand, and the religious beliefs of millions of American citizens, on the other, will continue.

As Tocqueville famously observed, American political questions inevitably become judicial ones.<sup>16</sup> Conflicts like the one in *Masterpiece Cakeshop* will continue to find their way into

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14. On Tocqueville and equality, see *infra* at 731–32.

15. See Samuel Gregg, *Equality in Democracy: Tocqueville’s Prediction of a Falling America*, CNS NEWS (Feb. 6, 2017, 10:38 AM), <https://www.cnsnews.com/commentary/samuel-gregg/equality-democracy-tocquevilles-prediction-falling-america> [<https://perma.cc/S8LN-TKCR>].

16. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* I.ii.8, at 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840) [hereinafter *DEMOCRACY IN AMERICA*] (“There is almost no political question in the United States that is not resolved sooner or later into a judicial question”).

our courts. How will the courts resolve them? The law with respect to religious accommodations is currently something of a “patchwork.”<sup>17</sup> Different jurisdictions employ different tests in different circumstances. Nonetheless, the leading test remains the so-called “compelling interest” test, which holds that the government may impose a substantial burden on a person’s religious exercise only if the government has a compelling interest in doing so and has chosen the least restrictive means.<sup>18</sup> Notwithstanding *Masterpiece Cakeshop’s* somewhat unusual resolution, the compelling interest test will probably determine the outcome in most future cases.

But the compelling interest test presents significant difficulties.<sup>19</sup> The test turns controversies about religious accommodation into judgment calls, the outcomes of which depend, practically speaking, on the intuitions of the people doing the judging.<sup>20</sup> In a polarized society like ours, with deeply divergent understandings about the nature and value of religion and the scope of equality, intuitions about “substantial burden” and “compelling interest” vary widely from person to person—and from judge to judge.<sup>21</sup> The test makes it very hard to predict what result will obtain in any particular case and makes judges’ identity, background, and prior normative

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17. MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 149 (2016).

18. *See, e.g.*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488–89 (codified at 42 U.S.C. § 2000bb-1 (2012)). On the current status of the compelling interest test, see MCCONNELL ET AL., *supra* note 17, at 198. *See also* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 231 (2010). I discuss the compelling interest test further below. *See infra* pp. 745–47.

19. *See, e.g.*, *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (rejecting the compelling interest test for purposes of the Free Exercise Clause); *see also* William P. Marshall, *Bad Statutes Make Bad Law*, 2014 SUP. CT. REV. 71 (reviewing problems with the compelling interest test).

20. *See* Mark L. Movsesian, *The Powerful Headwinds Confronting Religious Freedom*, L. & LIBERTY (May 2, 2018), <https://www.lawliberty.org/2018/05/02/masterpiece-cakeshop-religious-freedom-nones/> [https://perma.cc/FC7F-LUTF].

21. In a related context, David Bernstein has written that the compelling interest test may only serve as “an empty vessel for the justices’ moral intuitions.” David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 167 (discussing freedom of association).

commitments signally important.<sup>22</sup> In short, the cultural and political trends I have identified—growing religious polarization, an expanded concept of equality, and an activist state—suggest that conflicts between anti-discrimination norms and the religious beliefs of millions of Americans will, if anything, grow more frequent and bitter and that courts will continue to have to resolve them. And the vague nature of the compelling interest test suggests that the ultimate legal resolution will remain unclear for a long time to come.

This Article proceeds as follows. Part I describes the Court's decision in *Masterpiece Cakeshop*. Part II explores the cultural and political trends I have identified and shows how the *Masterpiece Cakeshop* litigation reflects them. Part III concludes and ventures three predictions: conflicts like *Masterpiece Cakeshop* will grow more frequent and harder for our society to negotiate; the law in this area will remain unsettled and deeply contested; and the judicial confirmation wars will grow even more bitter and partisan than they already are.

One clarification at the start: this Article is analytical rather than normative. For what it is worth, *Masterpiece Cakeshop* struck me as a difficult case. But my goal here is not to argue the merits. Rather, I seek to illuminate the issues and make some predictions about the future course of the law. Those predictions may turn out to be wrong. But their correctness does not depend on one's views about which side should prevail in the clash of important values that *Masterpiece Cakeshop* represents: our society's commitments both to non-discrimination and to religious freedom.

## I. THE MASTERPIECE CAKESHOP DECISION

*Masterpiece Cakeshop* presents what has become a familiar pattern in American commercial life. A gay couple asks a vendor to provide services in connection with the couple's wedding—photography, flowers, invitations—which the

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22. See Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 393–94 (1994) (observing that the balancing contemplated by the compelling interest test “invites judges to put their personal values onto the scale”).

vendor refuses on the basis of his religious convictions.<sup>23</sup> Providing services for a gay wedding, he explains, would make him complicit in conduct he considers sinful.<sup>24</sup> The couple objects that the vendor is denying service in violation of state public-accommodations laws that prohibit discrimination on the basis of sexual orientation. The vendor responds that he is willing to provide services to all customers, including the couple, whether they are gay or straight. But he declines to participate in gay weddings, because gay weddings violate his religious beliefs.

In *Masterpiece Cakeshop*, a gay couple, Charlie Craig and Dave Mullins, asked a Colorado cake designer, Jack Phillips—the owner of Masterpiece Cakeshop—to create a cake for their wedding celebration.<sup>25</sup> The couple didn’t specify exactly what they wished the cake to say, or, in fact, whether they wanted an inscription on the cake at all.<sup>26</sup> But they did want a custom cake that Phillips would design especially for their wedding. They were not interested in the off-the-shelf baked goods that Phillips offered to sell them.<sup>27</sup>

Phillips, a conservative Christian with traditional views about marriage, declined to fill their order, explaining that creating a cake for a gay wedding would violate his religious convictions. Creating such a cake, he said, would amount to his “participat[ing] in” and “personally endors[ing]” a relationship he considered unbiblical.<sup>28</sup> Indeed, the subsequent investigation by the state civil rights authorities revealed that Phillips had a policy against creating cakes for gay weddings and had declined to do so several times in the past.<sup>29</sup> He had also refused, out of religious conviction, “to bake cakes

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23. See Kendrick & Schwartzman, *supra* note 11, at 133–34 (discussing cases).

24. On complicity claims generally, compare Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015), with Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL’Y 233 (2018).

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

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1726.

containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween.”<sup>30</sup>

Shortly after Phillips rejected their order, Craig and Mullins began an administrative action against him (and Masterpiece Cakeshop) by filing a complaint with the Colorado Civil Rights Division, the state agency responsible for enforcing Colorado’s Anti-Discrimination Act, or CADA.<sup>31</sup> Like many similar laws across the country, CADA prohibits places of public accommodation from refusing customers equal service on the basis of sexual orientation, among other things.<sup>32</sup> The Division investigated Phillips, found probable cause that he had violated CADA, and referred the case to another state agency, the Colorado Civil Rights Commission, which in turn referred the case to an administrative law judge, who held a hearing and determined that Phillips had violated CADA by discriminating against Craig and Mullins on the basis of sexual orientation.<sup>33</sup>

Phillips appealed the ALJ’s ruling to the Commission itself, which held two public meetings in his case. At both meetings, but especially at the second, individual commissioners made remarks dismissing and disparaging Phillips’s religious convictions.<sup>34</sup> One commissioner suggested that, if Phillips’s religious beliefs prevented him from complying with Colorado’s anti-discrimination law, Phillips might find another place to do business.<sup>35</sup> Another likened Phillips’s stance to historical episodes in which religion had been used to justify violent acts of oppression, including slavery and the Holocaust.<sup>36</sup> This commissioner described Phillips’s religious objection to same-sex marriage as simply a way to injure gay

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30. *Id.* at 1745 (Thomas, J., concurring in part and concurring in the judgment).

31. *Id.* at 1725 (majority opinion).

32. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

33. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

34. *Id.* at 1729.

35. The “commissioner suggested that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’ A few moments later, the commissioner restated the same position: ‘[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.’” *Id.* (citations omitted).

36. *Id.*



people and “one of the most despicable pieces of rhetoric people can use.”<sup>37</sup> The Supreme Court made much of these remarks in its eventual decision.

The Commission affirmed the ALJ’s decision and ruled against Phillips.<sup>38</sup> It ordered him to stop refusing orders for wedding cakes from gay couples and to provide “comprehensive staff training” at his shop on CADA and on the requirements of the Commission’s ruling against him.<sup>39</sup> In addition, it required him to file compliance reports with the Commission on a quarterly basis for two years. The reports were to provide the Commission with details about how many people Phillips had refused to serve and the reasons for his refusals, among other things.<sup>40</sup>

When the Colorado Court of Appeals rejected his appeal of the Commission’s order, Phillips sought review in the United States Supreme Court, arguing that requiring him to create wedding cakes for gay couples violated both his free speech and free exercise rights under the First Amendment.<sup>41</sup> When the Supreme Court granted review, most observers thought the Court would focus on Phillips’s free speech claim. His free exercise claim seemed precluded by the Court’s landmark decision in *Employment Division v. Smith*, which held that the Free Exercise Clause is not violated by a neutral, generally applicable law that incidentally burdens a citizen’s religious exercise.<sup>42</sup> CADA certainly seemed to be such a law: it amounted to a blanket prohibition on discrimination in places of public accommodation, whether the motivation for the discrimination was religious or not.<sup>43</sup> Further, the Court’s Civil

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37. *Id.*

38. *Id.* at 1726.

39. *Id.*

40. *Id.*

41. Brief for Petitioners at 14–15, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2017) (No. 16-111).

42. 494 U.S. 872, 879 (1990).

43. In relevant part, CADA provides:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the

Rights Era jurisprudence suggested that, at least with respect to racial discrimination, religious objections would not exempt public accommodations from anti-discrimination laws.<sup>44</sup> To most observers, Phillips's chance of succeeding on a free exercise claim seemed remote.<sup>45</sup>

Somewhat surprisingly, however, the Court ruled, 7-2, that the Commission had violated Phillips's free exercise rights, not so much in its ultimate decision against him, but in its decision-making process. Writing for the Court, Justice Kennedy explained that the Free Exercise Clause gave Phillips the right to a neutral decision maker.<sup>46</sup> But the Commission had not been neutral at all. In fact, it had shown a clear bias against him—that is, against his sincere religious beliefs. As evidence, Justice Kennedy adduced the commissioners' official comments in the case, especially the remark about the "despicable" nature of Phillips's religious convictions against same-sex weddings.<sup>47</sup> In addition, he noted that the Commission had in prior cases allowed bakers to decline, on the basis of conscience, customers' orders for cakes with messages opposing gay marriage. This disparate treatment suggested that the Commission had ruled against Phillips simply because the Commission was hostile to the substance of Phillips's religious views.<sup>48</sup>

Because the Commission had not shown neutrality with respect to Phillips's sincere religious beliefs, Justice Kennedy concluded, its decision against him violated the Free Exercise Clause.<sup>49</sup> This conclusion, too, was a bit of a surprise, since it seemed to leave out a step. Most commentators had understood the Court's 1993 decision in *Church of Lukumi*

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goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

COLO. REV. STAT. § 24-34-601(2)(a) (2017).

44. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

45. See *supra* note 3 and accompanying text.

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

47. *Id.* at 1729. For an argument that the Court misinterpreted these comments, see *Kendrick & Schwartzman*, *supra* note 11, at 135.

48. *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31.

49. *Id.* at 1731–32.

*Babalu Aye v. City of Hialeah*<sup>50</sup> to require strict scrutiny in circumstances where the state had not been neutral with respect to religion: a state could burden religion in a non-neutral way only for a compelling reason and through the least restrictive means of doing so.<sup>51</sup> Indeed, Justice Gorsuch assumed as much in his concurring opinion, which applied the compelling interest test to invalidate the Commission's decision.<sup>52</sup> But Justice Kennedy skipped the compelling interest analysis altogether.

Justice Kennedy also left unresolved the question of what would happen if a state agency did not demonstrate overt bias against a claimant's religion. Presumably, in many cases in which state agencies apply anti-discrimination laws to vendors, officials do not make on-the-record comments disparaging the vendors' sincere religious convictions, and do not have a record of ruling inconsistently in prior disputes.<sup>53</sup> The Court would decide any such future cases, Justice Kennedy said, on the basis of the particular circumstances.<sup>54</sup> About the only guidance the Court was willing to give was this: courts would have to strike a balance between the right of religious persons to have their beliefs respected and the right of gay persons to obtain goods and services in the marketplace without suffering affronts.<sup>55</sup>

*Masterpiece Cakeshop* ultimately settled fairly little, and the fight over future cases already has begun.<sup>56</sup> Indeed, the

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50. 508 U.S. 520 (1993).

51. *Id.* at 546; see also, e.g., Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 375 (2010).

52. *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

53. Cf. Kendrick and Schwartzman, *supra* note 11, at 150 ("Going forward, state civil rights enforcement agencies have the chance to try again, while avoiding the mistakes of the [Colorado] Commission.").

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

55. *Id.*

56. Only two weeks after the Court ruled in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission sanctioned Jack Phillips for refusing to create a cake for a transgender celebration. See Amy B. Wang, *Baker claims religious persecution again—this time after denying cake for transgender woman*, WASH. POST (Aug. 15, 2018), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/15/baker-claims-religious-persecution-again-this-time-after-denying-cake-for-transgender-woman/> [<https://perma.cc/A4MN-NZGK>]. The Commission ultimately determined not to move forward with the case, as part of a settlement with

separate opinions in *Masterpiece Cakeshop* suggest where the battle lines may be drawn for the many complicated issues future cases will raise.<sup>57</sup> Still, although it did not resolve matters, the decision reveals important cultural and political trends that will likely drive future cases. I turn to those trends now.

## II. CULTURAL AND POLITICAL TRENDS IN MASTERPIECE CAKESHOP

### A. *Religious Polarization: The Nones vs. the Traditionally Religious*

*Masterpiece Cakeshop* reflects two important cultural trends. The first is a growing polarization between two groups in American religious life: the Nones and the Traditionally Religious. The second is an expanding notion of equality, one that goes beyond the anti-discrimination norms of the Civil Rights Movement, which opposed the state's differential treatment of persons on the basis of race and other characteristics, to a more general rejection of social distinctions, especially including those grounded in religion. This Article addresses each of these trends in turn.

The rise of the Nones is perhaps the most talked-about development in American sociology in the last decade.<sup>58</sup> "Nones" are those people who describe their religion in surveys as "none" or "nothing in particular"—people who say they have no religious affiliation at all.<sup>59</sup> According to the most recent Pew Research Center study in 2014, about 23% of Americans adults now fall within this category, an increase of about seven percent from the previous survey in 2007.<sup>60</sup> In

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Phillips. Chris Mills Rodrigo, *State of Colorado, baker in same-sex wedding case agree to end litigation*, THE HILL (Mar. 5, 2019), <https://thehill.com/regulation/court-battles/432722-state-of-colorado-baker-in-same-sex-wedding-case-agree-to-end>.

57. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (Kagan, J., concurring); *id.* at 1734 (Gorsuch, J., concurring); *id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 1748 (Ginsburg, J., dissenting).

58. Much of this discussion of the Nones derives from my earlier work. Movsesian, *supra* note 12.

59. Movsesian, *supra* note 12, at 1.

60. PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 20 (2015) [hereinafter AMERICA'S CHANGING RELIGIOUS LANDSCAPE],

historical terms, this percentage is extremely large. In the 1950s, only three percent of Americans said they had no religious identity.<sup>61</sup> According to the Pew survey, Nones now qualify as the second largest “religious” group in the country, after Protestants and ahead of Catholics—though, when aggregated, Christian faiths still claim the large majority of Americans, about 70%.<sup>62</sup>

Among Millennials, the percentage of Nones is significantly higher than in the general population. Pew divides Millennials into two cohorts, “Older Millennials,” born between the years 1981 and 1989, and “Younger Millennials,” born between the years 1990 and 1996.<sup>63</sup> Among Older Millennials, the percentage of Nones is 34%, up nine points from 2007; among Younger Millennials, the percentage is even higher—36%.<sup>64</sup> These numbers are significant because of what sociologists refer to as the “generational replacement” effect.<sup>65</sup> As older Americans with relatively strong religious commitments die off, younger, less affiliated Americans gradually will take their place. As a result, over time, Nones will make up an increasingly large percentage of the population. It is true that people often become more religious as they age, and today’s Millennials may do so as well. At the moment, though, they are not following that pattern. In terms of indicators such as church attendance and prayer, older Millennials “are, if anything, *less* religiously observant today than they were” just seven years ago.<sup>66</sup>

To be sure, some sociologists question whether the percentages are really as high as these surveys indicate.<sup>67</sup> Baylor University sociologist Rodney Stark, for example,

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<http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (select “Complete Report PDF”) [<https://perma.cc/2CBC-YA4P>].

61. MARK CHAVES, *AMERICAN RELIGION* 15 (2d. ed. 2017).

62. *AMERICA’S CHANGING RELIGIOUS LANDSCAPE*, *supra* note 60, at 3–4.

63. *Id.* at 11.

64. *Id.*

65. *Id.*

66. PEW RESEARCH CTR., *U.S. PUBLIC BECOMING LESS RELIGIOUS* 24 (2015) [hereinafter *U.S. PUBLIC BECOMING LESS RELIGIOUS*], <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> (select “Complete Report PDF”) [<https://perma.cc/3ZC7-ML8G>].

67. Movsesian, *supra* note 12, at 1.

believes that surveys overstate the numbers of Nones in America today; some respondents apparently list their religion as “None” to indicate that “they do not belong to a specific church”—that is, when they are non-denominational Christians.<sup>68</sup> (Some anecdotal evidence: When I presented an earlier version of this Article at a conference at the Notre Dame Center on Ethics and Culture, one audience member approached me afterwards to say that he would describe himself as a “None,” even though he was a Christian, precisely because he had never formally joined any church congregation). Whatever the precise numbers may be, most sociologists take the rise of the Nones to be a “‘highly reliable’ statistical finding” with implications for the future of American religion.<sup>69</sup>

Most Nones do not reject religious belief as such. The majority of them in the 2014 Pew survey, 61%, say they believe in God or a universal spirit—though that percentage represents a decline from the 2007 survey, which showed that 70% of Nones believed in God.<sup>70</sup> About a third of Nones say that religion is somewhat or very important in their lives—though, again, that percentage is down a great deal since 2007, which suggests that Nones are becoming more secular over time.<sup>71</sup> What most characterizes Nones is a rejection of institutional religion. The Nones are spiritual “Independents” who refuse to join formal, authoritative religious communities, which they see as coercive and stifling.<sup>72</sup> Instead, Nones believe they can fashion their own, personal religions from a variety of different traditions—indeed, from traditions which present themselves as opposed to one another. As Ross Douthat writes, the memoirist Elizabeth Gilbert, whose bestseller, *Eat Pray Love* helped popularize the concept of “spiritual but not religious” in the first decade of this century, created her own, personal

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68. *Conversations: Rodney Stark*, LAW AND RELIGION FORUM BLOG (Aug. 5, 2013), <https://lawandreligionforum.org/2013/08/05/conversations-rodney-stark/#more-13283> [<https://perma.cc/C5Y7-PEG6>].

69. Movsesian, *supra* note 12, at 1 (quoting FRANK NEWPORT, *GOD IS ALIVE AND WELL* 13 (2012)).

70. AMERICA’S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 47.

71. *Id.* at 15.

72. See Chaeyoon Lim et al., *Secular and Liminal: Discovering Heterogeneity Among Religious Nones*, 49 J. SCI. STUDY OF RELIGION 596, 597, 614 (2010).

spirituality by combining elements from Hindu polytheism, Christian monotheism, and Buddhist non-theism.<sup>73</sup>

Nones believe they can do this sort of thing for two reasons. First, they reject the idea that any one religious tradition can be uniquely true to the exclusion of all others. Exclusive claims of religious authority strike them as an affront to reason and good sense, as well as human freedom.<sup>74</sup> Second, they believe that the individual has the right to pick and choose among various traditions and forge a spiritual path that works for him, because the individual has God within him.<sup>75</sup> Spiritual enlightenment and peace come, not from submitting to external religious authority, which inevitably squelches spiritual authenticity, but from discerning and accepting the divine guidance that exists within oneself.<sup>76</sup> The individual, not the religious community, has the right to judge what is true—or, at least, what is true for him.

Religious Independents have always been part of American life.<sup>77</sup> In the eighteenth century, Thomas Paine wrote, “My own mind is my own church,”<sup>78</sup> a sentiment many twenty-first century Nones share. And the nineteenth-century Transcendentalists sound, to today’s ears, a great deal like Nones.<sup>79</sup> In the past, though, this sort of religious idiosyncrasy was essentially a fringe phenomenon.<sup>80</sup> Today, by contrast, Nones make up the second largest religious group in America, and roughly a third of Millennials. For large numbers of our fellow citizens, the conventional understanding of religion “as a distinctive body of beliefs, a moral and ritual set of practices, and the organizational structures surrounding ideas and ideals

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73. ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 218 (2012).

74. See Movsesian, *supra* note 12, at 2.

75. See DOUTHAT, *supra* note 73, at 4–5, 216–17.

76. See Movsesian, *supra* note 12, at 2.

77. *Id.* at 8.

78. KERRY S. WALTERS, *THE AMERICAN DEISTS* 213 (1992).

79. See DOUTHAT, *supra* note 73, at 217–19 (comparing Ralph Waldo Emerson with contemporary spiritual guides like Deepak Chopra, Paulo Coelho, and Oprah Winfrey).

80. See Movsesian, *supra* note 12, at 8.

of the sacred," no longer represents the norm.<sup>81</sup> In fact, for these citizens, traditional religion represents a malign force that stifles authentic spirituality, creating inner turmoil and preventing individuals from attaining their true potential.

Why should the rise of the Nones occur now, at the start of the twenty-first century? Many factors exist, but three merit special attention. First, there are demographic explanations. Changes in family structure, and, in particular, high rates of religious intermarriage and divorce have an important role. About half of Americans who marry today choose a spouse of a different religion.<sup>82</sup> More than a quarter of Millennials say they were raised in a religiously mixed family.<sup>83</sup> As one would expect, children from such families more often become Nones when they grow up than children whose parents shared the same religion.<sup>84</sup> Moreover, Nones are themselves having and raising children. Roughly one-quarter of Millennials in the Pew survey report having been raised by at least one parent who was a None; about six percent say both their parents were Nones.<sup>85</sup> A large percentage of these children also become Nones when they reach adulthood—62% percent where both parents were Nones.<sup>86</sup> Parental divorce also appears to have a role. Children of divorce are significantly less likely to identify with a religion than children from intact families, perhaps because they have less trust in institutions and authority figures generally.<sup>87</sup>

Second, the rise of the Nones seems to be associated with the Sexual Revolution, especially with changing views on homosexuality. According to a 2017 Pew report, a solid

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81. James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065, 1065 (2013).

82. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 148 (2010).

83. PEW RESEARCH CTR., *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES* 4 (2016) [hereinafter *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES*], <http://www.pewforum.org/2016/10/26/one-in-five-u-s-adults-were-raised-in-interfaith-homes/> (select "Complete Report PDF") [<https://perma.cc/LDA6-TWZN>].

84. See Movsesian, *supra* note 12, at 9.

85. *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES*, *supra* note 83, at at 4.

86. *Id.* at 5.

87. Movsesian, *supra* note 12, at 9.



majority of Americans, about 62% percent, now say that same-sex marriage should be legal.<sup>88</sup> Among Nones, however, the percentage is strikingly high—85%.<sup>89</sup> Here again, Millennials are key. Young adults are driving the changing social consensus on homosexuality, including among Nones. Millennials generally have more positive views of homosexuality than older Americans, and nearly 90% of Millennial Nones say that society should accept homosexuality.<sup>90</sup> The Pew report also offers support for what sociologists have been saying for years: young Nones dislike organized religion because they associate it with traditional, negative views about homosexuality, and because they believe organized religion's rejection of homosexuality masks hypocrisy about sexual sins generally.<sup>91</sup>

Finally, the rise of the Nones in the twenty-first century may reflect the gradual, but inevitable, working-out of the inner logic of liberalism, America's dominant political ideology. In the nineteenth century, Tocqueville wrote that escaping the hold of habit, family, and tradition were among the principal features of the American mindset.<sup>92</sup> More recently, Patrick Deneen has observed that liberalism has always opposed received authority, which it views as arbitrary and accidental, in favor of individual autonomy and choice. Liberalism teaches that loosening the bonds of family, community, and religion is necessary in order to release the full potential of human beings.<sup>93</sup> Liberalism encourages the person to think of himself as "primarily a free chooser" with respect to "all relationships, institutions, and beliefs."<sup>94</sup> Over time, the ethos of choice extends to more and more subjects. It is no surprise, then, in a society where liberalism dominates, that many people eventually come to see choice as extending to religious institutions and beliefs.

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88. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [<https://perma.cc/6WNN-A6SZ>].

89. *Id.*

90. U.S. PUBLIC BECOMING LESS RELIGIOUS, *supra* note 66, at 35.

91. See PUTNAM & CAMPBELL, *supra* note 82, at 130.

92. DEMOCRACY IN AMERICA, *supra* note 16, II.i.1, at 403.

93. See PATRICK DENEEN, WHY LIBERALISM FAILED 30 (2018).

94. *Id.* at 78.

Nonetheless, the rise of the Nones does not mean that religion is simply disappearing from American life. The increase in the number of the religiously unaffiliated is occurring simultaneously with an increase in religiosity among Americans who *do* maintain a religious identity—a group one might call the Traditionally Religious. According to the 2014 Pew survey, religiously affiliated Americans “appear to have grown *more* religiously observant in recent years,” if one considers things like Bible study and prayer groups.<sup>95</sup> Another recent survey shows that the percentage of “intensely religious” Americans, with intensity being measured in terms of indicators such as church attendance and frequent prayer, has remained remarkably stable for decades.<sup>96</sup> The percentage of Americans with a “strong” religious affiliation has remained steady, at a little less than 40%, since 1989.<sup>97</sup>

In other words, America is experiencing a deepening religious polarization rather than a systematic falloff from religion. The growing percentage of Nones does not result from a general decrease in religious observance, but “a dramatic decline” in the numbers of the “moderately religious”—people who formally identify with a religion but who show only modest levels of commitment.<sup>98</sup> As in so many areas of American life, the middle is dropping out in favor of the extremes on either end. The moderately religious are rapidly ending their affiliations and becoming Nones, while the Traditionally Religious are maintaining their affiliations or even increasing their intensity. We appear to be reaching a point of rough parity. More than a fifth of Americans, and more than a third of younger Americans, are now Nones, while something like two-fifths of Americans are among the Traditionally Religious.

This deepening polarization will exacerbate conflicts like the one in *Masterpiece Cakeshop* and make it harder for our society to negotiate them. Compromise requires an ability to sympathize with the other side, to understand, even if one does

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95. U.S. PUBLIC BECOMING LESS RELIGIOUS, *supra* note 66, at 6.

96. Landon Schnabel & Sean Bock, *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research*, 4 SOC. SCI. 686, 687–88 (2017).

97. *Id.*

98. *Id.* at 689.

not share, the commitments that motivate one's interlocutor. It requires some common base of experience. Americans have not always shown such sympathy for minority religious communities, of course. At various times, Catholics, Jews, and Mormons all have experienced hostility, among other religious groups. But a general sympathy for religion and religious claims has always marked American culture. In the past, someone like Jack Phillips might have counted on a widespread, if thin, sympathy with the idea of traditional religious commitments. The vast majority of Americans would have understood why he thought it so important to follow the tenets of his religion, for the simple reason that the vast majority of Americans would have had some connection with institutional religion. Even if they were only nominally religious, and even if they disagreed with his particular convictions, most Americans would have understood why Phillips insisted on acting as he did.

But this wider social sympathy for traditional religion is fading. Large numbers of Americans no longer have experience with traditional, organized religion—and, to the extent they do have such experience, they reject it. Nones are unlikely to respond sympathetically when the Traditionally Religious seek exemptions from legal requirements.<sup>99</sup> Indeed, Nones are likely to see such exemptions as an unfair advantage for organized religion. For their part, the Traditionally Religious are also unlikely to sympathize with the worldview of the Nones. Disagreements between the two groups will likely be amplified by the fact that Nones overwhelmingly reject traditional teachings on sexuality, which they see as psychologically damaging and essentially unjust, while the Traditionally Religious continue to endorse them as necessary for human dignity.<sup>100</sup> In short, we now have two fairly sizable, competing groups with sharply divergent understandings of the beneficence of traditional religious commitments, especially

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99. See JOHN INAZU, *CONFIDENT PLURALISM* 22–23 (2015).

100. See Mark L. Movsesian, *Of Human Dignities*, 91 *NOTRE DAME L. REV.* 1517, 1529 (2016).

with respect to sexuality—and neither group seems especially interested in compromise.<sup>101</sup>

The public response to controversies like *Masterpiece Cakeshop* reflects this religious polarization. In the summer of 2016, while the Court was considering Jack Phillips’s cert petition, the Pew Research Center surveyed Americans’ opinions on whether a business should be obligated to provide services for a gay wedding notwithstanding the owner’s religious objections.<sup>102</sup> The responses closely tracked America’s religious divide. About two-thirds of the religiously unaffiliated—the Nones—said that a business should be required by law to provide services for a gay wedding even if the owner had religious objections.<sup>103</sup> About two-thirds of Americans who attend religious services frequently—the Traditionally Religious—said that a business owner should *not* be required to do so.<sup>104</sup> Only a relatively small number of Americans, 18%, found it possible to sympathize with both sides’ points of view.<sup>105</sup> This sharp religious divide suggests that achieving social consensus on cases like *Masterpiece Cakeshop* will be extremely difficult.

#### B. Equality as Sameness

*Masterpiece Cakeshop* also reflects a second cultural trend: society’s expanding conception of equality. Equality has been central to the American worldview ever since Jefferson enshrined the concept in the Declaration of Independence. But equality can mean different things. According to one understanding, it refers to legal equality—to the fair and uniform application of the law to all citizens.<sup>106</sup> In the twentieth

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101. On the unwillingness of both the LGBT community and the Traditionally Religious to compromise in the marketplace, see, e.g., Mark L. Movsesian, *Markets and Morals: The Limits of Doux Commerce*, 9 WM. & MARY. BUS. L. REV. 449, 472 (2018).

102. PEW RESEARCH CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION (2016), <http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/> (select “Complete Report PDF”) [<https://perma.cc/BY4U-83ZC>].

103. *Id.* at 16.

104. *Id.*

105. *Id.* at 5.

106. Cf. Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 778–79 (1996) (distinguishing between “legal equality” and “actual equality”).

century, America gradually extended legal equality to racial and other minorities against whom it had discriminated, in law, for centuries. This has been one of the great achievements of our time.

However, equality can also refer to a broader unwillingness to accept any distinctions among groups and individuals, whether “material, social, or personal.”<sup>107</sup> According to this view, equality means a rejection of the idea of “difference per se.”<sup>108</sup> All boundaries that distinguish one group of people from another—for example, beliefs and practices that mark out a religious community and exclude non-members—are presumptively suspect because of the implicit judgments they suggest. Some groups apparently think their beliefs and ways of life are superior to others. Such judgments seem impolite, ungenerous, and inconsistent with the spirit of true equality, which requires that each community acknowledge the basic correctness and good will of all others. Suggesting that one finds others’ beliefs and practices morally inferior is, on this view, a grave affront to human dignity. Notwithstanding societal claims to respect diversity, it is this second concept of equality—“equality as sameness”<sup>109</sup>—that pervades our culture today, especially with respect to religion.

Once again, Tocqueville saw this coming. Equality, he observed, was Americans’ most fundamental moral commitment, the criterion by which we judged everything else.<sup>110</sup> Equality required that social distinctions be ignored—between aristocrats and common men, the educated and the unschooled, man and woman, parent and child. In law, it called for uniformity;<sup>111</sup> in philosophy and religion, for

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107. Patrick Deneen, *Alexis de Tocqueville*, FIRST PRINCIPLES (March 14, 2011), <http://www.firstprinciplesjournal.com/print.aspx?article=911&loc=b&type=cbtp> [<https://perma.cc/WRH7-AUYM>].

108. See Gregg, *supra* note 15.

109. *Id.*

110. See DEMOCRACY IN AMERICA, *supra* note 16, I:Introduction, at 3 (“[A]s I studied American society, more and more I saw in equality of conditions the generative fact from which each particular fact seemed to issue.”); see also PIERRE MANENT, *TOCQUEVILLE AND THE NATURE OF DEMOCRACY* (John Waggoner trans., Rowman & Littlefield 1996) (1982).

111. See DEMOCRACY IN AMERICA, *supra* note 16, II.iv.2, at 641; *id.* II.iv.3, at 645.

generality rather than a focus on the particular.<sup>112</sup> In fact, with respect to religion, the preference for generality ultimately worked to minimize distinctions between particular faith traditions and promote pantheism, which not only denied the relevance of difference in the created order, but also the distinction between creation and the Creator Himself.<sup>113</sup>

The emphasis on religious equality did not result in widespread pantheism in Tocqueville's time. Christianity had too powerful a hold on nineteenth-century Americans for that to happen.<sup>114</sup> Today, however, his predictions seem to be coming true. Americans are remarkably broad-minded about the legitimacy of all religions. A 2010 study by sociologists Robert Putnam and David Campbell reveals that almost 90% of Americans believe that members of other religions, not only their own, can go to Heaven.<sup>115</sup> Nuances exist, and much depends on how people understand the question. The percentage goes down, for example, when surveyors ask Christians whether non-Christians (as opposed to different kinds of Christians) can go to Heaven.<sup>116</sup> And much depends on how respondents understand the question. Some Christians would say, for example, that Christianity is the unique path to salvation, but members of other faiths may be on the path without knowing it. Other Christians would say that it's possible for non-Christians to go to Heaven, but rare. Still, it is noteworthy that the large majority of American Christians, even those who belong to churches that teach that Christianity is the exclusive path to salvation, believe that non-Christians can, in principle, receive eternal life.

Putnam and Campbell ascribe this remarkable ecumenism to a number of factors, including the large number of mixed-religious families in America, which tend to mute religious distinctions (how could my saintly "Aunt Susan" not go to

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112. *Id.* II.iv.2, at 640.

113. *Id.* II.i.7, at 425–26.

114. An "innumerable multitude of sects" existed in America, he noted, but all were "within the great Christian unity." *Id.* at I.ii.9, at 278; see also *id.* II.i.1., at 406 ("In the United States, Christian sects vary infinitely and are constantly modified, but Christianity itself is an established and irresistible fact that no one undertakes either to attack or defend.").

115. PUTNAM & CAMPBELL, *supra* note 82, at 534.

116. See *id.* at 536.

Heaven just because she's not a Christian?), and the inevitable social interactions between people from different religions in daily life ("My Friend Al" is an evangelical Christian, but he's not a bad guy).<sup>117</sup> These explanations seem to have things backwards: it is the norm of tolerance that lets Aunt Susan marry into the family in the first place, and allows one to have a friend from a different faith tradition. Whatever the reasons, when it comes to perhaps the most important religious question of all, Americans show a remarkably latitudinarian attitude. With respect to attaining salvation, and with the qualifications I suggest above, most Americans seem to believe that all ways are equally good.

On the one hand, the concept of equality as sameness may make conflicts like the one in *Masterpiece Cakeshop* less likely. If people perceive all ways as equally good, they will not have problems participating in all sorts of celebrations, whatever their religious convictions. On the other hand, when such conflicts do occur, an expansive concept of equality will make them more bitter and harder to resolve. To refuse to participate in someone else's wedding on religious grounds is to erect a boundary that seems socially incomprehensible. It is to express a judgment that the life events of other citizens are so opprobrious that one cannot take part in them. Such a judgment violates the principle of "equality as sameness" and, as a result, is likely to be taken as a deep insult to the dignity of other citizens.

If I may offer a personal anecdote, I recently posed a hypothetical case in my Law and Religion class.<sup>118</sup> Suppose, I asked the students, an observant Jew has a florist shop. One day, a customer, who is also Jewish, comes to the shop to say she's getting married and would like the florist to do the wedding. "That's wonderful," the florist says. "Where will you get married?" The customer replies that the wedding will be at a local nondenominational church, because her fiancé is Christian, and she, the customer, isn't very observant. The florist thinks about it and says, "I'm so sorry, but I can't do

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117. *Id.* at 526, 531.

118. I related this anecdote in a blog post. Mark Movsesian, *Passion for Equality*, FIRST THINGS (July 10, 2017), <https://www.firstthings.com/web-exclusives/2017/07/passion-for-equality> [<https://perma.cc/2SRF-ETCE>].

your wedding. It's nothing personal; I'm sure your fiancé is a fine person, as are you. It's just that as an observant Jew, I don't approve of interfaith weddings. For our community to survive, we must avoid intermarriage and assimilation. Please understand. There are many other florists who can do your wedding. I'll even suggest some. But I can't, in good conscience, participate." What result?

In posing this hypothetical, I was trying to show the students that these are complicated questions and that they need to consider both sides. Much to my surprise, the students were uniformly unsympathetic to the florist. There should be no legal right to decline services in this situation, they told me: the florist was not acting reasonably and in good faith. I pressed them. Didn't they see that genuine religious diversity requires respect for difference, that difference implies boundaries, and that boundaries necessarily exclude? Couldn't a member of a minority religion believe, in good faith, that her community faced assimilation and decline to run her business in a way that promoted it? Wasn't that a concern worthy of respect? No, they told me. The florist in my hypothetical case should have no right to turn away the interfaith couple.

I have thought about the students' reaction, and it seems to me that it results from the students' sense that it is wrong to draw religious distinctions that exclude others and injure their dignity, no matter what the justification. That is what the florist did in my hypothetical case—and that, I think, was what bothered the students. The florist was violating the "equality as sameness" principle, and my students simply did not think her concerns justified her in doing so.

Something similar, I believe, occurred in *Masterpiece Cakeshop* itself. Craig and Mullins viewed Phillips's objection to creating their wedding cake as an insult, no matter how much he protested about the good will he bore them, and no matter how willing he was to sell them goods off the shelf.<sup>119</sup> They experienced an affront so deep that, rather than obtain a cake somewhere else, as they easily could have done, they sought

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119. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719, 1724 (2018).



vindication by the state and pursued a lengthy litigation.<sup>120</sup> And the members of the Colorado Civil Rights Commission agreed with them about the depth of the insult, especially the one commissioner who compared Phillips's objections to historical episodes like slavery and the Holocaust.<sup>121</sup> Like the florist in my classroom hypothetical, Phillips had violated the "equality as sameness" principle. His claim that he could not in good conscience participate in a gay wedding, because that would make him complicit in activity his religion regarded as sinful, erected a boundary that increasing numbers of Americans find rebarbative.<sup>122</sup>

### C. *The Activist State*

The third trend that *Masterpiece Cakeshop* reflects is a political one: the rise of activist administrative agencies at both the federal and state levels. The growth of government over the course of the twentieth century, starting with the Progressives in the early 1900s, picking up steam in the New Deal of the 1930s, and continuing in the Great Society of the 1960s, has been much discussed.<sup>123</sup> Notwithstanding occasional resistance by Presidents and governors, the welfare state, "characterized by a high level of government action in all phases of economic and social life," is an inescapable fact of contemporary American politics.<sup>124</sup> Government rules affect virtually every aspect of our society, including commerce, communications, consumer transactions, education (at all levels), employment, food, health and safety, land use, and professional qualifications.

The expanding scope of the federal government illustrates the trend. Since the so-called "New Deal Settlement" of the

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120. See Transcript of Oral Argument at 62, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (Kennedy, J.) (noting availability of other bakeries to fill the couple's order).

121. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

122. See *id.* at 1724 ("To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."). For sources on complicity arguments generally, see *supra* note 24.

123. See, e.g., JOSEPH POSTELL, *BUREAUCRACY IN AMERICA* (2017).

124. Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 375 (1990).

1930s, the federal government has had more or less plenary legislative power under the Constitution's Commerce Clause.<sup>125</sup> The Court has occasionally suggested, most recently in the first Obamacare case, some limits to the Commerce Clause power, but it has not reconsidered the basic understanding.<sup>126</sup> The Court has also allowed Congress effectively unlimited discretion in delegating authority to executive branch agencies, and has allowed those agencies considerable discretion in interpreting congressional mandates.<sup>127</sup> As a result, "[t]here is now virtually no significant aspect of life that is not in some way regulated by the federal government."<sup>128</sup> Federal "agencies wield immense influence in shaping the conduct of individuals and organizations."<sup>129</sup>

Numbers tell part of the story. Consider federal government expenditures, which serve as a rough proxy for the state's growing role in the American economy. If we focus on entitlement spending—programs like Medicare and Social Security—the increase since the New Deal is remarkable. Adjusting for inflation and population growth, the federal government spends about fifteen times more today on entitlements than it did in 1940.<sup>130</sup> Federal spending on entitlements far outstrips spending on other government functions, such as national defense.<sup>131</sup> Or consider another number, the page count of the Federal Register, "the daily repository of all proposed and final federal rules and

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125. On the "New Deal Settlement," see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

126. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). For a good overview of the doctrine, see Solum, *supra* note 125.

127. On delegation, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). On agency deference, see *id.* at 1247; Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 802–04 (2010).

128. Lawson, *supra* note 127, at 1236.

129. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011).

130. WILLIAM VOEGELI, NEVER ENOUGH: AMERICA'S LIMITLESS WELFARE STATE 25 (2010). Voegeli's figures exclude veterans' programs and benefits, *id.* at 22, and measure the years 1940–2007.

131. *See id.* at 31–33.

regulations.”<sup>132</sup> The Federal Register for the year 2016 came to almost 100,000 pages, “the highest level in its history,” about 20% higher than the previous year’s edition.<sup>133</sup> Page counts are an imperfect measure of government activity, of course.<sup>134</sup> But, as a rough guide, they do indicate the increasing activity of federal agencies. And, again, these numbers relate only to the federal government, not to state governments, which retain plenary legislative jurisdiction in our constitutional system.

To be sure, the current administration has announced a deregulation campaign at the federal level—“a fundamental shift” in policy which, among other things, directs “federal agencies to eliminate two regulations for each new one implemented and to reduce new regulatory costs to zero.”<sup>135</sup> As Adam White writes, however, this “very, very good start” faces substantial obstacles, including inevitable legal challenges.<sup>136</sup> Moreover, “the next Democratic administration could undo much of the Trump administration’s deregulatory effort every bit as quickly as the Trump administration undid the Obama administration’s regulatory actions.”<sup>137</sup> It will take more than a few years of deregulation to stop the expansion of government—and the current efforts at the federal level will have no impact at all at the state level. Claims that “the era of big government is over” have misled people in the past.<sup>138</sup>

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132. CLYDE WAYNE CREWS JR., COMPETITIVE ENTERPRISE INSTITUTE, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 16 (2017), <https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf> [<https://perma.cc/3DKC-BULV>]; see also MCCONNELL ET AL., *supra* note 17, at 77 (using page count of Federal Register to illustrate growth of government).

133. CREWS, *supra* note 132, at 3, 16.

134. *Id.* at 16.

135. NEOMI RAO, OFFICE OF INFO. & REGULATORY AFFAIRS, INTRODUCTION TO THE FALL 2017 REGULATORY PLAN (2017), <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/VPStatement.pdf> [<https://perma.cc/73C2-BCQU>].

136. Adam J. White, *Trumping the Administrative State*, WEEKLY STANDARD (Jan. 19, 2018, 4:25 AM), <https://www.weeklystandard.com/adam-j-white/trumping-the-administrative-state> [<https://perma.cc/HJ62-FG8U>].

137. *Id.*

138. See, e.g., Gary Lawson, *One(?) Nation Overextended*, 94 B.U. L. REV. 1109, 1120 (2014).

The growth of activist administrative agencies figures prominently in controversies like *Masterpiece Cakeshop*. In part, it is simply a matter of volume. The more regulations, and the more subjects covered, the greater the potential for businesses to violate the law.<sup>139</sup> As Marc DeGirolami writes, where “government assumes an increasingly large role in the life of the citizenry, more injuries are transformed into legally (and perhaps even constitutionally) cognizable rights.”<sup>140</sup> But the volume of regulation alone does not explain things. The content matters, too. For reasons I will explain, administrative agencies inherently tend to favor the expansive concept of equality I have described. As a consequence, conflicts between the administrative state and the Traditionally Religious are apt to occur much more frequently.

Once again, Tocqueville offers useful insights as to why this should be so. Egalitarian democracies, he believed, tend to encourage a powerful state—because they promote an individualism that is unsustainable without it.<sup>141</sup> In a democracy, the individual learns to rely on his own judgment, not received wisdom, in making his life choices.<sup>142</sup> He learns to see himself as equal to everyone else; he sees no reason to defer to other people’s judgments or to the wisdom of traditional authority.<sup>143</sup> But this individualism, paradoxically, promotes a powerful state. The individual will from time to time feel his weakness and need the help of others. Subjecting oneself to one’s equals, or to traditional authority, would be unthinkable; but subjecting oneself to a state that stands alone above

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139. See Epstein, *supra* note 124, at 375; see also MCCONNELL ET AL., *supra* note 17, at 77 (“In a society that is pervasively regulated as ours now is, there are many more occasions for conflict between the government and religious believers.”).

140. Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 131 (2016); see also Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015).

141. For a discussion of individualism, by which Tocqueville meant a kind of withdrawal from and indifference to the affairs of other citizens, see DEMOCRACY IN AMERICA, *supra* note 16, II.ii.2, at 482–84.

142. “The inhabitant of the United States learns from birth that he must rely on himself to struggle against the evils and obstacles of life; he has only a defiant and restive regard for social authority and appeals to its power only when he cannot do without it.” *Id.* I.ii.4, at 180.

143. See *id.* at II.iv.1; *id.* at II.iv.3.

everyone would not only be thinkable but necessary.<sup>144</sup> Of the citizen in an egalitarian democracy, Tocqueville wrote:

His independence fills him with confidence and pride among his equals, and his debility makes him feel, from time to time, the need of the outside help that he cannot expect from any of them, since they are all impotent and cold. In this extremity, he naturally turns his regard to the immense being that rises in the midst of universal debasement. His needs and above all his desires constantly lead him back toward it, and in the end he views it as the unique and necessary support for individual weakness.<sup>145</sup>

Only a powerful state has the ability to protect and provide for the individual who has abandoned traditional sources of belonging and authority.

Tocqueville thought that American democracy overcame this tendency to statism through its commitment to private associations, including religious associations, which provided competing sources of loyalty that kept the state in check.<sup>146</sup> But, over time, a democratic state will find such associations a threat and try to weaken them, all in the interests of human flourishing.<sup>147</sup> As Patrick Deneen writes, the logic of liberal democracy requires an activist state that breaks the hold of traditional authorities in order to promote a salutary personal autonomy. Individualism and the activist state thus reinforce one another—“a virtuous circle,” from the perspective of liberalism.<sup>148</sup> In Tocqueville’s words, the state willingly works for each individual’s happiness, asking in return only the authority to “knead him as it likes” and have the final say on what happiness shall mean.<sup>149</sup>

In short, over time, a democratic state will tend to promote the “equality as sameness” principle through its administrative apparatus. The state will encourage people to think of

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144. *See id.* at II.iv.3.

145. *Id.* at II.iv.3, at 644 (footnote omitted).

146. Movsesian, *supra* note 12, at 14.

147. *See* DEMOCRACY IN AMERICA, *supra* note 16, II.ii.4, at 485 (“Despotism, which in its nature is fearful, sees the most certain guarantee of its own duration in the isolation of men, and it ordinarily puts all its care into isolating them.”); *see also* Movsesian, *supra* note 12, at 14.

148. DENEEN, *supra* note 93, at 59.

149. DEMOCRACY IN AMERICA, *supra* note 16, II.iv.6, at 663.

themselves only as citizens and abandon traditional sources of identity that distinguish them.<sup>150</sup> It will work to break down the social boundaries that groups, including the Traditionally Religious, erect to maintain their distinctiveness and preserve their values. Indeed, as Philip Hamburger writes, in contemporary America, it is the small-o “orthodox” who need most to worry about government action—those “minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views.”<sup>151</sup> In a society like ours, which prizes equality and which deeply suspects tradition and communal authority, “orthodoxy” is itself “unorthodox,”<sup>152</sup> even when people voluntarily choose it, and therefore occasions serious conflicts that our courts ultimately must resolve.

In twenty-first century America, this dynamic appears in various actions by government agencies that impinge on traditional religious associations and identities. Government has always impinged on the activities of religious associations in America to some degree, of course, going back to the early Republic.<sup>153</sup> But the potential for conflict has become much larger today. The Traditionally Religious face an expanding set of rules and policies that promote new understandings of equality, particularly with respect to sexuality and gender, along with an ever-expanding bureaucracy dedicated to enforcing them.<sup>154</sup> As Richard Epstein writes, civil rights offices exist today “in virtually every government agency, most notably in the agencies that regulate housing, education, and

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150. Cf. *Town of Greece v. Galloway*, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting) (“A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.”).

151. Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1929 (2015).

152. *Id.*

153. See, e.g., Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Property and Power before the Civil War*, 162 U. PA. L. REV. 307, 311 (2014).

154. On the centrality of sexuality in contemporary conflicts over religious liberty, see Horwitz, *supra* note 13, at 160.

employment.”<sup>155</sup> The Traditionally Religious face increasing pressure to accept the new understandings and comply with the new rules, or face a “looming threat of a wide range of legal sanctions.”<sup>156</sup>

*Masterpiece Cakeshop* offers a good example. The Colorado Civil Rights Commission ruled against Jack Phillips in order to promote equality for same-sex marriage, a concept that relatively few would have endorsed even a decade ago, even on the progressive left.<sup>157</sup> It imposed significant regulatory burdens on him, including training and quarterly reporting requirements that would have demanded significant time and money.<sup>158</sup> One commissioner even hinted that, with views like his, maybe Phillips should think about doing business in a different state.<sup>159</sup> Phillips decided to resist. But not many businesses will do so. Not many will be willing to bear such burdens or to relocate. The more likely result will be that Traditionally Religious businesspeople like Phillips abandon, or at least soften, their convictions in order to make a living. Of course, the commissioners were trying to promote human flourishing and protect gay couples from indignities in the marketplace; that is not the point. The point is that in imposing these burdens, the Commission acted in a way calculated to advance the principle of equality as sameness and weaken the hold of traditional religious commitments. As Rod Dreher writes, we can anticipate many more such conflicts in the future.<sup>160</sup>

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155. Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, L. & LIBERTY (Jan. 2, 2016), <http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/> [https://perma.cc/N6RS-XNDT].

156. *Id.*

157. President Obama notably did not endorse marriage equality in his first campaign in 2008, though he did endorse it in time for his second. Saikrishna Bangalore Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553, 554 (2012).

158. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719, 1726 (2018).

159. *Id.* at 1729.

160. On the challenges conservative Christians, in particular, may expect to face in the marketplace, see ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* 179–94 (2017).

III. CONCLUSION: AFTER *MASTERPIECE CAKESHOP*

In short, *Masterpiece Cakeshop* reflects important cultural and political trends. Those trends will continue to shape future conflicts between anti-discrimination norms, on the one hand, and religious freedom, on the other—disputes, to paraphrase Justice Kennedy, which set the right of gays and lesbians to obtain goods and services in the marketplace without experiencing affronts against the right of religious persons to have their sincere beliefs respected by our government.<sup>161</sup> In the space remaining, I would like to offer three predictions for what may lie ahead.

First, conflicts like the one in *Masterpiece Cakeshop* will become more frequent and harder for our society to negotiate. The “equality as sameness” principle has expanded to cover sexual identity and behavior in a way few foresaw even a decade ago.<sup>162</sup> The principle continues to expand, driven by its own inner logic. As Adrian Vermeule observes, the “triumph of same-sex marriage” has been “followed . . . rapidly by the opening of a new regulatory and juridical frontier, the recognition of transgender identity.”<sup>163</sup> Indeed, shortly after Jack Phillips won his case at the Supreme Court, the Colorado Civil Rights Division found probable cause that he had again violated CADA, this time by refusing to create a cake for a customer who wished to celebrate the anniversary of her coming out as transgender.<sup>164</sup> Phillips then filed an action for an injunction against the Colorado authorities, again alleging a violation of his constitutional rights.<sup>165</sup> The state ultimately decided not to pursue the case against Phillips as part of a

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

162. See, e.g., Horwitz, *supra* note 13, at 173–74 (discussing the rapid change in public acceptance of homosexuality and same-sex marriage).

163. Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism> [<https://perma.cc/WT2N-B2A9>].

164. See *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Div. June 28, 2018) (probable cause determination), <http://www.adfmedia.org/files/MasterpieceCakeshopProbableCauseDetermination.pdf> [<https://perma.cc/GX3C-X5XG>].

165. See Complaint, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074 (D. Colo. Aug. 14, 2018), <http://www.adfmedia.org/files/MasterpieceCakeshopComplaint.pdf> [<https://perma.cc/WL5Q-EV3S>].



settlement agreement.<sup>166</sup> But it seems likely that the courts will soon need to decide whether vendors have a free exercise right to decline to provide services for transgender coming out ceremonies.

The new understanding of sexual identity and behavior has become a flash point in our culture wars. Nones, especially younger Nones, embrace the new understanding,<sup>167</sup> as do regulatory agencies, which seek to promote it in American life.<sup>168</sup> But the Traditionally Religious, who remain comparatively numerous, continue to oppose it. Some of them, at least, will continue to resist government efforts to enforce it. That each side in the conflict cares deeply about the outcome, and finds the other's position increasingly unfamiliar and offensive, will make compromise much more difficult.<sup>169</sup>

It is true that the Traditionally Religious may themselves come to accept the new understanding over time. According to the Pew survey I quoted earlier, acceptance of homosexuality does appear to be "growing rapidly even among religious groups" that traditionally have "strongly opposed" same-sex relations.<sup>170</sup> If the Traditionally Religious were to accept the new understanding of sexuality, conflicts like *Masterpiece Cakeshop* would fade from view, much as conflicts over serving African-Americans in public places thankfully have disappeared from American life. But it seems more likely that those Traditionally Religious who accept the new understanding will gradually drift away from religion entirely and join the Nones. The mainline Protestant denominations that have embraced new norms about homosexuality—for example, the Episcopalians and Presbyterians<sup>171</sup>—have

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166. See *supra* note 56.

167. On Nones' acceptance of homosexuality, see *supra* Part II.A.

168. See *supra* Part II.C.

169. See INAZU, *supra* note 99, at 2–3 (discussing growing polarization over values in American life). For an interesting discussion of how mutually incompatible values make the resolution of social conflict between secular and traditionally religious groups difficult, see JONATHAN HAIDT, *THE RIGHTEOUS MIND* 105–10 (2012).

170. See AMERICA'S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 34.

171. The Episcopal Church reported a 19% decline in active members over the ten-year period from 2007 to 2017. *Episcopal Domestic Fast Facts: 2017*, GEN. CONVENTION OF THE EPISCOPAL CHURCH, <https://extranet.generalconvention.org/>

continued to experience sharp declines in membership, even as membership in conservative churches has remained relatively stable.<sup>172</sup> Endorsing the new sexual norms has not kept believers in the pews. Religious polarization, in other words, seems likely to continue.

Second, the law in this area likely will remain unsettled and deeply contested for some time to come, for two reasons. First, as I explained earlier, the law of religious exemptions is already something of a “patchwork.”<sup>173</sup> Different jurisdictions apply different tests in different circumstances. For example, for purposes of the Free Exercise Clause, the Court’s 1990 decision in *Employment Division v. Smith* indicates that no constitutional right to a religious exemption exists where a law is neutral and generally applicable.<sup>174</sup> In circumstances where the state has not shown neutrality towards religion, however, or where a law is not generally applicable, a different rule applies under a later case, *Church of the Lukumi Babalu Aye v. City of Hialeah*.<sup>175</sup> Before *Masterpiece Cakeshop*, most commentators understood that *Lukumi* called for the compelling interest test in those circumstances: the government could substantially burden religious exercise if it had a compelling reason for doing so and had chosen the least restrictive means.<sup>176</sup> Justice Kennedy’s

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staff/files/download/22938 [https://perma.cc/VQ9B-3LY4] (last visited Mar. 9, 2019). The Presbyterian Church (USA) lost almost 5% of its membership in 2017 alone. See *2017 Comparative Summaries*, OFFICE OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (USA), [http://oga.pcusa.org/site\\_media/media/uploads/oga/pdf/statistics/2017\\_comparative\\_summaries.pdf](http://oga.pcusa.org/site_media/media/uploads/oga/pdf/statistics/2017_comparative_summaries.pdf) [https://perma.cc/5TD9-SRGW] (last visited Mar. 9, 2019) (listing a decline of 68,000 members out of 1.48 million in 2016). Since 2005, it has lost two out of every five active members. Compare *id.* (listing 1.42 million active members in 2017), with *2008 Comparative Summaries*, OFFICE OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (USA), [https://www.pcusa.org/site\\_media/media/uploads/oga/pdf/2008-comp-sum.pdf](https://www.pcusa.org/site_media/media/uploads/oga/pdf/2008-comp-sum.pdf) [https://perma.cc/ENW4-8B63] (last visited Mar. 9, 2019) (listing 2.31 million active members in 2005).

172. MARK CHAVES, *AMERICAN RELIGION* 87 (2011). For an interesting discussion of how doctrinal leniency generally can lead to a decline in religious commitment, see Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1355–58 (2016).

173. See *supra* note 17 and accompanying text.

174. 494 U.S. 872, 879 (1990).

175. 508 U.S. 520, 546 (1993).

176. See, e.g., Lund, *supra* note 51, at 375 (“The *Smith/Lukumi* rule evaluates facially discriminatory laws under a compelling interest test.”).

opinion in *Masterpiece Cakeshop* suggests, though, even without going through the compelling interest analysis, that the government's failure to act neutrally amounts to a per se violation.<sup>177</sup> It remains to be seen what the Court will make of this suggestion in future cases.

Federal constitutional doctrine is thus unsettled. With respect to federal statutory law, the Religious Freedom Restoration Act (RFRA) requires the compelling interest test,<sup>178</sup> although, as I will explain in a moment, saying that does not clarify things too much. With respect to state constitutional and statutory law, substantial variation exists.<sup>179</sup> Some states apply the *Smith* test as a matter of state constitutional law, while others apply some version of the compelling interest test.<sup>180</sup> Some states have adopted a version of RFRA and apply the compelling interest test as a matter of state statutory law; some do not.<sup>181</sup> In short, generalizations are difficult.

Nonetheless, notwithstanding the doctrinal uncertainty, the compelling interest test remains the leading test in this area—under *Lukumi*, under RFRA and its state analogues, or under state constitutional provisions—and will provide the rule of decision in most cases in which a vendor seeks a religious exemption from anti-discrimination laws.<sup>182</sup> But—and this is the second reason for my prediction that the law will remain unsettled—the compelling interest test itself is deeply indeterminate. It turns on vague concepts that provide little guidance in specific cases.<sup>183</sup> The test depends almost entirely on the intuitions of individual judges, which of course differ

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177. See *supra* pp. 720–21.

178. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b), 107 Stat. 1488, 1488–89 (codified at 42 U.S.C. § 2000bb-1(b) (2012)).

179. See MCCONNELL ET AL., *supra* note 17, at 189–90.

180. See *id.* at 198; see also DURHAM & SCHARFFS, *supra* note 18, at 231 (identifying the state high courts that have adopted some form of the *Smith* analysis for state constitutional purposes).

181. MCCONNELL ET AL., *supra* note 17, at 189–90.

182. See *id.* at 198 (noting that “more than half of the states currently apply the compelling interest test to free exercise claims”); DURHAM & SCHARFFS, *supra* note 18, at 231 (observing that “it seems likely that a majority of jurisdictions will ultimately maintain strict scrutiny protections”).

183. See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 21–22 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (discussing indeterminacy of the compelling interest standard).

greatly.<sup>184</sup> In the recent *Hobby Lobby* case, for example, in which plaintiffs sought a religious exemption under RFRA from the so-called “contraceptive mandate,” the Justices differed strongly among themselves on the meaning and application both of “substantial burden” and “least restrictive means.”<sup>185</sup>

Indeed, in a society as polarized as ours, how could judges’ views on these concepts not differ? Is requiring a Christian vendor to provide services on an equal basis for gay and straight weddings a substantial burden on the vendor’s religion? Does the state have a compelling interest in ending discrimination that would justify that burden, even if other nearby vendors would readily provide those services? Does the state have reasonable alternative measures available to it that would burden the vendor’s religious exercise to a lesser degree? The answers depend on one’s perception of the nature and value of religion, the true meaning of equality, the proper scope of government action, and many other factors. The questions do not submit to easy, objective criteria on which everyone agrees, certainly not in our society, today. In a society in which we cannot agree on what is good, how can we agree on what is a compelling interest?

It is possible, of course, that these indeterminacy problems will hasten the end of the compelling interest test. The test has drawn strong criticism from judges and scholars for decades, as far back as the Court’s 1990 *Smith* decision, which sought to do away with the test, or at least to sharply confine it.<sup>186</sup> Justices Gorsuch and Alito hinted at their disapproval of *Smith* in *Masterpiece Cakeshop* itself.<sup>187</sup> But the test has shown remarkable durability. As I have explained, the Court reaffirmed the test, at least in some circumstances, only a few terms after *Smith*, in

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184. See *supra* pp. 715–16.

185. Compare *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–31 (2014) (arguing that the expense of the contraceptive mandate constituted a substantial burden and that it would be less restrictive for the Government to assume the cost of coverage itself or shift the costs of covering contraceptives to insurers than to mandate employers directly fund contraceptive coverage), *with id.* at 760–68 (Ginsburg, J. dissenting) (arguing that the contraceptive mandate was too tenuously connected to religious beliefs to constitute a substantial burden and that no alternative would effectuate the compelling interests at hand).

186. See *Emp’t Div. v. Smith*, 494 U.S. 872, 884–86 (1990).

187. See *Kendrick & Schwartzman*, *supra* note 11, at 162.

*Lukumi*.<sup>188</sup> Moreover, in 1993, Congress reinstated the test in RFRA, by a unanimous vote in the House and a vote of 97–3 in the Senate.<sup>189</sup> It is not clear that RFRA would pass today—but it is not clear that a vote to repeal it would succeed, either.<sup>190</sup> Two years ago, in the run-up to the Court’s decision in *Masterpiece Cakeshop*, Democratic members of Congress introduced the “Do No Harm Act,” which sought to amend RFRA to make clear that it would not apply to federal anti-discrimination laws.<sup>191</sup> The Do No Harm Act would not have repealed RFRA, only limited its application.<sup>192</sup> And yet the new act did not attract a single Republican cosponsor, in either the House or the Senate.<sup>193</sup> Repealing, or even amending, RFRA would require a bipartisan coalition, and it is difficult to see how a coalition could form in our current political environment.

American politics is becoming more and more polarized on the basis of religion—something that has not been true, historically.<sup>194</sup> Religion is now a strong element of partisan identity.<sup>195</sup> Today’s Democratic and Republican Parties have dramatically different religious profiles. According to a Pew survey conducted in 2018, about 70% of Republicans and people who lean Republican believe in the God of the Bible—they are the Traditionally Religious.<sup>196</sup> By contrast, only 45% of

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188. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

189. L.A. Powe, Jr., *The Court’s Constitution*, 12 U. PA. J. CONST. L. 529, 541 (2010).

190. See Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 501 (2015) (“It is, as many have observed, extremely unlikely that the RFRA would be enacted today, let alone enacted with near-unanimous and bipartisan support . . .”).

191. Do No Harm Act, H.R. 3222, 115th Cong. (2017). The Senate version of the bill, which bore the same name, was S. 2918, 115th Cong. (2018).

192. See H.R. 3222 § 3.

193. See *id.* at 1 (listing House co-sponsors); S. 2918 at 1 (listing Senate co-sponsors).

194. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Anti-Discrimination Law*, 88 S. CAL. L. REV. 619, 656–58 (2015).

195. See Mark Movsesian, *The New Divide in American Politics*, FIRST THINGS (May 23, 2018), <https://www.firstthings.com/web-exclusives/2018/05/the-new-divide-in-american-politics> [<https://perma.cc/Q8PP-HFE6>].

196. PEW RESEARCH CTR., WHEN AMERICANS SAY THEY BELIEVE IN GOD, WHAT DO THEY MEAN? 22 (2018), <http://www.pewforum.org/wp-content/>

Democrats and Democratic-leaning say they believe in the God of the Bible.<sup>197</sup> Another Pew survey revealed that Nones now make up the largest “religious” grouping in the Democratic Party—about 30 percent.<sup>198</sup> To be sure, some progressives are religious believers, a group some have called the “Religious Left.”<sup>199</sup> But this group has relatively little impact within the contemporary Democratic Party, and it’s not clear how much impact the group will have in the future.<sup>200</sup>

In this political environment, a move by one party to tinker with RFRA would immediately raise suspicions on the part of the other. Achieving agreement on any changes seems unlikely. As a result, the compelling interest test seems here to stay. And that observation leads to my third and final prediction. *Masterpiece Cakeshop* suggests that judicial appointments, certainly on the federal level, will become even more heated and partisan than they already are. Because the compelling interest test is so indeterminate, so dependent on the prior commitments of the people doing the judging, the identity of the judges is extremely important. Each side in our polarized society understands how crucial it is to have judges with the “right” intuitions about religion and equality on the bench. Each, therefore, will fight long and hard to ensure that such judges are appointed—and, conversely, that judges with the “wrong” intuitions are not. Having judges with the “wrong” intuitions about religion and equality could lead to negative outcomes in cases about which both sides care deeply. The stakes are too high to be ignored.

The late Justice Scalia recognized this dynamic long ago, in a different context, in his dissent in *Planned Parenthood of*

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uploads/sites/7/2018/04/Beliefs-about-God-FOR-WEB-FULL-REPORT.pdf  
[<https://perma.cc/8V4F-AUNB>].

197. *Id.*

198. See AMERICA’S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 9.

199. See, e.g., STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2009).

200. For explanations why the religious left will have difficulty influencing progressive politics, see, e.g., Daniel Cox, *Don’t Bet on the Emergence of a “Religious Left,”* FIVETHIRTYEIGHT (Apr. 20, 2017), <https://fivethirtyeight.com/features/dont-bet-on-the-emergence-of-a-religious-left/> [<https://perma.cc/YSM6-PQE5>]; Massimo Faggioli, *Francis & the “Religious Left”: It Won’t Be an Easy Match*, COMMONWEAL (July 30, 2018), <https://www.commonwealmagazine.org/francis-religious-left> [<https://perma.cc/2D7R-53TH>].

*Southeastern Pennsylvania v. Casey*.<sup>201</sup> Because the Court's constitutional jurisprudence had come to turn on the personal values of the Justices, he observed, the electorate had every right to focus on nominees' values during the selection process. "[C]onfirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them," he wrote.<sup>202</sup> "Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally [sic] committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward."<sup>203</sup> For Justice Scalia, interrogating nominees about their personal value judgments was a matter for regret. But, good or bad, the compelling interest test, which makes judges' value judgments about religion and equality crucial to the outcome of a case, creates strong incentives to do so.

In short, the new religious partisanship will only amplify the already intense acrimony over judicial selection. Given their religious profiles, the two parties will likely nominate judges with very different views on the conflict between anti-discrimination laws and religious liberty; each party will be very wary of the other's nominees. On the whole, given the party's religious makeup, one would expect Democrats to nominate judges with skeptical views of traditional religion—and therefore, less favorable views on exemptions for the Traditionally Religious from anti-discrimination laws. One would expect the opposite, on the whole, from judges Republican administrations nominate. Again, because everyone knows how high the stakes are, the judicial confirmation wars will likely be quite passionate and divisive for the foreseeable future.

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201. 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

202. *Id.* at 1001.

203. *Id.*

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*Masterpiece Cakeshop* is a narrow decision. The case turns on rather unique facts and does little to resolve conflicts between our anti-discrimination laws, on the one hand, and our commitment to religious freedom, on the other. But the narrowness of the case's holding is deceptive. In fact, *Masterpiece Cakeshop* reflects very broad cultural and political trends that drive those conflicts and shape their resolution: a deepening religious polarization between Nones and the Traditionally Religious, an expansive understanding of equality as sameness, and an activist state dedicated to enforcing that understanding in large areas of our common life.

As everyone knows, law and culture have a mutually reinforcing relationship.<sup>204</sup> Court rulings influence the way our culture perceives social conflicts: which arguments seem legitimate and which parties deserve our sympathies. But culture, in turn, influences law. I have explored here the cultural and political trends that form the backdrop to our law's attempt to resolve our competing commitments to equality and to religious freedom. Those trends, which *Masterpiece Cakeshop* so clearly reflects, will continue to shape our law for decades to come.

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204. See, e.g., Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 37 (2001) (describing the "mutually constitutive nature of the relationship"). For a good introductory essay on the subject of law and culture, see Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).