6-20-2019

Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights

Stephen Matthew Feldman
University of Wyoming College of Law, sfeldman@uwyo.edu

HAVING YOUR CAKE AND EATING IT TOO? RELIGIOUS FREEDOM AND LGBTQ RIGHTS

STEPHEN M. FELDMAN†

In Obergefell v. Hodges*, Justice Anthony Kennedy wrote for a majority holding that same-sex couples enjoy a constitutional right to marry as part of substantive due process. Yet in* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, his majority opinion held that the Free Exercise Clause invalidated government sanctioning of a baker who had refused to bake a cake for a same-sex couple's wedding reception. In both cases, the Court reasoned that the government must maintain neutrality when confronted with competing viewpoints. The* Masterpiece Cakeshop *Court concluded the state Civil Rights Commission had violated this requirement by impugning the baker's claim that his religious beliefs justified discrimination against LGBTQ individuals. But the Court's demand for government neutrality was wrongheaded. In such cases, religious freedom and LGBTQ rights clash. Rather than attempting to enforce a specious government neutrality, the Court should attend to the needs of democracy. Many theorists of pluralist democracy emphasize its processes, such as voting, but democracy also requires certain substantive preconditions if it is to exist and function. One cannot even conceptualize pluralist democracy without accounting for the political community: Who belongs and participates? To protect the operation of democracy, to preserve its substantive preconditions, at least one issue must be taken off the table. Namely, all individuals, regardless of sub-culture or societal grouping, must be treated as full and equal citizens in good standing. This issue can no longer be open to democratic debate. But discrimination against a marginalized group or its members,*

† .Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. I thank Mark Tushnet and Sam Kalen for their comments on earlier drafts.

> *such as LGBTQ individuals, inevitably undermines the standing of that group and its members in the political community. Therefore, discrimination against same-sex couples and LGBTQ individuals, even if arising from religious beliefs, cannot be deemed of constitutional value.*

Justice Anthony Kennedy wanted to have his cake and eat it too. His majority opinion in *Obergefell v. Hodges* held that same-sex couples enjoy a constitutional right to marry as part of substantive due process.[1] Yet in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, his majority opinion held that the Free Exercise Clause invalidated government sanctioning of a baker, Jack Phillips, who had discriminated against a same-sex couple, Charlie Craig and Dave Mullins.[2] Phillips had refused to bake a cake for the couple's wedding reception because he opposed same-sex marriage on religious grounds.[3] To be sure, *Masterpiece Cakeshop* did not hold that all generally applicable laws prohibiting discrimination against LGBTQ individuals necessarily violate the First Amendment.[4] Rather, the Court reasoned that the Colorado Civil Rights Commission ("Commission") had not treated Phillips' religious beliefs with "neutral and respectful consideration" when adjudicating the discrimination claim against him.[5]

1. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

2. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018). The sanctioning took the following form:

> The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Id.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken."

Id. at 1726.

3. Robert E. Rains, *Icing on the Wedding Cake: Same-Sex Marriage and Religious Objections—Is There an Accommodation That Will Make Everyone Happy (or Unhappy)?*, 42 VT. L. REV. 191, 218 (2017).

4. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24, 1727.

5. *Id.* at 1729.

Masterpiece Cakeshop entailed an indirect clash of constitutional values: religious freedom, based on the Free Exercise Clause, and marital freedom, based on substantive due process.[6] Because the constitutional rights of the same-sex couple were not specifically at issue, free exercise and substantive due process did not directly conflict.[7] In fact, when Phillips refused to bake a cake for Craig and Mullins, the Court had not yet decided *Obergefell*,[8] and Colorado did not yet allow same-sex marriage.[9] Even so, the Colorado Anti-Discrimination Act ("CADA") expressly prohibited discrimination based on sexual orientation.[10] Phillips nonetheless claimed that the Commission violated his religious freedom when it ordered him to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes . . . ."[11] As one commissioner emphasized, religious beliefs could not justify statutorily-prohibited discrimination.[12]

The Court sided with Phillips and overruled the Commission's decision because, according to Kennedy's opinion, the Commission had contravened religious neutrality.[13] Kennedy acknowledged that the case potentially implicated "the rights and dignity of gay persons,"[14] yet he insisted the Court could decide the free exercise issue in favor of Phillips without undermining LGBTQ rights.[15] Kennedy and the *Masterpiece Cakeshop* Court were mistaken. If same-sex marriage is constitutionally protected, as it is after *Obergefell*, then discrimination against same-sex couples cannot also be constitutionally protected, even if the discrimination arises from "sincere religious beliefs."[16] Kennedy, and the Court, could not have their cake and eat it too. When the commissioner explained that religion cannot legitimate unconstitutional dis-

6. Terri R. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86, 93–94 (2017).

7. *Id.* at 88.

8. *See id.* at 87.

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

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

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

12. *Id.* at 1729.

13. *Id.* at 1723–24.

14. *Id.* at 1723; *see id.* at 1727 (expressing concern for dignity and stigmatization of LGBTQ individuals).

15. *See id.* at 1728–29 (emphasizing the narrowness of the free exercise issue).

16. *Id.* at 1729.

crimination against same-sex couples,[17] the commissioner acted exactly as required by *Obergefell* and the Constitution.[18] Kennedy and the Court diminished the constitutional right to marry by validating Phillips' free exercise claim and constitutionally protecting his discrimination against Craig and Mullins.[19]

Democracy provides the crucial link illuminating the relationship between religious freedom and LGBTQ rights.[20] Theorists of pluralist democracy often emphasize its processes, such as voting,[21] but democracy also requires certain substantive preconditions if it is to exist and function.[22] One cannot even conceptualize pluralist democracy without accounting for the political community:[23] who belongs and participates? To protect the operation of pluralist democracy and to preserve the substantive conditions needed for democracy, at least one issue must be taken off the table.[24] Namely, all individuals, regardless of sub-culture or societal grouping, must be treated as full and equal citizens in good standing.[25] This issue can no longer be open to democratic debate. But discrimination against a marginalized group or its members, such as LGBTQ individuals, inevitably undermines the standing of that group and its members in the political community.[26] Therefore, discrimination against same-sex couples and LGBTQ individuals,

17. *Id.* at 1721.

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

19. *Cf.* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628–29 (2015) (arguing that businesses should be allowed to discriminate if they publicly identify themselves as discriminatory).

20. *Obergefell*, 135 S. Ct. at 2605.

21. *See, e.g.*, Stephen Bloch, *Cumulative Voting and the Religious Right: In the Best Interest of Democracy*, 24 J. CONTEMP. L. 1 (1998) (discussing the effects of implementing a cumulative voting system on a pluralistic democracy).

22. Robert Dahl developed the most comprehensive explanation of the democratic process and its underpinnings. *See generally* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DEMOCRACY]; ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001) [hereinafter HOW DEMOCRATIC]; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter PREFACE]; ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) [hereinafter ECONOMIC DEMOCRACY].

23. *See* Bloch, *supra* note 21.

24. *Id.* at 31–32.

25. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal . . . .").

26. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . . .").

even if arising from religious beliefs, cannot be deemed of constitutional value.[27]

Part I explains Phillips' free exercise claim. Part II focuses on the relation between neutrality and democracy. It begins by questioning whether the government can neutrally adjudicate the tension between free exercise rights and substantive due process rights to marry. It then articulates the substantive conditions that are necessary for the operation of pluralist democracy. It ends by emphasizing the relationship between religious freedom and democracy. Part III is the conclusion.

I. FREE EXERCISE DOCTRINE AND GOVERNMENT NEUTRALITY

The most common free exercise case arises from an exemption claim.[28] Typically, an individual seeks a court-ordered exception (or exemption) from a law of general applicability that allegedly burdens the individual's exercise of religion.[29] The generally applicable law might be a criminal law, an employment law, or any other widely applicable law.[30] The Court articulated the prevailing doctrine for exemption claims in the landmark 1990 decision, *Employment Division, Department of Human Resources v. Smith*.[31] *Smith* rejected the use of a strict scrutiny test that the Court used, at least nominally, for over twenty-five years.[32] Under this ostensibly rigorous judicial standard, if the government failed to

27. To clarify, I do not argue per se that LGBTQ individuals have a constitutional right to be protected from private discriminatory conduct. Rather, I argue that the Court should not interpret the Free Exercise Clause to protect private conduct that discriminates against LGBTQ individuals or the LGBTQ community. It is worth emphasizing, though, that the Court has already extended constitutional protections to LGBTQ individuals under substantive due process and to the LGBTQ community under equal protection. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015); United States v. Windsor, 570 U.S. 744, 769 (2013); Romer v. Evans, 517 U.S. 620, 623 (1996).

28. Stephen M. Feldman, *Religious Minorities and The First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 251 (2003).

29. *E.g.*, Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (denying an Orthodox Jewish Air Force officer a free exercise exemption from Air Force regulations prohibiting his wearing a skull-cap); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (granting an Old Order Amish claimant a free exercise exemption from a state compulsory-education law).

30. *E.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 830–32 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who refused to work on Sundays but did not belong to an established church or sect).

31. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

32. *Id.* at 888; *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (articulating a strict scrutiny test).

prove its action was narrowly tailored to achieve a compelling government interest, then the government needed to grant the claimant an exemption from its generally applicable law.[33] After *Smith*, the government would only need to satisfy a rational basis test.[34] If the government could prove that its action was rationally related to a legitimate government interest, then the government did not need to grant an exemption.[35] Following this deferential approach, the *Smith* Court refused to grant an exemption to an individual who consumed peyote in supervised religious rituals contravening state criminal law.[36]

The *Smith* Court, however, specified three exceptions from its doctrinal rule.[37] While rational basis review would normally be appropriate, strict scrutiny would be required in the following circumstances: first, if the government purposefully discriminated against religion;[38] second, if the case involved the denial of unemployment compensation;[39] and third, if the case involved a "hybrid" claim, where free exercise was combined with some other constitutional right (often, free expression).[40] In a subsequent case the Court, in effect, added a fourth exception: religious organizations are exempt from generally applicable antidiscrimination employment laws when hiring or firing religious ministers.[41]

In *Masterpiece Cakeshop*, the first *Smith* exception came to the forefront.[42] The *Masterpiece Cakeshop* Court refused to apply the deferential rational basis test because it found that the Commission had purposefully discriminated against Phillips because of

33. From an empirical standpoint, the government satisfied (or avoided) the strict scrutiny test surprisingly often in free exercise cases. Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision Making*, 15 WM. & MARY BILL OF RTS. J. 43, 50 (2006).

34. The Court reasoned that the "political process" should effectively determine the scope of free-exercise rights. *Smith*, 494 U.S. at 890.

35. *Id.*

36. *Id.*

37. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 41 (1990) (discussing *Smith* exceptions).

38. *Smith*, 494 U.S. at 877–78.

39. *Id.* at 883.

40. *Id.* at 881–82.

41. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194 (2012).

42. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (focusing on the free exercise claim, rather than the plaintiff's free expression claim under the First Amendment).

his religion.[43] For that reason, Kennedy's majority opinion repeatedly referred to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[44] the most prominent prior application of this exception.[45] The Court in *Church of the Lukumi Babalu Aye* emphasized "the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[46] The city of Hialeah had enacted ordinances that prohibited religious sacrifices of animals but did not otherwise restrict animal slaughter, such as for food.[47] In doing so, the city had not maintained religious neutrality, according to the Court.[48] To the contrary, the city aimed to interfere with the practices of the Santeria religion,[49] that combined elements of the traditional African Yoruba religion with Catholicism and included animal sacrifices.[50]

The Court in *Masterpiece Cakeshop* concluded that the Commission had violated the requirement of government neutrality, as the city of Hialeah had done in *Church of the Lukumi Babalu Aye*.[51] Instead, "religious hostility"[52] and "animosity"[53] skewed the Commission's adjudication of Phillips' case.[54] The *Masterpiece Cakeshop* Court primarily supported this conclusion with two factors: first, a commissioner's statement about religion and discrimination;[55] and second, a comparison between the Commission's decision in Phillips' case and three decisions involving another individual, William Jack.[56]

43. *Id.*

44. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

45. *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31; *see also id.* at 1734, 1737 (Gorsuch, J., concurring).

46. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532.

47. *Id.* at 527.

48. *Id.* at 531.

49. *Id.* at 526–27.

50. *Id.* at 524.

51. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

52. *Id.* at 1724.

53. *Id.* at 1731.

54. *Id.*

55. *Id.* at 1732.

56. *Id.* at 1749–50.

The commissioner's statement about religion and discrimination arose during a Commission meeting.[57] The Court quoted the commissioner at length:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[58]

According to the Court, "these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case."[59] The Court found that the commissioner's use of the words *despicable* and *rhetoric*—"it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others"—to be especially troubling.[60] *Despicable*, the Court reasoned, denoted the government's disparagement of Phillips' religion,[61] while *rhetoric* suggested that Phillips' religion was "something insubstantial and even insincere."[62] The Court emphasized that "[t]he commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."[63] Therefore, the commissioner's statement about religion and discrimination undermined the state's argument that the Commission had been fair, impartial, and neutral.[64]

The Court reinforced its conclusion by comparing Phillips' case with those of William Jack.[65] On three occasions, Jack asked

57. *Id.* at 1729.
58. *Id.*
59. *Id.* at 1730.
60. *Id.* at 1729.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1729–30.
65. *Id.* at 1730.

bakers to create cakes decorated with images and Biblical invocations disparaging same-sex marriage.[66] When the bakers refused Jack's requests, he filed complaints of discrimination with the Colorado Civil Rights Division ("Division").[67] The Division concluded that none of the bakers had illegally discriminated against Jack,[68] and the Commission affirmed the Division's conclusions.[69] According to the *Masterpiece Cakeshop* Court, the state could not adequately differentiate its treatment of Phillips' case with that of Jack's cases.[70] The Division had found that the bakers in Jack's cases had denied service because they believed his requested messages were offensive in various ways, being "derogatory," "hateful," and "discriminatory."[71] The *Masterpiece Cakeshop* Court reasoned that the Division's and Commission's acceptance of these justifications for denial of service underscored the Commission's hostility toward Phillips' religious justification for denying service.[72] From the Court's perspective, the cases were indistinguishable.[73]

The Court crucially premised its decision on the possibility of government neutrality.[74] "While the issues here are difficult to resolve,"[75] Kennedy wrote, "it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed."[76] The government, the Court emphasized, cannot evaluate the legitimacy of religious claims.[77] Rather, the government must remain impartial in its treatment of diverse religious beliefs.[78] Religious claims of conscience, in other words, are not subject to government approval and disapproval.[79] In fact, the Court went even further in emphasizing the possibility

66. *Id.*
67. *See id.*
68. *Id.*
69. *See id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1730–31.
74. *Id.* at 1731.
75. *Id.* at 1732.
76. *Id.*
77. *Id.* at 1731.
78. *Id.*
79. *Id.* at 1732.

for government neutrality.[80] According to Kennedy's opinion, the government can and must avoid taking sides when resolving future disputes apparently pitting religious freedom based on the First Amendment against marital freedom based on substantive due process.[81] The government should not choose between religious and marital freedom: "[T]hese disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[82]

Significantly, Kennedy's majority opinion in *Obergefell* emphasized the same point.[83] The *Obergefell* Court reasoned that a constitutional right to marry for same-sex couples can exist without diminishing the views or voices of religious opponents to same-sex marriage.[84] Thus, according to Kennedy, the Court itself maintained neutrality even as it recognized the right to marry.[85] "Many who deem same-sex marriage to be wrong reach that conclusion,"[86] Kennedy wrote, "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[87] Not only the government, but also the Court (which, of course, is part of the government), can and must remain neutral.[88] Therefore, although *Obergefell* guaranteed same-sex couples "marriage on the same terms as accorded to couples of the opposite sex,"[89] Kennedy added that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[90]

80. *Id.*
81. *Id.*
82. *Id.*
83. *Compare id.*, *with* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).
84. *Obergefell*, 135 S. Ct. at 2602.
85. *See id.*
86. *Id.*
87. *Id.*
88. *Id.* at 2597.
89. *Id.* at 2607.
90. *Id.*

II. NEUTRALITY AND DEMOCRACY

A. Is Neutrality Possible?

The problem for Kennedy and the Court is that neutrality is not only misguided, but also impossible.[91] The reality is that some (not all) religiously observant individuals sincerely believe that homosexuality and same-sex marriage are immoral and contravene their religious tenets.[92] In *Masterpiece Cakeshop*, Phillips' religious claims were most likely genuine.[93] As "a devout Christian," he opposed same-sex marriage because it violated his deeply held religious convictions.[94] He believed "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman."[95]

Yet, simultaneously, discriminatory acts such as Phillips' refusal to bake a wedding cake for Craig and Mullins have consequences.[96] Discrimination harms the targeted individuals and groups.[97] In *Obergefell*, Kennedy unequivocally described how prohibitions of same-sex marriage injured LGBTQ individuals.[98] He characterized marriage as "a central institution of the Nation's society."[99] When the government discriminated by allowing heterosexual but not same-sex marriage, the government stigmatizes and "demeans gays and lesbians."[100] Legislative prohibitions of marriage for gays and lesbians "disparage their choices and diminish their personhood."[101] Discrimination sends a message to LGBTQ individuals as well as to society at large: "[E]xclusion from [mar-

91. Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on* Obergefell v. Hodges*)*, 24 WM. & MARY BILL OF RTS. J. 341, 344 (2015).

92. *Obergefell*, 135 S. Ct. at 2602, 2607.

93. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018) (stating that "[t]he reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions").

94. *Id.* at 1724.

95. *Id.*

96. *See* Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 147, 155–56 (2018).

97. *Id.* at 156.

98. Obergefell v. Hodges, 135 S. Ct. 2584, 2601–02 (2015).

99. *Id.* at 2602.

100. *Id.*

101. *Id.*

riage] has the effect of teaching that gays and lesbians are unequal in important respects."[102]

The tension between LGBTQ individuals and their religiously motivated opponents cannot be avoided.[103] Quite simply, the views and values of LGBTQ individuals cannot be harmonized with those who view homosexuality, same-sex marriage, and other non-traditional sexual identities and behaviors to be heretical and sacrilegious.[104] Therefore, the government (and the Court) must choose between the two sides.[105] Neutrality is not an option. The dissenters in *Obergefell* emphasized this point.[106] Government recognition of same-sex marriage, Justice Samuel Alito feared, would marginalize and demean the views and values of traditionalists and the religiously faithful.[107] If the Court recognized same-sex marriage, as it did in *Obergefell*, then the Court necessarily diminished the views and values of those who opposed it.[108] Alito wrote: "[T]hose who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[109] Chief Justice John Roberts condemned the *Obergefell* majority for being "compelled to sully those on the other side of the debate."[110] Justice Clarence Thomas argued that the *Obergefell* decision threatened "the religious liberty our Nation has long sought to protect."[111]

Justice Neil Gorsuch's concurrence in *Masterpiece Cakeshop*, joined by Alito, argued similarly.[112] Gorsuch brushed aside the suggestion that the state government, through its Commission,

102. *Id.*

103. *Id.* at 2640 (Alito, J., dissenting).

104. *See id.* at 2594–95 (majority opinion).

105. *See id.* at 2640 (Alito, J., dissenting).

106. *Id.*

107. *Id.* at 2642–43.

108. *Id.*

109. *Id.* Unsurprisingly, Alito wrote the majority opinion in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that regulations requiring closely held corporations to provide health insurance for contraceptive methods inconsistent with their sincerely held religious beliefs violated the Religious Freedom Restoration Act of 1993).

110. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (further accusing Kennedy's *Obergefell* opinion of assaulting "the character of fairminded people" who believe marriage must be only between a man and a woman).

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

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

had acted neutrally.[113] From Gorsuch's perspective, the Commission's different decisions in the Phillips and Jack cases underscored the lack of neutrality.[114] The fact that the Commission allowed the bakers in Jack's cases to deny service while sanctioning Phillips for his denial of service revealed government hostility to religion.[115] "Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings."[116] Gorsuch insisted that the government cannot be allowed to choose who to favor or "to gerrymander their inquiries based on the parties they prefer."[117] Gorsuch not only repudiated government claims to neutrality, but also emphasized that the government must choose religion.[118] In other words, as between religious and marital freedom, the government must choose religious freedom. "[I]t is our job,"[119] Gorsuch wrote, to "afford legal protection to any sincere act of faith."[120]

B. The Substance of Democracy

While Gorsuch correctly reasoned that the government must choose,[121] he recommended the wrong choice. The government (and the Court) should choose the substantive due process rights of LGBTQ individuals over First Amendment free exercise rights. The crux of the matter is democracy.[122] Since the 1930s, the United States has operated as a pluralist democracy.[123] According

113. *Id.* at 1736.

114. *Id.* at 1738–39.

115. *Id.* at 1736.

116. *Id.*

117. *Id.* at 1739.

118. *Id.* at 1739–40.

119. *Id.* at 1738.

120. *Id.*

121. *Id.* at 1739–40.

122. *See* Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 34 (2017) (rebutting the view that *Obergefell* was an undemocratic decision).

123. From the framing through roughly the 1920s, the nation operated as a republican democracy. For discussions of the transition from republican democracy to pluralist democracy, *see, e.g.*, LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939, 252 (1990); STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 3–5 (2008); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 151 (1993); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 117–18 (1996). Bruce Ackerman also emphasizes regime change in constitutional law; on the decade of the 1930s, *see* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL

to numerous constitutional and political theorists, process defines pluralist democracy.[124] In other words, a democratic government is one that follows certain processes (or procedures) rather than pursuing some specific substantive goal, such as the common good or general welfare.[125] For instance, each individual must be allocated a vote of identical weight with all other voters, and the option receiving the greatest number of votes wins.[126] Most important, citizens and interest groups must be able to participate fully and effectively by expressing their respective values and interests in the democratic arena.[127] The government cannot dictate any particular goals or visions of a good and proper life.[128] Rather, the government remains neutral, providing a framework of processes (and rights) that allows individuals and interest groups to assert a plurality of visions.[129]

Although theorists have emphasized the centrality of process to pluralist democracy, some have also argued persuasively that process alone cannot define democracy.[130] Following the proper processes is crucial, but pluralist democracy cannot be maintained without the sustenance of certain substantive norms or conditions.[131] A democratic community, for instance, must maintain its democratic culture.[132] If citizens are not widely committed to the rules of the democratic game—negotiation, compromise, and coalition-building—then the political community will splinter into sharply polarized interest groups.[133] Moreover, a citizen's

RIGHTS REVOLUTION 4–5 (2014); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 256–57 (1998).

124. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS: THE NATIONAL GOVERNMENT 7–11 (1949); PREFACE, *supra* note 22, at 131; JOHN DEWEY, FREEDOM AND CULTURE 176 (1939).

125. *See, e.g.*, BINKLEY & MOOS, *supra* note 124, at 8–10; PREFACE, *supra* note 22, at 131.

126. ECONOMIC DEMOCRACY, *supra* note 22, at 59–60; PREFACE, *supra* note 22, at 67.

127. DEMOCRACY, *supra* note 22, at 109, 169–75 (discussing free speech and other rights integral to the democratic process).

128. JOHN RAWLS, POLITICAL LIBERALISM xvi–xvii, xxvii, 10, 29–35 (Expanded ed., 2005) (articulating the philosophy of political liberalism).

129. SANDEL, *supra* note 123, at 4 (explaining procedural republic).

130. *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 7 (1982).

131. *See* STEVEN LEVITISKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 97–100, 231 (2018) (emphasizing the importance of preserving democratic norms).

132. *See* ECONOMIC DEMOCRACY, *supra* note 22, at 48–49.

133. *See* PREFACE, supra note 22, at 4, 143; DEMOCRACY, *supra* note 22, at 172; *see also* DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 1, 162 (1953) (emphasizing a

right to participate fully and effectively is not merely formal.[134] Rather, citizens must have sufficient resources to participate.[135] Individuals who lack the fundamentals of housing, education, or medical care cannot fully engage in political discussion and participation regardless of their desire to play by the rules of the game.[136]

To be clear, these substantive conditions or prerequisites limit the reach of pluralist democratic processes.[137] For example, a legislature cannot constitutionally enact a law that would abridge some citizens' abilities and opportunities to participate—think of a law denying or diluting the right to vote—even if a supermajority of citizens and legislators followed the proper processes in enacting the law.[138] Certain government actions must be off the table, beyond democratic debate, because they would contravene the substantive conditions necessary for robust pluralist democracy.[139] Most important, all individuals, regardless of sub-culture or societal grouping, must be treated as full and equal citizens in good standing.[140] Even if a supermajority of Americans were to support a law discriminating against LGBTQ individuals, such government action must be unconstitutional because it would relegate the individuals to second-class democratic citizenship.[141]

"genuine community of our values"); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 129, 138, 512–13 (2d ed., 1971) (emphasizing the rules of the game for democracy).

134. *See* DEMOCRACY, *supra* note 22, at 175.

135. *See* HOW DEMOCRATIC, *supra* note 22, at 150–52.

136. *See id.* at 132–33 (maintaining that liberty and equality are not in opposition); *see also* ECONOMIC DEMOCRACY, *supra* note 22, at 46 (emphasizing relative economic well-being).

137. *See* DEMOCRACY, *supra* note 22, at 176.

138. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960) (invalidating law changing city boundaries to eliminate most African American voters).

139. Stephen F. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 265–66 (2015).

140. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 61 (2012) (discussing relation between hate speech and being a citizen in good standing).

141. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (invalidating law prohibiting same-sex marriages); Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 147–63 (2017) (arguing for the need to recognize the identity of societal groups in equal protection); Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1579–83 (2017) (arguing that laws discriminating against LGBTQ individuals should be subject to heightened scrutiny in equal protection challenges).

Whenever we discuss the processes of pluralist democracy, we necessarily raise a preliminary substantive issue.[142] We cannot articulate citizens' rights to participate fully and effectively in democracy without first considering the boundaries of the political community: Who belongs?[143] Without knowing who belongs to the political community, we cannot reasonably discuss full and equal participation.[144] But in a robust pluralist democracy, full and equal citizenship for all individuals must be a premise of the system.[145] Without full and equal citizenship, allowing for equal political participation for all, then pluralist democracy does not truly exist.[146] As Robert Dahl, the preeminent theorist of pluralist democracy, has written: "The demos *must* include all adult members except transients and persons proven to be mentally defective."[147]

Discriminatory actions targeting LGBTQ individuals, such as Phillips' refusal to bake a wedding cake for a same-sex marriage, warp the boundaries of the political community.[148] Any individual who is a full and equal citizen in good standing should be "entitled to the same liberties, protections, and powers" that all other citizens enjoy.[149] Each individual, regardless of whether he or she

142. *See* HOW DEMOCRATIC, *supra* note 22, at 132.

143. *Id.* (arguing that the existence of democratic rights raises the question of rights for whom); *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 491 (1997) (emphasizing that it is "morally imperative" to recognize the functions of political communities).

144. Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 642 (2015).

145. *Id.* at 612.

146. *See* HOW DEMOCRATIC, *supra* note 22 at 135–37 (emphasizing political equality as an anchor for democracy); Emanuela Lombardo & Petra Meier, *Good Symbolic Representation: The Relevance of Inclusion*, 51 PS: POL. SCI. & POL. 327, 327 (2018) (emphasizing that inclusion can be normative or substantive); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 1006 (2005) (emphasizing the importance of having legislatures uphold a right in belonging to the political community).

147. ECONOMIC DEMOCRACY, *supra* note 22 at 59–60 (emphasis added); *see also* Karen Celis & Sarah Childs, *Good Representatives and Good Representation*, 51 PS: POL. SCI. & POL. 314, 314 (2018) (discussing how to measure political equality in the form of good democratic representation); Eline Severs & Suzanne Dovi, *The Good Representative 2.0: Why We Need To Return To the Ethics of Political Representation*, 51 PS: POL. SCI. & POL. 309 (2018) (identifying the criteria for actors to be considered democratically representative).

148. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519–20 (2015) (emphasizing that allowing religious believers to discriminate can inflict harm on others); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1463 (2017) (discussing the harms inflicted on LGBTQ individuals by anti-gay curriculum laws).

149. WALDRON, *supra* note 140, at 219–20.

is LGBTQ, should be able "to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah."[150] If discrimination against LGBTQ individuals is allowed, if they can be treated as less than full and equal citizens, then democracy is necessarily stunted.[151]

Discriminatory conduct might not contravene democracy as overtly as does a denial of suffrage, yet such conduct still undermines the substantive conditions for democracy and should not be constitutionally protected.[152] Discrimination treats individuals differently (or unequally) from other citizens exactly because they belong to the designated group—gays and lesbians, in Phillips' case.[153] Discrimination sends the message that LGBTQ individuals should not get too comfortable because other Americans would gladly mistreat them or cast them out altogether.[154] In such a social and political environment, LGBTQ individuals cannot possibly participate in democratic negotiations, coalitions, and compromises on an equal basis with other citizens.[155] The political strength of LGBTQ individuals is diminished before the democratic process even gets underway.[156] Discrimination mutes the voices of LGBTQ individuals, thus allowing other citizens to readily discredit or ignore their values and interests.[157]

C. Religious Freedom and Democracy

What about the rights of sincere religious believers such as Phillips? Religionists are also entitled to full and equal citizen-

150. *Id.* at 220.

151. Nancy Fraser, *Recognition Without Ethics?*, 18 THEORY, CULTURE & SOC'Y 21, 27–29 (2001) (emphasizing "participatory parity").

152. Feldman, *supra* note 91, at 354.

153. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1725 (2018).

154. *See, e.g.*, Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1151 (2017) (emphasizing that social groupings—like transgender individuals—are sometimes important to recognize).

155. *See, e.g.*, *id.* at 1179 (quoting Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting)).

156. *See id.* at 1134.

157. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–80 (1980) (discussing how courts can facilitate the representation of minorities).

ship.[158] Moreover, the Free Exercise Clause of the First Amendment explicitly protects religious freedom.[159] Phillips, after all, claimed that he refused to bake a wedding cake for Craig and Mullins precisely because same-sex marriage contravened his religious convictions.[160] Nevertheless, all full and equal citizens, including religionists like Phillips, must have diminished rights and democratic power if and when they advocate for the discriminatory or unequal treatment of a marginalized societal group or its members, such as LGBTQ individuals, based on that group's ascriptive qualities or differences from the mainstream.[161] Recall that the *Masterpiece Cakeshop* Court emphasized a commissioner's statement regarding the history of religion and discrimination: "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history . . . . And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[162] According to the Court, this statement revealed hostility toward religion; the Commission did not act neutrally.[163]

But the commissioner accurately depicted history.[164] Some religionists have persistently justified discrimination and persecution based on their religious convictions.[165] The most obvious historical example involves Christian antisemitism and persecution of

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

159. U.S. CONST. amend. I.

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

161. It is worth emphasizing that, in many states, LGBTQ individuals were treated as deviant sexual criminals through the twentieth century. *See* Bowers v. Hardwick, 478 U.S. 186, 189–90 (1986) (upholding constitutionality of anti-sodomy law as applied to homosexuals), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding anti-sodomy laws unconstitutional); s*ee also* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 679–80 (2017).

162. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

163. *Id.*

164. *See, e.g.*, Tisa Wenger, *Discrimination in the Name of Religion? Segregationists and Slaveholders Did It, Too*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/?utm_term=.509062cd9c7b (explaining the use of Christian ideology to discriminate against African Americans during pre-Civil War and post-Civil War American history).

165. *See id.*

Jews.[166] The Christian Bible (or New Testament) explicitly blames Jews for killing Jesus Christ and for stubbornly refusing to accept him as the son of God.[167] The Jews, from this perspective, therefore deserve to suffer and to be endlessly persecuted.[168] Indeed, the condemnation of Jews and Judaism became an integral "aspect of Christian self-identity."[169] For centuries, New Testament discourse ostensibly justified antisemitism and persecution.[170] Christian rulers forced Jews to wear badges or other signs of identification,[171] isolated Jews in ghettos,[172] and exiled Jews from entire countries.[173] Christians repeatedly accused, condemned, and punished Jews for supposedly sacrificing Christian children for religious purposes, as part of Jewish rituals.[174] Nazi antisemitism, of course, was rooted in traditional Christian tropes about Jews, though the Nazis found new ways to subjugate and kill.[175] "Even when deportations and mass murder were already under way, decrees appeared in 1942 prohibiting German Jews from having pets, getting their hair cut by Aryan barbers, or receiving the Reich sport badge!"[176]

Nineteenth-century Americans frequently invoked Christianity and the Bible as justifying slavery.[177] A few examples suffice

166. *See* WILLIAM NICHOLLS, CHRISTIAN ANTISEMITISM: A HISTORY OF HATE 311–15 (1993) (discussing Christian justifications for hating Jews, or antisemitism, in the nineteenth century).

167. *John* 19:12–16; *Matthew* 27:25; 1 *Thessalonians* 2:14–16; *see also* STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 10–27 (1997) (discussing the origins of Christian antisemitism); NICHOLLS, *supra* note 166, at 3, 84; ELAINE PAGELS, THE ORIGIN OF SATAN 10, 103 (1995).

168. *Matthew* 23:37–39; 1 *Thessalonians* 2:14–16.

169. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 38 (1989).

170. *See* PAUL JOHNSON, A HISTORY OF THE JEWS 174 (1987).

171. *See, e.g.*, *id.*, at 204; JAMES R. MARCUS, THE JEW IN THE MEDIEVAL WORLD: A SOURCE BOOK: 315-1791, at 138–39 (5th ed. 1974).

172. JOHNSON, *supra* note 170, at 235.

173. *Id.* at 213, 229–31.

174. LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA xxii–xxiii (1994).

175. JOHNSON, *supra* note 170, at 472–73; NICHOLLS, *supra* note 167, at xxii.

176. BAUMAN, *supra* note 169, at 17 (quoting Christopher R. Browning, *The German Bureaucracy and the Holocaust*, *in* GENOCIDE: CRITICAL ISSUES OF THE HOLOCAUST 145, 147 (1983)).

177. DREW GILPIN FAUST, A SOUTHERN STEWARDSHIP: THE INTELLECTUAL AND THE PROSLAVERY ARGUMENT (1979), *reprinted in* PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS 129, 137–39 (Paul Finkelman ed., 1989) (emphasizing pro-slavery reliance on Bible and Christianity). To be clear, abolitionists as well as proslavery advocates invoked

to make the point. In the introduction to *Cotton is King*, an anthology published in 1860, E.N. Elliott wrote: "We understand the nature of the negro race; and in the relation in which the providence of God has placed them to us, they are happy and useful members of society."[178] In one of the *Cotton is King* essays, a Baptist pastor, Thornton Stringfellow, explained:

> Under the gospel, it has brought within the range of gospel influence, millions of [slaves] among ourselves, who but for this institution, would have sunk down to eternal ruin; knowing not God, and strangers to the gospel. In their bondage here on earth, they have been much better provided for, and great multitudes of them have been made the freemen of the Lord Jesus Christ, and left this world rejoicing in hope of the glory of God.[179]

In another essay in the same volume, Albert Tayler Bledsoe, an American Episcopal minister and a professor at the University of Virginia, maintained that "the institution of slavery, as it exists among us at the South, is founded in political justice, is in accordance with the will of God and the designs of his providence, and is conducive to the highest, purest, best interests of mankind."[180] Meanwhile, James Henry Hammond, who served in the House of Representatives, the Senate, and as governor of South Carolina, wrote that "American slavery is not only not a sin,

religion. *See* Ferenc M. Szasz, *Antebellum Appeals to the "Higher Law," 1830-1860*, 110 ESSEX INST. HIST. COLLECTIONS 33, 37–47 (1974).

178. E.N. ELLIOTT, COTTON IS KING AND PRO-SLAVERY ARGUMENTS ix (1860).

179. Thornton Stringfellow, *The Bible Argument: Or, Slavery in the Light of Divine Revelation, in* COTTON IS KING AND PRO-SLAVERY ARGUMENTS 461, 491 (E.N. Elliott ed., 1860); *see* THORNTON STRINGFELLOW, A SCRIPTURAL VIEW OF SLAVERY (1856), *reprinted in* SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 86, 86–88 (Eric L. McKitrick ed., 1963) (drawing on Bible to advocate for slavery). Elliott praised Stringfellow's *Cotton is King* essay: "The plain and obvious teachings, of both Old and New Testament, are given with such irresistible force as to carry conviction to every mind . . . ." ELLIOTT, *supra* note 178, at xiii.

180. Albert Taylor Bledsoe, *Liberty and Slavery: Or, Slavery in the Light of Moral and Political Philosophy, in* COTTON IS KING AND PRO-SLAVERY ARGUMENTS 271, 273 (E.N. Elliott ed., 1860).

but especially commanded by God through Moses, and approved by Christ through his apostles."[181]

Through the twentieth century, segregationists continued to use religion to justify their racist policies and laws.[182] For example, the Baptist Reverend James F. Burks argued in favor of segregation in 1954: "The Word of God is the surest and only infallible source of our facts of Ethnology, and when man sets aside the plain teachings of this Blessed Book and disregards the boundary lines God Himself has drawn, man assumes a prerogative that belongs to God alone."[183] Mississippi Senator Theodore G. Bilbo maintained that "miscegenation and amalgamation are sins of man in direct defiance with the will of God."[184] In a case that ended in the Supreme Court, *Loving v. Virginia*, the trial judge explained why anti-miscegenation laws were ostensibly necessary:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[185]

Unfortunately, history is filled with religiously-inspired claims to justify discrimination and persecution of marginalized groups and their members.[186] Moreover, such discrimination and persecution, as exemplified by anti-miscegenation and other Jim Crow laws, were often adopted through seemingly democratic channels.[187] But if we properly understand the substantive conditions of pluralist democracy, then religion can never justify dis-

181. James Henry Hammond, *Hammond's Letters on Slavery*, *in* THE PRO-SLAVERY ARGUMENT: AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES 99, 108 (1852).

182. Jane Dailey, *Sex, Segregation, and the Sacred after* Brown, 91 J. AM. HIST. 119, 121 (2004).

183. *Id.* at 121 (quoting Reverend James F. Burks).

184. *Id.* at 125 (quoting Mississippi Senator Theodore G. Bilbo); *see id.* at 125–26 (providing additional examples of utilizing religion to justify segregation).

185. Loving v. Virginia, 388 U.S. 1, 3 (1967).

186. *See* Wenger, *supra* note 164.

187. *See Loving*, 388 U.S. at 6 (demonstrating that Virginia was one of sixteen states to legally adopt laws that prohibited interracial marriage).

criminatory conduct or law.[188] In a well-functioning democracy, some issues must be off the table.[189] Unquestionably, we should no longer debate whether racial minorities are entitled to full and equal participation in the democratic process.[190] The same should be true regarding LGBTQ individuals. Full and equal citizenship for LGBTQ individuals should be among the "settled features of the social environment to which we are visibly and pervasively committed."[191] The fact that critics of LGBTQ individuals and same-sex marriage, such as Phillips, might be inspired or motivated by religion is irrelevant.[192]

Discrimination appears to legitimate further democratic debate about the status of LGBTQ individuals while simultaneously diminishing their full and equal ability to participate in the democratic process.[193] Discrimination thrusts LGBTQ individuals into a second-class position in our polity.[194] Some individuals, in such circumstances, will react by remaining silent or hiding their differences from the mainstream.[195] Others will attempt to continue participating openly in the democratic arena, yet their words and ideas must overcome the disadvantages of a diminished communal status.[196] "The issue is," according to Jeremy Waldron, "the harm done to individuals and groups through the disfiguring of

188. *E.g.*, *id.* at 3, 7–12 (invalidating anti-miscegenation laws despite claim that religion required separation of races).

189. *E.g.*, Twining v. New Jersey, 211 U.S. 78, 118 (1908) (Harlan, J., dissenting) (advocating that the right against self-incrimination has always been foundational to liberty in a functioning society).

190. KENNETH W. MACK, REPRESENTING THE RACE 255 (2012) (emphasizing a right to full participation in society).

191. WALDRON, *supra* note 140, at 95; *see also* KWAMME ANTHONY APPIAH, THE ETHICS OF IDENTITY 193 (2005).

192. *See* WALDRON, *supra* note 140, at 130.

193. *Id.* at 96–97 (arguing that the constitutionality of hate speech should not be evaluated pursuant to doctrinal tests, which would tend to legitimate debate over hate speech).

194. *"All We Want is Equality:" Religious Exemptions and Discrimination against LGBTQ People in the United States,* HUM. RTS. WATCH (Feb. 19, 2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people.

195. *See* SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 43 (2017) (discussing the potential for silencing outsiders on a campus); *see also* WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX 100–02 (1991) (arguing that members of targeted groups sometimes seek assimilation to avoid degradation).

196. Catriona Mackenzie, *Three Dimensions of Autonomy: A Relational Analysis*, *in* AUTONOMY, OPPRESSION, AND GENDER 15, 21–23 (Andrea Veltman & Mark Piper eds., 2014) (arguing for importance of protecting opportunities in social environments).

our social environment . . . to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship."[197] A fair and open democratic dialogue or exchange of ideas is impossible if social power is skewed before the dialogue even begins.[198] Pluralist democracy fails when some in the political community treat others as less than citizens of full and equal standing.[199]

In short, discrimination of marginalized groups or their members within the political community is not worthy of constitutional value and should not be protected under the First Amendment, even if the discriminatory conduct arises from religious conviction.[200] To be sure, religion should not be broadly condemned.[201] Even though religion has sometimes inspired atrocities, history is also filled with religiously-inspired acts of social justice.[202] Think of the Reverend Martin Luther King, Jr.[203] But the social and political consequences of religion in general are beside the point here. The Free Exercise Clause protects Phillips' right to *believe* in his religion, but the question in *Masterpiece Cakeshop* was whether Phillips' invocation of religion insulated his discriminato-

197. WALDRON, *supra* note 140, at 33.

198. *See* Natalie Stoljar, *Autonomy and Adaptive Preference Formation*, *in* AUTONOMY, OPPRESSION, AND GENDER 227, 227 (Andrea Veltman & Mark Piper eds., 2014).

199. Discrimination is likely to inculcate members and non-members of a targeted group with deformed attitudes toward the group; that is, disdain (including self-disdain) for the targeted group seems legitimate. *Id.*

200. *See* Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 59 (2017). It is worth noting that my argument bypasses any potential problems arising from the state-action doctrine, which emphasizes that most constitutional limitations apply only against traditional state actors. *See, e.g.*, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (applying state-action doctrine); Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 L. & SOC. INQUIRY 273 (2010) (discussing evolution of state-action doctrine); Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2253–57 (2014) (emphasizing state-action doctrine issues). I do not argue that Phillips' conduct, in particular, or private discrimination, in general, violates the Constitution. Rather, I argue that such non-government conduct has no constitutional value. For that reason, the Court should not extend constitutional protections to such conduct. Moreover, I do not argue that the Court itself has violated the Constitution by shielding Phillips' discriminatory conduct, though *Shelley v. Kraemer* suggests judicial action can sometimes amount to state action. 334 U.S. 1 (1948). Instead, I present a normative argument: that the Court should not interpret the Free Exercise Clause to protect discriminatory conduct.

201. Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 511 (2017).

202. *See id.* at 517, 523 (arguing in favor of special treatment for religion); Martin Luther King, Jr., *The Most Durable Power, in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 10–11 (James Melvin Washington ed., 1991).

203. King, *supra* note 202.

ry *conduct* from sanction.[204] And on this crucial question, the Commission was exactly right: Religion should not justify discrimination.[205]

In the language emphasized by the *Masterpiece Cakeshop* Court, the commissioner asserted two points.[206] The first was historical and factual: "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history."[207] This historical statement was unequivocally correct. As discussed, history is littered with attempts to justify discrimination and persecution based on religious beliefs.[208] The commissioner's second point was normative: "And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[209] But contrary to the Court's conclusion, this normative statement did not reveal hostility toward religion when understood in the context of the dispute.[210]

Remember, Phillips had invoked his religion to justify discrimination against Craig and Mullins.[211] Phillips would not bake a wedding cake for their same-sex marriage.[212] The Commission was adjudicating whether Phillips had violated CADA, the state antidiscrimination statute, which prohibits discrimination based on sexual orientation (among other things).[213] The prohibited discrimination could not be allowed regardless of Phillips' justification.[214] Like others before him, Phillips might have alternatively invoked freedom of contract, federalism-concerns for state sover-

204. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018); *see* Emp't Div., Dep't Human Res. v. Smith, 494 U.S. 872, 877–79 (1990) (distinguishing between religious beliefs and religiously-motivated conduct).

205. *Masterpiece Cakeshop*, 138 S. Ct. at 1726; *see also* Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1113 (2016) ("We argue people still can believe what they want, worship as they choose, and follow their religious precepts—until and unless doing so would hurt someone else."); Lucas, *supra* note 200, at 59–60 (arguing to constitutionally protect claims of religious identity but not to protect a right to discriminate).

206. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

207. *Id.*

208. *Id.*

209. *Id.*

210. *See id.* at 1730.

211. *Id.* at 1724.

212. *Id.* at 1730.

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

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

eignty, a fear of government tyranny, or any ostensible reason to insulate his conduct from government regulation.[215] Phillips' asserted justification did not matter because the Commission needed to focus on whether Phillips had engaged in prohibited discriminatory conduct.[216] The commissioner's normative statement was therefore unnecessary because it did not address the fact of the prohibited discriminatory conduct, but the statement was eminently reasonable.[217] If anything, the commissioner appeared to suggest that religion should have a higher calling.[218] It can promote social justice, social harmony, personal redemption, and the like.[219] A person acts despicably, according to the commissioner, when he or she twists religious tenets (as well as the constitutional principle of free exercise) to justify discrimination or persecution.[220]

The Commission acted congruously in adjudicating William Jack's claims.[221] Recall that Jack, on three occasions, had asked bakers to create cakes decorated with images and Biblical invocations disparaging same-sex marriage.[222] As Justice Elena Kagan emphasized in her concurrence, the Commission concluded that the bakers had not discriminated against Jack based on any of

215. Peggy Cooper Davis et. al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301 (2017) (arguing that federalism-based emphases on state sovereignty undermine the national protection of civil rights); Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549 (2002) (emphasizing that the Court's protection of private choice undermines the constitutional commitment to equality); K. Sabeel Rahman, *Reconstructing the Administrative State in An Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (arguing that attacks on democratic government that encourage privatization simultaneously undermine opportunities for democratic control over certain social interactions); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (explaining how the Roberts Court uses a market-libertarian approach reminiscent of freedom of contract to invalidate employment and consumer protections); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015) (discussing interrelationship between private property rights and rights to use public accommodations).

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

217. Thus, for instance, Erwin Chemerinsky and Michele Goodwin write: "People can justify the most horrible of actions, including watching their children die from treatable illnesses, in the noblest of [religious] rhetoric." Chemerinsky & Goodwin, *supra* note 205, at 1135.

218. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 (2018).

219. Alfred J. Sciarrino, *Civil Rights: Religion in the Public Sphere*, 30 HOW. L.J. 1127, 1132 (1987).

220. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

221. *Id.* at 1732–34 (Kagan, J., concurring).

222. *Id.* at 1728.

the statutorily-prohibited grounds.[223] A baker can refuse to bake a cake because of a would-be customer's requested message, but a baker cannot refuse to bake a cake because of the would-be customer's "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry."[224] Unlike the bakers in the Jack cases, Phillips had refused to bake a cake for Craig and Mullins because of their sexual orientation, a prohibited ground of discrimination.[225] As Kagan explained, "a vendor [such as Phillips] cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait."[226]

Even if the commissioner (and the Commission) had expressed hostility toward religion, the context of this particular dispute, in which Phillips discriminated against Craig and Mullins, is determinative.[227] Contrary to Kennedy and the Court's assertions, in both *Masterpiece Cakeshop* and *Obergefell*, the government could not be neutral.[228] Discrimination against LGBTQ individuals necessarily undermines the requisite substantive conditions for pluralist democracy.[229] Rather than aiming for a specious neutrality, the

223. *Id.* at 1732–34 (Kagan, J., concurring).

224. COLO. REV. STAT. § 24-34-601(2)(a) (2017); *see Masterpiece Cakeshop*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting) (emphasizing that the bakers did not discriminate against Jack because of his religion).

225. *Masterpiece Cakeshop*, 138 S. Ct. at 1724; *see id.* at 1727 (stating that LGBT people receive legal and constitutional protection because they "cannot be treated as social outcasts or as inferior in dignity and worth").

226. *Id.* at 1733 n.* (Kagan, J., concurring). Gorsuch wrote: "[T]he Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here [in Phillips' case]." *Id.* at 1738–39 (Gorsuch, J., concurring). Gorsuch's mistake is to focus too strongly on the motivations of the discriminator rather than on the discriminating conduct and its target.

227. *See* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 268 (2009) (arguing that a politics of "mutual respect" will sometimes require challenging "the moral and religious convictions that our fellow citizens bring to public life").

228. The government could not be neutral because there are two sides to this issue—religious individuals like Phillips, and individuals seeking equality on the basis of sexual orientation, like Craig and Mullins. The only two sides to the issue are the two options the government must choose from when ruling, preventing neutrality. *See Masterpiece Cakeshop*, 138 S. Ct. at 1739 (noting that religion can and did affect the government's ability to apply the same level of generality across cases); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting) (arguing that the majority was not neutral "[b]y imposing its own views [on same-sex marriage] on the entire country").

229. *See* William N. Eskridge, Jr., Lawrence's *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1065 (2004) (defining tolerance as vetoing state discretion to treat LGBT people as "outlaws or degenerates," and

government should affirmatively nurture democratic culture by ensuring that all citizens can fully and equally participate in the polity.[230] If the government allows an individual or business to discriminate against a marginalized (and statutorily-protected) group or its members, the government is not acting neutrally.[231] Instead, the government is facilitating the continued marginalization of the targeted group within the political community.[232] The ability of that group and its members to speak and otherwise participate within the community will inevitably be diminished.[233] Ultimately, a pluralist democratic government cannot merely provide an abstract framework of procedures that allows individuals to assert their respective interests and values.[234] Regardless of the content or source of those individual interests and values—even if the content or source is religious—certain substantive questions and matters must be off the table if a pluralist democracy is to exist.[235] All individuals, including members of the LGBTQ community, must be treated as full and equal citizens in good standing.[236]

III. CONCLUSION

The Court in *Obergefell* held that substantive due process protected a right to marry for same-sex couples.[237] Yet the Court in *Masterpiece Cakeshop* extended constitutional protection to a baker

discussing how toleration towards homosexuality is necessary for the survival of a pluralist democracy).

230. *See* SMITH, *supra* note 143, at 12 (arguing that egalitarians need "to give up conceiving of good governments as bloodless neutral umpires of private activities and preexisting rights"); *see also* Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AM. POL. SCI. REV. 39, 44 (2017) (arguing that democratic governments should empower inclusion in democratic decision making).

231. *See* Benjamin, F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599, 600–01 (1962).

232. *See id.* at 600.

233. BEN-PORATH, *supra* note 195 (using the context of campus free speech disputes, free speech advocates who insist on "open-minded free inquiry" ignore the reality that "when many on campus are effectively silenced, inquiry is in fact neither free nor open-minded").

234. *Id.* at 43–44.

235. *Id.*

236. In other words, religious freedom should not trump a right to full and equal standing in the democratic polity. *See* JENNIFER NEDELSKY, LAW'S RELATIONS: A RATIONAL THEORY OF SELF, AUTONOMY, AND LAW 232–36 (2011) (arguing that various constitutional rights should not be understood as one better than another).

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

who claimed his religious beliefs prevented him from baking a wedding cake for a same-sex wedding.[238] The Court, in other words, shielded purposeful discrimination against a same-sex couple.[239] The Court cannot have it both ways. If same-sex marriage is constitutionally protected, then discrimination against same-sex couples cannot also be constitutionally protected, even if the discrimination arises from sincere religious beliefs.[240] Discrimination against LGBTQ individuals undermines the substantive conditions that are prerequisite to pluralist democracy.[241]

When the Colorado Civil Rights Commission decided to sanction the baker, Phillips, for discriminating against the same-sex couple, Craig and Mullins—because Phillips had discriminated based on sexual orientation—the Commission bolstered pluralist democracy.[242] When other bakers refused William Jack's request to bake cakes with anti-LGBTQ messages, they too bolstered democracy.[243] They would not acquiesce to Jack's desire to demean the status of same-sex couples.[244] The Commission therefore decided the Jack cases correctly by finding against Jack and, in doing so, reinforced democracy.[245] But when the *Masterpiece Cakeshop* Court overturned the Commission's decision in Phillips' case, the Court acted erroneously. Despite its pretensions toward neutrality, the Court undermined the substantive conditions of democracy. In the guise of upholding the First Amendment and the free exercise of religion, the Court instead effectively cooperated with Phillips in demeaning the full and equal standing of LGBTQ individuals in the American polity.

238. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1739.
239. *Id.*
240. *Id.* at 1750–51 (Ginsburg, J. dissenting).
241. *Obergefell*, 135 S. Ct. at 2605.
242. *Masterpiece Cakeshop*, 138 S. Ct. at 1739.
243. *Id.* at 1730.
244. *Id.*
245. *Id.*