

2019

Queer Sacrifice in Masterpiece Cakeshop

Jeremiah A. Ho

University of Massachusetts School of Law - Dartmouth, jho@umassd.edu

Follow this and additional works at: https://scholarship.law.umassd.edu/fac_pubs

 Part of the [Civil Rights and Discrimination Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Ho, Jeremiah A., "Queer Sacrifice in Masterpiece Cakeshop" (2019). *Faculty Publications*. 201.
https://scholarship.law.umassd.edu/fac_pubs/201

This Article is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

Forthcoming, to be published in the *Yale Journal of Law & Feminism*.

QUEER SACRIFICE IN *MASTERPIECE CAKESHOP*

Jeremiah A. Ho*

ABSTRACT

This Article interprets the Supreme Court’s 2018 decision, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, as a critical extension of Derrick Bell’s interest convergence thesis into the LGBTQ movement. Chiefly, *Masterpiece* reveals how the Court has been more willing to accommodate gay individuals who appear more assimilated and respectable—such as those who participated in the marriage equality decisions—than LGBTQ individuals who are less “mainstream” and whose exhibited queerness appear threatening to the heteronormative status quo. When assimilated same-sex couples sought marriage in *Obergefell v. Hodges*, their respectable personas facilitated the alignment between their interests to marry and the Court’s interest in affirming the primacy of marriage. *Masterpiece*, however, demonstrates that when the litigants’ sexual identities seem less assimilated and more destabilizing to the status quo, the Court becomes much less inclined to protect them from discrimination and, in turn, reacts by reinforcing its interest to preserve the status quo—one that relies on religious freedoms to fortify heteronormativity. To push this observation further, this Article explores how such failure of interest convergence in *Masterpiece* extends Derrick Bell’s thesis on involuntary racial sacrifice and fortuity into the LGBTQ context—arguing that essentially *Masterpiece* is an example of *queer sacrifice*. Thus, using the appositeness of critical race thinking, this Article regards the reversal in *Masterpiece* as part of the contours of interest convergence, queer sacrifice, and fortuity in the LGBTQ movement. Such observations ultimately prompt this Article to propose specific liberationist strategies that the movement ought to adopt in forging ahead.

* Associate Professor of Law, University of Massachusetts School of Law. I would like to thank Emma Wood, Jessica Dziedzic, Joseph Machado, Mary McBride, Janice Small, Aleah Fisher, and Kayla Venckauskas for research assistance. Also, much thanks to the University of Massachusetts School of Law for funding this research.

DRAFT: Please do not cite or circulate without author’s permission.

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. ASSIMILATIONIST STRATEGIES IN MARRIAGE EQUALITY.....	4
A. ASSIMILATION VERSUS LIBERATION - HISTORICAL TENSIONS....	4
B. MARRIAGE AS ASSIMILATIONIST STRATEGY.....	7
C. ASSIMILATIONIST STRATEGIES AND INTEREST CONVERGENCE	12
D. THE OBERGEFELL COUPLES.....	18
III. UNALIGNED INTERESTS IN <i>MASTERPIECE</i>	25
A. <i>QUEERING THE RESPONDENTS</i>	26
1. <i>Not Mainstream All-American</i>	27
2. <i>Not Asexual</i>	29
3. <i>Not Family-Oriented Caretakers</i>	32
4. <i>Not Accidental Activists</i>	33
B. <i>THREATENING THE STATUS QUO</i>	36
C. <i>PRESERVING THE STATUS QUO</i>	41
1. <i>Reframing the Issues</i>	41
2. <i>Weighing the Preservation Interest of the Status Quo</i>	44
3. <i>Religious Hostility</i>	49
4. <i>Speciousness and Questions of Motives</i>	53
D. <i>QUEER SACRIFICE</i>	61
1. <i>Bell's Theory</i>	62
2. <i>Queering Bell's Theory in Masterpiece</i>	65
IV. QUEER FORTUITY.....	69
A. <i>CHANGED CONDITIONS</i>	69
B. <i>MASTERPIECE'S MISSED FORTUITY</i>	72
C. <i>FORGING FORTUITY THROUGH COALITION BUILDING</i>	75
V. CONCLUSION.....	81

I. INTRODUCTION

Despite equality in marriage for same-sex couples, the Supreme Court's 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*¹ illustrates that the dominant status quo is still able to pick and choose which moments to discriminate against sexual minorities. This Article will show how the impasse from fully reaching sexual orientation antidiscrimination in *Masterpiece* is associated with the choices

¹ 138 S. Ct. 1719 (2018).

that the gay movement has made with the visibility of sexual minorities, particularly from the Court's prior marriage cases. Marriage equality is not true equality. Marriage equality litigation purposely depicted same-sex couples as assimilated and distinctively aligned with the dominant status quo in order to increase the viability that the Court would extend marriage rights.² In writing about *Obergefell*, others have noted that eventual success was premised on this carefully-crafted image of sameness, assimilation, and respectability because it allowed the interests of same-sex couples in seeking marriage rights to converge with the Court's interests in affirming the heteronormative institution of marriage.³ Indeed, through such an interpretation of *Obergefell*, some have borrowed Derrick Bell's well-regarded interest convergence thesis from critical race theory and applied it to explain how the Court reached its decision to extend marriage rights to same-sex couples.⁴

In examining *Masterpiece*, this Article affirms and then extends further such application of Bell's thesis. It explores *Masterpiece* as an example where interests failed to converge and what that failure signifies. Deviating from its high regard for assimilated same-sex couples in *Obergefell*, the *Masterpiece* Court was unwilling to accommodate the less assimilated, less seemingly-respectable queer identities of the same-sex couple involved. Instead, their queerness led the Court to reinforce interests in preserving the status quo—one that currently protects religious exercise over the rights of sexual minorities. In this way, the Article will render further analogies to Derrick Bell's racial justice theorizing—not only to his interest convergence thesis but also his later theories on involuntary racial sacrifice and fortuity—to explain how *Masterpiece* speaks profoundly about the current progress of LGBTQ rights in the post-marriage equality era. Applying Bell's theory of involuntary racial sacrifice, *Masterpiece* is ultimately a grave example of

² See generally Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J. F. 136 (2015).

³ Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 Cal. L. Rev. Circuit 117, 122-24 (2015) [hereinafter Joshi, *Respectable Dignity*]; Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. Rev. 184, 214-224 (2017).

⁴ *Id.*

queer sacrifice. Nevertheless, the Article will also use Bell's theorizing to show invariably how sexual minorities ought to forge ahead.

Beyond this Introduction, Part II explores assimilationist strategies in both the gay movement and the marriage equality sub-movement that culminated in the proliferation of sameness and respectability archetypes that helped leverage marriage equality. Part III first compares the assimilative characteristics of the same-sex couples from *Obergefell* against the queer sexualities of the *Masterpiece* couple. Then Part III examines *Masterpiece* to show how the decision is an example of queer sacrifice and what this sacrifice indicates for LGBTQ equality going forward. Finally, before Part V's conclusion, Part IV uses guidance from Bell's forged fortuity theory for solutions in the movement's next steps beyond *Masterpiece*.

II. ASSIMILATIONIST STRATEGIES IN MARRIAGE EQUALITY

A. ASSIMILATION VERSUS LIBERATION - HISTORICAL TENSIONS

Questions of strategy have always embroiled themselves centrally in the social and political advancements of sexual minorities. Even in earlier mid-20th century efforts, various incarnations of the American LGBTQ movement have pondered and taken sides between embracing assimilationist strategies, which insist on a rights-based perspective within the existing liberal democratic regime, and liberationist strategies, which assert change from a more revolutionary perspective outside the dominant political discourse.⁵ This basic tug-of-war between strategies famously ripped through the Mattachine Society, an early gay rights group that dominated over the homophile movement of the 1950s—a precursor movement of the contemporary LGBTQ crusade.⁶ Initially, the Mattachine Society embraced liberationist values and led the homophile movement by organizing a militant following, igniting participant self-

⁵ CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE GAY AND LESBIAN MOVEMENTS IN THE UNITED STATES 2 (2002) [hereinafter RIMMERMAN, FROM IDENTITY TO POLITICS].

⁶ *Id.* at 21-22.

awareness as an active minority group, and dedicating efforts toward legal advancements and changes in public perceptions against sexual minorities.⁷ Within the McCarthy Era, liberationist strategies and ideologies, which embodied communist principles, eventually led to conflict within the Mattachine Society, especially when “rank-and-file Mattachine members grew increasingly concerned with the organization’s possible association with communism.”⁸ In the disagreement between founding Mattachine leaders and its membership, the central conflict between assimilation and liberation arose as “[t]he Mattachine founders envisioned a separate homosexual culture while other members worried that such a strategy would only increase the hostile social climate.”⁹ Unlike their liberationist-entrenched leadership, the society’s newer members “called for integration into mainstream society” and that conflict led to change at the helms of the Mattachine in 1953.¹⁰

Such change ultimately resulted in the homophile movement’s abandonment of liberationist approaches for assimilationist ones.¹¹ From the mid-1950s, this re-vamped homophile movement focused on initiating dialogue with mainstream society by presenting sexual minorities as upright citizens in order to change public perceptions of homosexuality.¹² Specifically, “[t]heir strategy was to present themselves as reasonable, well-adjusted people, hoping that these heterosexual arbiters of public opinion would rethink their assumptions regarding homosexuality.”¹³ Unlike earlier tactics, the activists’ strategy now promoted sameness between the heterosexual mainstream and sexual minorities: “This approach, rooted in dialogue, emphasized conformity and attempted to minimize any differences between heterosexuality and homosexuality.”¹⁴ That approach prevailed until the time of Stonewall in 1969.¹⁵

⁷ *Id.* at 20-21.

⁸ *Id.*

⁹ *Id.* at 21.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 22.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

After Stonewall, liberationist strategies gained more traction as gay and lesbian activism of the late 1960s transitioned to reflect the radical politics of the 1970s.¹⁶ Assimilationist strategies took a back-seat as the goal of many gay activists at the time was to revolutionize society and not merely change mainstream perceptions.¹⁷ During this time, the work of the Gay Liberation Front came to the forefront of the gay rights movement by challenging status quo.¹⁸ One of its noted works involved mainstream representations of sexual minorities through language and cultural imagery. Known as “visibility rhetoric,” its use of language was important and essential for achieving the social group identity of gays and lesbians.¹⁹ For instance, the word “homosexual” was replaced with “gay,” and the consciousness of the group was reinforced with the word “pride.”²⁰

But as activism for sexual minorities entered the 1980s and organizations within the movement began to play active roles in national politics—particularly as the AIDS crisis and the conservative Republican rise in the mainstream political sphere prompted the urgency for national presence—assimilationist strategies began to return to tactical prominence.²¹ Preference for assimilationist strategies deepened as marriage litigation in the early 1990s directed the gay movement toward marriage equality.²² In litigating and changing public reactions to same-sex marriages, activists shifted perceptions by crafting arguments for “sameness” between same-sex and opposite-sex relationships and by arguing for the human universality of being²³—arguments

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 24.

¹⁸ *Id.*

¹⁹ Jacobs, *supra* n. __, at 725-26.

²⁰ RIMMERMAN, FROM IDENTITY TO POLITICS, *supra* n. __, at 24.

²¹ *Id.* at 28-29.

²² Carlos A. Ball, *Introduction: The Past and the Future*, in AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 3 (Carlos A. Ball ed., 2016).

²³ *Id.*; see also CRAIG A. RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS: ASSIMILATION OR LIBERATION? 147 (2008) [hereinafter RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS].

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

that the homophile movement's assimilationist strategies had tried to instill a generation before.²⁴

B. MARRIAGE AS ASSIMILATIONIST STRATEGY

When it comes to marriage, the movement's attachment to that idea has had a lengthy history and is nothing if not complex. As Carlos Ball recounts, "[t]he question of marriage has been the subject of discussion and activism from the beginning of the LGBT rights movement in the United States."²⁵ Although deprived of the right to marry in the twentieth century, some accounts exist of same-sex couples taking part in symbolic marriage ceremonies over the decades prior to actualizing legal recognition of same-sex marriages.²⁶ Then legal action took shape. In the 1970s, same-sex couples in several states across the U.S. also initiated lawsuits to obtain the right to marry.²⁷ At that time, during the liberationist heyday, the underlying purpose of these lawsuits focused more on the legal participation that marriage would afford sexual minorities rather than any integrationist notions of becoming part of the mainstream.²⁸ Exclusion from marriage meant that the rights and incidents of marriage enjoyed by wedded opposite-sex couples eluded same-sex couples.²⁹ Such desire for equal treatment was often the actual goal of these early same-sex marriage suits, rather than folding sexual minorities into the social fabric.³⁰ Unfortunately, none of the same-sex couples who sued for the right to marry ever prevailed in these early efforts—including *Baker v. Nelson*, which was denied certiorari review by the Supreme Court.³¹

²⁴ Elizabeth J. Baia, *Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021, 1027-28 (2018).

²⁵ Ball, *supra* n. ___, at 1.

²⁶ *Id.*

²⁷ *E.g.*, *Singer v. Hara*, 522 P.2d 1187 (Wash. App. Div. 1 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

²⁸ Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 38-41 (2015) [hereinafter Boucai, *Glorious Precedents*].

²⁹ RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS, *supra* n. ___, at 139-40.

³⁰ Boucai, *Glorious Precedents*, *supra* n. ___, at 4.

³¹ 409 U.S. 810 (1972).

Notwithstanding feminist critiques of marriage as a patriarchal institution, gay rights thinkers also exhibited apprehension toward marriage. The now-classic 1989 debate between Paula Ettelbrick and Tom Stoddard published in *Out/Look Magazine* exposes the assimilationist-versus-liberationist tensions that activism and ultimately obtaining the right to marry would bring.³² Ettelbrick and Stoddard were both colleagues at the Lambda Legal Defense Fund, but shared profound differences on the idea of same-sex marriage.³³ Ettelbrick held views against same-sex marriage while Stoddard possessed favorable ones.³⁴ Their debate illustrated quite succinctly but effectively some of the fundamental assimilationist-versus-liberationist perspectives on same-sex marriage.

Though not completely agreeable with the institution of marriage, Stoddard took the position “that every lesbian and gay man should have the right to marry the same-sex partner of his or her choice, and that the gay rights movement should aggressively seek full legal recognition for same-sex marriages.”³⁵ He then underscored his strong belief through practical, political, and philosophical explanations that all more-or-less illustrate how marriage would uphold and integrate same-sex couples within mainstream society.³⁶

But from the liberationist view, Ettelbrick articulated her anti-marriage stance by criticizing the importance of “self-affirmation” that many gay couples ideally seek through marriage.³⁷ She understood the appeal: “After all, those who marry can be instantaneously transformed from ‘outsiders’ to

³² Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK*, Fall 1989, at 8, 9, 14-17 ; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK*, Fall 1989, at 8, 8-13.

³³ David W. Dunlap, *Paula L. Ettelbrick, Legal Expert in Gay Rights Movement, Dies at 56*, *N.Y. Times* (Oct. 8, 2011), <https://www.nytimes.com/2011/10/09/nyregion/paula-l-ettelbrick-legal-expert-in-gay-rights-movement-dies-at-56.html>.

³⁴ *Id.*

³⁵ Stoddard, *supra* n. ____, at 10.

³⁶ *Id.*

³⁷ Ettelbrick, *supra* n. ____, at 9.

‘insiders,’ and we have a desperate need to become insiders.”³⁸ That desire might be tantalizing to sexual minorities for various symbolic and dignifying reasons, but Ettelbrick argued that obtaining marriage would, firstly, force assimilation upon sexual minorities rather than liberate them, and, secondly, minimize the plurality of queer identities that preclude justice for sexual minorities.³⁹ Rather, Ettelbrick argued that “[j]ustice for gay men and lesbians will only be achieved when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships.”⁴⁰ Marriage would be antithetical to her view of equality that did not emphasize “sameness” but rather stressed acceptance and equal treatment of plurality.⁴¹ “The law,” she wrote, “provides us no room to argue that we are different, but are nonetheless entitled to equal protection.”⁴² Ultimately, in marriage activism, Ettelbrick saw the rights-based approach by assimilationists as resulting in inauthenticity: “We end up mimicking all that is bad about an institution of marriage in our effort to appear to be the same as straight couples.”⁴³ That inauthenticity would accommodate the inequalities within gay culture and society as well:

Of course, a white man who marries another white man who has a full-time job with benefits will certainly be able to share in those benefits and overcome the only obstacle left to full societal assimilation—the goal of many in his class. In other words, gay marriage will not topple the system that allows only the privileged few to obtain decent health care. Nor will it close the privilege gap between those who are married and those who are not.⁴⁴

³⁸ *Id.*

³⁹ *Id.* at 10, 14.

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 15.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 16.

Prophetically, Ettelbrick also predicted the decline in gay political advancement once marriage is obtained: “If the laws change tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships?”⁴⁵ All in all, her reasons against pursuing marriage were predominantly pointed at how it would subordinate sexual minorities underneath a multidimensional, white heteronormative supremacy both externally and within the movement.

In pre-*Obergefell* 1989, the Stoddard-Ettelbrick pro-and-con debate in *Out/Look Magazine* illuminated profound complications that the idea of marriage underscored between assimilationist and liberationist strategies for the movement as a whole. But in light of any efforts to resist conformity and assimilation, marriage equality activism began to advance shortly around the time the Stoddard-Ettelbrick debate was published.⁴⁶ Despite latency for more than a decade, interest in advancing same-sex marriage came about consequentially from the impact that the AIDS epidemic pressed upon inheritance and death benefits issues of sexual minorities.⁴⁷ In 1989, the State Bar Association of California recommended legally recognizing same-sex marriages.⁴⁸ Then in the early 1990s, marriage litigation that began in Hawaii eventually led to the temporary success of *Baehr v. Lewin*,⁴⁹ where the Hawaii Supreme Court recognized that denying same-sex couples the right to marry could be unconstitutional.⁵⁰ The surprise success of *Baehr*, however slight, brought frenzy to both social conservatives and gay rights proponents.⁵¹ According to Carlos Ball, post-*Baehr* “a growing number of LGBT rights organizations, facing both the surprising

⁴⁵ *Id.* at 17.

⁴⁶ See, e.g., Philip S. Gutis, *Ideas and Trends: Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. TIMES ARCHIVES (Nov. 5, 1989), <https://www.nytimes.com/1989/11/05/weekinreview/ideas-trends-small-steps-toward-acceptance-renew-debate-on-gay-marriage.html>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 852 P.2d 44 (1993).

⁵⁰ *Id.* at 68.

⁵¹ Ball, *supra* n. __, at 3.

prospect of a possible victory in the Hawai'i courts and a growing conservative backlash against marital rights for same-sex couples, quickly turned the pursuit of marriage equality into their most important objective."⁵²

Though the marriage equality movement held possibilities for articulating gay rights through a more universalized frame⁵³ and its focus on same-sex couples pushed the discussion over sexual orientation discrimination into a different realm,⁵⁴ a substantial formulation for demanding equality in marriage hinged on assimilationist arguments based on sameness:

Through the process of demanding admission into the institution of marriage, the movement sought to establish that LGBT individuals were capable of entering and remaining in committed relationships—and, for those who had them, of raising children—in ways that did not differ fundamentally from the experiences of heterosexuals.⁵⁵

Such sameness arguments eventually prevailed to facilitate certain sub-group's desires for disparate results for other sub-groups in the LGBTQ movement:

Although some feminist and queer activists continued to criticize the embrace of marriage as an assimilationist and conservative move that would not help individuals who were not interested in, or would not benefit financially from, marriage, those voices were largely drowned out as many movement organizations, as well as an apparent majority of LGBT individuals, made marriage equality their top political priority."⁵⁶

⁵² *Id.*

⁵³ Janet R. Jakobsen, *Queer Relations: A Reading of Martha Nussbaum on Same-Sex Marriage*, 19 COLUM. J. GENDER & L. 133, 137 (2010).

⁵⁴ Ball, *supra* n. __, at 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

As Ettelbrick predicted, the drive toward marriage equality was eventually fueled by a prevalent class within the LGBTQ movement at the cost of intra-group marginalization.

C. ASSIMILATIONIST STRATEGIES AND INTEREST CONVERGENCE

While *Obergefell* was being heard at the Supreme Court—just a little more than two decades after *Baehr*—the effects of assimilationist strategies in the marriage equality and gay rights movements had continued to crystallize. Ettelbrick’s noted disparity had, indeed, persisted. Mere months before the *Obergefell* decision, Alexander Nourafshan and Angela Onwuachi-Willig echoed what other scholars had articulated—that successes in gay rights advancement in pursuing marriage had incurred an unfortunate cost to the movement itself.⁵⁷

According to Nourafshan and Onwuachi-Willig, in championing marriage, movement proponents had, historically throughout the struggle up to *Obergefell*, embraced assimilationist tactics over liberationist ones: “[R]ather than seek to disrupt the paradigm of heteronormativity, assimilation-oriented homosexuals sought to fit gay rights into the existing legal and social structure, without threatening to upend the social order.”⁵⁸ The consequences might have made some in-roads toward formal equality, but the progress retained—if not deepened—some substantial limits for the movement as a whole:

Although *Windsor* and the revolution of cases that have led to *Obergefell* [sic] hold significant promise for one privileged subset of gays and lesbians—white, economically privileged, and educated gays and lesbians—they do not necessarily carry the same potential for less privileged subgroups within the gay and lesbian community, namely gays and lesbians of color.⁵⁹

⁵⁷ Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521 (2015).

⁵⁸ *Id.* at 526 (citations omitted).

⁵⁹ *Id.* at 521-22.

Others have similarly discerned, before and since *Obergefell*, that the assimilative push for equality in marriage was ironically done through channeling some important disparities within the gay community and movement. According to Kathrine Franke, “[i]n the marriage cases, lesbians and gay men have accomplished a rebranding of what it means to be homosexual.”⁶⁰ Through what she calls “just like us” arguments that connote sameness to the mainstream,⁶¹ that sameness connotation has eventually led to the prevailing use of whiteness in marriage litigation’s rebranding of the gay identity.⁶² Consequently, she posits that marriage became “publicly perceived to be a white issue” and the marriage equality movement itself “specifically enjoy a kind of racial privilege that has underwritten the plausibility of this positive transformation in the meaning of gay identity.”⁶³ Even before the 2003 success in Massachusetts through *Goodridge*, Darren Lenard Hutchinson had referenced what some scholars on race were already saying about the same-sex marriage movement in the U.S.—the apprehension “that many (or most) of the benefits from same-sex marriage will accrue to white and upper-class individuals.”⁶⁴

Nourafshan and Onwuachi-Willig also contend that the assimilationist strategies in marriage equality became a vehicle for a dominant sexual minority group—one that projected a white, upper-middle class image to emerge with its interests (including marriage) as representative of the rest of the sexual minority population.⁶⁵ They direct their findings at the sameness arguments.⁶⁶ Although the movement obtained some progress on social issues such as marriage, the collateral result is that “[t]he movement’s portrayal of gay identity as white, wealthy, and educated has created a race-based insider identity for white

⁶⁰ Katherine Franke, *What Marriage Equality Teaches Us: The Afterlife of Racism and Homophobia*, in Ball, *supra* n. ___, at 247.

⁶¹ *Id.* at 249-50.

⁶² *Id.* at 250.

⁶³ *Id.* at 251.

⁶⁴ Darren Lenard Hutchinson, “*Gay Rights*” for “*Gay Whites*”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1370 (2000)

⁶⁵ Nourafshan & Onwuachi-Willig, *supra* n. ___, at 522.

⁶⁶ *Id.* at 526.

homosexuals in mainstream society and within the gay community.”⁶⁷ In other words, “[t]he construction of gay identity has rendered whiteness the racial default, implicitly privileging white homosexuals over gays of color.”⁶⁸ Rebranding has become reality.

The saliency of this result is itself not hard to perceive. Indeed, even in 1989 before the advancement of marriage equality, Ettelbrick had predicted the racial and economic subordination of sexual minorities through obtaining the right to marry. Borrowing from Derrick Bell’s racial justice theorizing, his interest convergence theory helps illuminate the correlation between assimilationist strategies in the marriage movement and marginalizing effects on sexual minorities.⁶⁹ In theorizing racial inequality, Bell posited that the recognition of legal rights of those subordinated only occur upon convincing the white decisionmakers that the interests of both groups converge.⁷⁰ At the start of the marriage movement, sexual minorities vying for the right to marry appeared as outsiders attempting to appease the heterosexual mainstream who have the ability to marry and the power to extend the right to marry. Proponents and movement activists abandoned liberationist, outsider rhetoric to reach for sameness arguments, which revised pronouncements that same-sex couples could love, have relationships, or rear children well enough to deserve the rights and benefits of marriage to be “just like you.” Assimilationist accounts of sameness were predicated on how identical same-sex couples were to the heterosexual couples—how they would be unlikely to threaten the status quo. Once the establishment was convinced of the sameness, sexual minorities were granted the right to marry. In this way, making marriage equality appear as a “white issue” facilitated sameness arguments and also aligned the interests of between sexual minorities and the power-granting establishment. As Franke notes, “[t]he racial endowment as

⁶⁷ *Id.* at 534.

⁶⁸ *Id.*

⁶⁹ See Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 *Law & Ineq.* 117, 137-53 (2012).

⁷⁰ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

white from which the marriage equality movement has benefited . . . surely helped conservative courts, legislators, and others come to see *an affinity of interest* with this cause.”⁷¹ This notion is so “even if not grounded in reality, since many of the members of the LGBT community who sought marriage rights were people of color.”⁷²

In propelling gay rights and legal protections, this strategy to align interests is not exclusive to the marriage issue. Anthony Michael Kreis has drawn several accounts that reveal the impact of interest convergence in recent gay rights advances.⁷³ Reading together Justice Scalia’s dissent in *Romer v. Evans*⁷⁴ and Justice Kennedy’s majority opinion in *Lawrence v. Texas*,⁷⁵ Kreis argues that the Supreme Court’s reversal of *Bowers v. Hardwick*⁷⁶ involved several layers of interest convergence. With *Romer*, Kreis has discerned that Scalia’s scathing dissent was a reaction to the undercurrent of white privilege that helped convince the majority of Amendment 2’s animus: “[Scalia’s] intent was surely to highlight that the LGBT community is a powerful and visible force within the legal community and that visibility makes it easier for his fellow Justices to grant rights to a group of people with whom lawyers typically associate.”⁷⁷ Sameness facilitated *Romer*’s outcome. Kreis then pairs the resonance of Scalia’s *Romer* dissent with the passage in Kennedy’s majority opinion in *Lawrence*, when sameness was used to connote the discriminatory effect of sodomy laws.⁷⁸ As Kennedy distinguished the facts of the case from a case that might have involved minors, nonconsensual sex, public indecency, prostitution, or legal recognition of same-sex relationships, he stated that *Lawrence*, on the contrary, “involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”⁷⁹ As such, “[t]he petitioners are entitled to

⁷¹ Franke, *supra* n. __, at 250.

⁷² *Id.*

⁷³ See generally Kreis, *supra* n. __.

⁷⁴ 517 U.S. 620 (1996).

⁷⁵ 539 U.S. 558 (2003).

⁷⁶ 478 U.S. 186 (1986).

⁷⁷ Kreis, *supra* n. __, at 148.

⁷⁸ *Id.* at 149.

⁷⁹ *Lawrence*, 539 U.S. at 578; see also Kreis, *supra* n. __, at 149.

respect for their private lives.”⁸⁰ Kennedy imbued the petitioners with sameness rhetoric by drawing them in broad enough terms—“two adults”⁸¹ who were consensually “engaged in sexual practices”⁸²—but at the same time juxtaposing their case and predicament away from situations of real vice—pedophilia, rape, indecency, or prostitution—or a situation of larger societal or normalizing scope—perhaps same-sex marriage. The petitioners were just having consensual sex. What’s the harm in that? At the same time, Kennedy seems to show how the petitioners’ interests aligned with the decision-making establishment because, according to Kreis, the passage “emphasizes that there is no harm to heteronormative norms with the majority’s decision.”⁸³ Furthermore, by the time *Lawrence* weighed the legality of same-sex intimacy, other heteronormative institutions that might have been once threatened by the overturning of *Bowers*—such as religious organizations—already had such threats “neutralized” in other Supreme Court decisions.⁸⁴ Such neutralization of threats that *Lawrence* might have posed further demonstrated the aligning of interests that helped reverse *Bowers*: “The *Bowers*, *Romer*, and *Lawrence* opinions are strong evidence that once shared identity interests are realized, judicial remedies favoring sexual minorities will be authorized provided they do not undermine the power or authority of peer heterosexual stakeholders.”⁸⁵ In other words, the legal protections sexual minorities were asking for can be granted so long as such protections would not threaten the heteronormative status quo.

Similarly, Nourafshan and Onwuachi-Willig illustrate one particularly glaring instance of interest convergence in *U.S. v. Windsor*⁸⁶:

⁸⁰ *Lawrence*, 539 U.S. at 578; see also Kreis, *supra* n. __, at 149.

⁸¹ *Lawrence*, 539 U.S. at 578.

⁸² *Id.*

⁸³ Kreis, *supra* n. __, at 149.

⁸⁴ *Id.* at 150.

⁸⁵ *Id.* at 151.

⁸⁶ Nourafshan & Onwuachi-Willig, *supra* n. __, at 522-23; 133 S. Ct. 2675 (2013).

Under the theory of interest convergence, Edith Windsor, a wealthy, white woman in a long-term committed relationship in New York City, was, in many ways, the perfect plaintiff to challenge DOMA because she could be sold as part of a respectable, assimilation-based gay image to the general public and, more importantly, to those in power.⁸⁷

Particular aspects of Windsor's marriage to her deceased spouse Thea Spyer seemed conducive for drawing sameness arguments. According to Nourafshan and Onwuachi-Willig, Windsor's "wedding was 'mainstream' enough to be featured in the *New York Times* wedding section, even though the state of New York did not recognize same-sex marriage until 2012."⁸⁸ In addition, "[b]oth Windsor, who holds a Master's degree from N.Y.U., and Spyer, who has a Ph.D., have elite pedigrees in terms of education."⁸⁹ The combination of these attributes made the conclusion viable that "Edie Windsor closely hues to the image of homosexuality that has been consciously crafted in the public sphere."⁹⁰

Beyond the ways her identity could be construed as "conforming to society's perceived normative ideal in all ways expect for sexuality,"⁹¹ the financial losses associated with how the Defense of Marriage Act discriminated against her state-recognized marriage on the federal level (charging her \$363,053 in estate taxes) made her "sympathetic."⁹² In deconstructing the image that Windsor presented, Nourafshan and Onwuachi-Willig tease out the converging interests. Windsor's estate taxes dispute could be "highly salient to white elites, both gay and non-gay alike."⁹³ Her "respectability-based identity as a lesbian represented a departure from the stereotype of hyper-sexuality that is often affiliated with or imputed to gay culture."⁹⁴

⁸⁷ Nourafshan & Onwuachi-Willig, *supra* n. ___, at 522.

⁸⁸ *Id.* at 522 n. 7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 523.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Windsor’s “racial identity as a white woman reified the primacy of whiteness in the gay community and gay rights movement.”⁹⁵ Not to mention, “her identity as an educated Northerner reinforced notions of sophistication and assimilation in the gay and lesbian community.”⁹⁶ Combined together, these attributes “helped to remove the stigma of otherness (to an extent) and thus enabled broad swaths of people to identify with her.”⁹⁷ Of course, according to Nourafshan and Onwuachi-Willig, aligning interests between Windsor and the establishment here also created the inverse problem—using her attributes to draw similarities in interest “also implicitly worked to mark those who did not fit this normative ideal as outsiders.”⁹⁸

D. THE OBERGEFELL COUPLES

In examining *Obergefell* plaintiffs, Cynthia Godsoe has noted that attorneys’ strategies in managing their plaintiffs’ “ordinariness” and “approachability” hinged on portraying a sense of normality.⁹⁹ Animating both the selection of the twenty-nine *Obergefell* plaintiffs and their performance of attributes, the strategy of being normal was targeted chiefly toward members of the Court in ways that maximized and ensured sufficient interest convergence that would render positive outcomes:

[T]he Supreme Court is mainstream in its own way, composed of nine individuals from a very narrow slice of the population. Skilled advocates “play by its rules, and tell the Justices stories they like to hear about people who remind them of themselves.” In other words, plaintiffs should assimilate to norms that the Justices understand and their lawyers should play down differences.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Godsoe, *supra* n. __, at 136.

¹⁰⁰ *Id.* at 136-40 (footnotes omitted) (quoting Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (Mar. 12, 2012), <http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick>) (emphasis added).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

In doing so, Godsoe observes that result of such elaborate perception-building “reveals some deep-rooted assumptions about what a family should look like and what is an appropriate path to social change.”¹⁰¹ Assimilationist strategies would likely fit that path. According to Godsoe’s research, the *Obergefell* plaintiffs were “largely homogenous and non-representative of LGB families,”¹⁰² and their similarities and attributes can be categorized and compiled into to an archetypal scheme. Though self-identified as sexual minorities, the *Obergefell* plaintiffs appear to Godsoe to share four common traits; they are (1) typically all-American, (2) asexual, (3) devoted to childrearing and/or caregiving, and (4) accidentally political.¹⁰³

What Godsoe describes as “all-American” is synonymous with “reflect[ing] a traditional ‘Leave it to Beaver’ American ideal”¹⁰⁴ typified by their “overwhelmingly white and middle or upper-middle class”¹⁰⁵ composition that is “starkly different than the gay and lesbian population.”¹⁰⁶ In fact, only five *Obergefell* plaintiffs are white, and out of sixteen couples, just three are racially mixed.¹⁰⁷ These ratios amongst the *Obergefell* plaintiffs here are incongruous and unrepresentative of the racial breakdown in LGBT population as Godsoe reports.¹⁰⁸

Moreover, to continue building their all-American features, Godsoe notes that they “all have eminently respectable jobs.”¹⁰⁹ She illuminates this all-Americanness using one particular example of an actual *Obergefell* plaintiff-couple: “[T]wo attractive veterinary professors who were recruited because they are ‘in a stable, good relationship,’ and are ‘likeable’ ‘homeowners’ with respectable jobs.”¹¹⁰ In other words, using Godsoe’s own synonym for all-American, the *Obergefell* plaintiffs are more or less

¹⁰¹ *Id.* at 140.

¹⁰² *Id.* at 145.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 139.

¹⁰⁹ *Id.* at 146.

¹¹⁰ *Id.* at 138.

“mainstream.”¹¹¹ Extrapolating from Godsoe’s research, this group of litigants exhibited fewer or nearly no features that would personify them readily as “queer”; they do not appear to embody particularized attributes normally associated with sexual minority life, status, or culture. There are no transpeople or HIV-positive individuals amongst these plaintiffs.¹¹² Nor did these litigants possess less-seemingly “respectable” jobs, characteristics, or backgrounds that would label them alternative from the mainstream in some way.¹¹³ They are overwhelmingly white and privileged, and present themselves and their families as “‘do[ing] exactly the same things as everyone else does,’”¹¹⁴ or they consider themselves “‘just as boring and crazy and loud as any other family.’”¹¹⁵ In essence, one can alternatively designate what Godsoe identifies as “all-American” or “mainstream” in the *Obergefell* plaintiffs as assimilated characteristics.

Likewise, Godsoe noted that *Obergefell* plaintiffs were “asexual” or de-sexualized¹¹⁶—meaning that their highly-crafted image avoided the stereotypical notions of gay promiscuity or even reminded the public or the Court of non-heteronormative sex: “Not one of the many photographs and videos available online depict a plaintiff kissing his or her partner. Sex is never mentioned.”¹¹⁷ Rather their “asexual” images portray monogamous couples committed in their relationships to one-another.¹¹⁸ To borrow from Kreis’ observations regarding interest convergence from *Lawrence*,¹¹⁹ the de-sexualization of plaintiffs here likely serves to signal and underscore their non-threatening nature—how the qualities of their same-sex relationships (which would include aspects of sex and sexual intimacy) would not threaten the establishment’s social order. The irony here is that the *Obergefell* attorneys’ needed to de-sexualize their plaintiffs before the public and the Justices despite the progress already

¹¹¹ *Id.* at 145.

¹¹² *Id.*

¹¹³ *Id.* (noting no plaintiff with criminal histories or tattoos).

¹¹⁴ *Id.* 147

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 147-48.

¹¹⁷ *Id.* at 148.

¹¹⁸ *Id.*

¹¹⁹ Kreis, *supra* n. ___, at 149.

made by the Court in *Lawrence* to decriminalize consensual same-sex intimacy—in other words, despite the Court having neutralized that threat.¹²⁰ Thus, the tactic to de-sexualize the *Obergefell* plaintiffs here seem overprotective, and overstates the notion in *Lawrence* that consensual same-sex sexual activity bore no harm to the establishment; the truth about the sex in controversy in *Lawrence* was that it was unlikely to have met traditionally nuclear and heteronormative standards as the *Lawrence* litigants involved were likely not a committed couple.¹²¹ In *Obergefell*, the plaintiffs' could not threaten the status quo because they appeared so asexual or sterile that sex was categorically avoided. Simultaneously, the move also appears regressive as if intended to avoid the connotations that sodomy in *Bowers* had engendered¹²² or perhaps reach back further to early same-sex marriage cases when the primacy of procreative sex quashed any advancement of granting same-sex couples the right to marry.¹²³ All in all, the prophylactic move to de-sexualize *Obergefell* plaintiffs seemed aimed to neutralize any indication of threat to the mainstream social order.

According to Godsoe, the *Obergefell* plaintiffs were also engaged in childrearing at a degree much higher than statistics for the sexual minority population, or, if they did not have children, was often engaged in caretaking responsibilities for either their partners or parents.¹²⁴ Godsoe observed that caregiving “not only further desexualizes LGB relationship, but also entrenches the privatization of dependency, exempting the state from responsibility for supporting the disabled and children.”¹²⁵ But not only does caregiving facilitates the “reward” for receiving legal recognition of marriage, as Godsoe describes,¹²⁶ the use of childrearing and caregiving also aligns the interests of sexual minorities with the establishment by again minimizing same-sex relationships as non-threatening and appearing to hold

¹²⁰ 539 U.S. at 566-79.

¹²¹ Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004).

¹²² *Bowers*, 478 U.S. 186, 192-94 (1986).

¹²³ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

¹²⁴ Godsoe, *supra* n. ___, at 149.

¹²⁵ *Id.* at 150.

¹²⁶ *Id.*

up the values of childrearing and family subscribed by the mainstream—suggesting hints of assimilation in this attribute as well. One is reminded by the quote from *House of Cards*: “Everyone can get behind children.”¹²⁷ This suggestion remains even if the *Obergefell* plaintiffs overstate the prevalence of childrearing amongst the sexual minority population.¹²⁸

Finally, Godsoe perceives *Obergefell* plaintiffs as political outsiders, calling them “Accidental Activists.”¹²⁹ Indeed, “[t]he final ingredient in the perfect plaintiff [in *Obergefell*] is a disdain for politics. The *Obergefell* plaintiffs have been cast as ‘ordinary’ folks who just happened to get involved[.]”¹³⁰ They claim not to be “activists” but just interested in their private existence.¹³¹ Yet, their apolitical nature seems disingenuous to Godsoe, who notes their public involvement with the press, appearances at advocacy events, contributions to the media, and attendance at Supreme Court arguments once they were selected as plaintiffs.¹³² Again, the “apolitical” narratives seem to lessen any “activist” connotations, perhaps adding to their non-threatening personas.

All in all, Godsoe’s intricate scholarship here on the *Obergefell* plaintiffs details motivated interest convergence that underscores the reason why attorneys opted for an assimilationist strategy—one that complements and proves on a litigative scale Katherine Franke’s remark about the collateral rebranding of the gay identity by the movement’s focus on obtaining marriage equality.¹³³ Franke’s observations about racial marginalization in the marriage litigation also match Godsoe’s on *Obergefell*: “When the lawyers and the clients in the gay marriage cases stand on the steps of the Supreme Court after arguing their case for marriage equality, all, or nearly all, of them are white.”¹³⁴ Major coverage of recent marriage cases feature white individuals as plaintiffs and attorneys; noted leaders at major gay organizations

¹²⁷ *House of Cards: Chapter 1* (Netflix Feb. 1, 2013).

¹²⁸ Godsoe, *supra* n. __, at 149.

¹²⁹ *Id.* at 150.

¹³⁰ *Id.*

¹³¹ *Id.* at 151.

¹³² *Id.* at 151-52 (“They protest too much.”)

¹³³ Franke, *supra* n. __, at 247.

¹³⁴ *Id.* at 251.

involved in marriage equality advances have also been white.¹³⁵ But despite the images of incongruity between the sexual minorities at the frontlines of the marriage equality movement and those residing within the sexual minority population as a whole, the assimilationist strategy and the interest convergence ultimately worked to convince the Court to give same-sex couples the right to marry in *Obergefell*.¹³⁶ Identifying marriage as the “keystone of our social order,” Kennedy ultimately extended such right to plaintiff same-sex couples.¹³⁷

E. HIERARCHICAL EFFECTS

If Franke and others are correct that the assimilationist strategy in advancing toward marriage equality succeeded in rebranding the perception of the gay identity as predominately white, upper-middle class, then this result leaves out a substantial reality about the sexual minority population as a whole. Amongst the LGBTQ population, racial and economic stratification mirrors that of the general population in the U.S.¹³⁸ For better or worse, with marriage having arisen as the top priority of the gay rights movement in the last two decades, a skewed representation of the gay identity has emerged to help obtain formal equality at the expense of underprivileged voices in the sexual minority population. The problem is multifold. First, such success in formal equality using assimilationist strategies has, in essence, led to the replication of racial and underprivileged subordination within the architecture of such formal equality established in cases such as *Windsor* and *Obergefell*. On the one hand, the sameness arguments and interest convergence have only gotten the movement so far. In *Windsor*, Kennedy essentially replicated and extended his use of rationality with bite from *Romer*.¹³⁹ While in *Obergefell*, he

¹³⁵ *Id.*

¹³⁶ *Obergefell*, 135 S. Ct. at 2601-02 (2015).

¹³⁷ *Id.* at 2601.

¹³⁸ See, e.g., Gary J. Gates, Williams Inst., *LGBT Demographics: Comparisons Among Population-Based Surveys* (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf>.

¹³⁹ See Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1048 (2016).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

extended the right to marry primarily based on 14th amendment due process considerations—reflective of a similar stroke he used in *Lawrence*—and left a very thin equality jurisprudence hinged again on due process considerations, not on any heightened scrutiny analysis.¹⁴⁰ As Kreis remarked about lower district and appellate court marriage decisions that rendered favorably for same-sex couples, “[f]rom a judge’s perspective, it might very well be considerably difficult to apply a more exacting level of judicial review to a class of people that appear privileged.”¹⁴¹ In that way, the sameness arguments have a plateauing limit based on Bell’s interest convergence thesis: “So long as the interests of judges and White elites remain converged with the interest of the LGBT community due to a perceived common intersection of identity, and so long as remedies for LGBT discrimination do not undermine heteronormative interests, LGBT rights will ultimately prevail.”¹⁴² Examined this way, the contours of formal equality from recent advancement in gay rights are problematic. The encasement of hierarchy and privilege within advances for formal equality for sexual minorities makes such formal equality, once obtained, less than ideal—somewhat pernicious even—as a form of equality. Of course, same-sex couples do receive benefits through marriage. But because marriage was achieved through assimilationist strategies that aligned interests between privileged sexual minorities and the establishment, such achievements carry with them a certain level of taint.

Internally amongst sexual minorities, assimilationist strategies that accomplished, in part, the rebranding of the gay identity for the mainstream have also committed erasure for non-white, intersectional sexual minorities. For instance, as Nourafshan and Onuachi-Willig noted, the assimilationist, sameness strategies used in *Windsor* “enabled broad swaths of people to identify with [Edith Windsor]” but “also implicitly worked to mark those who did not fit this normative ideal as outsiders.”¹⁴³ As Stewart Chang has remarked, “[w]hen formal

¹⁴⁰ See 135 S. Ct. at 2603-05.

¹⁴¹ Kreis, *supra* n. ___, at 160.

¹⁴² *Id.* at 161.

¹⁴³ Nourafshan & Onwuachi-Willig, *supra* n. ___, at 523.

equality is tied to marriage, only those who subscribe to and have access to the institution of marriage are able to attain equality.”¹⁴⁴ Thus, marriage equality furthers sexual minority subordination by “stifl[ing] heterogeneous sexualities.”¹⁴⁵ All of this effectively stretches the existing marginalization of underprivileged and/or racial sexual minorities who do not fit the model created by assimilationist strategies.

Going forth, assimilationist strategies here will prove to be an obstacle in future advances for true equality. First, according to Kreis’ take on Bell’s interest convergence, gay rights will only prevail so long as interests are aligned and reparations for discrimination do not disturb the status quo.¹⁴⁶ Because the interests of sexual minorities who do not appear assimilated do challenge establishment norms—whether racially, economically, or otherwise—further advances in the areas of employment and housing discrimination, where intersectional members are affected more often, will likely face stagnancy. Such a result means that the progress for advancing sexual minorities has stalled since *Obergefell* and will likely taper unless a transformative strategy intervenes. As Part III will show, that stagnancy is apparent in aspects of the *Masterpiece* decision.

III. UNALIGNED INTERESTS IN *MASTERPIECE*

The *Masterpiece* dispute originated in 2012 when Charlie Craig and David Mullins, a Colorado same-sex couple, tried to order a custom-made wedding cake from Masterpiece Cakeshop and its owner-baker, Jack Phillips.¹⁴⁷ Because Colorado did not recognize same-sex marriages at the time, Craig and Mullins had planned to marry lawfully in Massachusetts and then return to Colorado to celebrate their out-of-state marriage.¹⁴⁸ A custom-ordered wedding cake from Phillip’s shop would have been part of that celebration.¹⁴⁹ Upon hearing that Craig and Mullins wanted

¹⁴⁴ Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, 23 *ASIAN AM. L.J.* 5, 26-27 (2016).

¹⁴⁵ *Id.* at 27.

¹⁴⁶ Kreis, *supra* n. ___, at 161.

¹⁴⁷ 138 S. Ct. 1719, 1724 (2018).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

a custom wedding cake for their party, Phillips refused, and later claimed that baking and selling a cake that celebrated a same-sex wedding was contrary to his Christian beliefs.¹⁵⁰ Craig and Mullins subsequently complained against Phillips and his bakery to the Colorado Civil Rights Commission, alleging sexual orientation discrimination under the public accommodations section of Colorado’s Anti-Discrimination Act (“CADA”).¹⁵¹ The couple’s claim succeeded before the Commission and Phillips appealed.¹⁵² The Colorado Court of Appeals affirmed the Commission’s findings that Phillips had discriminated against Craig and Mullins.¹⁵³ Yet in its 2017-2018 term, the Supreme Court reversed the Court of Appeal’s decision, ruling that the Commission and the appeals court did not exercise religious neutrality when examining the baker’s actions.¹⁵⁴ The finding of religious hostility allowed the Court to pass on deciding whether substantively CADA ought to prevail in favor of Craig and Mullins or whether Phillips’ speech and religious exercise rights under the First Amendment were violated.¹⁵⁵ The Court, instead, turned to criticizing the adjudicating processes below to reset the postures of the case.¹⁵⁶

A. QUEERING THE RESPONDENTS

In contrast to the assimilated and mainstream identities that the same-sex couples projected during the *Obergefell* litigation, the same-sex couple in *Masterpiece* did not appear as readily assimilated when they engaged in their legal battles over an instance of alleged sexual orientation discrimination. Although Craig and Mullins are both racially white and male, they did not share many of the other “normalized” similarities with the *Obergefell* plaintiffs. Substantially missing from Craig and Mullins’ public personas were characteristics that would have easily fallen within any of Godsoe’s four archetypal traits of gay assimilation in *Obergefell*: (1) projections of all-Americanness; (2)

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1723.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1723-24.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

asexuality; (3) childrearing or caretaking obligations; and (4) accidental activism.¹⁵⁷ If Godsoe's four categories are to be taken at some value for what it means to be gay and assimilated—at least in the *Obergefell* universe—then under a similar analysis, Craig and Mullins would stand outside the contours of assimilation.

1. *Not Mainstream All-American*

First, the couple here appears less mainstream or “all-American” than the *Obergefell* plaintiffs. Neither of them have jobs or careers that would survive a judgmental, status-driven scrutiny; neither of them have careers comparable to those held by the *Obergefell* plaintiffs that Godsoe had termed “eminently respectable.”¹⁵⁸ During the case, only one of the two, Mullins, had professional employment, but only as an office manager at a real estate firm.¹⁵⁹ Craig, meanwhile, was not employed despite his interior design training; during the years of litigation he had stalled in launching his career.¹⁶⁰ Also, to further deviate from perceived respectability, Mullins, aside from his day-job as an office manager, admitted to harboring literary ambitions as a poet.¹⁶¹ The couple neither embodied the more stable, upper-middle class professional template that Godsoe had identified with the *Obergefell* plaintiffs or, to extend comparisons further back to *Windsor*, possessed the wealth or elite educations that Edith Windsor and Thea Spyer had.¹⁶² Of course, Craig and Mullins could be millionaires in private. But on the surface, their professional and class identities vastly deviated from the upper middle-class image of prior marriage equality plaintiffs.

¹⁵⁷ See Godsoe, *supra* n. ___, at 145-52.

¹⁵⁸ *Id.* at 146

¹⁵⁹ Allison Sherry, *After the Masterpiece Ruling, David Mullins and Charlie Craig Hope to Move On*, COLO. PUB. RADIO NEWS (Jun. 11, 2018), <http://www.cpr.org/news/story/after-the-masterpiece-ruling-david-mullins-and-charlie-craig-hope-to-move-on> [hereinafter Sherry, *After the Masterpiece Ruling*].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Nourafshan & Onwuachi-Willig, *supra* n. ___, at 522 n. 7.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

Culturally, Craig and Mullins also did not embody “all-American” identities, nor project themselves as “Leave It to Beaver”-types either—borrowing Godsoe’s phraseology. Neither seemed to have served in the military and thus would lack the easy connotation that service could graft to create a conventional sense of patriotism.¹⁶³ Additionally, in their physical appearances, Craig and Mullins did not exhibit the “gendered” norms of hetero-masculinity typical of a “Leave It to Beaver,” traditionally all-American world. Various media photographs of the couple during their litigation depicted them adhering less to a “straightacting,” hetero-masculine script. Indeed, they often played with gender expectations with their physical choices in clothing, hairstyle, and jewelry. For instance, on the day of the Supreme Court arguments, both Mullins and Craig stood outside the Supreme Court Building in suits and ties.¹⁶⁴ However, deviating from traditional dark suits and conservative shirt-and-tie combinations, Mullins wore a brighter navy blue suit with his shirt and patterned tie both in dark purple, while Craig wore an all purple ensemble except for his bright white tie that stood out vividly along with his stylized hair dyed in platinum lavender.¹⁶⁵ The couple matched themselves more than their attorneys, and would have been easily noticed—deliberately so. By stark contrast, at *Obergefell* oral arguments, Jim Obergefell wore a traditional black suit paired with a lighted-colored checkered shirt and tie that was trendy but more conventional.¹⁶⁶ Beyond judicial appearances, the *Masterpiece* couple’s other public image

¹⁶³ Godsoe, *supra* n. __, at 146.

¹⁶⁴ See, e.g., Lucia Graves, ‘This Happens All the Time’: Why A Gay Couple Took Their Cake Case to the Supreme Court, *The Guardian* (Jan. 18, 2018) <https://www.theguardian.com/us-news/2018/jan/18/colorado-cake-shop-case-supreme-court> (showing photograph of the *Masterpiece* couple at the Supreme Court Building).

¹⁶⁵ *Id.*; see also Jeffrey Toobin, *Justices Ginsburg and Kagan Ask About the Artistry of Wedding Cakes*, *NEW YORKER* (Dec. 5, 2017), <https://www.newyorker.com/news/daily-comment/justices-ginsburg-and-kagan-ask-about-the-artistry-of-wedding-cakes> (showing the couple in full).

¹⁶⁶ E.g., Michael S. Rosewald, *A Day in Court for Jim Obergefell, the Face of the Historic Gay Marriage Case*, *WASH. POST* (Apr. 25, 2015), https://www.washingtonpost.com/local/a-day-in-court-for-jim-obergefell-the-face-of-the-historic-gay-marriage-case/2015/04/28/99a00bdc-eda5-11e4-8666-a1d756d0218e_story.html?utm_term=.4b329ca92a85 (photograph of Jim Obergefell at Supreme Court Building on argument day).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

choices in the media also exhibited their play with traditional masculine expectations. Often the couple was photographed wearing flashy, ostentatious clothing and alternative jewelry.¹⁶⁷ Instead of keeping a stable sense of physical appearance, they varied their hair and grooming—especially Mullins who appear from one photographic moment to the next altering his hair colors and lengths, maintaining what some might deem a more “androgynous” look.¹⁶⁸ Meanwhile, Craig often sported a sharply-trimmed beard and would seem to be the less androgynous of the two, but he also changed his hair color from time to time as well.¹⁶⁹ Compared to traditional, unwavering notions of all-American male-ness, frequent variations in appearances would connote destabilizing “gendered” characteristics and even personality traits of instability. In contrast to the *Obergefell* plaintiffs, Craig and Mullins projected an image that suggested they were not doing “exactly the same things as everyone else does.”¹⁷⁰ Stereotypically, they seemed more diverse, and less “family-oriented.” In other words, they appeared “alternative,” rather than “normal” or “mainstream”—even “queer” rather than “gay,” against the *Obergefell* template.

2. Not Asexual

¹⁶⁷ See, e.g., David Crary, *Opponents in LGBT Case Agree: It's Not About Wedding Cake*, AP NEWS (Dec. 1, 2017), <https://www.apnews.com/b4ef2e38d9b141d2ad82df3229a15928> (photograph of couple); Allison Sherry, *Colorado's Masterpiece Cakeshop Case Winds Toward A Decision With SCOTUS Arguments*, COLO. PUB. RADIO NEWS (Dec. 3, 2017), <http://www.cpr.org/news/story/colorado-s-masterpiece-cakeshop-case-winds-toward-a-decision-with-scotus-arguments> (photograph of couple).

¹⁶⁸ Compare *id.*, with Sandhya Somashekhar, *Trial Begins in Colorado Same-Sex Marriage Cake Case*, WASH. POST (July 5, 2017), https://www.washingtonpost.com/news/post-nation/wp/2015/07/07/trial-begins-in-colorado-same-sex-marriage-cake-case/?utm_term=.43b1c494cb5a.

¹⁶⁹ E.g., Richard Wolf, *Gay Couple, Devout Baker Take Cake Fight to High Court*, U.S.A. TODAY (Nov. 26, 2017), <https://www.usatoday.com/story/news/politics/2017/11/26/gay-couple-devout-baker-take-cake-fight-high-court/875305001/>.

¹⁷⁰ Lily Hiott-Millis, *6th Circuit Plaintiffs Stand Strong In Face of Loss in Court Today*, FREEDOM TO MARRY (Nov. 6, 2014), <http://www.freedomtomarry.org/blog/entry/6th-circuit-plaintiffs-stand-strong-in-face-of-loss-in-court-today>.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

Secondly, unlike the *Obergefell* plaintiffs, Craig and Mullins did not obscure or hide their sexuality. Many of the couple's public photos offered examples of them not shying away from affectionate gestures that could remind the public of their same-sex sexual desires or attractions. Often they were photographed in loving poses—ranging from holding hands¹⁷¹ and slight, suggestive embracing¹⁷² all the way to mouth-to-mouth kissing¹⁷³—even kissing on the Supreme Court Building steps.¹⁷⁴ Their photograph in an NBC news feature in December 2017 depicted them casually but affectionately huddled together in a public setting—Mullins with his body and legs curled in a loose but upright fetal position against Craig, who was closely flanked and attentive to holding Mullins.¹⁷⁵ Noticeably, Craig's right hand was reaching over the bottom of Mullins' thighs while his left hand was draped over the space between his own open legs, covering his genitals.¹⁷⁶ Another photograph with Politico showing the couple kissing seemed to have been done with a bit of provocative intent.¹⁷⁷ In addition to their visual displays of same-sex affection, the couple also discussed their physical affections publicly. In one interview, Mullins even recounted a personal

¹⁷¹ See, e.g., *U.S. Supreme Court Questions Bias in 'Gay Wedding Cake' Case*, BBC News (Dec. 5, 2017), <https://www.bbc.com/news/world-us-canada-42232162> (holding hands).

¹⁷² Zoë Henry, *Why a Gay-Themed Wedding Cake (And What the Supreme Court Says about It) Matters to Your Business*, INC.COM (Dec. 8, 2017), <https://www.inc.com/zoe-henry/gay-wedding-cake-case-heads-to-supreme-court.html> (embracing).

¹⁷³ Josh Gerstein, *Trump Administration Sides with Cake Baker in Gay Wedding Legal Fight*, POLITICO (Sept. 7, 2017), <https://www.politico.com/story/2017/09/07/trump-administration-gay-rights-supreme-court-242460> (kissing).

¹⁷⁴ Erin Scott/Zuma Press, *Photograph*, ALAMY NEWS (Dec. 5, 2017), <https://www.alamy.com/washington-district-of-columbia-usa-5th-dec-2017-charlie-craig-l-and-david-mullins-kiss-outside-the-supreme-court-after-oral-arguments-in-masterpiece-cakeshop-v-colorado-civil-rights-commission-the-court-ruled-in-favor-of-the-baker-who-denied-custom-wedding-cake-work-for-craig-and-mullins-credit-erin-scottzuma-wirealamy-live-news-image188455863.html> (kissing on Supreme Court Building).

¹⁷⁵ Julie Compton, *Meet the Couple behind the Masterpiece Cakeshop Supreme Court Case*, NBC News (Dec. 6, 2017), <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976>.

¹⁷⁶ *Id.*

¹⁷⁷ Gerstein, *supra* n. __.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

experience of gay public affection with a previous lover as both a liberating life event and a moment of personal bravery and pride, describing the gesture of intimate handholding in public as “the most normal thing in the world”¹⁷⁸ and “the first moment in my life where I presented myself as unabashedly gay in a public space.”¹⁷⁹ In their NBC news interview, the couple revealed that their decision to marry came during an intimate moment while “[t]hey were cuddling on their couch.”¹⁸⁰ From that statement, one could facetiously interpret that the whole entire case of *Masterpiece* might not have resulted, but for this one moment of intimacy.

Although public displays of affection between opposite-sex couples are so frequent to render them commonplace, if one situated Craig and Mullins’ affectionate gestures back into the hands (and bodies) of a male same-sex couple, their gestures could have appeared so unfamiliar or unnatural to some in the mainstream that such displays seemed threatening on several levels. First, Craig and Mullins’ public displays of affection could seem antithetical to the image of the respectable gay couple that has been built up, for instance, by the de-sexualized, assimilated impressions left by the *Obergefell* plaintiffs.¹⁸¹ Craig and Mullins’ public gestures risked reminding the world of their sexuality and hinted at the consensual intimacy behind closed doors. In that way, their public displays of affection would have violated the tenets of gay respectability. According to Yuvraj Joshi, “Lesbians and gays may produce performances of respectability as defensive strategies against being sexualized. Respectability may be a means of stopping their sexuality from becoming a barrier to their success and happiness or a safe space away from the pain and suffering of homophobia.”¹⁸² In comparison to any notions of assimilation, Craig and Mullins’ public displays of affection

¹⁷⁸ Eric Shorey & David Reddish, *David Mullins & Charlie Craig Stood against the “Humiliation of Being Told We Don’t Serve Your Kind,”* QUEERTY (Jun. 24, 2018), <https://www.queerty.com/david-mullins-charlie-craig-stood-humiliation-told-dont-serve-kind-20180624>.

¹⁷⁹ *Id.*

¹⁸⁰ Compton, *supra* n. __.

¹⁸¹ Godsoe, *supra* n. __, at 147-48.

¹⁸² Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 429 (2012) [Joshi, *Respectable Queerness*].

could have been interpreted as flaunting—a heightened reaction of threat even though *Lawrence* has legally sanctioned even the most intimate forms of such acts between same-sex couples.

On another level, their affection also had the potential to risk distinguishing their sex acts from those of opposite-sex couples. The image of two men being affectionate with each other rather than the image of a man and a woman doing the same could have triggered responses that distinguished consensual same-sex intimacy from consensual acts of opposite-sex intimacy; one way to do so would be by focusing on the latter's procreative agency.¹⁸³ Such images could also distinguish by triggering stereotypical connotations of promiscuity, deviancy, and disease historically associated with negative, biased opinions of gay sex, particularly of the kind that contributed to the political marginalization of sexual minorities during the AIDS crisis.¹⁸⁴ As a male same-sex couple rather than an opposite-sex couple, their abundant public images of affection could have alienated them from “mainstream” individuals who typically regarded same-sex affection as prurient, or just plain foreign. Such imagery and affectionate public displays reinforced their sexuality, enhanced the danger for social distinction, and even perhaps provoked homophobic reactions. This affect would undo the sameness arguments within gay assimilationist tactics and engender a heteronormative disapproval.

3. *Not Family-Oriented Caretakers*

According to Godsoe, involvement in childrearing or family caretaking was the third archetypal characteristic of gay assimilation the *Obergefell* plaintiffs displayed.¹⁸⁵ By contrast, in the public revelations about their lives, the *Masterpiece* plaintiffs made no mentioning of childrearing or caretaking of a loved one—neither of the two seemed to have any adopted or biological children nor did they seem involved in caretaking of a family member; instead Craig and Mullins projected the image of a

¹⁸³ *E.g.*, *Skinner v. Okla. ex rel. Williamson*, 316 U.S. at 541.

¹⁸⁴ MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & THE LAW* 5-6 (2010).

¹⁸⁵ Godsoe, *supra* n. __, at 149.

young, mobile couple who traveled, attended media parties, and were essentially carefree from familial responsibilities than the same-sex couples in *Obergefell*.¹⁸⁶ Thus, they risked associating themselves with the kind of domestic values and family image that the *Obergefell* plaintiffs projected.¹⁸⁷ In Craig and Mullins' case, non-existent attachment to a domestic, family-oriented lifestyle left their lives up for alternative interpretations. In contrast to the effect that caregiving had on further "de-sexualizing" the *Obergefell* plaintiffs and their relationships, the lack of caregiving or childrearing here could have had the opposite effect. It suggested that Craig and Mullins had less domesticated lives and were more easily differentiated from "respectable" or responsible gay couples who do have children and do take care of sick dependents. They seemed more hedonistic than the *Obergefell* plaintiffs—less selfless with their time and resources than gay couples helping to rear society's next generation or caring for the elderly. Moreover, being childless and independent disqualifies them from "the reward of caregiving" that has accompanied marriage equality cases previously.¹⁸⁸ This image had the slippery effect of making their marriage seem less dignified and less worthy of recognition.

4. Not Accidental Activists

Lastly, although Craig and Mullins have claimed that they were—as the *Obergefell* plaintiffs had been—"accidental activists,"¹⁸⁹ they seemed inconsistent in during interviews about just how "accidental" they were. First, they contradicted their own claims that they had no prior interest in LGBTQ activism. During interviews, they mentioned that they both "actually tried to avoid politics when they decided to get married"¹⁹⁰ and they "were never activists in the gay rights movement."¹⁹¹ That seemed more true for Mullins, who claimed he "considered himself apolitical until the day he and Craig were turned away at

¹⁸⁶ VH-1, Red Carpet Fashion, Picture 21, VH-1.com (Jun. 21, 2018) <http://www.vh1.com/photos/0wr209/2018-trailblazer-honors-red-carpet>.

¹⁸⁷ Godsoe, *supra* n. ___, at 149-50.

¹⁸⁸ *Id.* at 150.

¹⁸⁹ *Id.* at 150-52.

¹⁹⁰ Sherry, *After the Masterpiece Ruling*, *supra* n. __.

¹⁹¹ *Id.*

Masterpiece Cakeshop.”¹⁹² But in another interview, Craig revealed he did harbor some prior activist experiences: “Craig, an alumnus of University of Wyoming in Laramie, said 15 years ago he was a board member of a student LGBT group that sought to raise awareness for the Matthew Shepard Foundation and HIV testing.”¹⁹³ In fact, Craig seemed to harbor latent motives for activism because early experiences of being ostracized for his sexuality were “hardships” that eventually “pushed him to fight for himself on the cake case.”¹⁹⁴ Secondly, the act of pursuing a case of sexual orientation discrimination against Phillips and the bakery intrinsically seemed like a deliberate gesture of activism. After suffering from the humiliation of Phillips’ refusal, the couple first took their story online to Facebook, “which quickly went viral worldwide in a couple of days.”¹⁹⁵ Of course, the couple could have decided to forget the incident with Phillips and ordered their wedding cake from another bakery. Taking their story to social media, instead, could have been read as attention-seeking. The Facebook posting led Mullins and Craig to the discovery that Colorado public accommodations law afforded them recourse.¹⁹⁶ They got their wedding cake from another bakery.¹⁹⁷ And then Lambda Legal and the ACLU became involved in their case.¹⁹⁸ According to Mullins, “[e]ventually, someone at the ACLU found us and we spoke to them, and we decided to move forward to the complaint. . . . They sort of helped us file the paperwork a little bit, and then after that and much discussion on their part, they decided to take up the case.”¹⁹⁹

During their Supreme Court litigation, the couple participated very publicly. Until the decision was rendered, they had given over three hundred interviews, including interviews

¹⁹² *Id.*

¹⁹³ Chris Johnson, *Meet the Gay Couple at the Center of Masterpiece Cakeshop Case*, WASH. BLADE (Nov. 21, 2017), <https://www.washingtonblade.com/2017/11/21/meet-the-gay-couple-at-the-center-of-the-masterpiece-cakeshop-case/>.

¹⁹⁴ Sherry, *After the Masterpiece Ruling*, *supra* n. __.

¹⁹⁵ Johnson, *supra* n. __.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

with major news outlets.²⁰⁰ They were honored with the VH-1 Trailblazer Award for their “public fight against LGBTQ discrimination.”²⁰¹ Unlike plaintiffs in prior gay rights cases, such as *Lawrence v. Texas*, both Craig and Mullins appeared at the oral arguments at the Supreme Court.²⁰² While in Washington, D.C. to attend the arguments, they made speeches at several rallies²⁰³ and felt that “it’s important for people to see us just for the fact of we’re standing up for ourselves.”²⁰⁴ It was by chance that Craig and Mullins had experienced discrimination at the Masterpiece Cakeshop; they had not expected Phillips to refuse them based on his religious beliefs.²⁰⁵ Some of the facts of the case had accidental elements. Yet, the couple’s subsequent reactions—taking their story to social media and speaking to major advocacy groups—suggested decisiveness in seeking action and recourse. When pressed in one interview about the state of the LGBTQ community beyond their own lawsuit, Mullins remarked with a keen sense of political acumen:

The three changes I see happening that most inspire me are the aggressive dismantling of the gender binary, the embrace of intersectionality, and the push to make sure that marginalized voices, the voices of transgender individuals, of non-white people, of women, are not silenced or filtered through the experiences of their cisgender, white male counterparts.²⁰⁶

With less detail, but sharing a similar political tone, Craig responded to the same question with his analysis about gay visibility:

²⁰⁰ *Id.*; Sherry, *After the Masterpiece Ruling*, *supra* n. __; Compton, *supra* n. __.

²⁰¹ Evan Real, *Gay Couple Behind Supreme Court Wedding Cake Case to Receive VH1 Trailblazer Honor*, THE HOLLYWOOD REP. (Jun. 21, 2018), <https://www.hollywoodreporter.com/news/gay-couple-behind-supreme-court-wedding-cake-case-be-honored-at-vh1-trailblazer-s-2018-1122285>.

²⁰² Godsoe, *supra* n. __, at 152.

²⁰³ Johnson, *supra* n. __.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Shorey & Reddish, *supra* n. __.

For a long time the concept of fitting in was really important and for good reason. Now, that we are becoming more accepted by the public in general, I see more people embracing their individuality, and showing that our differences are what make our culture unique. Pride month gives the necessary visibility to our shared humanity.²⁰⁷

These seemingly-liberationist remarks reflected their admission after the Supreme Court decision was rendered that “they are lifetime activists now.”²⁰⁸ At that point, they could not claim to be reluctant or “accidental.” In the reverse, they created an image of willingness to challenge an instance of sexual orientation discrimination against them personally and pursue it as part of a comprehensive political impetus for change. For them, the personal had become political.

B. THREATENING THE STATUS QUO

It is difficult to envision sameness arguments when we place Craig and Mullins’ destabilizing sexualities within the context of queerness. The notion of “queerness” itself evades a concrete and stable definition,²⁰⁹ and it is indeed theoretically less constant than the terms “gay and lesbian”—which in recent decades, have taken on more mainstream adoptions.²¹⁰ Unlike “gay and lesbian,” the terminology “queer” does not merely describe sexual practices or demarcate certain traits, features, or conventions of same-sex lifestyles or practices; instead, whatever features that embodies “queerness” defy such identity-oriented classifications and exist as a means for “a destabilization of heterosexual hegemony.”²¹¹ Applying queerness to Craig and

²⁰⁷ *Id.*

²⁰⁸ Sherry, *After the Masterpiece Ruling*, *supra* n. __.

²⁰⁹ Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 248 (2005).

²¹⁰ Bijal Shah, *Gay American "Deviance:" Using International Comparative Analysis to Argue for A Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States*, 26 WIS. INT'L L.J. 1, 85 n. 3 (2008).

²¹¹ Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW & SEXUALITY 83, 87 (1994).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

Mullins' public personas, this observation would affirm and explain how their sexualities appeared more destabilizing than the *Obergefell* plaintiffs for the *Masterpiece* Court. They lacked the perceived socio-economic respectability of assimilated gay Americans. They flaunted their sexuality in public. They played with androgyny and avoided wearing conventional clothing to court appearances. They were more deliberate as activists. They dodged family-oriented responsibilities of childcare or caretaking. In essence, they affirmatively challenged the assimilated image of normalcy the *Obergefell* plaintiffs had embodied and curtailed any sameness arguments to be made for successfully increasing the levels of respectability and interest convergence. Craig and Mullins did not "cover" their identities, but in fact they offered a representation of sexual minorities with features that perhaps distanced themselves too far away from mainstream dominant culture itself and its "reverse cover" expectations of "stable" gay and lesbian identities.²¹² As perceived, they are "less gay," but could be quite "more queer." Consequently, major aspects of their public personas—their lifestyle, images, dress, personalities, political motivations, perceived dissociation from family values, occupations, and the like—destabilized both heteronormative associations of sexuality and connotations from mainstream gay assimilated culture as well. It is quite possible that disruption could be taken as a threat to the heteronormative status quo. Indeed, the sense of threat could have provoked the Court's less sympathetic reaction in *Masterpiece*.

The destabilizing extent and perceived threat to the status quo engendered by Craig and Mullin's queerness becomes more evident when considered within Justice Anthony Kennedy's majority opinion in *Masterpiece*. In both the state commission and Court of Appeal reviews, the couple obtained successful showings that Phillips' refusal had amounted to sexual orientation discrimination under CADA.²¹³ Nevertheless, without appearing assimilated, Craig and Mullins were unable to avail themselves to Kennedy's dignity jurisprudence to the extent that marriage equality plaintiffs in *Obergefell* and *Windsor* previously had. In *Obergefell*, assimilation had played well into Kennedy's

²¹² Yoshino, *supra* n. __.

²¹³ *Masterpiece*, 138 S. Ct. at 1723.

dignity jurisprudence and eventually allowed the Court to extend marriage rights to same-sex couples.²¹⁴ However, the manner in which Kennedy defined dignity in *Obergefell* revealed that he subscribed to a version of dignity that mandated respectability rather than a version premised on an individual's inherent worth and respect.²¹⁵ Within that paradigm, assimilated characteristics that illustrated how same-sex couples were invariably similar to opposite-sex couples permitted a comparison of respectability to be drawn where same-sex couples could seem just as respectable and as dignified as opposite-sex couples.²¹⁶ From there, same-sex couples' interest to have their relationships legally recognized as marriages were heightened and aligned with the establishment's interest to preserve and protect the primacy of marriage. As Kennedy wrote in *Obergefell*, plaintiffs there had sought the right to marry, "not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond."²¹⁷ In addition, by referring to how past historical changes to marriage, such as the abandonment of coverture, have "strengthened, not weakened, the institution of marriage," Kennedy suggested in *Obergefell* that extending the right to marry to same-sex couples would do the same.²¹⁸ Thus, by relying on features of assimilation and respectability to sufficiently dignify same-sex couples in *Obergefell*, the legal interests of the plaintiffs there aligned with mainstream interests to preserve marriage's institutional and social primacy. In this way, Kennedy's dignity jurisprudence in *Obergefell* became a vehicle that facilitated the interest convergence that eventually resulted in marriage equality.

On the contrary, in *Masterpiece*, Craig and Mullins' lack of comparable assimilated traits offered fewer opportunities for leveraging respectability within Kennedy's dignity paradigm. In terms of setting up the case inquiry that eventually revealed a denial of interest convergence for the *Masterpiece* couple, Kennedy begins at the outset of his decision by immediately

²¹⁴ Chang, *supra* n. __, at 6.

²¹⁵ Joshi, *Respectable Dignity*, *supra* n. __, at 119.

²¹⁶ Chang, *supra* note __, at 6.

²¹⁷ 135 S. Ct. at 2595.

²¹⁸ *Id.* at 2596.

establishing unequal levels of regard for the two sides of the litigation. Even before presenting the issues, Kennedy attempts to insinuate that what Craig and Mullins had requested from Phillips was somewhat illegitimate and as a result portrayed the couple in an undignified light. Beyond reciting that Phillips had denied Craig and Mullins' request for a custom wedding cake because of his religious views against same-sex marriages, Kennedy noted separately that Colorado had not recognized same-sex marriages at the time.²¹⁹ This observation takes attention off Craig and Mullins' sexual identities, which CADA protects, and suggests illicit conduct that would invariably bolster or support Phillips' discriminatory refusal; after all, Craig and Mullins had been legally married in Massachusetts and were not officially seeking to be recognized as a married couple in Colorado at the time.²²⁰ The cake was merely to celebrate that occasion.²²¹ This slight reference that Colorado was not a marriage equality state at the time the couple ordered the cake from Phillips does not reflect their intentions; instead it misconstrues the facts and poses the dubious effect of insinuating that Craig and Mullins were asking for something they were not legally entitled to, and under that logic, Phillips would have been complicit had he agreed to their cake request. In reality, Craig and Mullins was only asking Phillips to create a wedding cake to celebrate *their legally-obtained, out-of-state marriage*. Again, they were not seeking Colorado's recognition of their out-of-state marriage. Kennedy's factual mischaracterization is one step in denying Craig and Mullins dignifying potential. After all, it would seem hard to dignify—or even sympathize with—individuals who were refused for seeking something that was illegal.

Another step toward denying dignifying potential is in Kennedy's lack of acknowledgment of the Craig and Mullins' personal characteristics compared to the way he had handled the personal facts of prominent *Obergefell* plaintiffs. *Obergefell* had instances where Kennedy singled out assimilated traits of the litigants in order to show that denying marriage rights was

²¹⁹ 138 S. Ct. at 1723.

²²⁰ *Id.* at 1724.

²²¹ *Id.*

discriminatory and demeaning.²²² Specifically, Kennedy had depicted the personal stigma and harm of Jim Obergefell's erasure from his deceased husband's death certificate, despite having cared extensively for his dying husband; how marriage discrimination threatened the family life of April DeBoer and Jayne Rowse, a lesbian couple who were nurses and fostered several children; and how Ijpe DeKoe, a diligent and honorable member of the Army Reserve, was demeaned when his marriage to Thomas Kostura was not recognized in their home state.²²³ All of this was done in close-up, dramatic effect.

By contrast, throughout his *Masterpiece* opinion, Kennedy only mentions Craig and Mullins minimally, and when he does, it is transactional either to recite procedure²²⁴ or mere relevant facts.²²⁵ Such brief passages are devoid of any significant personalizing characteristics. Kennedy refuses to explore just how being denied a wedding cake as a same-sex couple demeaned the couple's human dignities. There were no extrapolations of indignity—no dramatizations involving medical transport planes or missing names on death certificates.²²⁶ Instead, the only passages that bring up the possibility that sexual orientation discrimination can result in violating human dignity or stigma are in two brief sections when Kennedy postulates about gay couples and individuals in the abstract.²²⁷ To Kennedy, it seems quite possible that gay people can be demeaned in the marketplace if denied goods and services.²²⁸ But he never applies such abstractions to Craig and Mullins' sexual orientation discrimination claim. Again, motivating this silent denial might be the lack of sameness and respectability in Craig and Mullins' identities, compared to litigants in the prior gay rights cases—particularly in the marriage context. Consequently, Kennedy's rhetorical techniques for dignifying individuals—and with that, his entire dignity jurisprudence—evades Craig and Mullins. This result stands even when their CADA claim for sexual orientation

²²² *E.g.*, Obergefell, 135 S. Ct. at 2594-95.

²²³ *Id.*

²²⁴ *Masterpiece*, 138 S. Ct. at 1723-24, 1725.

²²⁵ *Id.* at 1724.

²²⁶ Obergefell, 135 S. Ct. at 2594.

²²⁷ *Masterpiece*, 138 S. Ct. at 1727-28, 1732.

²²⁸ *Id.* at 1728

discrimination had substantial merit, as attested in the lower state forums. The incongruity is possible likely because at the Supreme Court level the couple did not exhibit the “stable,” gay assimilated characteristics that would have otherwise availed them access to Kennedy’s respectability line of dignity jurisprudence. They just did not garner the type of dignity for the Court to fully sympathize with their pursuit of formal equality. Rather than being just “gay enough” to succeed, Craig and Mullins’ queerness seemed to have broken the boundaries that lie at the core of what assimilationist strategies have done to essentialize the gay identity. The destabilizing effect of their queer sexualities undoubtedly clashed with the assimilationist images of litigants in the marriage equality cases and probably exceeded the Court’s tolerance of gay identities as well. As a result, Craig and Mullins’ public personas perhaps deviated too far from expected notions of gayness, cultivated from both mainstream and gay assimilated angles—ideas which have stable connotations that support the image of respectability. Quite possibly, this deviation, as the following will discuss, contributed to the Court’s reluctance to affirm their sexual orientation discrimination claim because they might have seemed too far from assimilated and too “queer” to connote the requisite sameness and dignifying respectability. Instead, this incongruity was likely a threat to the status quo.

C. PRESERVING THE STATUS QUO

Failing to satisfy each of Godsoe’s underscored characteristics of assimilation likely prevented Craig and Mullins from manifesting the version of gay assimilation and respectability propagated in the marriage cases. Consequently, the couple could not avail themselves as readily to the sameness arguments that the *Obergefell* plaintiffs used in making their collective case for marriage equality. They would have failed to appear “normal.” In fact, they would have threatened the idea of “normal.” Such distinctions afforded the Court opportunity to reinforce its interest to preserve the status quo against any interest to protect the couple’s queerness.

1. Reframing the Issues

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

To add to Kennedy's refusal to dignify Craig and Mullins' queerness in the way he had dignified the gay assimilated plaintiffs in the marriage cases, Kennedy also reframes the legal issues from how the claims had been discussed below. The Colorado Court of Appeals had observed that the dispute involved both Craig and Mullins' rights under CADA and Phillips' claim that his speech and religious expression rights were violated, but then very quickly dismissed Phillips' claim.²²⁹ Kennedy, on the other hand, begins his majority opinion by questioning the weight of Colorado's public accommodations law and its respect for sexual minorities against a status quo that finds religious intolerance compelling.²³⁰ Then he articulates the issues as a struggle between of the level of protection for the "rights and dignity of gay persons who are or wish to be, married but who face discrimination when they seek goods or services"²³¹ and "the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment."²³² From here, it becomes even clearer that the decision will weigh these competing interests, framed in this way. In recapitulating the issues thusly, Kennedy also legitimizes and raises the interest in protecting Phillips' free speech and religious exercise contentions. Indeed, he is focusing on the interest to preserve the status quo. First, he observes sympathetically that Phillips' free speech claim is "an instructive example, however, of the position that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning."²³³ Similarly, Kennedy finds that "[t]he same difficulties arise in determining whether a baker has a valid free exercise claim."²³⁴ He alludes to potentially validating Phillips' actions. In essence, the effort to which Kennedy explains why Phillips' free speech and religious exercise claims might pose difficulty in this case begins to establish what will be a plausible deniability that perhaps Phillips' refusal could

²²⁹ See e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. Ct. App. 2015).

²³⁰ *Masterpiece*, 138 S. Ct. at 1723.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

be constitutionally protected in light of Craig and Mullins' CADA discrimination claim or suggest that he regards Phillips' claims with more urgency than previous venues had.

By juxtaposing of the issues and amplifying Phillip's free speech and religious exercise claims, Kennedy hints at his potential deference to the status quo—one that is discriminatory. After all, despite marriage equality victories and the increasing positive image of sexual minorities in mainstream culture in the handful of years since *Lawrence*, the status quo has continued to recognize dominant religious views and sentiments—some that invariably have led to severe inequalities and legal detriments for sexual minorities and other marginalized people. Nevertheless, such views have received constitutional protection. For instance, in the face of legal and political advances for sexual minorities, many states have enacted religious freedom acts.²³⁵ In the same vein, after *Obergefell*, some states have relied on religion to motivate and legitimize bills that restrict restroom use for transgender people.²³⁶ And even the Supreme Court has recently prioritized religion over some aspects of women's reproductive rights.²³⁷ As for anti-discrimination laws, many states, unlike Colorado, currently do not have legislation that protects sexual minorities,²³⁸ and the same can be echoed for the federal government.²³⁹ Whatever federal protections against discrimination that sexual minorities have received are limited in scope and have come by piecemeal through various federal agencies or governmental branches.²⁴⁰ In essence, a discriminatory status quo that is partly validated and perpetuated by religious freedom has received heightened legal

²³⁵ Findlaw, *Religious Freedom Acts by State*, Findlaw.org <https://civilrights.findlaw.com/discrimination/religious-freedom-acts-by-state.html>.

²³⁶ Tom Dart, *Transgender 'Bathroom Bill' Leaves Texas Christians Deeply Divided*, THE GUARDIAN (Aug. 6, 2017) <https://www.theguardian.com/us-news/2017/aug/06/transgender-bathroom-bill-texas-christians-lgbt-rights>.

²³⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²³⁸ *LGBTQ Americans Aren't Fully Protected From Discrimination in 30 States*, Freedom for All Americans, <https://www.freedomforallamericans.org/states/>.

²³⁹ Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 927 (2019).

²⁴⁰ *E.g.*, Exec. Orders Nos. 11478 & 11246, 2014 WL 3569065 (Jul. 21, 2014).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

protections, and from the beginning of *Masterpiece*, Kennedy raises a strong interest in preserving that status quo.

2. *Weighing the Preservation Interest of the Status Quo*

Of course, Craig and Mullins do not exhibit sufficient dignity to match the interest to protect religious discrimination. In their initial respondents' brief, Craig and Mullins used dignity to leverage interests.²⁴¹ At the same time, Phillips also contested the couple's dignitary interests.²⁴² Thus, before arguments, the parties were already trying to access Kennedy's dignity jurisprudence. However, Craig and Mullins' use of dignity seemed less heightened compared to the use of dignity by the *Obergefell* plaintiffs, which was much more direct in regards to relying on interest convergence and had observed dignity within contexts such as parenting and the discriminatory status quo.²⁴³ Perhaps this less overt reliance on dignity and interest convergence was so because the *Masterpiece* couple had already prevailed against Phillips twice and technically had the law on their side. After all, CADA did expressly protect against sexual orientation discrimination. And cases such as *Lawrence*, *Windsor*, and *Obergefell* all showed that the Court could favor same-sex couples. Yet, the couple's inability to play into the "respectable dignity" that accessed Kennedy's gay rights jurisprudence ends up hurting their interests.²⁴⁴ Their inability to seem respectable because of their queerness affected the chances that their interests would substantively align with the Court's interests to affirm the status quo. In fact, their queerness challenged and threatened the status quo precisely through that inability to seem respectable under establishment norms. Accordingly, the focus of the opinion was heavily on Phillips' religious freedom—and by extension reinforcing the discriminatory status quo—even when Phillips did not fit within any religious protections under CADA. After all, the bakery was not a place "principally used for religious purposes" exempted by CADA.²⁴⁵ Therefore, technically

²⁴¹ *E.g.*, Brief for Respondents, *supra* n. __, at 41, 43.

²⁴² Brief for Petitioner, *supra* n. __, at 25, 54-61.

²⁴³ *Compare* Brief for Respondents, *supra* n. __, with Brief for Petitioners at 19-23, 31-32, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

²⁴⁴ Joshi, *Respectable Dignity*, *supra* n. __.

²⁴⁵ Colo. Rev. Stat. §24-34-601(1) (2017).

the couple's discrimination claim had more validity under CADA than Phillips' religious defenses.

Particularly in Section II of his *Masterpiece* opinion, Kennedy underscores the primacy of protecting anti-gay religious sentiments, despite no available CADA exception for Phillips. Kennedy accomplishes this underscoring in part by articulating how Craig and Mullins came up short in their dignified respectability. As he states, “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”²⁴⁶ At first, Kennedy seems consonant with his recognition of same-sex couples in *Obergefell*. By itself, the statement seems absolute in terms of protecting sexual minorities. However, Kennedy immediately qualifies his declaration by writing, “For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”²⁴⁷ By inserting how the Constitution “can, and in some instances must” provide sexual minorities civil rights protections, he suggests subtly that negotiation exists at setting the level of interest in which protections of civil rights based on sexual orientation are given—that there must be situations in which the Constitution has less interest in affording civil rights protections of sexual minorities even if their freedoms “on terms equal to others” are subject to “great weight and respect by the courts.”²⁴⁸ Other commentators have read this passage in Section II of *Masterpiece Cakeshop* with greater optimism because just on these three sentences alone one could read a friendly ambiguity in favor of sexual minorities into Kennedy's statement.²⁴⁹ Such a reading, however, would ignore the series of further qualifications that follow in which Kennedy raises the importance of preserving religious views against same-sex marriages: “At the same time, the religious and philosophical

²⁴⁶ *Masterpiece*, 138 S. Ct. at 1727.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *E.g.*, Elizabeth Sepper, *More at Stake Than Cake — Dignity in Substance and Process*, SCOTUS Blog (Jun. 5, 2018), <https://www.scotusblog.com/2018/06/symposium-more-at-stake-than-cake-dignity-in-substance-and-process/>.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

objections to gay marriage are protected views and in some instances protected forms of expression.”²⁵⁰ Here is where Kennedy repeats the disparity of interest levels. Like the protection of the civil rights of sexual minorities, such religious views against marriage equality are not absolute either. In the commercial context, these views are subject to public accommodation laws and would not survive so long as such laws are general and neutrally applicable.²⁵¹ But he does not actually critique how CADA itself is not general and neutrally applicable. There is no direct attack premised on the opinion that Phillips’ bakery ought to have been exempt. He is just weighing the interests.

Constitutionally, despite public accommodations legislation, he notes that the law could not compel members of a religious clergy to perform same-sex wedding ceremonies if doing so clashed with the free exercise of religion.²⁵² In fact, such protections of a clergy member’s refusal, based on freedom of religious exercise, to officiate a same-sex wedding ceremony is so sufficiently “well understood in our constitutional order as an exercise of religion” that Kennedy supposes sexual minorities could subordinate their rights in the face of such refusal—as “an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.”²⁵³ Such an overly-presumptuous observation patronizes and ignores the indignities that sexual minorities have suffered at the hands of religious exclusion. Yet again, the disparity of interest levels exists and is demonstrated by how Kennedy subordinates the interest of protecting sexual minorities beneath the interest for religious protections. The passage potentially condones certain acts of religious animus against sexual minorities, placing exercise of religion over the protection of non-heteronormative sexual identities. This priority exists even despite Kennedy’s observation of that protection for free exercise of religion must be “confined”;²⁵⁴ otherwise, a mass commercial refusal to provide

²⁵⁰ 138 S. Ct. at 1727.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

goods and services to sexual minorities might lead to “a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”²⁵⁵ But it also shows that there is enough room for Phillips to have validly refused Craig and Mullins. In terms of dignity, this discussion implies a hierarchical limitation; sexual minorities deserve some constitutional protection based on their dignity, but not enough to surpass some instances of free religious exercise. This hierarchy resembles the Court’s prior reluctance to raise the lower-level scrutiny analysis of sexual minorities—even in cases featuring assimilated plaintiffs—such as in *Windsor* and reveals how the Court actually views sexual orientation as a protectable trait below other protectable identity traits. Kennedy seems to signal that the *Masterpiece* couple could not confidently use their CADA sexual orientation discrimination claim to breakthrough to a fuller or higher treatment of formal equality for civil rights protections of sexual minorities in this federal forum. Even when Phillips and his bakery clearly did not fall within the CADA religion exemption, his religious exercise rights conflict and ought to be noted substantially enough *as if he deserved exemption*.

We see how Kennedy regards Phillips’ rights when he directly examines Phillips’ claim. In examining Phillips’ account, Kennedy sides with Phillips on his distinction that creating a custom-ordered cake for Craig and Mullins would have used “his artistic skill to make an expressive statement, a wedding endorsement in [Phillips’] own voice and of his own creation.”²⁵⁶ Here, Kennedy entwines both Phillips’ free speech and religious justifications for refusing Craig and Mullins and finds that “Phillips’ dilemma was particularly understandable given the background and legal principles and administration of the law in Colorado at that time” since Colorado had not yet recognized same-sex marriages when Phillips’ refusal occurred.²⁵⁷ In fact, Kennedy finds that

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1728.

²⁵⁷ *Id.*

there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.²⁵⁸

Kennedy seems to suggest that had Phillips reluctantly agreed to create a cake for Craig and Mullins, this act would have severely violated a term so personal to Phillips because of his religious beliefs that the government would need to take notice. He notes the three William Jack cake cases in which the Colorado Civil Rights Division found it was lawful for three bakers to have separately refused creating cakes that bore messages demeaning sexual minorities or same-sex marriages²⁵⁹ and noted that “[a]t the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive.”²⁶⁰ All of his ruminations about the protections of sexual minorities and exercise of religious freedom culminates in qualifications that appear as if Kennedy is heavily posturing to preserve what results in the bottom line regarding Phillips’ actions—that ultimately despite the dignity and worth the Court has previously given to sexual minorities in the marriage equality cases, and despite how Phillips is not exempted from CADA here, formal equality for sexual minorities must give way to religious freedom. Essentially the interest to protect sexual orientation from discrimination is not on equal footing as interest in protecting free exercise of religion. Categorical denial of services and goods to sexual minorities based on a provider’s religious beliefs would not be condoned, of course; however, as Kennedy recognized, “Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.”²⁶¹ On Phillips’ behalf, Kennedy reaches extensively to comprehend

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1729.

Phillips' moral and religious dilemma, reading the case narrowly at the expense of diminishing the dignity and worth of Craig and Mullins. Overall, Kennedy essentially embeds a plausible deniability favoring Phillips' actions over the dignity of Craig and Mullins' sexual identities. Thus, he heavily prioritizes the interest to preserve the discriminatory status quo in order to curb the threat against it.

3. *Religious Hostility*

In truth, the tension between sexual orientation antidiscrimination versus religious freedom that Kennedy raises, explores, and then seemingly weighs in favor of Phillips never comes to an actual determination on the merits. Kennedy never proclaims the actual doctrinal dividing line between Phillips' religious objections to same-sex marriage and the protections of Craig and Mullins' sexual identities from discrimination. He never overrules CADA. So his prioritization of interests to preserve the status quo is never given binding effect. Within the factual contours of *Masterpiece*, Kennedy merely suggests that the interest to preserve the status quo outweighs the interest to protect Craig and Mullins' sexual orientation from discrimination. On the substantive legal merits of Craig and Mullins' discrimination claim, the formal equality aspects would reach a favorable outcome for the couple. CADA had stood on the couple's side. Even Kennedy admits that CADA expressly forbid sexual orientation discrimination in the realm public accommodations.²⁶² Despite this, Kennedy effectuates preservation interest by examining the case procedurally to reverse the Court of Appeals. He reviews the public hearings on the matter by the Colorado Civil Rights Commission and reads into the record religious hostility displayed by members of the Commission sufficient for him to violate religious neutrality.²⁶³ Specifically, Kennedy focuses on remarks that disparage personal religious beliefs:

At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or

²⁶² *Id.* at 1725.

²⁶³ *Id.* at 1729.

commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One 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 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 comprise."²⁶⁴

Although Kennedy admits that such statements could be construed differently, he finds such comments are "more likely" hostile toward Phillips.²⁶⁵ He is convinced of observing more religious hostility made at a later Commission public hearing that furthered the animosity toward Phillips' religious views.²⁶⁶ Kennedy heavily-handedly compounds the Commission's previous statements he excerpted with a particular Commission member's individual quote criticizing societal uses of religion for advancing discriminatory ends throughout human history—for instance, justifying slavery or the Holocaust.²⁶⁷ That Commission member's quote had ended on a personal tone, which Kennedy expressly interprets as a disparagement that effectuated the Commission's alleged hostility to Phillips—that calling his religious views "despicable" and contextualizing them as rhetoric for advancing discrimination belittled and dehumanized such views and actions.²⁶⁸ Although Kennedy does not expressly use "dignity" rhetoric here in these passages, he employs these remote excerpts from the Commission's extensive hearings and review to draw conclusions that such remarks about Phillips' religious views and acts ultimately demeaned Phillips. All in all, Kennedy surmises that the Commission's remarks had suggested "that religious beliefs and persons are less than fully welcome in Colorado's business community"; could be seen as "inappropriate

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced"; and had "disparaged [Phillips'] religion" in ways that characterized it as "despicable," and "something insubstantial and even insincere."²⁶⁹ Even without expressly using the word "dignity" here, Kennedy tries to convince us that the Commission's criticisms and observations of Phillips' "sincerely held religious beliefs"²⁷⁰ were a kind of hostility that violated Phillips' personhood in some way. Kennedy's repeated characterizations of Phillips' religious motivations as "sincere" imply that Phillips was being genuine and truthful about his religious beliefs. It also suggests that Phillips' actions against Craig and Mullins were somehow blameless—that his refusal was somehow naturally justified because they were backed by "sincere" religious beliefs against same-sex marriages and that Phillips could not help himself from acting inconsistently with his beliefs. As such, Kennedy again views Phillips' religiously-motivated actions of sexual orientation discrimination with a plausible deniability in favor of Phillips. Because Phillips' religiously-motivated actions are backed by "sincere" religious beliefs, the Commission's public remarks on record about Phillips' exercise of religion—and the lack of objections to these remarks at the hearings and in later appellate review²⁷¹—would always be taken as hostile, inappropriate, and disparaging to Phillips' personal character. In this way, Kennedy moralizes and nearly essentializes Phillips' religious identity. He dignifies Phillips. This reasoning pantomimes the kind of dignity rhetoric Kennedy had used in *Lawrence*, *Windsor*, and *Obergefell* to show respectively how anti-sodomy laws, DOMA, and exclusion to marriage all demeaned the identities of same-sex couples. He ushers in such indication because the type of religious freedom Phillips subscribes to, after all, is within the dominant status quo. To Kennedy, the dignity in Phillips' religious identity unquestionably exists, and so it must be that his beliefs are "sincere."

This sense that Kennedy is not merely defending Phillips' religious views, but Phillips' dignity is even furthered by his

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* 1729-30.

comparisons between the Commission's prior decisions in three other Colorado cases where bakers had refused a customer who had requested cakes that would have conveyed derogatory and hateful messages about same-sex marriages.²⁷² Those bakers had won their cases and lawfully legitimized their refusals before the Commission on the basis of conscience.²⁷³ Comparing those cake cases to the present one before the Court, Kennedy finds that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections."²⁷⁴ To perpetuate another example that the Commission had shown religious hostility toward Phillips, Kennedy sides with Phillips' view that "this disparity in treatment reflected hostility on the part of the Commission toward his beliefs."²⁷⁵ In doing so, Kennedy implies that the Commission had treated the conscience-based objections in the other cake cases as legitimate because the Commission had equated designing a custom cake with derogatory messages as an endorsement of that message; meanwhile Kennedy finds the Commission's treatment of Phillips's objection, and the Court of Appeals' later disregard of the comparison, both ignored a similar logic that baking Craig and Mullins' cake signified for Phillips as an endorsement of same-sex marriage, which would violate his religious beliefs.²⁷⁶ One could draw from Kennedy's comparison that Phillips' compliance with Craig and Mullins' request would have been such a violation of Phillips' genuine religious sentiments against same-sex marriage by becoming an endorsement adverse to his own religious character—and by extension, to his religious identity. In essence, by making that cake for Craig and Mullins, he would be endorsing something that he did not believe in—so much so that he could not even go along with it without it becoming personal. Again, therein lies the hostility, according to Kennedy.²⁷⁷ One could argue that Kennedy was not merely defending Phillips' sincerely-held religious beliefs here but also defending Phillips' religious identity.

²⁷² *Id.* at 1730.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1730-31.

²⁷⁷ *Id.* at 1731.

4. *Speciousness and Questions of Motives*

Kennedy's religious hostility findings against Phillips become specious and thin when his version of the Commission's lack of neutrality competes with the versions expounded in his colleagues' concurrences and dissents. Whether the other Justices have found lesser, deeper, or no violations of religious neutrality, disagreement exists over both the Commission's remarks toward Phillips' religiously-motivated refusal and the handling of the William Jack cake cases below. Such disagreement calls into question the substance of Kennedy's religious hostility findings and illustrates the desperate attempt to preserve the status quo.

Although in agreement with the majority's overall ruling in *Masterpiece* that religious hostility existed in lower proceedings, Justice Kagan, with Justice Breyer joining, offers a lesser degree of religious hostility in her concurrence. She suggests that the Commission and the Court of Appeals' regard for the different results between the *Masterpiece* case here and the three other Colorado cake cases was legally justified and not a sign of religious hostility.²⁷⁸ In her view, the different regard between those cake refusals and Phillips' hinged on factual interpretation: "[I]n refusing that request, the bakers did not single out Jack because of his religion, but instead treated him the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple."²⁷⁹ Such refusal violated CADA's public accommodations protections against sexual orientation discrimination.²⁸⁰ In that way, "[t]he different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief."²⁸¹ Kagan only agrees with Kennedy's majority that the views and sentiments of the Commission members at the public hearings were religiously hostile, and thus, her version of

²⁷⁸ *Id.* at 1733-34 (Kagan & Breyer, JJ., concurring).

²⁷⁹ *Id.* at 1733.

²⁸⁰ *Id.*

²⁸¹ *Id.*

religious hostility—though it exists enough in this case for her to join in the Court’s reversal—seems less severe.

Justice Gorsuch, joined by Justice Alito, concurs by re-examining on his own terms the Commission’s treatment of the other Colorado bakers’ refusals in those three cake cases and Phillips.’ While Kagan had rendered that the cake that Craig and Mullins had requested from Phillips was a wedding cake, Gorsuch interprets that what Craig and Mullins had asked for was “a cake celebrating a same-sex wedding.”²⁸² This interpretation allows Gorsuch to read the fact patterns of the William Jack cake cases and *Masterpiece* similarly and question the Commission’s and Court of Appeals’ distinguishing of those cases from Phillips.’ If the bakers were legally allowed to refuse Mr. Jack’s requests for cakes that denigrated same-sex weddings because the messages were morally offensive to the bakers, then Phillips should have been able to refuse Craig and Mullins’ request for a cake celebrating a same-sex wedding because same-sex marriages was religiously repugnant to Phillips.²⁸³ As he sees it, “[i]n both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers”²⁸⁴ and that “[t]he problem here is that the Commission failed to act neutrally by applying a consistent legal rule.”²⁸⁵ Gorsuch heightens that disparity with deeper analysis than Kennedy does. But to see the cake as one that particularly celebrates a same-sex wedding or marriage resembles the “special rights” rhetoric that conservative opponents had lodged against gay rights movement initiatives in the past. In this way, Gorsuch’s deeper analysis engenders more animosity toward the couple than Kennedy’s.

Likewise, Justice Thomas’ concurrence, joined by Gorsuch, also seemed to deepen the religious hostility findings. Unlike Gorsuch or Kagan, his concurrence focused exclusively on the free speech claim that Kennedy had left unexplored in the majority opinion.²⁸⁶ Because Phillips refused Craig and Mullins on the

²⁸² *Id.* at 1735 (Gorsuch & Alito, JJ., concurring).

²⁸³ *Id.* at 1735-36.

²⁸⁴ *Id.* at 1736.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1740 (Thomas & Gorsuch, JJ., concurring in part and concurring in the judgment).

grounds that he was religiously opposed to same-sex marriage, his act of refusal, which Thomas analyzes as speech, is invariably entwined with religion. First, Thomas finds that for Phillips the design and creation of custom wedding cakes is expressive enough to qualify as speech.²⁸⁷ In addition, Thomas finds that wedding cakes themselves are highly symbolic, which further heightens the expressiveness of creating them.²⁸⁸ Thus, the act of creating wedding cakes for Phillips is an expressive one for speech protection.²⁸⁹ As such, Thomas regards Craig and Mullins' request as one that asked Phillips to create a cake for a same-sex wedding and sought endorsement with the couple's speech—not his.²⁹⁰ Thomas' rationale here amplifies Phillips' personal endorsement when he creates a wedding cake—"Colorado is requiring Phillips to be 'intimately connected' with the couple's speech"—and thus his First Amendment speech protections arise.²⁹¹ Such speech would be antithetical to Phillips' religious identity, and Thomas demonstrates this by drawing out Phillips' religious nature.²⁹² To add to this free speech violation to Kennedy's analysis deepens the findings of religious hostility in the majority opinion.

In her dissent, Justice Ginsburg, joined by Justice Sotomayor, completely disagrees with her colleagues' finding of religious hostility and she would have affirmed the ruling below that Phillips' refusal amounted to sexual orientation discrimination against Craig and Mullins.²⁹³ She contests the majority's finding of religious hostility.²⁹⁴ First, she sides with Kagan's view that the Masterpiece cake was a wedding cake and not a cake that had special meaning attributed to the baker.²⁹⁵ Predictably, this take on the cake leads to the finding that Kagan had asserted in comparing and ultimately contrasting Phillips' refusal with the refusal of other Colorado bakers for requests to

²⁸⁷ *Id.* at 1742.

²⁸⁸ *Id.* at 1743.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at n. 3.

²⁹¹ *Id.* at 1743 n. 3.

²⁹² *Id.* at 1745.

²⁹³ *Id.* at 1752 (Ginsburg & Sotomayor, JJ., dissenting).

²⁹⁴ See *id.* at 1748-49.

²⁹⁵ *Id.* at 1748 n. 1.

bake cakes with anti-gay messages: “The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation.”²⁹⁶ This rendering would contradict one of Kennedy’s two reasons for finding religious hostility. In Ginsburg’s opinion, she argues against Gorsuch’s view that the case is about the kind of cake and not the identity of the parties. Rather, “[w]hat matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”²⁹⁷ This reading reveals her perspective that the cake was a wedding cake and not a cake with a pro-marriage equality message: “When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied.”²⁹⁸ The reason for that denial, as Ginsburg surmises, is Craig and Mullins’ sexual orientation.²⁹⁹

Ginsburg also firmly contradicts Kennedy’s other reason for finding religious hostility, which regarded certain Commission members’ remarks as intolerant of Phillips’ religious views. Just as the treatment of the other Colorado cake cases with Phillips’ refusal should not have prompted a reversal based on religious hostility, “nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.”³⁰⁰ In her perspective, “[w]hatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to see a wedding cake to Craig and Mullins.”³⁰¹ To support her view here, she observed that the lower proceedings also “involved several layers of independent decisionmaking, of which the Commission was but one” and narrated four stages of rulings in Colorado before the case reached the Supreme Court.³⁰² Such layers of adjudication make

²⁹⁶ *Id.* at 1749.

²⁹⁷ *Id.* at 1750.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 1749.

³⁰¹ *Id.* at 1751.

³⁰² *Id.*

Kennedy's findings of religious hostility questionable and hollow.³⁰³ According to Ginsburg, even the Court's prior precedent on religious neutrality, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, "implicated a sole decisionmaking body" and not the kind of proceedings on below in *Masterpiece*.³⁰⁴ She would have completely rendered an opposite opinion had she penned the majority ruling.

Taken altogether, the differences amongst *Masterpiece*'s majority, concurring, and dissenting opinions over the existence, intensity, and non-existence of religious hostility against Phillips seems to suggest that the religious hostility issue was a tenuous one to consider. Did religious hostility exist in both the Commission member's remarks against Phillips' religious views and how the Commission distinguished Phillips's refusal in *Masterpiece* from the bakers' refusals in the William Jack cases, as Kennedy argues in the majority? Or did religious hostility only exist in the remarks and not in the way Kennedy or Gorsuch read the Commission's distinguishing of the other cake case, as Kagan writes in her concurrence? Did it arise within the free speech violation as well, as Thomas seems to suggest? Was the religious hostility more intense and more pernicious than Kennedy's majority suggest, as Gorsuch tries to demonstrate in his reconciliation of the William Jack cake cases and *Masterpiece*? Or did neither the remarks nor the Commissions' distinguishing of the William Jack cake cases from *Masterpiece* amount to any religious hostility in the lower proceedings, as Ginsburg tries to prove? There is no consensus, revealing that the Court's review of general applicability in *Masterpiece* is thin and potentially specious. Perhaps enough religious hostility exists or not. It suggests the possibility that the Court's rendering was not quite accurate, but instead it was the best argument to make in light of stronger, more definite facts that sexual orientation discrimination did occur under CADA when Phillips refused to fulfill Craig and Mullins' request. And that best argument—religious hostility that violates general applicability—is a contentious and debatable one, at best. That emphatic urgency in *Masterpiece* to stick with such a questionable argument as the

³⁰³ *Id.*

³⁰⁴ *Id.* at 1751-52.

crux to overturning the prior state court ruling of sexual orientation discrimination possibly reveals a tension—even with some of the non-conservative justices—for finding sexual orientation as a trait worthy of fuller protections, even after *Obergefell*. Or it could exemplify the Justices' tension with the kind of sexual minority litigants this time before the Court. In essence, the Court seems to articulate a higher interest in preserving a discriminatory status quo over affirming an instance of sexual orientation anti-discrimination. Sexual orientation as a protectable trait against discrimination reached some progress in *Obergefell*, but never at the kind of heightened scrutiny protections that race or gender has received. And that limited progress is definitely underscored by the interests the Court anxiously engenders around religious freedom in this sexual orientation discrimination case.

The instability of the religious hostility argument amongst Justices of the *Masterpiece* Court, hence, raises questions of motives. The case's resolution through Kennedy's majority opinion depends on the Justices' review of the procedural aspects of the lower proceedings in order to dispense with the task of determining the couple's sexual orientation discrimination claim under CADA. That strategic reliance on procedure forecloses any substantive review between Craig and Mullins' anti-discrimination interests and Phillips' religious interests—a substantive review that could have sided in favor of the couple as the Commission and the Court of Appeals exhibited strong findings of discrimination in their CADA reviews. Not to mention, the Court's review of the procedures on below is directly related to Phillips' religion—directly attached to interests in preserving a discriminatory status quo though religious freedom. Consequently, the Court highlights the interests of the status quo preservation over protecting sexual minorities—here, sexual minorities who showed little resemblance to the assimilated sexual minorities in *Obergefell*. Of course, it will be unknown, given the way the Court handled its decision to reverse *Masterpiece*, whether Craig and Mullins would have prevailed here had they exhibited more of the same traits that the plaintiffs from the marriage equality cases had exhibited. However, in terms of sexual orientation, one view remains evident from

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

Masterpiece. When confronted with religion—even in the context of marriage—queer sexual identities rather than assimilated ones engender much less deference with the Court. In *Masterpiece*, the Court's conception of sexual orientation anti-discrimination at this time very likely does not include protection of less assimilated, less mainstream sexual minorities.

Indeed, the primacy that Kennedy gives to protecting Phillips' exercise of religion is so paramount that it makes deference to religion seem circuitous and difficult to critique. After all, acts of discrimination are often harbored from some forms of animus.³⁰⁵ In pinpointing discrimination, drawing such motives help to establish that an act of discrimination occurred. However, because Kennedy finds that even the Commission's comparison remark about the historical use of religion to advance discrimination had tarnished Phillips' religious identity rather than serve to constructively demonstrate religiously-motivated discrimination, future adjudicating bodies must tread very carefully when their fair and neutral application of laws are prompted in religion cases. Such perspective on the Court's finding of religious hostility has scholarly support. According to Leslie Kendrick and Micah Swartzman,

[i]n *Masterpiece*, the Court mistook the neutral application of civil rights law for what Justice Scalia once called a "fit of spite." The Commission's decision to deny Phillips a religious exemption was not the product of religious hostility, but rather a good faith effort to interpret and apply CADA, which forbids discrimination on the basis of sexual orientation in public accommodations. In holding that the Commission failed to treat Phillips's claims with neutrality and respect, the Court improperly applied free exercise doctrine to the facts of the case, finding unconstitutional hostility and intolerance where there were none.³⁰⁶

³⁰⁵ *E.g.*, *Romer*, 517 U.S. at 632.

³⁰⁶ Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 145 (2018).

Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.

Correspondingly, the effect of *Masterpiece*, in regards to future application of neutrality, seems unclear according to John Inazu: "The [*Masterpiece* Court's] jurisprudence means that we're going to have state-by-state norms that vary quite a bit . . . about what counts as protections for religious freedom."³⁰⁷ These comments and the different versions (or in Ginsburg's case, non-version) of religious hostility render Kennedy's finding and use of religious hostility in the majority opinion shaky. Indirectly, it could exhibit the Court's hasty anxiety to prioritize the interest to protect religious freedom within a discriminatory status quo over interest to promote sexual orientation anti-discrimination. It serves as another possible sign of failure to satisfy the requisite interest convergence needed for Craig and Mullins' success.

All of this demonstrates the heightened interest the Court gives to preserving a discriminatory status quo in *Masterpiece*. Not only does Kennedy prioritize the interest toward protecting religious freedoms more heavily than the interest in protecting against sexual orientation discrimination, but he then demonstrates how paramount that interest is—in fact, he reinforces it—when he reverses the sexual orientation discrimination ruling on procedural grounds that the Colorado proceedings did not sufficiently respect Phillips' "sincere" religious beliefs.³⁰⁸ At the end of the Court's majority opinion, even despite Colorado's interest in protecting sexual orientation discrimination as CADA articulates and despite the state's adjudicated findings that Phillips' refusal was sexual orientation discrimination against Craig and Mullins, this interest in preserving a discriminatory status quo stands strong and towering. But in reaching that towering fortification, Kennedy and the concurring Justices seem to have offered an unsatisfying finding of religious hostility. It belies a deep, pernicious sense of queer anxiety against Craig and Mullins fueled by a perception that the status quo was threatened.

³⁰⁷ Tom Gjelten, *Court Sees 'Hostility' To Religious Beliefs In Case Of Baker And Same-Sex Couple*, NPR (Jun. 5, 2018), <https://www.npr.org/2018/06/05/617029562/colorado-bakers-supreme-court-win-revives-religious-freedom-debate>.

³⁰⁸ 138 S. Ct. at 1731.

D. QUEER SACRIFICE

Speciousness and anxiousness in the Court's religious hostility finding leaves a frustrating regard for Kennedy's opinion. Can such a dubious reasoning undo what had been a strong showing of sexual orientation discrimination under CADA? Craig and Mullins was refused service and goods because of their sexual orientation. Phillips was not exempt under CADA's religious exception. However, looking at the case through interest convergence theory, the ruling makes more sense psychologically because, although the law stands thinly, the motives are clear. Under the Court's perception, Craig and Mullins likely threatened the status quo.

But if the only conclusion drawn from observing the lack of interest convergence in *Masterpiece* is that dominant authorities—i.e. the Supreme Court—are reluctant to protect less unassimilated sexual minorities, then merely noticing the absence of converging interests would be a limiting feat. The utility of seeing Derrick Bell's interest convergence theory demonstrated in the context of gay rights would be constrained as well—like the Court's majority decision, only half-baked. Further significance exists in observing that the Court's interest in preserving a discriminatory status quo had outweighed any interest toward protecting sexual minorities, such as Craig and Mullins, from religious discrimination. What *Masterpiece* actually demonstrates is not merely that Bell's interest convergence thesis exists in the gay movement's progression, but what Anthony Kreis had identified when he applied Bell's interest convergence thesis as a predictive model for future gay rights advancements. He had reiterated Bell's thesis of involuntary sacrifice in the sexual minority context—a theory Bell called “racial sacrifice” that compliments interest convergence thesis to form what Bell referred to as “racial fortuity.”³⁰⁹ In writing several years before *Obergefell* and *Masterpiece*, Kreis was right to import Bell's racial sacrifice thesis here. *Masterpiece's* misalignment of interests—its lack of interest

³⁰⁹ Kreis, *supra* n. __, at 121-22; Derrick Bell, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 69 (2004) [hereinafter Bell, SILENT COVENANTS].

convergence—resembles that involuntary sacrifice. Indeed as the following explains, *Masterpiece* is an instance of *queer sacrifice*.

1. *Bell's Theory*

For Bell, interest convergence helped clarify why the Court in *Brown v. Board of Education* had the opportunity to overturn its previous segregation holding in *Plessy v. Ferguson*.³¹⁰ The theory offered a predictive mechanism for exploring when dominant powers would ever accommodate marginalized groups. Yet, interest convergence is merely one piece of Bell's later theory of racial fortuity. In the context of that racial fortuity theory, interest convergence is merely one variable that is complimented by another theory: racial sacrifice. Within the struggles to overcome racial inequality, Bell defined racial sacrifice as the way “the society is always willing to sacrifice the rights of black people in order to protect important economic or political interests of whites.”³¹¹ Bell later reiterated racial sacrifice as a predictive moniker—in the inverse logic of interest convergence—to expect when the white dominant power will decide not to wield their authority for legal and political change that would help advance interests of marginalized racial groups, such as African-Americans: “Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.”³¹² Both interest convergence and racial sacrifice are “two sides of the same coin. The two-sided coin, with involuntary racial sacrifice on the one side and interest-convergent remedies on the other, can be referred to as *racial fortuity*.”³¹³ Consequently, Bell conceptualizes the underpinnings of racial progress through “racial fortuity,” which are animated by instances of interest convergence and racial sacrifice.³¹⁴ And if

³¹⁰ 163 U.S. 537 (1896).

³¹¹ Derrick Bell, “*Here Come De Judge*”: *The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L.J. 1, 8 (1999) [hereinafter Bell, “*Here Come De Judge*”].

³¹² Bell, SILENT COVENANTS, *supra* n. __, at 69.

³¹³ *Id.*

³¹⁴ Kathleen A. Bergin, *Mixed Motives: Regarding Race and Racial Fortuity*, 23 CONST. COMMENT. 271, 274 (2006).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

one views racial fortuity as the way American society has achieved racial justice, then one would assume very pessimistically that racial justice occurs not through “hard-earned entitlement” but is “pre-ordained” through this mechanism of racial fortuity plotted by converging interests and racial sacrifice, alternating side-by-side.³¹⁵

Bell noticed examples of involuntary racial sacrifice in several American historical moments. For example, he saw racial sacrifice during the original drafting of the Constitution when slavery was protected to bolster slave owner support for the document.³¹⁶ Bell also considered the Hayes-Tilden Compromise in 1877 that staved off resurgence of the Civil War as racial sacrifice at the expense of the rights of Southern blacks.³¹⁷ As a third example, he also saw racial sacrifice in the way that the Court in *Plessy* constitutionally permitted segregation as a way to engender white support for existing economic policies that were not favoring white people.³¹⁸

Within the school desegregation era after *Brown*, Bell adopted the view that white resistance to desegregation lingered long after the landmark decision, which affected implementation of desegregation but that decision itself had left room for white resistance through its subtle deference to Southern whites.³¹⁹ Kathleen Bergin, in her study of Bell’s racial fortuity theory, concentrates on this observation as a way that the *Brown* eventually led to racial sacrifice:

The seeds of racial sacrifice were planted even prior to the announcement of *Brown*, when a number of Justices voiced concern during the Court’s judicial conferences for the impact desegregation would have on Whites. No matter how irrational “prosegregation emotion,” Justice Jackson wrote, “we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are

³¹⁵ Bell, SILENT COVENANTS, *supra* n. ___, at 9.

³¹⁶ Bell, “Here Come De Judge,” *supra* n. ___, at 8.

³¹⁷ *Id.*

³¹⁸ *Id.* at 8-9.

³¹⁹ Bell, SILENT COVENANTS, *supra* n. ___, at 95.

something worthy of protection by separatism.” Justice Reed was even more solicitous, urging the Court to “start with the idea that there is a large and reasonable body of opinion in various states that separation of the races is for the benefit of both.” The record suggests that several Justices agreed to strike down segregation on the condition that Chief Justice Warren draft an opinion that did not require immediate implementation from the South.³²⁰

In tone, the passages of Justices Robert Jackson and Stanley Reed on the *Brown* Court sharply resemble the deference that Kennedy gave in *Obergefell* to those who opposed same-sex marriages, whom he characterized as acting “in good faith” in their religious belief and “reasonable and sincere.”³²¹ In *Masterpiece*, sincerely-held religious antipathy toward same-sex marriages became the focus of defense by the majority. In addition, Bergin observes that in implementing *Brown*, the Court’s “all deliberate speed” standard for schools to comply with desegregation left some directives unclear:

The [*Brown*] decree instructed local school boards to make a “prompt and reasonable start” towards full desegregation, but district courts charged with monitoring compliance were never told when desegregation should begin, when it should end, or what pace of progress to demand in between. They were instead instructed to move cautiously and authorized to interrupt a desegregation plan once it began if circumstances warranted “additional time.” The Justices hoped this cooling off period would induce voluntary compliance from the South, but only prolonged delay by relinquishing oversight to “the most recalcitrant judge and the most defiant school board.”³²²

³²⁰ Bergin, *supra* n. __, at 285.

³²¹ 135 S. Ct. at 2594.

³²² Bergin, *supra* n. __, at 285.

By analogy, the *Obergefell* Court mandated marriage equality by state courts, but left the contours of implementations vague—especially the tensions with religious freedom—which led to resistance immediately after the decision with local clerks refusing to issue marriage licenses³²³ and judges who tried to disobey the ruling,³²⁴

To further hone in on her observation of racial sacrifice in the desegregation era, Bergin observes that “[i]mmediately after *Brown*, the Court let stand a series of district court judgments that distinguished between ‘integration’ and ‘desegregation’ by recognizing a right of White school children to avoid compulsory integration with Blacks.”³²⁵ Lower courts followed suit and eventually “[t]he distinction between ‘desegregation’ and ‘integration’ established in these cases led to the proliferation of ‘freedom of choice’ plans, transfer provisions and other measures that maintained actual segregation while purporting to comply with *Brown*.”³²⁶ Here it is not difficult to compare Bergin’s identification of racial sacrifice post-*Brown* and the *Obergefell* Court’s deference to religious beliefs to the *Masterpiece* Court’s use of religious exercise to foreclose sexual orientation antidiscrimination. Between Bell and Bergin, their post-*Brown* observations of racial sacrifice resemble the homophobic reactions after *Obergefell* and stalled progress in *Masterpiece*.

2. Queering Bell’s Theory in Masterpiece

If one can conclude that interest convergence did occur in *Obergefell* and in other gay rights decisions³²⁷—then it is also possible to apply the rest of Bell’s thesis toward interpreting the mechanism of advancements in justice for sexual minorities. If

³²³ E.g., Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html>.

³²⁴ E.g., Campbell Robertson, *Roy Moore, Alabama Judge, Suspended Over Gay Marriage Stance*, N.Y. TIMES (May 6, 2016), <https://www.nytimes.com/2016/05/07/us/judge-roy-moore-alabama-same-sex-marriage.html>.

³²⁵ Bergin, *supra* n. ___, at 286.

³²⁶ *Id.* at 286.

³²⁷ See Khuu, *supra* n. ___, at 214-24; see also Kreis, *supra* n. ___, at 142-51.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

Obergefell signified interest convergence, then *Masterpiece* with its lack of converging interests could stand an example of the kind of involuntary sacrifice akin to what Bell and Bergin pegged as racial sacrifice post-*Brown*—only here perhaps what the *Masterpiece* decision represents is a moment of “queer sacrifice.”

To reiterate the definition of racial sacrifice, Bell’s own pronouncement is used: “Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.”³²⁸ Bell’s theory is applicable to *Masterpiece*. At the start of the case, the effective remedy available to sexual minorities against sexual orientation discrimination was Colorado’s public accommodations law.³²⁹ CADA’s inclusion of sexual orientation likely resulted in interest convergence at the state level, since that category was not always included in the act. As Kennedy even notes in *Masterpiece*, CADA’s protection of sexual minorities against discrimination in places of public accommodation was an addition made in 2007 and 2008.³³⁰ Prior to this amendment, sexual orientation had been an absent trait for CADA protection. In this way, the Colorado state legislature’s later addition to include sexual orientation as a protected class within its state antidiscrimination law was likely an instance of interest convergence that resulted in a remedy for protecting sexual minorities.³³¹ This specific instance of interest convergence could have been facilitated also by the Court’s decision in *Romer v. Evans* in 1996, striking down Colorado’s Amendment 2, which specifically denied protections for sexual orientation discrimination.³³² In addition, since *Masterpiece* was following the Court’s marriage equality decision in *Obergefell*, an interpretation could also be made that interest convergence could have contributed to another effective remedy for sexual minorities here, even though the facts of *Masterpiece*

³²⁸ Bell, SILENT COVENANTS, *supra* n. __, at 69.

³²⁹ Colo. Rev. Stat. §24-34-605 (2017).

³³⁰ *Masterpiece*, 138 S. Ct. at 1725.

³³¹ See Matt Simonsen, *Master File*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.*, __ U.S. __ (2017): *Legislative History of SB08-200* (Sept. 23, 2017), <http://scholar.law.colorado.edu/research-data/8/>.

³³² 517 U.S. 620, 635-36 (1996).

Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.

pre-dated the *Obergefell* decision. The references to *Obergefell* in respondents' briefs could reasonably allow such an inference; Craig and Mullins were trying to use *Obergefell* to leverage the outcome of their case.³³³ Thus, likely the Court's own interest convergence in *Romer* and *Obergefell* influenced the available relief at this judicial level of review. In other words, the couple had CADA on their side—especially after the lower proceedings. But they were also following *Obergefell* directly, and had *Romer* in the remote shadows. Alternatively, one could plausibly read CADA as the only remedial relief available for Craig and Mullins or respectively use *Obergefell* to that same effect—hence the various starting points for grafting Bell's theory of racial sacrifice onto *Masterpiece*. However, because *Masterpiece* was a Supreme Court decision reviewing CADA, a conflation of both CADA and prior Supreme Court gay rights cases seems more appropriate for satisfying the extension of Bell's sacrifice theory here.

From here, it is possible to read into *Masterpiece* the effect that Craig and Mullins' less-assimilated, destabilizing sexual identities had toward producing the Court's reversal of their successful CADA discrimination claim against the religious baker, Phillips. Borrowing Bell's description of racial fortuity, conditions that had been fortuitous for marriage equality and same-sex couples in the *Obergefell* case were now changed in *Masterpiece*.³³⁴ As discussed above, the *Masterpiece* couple did not embody the assimilated traits of the *Obergefell* plaintiffs and they did not share perceived mainstream American characteristics or demographics, nor did they seem similar to the identities of the Justices themselves. Instead, their queer identities deemed them more like outsiders to either the American mainstream or elite, assimilated gay populations. Instead of fitting in with perceived heteronormative ideals of family and gender roles, Craig and Mullins played with androgyny and repeatedly displayed their sexuality in public for the media to harness. They did not have family-oriented obligations such as childrearing. When they should have been more politically quiet, they did not relent. They did not present themselves as having respectable jobs or careers. Outside of

³³³ Brief for Respondents, *supra* n. ___, at 1-2, 42-43.

³³⁴ Bell, SILENT COVENANTS, *supra* n. ___, at 9.

traditional dominant ideas about gender, family, and respectability, they appeared threatening to the heteronormative status quo in ways that the *Obergefell* plaintiffs had not. Their perceived non-conformity cost them.

Moreover, their discrimination claim involved religious beliefs that reaffirmed the dominant, heteronormative status quo—specifically Christian beliefs against same-sex marriages held by a deeply-religious merchant. In following Bell’s theory of racial sacrifice, it might be possible enough for queer sacrifice to take place when the facts present a sexual orientation discrimination suit filed by a same-sex couple whose destabilizing sexual identities threaten the status quo more than other assimilated same-sex couples would. However, what could seem even more threatening to the Court was how that sexual orientation discrimination suit by this non-conforming queer couple directly confronted religion through a moment of Christian antipathy toward same-sex marriages. This direct confrontation with religion offered the tipping point to which the Court responded by reversing the Court of Appeals’ decision favoring the couple, not by finding fault with the CADA claim itself but through a questionable finding of religious hostility with the lower proceedings. It could be likely that the Court’s protection of religion—thus reflecting its interest in protecting the heteronormative status quo—was provoked by anxiety over having to protect queerness under CADA, even if marriage equality legally existed. The reversal in *Masterpiece* seemed likely as an abrogation of effective remedies under CADA because otherwise the couple’s use of remedies under CADA would somehow threaten the dominant group. It would have led to an acknowledgement of their queerness.

Accordingly, *Masterpiece* extends of Bell’s racial sacrifice theory—but as an instance of *queer sacrifice*. If interest convergence has already been observed in other moments within the LGBTQ movement, then one could plausibly read instances in which sexual minorities did not prevail, such as *Masterpiece* here, as queer sacrifice within a similar—perhaps, identical—mechanism of sexual minority justice similar to Bell’s theory of racial fortuity. Only here, we have queer fortuity instead of racial fortuity. Precisely in this comparison, examples of interest

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author’s permission.*

convergence and queer sacrifice could also animate advances for sexual minorities consonant with how Bell's thesis offers specific strategies against the mechanisms of subordination and injustice in the racial justice context. As much as this Part III has shown that Bell's thesis has been appropriate for explaining *Masterpiece*, his thesis can also guide forward. Part IV explores such possibilities.

IV. QUEER FORTUITY

At first glance, the *Masterpiece* decision ought to engender various levels of pessimism for sexual minorities in the post-marriage equality era. From Part III's discussion, the decision reveals significant limits with the level of formal legal equality that assimilated same-sex couples had received in *Obergefell*. *Masterpiece* illustrates the constraints of both marriage rights and sameness arguments, and exhibits the lengths at which the Court will take to preserve a discriminatory status quo in light of protecting sexual minorities who appear less mainstream. This result is so even when Craig and Mullins had an effective legal remedy to secure under CADA. Legal commentators have drawn multiple conclusions about the case depending on each commentator's the level of pessimism. Some regard the decision as narrow; while others disagree.³³⁵ But by applying Bell's theory, this Article has argued that *Masterpiece* was a setback for the gay movement—a movement that has by now largely shifted away from employing grassroots liberationist tactics pinned on transforming existing hegemony to more assimilative strategies rooted in identity politics and single-issue causes that are often more salient to what matters to the elite-tier demographic of the sexual minority population.

A. CHANGED CONDITIONS

³³⁵ Compare Amy Howe, *Court Rules (Narrowly) for Baker in Same-Sex Wedding-Cake Case*, SCOTUS Blog (Jun. 4, 2018), <https://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/>, with Douglas Laycock & Thomas Berg, *Masterpiece Cakeshop—Not as Narrow as May First Appear*, SCOTUS Blog (Jun. 5, 2018), <https://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/>.

Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.

As the Court's reversal of Craig and Mullins' CADA discrimination claim has perhaps showed, so long as the kind of sexual minorities seeking remedial protection under anti-discrimination laws seem to pose a threat to the status quo, the interest to protect them is less aligned than when the litigants seemed more assimilated and respectable. As a result, the status quo will be preserved if a solution to do so exists. In *Masterpiece*, that solution involved prioritizing an already-existing aspect of the dominant status quo: anti-gay religious belief. As an instance of queer sacrifice, the Court used religious freedom to undo the substance of Craig and Mullins' public accommodations claim of sexual orientation discrimination, while legitimizing Phillips' right to refuse the couple's wedding cake request because of his religious beliefs.

Masterpiece's legal contours, of course, beg the question of how sexual orientation anti-discrimination claims at the Court might succeed in the future. A few weeks after releasing the decision, Justice Kennedy, the swing vote and author of previous gay rights decisions, as well as the author of *Masterpiece's* majority opinion here, retired from the Court's membership.³³⁶ With his retirement, the Court's new composition tips ever more socially and politically conservative, and thus, more directionally challenged to recognizing the rights of sexual minorities.³³⁷ Even if anti-discrimination legislation that protects sexual identity were to pass federally, such as the proposed *Equality Act*,³³⁸ what would prevent the Court from denying an otherwise valid instance of sexual orientation discrimination if the interests of uphold such protection failed to converge with the interests of status quo protection? Given what occurred in *Masterpiece*, what

³³⁶ Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (Jun. 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

³³⁷ Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html>.

³³⁸ Jacob Ogles, *Pelosi Prioritizing LGBTQ Equality Act as Speaker*, ADVOCATE (Jan. 4, 2019), <https://www.advocate.com/politics/2019/1/04/pelosi-prioritizing-lgbtq-equality-act-speaker>.

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

could prompt the Court not to commit other moments of queer sacrifice in future cases?

Conditions have veritably changed. The Court is now a less gracious and promising venue for sexual minorities than when it decided the marriage cases. But the problem of strategy for true equality should not have been exclusively hinged on the legal forum.³³⁹ Assimilationist strategies based on changing organizational practices in the gay movement that survived since AIDS epidemic campaigns have professionalized the face of gay rights lobbying and political organization.³⁴⁰ Some of the blame for the limitations in *Masterpiece* lies also within the narrower, single-issue approaches—such as marriage equality—that funneled gay rights into identity politics and a politics of respectability. Unfortunately, respectability politics played into the dominance and power of the mainstream culture, rather than gaining equal footing with the mainstream. Perhaps engaging within a politics of respect for all types of sexual identities, instead, would have avoided a more accommodating position against the mainstream.

Even worse, if Bell was correct in interpreting his own racial fortuity theory, then his observation stands that racial progress—and likely advancements for other marginalized groups—are “pre-ordained” by the back-and-forth process of interest convergence and involuntary sacrifice at the hands of the dominant power rather than considered as “hard-earned entitlement[s].”³⁴¹ Placing this notion within the context of sexual orientation antidiscrimination, Bell’s remark here about the illusion of hard-earned entitlements in successes driven by interest convergence would even pierce or debunk the respectability politics that the *Obergefell* plaintiffs had courted with in order to obtain married equality. One previous strand of conceptualizing *Obergefell* has focused on how same-sex couples there had earned their entitlement to marriage through their appearances of respectability—by how much their sameness

³³⁹ Bell, SILENT COVENANTS, *supra* n. ___, at 185-86.

³⁴⁰ Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 535 (2018).

³⁴¹ Bell, SILENT COVENANTS, *supra* n. ___, at 9.

dignified themselves enough for the Court to extend to them fundamental rights to marry, rather than by their showing of any intrinsic human worth or any inherent dignity. However, if applying racial fortuity to explain gay rights advancements, then Bell would perhaps offer an even more cynical view than respectability politics. His theory would deny the view of success in *Obergefell* as any hard-earned entitlement. Rather, his theory of fortuity grafted here would conclude that equality for sexual minorities in *Obergefell* was driven by conditions beyond the control of sexual minority litigants themselves and that “[i]ts departure, when conditions change, is preordained,”³⁴² as it did in *Masterpiece*. In this view, *Obergefell*’s success was pre-ordained by changing conditions that provided sufficient interest convergence; it was not necessarily and solely earned through a showing of respectability.

B. MASTERPIECE’S MISSED FORTUITY

Nevertheless, even if Bell’s theory about racial fortuity could be extended to comprehend the legal and political advancements for sexual minorities, this thesis ought not to stifle the movement, nor the aspirations for true equality. Indeed, to combat the dilemma of racial fortuity, Bell responded with a strategy he called “forged fortuity.”³⁴³ Drawing on the view here that *Masterpiece* represents queer sacrifice and that the movement for advancing true equality for sexual minorities could be similarly understood within Bell’s racial fortuity thesis—albeit, “queer fortuity” here—sexual minorities might benefit from Bell’s call to persist with forged fortuity, which he described as focusing less on the judiciary for results and “more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance.”³⁴⁴ In particular, Bell had insisted that African-Americans “initiate and support actions that seemingly fly in the face of interest-convergence principles when those actions make life more bearable for blacks in a society where blacks are a permanent, subordinate class.”³⁴⁵ In such a

³⁴² *Id.*

³⁴³ *See, e.g., id.* at 190.

³⁴⁴ *Id.* at 9.

³⁴⁵ *Id.* at 190.

way, “[r]ecognition of our true state will serve as a gateway to an era where we forge fortuity, that is defy the workings of the involuntary sacrifices and interest-convergence determinants of racial policies and practices.”³⁴⁶ Bell’s examples of forged fortuity included the lunch counter sit-in protests by African-Americans that allowed them to “overcome traditional laws of trespass and breach of the peace” and prompted leaders of such protests “to think and plan within a context of ‘what is’ (the existing problem) rather than simply rely on the abstract concept of equality.”³⁴⁷ For Bell, the crux of these sit-in protests for explaining forged fortuity strategies was “that a great many whites would not maintain discriminatory policies if the cost was too high.”³⁴⁸ Likewise, Bell’s example of the strategies employed by William Robert Ming, a lawyer defending Dr. Martin Luther King, Jr. in a state income tax fraud claim, also displayed forged fortuity tactics that “articulate[d] racially realistic positions that touch some whites in the pocketbook, [and expected] that their sense of justice [would] follow.”³⁴⁹ In the suit that charged King with evading taxes by not reporting the funds retained by his Southern Christian Leadership Conference as his own taxable income, Ming defended Dr. King by boosting the number of businessmen in his all-white jury so that he could effectively win the case by convincing them that to find against Dr. King, they would be establishing a new precedent that would permit Alabama to “calculated your income taxes based on the total monies you have in your checking accounts.”³⁵⁰ Thus, Ming changed the conditions and forged fortuity by showing how costly it would be for whites to discriminate against Dr. King. In some ways, one could recapitulate that forged fortuity represents action by a marginalized group to maximize self-interest in a way that harnesses the group’s power (rather than playing into the dominant authority) to drive forth common interests between the marginalized and dominant groups for producing meaningful, even transformative, change.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 191.

³⁵⁰ *Id.*

By interpreting major gay rights cases, such as *Obergefell* and *Masterpiece*, through an extension of Bell's theories, we receive insight about how such successes and defeats gained and suffered by sexual minorities are actually still predicated within the status quo, rather than actual victories that transform the status quo. Thus, in hindsight, perhaps Craig and Mullins might have benefitted from legal arguments that had a larger focus on forging fortuity, rather than relying predominately on persuasions based within constitutional doctrine. Like the lunch counter sit-ins or William Robert Ming's defense of Dr. King, Craig and Mullins might have raised reasons why sustaining discrimination against sexual minorities might not be economically viable for those controlling the status quo—not to say that this line of reasoning would have categorically altered *Masterpiece's* course, but it perhaps would have played into neoliberal sensibilities of the Supreme Court Justices without affecting respectability politics.³⁵¹ On below, the Colorado Court of Appeals had raised the economics issue, by noting that sexual orientation discrimination in public places incur “measurable adverse economic effects.”³⁵² The Court of Appeals had even referenced a Michigan study that discussed how discriminatory business practices against sexual minorities had negative economic impacts on employers and for business profits state-wide.³⁵³ On appeal to the Supreme Court in *Masterpiece*, the petitioner's brief by Phillips' attorneys unilaterally contested this point, downplaying the Court of Appeals' analysis.³⁵⁴ But neither the Commission's nor Craig and Mullins' respondents' briefs meaningfully addressed the economics of sexual orientation discrimination to combat the denial in Phillips' petitioner's brief.³⁵⁵ Rather, the economic impact of the sexual orientation discrimination was only left for prominent debate for *amici*—

³⁵¹ David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 2014 LAW & CONTEMP. PROBS. 1, 13 (2014).

³⁵² Craig v. Masterpiece Cakeshop, Inc., 370 P.3d at 293.

³⁵³ *Id.* (referencing MICH. DEP'T OF CIV. RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION 74-90 (Jan. 28, 2013), <http://perma.cc/Q6UL-L3JR>).

³⁵⁴ Brief for Petitioner at 51, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

³⁵⁵ See Brief for Respondents at 9, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

between legal scholars who philosophically adhered to law and economics principles and filed their brief for Phillips' side,³⁵⁶ and scholars who adhered to law and behavioral economics studies and wrote to undermine Phillips' position and to debunk the certainty of law and economics arguments.³⁵⁷

C. FORGING FORTUITY THROUGH COALITION BUILDING

Following Bell's theory, others, in the context of race, have articulated multiracial coalition-building as an important general strategy for forging fortuity.³⁵⁸ "Interest," as Sheryll Cashin perceives in her study of Bell's thesis, "is the recognized tactical or strategic advantage that one racial group can gain by forming a coalition with another group."³⁵⁹ In this sense, she remarks that "[t]here is a hopeful upside to Bell's interest-convergence thesis: broad coalitions for progressive social change are theoretically possible when common interests, or a convergence of enlightened self-interest, can be established."³⁶⁰ Cashin's examples of such coalition-building that transcends interest-convergence principles include "coalitions among Asians, Latinos, and blacks [that] tend to be quite strong when formed around issues that all three groups benefit from, such as eliminating poverty or unemployment or discrimination."³⁶¹ Patience Crowder concurs with Cashin in her recent articulation of Bell's interest convergence thesis from a transactional perspective: "[W]ithout significant coalition building among all relevant interest groups concerned about a particular issue, the unalignment of interests cannot only undo the outcome that resulted from a convergence of those interests but can actually abrogate any progress made during the period of convergence."³⁶²

³⁵⁶ See Brief Amici Curiae of Law and Economics Scholars, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111).

³⁵⁷ See Brief Amici Curiae of Scholars of Behavior Science and Economics, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111).

³⁵⁸ Bergin, *supra* n. __, at 302.

³⁵⁹ Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 278 (2005). 278.

³⁶⁰ *Id.* at 276.

³⁶¹ *Id.* at 278-79.

³⁶² Patience Crowder, *Interest Convergence as Transaction?*, 75 U. Pitt. L. Rev. 693, 694 (2014).

*Forthcoming, to be published in the Yale Journal of Law & Feminism.
Please do not cite or circulate without author's permission.*

In Catherine Smith's work on "outsider" interest convergence, Smith augments Cashin's coalition-building idea by adding that within large coalitions, "members of subordinated groups go even further and identify how what are perceived to be white middle class, heterosexual norms and the subordinated groups' respective group's failures to conform to those norms serve to marginalize each group and all groups in the coalition."³⁶³ Doing so "may also reveal how we each, even as members of subordinated groups, play a role in perpetuating the status quo"³⁶⁴ and how to respond to it collectively with action.³⁶⁵

Of course, one danger of coalitions amongst different racial demographics, as Cashin admits, is how such multiracial coalition building might break down when specific intra-group ideologies or antagonism interfere with the cohesion of converging self-interests.³⁶⁶ The hurdle of multiracial coalitions is for finding "a common interest that is significant enough to overcome any ideological differences."³⁶⁷ Scott Cummings responds with two different takes on overcoming this hurdle. First, he mentions Reva Siegel's view that "it is the power of countermobilization in politics . . . that causes social movements to reframe their claims in terms that can attract widespread mainstream support."³⁶⁸ Secondly, Cummings also restates Gerald Torres' perspective that "movements can succeed in shifting cultural norms in progressive directions so long as 'non-elite actors have . . . a voice earlier in the agenda setting process' thus ensuring the adequacy of their representation."³⁶⁹ Both views give a less worrisome take on the political differences with large multiracial coalitions.

In the advancement for true equality for sexual minorities, Bell's forged fortuity strategies could help combat the cycle of interest convergence and queer sacrifice that continue to

³⁶³ Catherine Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 CONN. L. REV. 1077, 1089 (2008) (citing Cashin, *supra* n. __, at 276).

³⁶⁴ *Id.* at 1090.

³⁶⁵ *See id.* at 1092.

³⁶⁶ Cashin, *supra* n. __, at 279.

³⁶⁷ *Id.* at 282.

³⁶⁸ Scott L. Cummings, *The Social Movement Turn in Law*, 43 Law & Soc. Inquiry 360, 386 (2018).

³⁶⁹ *Id.* at 386-87.

subordinate sexual minorities. Given the complexities between racial and queer subordinations, some differences in forging fortuities in the context of race versus sexuality might occur. However, some commentators within the sexual minority movement have also noted the need for better coalition building that shifts the movement away from the professionalized, single-issue, identity politics organizing of recent decades. Through coalitions, Bell's theory might bring the movement back to liberationist roots and view change not just in terms of formal equality but in terms of transforming the current world—i.e. that discriminatory status quo. In line with views about coalition-building for the sexual minority movement, some prominent LGBTQ voices have posited similarly. Political science scholar Craig Rimmerman notes that “[a] central goal of radical democratic politics is to build permanent coalitions around political strategies and concrete public policies that cut across race, class, and gender divides, coalitions that will be ready to respond to the Christian Right's distortions in all political arenas.”³⁷⁰ Historian Martin Duberman writes that in the advancement of sexual minorities the imperative for coalition building exists. Especially in the post-*Obergefell*, post-Obama era, there might be a current spirit for “resistance” but “the parts do not cohere, and may never—not without a seismic effort to overcome our penchant for single-issue politics that caters solely to our own primary concerns.”³⁷¹ He urges further “we must combine with allies who we don't love but who share with us a common enemy—the country's oligarchic structure, its patriarchal author, and its primitively fundamentalist moral values.”³⁷²

In the short years before *Obergefell*, queer activist Urvashi Vaid wrote that mainstream gay rights organizations' assimilative approaches have reduced the movement's goals.³⁷³ In part, this result is so because of the narrow vision of equality

³⁷⁰ RIMMERMAN, THE LESBIAN AND GAY MOVEMENTS, *supra* n. __, at 160.

³⁷¹ MARTIN DUBERMAN, HAS THE GAY MOVEMENT FAILED 206-07 (2018).

³⁷² *Id.* at 207.

³⁷³ URVASHI VAID, IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS, AND THE ASSUMPTIONS OF LGBT POLITICS 4 (2012) [hereinafter VAID, IRRESISTIBLE REVOLUTION].

that resonates only with the powerful factions of the mainstream gay movement and causes the movement to conceptualize changes within the framework of equality that are set ultimately by the dominant status quo.³⁷⁴ This notion might add to the reasons for explaining why the *Obergefell* and *Masterpiece* cases resulted the way they did, and how they extend Bell's interest-convergence and sacrifice thesis into gay rights, showing that progress is always "pre-ordained" by the dominant powers at play. Recognition of sexual identity is not the same as allowing sexual minorities the ability to also live full lives.³⁷⁵ The goal is not just true equality, but human flourishing. Change must affect the status quo in a way that transforms current hegemonic ideas about sexual minorities and result in a redistribution of justice.³⁷⁶ To that end, Vaid writes that

[w]ithout a more substantive definition of equality, without a commitment to its extension to all LGBT people, without deeper and more honest appraisals of the limits of the traditions to which LGBT people seek admission, without a willingness to risk gains made for the opportunity to create a world that truly affirms the intrinsic moral and human worth of people's sexual, racial, and gender difference, the LGBT politics currently pursued will yield only conditional equality, a simulation of freedom contingent on "good behavior."³⁷⁷

To displace this continuing phenomenon, she proposes a "justice-based movement" as a type of "re-formed LGBT movement focused on social justice."³⁷⁸ It would be committed to recognizing the different racial and economic demographics of sexual minorities³⁷⁹ and expanding a definition of equality that is more comprehensive.³⁸⁰ Such a movement would broaden the missions of major LGBT organizations, make them more inclusive and

³⁷⁴ *Id.* at 8-20.

³⁷⁵ *Id.* at 16-17.

³⁷⁶ *Id.* at 21.

³⁷⁷ *Id.* at 5.

³⁷⁸ *Id.* at 20.

³⁷⁹ *Id.* at 20-21.

³⁸⁰ *Id.* at 21-22.

democratic in participation and representation, and force restructure of their donor schemes that promote assimilationist strategies.³⁸¹ To echo Bell about the over-reliance on the judiciary,³⁸² Vaid suggests

[s]hifting the arenas where we concentrate—from courts to executive and administration agencies, for example—and then also shifting how we consider the goal of our work there, from mere recognition or naming in a regulatory scheme to a consideration of how it does or does not help the lives and life chances of our communities, offers a practical path forward.³⁸³

Lastly, for such a movement to flourish, “we will have to join with straight allies and create a new powerful electoral majority in this country.”³⁸⁴ Here, Vaid arrives at her concept of coalition-building for sexual minorities. Specifically, she mentions that “[f]or many decades, progressives have talked about the need to link up with each other beyond identity, around shared values and goals.”³⁸⁵ Thus, instead of working in political silos, “[w]e who have been working for LGBT liberation certainly do not see our goal as building a gay silo or living in one.”³⁸⁶ Those moves would be assimilative. Rather “[w]e see our work instead as building common ground.”³⁸⁷ Vaid’s conception of coalition-building is broad, philosophical, and liberationist, compared to the assimilative methods of lobbying by current mainstream gay rights organizations. It also approaches Cashin, Crowder, and Smith’s extensions of Bell’s forged fortuity.

Reaching back to Bell’s iterations of forged fortuity, like white dominance, sexual minorities must presume heterosupremacy at play in everyday ordinary life.³⁸⁸ Because of

³⁸¹ *Id.* at 22-28.

³⁸² Bell, SILENT COVENANTS, *supra* n. ___, at 9.

³⁸³ *Id.* at 29.

³⁸⁴ *Id.* at 202.

³⁸⁵ *Id.* at 203.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 204.

³⁸⁸ Bell, SILENT COVENANTS, *supra* n. ___, at 190.

that supremacy, queer people are often undermined or subordinated—whether they are planning to get married, applying for a job, renting an apartment, or shopping for a cake. Understanding this perspective, sexual minorities ought to be subversive and work actively to protect self-interest but also not eager to sell out just to gain access to the dominant status quo.³⁸⁹ Through inter- and intra-group interest convergence, coalitions must be formed with other marginalized people; and they must exist and protest collectively in ways that resemble in spirit the lunch counter sit-ins that Bell mentioned—against the dominant status quo as the cost and expense for reinforcing discriminatory beliefs and practices. The larger and more robust the coalitions are, the less advantageous it would be in the dominant group’s interest to sustain discrimination. Together with other groups, sexual minorities ought to be able to create change that is lasting, transformative, and indeed liberationist.

Scholarly calls for coalition building echo each other. On more liberationist terms, all of these calls could be workable as examples of forging fortuity. Within the racial context, the scholarly observations for coalition building with common interests externalize Bell’s forged fortuity. Brought into the sexual minority context, the call for broad coalition building—particularly one that appears more transformative—echoes the need not only to combat a continuing inequality imposed against sexual minorities by those operating within a discriminatory status quo, but also the need to resolve the intra-group marginalization between assimilated, elite gays and lesbians and sexual minorities living outside that sub-category.³⁹⁰ These overlapping calls and suggestions for coalition building are more liberationist than assimilative. Because such coalition building would hopefully seek to challenge the hegemony and not play into it, in that sense, a reformed movement that forges its own fortuity by coalescing around values and issues beyond identity politics should be broad and should earnestly be investigated as the next step forward.³⁹¹ It invariably ought to dial the LGBTQ

³⁸⁹ *See id.*

³⁹⁰ Nourafshan & Onwuachi-Willig, *supra* n. __, at 540-41.

³⁹¹ Bergin, *supra* n. __, at 303.

movement's approaches and tactics back a few degrees liberationist and some significant degrees more queer.

V. CONCLUSION

Sexual minorities still live at the mercy of the dominant status quo. By conceptualizing *Masterpiece* as an example of queer sacrifice and seeing how Bell's theory of fortuity fits appropriately over the progressive ebb and flow of the sexual minority movement, it is possible to perceive that the movement needs to forge its own fortuity in order to further antidiscrimination efforts and effectively reach toward the state of true equality and human flourishing. To that end, coalition building that focuses on common values and interests rather than identity politics might be the solution to press upon upending the dominant status quo. And within such coalitions, liberationist approaches might need to guide the movement to advance more collectively and transformatively.