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Equal Justice Under Law: Navigating the Delicate Balance Between Religious Liberty and Marriage Equality

Meg Penrose

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I. INTRODUCTION: WHOSE RIGHT WILL PREVAIL?

In 2015, the United States Supreme Court held that same-sex couples have a constitutionally protected right to marry.[1] The decision was controversial; it fractured the Court, splintered society, and immediately put into motion dissenting Justice Thomas's prediction that this newly established right to marry would clash with religious liberty.[2]

From photographers, to bakers, to florists, to foster care and adoption agencies, individuals and organizations have sought—based on religious liberty claims—to limit their recognition of, and participation in, same-sex marriages. The objection is quite simple: "I (or we) don't do gay weddings." Such objections are not new. Religious liberty challenges were lodged against the Civil Rights Act of 1964, a law requiring that businesses serve all individuals, including racial minorities.[3] In the clash between racial equality and religious liberty during the 1960s, racial equality prevailed.

But whose right will prevail in this modern conflict—the clash between marriage equality and religious liberty? Race and sexual orientation are not the same. Slavery and its harmful consequences raise unique issues in American legal history. The Thirteenth, Fourteenth, and Fifteenth Amendments are a direct result of slavery. Eradicating the vestiges of slavery remains a critical goal of securing the Supreme Court's promise, "Equal Justice Under Law." This history makes relying on past race-based cases difficult.

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1. *See* Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

2. *Id.* at 733 (Thomas, J., dissenting) ("Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.").

3. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Newman v. Piggie Park Enters, Inc., 390 U.S. 400, 402 n.5 (1968).

The conflict between religious liberties and same-sex marriage raises important constitutional questions. How do courts approach this modern challenge? How do we balance the interests of those whose sincere religious beliefs prevent them from recognizing same-sex marriages with those seeking the legal benefits arising from same-sex marriage? In the collision between religious liberty and marriage equality, whose right prevails? This question has not been squarely answered. Instead, the Supreme Court has consistently avoided the issue by relying on a 1989 case, *Employment Division, Department of Human Resources of Oregon v. Smith*.[4]

The Supreme Court's decision this term in *Fulton v. City of Philadelphia* was poised to provide clarity.[5] It did not. Instead, much like the *Masterpiece Cakeshop* case before it, *Fulton* stuck tightly to the facts and provided a narrow holding.[6] Other cases have shed light on the issue, but the broader question of whose right will prevail remains uncertain.[7] Will religious objectors to same-sex marriage be able to rely on the First Amendment to avoid serving same-sex couples? Or will the constitutionally established right to same-sex marriage require businesses to serve the public without discriminating against same-sex couples?

This Article discusses the current state of the law and offers thoughts on its future. Part II provides a brief overview of the legal landscape involved in the clash between religious liberty and same-sex marriage. From Justice Scalia's seminal religious liberty test to the evolution of same-sex marriage, Part II describes the current law. Part III introduces the reader to public accommodations laws. After providing this brief history, Part III discusses three Supreme Court cases that could have resolved the religious liberty versus marriage equality question. Part IV looks ahead and draws analogies to the 1960s religious liberty objections as a way of predicting how the clash between religious liberty and marriage equality could play out. Finally, Part V concludes the Article by briefly exploring possible solutions to the clash of rights, before ending with a question. When the Court must finally choose between religious liberty rights and same-sex marriage equality, whose right will prevail?

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4. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *as recognized in* Tanzin v. Tanvir, 141 S. Ct. 486 (2020).

5. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

6. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm., 138 S. Ct. 1719 (2018).

7. The Supreme Court regularly sided with religious liberty during the 2020 Supreme Court Term, particularly when facing COVID-19 related worship restrictions. *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021). Both cases reinforced that when a law is neither neutral toward religion nor generally applicable, strict scrutiny—the Court's most rigorous standard of review—applies. Most laws facing strict scrutiny fail.

This Article does not make a value judgment between those seeking religious liberty and those desiring marriage equality. Both sides raise valid and defensible claims. Our Constitution does not provide a hierarchy of rights and, thus far, the Court has avoided creating one. Liberty and equality are both important; however, the collision keeps occurring. Soon this clash of rights will require resolution.

II. THE LEGAL LANDSCAPE—SETTING THE STAGE

To understand the clash between religious liberty and marriage equality, one must understand the nature of the competing rights being protected. The Supreme Court has decided a patchwork of interrelated cases providing insight into the strengths of each right. Americans are largely permitted to worship and believe as they see fit.[8] Americans are also entitled to marry a same-sex or opposite-sex partner.[9] But these two rights do not always peacefully co-exist. In fact, these rights directly conflict for many individuals and businesses. For example, if I want my business to reflect my religious ideals, I may not serve your same-sex wedding. On the other hand, if you are planning a same-sex wedding and come to my bakery for the perfect cake, you will expect to receive the same service as others. It remains an open question—in states and cities with public accommodations laws containing non-discrimination policies—whether I must serve same-sex couples if doing so will offend my sincere religious beliefs. The following cases help readers understand the Supreme Court's approach toward each right.

A. Religious Liberty—Neutral and Generally Applicable Laws Are Valid

It might seem unusual that a case about smoking peyote, a powerful hallucinogenic, is relevant to whether a baker or florist must cater a same-sex wedding. But Justice Scalia's majority opinion in *Employment Division v. Smith*[10] still provides the template for balancing religious liberty rights against countervailing interests. Both the case facts and governing test are straightforward.

Two members of a Native American Church, Smith and Black, were fired for ingesting sacramental peyote during a worship service.[11] They

8. *But see Smith*, 494 U.S. 872 (1990).

9. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

10. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *as recognized in* Tanzin v. Tanvir, 141 S. Ct. 486 (2020).

11. *Id.* at 874.

were fired because, at the time, Oregon criminalized peyote use.[12] Smith and Black then sought unemployment benefits.[13] Oregon denied their benefit claims due to alleged "misconduct" in using peyote.[14] Smith and Black sued, claiming a violation of their religious liberty rights.[15]

Justice Scalia characterized Smith and Black's claim as a contention that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice" and is otherwise lawful.[16] His majority opinion explained that religious practices are not insulated from legal consequences when the challenged law is religiously neutral and generally applicable. Emphasizing this point, Justice Scalia wrote: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[17]

Because Oregon's law banning peyote use was religiously neutral and generally applicable, it did not have to satisfy "strict scrutiny"—the Court's most demanding standard in reviewing constitutional claims—to justify its decision.[18] This was significant because most laws facing strict scrutiny review are invalidated.[19] In balancing Smith and Black's challenge, the majority aimed to prevent religious liberty objections from overturning a host of laws that incidentally burden religion, including laws prohibiting race discrimination, child neglect laws, animal cruelty laws, environmental protection laws, and child labor laws.[20] Simply put, "The First Amendment's protection of religious liberty does not require this."[21]

Smith stands for the proposition that if a law incidentally burdens religious liberty but is neutral and generally applicable, the law will prevail against a religious liberty challenge. Generally applicable laws are necessary to maintain order in our society. Granted, religious liberty protects

12. *Id.* ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medial practitioner.").
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 878.
17. *Id.* at 878–79.
18. *See id.* at 885–89.
19. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993). The Court noted that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.*
20. *Smith*, 494 U.S. at 888–89.
21. *Id.* at 889.

individuals against discrimination.[22] But under *Smith*, religious liberty does not allow an individual or business to avoid the consequences of an otherwise valid law.[23]

Smith remains the governing test in religious liberty cases. States and cities throughout the United States rely on *Smith* when formulating laws, particularly modern public accommodations laws. Many states have instituted public accommodations laws that broadly protect their populations and visitors. These laws require public businesses to serve the public without discrimination.

Following the constitutional recognition of same-sex marriage, many states expanded their public accommodations laws to include sexual orientation or marital status. This expansion resulted in courts and scholars rethinking *Smith*'s viability. Public accommodations laws have previously withstood religious liberty challenges, largely because any service requirement that is not connected to worship or employment activities was considered incidental to religious liberty.[24] *Smith* remains good law. As long as a public accommodations law is neutral and generally applicable, religious liberty challenges should not overcome these expanded service requirements.[25]

It is worth noting that at least three current Supreme Court Justices appear willing to jettison *Smith*'s test, opting for a more stringent "strict scrutiny" test imposed on laws burdening religion.[26] The question remains: Can these Justices secure two more votes?

B. Obergefell*—Same-Sex Marriage Is a Constitutional Right*

Obergefell v. Hodges was a seismic decision.[27] The issue of same-sex marriage transformed overnight from a legislative battle to a constitutional right. While some states legislatively expanded their marriage definitions to include same-sex couples, others held firm to the traditional definition that marriage was only available to one man and one woman.[28] The Supreme Court upended the status quo. The public response was split between

22. *Lukumi*, 508 U.S. at 547. "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*

23. *Id.*

24. *See, e.g.,* Katzenbach v. McClung, 379 U.S. 294 (1964) (serving food at a restaurant not deemed a religious liberty activity).

25. *Cf.* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

26. *See id.* at 1894 (Alito, J., concurring). Justice Alito's desire to overturn *Smith* is shared by Justices Thomas and Gorsuch.

27. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

28. *Id.* at 653–54.

joy and anger. Those that had been waiting for years to legally marry could now obtain a valid marriage license in all fifty states.[29] But those whose religious beliefs cabin marriage solely to one man and one woman worried how this new ruling might impact them.

Obergefell involved legal challenges to four states' marriage definitions.[30] These states, and many others, limited marriage to unions between one man and one woman.[31] Plaintiffs sought to change this definition to allow them to marry their same-sex partners or have their out-of-state marriage legally recognized.[32] The Court was directly asked to enter the debate and decide whether there was a constitutional right to same-sex marriage.

In the twenty years preceding *Obergefell*, the Supreme Court consistently expanded gay rights. Justice Kennedy, who authored *Obergefell*, also authored three pivotal opinions leading up to *Obergefell*. In the first, *Romer v. Evans*,[33] the Supreme Court held that a state could not exclude same-sex individuals from non-discrimination laws when the perceived motivation was animus against gays and lesbians.[34] As indicated above, modern public accommodations laws have expanded, and often include sexual orientation as a protected category. However, sexual orientation is not a protected category in federal civil rights statutes, including federal public accommodations laws. This meant if sexual orientation were to be protected from discrimination, states would have to provide that protection. Many states did. It was this attempt to provide broad protection to LGBTQ individuals that led to *Romer*.

1. *Romer v. Evans*

In response to several Colorado cities passing expansive public accommodations laws, Colorado voters passed a state constitutional amendment singling out gays and lesbians for disfavored treatment by excluding them—and specifically them—from non-discrimination laws.[35] The status of being gay removed an individual from a host of protective anti-discrimination measures.[36] Justice Kennedy harkened back to *Plessy v. Ferguson*, emphasizing that Equal Protection ensures "that government and

29. *Id.* at 675; *see also id.* at 681 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all [fifty] States.").

30. *Id.* at 653–54. The four states are Michigan, Kentucky, Ohio, and Tennessee.

31. *Id.*

32. *Id.* at 658–59.

33. Romer v. Evans, 517 U.S. 620 (1996).

34. *Id.* at 634–35 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

35. *Id.* at 630–32 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation.").

36. *Id.* at 623–25.

each of its parts remain open on impartial terms to all who seek its assistance."[37]

Romer was the first Supreme Court case to extend legal protection to gays and lesbians.[38] The Court purportedly relied on the rational basis test, the most deferential constitutional test, in finding that Colorado failed to provide a legitimate reason to single out gays and lesbians for disfavored treatment.[39] In a phrase that continues to cause controversy today, Justice Kennedy wrote that the only explanation for such differential treatment, the "inevitable inference," was that the choice "is born of animosity toward the class of persons affected."[40] He continued:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause . . . .[41]

Romer drew a sharp dissent from Justice Scalia.[42] His dissent raised what continues to be a concern today. Justice Scalia asserted the law was not a bare desire to harm homosexuals, "but is rather a modest attempt by seemingly tolerant [Americans] to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[43] One need not agree with Justice Scalia to see his point. Some view the expansion of gay rights as an affront to moral values. While the dissent claims to eschew picking sides in a culture war, it does not hesitate to challenge the majority's decision as an act of political will rather than judicial judgment.[44]

2. *Lawrence v. Texas*

The next expansion of gay rights occurred when the Court overturned the 1986 case *Bowers v. Hardwick*.[45] *Bowers* upheld a state's right to criminalize homosexual sodomy. Justice Kennedy's majority opinion in *Lawrence v. Texas* found that criminalizing a private sexual act among consenting adults violated their constitutional liberty rights.[46] Relying on a line

37. *See generally id.* at 633.
38. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (finding that states could, consistent with the Constitution, criminalize homosexual sodomy).
39. *Romer*, 517 U.S. at 635.
40. *Id.* at 634.
41. *Id.* at 635.
42. *See id.* at 636 (Scalia, J., dissenting).
43. *Id.*
44. *Id.* at 653 (Scalia, J., dissenting).
45. Bowers v. Hardwick, 478 U.S. 186 (1986).
46. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

of cases dating back to *Griswold v. Connecticut*,[47] the majority explained that certain intimate decisions extend outside marriage and required the Court to reconsider *Bowers*.[48] Much like past decisions protecting intimate acts among heterosexual couples, the Court emphasized the private nature of the same-sex couple's intimate acts.[49] Justice Kennedy's opinion noted that same-sex sodomy was not singled out for punishment until the 1970s.[50] Echoing its concern in *Romer*, the majority fretted over the stigma that criminal prosecution imposed on private intimate acts among consenting adults.[51] In overturning *Bowers*, the Court moved one step closer to same-sex marital rights.

Decriminalizing same-sex sodomy was the first step toward marriage equality. This can be illustrated by analogy to interracial marriages. While race and sexual orientation are not identical, a significant hurdle in permitting interracial marriage was the decriminalization of intimate activity between interracial couples.[52] Once sexual acts between interracial couples were decriminalized,[53] the legalization of interracial marriage was the natural next step. Same-sex marriage appeared to be on the same trajectory. Enter Edith Windsor.

3. *United States v. Windsor*

The third and final case leading up to *Obergefell* was a federal tax case, *United States v. Windsor*.[54] Edith Windsor and her partner of forty-four years, Thea, were legally married in Canada.[55] Thea died shortly thereafter, leaving her entire estate to Windsor.[56] New York recognized the marriage as legally valid, but the federal government did not.[57] Thus, Windsor faced a $363,053 estate tax because the United States did not accept Windsor as Thea's "surviving spouse."[58]

Windsor challenged the tax and, by extension, the federal Defense of Marriage Act ("DOMA"). DOMA's traditional marriage definition (one

47. Griswold v. Connecticut, 381 U.S. 479 (1965).

48. *Lawrence*, 539 U.S. at 567; *see Bowers*, 539 U.S. at 190. The Court in *Bowers* cited a long line of privacy cases starting with *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*. *Bowers*, 539 U.S. at 190. The Court then moved to *Griswold*, *Eisenstadt v. Baird*, *Roe v. Wade*, and *Carey v. Population Services, International*. *Id.*

49. *Lawrence*, 539 U.S. at 565–67.

50. *Id.* at 570.

51. *Id.* at 575.

52. *See* McLaughlin v. Florida, 379 U.S. 184, 187 (1964) (striking down Florida law that prohibited unmarried interracial couples from occupying the same room at night).

53. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

54. United States v. Windsor, 570 U.S. 744 (2013).

55. *Id.* at 753.

56. *Id.*

57. *Id.*

58. *Id.*

man, one woman) impacted over 1,000 federal statutes relating to marriage.[59] Finding that marriage regulations had long been within the province of the states, Justice Kennedy's majority opinion noted:

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection . . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[60]

The majority, once again, emphasized the dignity rights of same-sex couples.[61] It reasoned that allowing Congress to exclude same-sex marriage from its definition of marriage would demean same-sex couples, placing "same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationships the State has sought to dignify."[62] The Court struck down DOMA's traditional marriage definition, holding it violated the Fifth Amendment.[63]

Once the federal definition fell, it was only a matter of time before state definitions were deemed unconstitutional.[64]

4. *Obergefell v. Hodges*

This accretion of rights for same-sex couples led to *Obergefell*'s holding that same-sex couples have a legal right to marry.[65] The ruling was contentious and controversial.[66] Frustration, even among the Justices, lingers to this day.[67] Rather than allowing the issue to play out in the legislative chambers across America, the Supreme Court found that same-sex couples have a legal right to marry and that these marriages must be recognized in all fifty states.[68]

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59. *Id.* at 765.
60. *Id.* at 769–70.
61. *Id.* at 770.
62. *Id.* at 772 (internal citations omitted).
63. *Id.* at 774. The opinion vacillates between the violation being based on Equal Protection and liberty protected by Due Process. The lack of constitutional clarity regarding the source of the violation was repeated in the *Obergefell* decision.
64. *See id.* at 799–800 (Scalia, J., dissenting).
65. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").
66. All four dissenting Justices authored individual opinions in *Obergefell*. This is unusual. More unusual was the tone of these opinions.
67. *See* Davis v. Ermold, 141 S. Ct. 3 (2020) (Thomas, J., concurring in denial of certiorari) (writing that *Obergefell* "read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text"). For more about this case, and Justice Thomas's dissent from the denial of certiorari, *see infra* Part III.D.
68. *Obergefell*, 576 U.S. at 680–81.

Justice Kennedy once again authored the majority opinion. The decision is long on platitudes but less clear on law. Explaining that "[t]he nature of injustice is that we may not always see it in our own times," the Court broadened the right to marry to include same-sex couples.[69] Justice Kennedy emphasized that excluding gays and lesbians from marriage and its many benefits demeans them.[70] The majority was troubled that "by virtue of their exclusion from [marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage."[71] The majority acknowledged the historical definition of marriage throughout its opinion. But in the end, Justice Kennedy's opinion delivered the expected sequel to *Windsor*, stating that "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[72]

Incrementally, the Supreme Court created a constitutional right for same-sex couples to legally marry. With *Romer* as the foundation, and *Lawrence* expanding the privacy rights of same-sex couples, *Windsor* and *Obergefell* were natural extensions leading to a new constitutional right.[73] These extensions were not uniformly welcomed. In fact, many Americans did not embrace this new legal right and claimed to have an equally potent right of their own to counter same-sex marriage—religious liberty. For those whose sincere religious beliefs prevent them from recognizing, or in any way supporting, same-sex marriage, religious liberty offers a possible shield.[74]

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69. *Id.* at 664.

70. *Id.* at 669–71. The opinion notes that "while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* at 669–70.

71. *Id.* at 670.

72. *Id.* at 760–71.

73. *Id.* at 672 ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."). Relying on the dignity injuries discussed in *Romer* and *Lawrence*, Justice Kennedy's majority opinion found that "excluding same-sex couples from the marriage right impose[s] stigma and injury of the kind prohibited by our basic charter." *Id.* at 679.

74. The *Obergefell* majority did address religious liberty in its opinion:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id. at 679–80.

III. THE SUPREME COURT, RELIGIOUS LIBERTY, AND PUBLIC ACCOMMODATIONS

Another Colorado case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, provided the United States Supreme Court with its first real opportunity to resolve the religious liberty versus marriage equality question.[75] Following *Romer*, Colorado—which has a robust history of non-discrimination—passed a public accommodations law including protections for sexual orientation.[76] A public accommodations law, or non-discrimination ordinance, requires that businesses and individuals provide equal access to customers in places of public accommodation.[77] Colorado's public accommodations law dates back to statehood—the late 1800s.[78] The version in place at the time of the *Masterpiece Cakeshop* case defined any business that engaged in sales or services to the public to be a place of public accommodation.[79] When a Colorado baker refused to provide a wedding cake for a same-sex marriage ceremony, the law's applicability was called into question.[80] Before going into detail about the *Masterpiece Cakeshop* case and other public accommodations challenges, it is helpful to provide a brief overview of public accommodations laws.

A. The History of Public Accommodations Laws

Public accommodations laws exist at the federal, state, and city level throughout the United States. Sometimes labeled non-discrimination laws, the purpose of public accommodations laws is to ensure that all individuals have access to public businesses.[81] These laws date back to the English common law where inns and common carriers were prohibited from refusing a person a room at an inn or a seat on a carriage where room was available.[82]

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75. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm., 138 S. Ct. 1719 (2018).

76. *Id.* at 1725. The Colorado Anti-Discrimination Act was "[a]mended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation [and] other protected characteristics." *Id.*

77. Colorado's 1885 anti-discrimination statute provides a good example. The 1885 "Act to Protect All Citizens in Their Civil Rights" provided the "full and equal enjoyment" of places of public accommodation "regardless of race, color, or previous condition of servitude." *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. During the Civil Rights Act debates, Representative James Rapier stated the case as follows:

> I hold that the solution of this whole matter is to enact such laws and prescribe such penalties for their violation as will prevent any person from discriminating against another in public places on account of color. No one asks, no one seeks the passage of a law that will interfere with anyone's private affairs. But I do ask the enactment of a law to secure me in the enjoyment of public privileges.

2 CONG. REC. 4785 (1874) (statement of Rep. Rapier).

82. Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1 (1968); *see also* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment*

Following the Civil War, public accommodations laws expanded to include a broader range of businesses.[83] Congress's goal was to secure equal access to public businesses for freed slaves.[84] Exclusion from public businesses, due to race, harmed an individual's access to commerce and their personal dignity.[85]

Fighting the Jim Crow laws, Congress initially passed the Civil Rights Act of 1875. The Civil Rights Act sought to ensure that all persons would "be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres [sic], and other places of public amusement."[86]

Violation of the Civil Rights Act was a misdemeanor.[87] The Supreme Court struck down the Act in 1883 in *The Civil Rights Cases*, finding that the Fourteenth Amendment did not give Congress the power to directly regulate individuals.[88] While Congress could use the Fourteenth Amendment to prohibit discriminatory state action, the discriminatory actions of individuals were beyond the Constitution's reach. The Court noted, however, that Congress might have power to pass similar legislation using its Commerce Clause power.[89]

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and Public Accommodations, 66 COLUM. L. REV. 873, 879 (1966) (providing extensive history on the 1875 Civil Rights Act and Senator Sumner's reliance on the "common-law duty to treat all applicants equally").

83. The Civil Rights Act of 1875, 18 Stat. 335–37, was overturned by the United States Supreme Court in *The Civil Rights Cases*.

84. *See* Alfred Avins, *Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 18 W. RES. L. REV. 1251, 1252 (1967). Senator Sumner repeatedly introduced bills to provide equality in public accommodations until Congress finally passed the Civil Rights Act of 1875. Sumner's crusade began in 1870 seeking to provide all "equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement [and schools and churches]." *Id.* (quoting Cong. Globe, 41st Cong., 2d Sess. 3434 (1870)).

85. Representative Rapier provided ample evidence of the indignity he faced during his Congressional statement on June 9, 1874. 2 CONG. REC. 4782–86 (1874).

86. Civil Rights Act of 1875, 18 Stat. 335 (1875).

87. *Id.*

88. The Civil Rights Cases, 109 U.S. 3, 13 (1883). Five cases were consolidated before the Supreme Court and considered together in *The Civil Rights Cases*. Those cases were: *United States v. Stanley*; *United States v. Ryan*; *United States v. Nichols*; *United States v. Singleton*; and *Robinson v. Memphis and Charleston Railroad Co. Id.* at 3.

89. *Id.* at 18. The Court clarified the limited nature of its holding:

> Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce . . . among the several States . . . . In these cases Congress has the power to pass laws for regulating the subjects specified, in every detail, and the conduct of the transactions of individuals in respect thereof.

Id.

Roughly eighty years later, Congress took the Court's advice and passed the Civil Rights Act of 1964.[90] This Act serves as the template for many modern non-discrimination or public accommodations laws. Title II provided protection "against discrimination in places of public accommodation."[91] The 1964 Act defined public accommodations to include hotels and motels with five rooms or more, restaurants (broadly defined), theaters, and a catch-all provision that enveloped any establishment physically located within the premises of a covered public accommodation that serves its customers—such as a hair salon in a hotel.[92]

The Act provided strong protection. It assured: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[93] The Act provided critical protection to racial minorities who had long been excluded from hotels, theaters, and restaurants.[94] The law also protected religious minorities.[95]

Reaction was swift, particularly in the South. The 1964 Act was immediately challenged as a violation of business owners' property rights and religious liberty rights.[96] Hotel and restaurant owners challenged Title II's constitutionality.[97] The Supreme Court quickly dismissed these challenges, finding (1) that hotels, often located on or near highways and catering to interstate travelers, qualified as interstate commerce,[98] and (2) that a restaurant that serves a majority of food products that travel in interstate commerce qualified as interstate commerce.[99]

The Court found the 1964 Act to "be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude."[100] The fact that Congress was legislating to correct a moral wrong was found irrelevant to the question of whether the law

90. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

91. This protection is now enshrined at 42 U.S.C. § 2000a (prohibition against discrimination or segregation in places of public accommodation).

92. Barefoot Sanders, *The Civil Rights Act of 1964*, 27 TEX. B. J. 931, 1016 (1964). Judge Sanders, a U.S. Attorney at the time he wrote this essay, further explained that while restaurants were broadly defined under the Act, a tavern or bar would not be covered. But like the hair salon, if the bar or tavern was located in an otherwise covered public accommodation the law applied. *Id.*

93. 42 U.S.C. § 2000a.

94. Sanders, *supra* note 92.

95. *Id.*

96. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

97. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968) (addressing the Act's applicability to five drive-in restaurants and a sandwich shop).

98. *Heart of Atlanta Motel*, 379 U.S. at 252–54.

99. *McClung*, 379 U.S. at 299–302.

100. *Id.* at 305.

impacted interstate commerce.[101] According to the Court, "The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[102] This issue of personal dignity remains relevant today.

In one decision, *Newman v. Piggie Park Enterprises*, the Supreme Court dismissed religious liberty objections to the Act as "frivolous."[103] Admittedly, the race analogy does not provide a perfect fit for same-sex marriage. In fact, distinctions between race and sexual orientation raise questions of how religious liberty challenges may apply to modern public accommodations laws including sexual orientation. Personal dignity and rights to access public facing businesses have been historically protected.[104] And the quest for personal dignity remains important for all Americans. But so does the tradition of religious liberty.

B. Making Room for Religious Liberty in Public Accommodations

The Supreme Court has had four chances to provide guidance on religious liberty objections to modern public accommodations laws. In each case, the question of which right would prevail—religious liberty or marriage equality—was before the Court. The first case, *Masterpiece Cakeshop*, was decided on narrow grounds, which allowed the Court to avoid the broader liberty versus equality question.

Jack Phillips, the owner of Masterpiece Cakeshop, was asked by a same-sex couple to bake a wedding cake.[105] He refused, claiming religious objection to the marriage.[106] Phillips felt that "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[107] Phillips's refusal to serve the couple violated Colorado's public accommodations law.[108] The

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101. *Heart of Atlanta Motel*, 379 U.S. at 257. In addressing the morality question, the Court wrote:

> That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.

Id.

102. *Id.* at 250.

103. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 403 n.5 (1968). The Per Curiam opinion stated that the Supreme Court had previously foreclosed the religious liberty argument in *McClung*. The Court refused to accept Piggie Park's defense that racial integration "contravenes the will of God" and thus provides a First Amendment defense. *Id.*

104. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

105. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm., 138 S. Ct. 1719, 1723 (2018).

106. *Id.*

107. *Id.* at 1724.

108. *Id.* at 1725.

couple filed a complaint against Masterpiece Cakeshop for violating their right to access a public business.[109]

Justice Kennedy, in authoring the majority opinion, wrote:

> The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment . . . .[110]

Colorado has regularly prohibited discrimination in public accommodations. In the decade following statehood, Colorado passed legislation granting to persons within its borders "full and equal enjoyment" to public facing businesses regardless of their race.[111] This law has constantly been expanded, and at the time of this case included, but was not limited, to race, sex, sexual orientation, marital status, national origin, and ancestry.[112] The law also established an administrative system to resolve discrimination claims that were brought.[113] Based on the couple's complaint, an investigation was opened against Masterpiece Cakeshop.[114] The complaint alleged that Phillips refused to provide "full and equal service" to same-sex couples, thereby discriminating against them based on their sexual orientation.[115]

The Colorado Civil Rights Division referred the matter to an administrative law judge to hear the case.[116] Phillips raised two constitutional challenges to the Colorado non-discrimination law: (1) a free speech claim, and (2) a religious liberty claim.[117] The judge denied both challenges, finding that wedding cakes are not protected free speech and that, under *Smith*, Colorado's law was religiously neutral and generally applicable.[118] The larger Commission affirmed the administrative law judge's decision against Phillips.[119] Phillips was ordered to stop violating the non-discrimination law.[120] Phillips unsuccessfully appealed to the Colorado courts.[121] He then petitioned the United States Supreme Court to take his case. It did.

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109. *Id.*
110. *Id.* at 1723.
111. *Id.* at 1724–25.
112. *Id.* at 1725.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 1726.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 1726–27.

The Supreme Court sidestepped Phillips' free speech claim of whether a baked good becomes an expressive statement when a baker's artistic talent is used.[122] The majority remarked, "Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."[123] The Colorado Civil Rights Division had allowed other bakers to refuse to provide cakes when the requested cake sought messages that demeaned LGBTQ individuals.[124] This disparity—providing an exception in some cases but not in Phillips's case—posed a legal problem for Colorado.[125] The position that Phillips took in declining to bake a cake was treated differently than the position other bakers took who were permitted to decline the requested business.[126] This differentiation removed the case from *Smith*'s neutrality requirement.[127]

The majority agreed that the Court's precedents "make clear that the baker . . . might have his right to the free exercise of religion limited by generally applicable laws."[128] But in this case, the Court found the State's resolution of Phillips's complaint showed hostility toward religion.[129] The Court emphasized one exchange between the Commission and Phillips. A Commissioner opined that

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[130]

The majority found this condemnation crossed a line.[131] It evidenced hostility toward Phillips's religion and took the case outside of *Smith*.[132] The Commission did not approach Phillips's religious objection with neutrality.[133] The Colorado courts' orders against Phillips were reversed.[134]

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122. *See id.* at 1723.
123. *Id.*
124. *Id.* at 1728.
125. *Id.* at 1730.
126. *Id.*
127. *Id.* at 1730–31.
128. *Id.* at 1723–24.
129. *Id.* at 1732.
130. *Id.* at 1729.
131. *Id.* The majority found that "[t]o describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical–something insubstantial and even insincere." *Id.*
132. *Id.* at 1732.
133. *Id.* at 1731. In fact, the majority found that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1721. *See also id.* at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.").
134. *Id.* at 1732.

In reversing the Colorado courts' decisions, the Supreme Court explained that the broader question regarding religious liberty versus marriage equality "must await further elaboration in the courts."[135] It urged that such future disputes must be resolved "with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[136]

Phillips won, in the short term.

However, Phillips is now again being sued for refusing to bake a birthday cake for a transgender person.[137] In this new case, the court explained that Phillips reviews every request for a custom cake, including "the cake's type, design, and message, and what event the cake is intended to celebrate."[138] Phillips continues to abide by his faith and will not create any custom cake expressing a message or celebrating any event he believes conflicts with his faith.[139] The current challenge arises from a customer's request for a pink cake with blue frosting to help "celebrate her transition from male to female."[140] Phillips refused to prepare the custom cake, instead offering the customer access to any of his pre-made cakes.[141] Once the complaint was filed against Phillips for refusing to bake the cake, the Civil Rights Commission reviewed the complaint, found probable cause that Phillips discriminated against the customer based on sexual orientation, and set the case for a hearing.[142]

Phillips, claiming that he is being targeted and unconstitutionally bullied, filed suit against several Colorado officials seeking an injunction, declaratory relief, and monetary damages.[143] Phillips again relies on his free speech and religious liberty rights to avoid not only baking the cake, but Colorado's antidiscrimination process.[144] That suit remains ongoing. At some point, the direct conflict of religious liberty versus the right to access public goods without discrimination will require resolution, though that resolution may not necessarily occur in Phillips's case.

135. *Id.*
136. *Id.*
137. Masterpiece Cakeshop, Inc. v. Elenis, 445 F. Supp. 3d 1226, 1232 (D. Colo. 2019).
138. *Id.* at 1233.
139. *Id.*
140. *Id.* at 1236.
141. *Id.* at 1236–37.
142. *Id.* at 1237.
143. *Id.* at 1232.
144. *Id.* at 1238. His suit also added new claims based on the Fourteenth Amendment's Due Process and Equal Protection Clauses. *Id.*

C. Fulton—*The Court's Continued Reliance on* Smith

Many thought that when Philadelphia refused to renew Catholic Social Services' ("CSS") foster care services contract, the Supreme Court would resolve the question of religious liberty versus LGBTQ access to public services.[145] Justice Kennedy had retired, and the Court's new composition brought hope that religious liberty claims would find a welcome audience.[146] That hope was quickly dashed when the Supreme Court stuck closely to the facts and issued another narrow ruling.[147] Looking at the Court's decision, it is neither surprising nor controversial. Once again, the Supreme Court followed *Smith*. Laws that incidentally burden religious freedom will be upheld if they are both religiously neutral and generally applicable.[148] In the end, *Fulton* was not a close call. In a technically unanimous opinion, the Court found Philadelphia violated CSS's religious liberty by refusing to renew its foster care services contract when the contract allowed for exemptions at the City's sole discretion.[149]

For years, CSS had provided foster care services in Philadelphia.[150] CSS, like Phillips, believes that marriage is a sacred bond between one man and one woman.[151] CSS refuses to recognize the legal marriage of same-sex couples based on its religious beliefs and, accordingly, refuses to qualify same-sex couples for foster care services.[152] CSS does not refuse to serve gay and lesbian individuals. But if a married, same-sex couple sought CSS's services, it would be refused.[153] This conduct violated the City's governing non-discrimination ordinance.[154]

Philadelphia works in concert with thirty foster care agencies, including CSS, to help place needy children in safe homes.[155] The City issues one-year, annually renewable contracts for foster care services to various agencies.[156] A newspaper reporter informed the City's Department of Human Services ("DHS") that two of its foster agencies refused to work

145. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

146. *See id.*; *see also* Adam Liptak, *Supreme Court Weighs Legacy of Same-Sex Marriage Case*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/us/politics/supreme-court-same-sex-marriage.html [https://perma.cc/AY6M-DK8Y].

147. *Fulton*, 141 S. Ct. at 1874–82.

148. *Id.* at 1876–80.

149. *Id.* at 1880–82.

150. *Id.* at 1874–76.

151. Fulton v. City of Philadelphia, 922 F.3d 140, 148 (3d Cir. 2019), *rev'd by* 141 S. Ct. 1868; Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm., 138 S. Ct. 1719 (2018). In addition, Catholic Social Services ("CSS") also raised a Free Speech and Pennsylvania Religious Freedom Protection Act challenge to the City's non-renewal. *See Fulton*, 922 F.3d at 162–63.

152. *Fulton*, 141 S. Ct. at 1875.

153. *Fulton*, 922 F.3d at 148.

154. *Id.*

155. *Id.* at 147.

156. *Id.*

with same-sex couples as potential foster parents. When DHS sought clarification from CSS, CSS indicated that while it will certify gay and lesbian individuals, its religious convictions will not allow it to certify any "unmarried couples," including same-sex couples.[157] Thus, despite same-sex couples' legal right to marry, CSS refused to honor that legal status because of its religious beliefs.[158] The appellate court emphasized the City's non-discrimination policy in upholding the City's decision to cut ties with CSS.[159] The Court stated that "[t]he City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services."[160]

The Supreme Court reversed.[161] Chief Justice Roberts authored the Court's short opinion. The majority refused to reconsider *Smith*'s neutral and general applicability requirements.[162] The facts of this case simplified the Court's task. The City, while never having granted an exception to its non-discrimination policy, provided the City Commissioner the power—"in his/her sole discretion"—to grant such an exception.[163] This contractual provision, even though never invoked, violated the generally applicable requirement.[164] If the City *could* grant exemptions, it had to consider granting an exemption based on religious liberty.[165] Relying on past precedent, the Court explained the "City 'may not refuse to extend that [exemption] system to cases of "religious hardship" without compelling reason.'"[166]

Justices Alito, Thomas, and Gorsuch asserted that *Smith* should be reconsidered.[167] Their concurring opinions went further—Justice Alito's lengthy opinion made it clear that *Smith* should not only be reconsidered, it should be reversed.[168] This signals that at least three Justices are in favor of expanding religious liberty rights by evaluating religious liberty claims under the strict scrutiny standard. If this trio gains two additional supporters, the tide may turn dramatically in favor of religious liberty claims and against marriage equality claims.

157. *Id.* at 148.
158. *Id.*
159. *Id.* at 156, 162–65.
160. *Id.* at 165.
161. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).
162. *Id.* at 1878.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 1878 (quoting Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *as recognized in* Tanzin v. Tanvir, 141 S. Ct. 486 (2020)) (alterations in original).
167. *Id.* at 1883.
168. *Id.* at 1924.

D. Davis—*In Access to Public Services, Marriage Equality May Win*

Kim Davis, like the defendants described above, believes that legal marriage is limited to one man and one woman. But unlike Phillips and CSS, Davis held a public position and was tasked with issuing marriage licenses.[169] Davis served as the Rowan County Clerk in Kentucky.[170] When *Obergefell* changed the legal definition of marriage, that change was instantly applicable.[171] Public servants like Davis had no time to adjust. Davis ignored the Governor's mandate that same-sex marriage licenses be made immediately available to same-sex couples.[172] Two weeks after *Obergefell* was decided, a Rowan County same-sex couple sought a marriage license from Davis.[173] Davis refused to issue the license, relying on her religious beliefs.[174] She was sued in federal court.[175]

Davis asserted the couple could go to another Kentucky county.[176] She decided that because her religious convictions prohibited her from participating in any same-sex marriage, she would no longer issue marriage licenses to anyone.[177] Davis believed that denying marriage licenses to all individuals protected her from discrimination claims.[178] Even when ordered to comply with *Obergefell* and the Governor's mandate, Davis refused.[179] She was ultimately held in contempt for disobeying an injunction requiring that her office comply with the law and perform the public task of issuing marriage licenses.[180] Davis went to jail.[181]

Davis was ultimately sued for her failure to provide marriage licenses to eligible couples.[182] Davis fought that suit, alleging she was granted immunity for her actions.[183] The appellate court found that Davis had acted in her official capacity when she refused to issue marriage licenses, and that sovereign immunity protected her against any suit when she acted in her

169. Ermold v. Davis, 936 F.3d 429, 432 (6th Cir. 2019) [hereinafter *Davis II*].
170. Miller v. Caudill, 936 F.3d 442, 446 (6th Cir. 2019).
171. *See* Ermold v. Davis, 855 F.3d 715, 716 (6th Cir. 2017) [hereinafter *Davis I*] (noting on the same day *Obergefell* was decided, "then-Governor of Kentucky, Steven Beshear, ordered all of Kentucky's county clerks to begin issuing marriage licenses to same-sex couples").
172. *Miller*, 936 F.3d at 446.
173. *Davis I*, 855 F.3d at 716.
174. *Id.*
175. *Id.* at 717.
176. *Davis II*, 936 F.3d at 437.
177. *Id.* at 432.
178. Miller v. Caudill, 936 F.3d 442, 446 (6th Cir. 2019).
179. *Id.*
180. *Id.*
181. *Id.* The *Miller* court explains that the district court was willing to give Davis a second chance. Davis's deputy clerks advised the trial court they would issue the licenses. Davis was ordered not to interfere. She refused this option. *Id.*
182. *Davis II*, 936 F.3d at 432.
183. *Id.* at 432–33.

official capacity.[184] But public officials can still be sued in their personal capacity if they violate a person's clearly established constitutional right.[185] Indeed, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[186] The key question was whether the right to same-sex marriage was clearly established when Davis refused to issue marriage licenses.[187] The right was well known to Davis.[188] It was the very fact that same-sex marriage received constitutional protection that prompted Davis to stop issuing marriage licenses.[189] The right to same-sex marriage was deemed to be clear following *Obergefell*.[190] Davis indicated she stopped issuing any marriage licenses because she wanted to protect herself against an Equal Protection claim.[191] But the appellate court explained that "[*a*]*ll* government officials must respect *all* constitutional rights."[192]

Davis's case directly raises the religious liberty versus marriage equality question, but in a limited setting. The *Davis* appellate court sided with the same-sex couple over a government employee. The court noted: "To be sure, *Obergefell* might have created 'serious questions about religious liberty,' but it said nothing to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs."[193] Despite the religious liberty issues at play, the Supreme Court denied Davis's petition for certiorari.

Davis's case only partially sheds light on the religious liberty versus marriage equality conflict precisely because of Davis's government position. Once the Supreme Court held that same-sex marriage was legally available, no government official would be permitted to ignore the law. This fact distinguishes Davis's case from *Masterpiece Cakeshop* and other cases involving private actors.

Justice Thomas, joined by Justice Alito, took the unusual step of writing a statement regarding the denial of certiorari.[194] They did not think

184. *Id.* at 435.
185. *Id.*
186. Malley v. Briggs, 475 U.S. 335, 341 (1986).
187. *Davis II*, 936 F.3d at 435.
188. Ermold v. Davis, 855 F.3d 715, 716 (6th Cir. 2017); Miller v. Caudill, 936 F.3d 442, 446 (6th Cir. 2019).
189. *Davis II*, 936 F.3d at 436.
190. *Id.* ("The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.") (quoting Obergefell v. Hodges, 576 U.S. 644, 675 (2015)).
191. *Id.*
192. *Id.* (emphasis in original).
193. *Id.* at 437 (quoting *Obergefell*, 576 U.S. at 675 (Roberts, C.J., dissenting)) (internal citations omitted).
194. Davis v. Ermold, 141 S. Ct. 3 (2020) (Thomas, J., concurring in denial of certiorari).

certiorari should be granted in Davis's case.[195] Instead, the Justices took the opportunity to criticize *Obergefell*, lamenting that due to the "Court's alteration of the Constitution, Davis found herself faced with a choice between her religious beliefs and her job."[196] Justice Thomas used strong language to convey his displeasure that Davis was "one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision."[197] He challenged the Court to take up a religious liberty case, but one that more "cleanly" presented the issue.[198] Justice Thomas opined that

> By choosing to privilege a novel constitutional right [same-sex marriage] over the religious liberty interests explicitly protected in the First Amendment . . . the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have "ruinous consequences for religious liberty."[199]

But how do we guarantee the marriage rights of same-sex couples that seek a lawful marriage license from a public official? For weeks, Davis delayed access to couples that were legally entitled to obtain the license she was hired to provide.[200] Davis chose her faith over someone else's rights to access government services. That choice may expose her to legal liability. For now, the Supreme Court has refused to consider Davis's claimed immunity from a civil lawsuit filed by the couples she denied marriage licenses. The appellate court found that once *Obergefell* was decided, same-sex couples' access to marriage became an established right.[201] Refusing to comply with the Court's *Obergefell* decision potentially exposes Davis to civil damages for interfering with others' rights to access public services.[202]

The *Davis* case provides an important distinction between public and private actors. Davis is in a different category than Phillips. Phillips denied customers a baked good. Davis denied couples access to a public service and legally entitled right. Davis now faces an individual lawsuit without the protection of qualified immunity.[203] If she is found culpable for

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195. *Id.* at 4.
196. *Id.* at 3.
197. *Id.* Justice Thomas wrote:
> Davis may have been one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision, but she will not be the last. Due to *Obergefell*, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoul of *Obergefell* and its effect on other antidiscrimination laws.

Id. at 3–4.
198. *Id.* at 4.
199. *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting)).
200. *Id.*
201. Ermold v. Davis, 936 F.3d 429, 435–36, 37 (6th Cir. 2019) ("In short, plaintiffs pleaded a violation of their right to marry: a right the Supreme Court clearly established in *Obergefell*.").
202. *Id.* at 435–37.
203. *Id.*

violating the couple's right to access a marriage license, she may be financially responsible for civil damages.

E. Arlene's Flowers—*Another Bite at the Apple?*

At the end of the 2020 Supreme Court term, the Court quietly denied certiorari to a florist, Barronelle Stutzman.[204] The case, *Arlene's Flowers, Inc. v. Washington*, presented an ideal opportunity for the Court to decide whose right prevails when religious liberty and marriage equality clash.[205] Stutzman, like Phillips before her, raised both a free speech and religious liberty challenge to her state's non-discrimination law prohibiting discrimination based on sexual orientation.[206]

This case began in 2013 when Robert Ingersoll asked Stutzman to arrange flowers for his wedding with another man.[207] Stutzman declined due to her religious belief that marriage can only occur between a man and a woman.[208] Stutzman's denial curbed Ingersoll's enthusiasm for a public wedding, contending he "feared being denied service by other wedding vendors."[209] Stutzman indicated this was the first time she denied service to anyone.[210] Afterwards, she and her husband decided they would institute an informal policy of not creating flower arrangements for same-sex weddings.[211] Stutzman was willing to sell, and had sold, flowers and non-wedding floral arrangements to gays and lesbians.[212] The sticking point was that a same-sex wedding event would compromise her faith because, in Stutzman's mind, she would be endorsing a marriage her religious beliefs opposed.[213]

Washington's public accommodations law prohibits discrimination based on sexual orientation.[214] When the Washington Attorney General's Office learned that Stutzman was violating the state's public accom-

204. Certiorari was denied on July 2, 2021. Justices Thomas, Alito, and Gorsuch would have granted the petition. No statement or opinion was issued other than the statement denying certiorari.

205. Washington v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) [hereinafter *Arlene's Flowers II*].

206. *Id.* at 1212.

207. Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017) [hereinafter *Arlene's Flowers I*]. The 2019 opinion repeated nearly all its earlier 2017 opinion verbatim. *See Arlene's Flowers II*, 441 P.3d at 1210 n.1. The Court confessed that the "careful reader will notice that starting here, major portions of our original (now vacated) opinion *State v. Arlene's Flowers, Inc.*, 187 Wash.2d 804, 389 P.3d 543, are reproduced verbatim." *Id.*

208. *Arlene's Flowers II*, 441 P.3d at 1211. Stutzman told Ingersoll that "her relationship with Jesus Christ" prevented her for preparing flowers for Ingersoll's wedding. *Id.*

209. *Id.*

210. *Id.* at 1211–12.

211. *Id.* at 1212.

212. *Id.*

213. *Id.*

214. *Arlene's Flowers I*, 389 P.3d at 550 (citing WASH. REV. CODE. ANN. § 49.60.215 (West 2020)). Washington added sexual orientation to its public accommodations law in 2006. *Id.* at 551.

modations law, it asked for assurances she would stop discriminating against same-sex couples.[215] Stutzman refused.[216] The State sued. Ingersoll and his spouse Freed also filed a private lawsuit against Stutzman and Arlene's Flowers.[217] The suits were consolidated. Stutzman raised free speech, freedom of association, and religious liberty defenses to both suits.[218]

The trial court ruled in favor of the State and Ingersoll, enjoining Arlene's Flowers from continuing its violation of the public accommodations law and granting Ingersoll monetary damages.[219] Stutzman appealed directly to the Washington State Supreme Court. She asserted the court should balance her religious liberty against Ingersoll's right to receive services for his same-sex wedding.[220] This was a direct collision between competing rights. The Washington Supreme Court found against Stutzman on all claims.[221]

First, the court found that selling wedding flowers is not speech but conduct.[222] Second, applying *Smith*, the court found Washington's public accommodations law to be both religiously neutral and generally applicable.[223] Stutzman's appeal was denied.[224] The Washington Supreme Court found that Stutzman "refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding" constitutes sexual orientation discrimination in violation of Washington state law.[225]

Stutzman filed a petition for certiorari with the United States Supreme Court.[226] In a one paragraph opinion, the Court granted the petition and remanded to the Washington Supreme Court for reconsideration considering *Masterpiece Cakeshop*.[227] The Washington Supreme Court allowed additional briefing but once again ruled against Stutzman and Arlene's Flowers.[228] The court found that unlike *Masterpiece Cakeshop*, the

215. *Arlene's Flowers II*, 441 P.3d at 1212.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 1213.
220. *Id.*
221. *Id.*
222. *Id.* at 1224–25.
223. *Id.* at 1228–31. Despite *Smith*'s applicability, the court applied strict scrutiny based on Washington state law. *Id.* at 1231–35. The court found that the public accommodations law satisfies strict scrutiny because such laws "serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace." *Id.* at 1235.
224. *Id.*
225. *Id.* at 1237.
226. *See* Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).
227. *Id.*
228. *Arlene's Flowers II*, 441 P.3d at 1206.

Washington courts showed religious neutrality in resolving Stutzman's claims.[229] Once again, the Washington Supreme Court found that the public accommodations law "does not violate [Stutzman's] right to religious free exercise . . . because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations."[230]

Stutzman again filed a petition for certiorari. For the first time since *Masterpiece Cakeshop*, the Supreme Court had before it a direct collision of religious liberty and marriage equality rights involving public accommodations laws. This was the case. This was the opportunity. And the Court passed. Certiorari was denied.[231] Justices Thomas, Alito, and Gorsuch would have granted the petition.[232] These same three Justices concurred in *Fulton*, indicating their desire to overturn and replace *Smith*.[233] So perhaps the question is not whose right will prevail. The question is: What will it take to get two other Justices to overturn and replace *Smith*?

IV. READING THE TEA LEAVES—THE ROLE OF FAITH, THE ROLE OF DIGNITY

What lies ahead in the clash between religious liberty and same-sex marriage equality? It likely depends on the case the Court accepts to resolve the conflict. The *Arlene's Flowers* case provided a clear and direct conflict. The denial of certiorari means that florists, bakers, and other public facing businesses in Washington, and likely other states with similar public accommodations laws, cannot rely on religious liberty objections to avoid serving same-sex couples.[234] What about other jurisdictions where non-discrimination laws do not provide protection to gays and lesbians? In states where public businesses can avoid serving those they would prefer to avoid, those turned away will have no recourse outside public accommodations laws. If sexual orientation is not protected, a business can refuse to

229. *Id.*. *See also id.* at 1237–38 ("After careful review on remand, we are confident that the courts resolved this dispute with tolerance, and we therefore find no reason to change our original judgment in light of *Masterpiece Cakeshop*.").

230. *Id.* at 1237.

231. Arlene's Flowers, Inc. v. Washington, No. 19-333, 2021 U.S. LEXIS 3574 (July 2, 2021).

232. *Id.*

233. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83.

234. *See* Elane Photography, LLC v. Willock, 309 P.3d 53 (2013). The New Mexico Supreme Court found that a photographer serving the public was subject to the State's non-discriminatory public accommodations laws. *Id.* at 59. The photographer refused to provide services for a same-sex wedding, noting she only photographs "traditional weddings." *Id.* at 59–60. Elaine Huguenin, the owner, raised free speech and religious liberty challenges to the public accommodations law. *Id.* at 60. Relying on *Smith*, the New Mexico Supreme Court ruled against Elane Photography. *Id.* at 72–77. Elane Photography filed a petition for certiorari with the Supreme Court. That petition was denied, without comment or statement, on April 7, 2014. *See* Elane Photography LLC v. Willock, 134 S. Ct. 1787 (2014).

serve LGBTQ individuals. For now, the question remains in the hands of state and local governments. Without trying to predict the outcome of any as-yet filed lawsuit, there are still certain knowns we can consider.

A. The Value of Justice Kennedy's Opinions Following His Retirement

The cases discussed in this Article provide the best indication of the Court's struggle with religious liberty in relation to same-sex marriage and marriage services. The five Justice Kennedy decisions—*Romer*, *Lawrence*, *Windsor*, *Obergefell*, and *Masterpiece Cakeshop*—sought to protect the personal dignity of gays and lesbians while simultaneously balancing the religious liberty rights of others. *Masterpiece Cakeshop* came the closest to resolving the direct question of which right prevails in the clash between religious liberty and marriage equality. The Court avoided this larger question and issued a narrow holding, precluding either side from declaring full victory or full defeat.

What will happen to Justice Kennedy's opinions now that he has retired? It matters not that two of his former law clerks, Justices Gorsuch and Kavanaugh, now sit on the Supreme Court.[235] Their presence, like the presence of Justice Barrett—a former Justice Scalia clerk—do not ensure that past decisions, even those decided by their former bosses, will endure.[236] Each Justice is tasked with deciding for him- or herself whether past decisions hold up against current scrutiny. Justice Kennedy's decisions solidified dignity and marriage rights for LGBTQ individuals. But that focus may not hold up against religious liberty claims on the current Court.

The Roberts Court has shown great affinity for religious liberty in a series of recent cases.[237] These cases require that government treat religion with neutrality and not hostility. From funding cases to the pandemic cases, most religious liberty challengers have succeeded when their cases have been accepted for Supreme Court review.[238] In matters of conscience and

235. Interestingly, both Justices clerked for Justice Kennedy during the same year. *See* Richard Wolf*, Basketball, Popeyes, 2 Live Crew*: *The Year Neil Gorsuch and Brett Kavanaugh Clerked for Anthony Kennedy*, USA TODAY, (Aug. 30, 2018, 7:00 AM) https://www.usatoday.com/story/news/politics/2018/08/30/brett-kavanaugh-neil-gorsuch-learned-supreme-court-ropes-together/1050836002/ [https://perma.cc/5Z5Q-EFJR]. Justice Gorsuch split his time between Justice Kennedy and Justice White.

236. Justice Scalia authored *Smith*. Even so, Justice Barrett concurred in *Fulton*, indicating her reluctance to immediately replace *Smith*. Justice Barrett noted "There would be a number of issues to work through if *Smith* were overruled." *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

237. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021); South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021); Roman Catholic Diocese of Brooklyn v. *Cuomo*, 141 S. Ct. 63 (2020); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020).

238. The key may be in having the Court accept a case. Both *Elane Photography* and *Arlene's Flowers* lost their separate challenges to state public accommodations laws. When certiorari was denied

religion, this Court seems poised to side with religious liberty. But the true test—an actual clash between religious liberty and marriage equality—has yet to be decided. Thus far, the collision has been deftly avoided.

What happens next? The Court's decisions are usually guided by the facts of a given case. No right, no issue, is decided in a vacuum. Case facts matter. Court composition matters. And the ability to gain consensus from five Justices matters. For now, Justice Kennedy's past opinions remain as viable as Justice Scalia's *Smith* decision. But change is inevitable. Pay attention to the next big case, and the case facts, that the Court accepts in the clash between religious liberty and marriage equality. The Court cannot avoid the issue forever. At some point, an answer will either be affirmatively given or determined by inertia. The denial of certiorari in *Arlene's Flowers* may not be a decision on the merits. But the Court's inaction means that, as of this moment, four Justices do not want to resolve the recurring collision.[239]

B. Racial Equality

I indicated early in this Article that race is unique. To draw lessons from the race equality cases is difficult, but not impossible. Without exception, religious liberty objections to laws requiring racial minorities receive equal service were denied.[240] In fact, when the Supreme Court permitted recovery of attorneys' fees in one such public accommodations case, the Court found those religious liberty objections "frivolous."[241] That same finding has not occurred in marriage equality cases. Whether because the Court established the same-sex marriage right, as opposed to a legislature, or simply because race is unique, courts are unwilling to find that religious liberty objections lack seriousness in the context of marriage equality and public accommodations laws.[242]

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in both cases, those rulings become binding law against these—and other similarly situated—businesses in New Mexico and Washington, respectively.

239. If four Justices agree to accept a Petition for Certiorari, the Supreme Court takes the case. This has long been referred to as "the Rule of Four." When certiorari is denied, that means that no more than three Justices were willing to accept the case. Unless a Justice authors a dissent from the denial of certiorari, we have no way of knowing which Justices—if any—wanted to hear a particular case. *See generally* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

240. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, n.5 (1968); Katzenbach v. McClung, 379 U.S. 294 (1964).

241. *See* Newman, 390 U.S. at n.5. The Court found that a religious objection that public accommodations laws requiring service to racial minorities "contravenes the will of God" thereby violating religious liberty was "patently frivolous." That same objection had been previously disposed of in *McClung*.

242. *See, e.g.*, Davis v. Ermold, 141 S. Ct. 3 (2020). Justice Thomas asserts that "*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss." *Id.* at 4. But

Will the Court, when it finally addresses this clash, place same-sex marriage on par with race? The answer is unclear. There are important differences between race and sexual orientation. There are important differences between the indignities each group has endured and continue to endure. Race is not a good analogy for any other category. But even as an imperfect analog, race discrimination, and religious liberty cases provide instruction. Public facing businesses are, at the end of the day, tasked with serving the public. When states and cities mandate that public facing businesses serve the public, the target is equal access to goods and services—not religion. It remains unclear whether the race discrimination cases will offer any meaningful insight. Will the Court keep its focus on access and equality, or will the Court shift its focus to religious liberty?

V. CONCLUDING THOUGHTS: POSSIBLE SOLUTIONS TO PLURALISM AND THE INEVITABLE CLASH OF RIGHTS

The collision between religious liberty and marriage equality is nearing its first decade. We are no wiser now than when *Obergefell* was decided in 2015. We have more same-sex marriages and more public accommodations laws, and we have more cases regularly challenging an individual or business's ability to refuse service to those who have a legal right to marry. When this clash occurs, whose right prevails?

One potential solution would be Congressional legislation. Congress has the power, as demonstrated by the Civil Rights Act of 1964, to expand the categories deserving protection when accessing places of public accommodation.[243] Were it to do so, its legislative history would be important in answering any exemptions for religious liberty. The 1964 Act emphasized the importance of dignity when individuals are turned away by public facing businesses.[244] But importantly, Congress tied that dignity injury to goods and services moving in interstate commerce.[245] If a business serves the public and caters to interstate customers, or its products move in interstate commerce, Congress can prohibit that business from excluding a definable group of individuals. Religious liberty claims would likely fall as they did in the 1960s, provided the law is religiously neutral and generally applicable.

But this solution is only a potential solution because the current Supreme Court could determine that race-based discrimination injuries are dis-

outside this statement, most reviewing courts have shown respect for those with sincere religious opposition to same-sex marriage.

243. *See* 42 U.S.C. § 2000a.

244. Sanders, *supra* note 92, at 1016.

245. *See* 42 U.S.C. § 2000a.

tinguishable from sexual-orientation-based discrimination injuries. To do so, the Court would have to pull back from the same-sex marriage case opinions authored by Justice Kennedy. In those cases, a slim majority found that dignity injuries were serious and that there should not be a classification of marriages—with some marriages deserving protection while other marriages are ostracized.

A second solution is to evaluate religious liberty claims narrowly. Americans are, and should be, free to believe as they choose. But the act of serving an individual consumer goods does not implicate religious liberty like being asked to work on the Sabbath.[246] If the Court takes this road, all that is required is to continue abiding by the *Smith* precedent. Religiously neutral and generally applicable laws do not legally violate a person's religious liberty.[247] A business or individual might not want to serve same-sex couples. But modern public accommodations laws that preclude exemptions would satisfy *Smith*'s approach to living in a pluralistic society.

A third solution would be to side firmly with religious liberty. The Court could jettison former Justice Kennedy's dignitary injury approach and find that when a clash between religious liberty and public accommodations laws arises, the purchasing of goods and services does not rise to the same level as faith-based objections. This would provide a clear decision on the hierarchy of rights question. When faith objections are interposed against racial equality, race prevails.[248] But when faith objections are raised against sexual orientation rights, faith prevails.

Still, the Court could continue—for the foreseeable future—to only take those cases that provide it with an opportunity to emphasize our pluralistic society and the governing *Smith* precedent. When a city, like Philadelphia, claims to be adhering to a generally applicable non-discrimination law, it cannot provide any exceptions.[249] The simple act of permitting discretion removes the law's general applicability.[250] Likewise, when a state, like Colorado, requires conformity with non-discrimination laws that ensure equal access to public accommodations, any resolution of an alleged violation must remain neutral and free from religious hostility. To gain the benefit of *Smith*'s neutral and generally applicable test, governmental action must comply with both requirements: (1) religious

246. Sherbert v. Verner, 374 U.S. 398 (1963).

247. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *as recognized in* Tanzin v. Tanvir, 141 S. Ct. 486 (2020).

248. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964); Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968).

249. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

250. *Id.*

neutrality, and (2) general applicability.[251] Variations from *Smith* will go the way of *Masterpiece Cakeshop* and *Fulton*.

The *Smith* approach has been working. Rights are balanced according to settled Supreme Court precedent. But neither side appears happy. Each is waiting to be declared the group with the prevailing right. A zero-sum approach is understandable. The current law results in uncomfortable compromises between people who wish to follow their faith and same-sex couples exercising their legal right to marry and access services without discrimination. An ultimate solution—lifting one right above the other—will be messy. And it is avoidable. *Smith*'s compromise requires legislators to make choices. The formula is clear. If a law is religiously neutral and applies to all, religious objectors must conform to those laws. If exceptions are granted, then the law must provide room for religious exemptions.

America is a pluralistic society. Yet, discrimination still occurs. Importantly, religious and sexual orientation discrimination still occur in America. This discrimination compounds the clash of rights discussed in this Article because both sides want, and deserve, to conduct their lives free from discrimination. The unfortunate history of discrimination for both sides adds complexity to the issue and urges a delicate resolution. The Supreme Court has had ample opportunity to resolve the clash of rights. Yet on each occasion it has sidestepped the issue. For now, *Smith*'s compromise and the status quo holds. But how much longer will that remain true? And how many more individuals will be impacted in the meantime? Only time will tell if the Supreme Court can give the Nation the resolution that the clash of rights requires.

251. *Id.*