# *MASTERPIECE CAKESHOP* AND THE FUTURE OF RELIGIOUS FREEDOM

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## *Introduction*

Last term, the Supreme Court decided *Masterpiece Cakeshop*, one of several recent cases in which conservative Christians have sought to avoid the application of public accommodations laws that ban discrimination on the basis of sexual orientation.[1] Like most of these disputes, the case involved a small business that declined, because of the owner's religious convictions, to provide a service for a same-sex wedding—in this case, Colorado cake designer Jack Phillips's convictions against designing and baking a cake.[2] In most of these cases, courts have been unwilling to allow the businesses religious exemptions from the anti-discrimination laws and have ruled in favor of the customers. I think it's fair to say most observers thought that Jack Phillips would lose in *Masterpiece Cakeshop* as well.

Somewhat surprisingly, though, the Supreme Court ruled in his favor, and did so based on an argument few observers had credited before the Court heard the case. In a 7-2 opinion written by Justice Kennedy, the Court held that, in deciding that Phillips's refusal to create a cake for a same-sex wedding violated the state's anti-discrimination laws, the Colorado Civil Rights Commission had violated Phillips's free exercise rights.[3] The Commission, the Court wrote, had failed to treat Phillips's religious convictions in a neutral and respectful way.[4] At least two of the commissioners had publicly disparaged Phillips's religious convictions and none of the other commissioners present had objected.[5] Moreover, the Commission had acted inconsistently in at least three analogous prior cases, in which

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[1] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S.Ct. 1719 (2018). For similar recent cases, see, for example, Telescope Media Group v. Lindsey, 271 F.Supp. 3d 1090 (D. Minn. 2017); Elane Photography, LLC v. Willock, 309 P.3d 53 (2013) (New Mexico), *cert. denied*, 572 U.S. 1046 (2014); State of Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (2017) (Wash.), *vacated*, 138 S.Ct. 2671 (2018); Brush & Nib Studio, LC v. City of Phoenix, 244 Ariz. 59 (2018).

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

[3] *Id.* at 1724.

[4] *Id.* at 1729.

[5] *Id.* at 1729-30.

bakers had refused, on grounds of conscience, to create cakes with anti-gay marriage sentiments. Punishing Phillips for refusing to create a pro-gay marriage cake, while failing to punish those other bakers who had declined to create anti-gay marriage cakes, indicated that the Commission had based its decision against Phillips in its hostility to his religious beliefs.[6]

Because the Commission had failed to treat Phillips's religious convictions in a neutral and respectful way, the Court held, its action against him violated the Free Exercise Clause of the U.S. Constitution.[7] The Court stressed that its holding was based on the bias the Commission had shown against Phillips. Future cases, in which state authorities had not demonstrated such overt hostility to a claimant's religious convictions, might well reach a different result—a fact two concurring justices stressed in a separate opinion.[8] *Masterpiece Cakeshop* thus does relatively little to resolve the underlying conflict between anti-discrimination laws and the right of business owners to decline, from sincere religious conviction, to provide services in connection with same-sex weddings.

*Masterpiece Cakeshop* is nonetheless important for what it reveals about deeper cultural and political trends in our country. Culturally, two trends are important: religious polarization and an expansive concept of equality. Over the past two decades, American religion has become polarized between two groups, the Nones, who reject organized religion as authoritarian and hypocritical, especially with respect to sexuality, and the Traditionally Religious, who continue to adhere to organized religion and to traditional religious teachings, especially with respect to sexuality.[9] Each group views the other's values as threatening and incomprehensible; neither group is going away, and neither seems in a mind to compromise—including in commercial life.[10] At the same time, our wider culture is committed to an expansive concept of equality—"equality as sameness"—that treats social distinctions that exclude people, including religious distinctions, as ungenerous and insulting.[11] Taken together, these two cultural trends suggest protracted disagreement over the proper relationship between anti-discrimination laws and religious liberty.

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[6] *Id.* at 1730-31.
[7] *Id.* at 1731-32.
[8] *Id.* at 1724, *id.* at 1732; *see id.* at 1732-34 (Kagan, J., concurring).
[9] On the Nones generally, see Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones*, EUI Working Paper RSCAS 2014/19 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470.
[10] *Cf.* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 157 (2014) ("We are in the middle of a process of social contestation on some key questions: between certain issues being taken for granted in one direction and their being equally taken for granted in the other direction."). On the unwillingness of either side in the conflict to compromise in commercial life, see Mark L. Movsesian, Book Review, *Of Markets and Morals: The Limits of Doux Commerce*, 9 WM. & MARY BUS. L. REV. 449, 472 (2018).
[11] *See* Samuel Gregg, Equality in Democracy: Tocqueville's Prediction of a Failing America (Feb. 6, 2017), https://www.cnsnews.com/commentary/samuel-gregg/equality-democracy-tocquevilles-prediction-falling-america ("equality as sameness").

Politically, the steady growth of an activist state committed to the expansive concept of equality I have just mentioned suggests that conflicts between the government and the Traditionally Religious will grow more frequent. Indeed, those conflicts seem to be accelerating, not only in commercial life, but in contexts like student clubs at state universities as well.[12] It's true that the current Administration has embarked on a campaign of deregulation, but that may only be a temporary phenomenon.[13] Claims that "the era of big government is over" have misled people in the past.

As Tocqueville famously observed, American political questions inevitably become judicial ones.[14] The trends I have identified will inevitably influence the course of future litigation in this area. Notwithstanding *Masterpiece Cakeshop*'s somewhat unusual resolution, many, if not most cases about the application of anti-discrimination laws to religious objectors will be decided according to some version of the compelling-interest test, which holds that the government may impose a burden—actually, a "substantial" burden—on a person's religious exercise only if the government has a compelling interest in doing so and has chosen the least-restrictive means.[15] Under this test, controversies about religious liberty are judgment calls, the outcomes of which depend, to a great degree, on the intuitions of the people doing the judging. In a polarized society like ours, with deeply divergent understandings about the nature and value of religion and the scope of equality, intuitions about "substantial burden" and "compelling interest" vary widely from person to person—and from judge to judge.

In addition, although state officials are unlikely in the future to demonstrate the same level of overt hostility to traditional religious beliefs as the members of the Colorado Civil Rights Commission, state agencies will likely still be committed to the same expansive view of equality. As a result, conflicts between our anti-discrimination laws, on the one hand, and the religious beliefs of millions of American citizens, on the other, will continue. And the vague nature of the compelling interest test suggests that the ultimate resolution of those conflicts is likely to be unsettled for a long time to come.

This Working Paper proceeds as follows. Part I describes the Court's decision in *Masterpiece Cakeshop*, Part II explores the cultural and political trends I have identified and shows how the *Masterpiece Cakeshop* litigation reflects them. Part III offers some

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[12] On the issue of student clubs, see, for example, Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

[13] *See* Adam J. White, "Trumping the Administrative State," THE WEEKLY STANDARD (Jan. 19, 2018).

[14] TOCQUEVILLE, DEMOCRACY IN AMERICA I:ii:8, at p. 257 (Mansfield & Winthrop ed. 2000) [hereinafter DEMOCRACY IN AMERICA] ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").

[15] *See*, *e.g.*, the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb-1. The compelling interest test derives from the Court's pre-*Smith* jurisprudence. In one form or another, it still serves as the test in many if not most American jurisdictions, either under RFRA or under state statutory or constitutional provisions. *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 198 (2016); *see also* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 231 (2010).

concluding comments, to be expanded in a final version. It ventures three predictions: conflicts like *Masterpiece Cakeshop* will grow more frequent and harder to negotiate; the law in this area will remain deeply unsettled; and the judicial selection process will grow even more bitter and partisan than it already is.

One clarification may be necessary at the start. This essay is analytical rather than normative. I have my own views on the proper outcome of the controversies I describe. For what it's worth, *Masterpiece Cakeshop* struck me as a difficult case. But my goal here is simply to illuminate the issues and make some predictions about the future course of the law. Those predictions ultimately may turn out to be wrong. But their correctness does not depend on one's views about which side should prevail in the conflict between anti-discrimination laws and religious freedom.

## I. *The Masterpiece Cakeshop Decision*

*Masterpiece Cakeshop* presents what has become a familiar pattern in American commercial life. A gay couple asks a vendor to provide services in connection with the couple's wedding—photography, flowers, invitations—which the vendor refuses on the basis of his religious convictions. Providing services for a gay wedding, he explains, would make him complicit in conduct he considers sinful. The couple objects that the vendor is denying service in violation of state public-accommodations laws that prohibit discrimination on the basis of sexual orientation. The vendor responds that he is willing to provide services to all customers, including the couple, whether they are gay or straight. But he declines to participate in gay weddings, since gay weddings violate his religious beliefs.

In *Masterpiece Cakeshop*, a gay couple, Charlie Craig and Dave Mullins, asked a Colorado cake designer, Jack Phillips—the owner of Masterpiece Cakeshop—to create a cake for their wedding celebration.[16] The couple didn't specify exactly what they wished the cake to say, or, in fact, whether they wanted an inscription on the cake at all.[17] But they did want a custom cake that Phillips would design especially for their wedding. They were not interested in the off-the-shelf baked goods Phillips offered to sell them.[18]

Phillips, a conservative Christian with traditional views about marriage, declined to fill their order, explaining that creating a cake for a gay wedding would violate his religious convictions. Creating such a cake, he said, would amount to his "participat[ing] in" and "personally endors[ing]" a relationship he considered unbiblical.[19] Indeed, the subsequent investigation by the state civil rights authorities revealed that Phillips had a policy against creating cakes for gay weddings and had declined to do so several times in the past.[20] He

[16] *Masterpiece Cakeshop*, 138 S.Ct. at 1724.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1726.

had also refused, from religious conviction, "to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween."[21]

Shortly after Phillips rejected their order, Craig and Mullins began an administrative action against him (and Masterpiece Cakeshop) by filing a complaint with the Colorado Civil Rights Division, the state agency responsible for enforcing Colorado's Anti-Discrimination Act, or CADA.[22] Like many similar laws across the country, CADA prohibits places of public accommodation, like Masterpiece Cakeshop, from refusing customers equal service on the basis of sexual orientation, among other things.[23] The Division investigated Phillips, found probable cause that he had violated CADA, and referred the case to another state agency, the Colorado Civil Rights Commission, which in turn referred the case to an Administrative Law Judge, who held a hearing and determined that Phillips had violated CADA by discriminating against Craig and Mullins on the basis of sexual orientation.[24]

Phillips appealed the ALJ's ruling to the Commission itself, which held two public meetings in his case. At both meetings, but especially the second, individual commissioners made remarks dismissing and disparaging Phillips's religious convictions.[25] One commissioner suggested that, if Phillips's religious beliefs prevented him from complying with Colorado's anti-discrimination law, Phillips might find another place to do business.[26] Another likened Phillips's stance to historical episodes in which religion had been used to justify violent acts of oppression, including slavery and the Holocaust.[27] This commissioner described Phillips's religious objection to same-sex marriage as "'one of the most despicable pieces of rhetoric people can use'"—a way simply to injure gay people.[28] As we shall see, the Supreme Court made much of these remarks in its subsequent decision in the case.

The Commission agreed with the ALJ that Phillips should lose.[29] It ordered him to stop refusing orders for wedding cakes from gay couples and to provide his staff with "'comprehensive training'" on CADA and on the requirements of the Commission's ruling against him.[30] In addition, the Commission required him to file compliance reports with the Commission on a quarterly basis for two years. The reports were to provide the Commission

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[21] *Id.* at 1745 (Thomas, J., concurring in part and concurring in the judgment).
[22] *Id.*at 1725.
[23] Colorado Rev. Stat. § 24-34-601(2)(a) (2017).
[24] *Masterpiece Cakeshop*, 138 S.Ct. at 1726.
[25] *Id.* at 1729.
[26] The "commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.' A few moments later, the commissioner restated the same position: '[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'" *Id.* (citations omitted).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1726.
[30] *Id.*

with details, among other things, about how many people Phillips had refused to serve and the reasons for the refusals.[31]

When the Colorado Court of Appeals rejected his appeal of the Commission's order, Phillips sought review in the United States Supreme Court, arguing that requiring him to create wedding cakes for gay couples violated both his free speech and free exercise rights under the First Amendment.[32] When the Supreme Court granted review, most observers thought the Court would focus on Phillips's free speech claim. His free exercise claim seemed precluded by the Court's landmark decision in *Employment Division v. Smith*,[33] which held that the Free Exercise Clause is not violated by a neutral, generally applicable law that incidentally burdens a citizen's religious exercise. CADA certainly seemed to be such a law: it amounted to a blanket prohibition on discrimination in places of public accommodation, whether the motivation for the discrimination was religious or not. And the Court's Civil Rights Era jurisprudence suggested that, at least with respect to racial discrimination, religious objections would not exempt public accommodations from anti-discrimination laws.[34] To most observers, Phillips's chance of succeeding on a free exercise claim seemed remote.

Somewhat surprisingly, however, the Court ruled, 7-2, that the Commission had violated Phillips's free exercise rights, not so much in its ultimate decision against him, but in its process for reaching that decision. Writing for the Court, Justice Kennedy explained that the Free Exercise Clause gave Phillips the right to a neutral decision maker.[35] But the Commission had not been neutral at all. In fact, it had shown a clear bias against him, that is, against his sincere religious beliefs. As evidence, Justice Kennedy adduced the commissioners' official comments in the case, especially the remark about the "'despicable'" nature of Phillips's religious convictions against same-sex weddings.[36] In addition, he noted that the Commission had in prior cases allowed bakers to decline, on the basis of conscience, customers' orders for cakes with anti-gay marriage messages. This disparate treatment suggested that the Commission had ruled against Phillips simply because the Commission was hostile to the substance of Phillips's religious views.[37]

Because the Commission had not shown neutrality with respect to Phillips's sincere religious beliefs, Justice Kennedy concluded, its decision against him violated the Free Exercise Clause.[38] This conclusion, too, was a bit of a surprise, since it seemed to leave out a

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[31] *Id.*
[32] Brief for Petitioners, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, no. 16-111, at 14 (2017).
[33] 494 U.S. 872 (1990).
[34] E.g., Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 n.5 (1968) (per curiam). *Cf.* Bob Jones University v. US, 461 U.S 574 (1983).
[35] *Id.* at 1732.
[36] *Id.* at 1729.
[37] *Id.* at 1730-31.
[38] *Id.* at 1731-32.

step. Most commentators had understood the Court's 1993 decision in *Church of Lukumi Babalu Aye v. City of Hialeah* to require application of the compelling-interest test in circumstances where the state had not been neutral with respect to religion; under *Lukumi*, it was thought, a state could burden religion in a non-neutral way if it had a compelling reason for doing so and had chosen the least-restrictive means. [39] Indeed, Justice Gorsuch assumed as much in his concurring opinion, which applied the compelling interest test to invalidate the Commission's decision against Phillips.[40] But Justice Kennedy skipped the compelling interest analysis altogether.

Justice Kennedy also deferred to another day the question of what would happen if a state agency did not demonstrate overt bias against a claimant's religion. Presumably, in many cases in which state agencies apply anti-discrimination laws to vendors, officials do not make on-the-record comments disparaging the vendors' sincere religious convictions, and do not have a record of ruling inconsistently in prior cases. The Justices would decide any such future cases, Justice Kennedy said, on the basis of the particular circumstances.[41] About the only guidance the Court was willing to give was this: courts would have to find a balance between the right of religious persons to have their beliefs respected and the right of gay persons to obtain goods and services in the marketplace without suffering affronts.

*Masterpiece Cakeshop* ultimately settled fairly little. And the fight over future cases already has begun. Indeed, the separate opinions in *Masterpiece Cakeshop* itself suggest something about battle lines and the many complicated issues future cases will raise.[42] Still, even though it did not resolve matters, the decision reveals important cultural and political trends that will likely drive future cases. I turn to those trends now.

## II. *Cultural and Political Trends in* Masterpiece Cakeshop

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

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

The Rise of the Nones is perhaps the most talked-about development in American sociology in the last decade. "Nones" are those people who describe their religion in surveys

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[39] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[40] *Masterpiece Cakeshop*, 138 S.Ct. at 1734 (Gorsuch, J., concurring).
[41] *Id.* at 1732; *see also id.* at 1724.
[42] *Id.* at 1732 (Kagan, J., concurring); *id.* at 1734 (Gorsuch, J., concurring); *id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 1748 (Ginsburg, J., dissenting).

as "none" or "nothing in particular"—people who say they have no religious affiliation at all.[43] According to the most recent Pew Research Center study, in 2014, more than a fifth of the adult population, about 23% of Americans, now falls within this category, which represents a rise of about seven percent from the most recent previous survey, in 2007.[44] In historical terms, this percentage is extremely large. In the 1950s, only three percent of Americans said they had no religious identity.[45] According to the Pew survey, Nones now qualify as the second largest "religious" group in the country, after Protestants and ahead of Catholics—though, when aggregated, Christian faiths still claim the large majority of Americans, about 70%.[46]

Among Millennials, the percentage of Nones is significantly higher than in the general population. Pew divides Millennials into two cohorts, "Older Millennials," born between the years 1981 and 1989, and "Young Millennials," born between the years 1990 and 1996.[47] Among Older Millenials, the percentage of Nones is 34%, up nine points from 2007. Among Young Millennials, the percentage is even higher—36%.[48] These numbers are significant because of what sociologists refer to as the "generational replacement" effect.[49] As older Americans with relatively strong religious commitments die off, younger, less affiliated Americans gradually will take their place. As a result, over time, Nones will make up an increasingly large percentage of the population. It's true that people often become more religious as they age, and today's Millennials may do so as well. At the moment, though, they are not following that pattern. In terms of things like church attendance and prayer, older Millennials "are, if anything, less religiously observant today than they were" just seven years ago.[50]

Nones generally do not reject religious belief as such. The majority of them in the 2014 Pew survey, 61%, say they believe in God or a universal spirit—though that percentage represents a sharp decline from the 2007 survey, which showed that 70% of Nones believed in God.[51] About a third of Nones say that religion is very important in their life—though, again, that percentage is down a great deal since 2007, which suggests that Nones are becoming more secular over time.[52] What most characterizes Nones is not an absence of belief, but a rejection of institutional religion. The Nones are spiritual "Independents" who refuse to join formal, authoritative religious communities, which they

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[43] Movsesian, *supra* note xx, at 1.
[44] Pew Research Center, "U.S. Public Becoming Less Religious" (Nov. 3, 2015), http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.
[45] MARK CHAVES, AMERICA RELIGION 19 (2011).
[46] Pew Research Center, "America's Changing Religious Landscape" (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.
[47] *Id.* at 7/14.
[48] *Id.*
[49] *Id.*
[50] Pew Report (Nov. 3, 2015), at 20/34, 22/34.
[51] *Id.* at 5/34.
[52] *See id.* at 15/34.

see as coercive and stifling.[53] Instead, Nones believe they can fashion their own, personal religions from a variety of different traditions— indeed, from traditions which present themselves as opposed to one another.

Nones believe they can legitimately do this for two reasons. First, they reject the idea that any one religious tradition can be uniquely true to the exclusion of all others. Exclusive claims of religious authority strike them as an affront to reason and good sense, as well as human freedom.[54] Second, they believe that the individual has the right to pick and choose among various traditions and forge a spiritual path that works for him, because the individual has God within him.[55] Spiritual enlightenment and peace come, not from submitting to external religious authority, which inevitably squelches spiritual authenticity, but from discerning and accepting the divine guidance that exists within oneself.[56] The individual, not the religious community, has the right to judge what is true— or, at least, what is true for him.

America has always had religious individualists. In the eighteenth century, Thomas Paine wrote, "My own mind is my own church," a sentiment twenty-first Nones would definitely share.[57] And the nineteenth-century Transcendentalists sound, to today's ears, a great deal like Nones. But, in the past, this sort of religious idiosyncrasy was a more or less fringe phenomenon.[58] Not now: as I have explained, Nones now make up the second largest religious group in America, and roughly a third of Millennials. For large numbers of our fellow citizens, the conventional understanding of religion "as a distinctive body of beliefs, a moral and ritual set of practices, and the organizational structures surrounding ideas and ideals of the sacred," no longer represents the norm.[59] In fact, for these citizens, traditional religion represents a malign force that stifles authentic spirituality, creating inner turmoil and preventing individuals from attaining their true potential.

Why should the Rise of the Nones occur now, at the start of the twenty-first century? Many factors exist, but three merit special attention, in my view. First, there are demographic explanations. Changes in family structure, and in particular high rates of religious intermarriage and divorce, have an important role. About half of Americans who marry today choose a spouse of a different religion;[60] more than a quarter of Millennials say they were raised in a religiously mixed family.[61] As one would expect, children from mixed-

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[53] *See* Chaeyoon Lim et al., *Secular and Liminal: Discovering Heterogeneity Among Religious Nones*, 49 J. SCIENTIFIC STUDY OF RELIGION 596, 597 (2010) ("Independents").
[54] *See* Movsesian, *supra* note xx, at 2.
[55] *See* ROSS DOUTHAT, BAD RELIGION ch. 7 (2012).
[56] *See* Movsesian, *supra* note xx, at 2.
[57] KERRY S. WALTERS, THE AMERICAN DEISTS 213 (1992).
[58] *See* Movsesian, *supra* note xx, at 8.
[59] James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPPERDINE L. REV. 1065, 1065 (2013).
[60] PUTNAM & CAMPBELL, AMERICAN GRACE (2010).
[61] The figures in this paragraph come from a recent Pew report, "One-in-Five US Adults Were Raised in Interfaith Homes" (Oct. 26, 2016).

religious families are more likely to become Nones when they grow up than children whose parents shared the same religion.[62] Moreover, Nones are themselves having and raising children. Roughly one-quarter of Millennials in the Pew survey report being raised by at least one parent who was a None; about six percent say both their parents were Nones. A large percentage of these children also become Nones when they reach adulthood—more than 62% where both parents were Nones. Parental divorce also appears to have a role. Children of divorce are significantly less like to identify with a religion than children from intact families, perhaps because they have less trust in institutions and authority figures generally.[63]

Second, the Rise of the Nones seems to be associated with the Sexual Revolution, especially with changing views on homosexuality. According to the 2014 Pew report, a solid majority of Americans, about 62%, now say that society should accept homosexuality.[64] Acceptance appears to be "growing rapidly even among religious groups" that traditionally have "strongly opposed" same-sex relations.[65] Among Nones, however, the percentage who say society should accept homosexuality is strikingly high—83%.[66] Here again, Millennials are key. Young adults appear to be driving the changing social consensus on homosexuality, including among Nones. Millennials generally have more positive views of homosexuality than older Americans, and nearly 90% of Millennial Nones say that society should accept homosexuality.[67] The Pew report thus offers support for out what some sociologists have been saying for years: young Nones dislike organized religion because they associate it with traditional, negative views about homosexuality, and because they believe organized religion's rejection of homosexuality masks a hypocrisy about sexual sins generally.[68]

Finally, the Rise of the Nones in the twenty-first century may reflect the gradual, but inevitable, working-out of the inner logic of liberalism, America's dominant political ideology. In the nineteenth century, Tocqueville wrote that escaping the hold of habit, family, and tradition were among the principal features of the American mindset.[69] More recently, Patrick Deneen has observed that liberalism has from the beginning opposed received authority, which it views as arbitrary and accidental, in favor of individual autonomy and choice. Loosening the bonds of family, community, and religion is necessary, liberalism teaches, in order to release the full potential of human beings.[70] Liberalism encourages the person to think of himself "primarily a free chooser" with respect to "all relationships, institutions, and beliefs."[71] Over time, the ethos of choice extends to more and

[62] See Movsesian, *supra* note xx, at 9.
[63] *Id.*
[64] Pew Report (Nov. 3, 2015), at 29/34.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 30/34.
[68] *See* PUTNAM & CAMPBELL, *supra* note xx, at 130.
[69] DEMOCRACY IN AMERICA, II.i.1, at 403.
[70] See PATRICK DENEEN, WHY LIBERALISM FAILED 28 (2018).
[71] *Id.* at 77.

more subjects. It is no surprise, then, in a society where liberalism dominates, that many people eventually come to see choice as extending to religious institutions and beliefs, along with all the others.

Nonetheless, the Rise of the Nones does not mean that religion is simply disappearing from American life. The increase in the number of the religiously unaffiliated is occurring simultaneously with an increase in religiosity among Americans who *do* maintain a religious identity—a group one might call the Traditionally Religious. According to the 2014 Pew survey, religiously-affiliated Americans "appear to have grown more observant in recent years," if one considers things like Bible study and prayer groups."[72] Another recent survey by sociologists Landon Schnabel and Sean Bock shows that the percentage of "intensely religious" Americans, with intensity being measured in terms of things like church attendance and frequent prayer, has remained remarkably stable over decades.[73] The percentage of Americans with a "strong" religious affiliation has remained steady, at a little less than 40%, since 1989.[74]

In other words, America is experiencing a deepening religious polarization rather than a systematic falloff from religion. The growing number of Nones is explained not by a general decrease in religious observance, but "a dramatic decline" in the numbers of the "moderately religious"— people who formally identify with a religion, but who show only modest levels of commitment.[75] As in so many areas of American life, the middle is dropping out in favor of the extremes on either end. The moderately religious are rapidly ending their affiliations and becoming Nones, while the Traditionally Religious are maintaining their affiliations or even increasing their intensity. And we appear to be reaching a point of rough parity. More than a fifth of Americans, and more than a third of younger Americans, are now Nones, while something like two-fifths of Americans are among the Traditionally Religious.

This deepening polarization will exacerbate conflicts like the one in *Masterpiece Cakeshop* and make negotiating them harder. Compromise requires an ability to sympathize with the other side, to understand, even if one does not share, the commitments that motivate one's interlocutor. It requires some familiarity, some common base of experience. In the past, someone like Jack Phillips might have counted on a widespread, if thin, sympathy with the idea of traditional religious commitments. The vast majority of Americans would have understood why he thought it so important to follow the tenets of his religion, for the simple reason that the vast majority of Americans would have had some connection with institutional religion. Even if they were only nominally religious, and even

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[72] Pew Report (Nov. 3, 2015), at 6/34 (emphasis omitted).
[73] Landon Schnabel & Sean Bock, *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research*, 4 SOCIOLOGICAL SCIENCE 686, 687 (2017).
[74] Id. at 688.
[75] Schnabel & Bock, *supra* note xx, at 689.

if they disagreed with his particular convictions, most Americans would have understood why Phillips insisted on acting as he did.

But this wider social sympathy for traditional religion is fading. Large numbers of Americans no longer have experience with traditional, organized religion—and, to the extent they do have such experience, they reject it. Nones are unlikely to respond sympathetically when the Traditionally Religious seek exemptions from legal requirements. Indeed, Nones are likely to see such exemptions as an unfair advantage for organized religion. For their part, the Traditionally Religious are unlikely to sympathize with the worldview of the Nones. And disagreements between the two groups are likely to be amplified by the fact that Nones overwhelmingly reject traditional teachings on sexuality, which they see as psychologically damaging and essentially unjust, while the Traditionally Religious continue to endorse them as necessary for human dignity.[76] In short, we now have two fairly sizable, competing groups with sharply divergent understandings of the beneficence of traditional religious commitments, especially with respect to sexuality—and neither group seems especially interested in compromise.[77]

The public response to controversies like *Masterpiece Cakeshop* reflects this religious polarization. In the summer of 2016, while the Court was considering Jack Phillips's cert petition, the Pew Research Center surveyed Americans' opinions on whether a business should have to provide services for a gay wedding notwithstanding the owner's religious objections.[78] The responses closely tracked America's religious divide. About two-thirds of the religiously unaffiliated—the Nones—said that a business should be required by law to provide services for a gay wedding even if the owner had a religious objection.[79] And about two-thirds of Americans who attend religious services frequently—the Traditionally Religious—said that a business owner should *not* be required to do so.[80] Only a relatively small number of Americans—18 percent—found it possible to express sympathy for both sides' points of view.[81] This sharp religious divide suggests that achieving social consensus on cases like *Masterpiece Cakeshop* will be extremely difficult.

b. *Equality as Sameness*

I'll have more to say about the potential consequences of this religious polarization in a moment. First, though, I'd like to address a second cultural trend that *Masterpiece Cakeshop* reflects: our expanding notion of equality. Equality has been central to the American worldview ever since Jefferson enshrined the concept in the Declaration of

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[76] *See* Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517, 1529 (2016).
[77] On the unwillingness of both the LGBT community and the Traditionally Religious to compromise in the marketplace, see, for example, Movsesian, *supra* note xx, at 472.
[78] Pew Research Center, "Where the Public Stands on Religious Liberty vs. Nondiscrimination" 4 (Sept. 28, 2016).
[79] *Id.* at 16.
[80] *Id.*
[81] *Id.* at 18.

Independence. But equality can mean different things. On one understanding, it refers to legal equality—to the fair and uniform application of the law to all citizens.[82] In the twentieth century, America gradually extended legal equality to racial and other minorities against whom it had discriminated, in law, for centuries. This has been one of the great achievements of our time.

Equality can also refer, though, to a broader unwillingness to accept any distinctions among groups and individuals, whether "material, social, or personal."[83] On this view, equality means a rejection of the idea of "difference per se."[84] All boundaries that distinguish one group of people from another—for example, beliefs and practices that mark out a religious community and exclude non-members—are presumptively suspect, because of the implicit judgments they suggest: Some groups, apparently, think their beliefs and ways of life are superior to others. Such Judgments seem impolite, ungenerous, and inconsistent with the spirit of true equality, which requires that each community acknowledge the basic correctness and good will of all others. Suggesting that others' beliefs and practices are morally inferior to one's own is, on this view, a grave affront to their human dignity. Notwithstanding our claims to respect diversity, it is this second concept of equality—"equality as sameness"[85]—that pervades our culture today, including with respect to religion.

Once again, Tocqueville saw this coming. Equality, he observed, was Americans' most fundamental moral commitment, the criterion by which we judged everything else.[86] Equality required that social distinctions be ignored—between aristocrats and common men, the educated and the unschooled, man and woman, parent and child. In law, it called for uniformity;[87] in religion, generality, rather than a focus on the particular.[88] In fact, with respect to religion, the preference for generality ultimately worked to minimize distinctions between particular faith traditions and promote pantheism, which not only denied the relevance of difference in the created order, but also the distinction between creation and the Creator himself.[89]

The emphasis on religious equality did not result in widespread pantheism in Tocqueville's time, of course. Christianity had too powerful a hold on nineteenth-century

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[82] *Cf.* Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 778-79 (1996) (distinguishing between "legal equality" and "actual equality").
[83] Patrick Deneen, "Alexis de Tocqueville," First Principles (March 14, 2011), http://www.firstprinciplesjournal.com/print.aspx?article=911&loc=b&type=cbtp.
[84] See Samuel Gregg, Equality in Democracy: Tocqueville's Prediction of a Failing America (Feb. 6, 2017), https://www.cnsnews.com/commentary/samuel-gregg/equality-democracy-tocquevilles-prediction-falling-america.
[85] *Id.* at 3/10.
[86] *See* DEMOCRACY IN AMERICA, I:Introduction, at 3; *see also* PIERRE MANENT, TOCQUEVILLE AND THE NATURE OF DEMOCRACY (John Waggoner trans. 1996).
[87] *See* DEMOCRACY IN AMERICA II:4:3, at641, 645.
[88] *See* DEMOCRACY IN AMERICA II:i:3; II:iv.2, at 640.
[89] DEMOCRACY IN AMERICA II:i:7, at 425-26..

Americans for that to happen, though Tocqueville did observe that doctrinal differences among Christians, which so convulsed Europe, had little practical importance in the United States.[90] Today, though, his predictions seem to be coming true. Americans are remarkably broad-minded about the legitimacy of all religions. A 2010 study by sociologists Robert Putnam and David Campbell reveals that almost 90% of us believe that members of other religions, not only our own, can go to Heaven.[91] Nuances exist, of course, and much depends on how people understand the question. The percentage goes down, for example, when surveyors ask Christians whether non-Christians (as opposed to different kinds of Christians) can go to Heaven.[92] Still, it is noteworthy that the large majority of American Christians, even those who belong to churches that teach that Christianity is the exclusive path to salvation, believe that non-Christians can in principle receive eternal life.

Putnam and Campbell ascribe this remarkable ecumenism to a number of factors, including the large number of mixed-religious families in America, which tend to mute religious distinctions (how could my saintly "Aunt Susan" not go to Heaven just because she's not a Christian?), and the inevitable social interactions between people from different religions in daily life ("My Friend Al" is an evangelical Christian, but he's not a bad guy).[93] These explanations seem to have things backwards: it is a norm of tolerance that lets Aunt Sally marry into the family in the first place, and allows one to have a friend from a different faith tradition. Whatever the reasons, when it comes to perhaps the most important religious question of all, who shall go to Heaven, Americans show a remarkably latitudinarian attitude. With respect to attaining salvation, most Americans seem to believe that all ways are equally good.

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

If I may offer a personal anecdote, I recently posed a hypothetical case in my law-and-religion class.[94] Suppose, I asked the students, an observant Jew has a florist shop. One

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[90] DEMOCRACY IN AMERICA I:ii:9, at 278. See also discussion at 433.
[91] ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE 534 (2010).
[92] *See id.* at 536.
[93] *Id.* at 526 ("Aunt Susan"), 531 ("My Friend Al").
[94] I related this anecdote in a blog post. Mark Movsesian, *Passion for Equality*, First Things Web Exclusive (July 10, 2017), at https://www.firstthings.com/web-exclusives/2017/07/passion-for-equality.

day, a customer, who is also Jewish, comes to the shop to say she's getting married and would like the florist to do the wedding. "That's wonderful," the florist says. "Where will you get married?" The customer replies that the wedding will be at a local nondenominational church, because her fiancé is Christian, and she, the customer, isn't very observant. The florist thinks about it and says, "I'm so sorry, but I can't do your wedding. It's nothing personal; I'm sure your fiancé is a fine person, as are you. It's just that as an observant Jew, I don't approve of interfaith weddings. For our community to survive, we must avoid intermarriage and assimilation. Please understand. There are many other florists who can do your wedding. I'll even suggest some. But I can't, in good conscience, participate, myself." What result?

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

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

Something similar, I think, occurred in *Masterpiece Cakeshop* itself. Craig and Mullins viewed Phillips's objection to creating their wedding cake as an insult, no matter how much he protested about the good will he bore them, and no matter how willing he was to sell them goods off the self.[95] They experienced an affront so deep that, rather than seek a cake somewhere else, which they easily could have done, they sought vindication by the state and pursued a lengthy litigation. And the members of the Colorado Civil Rights Commission agreed with them about the depth of the insult, especially the one commissioner who compared Phillips's objections to historical episodes like slavery and the Holocaust.[96] Like the florist in my classroom hypothetical, Phillips had violated the equality-as-sameness principle. His claim that he could not in good conscience participate in a gay wedding, because his religion taught him such weddings were a sin, erected a boundary that many in American society find increasingly rebarbative.

[95] *See Masterpiece Cakeshop*, 138 S.Ct. at 1724.
[96] *See id.* at 1729.

c. *Activist Agencies*

The third trend that *Masterpiece Cakeshop* reflects is a political one: the rise of activist administrative agencies, at both the federal and state levels. The growth of government over the course of the twentieth century, starting with the Progressives in the early 1900s, picking up steam in the New Deal of the 1930s, and continuing in the Great Society of the 1960s, has been much discussed.[97] Notwithstanding occasional resistance by presidents and governors, the welfare state, "characterized by a high level of government action in all phases of economic and social life," is an inescapable fact of contemporary American politics.[98] Government rules affect virtually every aspect of our society, including commerce, communications, consumer transactions, education (at all levels), employment, food, health and safety, land use, and professional qualifications.

The expanding scope of the federal government illustrates the trend. Since the so-called "New Deal Settlement" of the 1930s, the federal government has had more or less plenary legislative power under the Constitution's Commerce Clause.[99] The Court has occasionally suggested, most recently in the first Obamacare case, that some limits to the Commerce Clause power exist, but it has not reconsidered the basic understanding.[100] The Court has also allowed Congress effectively unlimited discretion in delegating authority to executive branch agencies, and has allowed them considerable discretion in interpreting the mandates Congress has given them.[101] As a result, "[t]here is now virtually no significant aspect of life that is not in some way regulated by the federal government,"[102] and federal "agencies wield immense influence in shaping the conduct of individuals and organizations."[103]

Numbers tell part of the story. Consider federal government expenditures, which serve as a rough proxy for the state's growing role in the American economy.[104] If we focus on entitlement spending—programs like Medicare and Social Security—the increase since the New Deal is remarkable. Adjusting for inflation and population growth, the federal government spends about 15 times more today on entitlements than it did in 1940. Federal spending on entitlements far outstrips spending on other government functions, such as

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[97] See, e.g., JOSEPH POSTELL, BUREAUCRACY IN AMERICA (2017).
[98] Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. AND MARY L. REV. 375, 375 (1990).
[99] On the "New Deal Settlement," see Lawrence B. Solum, *How NFIB v. Sibelius Affects the Constitutional Gestalt*, 91 WASH. U.L. REV. 1 (2013).
[100] NFIB v. Sibelius, 132 S.Ct. 2566 (2012). For a good overview of the doctrine, see Solum, supra note xx.
[101] On delegation, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). On agency deference, see *id*. at 1247; Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 802-04 (2010).
[102] Lawson, supra note xx, at 1236.
[103] Randy J. Kozel and Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011).
[104] These numbers come from WILLIAM VOEGELI, NEVER ENOUGH: AMERICA'S LIMITLESS WELFARE STATE (2010).

national defense. Or consider another number, the page count of the Federal Register, "the daily repository of all proposed and final federal rules and regulations."[105] The Federal Register for the year 2016 came to almost 100,000 pages, "the highest level in its history," about 20% higher than the previous year's edition.[106] Page counts are an imperfect measure of government activity, of course.[107] But, as a rough guide, they do indicate the increasing activity of federal agencies. And, again, these numbers relate only to the federal government, not to state governments, which retain plenary legislative jurisdiction in our constitutional system.

To be sure, the current administration has announced a deregulation campaign at the federal level—"a fundamental shift" in policy which, among other things, directs "federal agencies to eliminate two regulations for each new one implemented and to reduce new regulatory costs to zero."[108] As Adam White writes, however, this "very, very good start" faces substantial obstacles, including inevitable legal challenges.[109] Moreover, "the next Democratic administration could undo much of the Trump administration's deregulatory effort every bit as quickly as the Trump administration undid the Obama administration's regulatory actions."[110] It will take more than a few years of deregulation to stop the expansion of government.

The growth of activist administrative agencies figures prominently in cases like *Masterpiece Cakeshop*. In part, it's simply a matter of volume. The more regulations, and the more subjects covered, the greater the potential for businesses to violate the law.[111] As my colleague Marc DeGirolami writes, where "government assumes an increasingly large role in the life of the citizenry, more injuries are transformed into legally (and perhaps even constitutionally) cognizable rights."[112] But the volume of regulation alone does not explain things. The content matters, too. For reasons I will explain, administrative agencies inherently tend to favor the expansive concept of equality I have described. As a consequence, conflicts between the administrative state and the Traditionally Religious are apt to occur much more frequently.

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[105] Crews, "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State" 16 (Competitive Enterprise Institute 2017). *See generally* MCCONNELL ET AL., supra note xx, at 77 (using page count of Federal Register to illustrate growth of government).
[106] Crews, supra note xx.
[107] *Id.*
[108] Statement by OIRA Director Neomi Rao, "Introduction to the Fall 2017 Regulatory Plan" (Dec. 2017), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/VPStatement.pdf.
[109] White, "Trumping the Administrative State," THE WEEKLY STANDARD (Jan. 23, 2108).
[110] *Id.*
[111] *See* Epstein, supra note xx, at 375; *see also* MCCONNELL ET AL., supra note xx, at 77 ("In a society that is pervasively regulated as ours now is, there are many more occasions for conflict between the government and religious believers.").
[112] Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 131 (2016); *see also* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103 (2015).

Once again, Tocqueville offers useful insights as to why this should be so. Egalitarian democracies, he wrote, tend to encourage a powerful state. Egalitarian democracies promote an individualism that is unsustainable without such a state.[113] In a democracy, the individual learns to rely on his own judgment, not received wisdom, in making his life choices.[114] He learns to see himself as equal to everyone else; no reason exists for him to defer to other people's judgments or to the wisdom of traditional authority.[115] But this individualism, paradoxically, promotes a powerful state. Subjecting oneself to one's equals, or to traditional authority, is unthinkable; but subjecting oneself to a state that stands alone above everyone is not only thinkable but necessary.[116] Only a powerful state has the ability to protect and provide for the individual who has abandoned traditional sources of belonging and authority.

Tocqueville famously thought that American democracy overcame this tendency to statism through its commitment to private associations, including religious associations, which provided competing sources of loyalty that kept the state in check.[117] But, over time, a democratic state will find such associations a threat and try to weaken them, all in the interests of human flourishing.[118] As Patrick Deneen writes, the logic of liberal democracy requires an activist state that breaks the hold of traditional authorities in order to promote a salutary personal autonomy. Individualism and the activist state thus reinforce one another—"a virtuous circle," from the perspective of liberalism.[119] In Tocqueville's words, the state willingly works for each individual's happiness, asking in return only the authority to "knead him as it likes" and have the final say on what happiness shall mean.[120]

In short, in the long run, a democratic state will tend to promote the equality-as-sameness principle through its administrative apparatus. The state will encourage people to think of themselves only as citizens and abandon traditional sources of identity that distinguish them.[121] It will work to break down the social boundaries that groups, including the Traditionally Religious, erect to maintain their distinctiveness and preserve their

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[113] For a discussion of individualism, by which Tocqueville meant a kind of withdrawal from and indifferent to the affairs of other citizens, see DEMOCRACY IN AMERICA II:ii.2, at 482.

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

[115] *See id.* at II.iv.1; *id.* at II.iv.3.

[116] *See id.* at II.iv.3.

[117] Movsesian, *supra* note xx, at 14.

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

[119] DENEEN, *supra* note xx, at 59.

[120] DEMOCRACY IN AMERICA II:iv.6, at 663.

[121] *Cf.* Town of Greece v. Galloway, 134 S.Ct. 1811, 1841 (2014) (Kagan, J., dissenting) ("A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.").

values. Indeed, as Philip Hamburger writes, in contemporary America, it is the small-o "orthodox" who need most to worry about government action—those "minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views."[122] In a society like ours, which prizes equality and which deeply suspects tradition and communal authority, "orthodoxy" is itself "unorthodox,"[123] even when people voluntarily choose it, and therefore occasions serious conflicts that our courts ultimately must resolve.

In twenty-first century America, this dynamic appears in various actions by government agencies that impinge on traditional religious associations and identities. The Traditionally Religious face an expanding set of rules and policies that promote new understandings of equality, particularly with respect to sexuality and gender, along with an ever-expanding bureaucracy dedicated to enforcing them.[124] As Richard Epstein writes, civil rights offices exist today "in virtually every government agency, most notably in the agencies that regulate housing, education, and employment."[125] The Traditionally Religious face increasing pressure to accept the new understandings and comply with the new rules, or face a "looming threat of a wide range of legal sanctions."[126]

*Masterpiece Cakeshop* itself offers a good example. The Colorado Civil Rights Commission ruled against Jack Phillips in order to promote equality for same-sex marriage, a concept that relatively few people would have endorsed even a decade ago, even on the progressive left.[127] It imposed significant regulatory burdens on him, including training and quarterly reporting requirements that would have demanded a lot of time and money.[128] One commissioner even hinted that, with views like his, maybe Phillips should think about doing business in a different state.[129] Now, Phillips decided to resist. But not many businesses will do so. Not many will be willing to bear such burdens or to relocate; the more likely result will be that Traditional Religious businesspeople like Phillips gradually abandon, or at least soften, their convictions in order to make a living. Of course the commissioners were trying to promote human flourishing as they saw it and protect gay couples from indignities in the marketplace; that's not the point. The point is that in imposing these burdens, the Commission was acting in a way calculated to advance the

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[122] Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1929 (2015)
[123] *Id.*
[124] On the centrality of sexuality in contemporary conflicts over religious liberty, see Horwitz, *supra* note xx, at 160.
[125] Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, Library of Law and Liberty, http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/ (Jan. 2, 2016).
[126] *Id.*
[127] President Obama notably did not endorse marriage equality in his first campaign in 2008, though he did endorse it in time for his second. Saikrishna Bangalore Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553, 554 (2012).
[128] *Masterpiece Cakeshop*, 138 S.Ct. at 1726.
[129] *Id.* at 1729.

principle of equality-as-sameness and weaken the hold of traditional religious commitments. We can anticipate many more such conflicts in the future.

## III. *Conclusion: After* Masterpiece Cakeshop

In short, *Masterpiece Cakeshop* reflects important cultural and political factors that figure in conflicts between anti-discrimination laws, on the one hand, and religious liberty, on the other: a deepening religious polarization, an expansive ideology of equality-as-sameness, and an activist state dedicated to promoting that ideology at the expense of traditional religious commitments. *Masterpiece Cakeshop* does relatively little to resolve such conflicts. But the cultural and political factors the case reflects will continue to influence future cases on, in Justice Kennedy's words, the balance between the right of religious persons to have their sincere beliefs respected and the right of gay persons to obtain goods and services in the marketplace without suffering affronts. In the brief space remaining, I would like to offer some preliminary thoughts on how those factors might do so.

I would like to venture three predictions. First, conflicts between anti-discrimination laws and religious liberty will grow ever more frequent and harder to negotiate. The equality-as-sameness principle has expanded to cover sexual identity and behavior in a way it did not even a few years ago.[130] The new understanding of sexual equality is endorsed both by the Nones, who make up a sizable percentage of the population, especially young people, and by regulatory agencies, which will seek to promote the new understanding in American life. But the Traditionally Religious, who remain comparatively numerous, and for whom the new understanding poses serious religious difficulties, will resist. The fact that each side cares very deeply about the outcome in these conflicts and finds the other's values increasingly unfamiliar and offensive will make compromise much more difficult.[131] I have already described how this dynamic revealed itself in *Masterpiece Cakeshop*. It will not doubt continue to reveal itself in disputes across the country.

Second, the courts' resolution of these conflicts is likely to be unsettled for some time. This is so for a couple of reasons. First, as I explained earlier, the law on religious exemptions is itself something of a "patchwork."[132] For purposes of the federal Free Exercise Clause, the Court's 1990 decision in *Employment Division v. Smith* indicates that there is no constitutional right to a religious exemption from a neutral and generally applicable law.[133] Where the state has not shown neutrality towards religion, however, or where a law is not generally applicable, a different rule applies under a later case, *Church of Lukumi*

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[130] *Cf.* Horwitz, *supra* note xx, at 173-74 (discussing the rapid change in public acceptance of homosexuality and same-sex marriage).
[131] For an interesting discussion of how mutually-incomprehensible values make the resolution of social conflict between secular and traditionally religious groups difficult, see JONATHAN HAIDT, THE RIGHTEOUS MIND (2012).
[132] MCCONNELL ET AL., *supra* note xx, at 149.
[133] 494 U.S. 872 (1990).

*Babalu Aye v. City of Hialeah*.[134] Before *Masterpiece Cakeshop,* most commentators understood that, in those circumstances, the compelling-interest test would apply—the government cannot substantially burden religious exercise unless it has a compelling reason for doing so and has chosen the least-restrictive means. *Masterpiece Cakeshop* suggests, though, that the government's failure to act neutrally with respect to religion itself amounts to a per se constitutional violation, even without going through the compelling-interest analysis.[135]

So the federal constitutional doctrine is a bit unclear. With respect to federal statutory law, RFRA embodies the compelling interest test—though, as I will explain in a moment, that doesn't clarify things too much.[136] With respect to state constitutional and statutory law, substantial variation exists.[137] Some states apply the *Smith* test as a matter of state constitutional law, while others apply some version of the compelling-interest test.[138] Some states have adopted a version of RFRA and apply the compelling-interest test as a matter of state statutory law; some do not.[139] Generalizations are difficult.

Nonetheless, it's probably the case—under the *Lukumi* exception for the Free Exercise Clause, under RFRA and its state analogues, and under state constitutional provisions—that the compelling interest test remains the leading test in this area.[140] It likely will provide the rule of decision in many, if not most, cases in which a vendor seeks a religious exemption from anti-discrimination laws. But this leads to the second reason why the law in this area will remain unsettled. The compelling-interest test is itself deeply indeterminate. It turns on vague concepts—"substantial burden," "compelling interest," and "least restrictive means—that provide little guidance for courts in specific cases.[141] The test depends almost entirely on the intuitions of individual judges, which of course may differ greatly. In the recent *Hobby Lobby* case, in which plaintiffs sought a religious exemption under RFRA from the so-called Contraception Mandate, the Justices differed strongly on the meaning and application of all these concepts.[142]

Indeed, in a society as sharply polarized as our own, how could judges' views on the meaning of these concepts not differ greatly? At the moment, a consensus on these concepts does not exist. Is requiring a Christian vendor to provide services on an equal basis for gay

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[134] 508 U.S. 520 (1993).
[135] *See* discussion supra text accompanying notes xxx-xx.
[136] Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb-1.
[137] MCCONNELL ET AL., *supra* note xx, at 189-90.
[138] *See id.* at 198; *see also* DURHAM & SCHARFFS, supra note xx, at 231 (noting the state high courts that have adopted the *Smith* analysis for state constitutional purposes).
[139] MCCONNELL ET AL.., *supra* note xx, at 189-90.
[140] *Cf. id.* at 198 (noting that "more than half of the states currently apply the compelling-interest test to free exercise claims"); DURHAM & SCHARFFS, *supra* note xx, at 231 (observing that "it seems likely that a majority of jurisdictions will ultimately maintain strict scrutiny protections").
[141] *See* Priests for Life v. Dept. of Health & Human Serv., 808 F.3d 1, 21 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (discussing indeterminacy of the compelling-interest standard).
[142] Burwell v. Hobby Lobby Stores, 134 S.Ct. 2751 (2014).

and straight weddings a substantial burden on the vendor's religion? Does the state have a compelling interest in ending discrimination that would justify that burden, even if other nearby vendors would readily provide those services? Does the state have other, reasonable alternative measures available to it that would burden the vendor's religious exercise to a lesser degree? The answers to these questions depend on the judges' perception of the nature and value of religion, the true meaning of equality, the proper scope of government action, and many other factors. The questions do not submit to easy, objective criteria on which everyone agrees—certainly not in our society today.

And this leads to my third, final, prediction: *Masterpiece Caksehop* and cases like it suggest that judicial appointments will become even more heated and partisan than they already are. Because the compelling interest test is so indeterminate, so dependent on the prior commitments of the people doing the judging, the identity of the judges is extremely important. Each side in our polarized society knows how important it is to have judges with the "right" intuitions about religion and equality on the bench. Each will therefore fight long and hard to ensure that such judges are appointed—and, conversely, that judges with the "wrong" intuitions are not. Having judges with the "wrong" intuitions about religion and equality could lead to negative outcomes in cases about which both sides care deeply. The stakes are too high to be ignored.

Moreover, American politics generally is becoming polarized on the basis of religion, and this fact will itself affect judicial selection, which is after all a political process. Today's Democratic and Republican Parties have dramatically different religious profiles. According to a Pew survey conducted earlier this year, about 70% of Republicans and people who lean Republican believe in the God of the Bible—they are the Traditionally Religious.[143] By contrast, only 45% of Democrats and Democratic-leaners say they believe in the God of the Bible.[144] Another Pew survey revealed that Nones now make up the largest "religious" grouping in the Democratic Party—about 30%.[145] Religion has thus become an element of partisan identity—something of a new development in American politics.[146]

The new religious partisanship will amplify the acrimony over judicial appointments. Given their religious profiles, the two parties will likely nominate judges with very different views on the conflict between anti-discrimination laws and religious liberty; each party will be very wary of the other's nominees. On the whole, given the party's religious makeup, one would expect judges nominated by Democrats to have less

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[143] Pew Research Center, "When Americans Say They Believe in God, What Do They Mean?" (April 25, 2018), at http://www.pewforum.org/2018/04/25/when-americans-say-they-believe-in-god-what-do-they-mean/.
[144] *Id.*
[145] Pew Report (Nov. 3, 2015), at http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.
[146] *See* Mark Movsesian, "The New Divide in American Politics" (May 23, 2018), First Things Web Exclusives, at https://www.firstthings.com/web-exclusives/2018/05/the-new-divide-in-american-politics.

favorable views of traditional religion—and therefore, less favorable views of exemptions for the Traditionally Religious from anti-discrimination laws. One would expect the opposite, on the whole, from judges nominated by Republican administrations. Again, because everyone knows how high the stakes are, judicial nomination wars will likely be quite intense for the foreseeable future.

I will develop these closing remarks further in my final paper. I look forward to hearing the comments from my colleagues at this conference. For now, I will close with this. As everyone knows, law and culture have a mutually-reinforcing relationship. Court rulings influence the way our culture perceives social conflicts: which arguments seem legitimate, which parties deserve our sympathies, and so on. But culture also influences law. Indeed, although I'm not sure how you could prove the point, it seems to me that culture influences law much more than the other way around. The cultural and political factors that *Masterpiece Cakeshop* reflects will determine the course of American law on anti-discrimination and religious freedom for many years to come.