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PLESSY REDUX: WHY THE HUMAN RIGHTS OF GAY, LESBIAN, AND TRANSGENDER CITIZENS LOST TO RELIGIOUS CLAIMS

Laura S. Underkuffler*

PREFACE

I am delighted to contribute this Essay to this collection of works celebrating Michael Perry’s lifetime achievements. From my first acquaintance with his work in the late 1980s, I have both admired and been profoundly challenged by it. One of his greatest and most enduring contributions is his foundational idea that every human life is sacred and, therefore, all are entitled to basic human rights.1 In his words, it is this “fundamental conviction [that is] at the heart of the morality of human rights.”2

What is the ultimate source for this “sacredness view,” upon which so much of human law depends? Perry is inherently skeptical about the capacity of secular reasoning and convictions to offer a coherent account of both human rights and the innate worth of human beings upon which they are founded. Rather, the premise that every human being is “sacred” or “inviolable” is inescapably religious.3 In other words, religious beliefs and secular objectives work together to create legal regimes of human rights.

As a matter of personal understanding and conviction, I do not doubt there are both great truth and power in what he says. For me, questions about human worth and destiny involve inquiries that can easily transcend the limits of the human mind. In this Essay, rather than engaging with his work in a theoretical vein, I have chosen to engage it in an immediate and very critical context. Religion can create, ground, and support human rights. But what if it does not?

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2 Perry, Universality, supra note 1, at 388.
3 See Perry, Idea of Human Rights, supra note 1, at 11–41.
INTRODUCTION

The clash between recognition of the human rights of gay, lesbian, and transgender citizens and the religious individuals and institutions that oppose them is one of the defining issues of our time. Gender-nonconforming citizens, who have endured centuries of violence and discrimination, now demand basic civil rights, such as the right to marry and form families and the right to equal treatment in employment, housing, credit, health care, and all other areas that non-LGBTQ+ Americans take for granted.

As a result of these efforts, there has been a sea change in legal recognition of rights regarding sexual orientation and gender identity in state and local legislation over the past thirty years. With regard to housing, twenty-two states and the District of Columbia explicitly prohibit discrimination based on sexual orientation and gender identity; nine states interpret existing prohibitions on sex discrimination to include sexual orientation and gender identity; nine states interpret existing prohibitions on sex discrimination to include sexual orientation and gender identity; and one state...

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4 In this Essay, I will refer to “gay, lesbian, and transgender” persons; however, this is intended to include all other gender-nonconforming people as well.

5 As Jonathan Ned Katz has written, gay men and lesbian women in American history have been “condemned to death by choking, burning and drowning; they were executed, jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, declared insane, . . . entrapped, stereotyped, mocked, insulted, isolated, . . . castigated, and despised” because of who they are. JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 11 (1976); see also Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431, 1464 (1992) (“Violence against gay[s] . . . and lesbians . . . is a structural feature of life in American society.”).
explicitly prohibits discrimination based on sexual orientation only. The number of states prohibiting discrimination in public accommodations is virtually the same. Polling data show that the number of people who believe that marriages between same-sex couples should “be recognized by law, with the same rights as traditional marriages,” increased from twenty-seven percent in 1996 to seventy percent in 2021. In 2019, ninety-three of poll respondents believed that gay men and lesbian women should have the same job opportunities as non-LGBTQ+ individuals; seventy-five percent agreed that gay and lesbian applicants should be able to adopt children; and the percentage of respondents who believed that sexual orientation is an innate human characteristic increased to forty-nine percent. Very recently, in a landmark opinion, the United States Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

All of these developments have been resisted—often vehemently—by those who oppose gay marriage and other rights for gay, lesbian, and transgender people, particularly on religious grounds. For example, a municipal clerk refused to issue a same-sex marriage license, an employee of a government contractor (hired to provide counseling services to government employees) refused to provide same-sex relationship counseling, and a physician refused to provide infertility treatment to a lesbian woman, all on asserted religious grounds. Religious objectors have refused to provide public hotel rooms, sell flowers, comply with a public school’s guidelines allowing transgender students to use locker rooms, bathrooms, and

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7 The numbers for each category in this case are twenty-one, seven, and one, respectively. See id.
9 See id.
pronouns in accordance with their gender identity,\textsuperscript{17} and create a wedding website,\textsuperscript{18} on the ground that compliance with laws protecting gay, lesbian, and transgender people was forbidden by their religious beliefs. At times, legislative responses have been pressed to nullify real or feared LGBTQ+ protection laws.\textsuperscript{19} Conflicts over demands for religious exemptions from LGBTQ+-protective laws have dominated popular media and the work of academic commentators and the courts.

Although all of this seems to be new, in fact, it is not. Dealing with clashes between religious claims and civil-rights laws is familiar territory for the American courts. Over past decades, landmark cases have dealt with religious claims of the right to engage in what I call “odious discrimination”—discrimination against people on the basis of their immutable human characteristics or identity in a way that secular law forbids.\textsuperscript{20} Examples of such discrimination include that which is rooted in the color of a person’s skin, the parents from whom the individual was born, the sexual anatomy that a person possesses (or does not possess), and the mere fact of one’s religious identity or affiliation.\textsuperscript{21} And when claimed religious beliefs or practices are asserted to demand the right to engage in discrimination of this kind, it is overwhelmingly the conclusion of contemporary American law that those beliefs have no legal priority, protection, or accommodation.\textsuperscript{22}


\textsuperscript{18} See 303 Creative LLC v. Elenis, 6 F.4th 1160, 1161 (10th Cir. 2021).

\textsuperscript{19} For instance, in 2016 a Mississippi law was enacted that created protections for those who believe that marriage is for opposite-sex couples only and that gender identity is determined by sexual anatomy at birth. The law shielded those who act in accordance with those beliefs in the areas of foster care, counseling, school administration, facility rentals and wedding services, hiring and firing decisions, and others. Court clerks were authorized to refuse to grant wedding licenses to same-sex couples as long as they were “accommodated” in another way. See Campbell Robertson, Mississippi Law Protecting Opponents of Gay Marriage is Blocked, N.Y. TIMES (July 1, 2016), https://www.nytimes.com/2016/07/02/us/mississippi-law-protecting-opponents-of-gay-marriage-is-blocked.html (referencing 2016 Miss. Laws H.B. No. 1523 § 2). This law was struck down by a Mississippi judge on the grounds that it singled out particular religious beliefs for special, protected treatment and created a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. See Barber v. Bryant, 193 F. Supp. 3d 677, 691–95, 710–11, 723–24 (S.D. Miss. 2016), rev’d on other grounds, 860 F.3d 345 (5th Cir. 2017).

\textsuperscript{20} Laura S. Underkuffler, Odious Discrimination and the Religious Exemption Question, 32 CARDOZO L. REV. 2069, 2069–70 (2011) (discussing relevant litigation). See also, e.g., Green v. State, 58 Ala. 190, 195 (1877) (upholding intermarriage ban on the basis that God “has made the two races distinct”); State v. Gibson, 36 Ind. 389, 405 (1871) (stating that ban on interracial marriage “follow[ed] the law of races established by the Creator himself”); West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 213 (1867) (calling it “the order of Divine Providence” that the races should not mix).

\textsuperscript{21} See Underkuffler, supra note 20, at 2072.

\textsuperscript{22} See id. at 2070–71.
Consider, for instance, the area of race. In *Loving v. Virginia*, decided in 1967, and *Bob Jones University v. United States*, decided sixteen years later, the United States Supreme Court rejected once and for all the idea that discrimination on the basis of race can be justified on the basis of religious belief or practice. *Loving* involved a Virginia anti-miscegenation statute that prohibited a “white person” from marrying any person other than another “white person.” The Court struck this down, observing that “[o]ver the years, [the] Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’” In the process, the religious justification that was advanced by the State was implicitly rejected. \(^{27}\) In *Bob Jones*, the University asserted that its Christian religious beliefs required that it prohibit interracial dating and marriage by its students, despite the provisions of Section 501(c)(3) of the Internal Revenue Code of 1954, which governed tax-exempt organizations. \(^{28}\) The Court rejected this argument on the ground that the government interest in eradicating racial discrimination in education was compelling. \(^{29}\)

Although these two cases dealt with clashes between religious rights and anti-discrimination laws in particular settings, the principles that they established have become deeply entrenched in American law. County clerks, hotel owners, landlords, employers, commercial purveyors of publicly sold goods, and anyone else involved in offering public goods or services cannot refuse to serve, process, hire, or otherwise deny equal access to people on the basis of race, whether their reasons are religious or not. \(^{30}\) As one commentator has written, “we understand it is impermissible to discriminate based on race."

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\(^{23}\) 388 U.S. 1, 3 (1967).


\(^{25}\) See 388 U.S. at 2, 5 n.4.

\(^{26}\) Id. at 11 (alteration in original) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

\(^{27}\) In Virginia, the prohibition of interracial marriage was asserted to be “clearly divine” and a fundamental Christian principle, which preserved “the racial integrity” of Virginia citizenry, prevented “the corruption of [the] races,” prevented the development of “a mongrel breed of citizens,” and preserved “racial pride.” See Naim v. Naim, 87 S.E.2d 749, 752, 756 (Va. 1955), vacated and remanded, 350 U.S. 891 (1956), reinstated and aff’d, 90 S.E.2d 849 (1956), appeal dismissed, 350 U.S. 985 (1956), cited with approval in *Loving v. Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966), rev’d sub. nom., *Loving*, 388 U.S. at 1.

\(^{28}\) See *Bob Jones*, 461 U.S. at 580–81.

\(^{29}\) See id. at 604.

\(^{30}\) See, e.g., Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam) (holding that the refusal of the owner of a South Carolina barbecue restaurant to serve Black customers, on the basis that such service would “violate his sacred religious beliefs,” violated federal civil-rights laws). This case was cited in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018).
We understand that it is impermissible, even when done in the name of religion.\footnote{Louise Melling, Religious Refusals to Public Accommodations Laws: Four Reasons to Say No, 38 HARV. J.L. & GENDER 177, 191 (2015).}

There is also—importantly for our purposes—no judge or contemporary scholar who claims that racially discriminatory religious beliefs should be “respected” or “accommodated” in any way. There is no argument that a city clerk who—on the basis of religious belief—refuses to serve Black, Asian, or mixed-race people should be given the opportunity to “step aside” and refer the applicant to a colleague, or that a hotel owner who asserts religious beliefs can refuse to rent a room to a Black, Asian, or mixed-race person if there is another place down the road where the customer could stay. Indeed, suggesting that respect or accommodation is required for religiously based actions that are avowedly motivated by an applicant’s or customer’s race is both legally and societally unthinkable.

There is a similar aversion both legally and societally to the granting of respect or accommodation to religious beliefs that assert the right to discriminate on the basis of other immutable characteristics, such as national origin or sex.\footnote{Discrimination on the basis of national origin is permitted in certain, very limited circumstances under some statutes, such as Title VII, when it is proven to be a bona fide occupational qualification in employment. See Civil Rights Act of 1964, § 703(e)(1) (codified as amended at 42 U.S.C.A § 2000e-2(e)(1)). General claims of right to engage in discrimination on the basis of national origin are not tolerated whether founded in secular or religious reasons. Similarly, any claim of a right to impose different treatment of men and women is subject to rigorous judicial scrutiny and must be proven to be grounded in the legitimate, verifiable requirements of a particular employment, educational, or other setting. See id. Religious motivations for gender discrimination do not change this outcome unless the actor is a religious institution and the case involves certain core religious matters. See Underkuffler, supra note 20, at 2071–72, 2075, 2078–79.} Presumably, no court or reputable scholar today would argue that a woman can be passed off to a colleague if a city clerk claims that his religion prohibits him from touching the papers that she touched, or that a Mexican or Japanese person can be denied a hotel room or a restaurant meal on the ground that serving that person would violate the proprietor’s religion.

There is one area, however, where all of these principles recently seemed to vanish. In two decisions of the United States Supreme Court in the past three years, which involved avowed discrimination against gay, lesbian, and transgender citizens on religious grounds, the assumption that human rights are necessarily stronger than religious claims suddenly faltered. Whatever “lip service” the Court gave to the importance of human rights in this context, it ultimately became of no consequence in these decisions. How this happened,
why this happened, and whether this should have happened are the concerns of this Essay.

I. Masterpiece Cakeshop and Fulton: The Current Supreme Court Landscape

A. Masterpiece Cakeshop

The United States Supreme Court’s decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission, rendered in 2018, was a much-anticipated opinion that squarely presented a situation in which religious claims opposed gay, lesbian, and transgender citizens’ legally protected human rights. The case involved a Colorado statute that prohibited discrimination in places of public accommodation on the basis of sexual orientation as well as other protected, personal characteristics. The Colorado statute stated the following:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to any individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

“Public accommodation” was defined to include “any place of business engaged in any sales to the public and any place offering services . . . to the public,” excluding any “church, synagogue, mosque, or other place that is principally used for religious purposes.”

The important facts of the case were uncontested. Jack Phillips, proprietor of a cakeshop in Colorado, refused to “create” a wedding cake for Charlie Craig and Dave Mullins, public customers, because he opposed same-sex marriage on religious grounds. He believed that gay marriage “directly [went] against the teachings of the Bible” and that his creation of a cake for these customers would be “a personal endorsement and participation” in the gay marriage they planned. After investigation, the state civil-rights agency found that this was not an isolated instance of Phillips’s refusal to provide services for gay and

33 Masterpiece Cakeshop, 138 S. Ct. at 1719.
34 Id. at 1725 (quoting Colo. Rev. Stat. § 24-34-601(2)(a) (2017)).
35 Colo. Rev. Stat. § 24-34-601(1); see Masterpiece Cakeshop, 138 S. Ct. at 1725. The Court’s exemption for religious institutions mirrors their exemption from other civil-rights guarantees as a statutory and constitutional matter. See Underkuffler, supra note 20, at 2070–71.
36 See Masterpiece Cakeshop, 138 S. Ct. at 1724.
37 Id.
lesbian marriages and commitment ceremonies. “[O]n multiple occasions,” the agency found, Phillips had “turned away potential customers on the basis of their sexual orientation,” stating that creating cakes for a same-sex wedding or commitment ceremony would violate his religious beliefs.\(^{38}\)

The Court began with a strong endorsement of the “dignity and worth” of gay and lesbian persons and anti-discrimination legislation that protects them. “Our society,” the Court stated, “has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. [T]he laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedoms on terms equal to others must be given great weight and respect by the courts.”\(^{39}\)

The question that the case presented was how “religious and philosophical objections” to those rights should be treated by law.\(^{40}\) The Court first noted that this case did not involve compelling a member of the clergy to perform a gay wedding; that, under long-established Supreme Court precedent, would violate the particular protections afforded to groups and institutions in their private religious practice.\(^{41}\) However, those exemptions must be “confined”; otherwise, “a long list of persons who provide goods and services for marriages might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”\(^{42}\)

Turning, then, to the case at hand, the Court observed that private “religious and philosophical objections to gay marriage are protected views and, in some instances, protected forms of expression.”\(^{43}\) What about actions, such as the denial to gay citizens of products and services available to all others in the public marketplace? The Court stated that those are not. Although private objections are protected, it is “a general rule that [religious and philosophical] objections

\(^{38}\) Id. at 1725–26.

\(^{39}\) Id. at 1727.

\(^{40}\) See id.

\(^{41}\) Religious groups, under prevailing legal norms, are generally afforded exemptions from secular laws that actually burden private religious practice. This includes constitutional and statutory exemptions from secular interference in the selection of clergy, the content and performance of religious rituals, and the resolution of internal doctrinal, property, and organizational disputes. See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (noting civil courts must defer to church tribunals on matters of purely ecclesiastical concern); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952) (holding that, as a constitutional matter, religious organizations are afforded a “power to decide for themselves . . . matters of church government as well as those of faith and doctrine”).

\(^{42}\) Masterpiece Cakeshop, 138 S. Ct. at 1727.

\(^{43}\) Id.
do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”

The reference to a “neutral, generally applicable public accommodations law” is a reference to Employment Division v. Smith, a case decided by the Court thirty years previously. Under Smith, a claim of religious exemption from a secular law does not have purchase if the law is both neutral and generally applicable. If the Colorado law met those tests—and it appeared to do so—then the claim of a religious exemption in the case would be eliminated.

Faced with this test, the Court appeared to be on the brink of rejecting the religious claim. However, at this point, the opinion took an abrupt turn. There was another problem, the Court explained. Not only must the law be neutral and generally applicable; in addition, the dispute must have been resolved in a way that does not reflect “hostility” or “undue disrespect” toward “religion or [the] religious viewpoint.”

Applying this idea, the Court cited “elements of a clear and impermissible hostility [on the part of the adjudicators] toward the religious beliefs that motivated [Phillips’s] objection.” This hostility, it continued, can be found in the following parts of the Colorado Civil Rights Commission’s hearing transcript. At one point, a commissioner stated “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.’” At another point, another commissioner expressed the view that “religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust,” and that there are “hundreds of situations where freedom of religion has been used to justify discrimination.” This commissioner went on to state that he found it to be a “despicable piece[] of rhetoric” when someone “use[s] their religion to hurt others.”

All of this, the Court held, shows that the Commission “adjudicat[ed] Phillips’ religious objection based on a negative normative ‘evaluation of the

44 Id.
46 See id. at 878–79.
47 See Masterpiece Cakeshop, 138 S. Ct. at 1729, 1731–32.
48 Id. at 1729.
49 Id.
50 Id.
51 Id.
particular justification' for his objection and the religious grounds for it. Government has no role in deciding or even suggesting whether the religious grounds for Phillips’ conscience-based objection is legitimate or illegitimate. Any expressed views about the religious views’ legitimacy deprive the religious litigant of the “neutrality” that the Constitution demands.

There are two possible interpretations of what this language means. The first interpretation sees this language as addressing a matter of form. The second sees it as a more sweeping mandate.

Under the first interpretation, the Court’s holding was this: if the case involves a religious claim, the adjudicator must refrain during the proceedings from making any negative or otherwise derogatory comment about it. This is rooted in the idea that every litigant, when before an adjudicatory tribunal, is entitled to neutral consideration and respect. In the context of a religious claim, the Court reasoned as follows. If an adjudicator expresses negative or derogatory comments about a religious claim, then that is necessarily a negative or derogatory comment about the religion that underlies it. If a negative or derogatory comment is made about the religion that underlies it, then that is necessarily a negative or derogatory comment about the individual who holds it. In other words, any negative or derogatory comment about a religious claim automatically works to impugn the human being who holds it. And as a result of that, any “dismissive,” “demeaning,” or critical comment about a religious claim deprives the religious claimant of the neutrality and respect to which that claimant is entitled.

This holding—if it is what the Court intended—is markedly peculiar. Most obviously, the idea that a claim made by a litigant “is” the litigant herself—such that “disrespect” or negativity toward the claim demeans the litigant—is an unprecedented one, and for good reason. If a decision maker’s criticism of a claim is ipso facto deemed to demean the litigant, a difficult problem immediately arises. Under this rule, negative or unsupportive statements by an adjudicator about a religious claim—during the hearing or (presumably) in the decision rendered—would never be permissible.

It could be argued that this interpretation of the Court’s holding goes too far. Perhaps the Court’s new rule applies to hearings or other proceedings where the religious litigant is present, but not to the ultimate decision made. In other words,

52 Id. at 1731.
53 See id.
54 See id. at 1729.
a “neutral” and “nonjudgmental” attitude must be maintained throughout the consideration of the case, but this veneer can be dropped in the final decision rendered.

It might be desirable, from the point of view of calm and harmonious hearings, for an adjudicator to refrain from pointing out that a party’s claim is contrary to law, assumes abuse of the rights of others, or will result in other severely detrimental societal consequences. There are obvious problems with this, however. First, this required facade would deprive the religious litigant of any opportunity to respond to any negative views of her claim that the adjudicator, at that point, silently holds. In addition, the prohibition of implied as well as express negativity creates an enormous practical problem. Anything that the adjudicator says that is not expressly positive could be argued to reflect an unspoken “hostile” or “judgmental” attitude toward the religious claim. Is the adjudicator bound during the adjudicative process to hypocritically assert support for a claim that it believes to be (in fact) unmerited?

The foundational problem with the Court’s “process holding” is that normative evaluation underlies all laws and all applications of laws. Loving itself was a starkly normative decision, which is one of the deep and enduring reasons for its contemporary celebration. A requirement that an adjudicator must remain mum as a sphinx, or express positive reactions that the adjudicator might or might not hold, turns the adjudicatory process into something that is vacuous at best or completely unworkable at worst. In addition, unless an adjudicatory body issues only a one-sentence opinion if it rejects the religious claim—for example, “this claim fails because it conflicts with law”—there necessarily will be “intolerance” and “disrespect” of the religious claim in whatever explanation the adjudicator gives. Indeed, one could say “intolerance” and “disrespect” are inherent in any rejection.55

The charade that this “process” interpretation requires leads to the second possible interpretation of the Masterpiece Cakeshop holding.

55 Justice Kagan, concurring, makes a valiant effort to make sense of the Court’s decision. A state adjudicatory body, she reasons, could treat a religious claim of the type raised by Phillips with neutrality and respect by simply stating that “a plain reading and neutral application of [the] Colorado law” required its rejection. See id. at 1733–34 (Kagan, J., concurring). That might save the decision from any explicit statement of anti-religious bias. However, the implication (under the Court’s analysis) that the adjudicator is or might be hostile to the religious claim remains. Indeed, the idea that citing the illegal nature of the conduct evades the Court’s concern with anti-religious bias contradicts the Court’s opinion itself. One of the statements made during the Colorado Civil Rights Commission hearing—and condemned by the Court—was precisely of this kind. Phillips, one commissioner stated, “can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’” Id. at 1729. This was because Phillips’s religiously-motivated refusal to serve LGBTQ+ customers violated state law.
Under this second interpretation, the idea of ostensibly “supportive” or “non-contentious” proceedings is not all that the opinion demands. Under this interpretation, the adjudicator must not only feign respect and positive regard for the religious claim; the adjudicator must in fact hold that view. Neutrality, respect, and deference to religious claims are not only required as a matter of form during the hearing of the case; they must also govern its outcome.

Unfortunately for those who desire this requirement, there is no existing constitutional doctrinal piece that ensures this kind of presumed respect—indeed, deference—for religious views when confronted by secular law. In Employment Division v. Smith, the Supreme Court held that a religious motivation for acts in violation of neutral and generally applicable laws does not exempt those acts from government prohibition. Indeed, we know that this has to be true: society cannot be bound to tolerate theft, mayhem, murder, and other trampling of the rights of others because the actors claim that they are involved in religious conduct. “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of relig[on]. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”

There are hints in the Masterpiece Cakeshop opinion that this “discrimination” theory is what justifies its conclusion that Phillips’s religiously motivated conduct was unfairly evaluated. For instance, the Court described how the “conscience-based objections” of secular bakers who refused to create cakes with anti-gay slurs and biblical condemnations were “treated as legitimate,” while the religious “conscience-based objections” of Phillips to create cakes for gay weddings were not—an invocation of discriminatory treatment. This “disparity,” the Court stated, “reflected hostility on the part of the Commission toward [Phillips’s] beliefs” and was a prohibited “government . . . assessment of offensiveness.”

57 Id. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940), overruled (in the case of compelled belief) by W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630–31 (1943) (“The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . Here, . . . we are dealing with a compulsion . . . to declare a belief.”)).
58 See id. at 881–85.
59 Masterpiece Cakeshop, 138 S. Ct. at 1730.
60 Id. at 1730–31.
The logical flaws in this analysis are glaring. This analysis identifies the only important similarity among compared cases to be a “refusal to bake.” If two cases involve a simple “refusal to bake something,” for whatever reason, they are completely, legally equivalent. If one baker refuses to bake a cake with racist, religious, or anti-gay slurs to avoid demeaning a statutorily protected group, and another baker refuses to bake a cake—which is innocent in itself—to avoid serving a group that the law requires the baker to serve, the cases are equivalent. An “exercise of conscience” in the first case (X) is the same as an “exercise of conscience” in the second case (Y), regardless of the reasons for, the content of, and the legality or illegality of the two different acts. If a refusal to bake is deemed to be legitimate in the first case, then “equal treatment” demands that it be deemed legitimate in the second.

In all prior cases in which discrimination against religion was found, religion and non-religion, or religious persons and non-religious persons, were treated differently when the same legally significant conduct was involved in both cases. For instance, when particular sanitary practices pursued by a secular actor are permitted, but the same sanitary practices by a religious actor are not, then religion can be isolated as the only factor involved in the difference in treatment and a conclusion of discrimination against the religious can be drawn. 61 If the acts by the secular and religious actors are different, then it cannot be concluded that the difference in treatment is due to anti-religious bias. “Religious discrimination” cases are not simply those in which X did one thing and Y did another, the first for a secular and the second for a religious reason.

In short, the attempt in Masterpiece Cakeshop to force the two refusal-to-bake situations into the same conduct box—as “exercises of conscience”—is entirely unconvincing. The question is not simply that both bakers “exercised conscience” any more than it is (in another case) that two parties “acted.” The question is what conduct—actions, or exercises of conscience—the two cases involved. The Court’s attempt to make that irrelevant is frivolous.

Seemingly anticipating that argument, the Masterpiece Cakeshop opinion offers what appears to be a rebuttal of sorts. The argument that the religious and secular bakers engaged in different conduct—which justifies their different treatment—is rooted in the idea that the religious baker’s conduct was illegal, bad, or presented as otherwise undesirable and that the secular baker’s conduct did not have these characteristics. However, the opinion implies, that approach demands that we judge the religious conduct. In fact, as already stated by the

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Court, the law must treat the religious claim with “tolerance” and refrain from any normative evaluation of it. Whether the religious “exercise of conscience” violated the law, was bad, or otherwise undesirable cannot be used as a point of comparison in determining whether “like cases were treated alike”—because that assessment requires a prohibited “normative judgment” of the content of the religious claim.

Both interpretations of the Masterpiece Cakeshop opinion have one strong, consistent, and impossible message. No judgment can be made about a religious claim, whether as a matter of procedure or substance, or whether discrimination against it occurred. No assessment can be made by an adjudicator in a religious-rights case of the claim’s consequences or potential harm to others.

This leaves an overwhelmingly heavy question hanging in the air. If Masterpiece Cakeshop had involved a refusal to serve a Black person (race), a woman (sex), a Mexican (national origin), or a Jew (religion), would the Court have issued such a convoluted and strained opinion? Would the Court have insisted that the adjudicator must remain completely “neutral” and express no criticism or “normative” evaluation of the religious claim? If we are honest with ourselves, the answer is obvious. This kind of treatment would not be extended to the human rights of those other groups. It is something unique to the human rights of gay, lesbian, and transgender citizens.

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After Masterpiece Cakeshop was decided, there was the possibility that it was some kind of doctrinal aberration. Perhaps it was a transitory or transitional view by the Court as to how gay, lesbian, and transgender human-rights protections should be regarded when clashing with religious claims. Perhaps, after more experience with the issue, the Court would modify its apparent direction.

If there ever was such hope, it was eliminated by the next case, decided three years later.

B. The Fulton Case

Fulton v. City of Philadelphia, decided by the United States Supreme Court in 2021, dealt with the refusal of Catholic Social Services (CSS)—a foster care
agency—to certify same-sex couples to be foster parents under a City-sponsored program. The reason for this refusal was its belief that “marriage is a sacred bond between a man and a woman,” and that certifying same-sex couples for the City-run program would be “an endorsement of their relationships.”

The City of Philadelphia informed CSS that its exclusion of same-sex couples violated the contract that the City had entered with the agency, which required that a certifying agency “not reject a . . . family [as] prospective foster or adoptive parents . . . based upon . . . their sexual orientation.” It also violated the City’s Fair Practices Ordinance, which prohibited “deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, disability, marital status, [or] familial status.” The City advised CSS that it would not continue its foster care contract with the agency unless it agreed to certify same-sex couples. CSS sued, claiming that these non-discrimination provisions violated its free exercise of religion.

At the outset of its opinion, the Court began with the principle established in the Smith case: “laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” In addition, even if a law meets those tests, there is the requirement (described in Masterpiece Cakeshop) of “neutrality” in application. Government cannot disadvantage particular views because they are religious.

In this case, CSS alleged that the City “transgressed neutrality” in its treatment of CSS, but the Court decided the case on a different basis. The City’s anti-discrimination policy, the Court held, did not meet the Smith requirement of “general applicability.” Quoting Smith, the Court observed that a law is not generally applicable if it “provid[es] ‘a mechanism for individualized exemptions.’” In this case, the contractual provision between CSS and the City prohibited discrimination on the basis of sexual orientation

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65 See id. at 1874–76.
66 Id. at 1875.
67 See id. at 1878.
68 See id. at 1880.
69 See id. at 1875–76.
70 See id. at 1876.
71 Id. (citing Emp. Div. v. Smith, 494 U.S. 872, 878–82 (1990)).
72 See id. at 1877.
73 See id.
74 See id.
75 Id. (quoting Smith, 494 U.S. at 884).
“unless an exemption [was] granted by the [City].”\textsuperscript{76} Although as a matter of fact no exemption had ever been granted by the City to any agency,\textsuperscript{77} the existence of the theoretical possibility meant that the City could not refuse to extend an exemption to a religious claimant “without [a] compelling reason.”\textsuperscript{78} Under this test, the City lost. The Court acknowledged that the City had an interest in the equal treatment of prospective foster parents and that this was a “weighty” one, for “[o]ur society has come [to recognize] that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”\textsuperscript{79} However, that was not “the interest” in question. The question in this case was not whether the City had a compelling interest in its anti-discrimination law but whether it had a compelling reason why it might (theoretically) grant an exemption to some other (presumably secular) agency while denying one to CSS. If some other (secular) reason might be enough to justify an exemption from its civil-rights norms, why not a claim of free exercise of religion? As stated by the Court, “The creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.”\textsuperscript{80}

At this point we must again pause. The “compelling interest test”—as applied for decades by the Court in its pre-\textit{Smith} First Amendment jurisprudence and by current courts in the adjudication of federal and state statutory guarantees—has just taken a peculiar and radically limiting turn. Under that test, as universally known, the religious-exercise claim is weighed against the interest of the public in the opposing legislation. In this case, the claimed infringement upon the religious freedom of CSS would be weighed against the City’s interest in prohibiting discrimination. In prior cases, this has not been much of a contest because of society’s overwhelming interest in protecting the human rights of its citizens. In \textit{Fulton}, however, all of this changes. Now, the “compelling interest” involved is not the City’s interest in its civil-rights law; it is the interest that the City can demonstrate in \textit{denying} an exemption to CSS, but \textit{granting} it in some other (theoretical) case, to some other (theoretical) agency. Because the City could provide no evidence regarding its comparative interests in this (theoretical

\textsuperscript{76} See id. at 1878.
\textsuperscript{77} See id. at 1879.
\textsuperscript{78} See id. at 1877.
\textsuperscript{79} \textit{Id.} at 1882 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719, 1727 (2018)).
\textsuperscript{80} \textit{Id.}
and nonexistent) matchup, its denial of a religiously based exemption to CSS was assumed to be discriminatory.

By reframing the “conflicting interests” involved in this case in this way, the Court rendered the compelling interest that the City had in its civil-rights law—usually determinative in these cases—analytically irrelevant.

As an aside, the Court also rejected the City’s claim under its Fair Practices Ordinance. That law—which forbade the denial of public accommodation opportunities on the basis of sexual orientation and other grounds—contained no exemption provision,81 so the exemption theory used to negate the contract’s equal-treatment provision could not be used. Instead, the Court denied the City’s Fair Practices Ordinance claim on the ground that agencies that contracted with the City to qualify families for the City’s foster program were not places “of public accommodation.”82

There is a final, parting comment by the Court in an effort to justify the outcome in the *Fulton* case. CSS, it noted, “seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on [others].”83

Would the result in *Fulton* have been the same if CSS had asserted a religious right to discriminate on the basis of race, national origin, religious identity, or gender? Could it have successfully claimed a categorical right to exclude Blacks, or Jews, or Mexicans, or women from its City-authorized program, if there was a theoretical possibility that an exemption from the City’s civil rights policies could be given to some other agency on some other secular ground? Or could it have successfully claimed that its discrimination was, in any event, only “private” in nature? Frankly, I doubt it. I doubt it because the human-rights norms in all of those cases are too important to be denied. Not so, apparently, when those protected are gay, lesbian, and transgender citizens.

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Some have argued that *Masterpiece Cakeshop* and *Fulton* can be simply ignored by those concerned about human rights because there are such obvious

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81 See id. at 1879–80.
82 See id. at 1879–81.
83 Id. at 1882.
ways to evade them. Under its most narrow reading, the holding in *Masterpiece Cakeshop* can (perhaps) be avoided if state decision makers are simply mum during hearings about the merits and implications of religious claims, and the holding of *Fulton* can be avoided if civil-rights laws contain no provisions for exceptions.

Perhaps this is true. However, within the fabric of these opinions is embedded a structural architecture that speaks of fundamental attitudes toward the human-rights claims of gay, lesbian, and transgender citizens. To illustrate this, we need to consider an old—and what was thought to be universally discredited—opinion: the case of *Plessy v. Ferguson*.

II. SEPARATE, SUBORDINATE, BUT SOMEHOW “EQUAL”: THE LEGAL ARCHITECTURE OF THE PLESSY CASE

In *Plessy v. Ferguson*, decided more than one hundred years ago, the United States Supreme Court was faced with the constitutionality of a statute that mandated racial segregation. That statute stated, in pertinent part, that “all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.” Plessy, who “was seven-eighths Caucasian and one-eighth African blood,” and who had taken “a vacant seat in a coach where passengers of the white race were accommodated, . . . was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race.” When he refused to do so, he was forcibly ejected with the aid of a police officer and imprisoned in the parish jail. He attacked the statute during his criminal prosecution on the ground—among others—that it violated the Fourteenth Amendment’s equal protection guarantee.

The case, the Court’s opinion begins, is “reduce[d] . . . to the question [of] whether the statute of Louisiana is a reasonable regulation.” When considering “reasonableness,” “the established usages, customs, and traditions of the people” must be considered “with a view to the promotion of their comfort, and the

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84 163 U.S. 537 (1896).
85 Id. at 540 (quoting Separate Car Act of 1890, No. 111, § 3).
86 Id. at 541–42.
87 See id. at 542.
88 See id.
89 See id. at 550.
preservation of the public peace and good order.”\textsuperscript{90} This necessarily must include consideration of the sensibilities of the “white race.” The Amendment “could not have been intended to abolish [racial] distinctions” among people because those “must always exist so long as white men are distinguished from the other race by color.”\textsuperscript{91} The Amendment could not have been intended to enforce social—as distinguished from political—equality “or a commingling of the two races upon terms unsatisfactory to either.”\textsuperscript{92}

What the Amendment intends, the Court explains, is “legal equality,” or “to establish the citizenship of the negro.”\textsuperscript{93} “[A]bsolute equality of the two races” in that sense is within the Amendment’s proper purview.\textsuperscript{94} However, if that is afforded, it does not mean that shared accommodations are required. Rather, separate accommodations, within a culture of political equality, are eminently acceptable. \textit{Plessy}’s argument “that the enforced separation of the two races stamps the colored race with a badge of inferiority” involves a logical fallacy.\textsuperscript{95} If the minority race maintains that proposition, “it is not by reason of anything found in the [A]ct, but solely because the colored race chooses to put that construction upon it.”\textsuperscript{96} To illustrate how such a construction is a matter of individual choice, the Court offered an analogy. Suppose that “the colored race should become the dominant power in the state, and should enact a law in precisely similar terms.”\textsuperscript{97} In that case, “the white race would [undoubtedly] not acquiesce” in an assumption of its inferiority.\textsuperscript{98}

As a final statement, the Court noted that \textit{Plessy}’s idea about the requirements of the Amendment involves a practical fallacy as well. It “assume[s] that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the . . . races.”\textsuperscript{99} That, the Court stated, it cannot accept. Social equality “must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals”; it cannot be achieved by government coercion.\textsuperscript{100}

\textsuperscript{90} Id.
\textsuperscript{91} Id. at 543–44.
\textsuperscript{92} Id. at 544.
\textsuperscript{93} Id. at 543.
\textsuperscript{94} Id. at 543–44.
\textsuperscript{95} Id. at 551.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} See id.
As one considers the *Plessy* opinion, the legal architecture that is constructed to support the outcome becomes clear. First, and importantly, the injury, pain, humiliation, and other consequences for the victim of discrimination are ignored. There is gratuitous mention of the object of the federal law—“to enforce . . . [the] equality of the two races”\(^{101}\)—but it is stated as an abstract proposition, an almost disembodied fact. We are given no idea of Plessy as a person. None of the pain, humiliation, or other suffering of Plessy as the result of his experience is anywhere described or acknowledged.

Next, the anti-discrimination norm is marginalized, as a legal matter, until its putative power vanishes. “Equality of the two races” is acknowledged by the Court as the Amendment’s “object,” but this is stated simply as a neutral fact—as would be done for a statute of limitations governing contract actions or a recognition of contributory negligence.\(^{102}\) One gains the distinct impression that “equality” is not only the object of the federal law. It is also an “object” in the sense that it must be circumvented to uphold what the Court sees as the more important and truer principle: that the “rights” of citizens to segregation must be honored.

Indeed, that objective leads to the next important and powerful piece: that any law that outlaws discrimination, and the interests of the citizens that the law protects are only half of the equation. The other half is comprised of the (implicitly legitimate) needs of the individuals who oppose it. A nondiscrimination law is fine as far as it goes; “[b]ut, when [it] comes to be applied . . ., it will not warrant [more than that]. . . . the rights of all . . . are equally entitled to the paternal consideration and protection of the law for their maintenance and security.”\(^{103}\) “Separate but equal” guarantees this: it allows all citizens to enjoy their full panoply of rights in their separate spheres. There is no legal cause to grant to Black citizens what Plessy demands and to deny the “right” to be separate asserted by others.

The final piece of legal architecture upon which the opinion rests assures us that the alleged discriminatory conduct of which Plessy complains has little societal impact. This is because the discriminatory conduct complained of here is truly *private* conduct, which does not by its nature implicate or impair the equality of the races.\(^{104}\) White citizens who wish to separate themselves from Black citizens are simply making private choices for themselves. Political

\(^{101}\) See *id.* at 544.

\(^{102}\) *Id.*

\(^{103}\) *Id.*

\(^{104}\) See *id.* at 547, 551.
equality is all that government can legally and practically accomplish.\textsuperscript{105} Private discriminatory views and actions are beyond the power of the law, and anti-discrimination norms are powerless—legally and practically—to change them. “Equality” laws must recognize “the established usages, customs, and traditions of the people” and respect the private rights of all.\textsuperscript{106} They have no power—indeed, \textit{must} have no power—to invade the private realm of private choice and force the desires of the Black citizens over the desires of the other.\textsuperscript{107}

Today, of course, \textit{Plessy} and its treatment of the human rights of Black citizens have been roundly and unequivocally rejected. Completely private racial discriminatory beliefs and conduct are beyond the purview of the law, but racially discriminatory conduct in the public sphere is not. Racial discrimination in public carriers, employment, accommodations, legal processes, and other public aspects of American life is absolutely and without exception prohibited. No minimization of the effects of racial discrimination on individuals or society, no disregard of the anti-discrimination norm, no solicitous attitude or “private” characterizations for public discriminatory acts, and no claim that the victims of racism “choose” the stigmatization that they experience can be a part of American public life and law.

So, \textit{Plessy} and the legal architecture that supports it have been abandoned. But have they? In fact, I shall argue, they have been resurrected by the Court when it comes to clashes between religious objections and the rights of gay, lesbian, and transgender citizens.

\section*{III. \textit{Plessy Redux}: \textit{Masterpiece Cakeshop}, \textit{Fulton}, and the “Accommodation” of Discrimination}

In the United States Supreme Court’s opinions in \textit{Masterpiece Cakeshop} and \textit{Fulton}, as well as in “accommodation” arguments made by scholars, we find distinct and unmistakable echoes of \textit{Plessy}’s legal structure. The gay, lesbian, and transgender victims of discriminatory treatment are invisible. The power of the anti-discrimination law, as a fundamental legal norm, vanishes. The societal impact of the discriminatory act is minimized because of its allegedly private nature. And, finally, there is the direct application of \textit{Plessy}’s essential holding: that the victims of discrimination have no essential complaint because they have—as an available option—“separate and equal” accommodations.

\textsuperscript{105} See id. at 551–52.
\textsuperscript{106} See id. at 550.
\textsuperscript{107} See id. at 544.
A. The Invisible Victim

The most compelling reason for anti-discrimination laws is the impact of discrimination on its victims. Emotionally wrenching stories of Black people being relegated to the back of the bus, shunted to separate public schools, and required to use separate restrooms and water fountains ultimately forced the adoption of the civil-rights laws in the 1960s. Abstract notions of “equality” are important, but it is discrimination in action—and being confronted by the impacts on victims—that causes social and legal change.

When a party seeks to undercut a discrimination claim, therefore, one of the most time-tested strategies is to avoid description of the pain of the victim. If the conflict can be presented as abstract idea vs. abstract idea, or—even better—if the needs of the “discriminating” individual can be presented in humanly understandable terms while the needs of the victim of discrimination are not, the conclusion that no legal wrong has occurred is that much easier.

In *Plessy*, this strategy was utilized to its fullest. Indeed, in that case, it was carried to what would be considered today to be an unthinkable extreme. Not only was what Plessy experienced minimized and his humanity made invisible; the opinion went so far as to assert that if the Black race experienced any stigmatization from “separate but equal accommodations,” then it only imagined it.\(^{108}\)

The *Masterpiece Cakeshop* and *Fulton* opinions are written in more contemporary terms; it would be awkward for a court today to say that gay, lesbian, and transgender victims of discrimination imagine the effects of the discrimination against them. However, the essential architecture of the invisible victim, and the suggestion that the victim has “overstated” the harm experienced in the case, is fundamental to both opinions.

Both opinions initially state (although in *Fulton* it feels like a matter of rote) that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”\(^{109}\) In *Masterpiece Cakeshop*, the Court added that refusals of service create a “community-wide stigma” that is inconsistent with commitment to civil rights.\(^{110}\) In those statements, the effects of discrimination on victims are theoretically acknowledged, but that is where discussion of their experience ends. Although the parties in each case who engaged in discrimination

\(^{108}\) See id. at 551.


\(^{110}\) See 138 S. Ct. at 1727.
are painstakingly portrayed in very human terms, the humanity of the victims is invisible.

Consider, first, the Masterpiece Cakeshop opinion. The experience of the baker who refused to serve the gay couple is described in wrenchingly human and emotional terms. Phillips, the Court wrote, had to endure discussion of his religious beliefs in “hostile,” “disparaging,” and “dismissive” terms. 111 He was a sincere (and presumably honorable) man who held “deep and sincere religious beliefs.” 112 During the hearing, he was subjected to decision makers who “lack[ed] [humane] . . . consideration for . . . the dilemma [that] he faced.” 113 Indeed, one commissioner even went so far as to condemn religious defenses made “throughout history, whether it be [for] slavery, whether it be [for] the [H]olocaust.” 114 Having religion described in such terms was undoubtedly a terrible experience for Phillips, as a man, to endure (even though the commissioner’s historical statements were not inaccurate). Indeed, that aptly illustrates the point that the Court was trying to make. This is not a debate about whether religion has been used, some time in history, for oppressive or even genocidal ends. Rather, we must focus on how Phillips, a “sincere” and honorable man, was forced to endure these statements.

As for the gay men on the other side of the ledger, no sympathy for them is expressed in the opinion. What they experienced—any pain, humiliation, insult, or anger—is never an overt concern of the Court. Their story is told in the dry recitation of essential facts at the beginning of the opinion, with no commentary or elaboration whatsoever. We are left to imagine what—if anything—these men experienced when they were told by a prominent purveyor of public goods that they could not be served because their upcoming joyous celebration was immoral and (inferentially) an abomination to God. Maybe they should have simply expected this or taken it in stride. Maybe they were not true “victims” at all. Perhaps the “indignity” of being denied a cake was really trivial.

The gay men, as human beings, are invisible. 115

111 Id. at 1729.
112 See id. at 1724, 1728–30.
113 See id. at 1729.
114 See id.
115 Compare, for instance, the court’s description of the gay men’s experience in the Arlene’s Flowers case, which involved a florist’s refusal to provide services for their wedding. “In 2004, Ingersoll and Freed began a committed, romantic relationship. . . . The two intended to marry on their ninth anniversary . . . and were ‘excited about organizing [their] wedding.’” Their plans included inviting “‘[a] hundred plus’ guests, . . . complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers.” State v. Arlene’s Flowers, Inc., 441 P.3d 1203, 1210 (Wash. 2019).

The court noted that “by the time [Ingersoll] and Freed became engaged, Ingersoll had been a customer
Fulton continues the use of this architecture, although in a different context and in even bolder strokes. In this case, the City, as an entity, clashed with the Catholic Church. At the outset of the opinion, the laudable history and mission of the Church is described in moving terms. “The Catholic Church,” the opinion begins, “has served the needy children of Philadelphia for over two centuries.” Its involvement began in 1798, when it cared for orphans whose parents had died of yellow fever. Later, “the Church established the Catholic Children’s Bureau to place children in foster homes.” It was in pursuit of that unbroken history of service and caring that the involvement of CSS in the City’s foster program arose.

The City, on the other hand, is simply portrayed as a government entity that decided, apparently as a matter of abstract policy, to add sexual orientation to its list of prohibited discrimination along with race, ethnicity, color, sex, and other grounds. There is no discussion of what, in the panoply of human experience, motivated this decision. There is no expressed solicitousness or concern about the victims who needed to be protected. Only one sentence appears in the opinion that refers to the merit of prohibiting sexual orientation discrimination. When addressing the City’s claimed “compelling interest” in its policy, the opinion states that there is “no[] doubt that [the City’s] interest [in] this [case] is a weighty one, for ‘[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and

at Arlene’s Flowers for at least nine years, purchasing numerous floral arrangements . . . and spending an estimated several thousand dollars. The two men considered Arlene’s Flowers to be “[their] florist.” When Ingersoll entered the shop to order flowers, he did not have a chance to specify what floral arrangement he wanted before the proprietor told him that she would not provide flowers for the ceremony. She “assert[ed] that she gave [him] the names of other florists who might be willing to serve him. Ingersoll maintains that he walked away from that conversation ‘feeling very hurt and upset emotionally.’”

The court continued that “after a sleepless night, Freed posted a status update on his personal Facebook feed [stating] that the couple’s ‘favorite Richard Lee Boulevard flower shop’ had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt ‘so deeply offended that apparently our business is no longer good business’ because ‘[his] loved one [did not fit] within their personal beliefs.’ As a result of the ‘emotional toll’ . . . [of this] refusal, they ‘lost enthusiasm for a large ceremony’ as initially imagined. . . . In fact the two ‘stopped planning for a wedding in September because [they] feared being denied service by other wedding vendors.’ The couple also feared that in light of increasing public attention—some of which caused them to be concerned for their own safety—a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group. So they were married on July 21, 2013, in a modest ceremony at their home. There were 11 people in attendance.”

117 Id.
118 Id. at 1874–75.
119 See id.
120 See id. at 1878–80.
worth.”121 However, that interest of the City is quickly dispatched. In the next sentence, it is abruptly concluded that “this interest cannot justify” the City’s denial of the request by CSS for an exception.122

In short, in the Fulton opinion, the only entity with an acknowledged interest in the City’s position is the City itself. Although the City’s non-discrimination policy was presumably implemented to protect human beings—gay, lesbian, and transgender citizens who were previously denied access to services and sought opportunities to create families—their experiences, interests, hopes, and dreams are invisible. In a contest only between CSS, an honorable charity with a long history of service, and a City bureaucracy which (for all we know) simply and arbitrarily decided that adding sexual orientation to the list was a good idea, the choice is easy. Real people would suffer if the CSS program were forced to accept gay families and the agency were therefore forced to refuse to continue its work. No one would be hurt if CSS were allowed, in this City program, to continue to discriminate against gay and lesbian citizens.

B. The Vanishing Norm

Even more important to the outcomes in Masterpiece Cakeshop and Fulton is the phenomenon of the vanishing norm. It would seem, in a discrimination case, that the anti-discrimination norm that underlies the case should have great societal and legal power. After all, what could be more fundamental than protecting basic human rights? However, both Masterpiece Cakeshop and Fulton are structured to undermine that assumption. Although there are brief introductory statements in each that seem to engage the dueling-rights nature of both cases, as the opinions progress, the putative power of the anti-discrimination norm is methodically eroded.

Consider, first, Masterpiece Cakeshop. As stated above, that decision turned (at least ostensibly) on the treatment that Phillips—as an individual—received during the state administrative hearing. The Supreme Court held that Phillips, the religious baker, should prevail because he was denied “neutral and respectful consideration.”123

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121 See id.
122 Id. at 1882 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719, 1727 (2018)).
123 Masterpiece Cakeshop, 138 S. Ct. at 1729.
To reach this conclusion, the Court had to utilize several steps to merge the treatment of the religious claim with the treatment of the religious claimant. This required the following chain of reasoning:

1. Phillips’s claim was that he was entitled to discriminate against gay and lesbian individuals because his religious beliefs demanded it.
2. “His claim” was therefore equivalent to “his religious beliefs.”
3. As a result, disparaging or insensitive comments about the merits of Phillips’s claim were disparaging or insensitive comments about the nature of his religious beliefs. When the commissioner expressed hostility to Phillips’s claim that religion could be used to justify discrimination, this expressed “a clear and impermissible hostility toward [Phillips’s] sincere religious beliefs.”
4. Because religious beliefs “cannot be separated from the man,” hostility toward Phillips’s religious beliefs meant personal hostility toward Phillips himself. That is impermissible.

Apart from the highly irregular equivalence of the treatment of a litigant’s claim with the personal treatment of the litigant, this chain of reasoning has another important architectural feature. If a man refuses to serve Blacks, Jews, or gay individuals in the public marketplace because he espouses—on religious grounds—that Blacks are inferior, that Jews are subverting the governance of the United States, or that gay individuals are a Biblical abomination to God, expression of condemnation of those beliefs or actions by a court or other adjudicator is to disrespect the man. In other words, through religion, the tables are turned. The perpetrator of the civil-rights denial becomes the victim, and any normative condemnation of the civil-rights denial—and the injustice to its victim—disappears.

In addition, any condemnation of the human-rights denial is doubly dead on another ground. Not only is it dead on the ground that condemnation of his beliefs will be condemnation of the man himself, which is unfair and disparaging treatment; it is also dead because of the bedrock principle that the content of religion cannot be questioned, and it is no business of the courts. When it comes to religious claims, as the Masterpiece Cakeshop opinion states, outcomes “cannot be based on the government’s . . . assessment of offensiveness.”

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124 See id.
125 Id. at 1731.
126 Id.
Government cannot condemn, evaluate, or otherwise pass judgment on religious claims, it must, at all times, remain neutral and respectful.\textsuperscript{127}

With that statement, we know it beyond doubt. The civil-rights or human rights norm at stake in this case has both practically and legally disappeared. It has disappeared, finally, because the religious claim—which rejected it—is completely beyond evaluation or reproach. By decree, only the religious claim—untouchable as it is—remains standing.

In \textit{Fulton}, the treatment of the civil-rights norm is similar but even more direct. In the opening paragraphs of the \textit{Fulton} opinion, the description of the case as involving “rights vs. rights” (as had been stated in the earlier \textit{Masterpiece Cakeshop} opinion) is omitted.\textsuperscript{128} “Our task,” the \textit{Fulton} opinion begins, “is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.”\textsuperscript{129} No mention of the competing human-rights norm, or of the human rights of the victims involved, appears.

Indeed, the only mention of interests in the civil-rights norm appears in the final step of the Court’s analysis. Because the City’s non-discrimination policy was found to fail \textit{Smith}’s “generally applicable” test,\textsuperscript{130} the only remaining question was whether the City’s policy protected a compelling interest of the entity that enacted it.\textsuperscript{131} The interests that the City advanced for its policy were quickly dispatched. There was no evidence, the Court stated, that the policy would maximize the number of foster families or protect the City from liability.\textsuperscript{132} As for the final claim—that the policy would advance the equal treatment of prospective foster parents—the Court rejected that also. That interest was eliminated by the possible availability of an exception from the City’s policy, on unspecified grounds—an exception which had never been granted to anyone.\textsuperscript{133}

With that rhetorical flourish, the anti-discrimination norm vanishes from this case as well. The City cannot assert it, and—at no time during its consideration—does the Court acknowledge that any other interested party to the outcome exists. Just as in Plessy, the pain, deprivations, and other

\begin{itemize}
  \item \textsuperscript{127} See \textit{id}.
  \item \textsuperscript{128} \textit{Id.} at 1719.
  \item \textsuperscript{129} \textit{Fulton v. City of Philadelphia}, 141 S. Ct. 1868, 1876 (2021).
  \item \textsuperscript{130} See \textit{id.} at 1877.
  \item \textsuperscript{131} \textit{See id.} at 1878–79, 1881.
  \item \textsuperscript{132} \textit{See id.} at 1881–82.
  \item \textsuperscript{133} \textit{See id.} at 1882.
\end{itemize}
experiences of the victims of discrimination are never mentioned. They are simply not a part of the case.

C. The Claim of No Harm

We are now left with the final piece of legal architecture that undergirded the *Plessy* case, one that is implicitly used in *Masterpiece Cakeshop* and *Fulton* as well. This piece is related to the others but is also conceptually distinct. It is simple: it is (perhaps) unfortunate that victims of discrimination are invisible, or that the anti-discrimination norm tends to disappear. But those are, in the end, only rhetorical concerns with little practical consequence. This is because—whatever has happened—little or no harm has been done to the protected classes in these cases.

This legal piece is both explicitly and implicitly a part of the *Masterpiece Cakeshop* and *Fulton* opinions, and it is a pillar of the “religious accommodation” literature in this area as well. In *Masterpiece Cakeshop*, its use is subtle. Ostensibly, this case is only about denial of fair process in the State’s adjudication of that case. Hearings in other cases could be held in which disrespectful and demeaning comments about the religious actor or claim could be avoided. As for the complaining parties in the *Masterpiece Cakeshop* case, if they do not have the money or intestinal fortitude to pursue the case again (after remand), they certainly have other options. There was no allegation or proof that in the Denver area, where the complaining parties lived, no baker would make a same-sex wedding cake.

In *Fulton*, the no-harm argument is more explicit and coupled with other elements. The religious defendant, the Court stated, is an upstanding agency which “has long been a point of light in the City’s foster-care system.”\(^\text{134}\) It seeks only to continue its life-saving operations. Furthermore, there are some twenty other agencies in the City that “currently” certify same-sex couples. And, to date, “[n]o same-sex couple has . . . sought certification from CSS.”\(^\text{135}\)

In these passages of *Fulton*, echoes of *Plessy*’s rationale, written a hundred years ago, are deafening. In *Plessy*, the discriminatory attitudes of White people were deemed to be a private matter, as were the discriminatory beliefs of the agency (with whom the City contracted) in *Fulton*. In both opinions, it was pointedly noted that the beliefs that underlay them—that personal or business

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\(^{134}\) Id. (citing Brief for City Respondents at 1, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123)).

\(^{135}\) See id. at 1875.
association with Black people (Plessy) or gay people (Fulton) was somehow repugnant—were not pushed on others. In both cases, preoccupation with the rights of those who objected to the civil rights of members of the protected classes was paramount. Through various legal stratagems, the end result was “separate but equal”: the objectors to the civil rights of the protected classes could live in their protected sphere and the beneficiaries of civil rights could live in theirs. Any harm caused to Black citizens in Plessy or to gay, lesbian, and transgender citizens in Fulton was ignored.

Of all arguments that a religious objector might make in a discrimination case, arguments like this are the most duplicitous and disingenuous. The entire operation of non-discrimination law—as claimants, courts, and commentators well know—is restricted to public operations in the public marketplace. If religious individuals or organizations operate apart from the public world—apart from governmentally run and funded institutions, or the offering of public services and accommodations—then this kind of claim of “private function and effect” is accepted as true. However, that is exactly what Phillips in the Masterpiece Cakeshop case, CSS in the Fulton case, and the discriminatory public-carriage scheme in Plessy did not do. Rather, they operated in the public arena, in an avowedly discriminatory manner, with targeted and personal impacts on the victims of their actions.

As a final way to illustrate the fallacies of this “no harm” and “just-go-down-the-road” approaches in today’s legal world, we only need to simply substitute one phrase for another. Specifically, let us change “gay-and-lesbian” discrimination to “racial” or “religious-identity” discrimination instead. Would we, today, even entertain the idea that a public vendor, government clerk, or provider of government-funded social services would be deemed to operate in a protected private sphere if he claimed that he would not serve Black, Asian, or mixed-race couples because their racial characteristics or relationships violated his religious teachings? Would we accept—as the Fulton Court did—that no harm was done if excluding

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136 Accommodations of religious beliefs that declared separation of the races to be divinely ordered in public accommodations, housing, employment, and education were demanded—and rejected—during the struggle for passage of the federal civil-rights laws. See Melling, supra note 31, at 180–83.
persons had not sought services from a provider who had made it abundantly and publicly clear that it had no intention of serving them?

All of those responses would be unthinkable today. It would be unthinkable that the anti-discrimination norms that are operative in those cases would be trumped by such sophistic arguments. Not so for the human rights of gay, lesbian, and transgender citizens.

CONCLUSION

At the time that Plessy was decided, the idea that the human rights of Black citizens could be shoved aside using various legal stratagems and structures was an accepted one. What the victims experienced was invisible; the anti-discrimination norm, in operation, vanished; and the separate but equal spheres for the two races created no harm, serving only to respect the private realm of each. Since that time, we have completely and finally rejected all of these premises. Victims of race, religious, national-origin, and gender discrimination are no longer invisible, legally or societally; norms enforcing human rights are of the utmost importance; and the idea of no harm from “private action” in the public arena has been totally and finally discredited. Victims matter; what victims experience matters; and “reasons” for discrimination, including religious reasons, are no longer privileged over human rights in public life.

Today, all of these convictions remain—except when the protected class is gay, lesbian, and transgender citizens. When they are the protected class, lower courts have continued to honor their claims and the statutes that protect them. However, not so in the United States Supreme Court’s Masterpiece Cakeshop and Fulton opinions. Whatever the brief, titular nods to the lofty goals of non-discrimination in those cases, the opinions re-establish the arguments and legal architecture of Plessy. When it comes to discrimination against gay, lesbian, and transgender citizens on religious grounds, the experiences of victims are

137 See, e.g., Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 925 (Haw. Ct. App. 2018) (granting partial summary judgment for a same-sex couple denied lodging at a bed and breakfast); State v. Arlene’s Flowers, Inc., 441 P.3d 1203, 1237–38 (Wash. 2019) (finding in favor of a same-sex couple who was refused service by a florist); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021) (upholding the Colorado Anti-Discrimination Act); Scardina v. Masterpiece Cakeshop Inc., No. 19-CV-32214, at *21 (Colo. Dist. Ct. Denver Cnty., June 15, 2021) (finding in favor of a transgender woman who was refused a birthday cake). As Judge A. Bruce Jones wrote in Scardina, religious freedom from a compelled flag salute—upheld in the famous case of West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)—“is quite different from preventing places of public accommodation from discriminating against transgender persons. The anti-discrimination laws are intended to ensure that members of our society who have historically been treated unfairly, who have been deprived of even the every-day right to access businesses to buy products, are no longer treated as ‘others.’” Scardina, at *27–28.
invisible; the non-discrimination norm vanishes; and “no harm” arguments of separate but equal (private) realms are all unquestioningly reasserted. When it comes to religious claims in this context, the experience of religious adherents trumps the experience of victims of public discrimination. Why is this so? One can only wonder, although it does not take much thought. Gay, lesbian, and transgender citizens, uniquely, are simply not worth the candle when it comes to their basic human rights.

Religion is a powerful and vital force for many in American life. But religion that seeks to deprive others of human rights does not deserve immunity or accommodation. It does not have the moral authority demanded of law.