THE PRECARITY OF JUSTICE KENNEDY'S QUEER CANON

Kyle C. Velte[*]

INTRODUCTION

It has been nearly four years since Justice Kennedy retired from the U.S. Supreme Court after 30 years of service. In a series of four cases from 1996 to 2015, Justice Kennedy authored opinions that created a constitutional canon of LGBTQ jurisprudence that constructed positive social and legal meaning for LGBTQ people. In *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, Justice Kennedy created a legal framework and social narrative demanding that LGBTQ people be treated as full and equal citizens under the constitution.[1] Animus-driven, anti-LGBTQ legislation was forbidden. Instead, the constitution compelled law to recognize LGBTQ people as having integrity and dignity. Justice Kennedy's LGBTQ constitutional canon—dubbed the Queer Canon here—was clear: unequal status regimes regarding LGBTQ people or same-sex couples are unlawful and normatively unwarranted. Instead, the law must reflect that LGBTQ people and their families have integrity, dignity, and honor, and are deserving of the rights of full citizenship.

Justice Kennedy's fifth, and final, LGBTQ opinion, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[2] was not the finale hoped for by the LGBTQ community. While *Masterpiece Cakeshop* affirmed the right and power of states to enact public accommodations laws that

[*]Associate Professor, University of Kansas School of Law. Thanks to Tracy Thomas for including me in this symposium and to the symposium participants for their engagement with and thoughtful input on this essay. For their valuable feedback on early iterations of this essay, thanks to Larry Levine, Catherine Smith, and Ezra Young.

1. Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

2. 584 U.S. ___, 138 S. Ct. 1719 (2015).

prohibit sexual orientation and gender identity ("SOGI") discrimination, Justice Kennedy nevertheless held that a traditional Christian baker would prevail on his First Amendment Free Exercise challenge to Colorado's public accommodations law.

LGBTQ-rights advocates were deeply concerned when Justice Kavanaugh replaced Justice Kennedy, just as they were when Justices Gorsuch and Barrett took their seats on the Court. That concern might be summarized in one question: What will a post-Justice Kennedy Court mean for LGBTQ people and the 25 years of constitutional progress reflected in his Queer Canon?

Given that we now have two LGBTQ decisions from the post-Justice Kennedy Court, this essay seeks to answer that question. Through a comparative analysis of the Court's two post-Justice Kennedy decisions, *Bostock v. Clayton County*[3] and *Fulton v. City of Philadelphia*,[4] Justice Kennedy's Queer Canon, and his opinion in *Masterpiece Cakeshop*, this essay contends that the progress made during the Justice Kennedy era is a fragile progress, one that is under threat by the current Court.

I. SECURING CONSTITUTIONAL EQUALITY: JUSTICE KENNEDY'S QUEER CANON

A. Animus, Dignity, Liberty, and Equality

For many (though not all[5]) LGBTQ people and our allies, Justice Kennedy's legacy is often described in glowing terms, characterizing him as the hero or savior of our community.[6] The Queer Canon, a series of four cases over nearly two decades, formed the basis of the exalted status enjoyed by Justice Kennedy in much of the LGBTQ community: *Romer*

3. 590 U.S. ___, 140 S. Ct. 1731 (2020).

4. 593 U.S. ___, 141 S. Ct. 1868 (2021).

5. *See, e.g.*, Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1030 (2019) (noting that while Justice Kennedy "underscored the importance of affirming gays' and lesbians' dignity and inclusion as full citizens, his jurisprudence fostered a hierarchy of belonging and exclusion along lines including race, gender, national origin, religion, citizenship, and their intersections"); *id.* at 1042 (explaining that the author decided to focus on Justice Kennedy "because I fear that his prominent role in the sexual orientation cases will enable myth-making that frames him as more progressive than he actually was"); *id.* at 1045 (arguing that "white nationalism persisted as an undercurrent in Justice Kennedy's subsequent cases concerning sexual orientation, family formation, and the right to marry" and "notwithstanding his flowery rhetoric, for Justice Kennedy, constitutional liberty does not in fact extend equally and neutrally to all").

6. *See, e.g.*, Adam Liptak, *Surprising Friend of Gay Rights in a High Place*, N.Y. TIMES (Sept. 1, 2013), https://www.nytimes.com/2013/09/02/us/surprising-friend-of-gay-rights-in-a-high-place.html/; Ruthann Robson, *Justice Ginsburg's* Obergefell v. Hodges, 84 UMKC L. REV. 837, 837-38 (2016) (collecting sources).

v. Evans,[7] *Lawrence v. Texas*,[8] *United States v. Windsor*,[9] and *Obergefell v. Hodges*.[10]

In these cases, Justice Kennedy established a doctrinal lens that wove together notions of animus, dignity, liberty, and equality; together these concepts informed his application of the Fourteenth Amendment's Equal Protection and Due Process Clauses in LGBTQ cases. His analysis was sometimes marked by an intertwining of these two clauses; he observed that they are related and that each informs the other.[11]

Certainly, these cases handed LGBTQ people important legal victories. Along with legal rights and protections, the Queer Canon did meaningful normative work to make visible and validate LGBTQ lives.[12] Taken together, the Queer Canon packs a powerful expressive punch that arguably has been an important part of the rapid cultural shift in the acceptance of LGBTQ people in American society.[13]

Justice Kennedy's LGBTQ animus doctrine made its debut in *Romer*. His majority opinion struck down a sweeping amendment to the Colorado Constitution that would have repealed existing antidiscrimination laws prohibiting SOGI discrimination and barred any such protections in the future (whether implemented through judicial, legislative, or executive efforts).[14] Given the "exceptional" qualities of the amendment, including its "peculiar property of imposing a broad and undifferentiated disability on a single named group,"[15] Justice Kennedy drew the "inevitable inference" that the amendment was fueled by animosity toward LGBTQ people.[16] Relying on settled equal protection law that "a bare . . . desire to

7. 517 U.S. 620 (1996).

8. 539 U.S. 558 (2003).

9. 570 U.S. 744 (2013).

10. 576 U.S. 644 (2015).

11. *See, e.g., Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

12. *See* Kyle C. Velte, Obergefell's *Expressive Promise*, 6 HOUS. L. REV. 157, 162 (2015) ("*Obergefell* uses sweeping language on three themes that are central to our national identity and comprise our social norms: change, dignity, and liberty. Justice Kennedy connects these themes to LGBT people and in doing so, 'sends a message' about what is 'appropriate behavior' toward LGBT people.")

13. *See* Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists*, PEW RESEARCH CENTER (June 25, 2020) (noting that between 1994 and 2019, the percentage of Americans who believe that "homosexuality" should be accepted in society rose from 46% to 72%), https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/.

14. *Romer*, 517 U.S. at 627.

15. *Id.* at 632.

16. *Id.* (concluding that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

harm a politically unpopular group cannot constitute a legitimate governmental interest,"[17] he struck down the amendment under the rational basis test, holding that animus was an impermissible rationale for law.

Rejecting anti-LGBTQ animus as a legitimate basis for lawmaking, *Romer*'s message was simple yet transformational: LGBTQ people deserve to be treated with civility. The constitution's equality norm applies to LGBTQ citizens just as it does to everyone else. This legal (and expressive and normative) rejection of animus as a basis for lawmaking foreshadowed Justice Kennedy's later embrace of dignity as a guiding principle of constitutional interpretation vis-à-vis SOGI.[18]

That embrace took place seven years later in *Lawrence*, in which dignity, scaffolded by a liberty interest protected by due process, were Justice Kennedy's normative and legal touchstones. In holding that the Texas sodomy law violated the Fourteenth Amendment's promise of due process, Justice Kennedy's characterized the Court's decision to uphold a similar sodomy law in *Bowers v. Hardwick*—just seventeen years earlier—as one that both stigmatizes[19] and "demeans the lives of"[20] LGBTQ people. As a legal matter, the due process liberty interest recognized and protected the right of LGBTQ people to engage in same-sex intimate conduct without fear of criminal prosecution—to do so, in other words, "and still retain their dignity as free persons."[21] In *Lawrence*, liberty and dignity worked together to build on *Romer*'s animus holding: While *Romer* may be understood through a "tolerance"[22] lens (bare animus is not a legitimate government interest on which to pass anti-LGBTQ laws), *Lawrence* may be understood through an "acceptance"[23] lens (law must affirmatively recognize and protect the dignity of LGBTQ people to live and love as full citizens, and it does so through the due process liberty right).

Justice Kennedy reprised his animus and dignity doctrines in *Windsor*, in which he wrote the majority opinion striking down a

17. *Id.* at 634 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

18. *See generally*, Allyson C. Yankle & Daniel Tagliarina, *Adjudicating Dignity: Judicial Motivations and Justice Kennedy's Jurisprudence of Dignity*, 46 HASTINGS CONST. L.Q. 713 (2019) (tracing Justice Kennedy's development of a dignity doctrine and theorizing *how* he accomplished it).

19. *Lawrence,* 593 U.S. at 575.

20. *Id.* at 575.

21. *Id.* at 567.

22. *See, e.g.*, Stephen Hall, *Creating an Inclusive Society–Tolerance vs. Acceptance*, RUMINATING.ORG (May 30, 2016), https://ruminating.org/news/creating-an-inclusive-society-tolerance-vs-acceptance/#:~:text=Tolerance%20is%20defined%20by%20Dictionary,reception%3B%20approval%3B%20favor%E2%80%9D.

23. *See id.*

provision of the federal Defense of Marriage Act ("DOMA"). That provision mandated marriage be defined as between a man and a woman for the purpose of federal law, in effect erasing same-sex marriages that were then legal under the law of several states.[24] Contrasting the states' conferral of "a dignity and status of immense import"[25] in permitting such marriages, Justice Kennedy described the federal government's erasure of them as an "injury and indignity" that constituted "a deprivation of an essential part of the liberty protected by the Fifth Amendment."[26] Moreover, Justice Kennedy determined the "essence" of Congress's intent in passing DOMA was the flip-side of dignity: animus—to express moral disapproval of LGBTQ identities, to stigmatize LGBTQ people, and to humiliate their children.[27]

Finally, in *Obergefell* Justice Kennedy centered equality and dignity, while minimizing the rhetoric of animus, when he held that the fundamental right to marry includes same-sex couples.[28] His pivot away from animus foreshadowed his opinion in *Masterpiece Cakeshop*, explored below. While he did hold that denying the marriage right to same-sex couples created stigma and was demeaning, he went out of his way to declare that those who oppose same-sex marriage were *not* expressing animus: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[29] Justice Kennedy further described such opposition as "sincere."[30]

Obergefell certainly was a positive legal and normative victory for the LGBTQ community. Justice Kennedy's closing proclamation—"[LGBTQ people] ask for equal dignity in the eyes of the law. The Constitution grants them that right"[31]—might be characterized as moving the needle for LGBTQ people from "acceptance" to "inclusion."[32] But, as

24. *Windsor*, 570 U.S. at 749.

25. *Id.* at 768.

26. *Id.*

27. *Id.* at 770, 772 (stating that the "avowed purpose and practical effect" of DOMA was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages" and noting that DOMA "humiliates tens of thousands of children now being raised by same-sex couples").

28. 576 U.S. at 670-71.

29. *Id.* at 672.

30. *Id.*

31. *Id.* at 681.

32. *See, e.g.*, Sesil Pir, *Reclaiming Our Space: Why We Need To Move From Tolerance To Acceptance For Inclusion*, FORBES (June 27, 2021), https://www.forbes.com/sites/sesilpir/2021/06/27/reclaiming-our-space-why-we-need-to-move-from-pride-to-acceptance/?sh=5c0623d03b0d/.

discussed below, the shift away from animus in Justice Kennedy's rhetoric and analysis may have contributed to the destabilization of LGBTQ rights with the current Court.

These cases created and protected legal rights of LGBTQ people while simultaneously playing a part in the larger, shifting cultural narrative about LGBTQ people—one that was moving from an era of pathologizing, criminalizing, and othering LGBTQ people to one in which LGBTQ lives began to be normalized, protected, and respected.[33] The Queer Canon established that LGBTQ people (and their families) are deserving of all the rights of a full citizenship, as well as that LGBTQ people have integrity, dignity, and honor.

Thus, the trouble for LGBTQ people arose not in Justice Kennedy's articulation of pro-LGBTQ rights and protections. Rather, the trouble—both doctrinal and normative—began to brew in Justice Kennedy's response to the *backlash* that followed his articulation and recognition of those rights and protections.[34] In particular, in the wake of his *Obergefell*

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33. *See generally*, Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQ. 67, 71 (2018).

34. Some LGBTQ-rights scholars were troubled by Justice Kennedy's legal reasoning and rhetoric *during* the creation of the Queer Canon. Frequent critiques included imprecise legal reasoning and sweeping, flowery language that served to obscure that imprecise legal reasoning. These scholars contend that the Queer Canon left LGBTQ people and their allies without a doctrinally robust or doctrinally clear legacy. For example, Nan Hunter noted "razors in [the] apple" of *Obergefell*'s flowery language about marriage:

> Justice Kennedy's opinion for the Court reached for what he no doubt genuinely believes are the stars, but it wrapped a legal interpretation that is both profound and simple in a miasma of rhetoric about marriage that is both sententious and simplistic. In one of many examples, the opinion's final paragraph speaks of the plaintiffs' "hope . . . not to be condemned to live in loneliness." Imagine what it felt like for the never-married Kagan, the divorced Sotomayor, and the widowed Ginsburg to join that language. Now imagine how much sharper the edge is for a single-mom waitress or bus driver. And consider how disconnected that platitude is from the vibrancy of a community that has generated new forms of kinship in moments of love and grief, sickness and health.

Nan D. Hunter, *Beyond Legalizing Same-Sex Marriage, Justice Kennedy's Opinion Made Profound Arguments About Liberty Under the Constitution and Advanced a Novel Jurisprudence of Dignity*, THE NATION (June 29, 2015), https://www.thenation.com/article/archive/the-undetermined-legacy-of-obergefell-v-hodges/. *See also generally*, Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015) (noting, with regard to *Obergefell*: "Even among those who emphatically agree with Justice Kennedy that the Constitution affords same-sex couples the right to marry, many are quick to claim that his sweeping opinion was heavy on rhetoric and light on legal reasoning—a political masterstroke but a doctrinal dud."); Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. WEST. L. REV. 271, 285 (1999) ("The majority decision and its use of rational basis review is odd considered on its own. Justice Kennedy's constitutional analysis left many questions unresolved."); Adam

opinion rose a nationally-coordinated campaign by the Religious Right[35] to carve out quasi-theocratic zones of exemption from state antidiscrimination law that would allow SOGI discrimination in the marketplace and beyond. As described in the next section, Justice Kennedy's tepid response in *Masterpiece Cakeshop* to the marriage equality backlash likely portended the destabilizing of LGBTQ constitutional rights in the post-Justice Kennedy era.

B. Destabilizing Equality: Masterpiece Cakeshop v. Colorado Civil Rights Commission

Three years after *Obergefell*, Justice Kennedy wrote the majority opinion in *Masterpiece Cakeshop*, which would prove to be his last LGBTQ rights opinion. *Masterpiece Cakeshop* addressed the question of whether the First Amendment's Free Exercise and Free Speech Clauses exempted a traditional Christian baker from complying with a state public accommodations law.[36] In that case, a baker refused to sell a wedding cake to a same-sex couple in violation of Colorado's public accommodations law, which included SOGI as a protected class.[37] He argued that he was exempt from complying with the law based on his sincerely held religious belief that marriage is between a man and a woman—a belief protected by the First Amendment.[38]

The Court held in his favor on procedural grounds: Justice Kennedy held that some adjudicators in an administrative hearing failed to provide constitutionally required neutrality when they considered the baker's religiously grounded claims.[39] Because those adjudicating the baker's

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Lamparello, *Why Justice Kennedy's Opinion in* Windsor *Shortchanged Same-Sex Couples*, 46 CONN. L. REV. ONLINE 27, 29 (2014) ("A closer look at *Windsor* . . . reveals that same-sex couples won *and* lost. While Justice Kennedy's opinion used sweeping rhetoric and blasted DOMA's 'interference with . . . equal dignity,' it amounted to little more than a nebulous discussion of liberty, sprinkled with a federalist glaze."); Lawrence C. Levine, *Justice Kennedy's "Gay Agenda":* Romer, Lawrence, *and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 1 (2013) ("Justice Kennedy's key gay-rights decisions have been subjected to substantial criticism even by those favoring gay and lesbian rights, however. There are ambiguities in both *Romer* and *Lawrence* that have permitted lower courts to interpret these decisions extremely narrowly.")

35. I have previously defined my use of this phrase as a term of art that "describes a group of organizations that specifically harness their Christian faith to target the project of LGBT legal equality. Together, these organizations are the leading voice of the anti-LGBT rights movement in the United States. It is an alliance of evangelical Protestant Christians and American Roman Catholics, whose goal is to stop and reverse these civil rights victories." Kyle C. Velte, *Postponement as Precedent*, 29 S. CAL. REV. L. & SOC. JUST. 1, 3, n.5 (2019).

36. 138 S. Ct. at 1723.

37. *Id.*

38. *Id.* at 1726.

39. *Id.* at 1723-24.

claims demonstrated a "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection[,]" the Court held that the baker's free exercise rights had been violated.[40]

Masterpiece Cakeshop is important for many reasons, two of which are pertinent here. First, the case—and the others like it that are percolating through courts around the United States—are part of a long-term, nationally coordinated campaign by the Religious Right to halt and/or rollback the legal gains made by the LGBTQ community, gains in part attributable to Justice Kennedy's Queer Canon.[41] Through well-funded and well-connected legal advocacy groups such as the Alliance Defending Freedom, the Religious Right is waging a campaign to radically revise the meaning of the First Amendment vis-à-vis neutral, generally applicable antidiscrimination laws.[42] The Religious Right's goal is retrenchment of SOGI protections (as well as reproductive rights)[43] and the expansion of Christian nationalism.[44] The breadth and scope of this campaign thus make the strength (or lack thereof) of Justice Kennedy's Queer Canon significant: Do those cases provide a doctrinal stronghold *against* the onslaught of resistance and pushback?

Second, Justice Kennedy's "punt" in *Masterpiece Cakeshop*—his avoidance of the central merits question of whether the First Amendment supports religious exemptions to public accommodations laws—marks a distinct departure from his previous commitment to uplifting animus, dignity, and equality for LGBTQ people in his Queer Canon.[45] That departure was foreshadowed during the oral arguments in *Masterpiece*

40. *Id.* at 1732.

41. *See* Sarah Posner, *The Christian Legal Army Behind "Masterpiece Cakeshop*," THE NATION (Nov. 28, 2017), https://www.thenation.com/article/archive/the-christian-legal-army-behind-masterpiece-cakeshop/.

42. *See generally id.*

43. *See* Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi*, THE NATION (Nov. 30, 2021), https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/.

44. *See, e.g.*, Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Rights Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 3 (2016).

45. This is not to say that the *Masterpiece Cakeshop* decision was altogether negative for LGBTQ people; Justice Kennedy did reinforce the importance of SOGI antidiscrimination laws and a state's power to enact such laws. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727. *See also* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J. FORUM 201, 205 (2018) ("Those who characterize the Court's opinion in *Masterpiece Cakeshop* as narrow do not appreciate how the majority rejects certain familiar arguments for expansive religious exemptions from LGBT-protective laws."). Justice Kennedy also included some language affirming the dignity of LGBTQ people and the stigma that community would suffer if merchants were able to turn them away under broad religious exemptions. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727-29. This essay, however, examines those portions of *Masterpiece Cakeshop* that mark Justice Kennedy's shift away from his Queer Canon.

Cakeshop. After a colloquy between Justice Gorsuch and David Cole, the attorney for the same-sex couple, in which Cole argued that turning away his clients constituted identity-based discrimination that was covered by Colorado's antidiscrimination statute, Justice Kennedy followed up:

> Well, but this whole concept of identity is a slightly—suppose he says: Look, I have nothing against—against gay people. He says but I just don't think they should have a marriage because that's contrary to my beliefs. It's not— . . . It's not their identity; it's what they're doing. . . . I think it's–*your identity thing is just too facile*.[46]

Cole's response to this concern concisely explains why turning away a same-sex couple seeking to buy a wedding cake is, in fact, identity-based discrimination:

> Well, Justice Kennedy, this Court faced that question in Bob Jones University. Bob Jones University said we're not discriminating on the basis of race; we allow black people to come into the school. We just refuse to admit those who are engaged in interracial marriages or advocate interracial dating. And this Court said that's race discrimination. That's identity-based discrimination, even if you treat others similarly.[47]

Characterizing as "facile" the contention that it is SOGI discrimination to refuse to sell a wedding cake to a same-sex couple seems to contradict an understanding of how LGBTQ identity and SOGI discrimination are connected that Justice Kennedy evinced in his Queer Canon. His framing as superficial the argument that this is identity-based discrimination was jarring, disappointing, and concerning to those of us who were in the courtroom for the *Masterpiece Cakeshop* oral argument. It was a red flag that all was not well with the Queer Canon; that perhaps it was at risk of erosion or destabilization. It certainly seemed a turning point in Justice Kennedy's—and thus the Court's—conception of what SOGI discrimination means for LGBTQ dignity and equality, one that might have *doctrinal* significance in the future.

Moreover, Justice Kennedy used language in the *Masterpiece Cakeshop* opinion supportive of the baker seeking a religious exemption that is eerily like key language that he used to support same-sex couples seeking marriage equality in *Obergefell*. When writing about the baker's free speech claim in *Masterpiece Cakeshop*, Justice Kennedy described

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46. *See* Transcript of Oral Argument at 86-87, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2015) (No. 16-111) (emphasis added).

47. *Id.* at 87. *See also, e.g.*, Velte, *Why the Religious Right Can't*, *supra* note 33, at 90-93.

that claim as "difficult"[48] because "few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech."[49] He continued, framing the claim as "an instructive example, however, of the proposition that the application of constitutional *freedoms in new contexts* can *deepen our understanding* of their meaning."[50]

In *Obergefell*, Justice Kennedy used similar language, but to extend the rights of same-sex couples rather than to contract such rights: "*[C]hanged understandings of marriage are characteristic of a Nation where new dimensions of freedom* become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[51] When discussing the identification and protection of fundamental rights in *Obergefell*, Justice Kennedy evoked similar principles:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment *did not presume to know* the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When *new insight* reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[52]

The soaring language of dignity, liberty, and equality that marked *Obergefell*'s holding *in favor of LGBTQ people* found a new home in *Masterpiece Cakeshop*—to frame and support a holding in favor a party seeking to discriminate *against LGBTQ people*. Harnessing such language in *Masterpiece Cakeshop* to dismantle SOGI protections signaled an expressive shift: Notions of LGBTQ dignity, liberty, and equality are open to debate and contestation, notwithstanding the promise of dignity, liberty, and equality set forth in the Queer Canon. It might also prove to have signaled a doctrinal shift: It sets the stage for the Court to engage in LGBTQ exceptionalism by recognizing SOGI religious exemptions that would carve out wide swaths of antidiscrimination law as no longer protecting LGBTQ consumers.[53]

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48. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
49. *Id.*
50. *Id.* (emphasis added).
51. *Obergefell*, 576 U.S. at 660 (emphasis added).
52. *Id.* at 664 (emphasis added).
53. *See, e.g.*, Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J. CIV. RTS. & ECON. DEV. 233, 237-38 (2018).

Finally, Justice Kennedy's finding of religious hostility in the first instance arguably marks a shift away from his Queer Canon generally and away from the animus doctrine in particular. Justice Kennedy found hostility to religion in several comments made by commissioners in the administrative adjudication of the baker's claims. One such comment noted that religion had been used throughout history to justify the violations of human rights, such as religious justifications for slavery in the United States and the Holocaust in Germany.[54] Although this is true as an historical fact,[55] Justice Kennedy appears to have considered that comment and others like it[56] as evidence of bias, animus, or hostility toward the baker and his sincerely held religious beliefs.[57] He did so despite conceding that the commissioners' statements, were "susceptible of different interpretations."[58]

Justice Kennedy's characterization of the commissioner's remarks as grounded in religious hostility is connected to the larger concern, seemingly shared by Justice Kennedy and the Court's conservative wing, that today's exemption seekers are being unjustifiably branded as bigots.[59] The concern over branding today's exemption seekers as bigots loomed large in *Masterpiece Cakeshop* and in *Fulton*. The fact that Justice Kennedy declined to consider statements concerning historic use of religion as justifications for discrimination as just that—historical *fact*—and instead chose to consider them as revealing hostility, bias, animus, and/or bigotry marks a normative and rhetorical shift of which LGBTQ rights advocates should take heed.[60] More specifically, the animus doctrine leveraged by Justice Kennedy to find in favor of LGBTQ people in the Queer Canon likely will find a chilly reception if made in future religious exemptions cases—to claim that religious exemption seekers are

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

55. *See generally, e.g.*, LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (2020).

56. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 (noting that the same commissioner stated: "And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.").

57. Reacting to these comments, Justice Kennedy wrote: "This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation"—thus suggesting such comments are evidence of discriminatory bias or animus toward the baker. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. *See also* Transcript of Oral Argument, *supra* note 46, at 52 (discussing concerns of bias against the baker by some members of the commission).

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

59. *See, e.g.,* Kyle C. Velte, *Lessons for LGBTQ Rights Advocates from* Who's The Bigot?, 36 J.L. & RELIGION 341, 343 (2021).

60. *See id.*

acting from a place of anti-LGBTQ animus is to feed directly into the concern of some justices that the exemption seekers are being branded as bigots, a result these justices have made clear they will not stand for. As a result, animus doctrine seems a dead letter, at least in religious exemption cases.

In sum, Justice Kennedy's reasoning and rhetoric in *Masterpiece Cakeshop* matter: They appear to provide a doctrinal and normative opening *for* the onslaught of resistance and pushback against LGBTQ equality in ways that destabilize the Queer Canon.

One final observation is important for what follows in this essay. Many LGBTQ organizations, advocates, and allies reacted optimistically to the *Masterpiece Cakeshop* decision by framing it as a "narrow" decision that did little harm to antidiscrimination law's continuing protections of LGBTQ people.[61] I contend that the narrowness narrative is inaccurate and dangerous. While the substantive legal principle underlying *Masterpiece Cakeshop* may arguably be narrow (religious hostility by adjudicative bodies is constitutionally impermissible), its questionable application to the facts in *Masterpiece Cakeshop* together with the expressive and normative messages sent by Justice Kennedy's decision, open the door to further, future destabilization of the Queer Canon, a topic I turn to next.

C. *Threatening Constitutional Equality? What* Bostock *and* Fulton *Might Tell Us About the Precarity of the Queer Canon in a Post-Justice Kennedy Era*

1. *Bostock v. Clayton County*

In June 2020, the Court issued its first LGBTQ decision since Justice Kennedy's retirement: *Bostock v. Clayton County*.[62] In a 6-3 opinion authored by Justice Gorsuch, the Court held that Title VII's prohibition of sex discrimination in employment extends to SOGI discrimination.[63] This was a tremendous victory for LGBTQ people in the employment

61. *See, e.g.*, Nick Morrow, *Narrow Scope of SCOTUS Ruling in Masterpiece Cakeshop Case Does Not Change Civil Rights Laws, Human Rights Campaign* (June 4, 2018), https://www.hrc.org/news/narrow-scope-of-scotus-ruling-in-masterpiece-cakeshop-case-does-not-change/; NCLR Statement: Masterpiece Cakeshop, National Center for Lesbian Rights (June 4, 2018), https://www.nclrights.org/about-us/press-release/nclr-statement-masterpiece-cakeshop/.

62. 140 S. Ct. 1731 (2020).

63. *Id.* at 1742 ("The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

context,[64] and likely beyond.[65] That victory, however, is not without caveats; there is a "both/and" reality to the *Bostock* decision to which LGBTQ-rights advocates should attend. It is *both* a victory for LGBTQ people that demonstrates the Queer Canon can continue to do positive work in providing a doctrinal stronghold *against* the onslaught of resistance and pushback *and* an example of Justice Kennedy's decision in *Masterpiece Cakeshop* providing a doctrinal and normative opening *for* the onslaught of resistance to and pushback against the Queer Canon.

The first contention—that the Queer Canon continued to hold in *Bostock*—is evidenced not just by the pro-LGBTQ holding but by the fact that one of the Court's conservative justices authored the opinion and was joined by the conservative Chief Justice. In the run up to the decision, many on the political left lamented that the opinion was bound to be negative for LGBTQ people given Justice Kennedy's departure from the Court.[66] They were wrong. And while Justice Gorsuch did not explicit rely on the Queer Canon in his reasoning—instead utilizing a purportedly straightforward textualist approach[67]—the Queer Canon and its legacy of establishing background norms of LGBTQ dignity and equality arguably played a normative, if not doctrinal, role in Justice Gorsuch's consideration of the case. Put another way, the Queer Canon shifted the legal and normative landscape over the past quarter century in ways that have baked normative and doctrinal LGBTQ equality and dignity into the public consciousness and culture, including into the Court's culture. While it might go unacknowledged, it nonetheless is there, having established a new, more inclusive, baseline norm upon which new cases

64. *See, e.g.*, Nina Totenberg, *Supreme Court Delivers Major Victory To LGBTQ Employees*, NPR (June 15, 2020), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees/.

65. *See, e.g.*, Sharita Gruberg, *Beyond* Bostock: *The Future of LGBTQ Civil Rights*, CENTER FOR AMERICAN PROGRESS (Aug, 26, 2020), https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/.

66. *See, e.g.,* The Daily, *A Landmark Supreme Court Ruling*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/podcasts/the-daily/supreme-court-lgbtq.html/. *But see* Katie R. Eyer, *Understanding the Role of Textualism and Originalism in the LGBT Title VII Cases*, ACS EXPERT FORUM (Apr. 26, 2019), https://www.acslaw.org/expertforum/understanding-the-role-of-textualism-and-originalism-in-the-lgbt-title-vii-cases/.

67. *Bostock*, 140 S. Ct. at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."). *But see* Marc Spindelman, Bostock's *Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 594-95 (2021) ("Insofar as *Bostock*'s reading of Title VII's sex discrimination rule depends on a rule-of-law conception of legal justice that is itself not found within Title VII's text, *Bostock* cannot be the pure textualist ruling that it maintains.").

are decided.[68] Moreover, *Bostock* lays the doctrinal groundwork for future advances for LGBTQ equality, such as a declaration that SOGI constitutes a quasi-suspect class subject to intermediate scrutiny under the Equal Protection Clause—a decision likely to be grounded in *Bostock and* in the Queer Canon.

The second contention—that the Queer Canon showed signs of cracking—is evidenced by Justice Gorsuch's discussion of the possibility of religious exemptions to Title VII.[69] He noted that the "employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions," to which he responded: "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution[.]"[70] Although he noted that the religious exemption question was not presented in this case and would thus be saved for another day, he did hint that the Court might be open to creating religious exemptions to Title VII through the application of the Religious Freedom Restoration Act ("RFRA").[71]

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68. *See generally, e.g.*, Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations,* 3 CHI. J. INT'L L. 435, 442-43 (2002); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (noting that "'constitutional' norms provide the background context that informs our interpretation of statutes and other subconstitutional texts."); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime is a system of background norms and conventions against which the Court will read statutes."). As Spindelman observes:

> [L]egal justice—understood to implicate an abstract formal equality principle—may, on a certain account of it, be thought of as not simply a background rule-of-law rule governing statutory interpretation, but as a background rule-of-law rule that effectively supplies an implied term of statutory text. Recognizing the prospects of such an argument in the context of *Bostock* and Title VII, it still leaves *Bostock*'s pro-LGBT specification of the abstract formal equality principle to consider. Before *Bostock* anyway, as a positive law matter, the pro-LGBT specification of the abstract ideal of legal justice was not a basic rule-of-law condition, meaning that it—if not the abstract principle of formal equality from which it derives—remained at the time of decision in *Bostock* an extra-textualist value. *Bostock*'s reliance on it is thus an extra-textualist consideration inconsistent with its self-representation as an uncomplicatedly "straightforward" textualist ruling grounded in nothing more than Title VII's "plain" or "clear" statutory text.

Spindelman, *supra* note 67, at 594-94, n.139.

69. *Bostock,* 140 S. Ct. at 1754.

70. *Id.*

71. *Id.* RFRA "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest." *Id.* (citing RFRA, 42 U.S.C. § 2000bb et seq.).

While certainly not the only reason for this indication of the Court's openness to carving out religious exemptions to Title VII via RFRA, Justice Kennedy's *Masterpiece Cakeshop* decision arguably provides the normative and doctrinal opening for such a move. In this way, *Masterpiece Cakeshop* might be viewed as the bridge between the strength of the Queer Canon and that canon's current precarity. Put another way, the Queer Canon and its current fragility (as demonstrated in *Bostock* and *Fulton*) are connected through *Masterpiece Cakeshop*. That precarity is further illustrated in Justice Gorsuch's statement in *Bostock* that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[72] Although dicta, this language further indicates the Court's willingness to carve out religious exemptions in the future and building on *Masterpiece Cakeshop* to do so. Justice Gorsuch's language in this regard continues the destabilization of LGBTQ rights that Kennedy helped to usher in in *Masterpiece Cakeshop*.

2. *Fulton v. City of Philadelphia*

Fulton is the Court's most recent LGBTQ decision. The question in *Fulton* was whether a faith-based foster care agency, Catholic Social Services ("CSS"), which contracted with the City of Philadelphia to provide screening of prospective foster parents, could claim a religious exemption to the city's antidiscrimination ordinance and the contract's nondiscrimination clause so that it could decline to certify same-sex couples as foster parents.[73] CSS based its religious exemption claim on the First Amendment's Free Exercise and Free Speech Clauses.[74]

Leaving the free speech claim for another day, the Court unanimously held that the city violated the Free Exercise Clause when it denied CSS a religious exemption.[75] But it did so without answering the question also left unanswered in *Masterpiece Cakeshop*, namely whether the First Amendment requires religious exemptions from state or local public accommodations laws.[76]

Instead, the Court based its decision on the fact that the contract itself contained a provision allowing the city to grant an exception to the

72. *Bostock*, 140 S. Ct. at 1754.

73. *Fulton*, 141 S. Ct. 1868, 1875-76 (2021). CSS's religious exemption claim was based on its sincerely held religious belief that marriage is a sacred bond between a man and a woman. *Id.* at 1875.

74. *Id.*

75. *Id.* at 1881-82.

76. *Id.* at 1881. The Court held that foster care agencies are not public accommodations under the city's public accommodations law, therefore taking CSS out of the purview of that law. *Id.*

contract's antidiscrimination clause and to do so at a city commissioner's sole discretion.[77] This possibility of discretionary exemptions rendered the contract provision not generally applicable and thus subject to strict judicial scrutiny.[78] The Court held that the city did not carry this burden and thus unconstitutionally burdened CSS's right to free religious exercise.[79]

As was the case in *Masterpiece Cakeshop*, during oral argument in *Fulton* some members of the Court expressed a concern that today's exemption seekers are unfairly being branded as bigots, rather than cast as honorable people of faith with sincerely held religious beliefs.[80] Again, Justice Kennedy's decision in *Masterpiece Cakeshop* arguably provided a baseline norm vis-à-vis notions of religious hostility and the framing of religious exemption claimants that flips the victimhood narrative—from framing LGBTQ people as victims of longstanding, historic subordination and marginalization to framing traditional Christians as victims of an increasingly secularized society that brands these believers as intolerant at best and bigoted at worst.[81]

As noted above, this flipped narrative, supported by Justice Kennedy's *Masterpiece Cakeshop* decision, likely means that animus argument in future cases—that claims for religious exemptions should be denied because exemption seekers are acting from a place of impermissible animus toward LGBTQ people—likely will have little purchase with most members of the Court. In this respect, a key tenant of the Queer Canon—the animus doctrine—appears to no longer be a viable arrow in the quiver of LGBTQ-rights advocates, a result likely made possible in part by the destabilization of the Queer Canon by Justice Kennedy himself in *Masterpiece Cakeshop* and its extension in *Fulton*.

As was the case with *Masterpiece Cakeshop*, the reaction of LGBTQ advocacy organizations to the *Fulton* decision was largely positive, framing the case as narrow and thus not a loss for LGBTQ equality—notwithstanding that the Court had just ruled that CSS may refuse to certify same-sex couples as foster parents.[82] Some even characterized the

77. *Id.*

78. *Id.* at 1881-82.

79. *Id.*

80. *See* Transcript of Oral Argument at 38-40, 112-14, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

81. *See, e.g.*, Velte¸ *Postponement as Precedent*, *supra* note 35, at 48-49.

82. *See, e.g.*, Statement in Response to Supreme Court Decision on Fulton v. City of Philadelphia, Pennsylvania, NATIONAL LGBTQ TASK FORCE (June 17, 2021), https://www.thetaskforce.org/statement-in-response-to-supreme-court-decision-on-fulton-v-city-of-philadelphia-pennsylvania/ ("The Court's narrow ruling applies only to the City of Philadelphia's

decision as a victory for LGBTQ people.[83] This reprise of the narrowness narrative from *Masterpiece Cakeshop* in the wake of *Fulton* is, I contend, ill-advised. Such framing hides an important and disturbing trend—that of the Court consistently granting SOGI religious exemptions, one "narrow" ruling at a time. Rather, *Fulton* marks further destabilization of the Queer Canon that renders that canon precarious, both doctrinally and normatively.

II. CONCLUSION

There is little doubt that Justice Kennedy's Queer Canon played a significant role, both doctrinally and expressively, in the tremendous and rapid ascension of LGBTQ rights in the past three decades. LGBTQ people are in a much better place politically, culturally, and legally thanks to the Queer Canon. But that is not the entire story of the Queer Canon. Justice Kennedy's opinion in *Masterpiece Cakeshop* destabilized the Queer Canon in meaningful ways, ways that became clearer in both of the Court's LGBTQ cases after his retirement.

In sum, *Masterpiece Cakeshop* connects the Queer Canon to the current Court's LGBTQ emerging jurisprudence in ways that render the progress made during the Justice Kennedy era a fragile progress, one that is under threat by the current Court. In particular, the *Masterpiece Cakeshop* decision arguably helped to usher in an era in which the continued viability of the Queer Canon's animus and dignity doctrines are today both fragile and precarious, in turn revealing Justice Kennedy's legacy to be more complicated than it often is framed to be—as heralded by many in the LGBTQ community as heroic.

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contract with CSS. The ruling does not create a broad license to discriminate and is very specific to the city of Philadelphia and their nondiscrimination ordinance.").

83. *See, e.g.*, Christopher Vasquez, *NCLR Relieved by Narrow SCOTUS Ruling in Fulton Allowing Governments to Prohibit Anti-LGBTQ Discrimination*, NATIONAL CENTER FOR LESBIAN RIGHTS (June 17, 2021) ("'Properly understood, today's decision is a significant victory for LGBTQ people,' said Shannon Minter, NCLR Legal Director. The Court ruled in favor of Catholic Social Services, but on the narrowest possible ground, based on language in the City of Philadelphia's contract that authorized individualized exemptions for any provider."), https://www.nclrights.org/about-us/press-release/nclr-relieved-by-narrow-scotus-ruling-in-fulton-allowing-governments-to-prohibit-anti-lgbtq-discrimination/.