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**Why the Religious Right Can't Have Its
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Transformation Dynamic in *Masterpiece
Cakeshop v. Colorado Civil Rights
Commission***

Kyle C. Velte†

Introduction

In the 2017 term, the U.S. Supreme Court will consider the most significant LGBT-rights case since its 2015 marriage equality decision:¹ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.² The case presents a question—what I call the Antidiscrimination Question³—that has been percolating through lower courts for nearly a decade: may small business owners, such as photographers, bakers, and florists, be exempt from state antidiscrimination laws based on their religious beliefs about same-sex marriage?⁴ The Religious Right⁵ has been squarely behind this

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1. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *Craig v. Masterpiece Cakeshop, Inc.* 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017).

3. See Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenge to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016) for an overview of the Anti-Discrimination question and the history of religious organizations' litigation using this concept.

4. The specific question presented in *Masterpiece* is whether Colorado's public accommodation law violates the First Amendment as applied to a baker who refused to bake a wedding cake for a gay couple based on the baker's religious belief that marriage is only between one man and one woman. See QUESTION PRESENTED: MASTERPIECE CAKESHOP (2017), U.S. SUPREME COURT, <https://www.supremecourt.gov/qp/16-00111qp.pdf> (last accessed Nov. 8, 2017). Other Antidiscrimination Question cases present the same question vis-à-vis a state's Religious Freedom Restoration Act (RFRA). See, e.g., *Elane Photography v. Willock*, 309 P.3d 53, 58–59 (N.M. 2013).

5. The Religious Right is a 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. I use this phrase as an umbrella term to describe organizations such as

effort to carve out religious exemptions for secular businesses from generally applicable antidiscrimination laws.⁶

The Antidiscrimination Question is as significant as the marriage equality question. It may have more significance due to the sweeping scope of what the Religious Right seeks: the creation of quasi-theocratic zones of exemption, disguised in the seemingly neutral concept of “religious liberty,” in which Christian business owners may pick which laws to follow.⁷ A decision that the First Amendment trumps antidiscrimination laws when applied to secular businesses discriminating against LGBT couples would have a wide-reaching and devastating impact on the LGBT community, ushering in an era of the Gay Jim Crow.

I have previously addressed the legal and policy axes of the Antidiscrimination Question.⁸ Here, I address the theoretical axis, namely the rhetorical tactics being used by the Religious Right in its attempt to achieve what Professor Reva Siegel calls “preservation-through-transformation”—a dynamic through which a group that opposes civil rights reform modernizes its rhetoric after a civil rights victory in an attempt to maintain unequal status regimes.⁹ The Religious Right is employing two rhetorical tactics in its attempt to maintain a status regime in which LGBT people are second-class citizens—one descriptive and one legal.¹⁰ Notably, these maneuvers are *not* the primary arguments made by the Religious Right. Rather, the dynamic is working at a more nuanced

Focus on the Family, the Alliance Defending Freedom, the Becket Fund for Religious Liberty, the Liberty Counsel, the Freedom of Conscience Defense Fund, American Center for Law and Justice, United States Conference of Catholic Bishops, the Family Research Council, Concerned Women for America, the Faith & Freedom Coalition, the Council for National Policy, and the Liberty Institute. *See generally* FREDERICK CLARKSON, POLITICAL RESEARCH ASSOCS., WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT 10–12 (Jan. 2016), <http://www.politicalresearch.org/wp-content/uploads/2016/01/When-Exemption-is-the-Rule-PRA-Report.pdf>.

6. *See id.* (discussing the general strategy of the Religious Right in framing its policy goals in an attempt to permit exemption from antidiscrimination laws on facially permissible bases).

7. *See* Kyle C. Velte, *Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOK. L. REV. 1109 (2017).

8. *See id.*; *see also* Velte, *All Fall Down*, *supra* note 3 (discussing the role of the feminist movement in reforming marriage laws and the continuation of status difference in the legal system).

9. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996); *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2552 (2015).

10. *See* Velte, *All Fall Down*, *supra* note 3, at 8–9.

level, subordinate to the primary legal argument that the First Amendment's Free Exercise and Free Speech clauses render application of antidiscrimination law unconstitutional.¹¹ Because these maneuvers are embedded within and subordinate to the primary arguments, it is important to expose them so that LGBT-rights advocates can expressly argue against them and the Court can have the opportunity to expressly address them and break the preservation-through-transformation dynamic.

The descriptive tactic is a revamped narrative about the place and perception of the Religious Right in American law and culture. Where the Religious Right once used an attacking narrative that vilified and pathologized LGBT people to achieve its goal of perpetuating status hierarchies, today it has modernized the narrative. It invokes a victimhood narrative rather than an attacking one.¹² It contends that enforcing antidiscrimination laws to require Christian business owners to provide goods and services for a same-sex wedding is discrimination *against the Religious Right*.¹³

The Religious Right uses this descriptive tactic as a springboard to make its secondary and subordinate legal argument, the "status-conduct argument." This argument insists that what LGBT people label as prohibited "discrimination"—denying same-sex wedding-related goods and services—is *not* discrimination based on sexual orientation (status).¹⁴ Rather, the refusal is a rejection of *conduct*—the act of marrying.¹⁵ Thus, the argument concludes, there is no status-based (sexual orientation) discrimination, which is the only type of discrimination which antidiscrimination laws prohibit.¹⁶ As a result, these businesses should be free to refuse same-sex wedding goods and services.

At first blush, this descriptive and legal rhetoric might appear to be new and *sui generis* in the wake of *Obergefell*. However, closer examination of the status-conduct argument reveals it is merely an

11. See, e.g., Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* at 14–16, 137 S. Ct. 2290 (2017) (No. 16-111), 2017 WL 3913762, at *14–16.

12. See Velte, *All Fall Down*, *supra* note 3, at 8–9.

13. I have previously addressed this narrative shift in greater detail. See *id.*; Velte, *Fueling the Terrorist Fires*, *supra* note 7, at 1129–1139.

14. As used throughout this article, "status" is intended to signify the concept of sexual orientation as an identity—heterosexual, gay, lesbian, or bisexual.

15. See generally, e.g., NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2516 (describing the burgeoning requests for religious exemptions as "complicity-based conscience claims" and noting that such claims "focus on the conduct of others outside the faith community").

16. See *infra* Part I(d).

old trope in new clothing. The status-conduct argument was successfully used for many decades to justify status hierarchies in which LGBT people were subordinated. It was the primary basis of court decisions in the 1970s through the mid-2000s when LGBT-rights activists challenged sodomy laws.¹⁷ Often, courts relied on the status-conduct distinction to uphold such laws, reasoning that states could prohibit *conduct*;¹⁸ these decisions failed to consider the inextricable connection between (outlawed) same-sex intimate conduct and the status (identity) of being lesbian or gay.

By looking behind the surface-level First Amendment arguments and deconstructing the Religious Right's subordinate arguments, this essay demonstrates what is at stake in *Masterpiece*, namely an attempt to secure the preservation of status regimes in the face of civil rights victories through the transformation and modernization of the rhetoric utilized by the Religious Right.¹⁹ The Court should carefully consider the Religious Right's subordinate arguments and soundly reject them—based on its own precedent, which has addressed and rejected the status-conduct argument, based on accepted notions about what constitutes identity, and because it is an important opportunity to expose and break the preservation-through-transformation dynamic that works to deny LGBT Americans formal equality. The Religious Right should not get a second bite at the status-conduct apple simply by dressing it up as an orange. To allow the resuscitation of an old, factually incorrect, and legally untenable position would undermine the legitimacy of the Court and its LGBT-rights precedent and harm LGBT Americans.

17. See Velte, *Fueling the Terrorist Fires*, *supra* note 7, at 1131–1132, for a discussion of Religious Right opposition to the repeal of sodomy laws by citing conduct such as bestiality and the seduction of children as comparable actions.

18. *See id.* at 1138 n.166 (discussing the Supreme Court's recent holdings on the status-conduct distinction).

19. *See* Siegel, "Rule of Love", *supra* note 9, at 2119; NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2553 (noting that "religious actors can shift from speaking as a *majority* seeking to enforce traditional morality to *speaking as a minority* seeking exemptions from laws that offend traditional morality" and observing that when opponents of marriage equality "can no longer persuade by appeal to shared beliefs about the wrongs of same-sex relationships, they may instead appeal to beliefs about the importance of protecting religious pluralism, revising the secular rationale for the claim in a way that gives more direct and uninhibited expression to its religious logic.").

I. What's Old Is New Again: The Status-Conduct Argument in LGBT Civil Rights Litigation

The Religious Right has employed various arguments and narratives throughout its long anti-equality history.²⁰ Tracing its trajectory reveals the rhetoric and argument moving from (1) an anti-equality agenda based on outright moral disapproval of homosexuality, to (2) one that was based on an alleged distinction between the status of being LGBT and the conduct associated with it, but still cloaked in moral disapproval, to (3) one that no longer emphasized the status-conduct distinction but instead made an argument about protecting children, to (4) the present-day resurrection of a modernized status-conduct argument, this time with less emphasis on moral disapproval and more focus on characterizing Christian business owners as tolerant of LGBT people and seeking merely to decline participating in *conduct*—the act of same-sex marriage.

Each era builds upon the one before it. As LGBT equality made gains, the next era's argument opposing that equality took a different form designed to absorb the gains and freeze them where they were. This is Siegel's preservation-through-transformation dynamic in action.²¹ This dynamic is particularly notable in the Antidiscrimination Question cases, where we can trace a direct line from the status-conduct arguments of forty years ago to the modernized version of that argument in *Masterpiece*.²²

a. The Early Years (1950s Through 1970s): Expressly Homophobic Rhetoric, Expressly Homophobic Laws

As I have described in detail elsewhere,²³ the 1950s through the 1970s saw a virulently homophobic narrative emanating from the Religious Right.²⁴ It was an attacking narrative, grounded in Christianity, that characterized "homosexuals"²⁵ as prone to

20. The history of LGBT rights in American law and the history of LGBT organizing in American society is long and rich, stretching back to the 1900s. Professor Patricia Cain has provided a comprehensive summary of this history up to 1993. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). The intentionally narrow focus of this essay on just one small piece of that history is not meant to diminish the victories won along the way or minimize the sting of the other defeats suffered by the LGBT community.

21. Siegel, "Rule of Love", *supra* note 9; NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2552.

22. See Velte, *All Fall Down*, *supra* note 3.

23. See Velte, *Fueling the Terrorist Fires*, *supra* note 7, at 1129–1132.

24. *Id.*

25. "Homosexual" is a label "aggressively used by anti-gay extremists to suggest

pedophilia, sick, and child molesters.²⁶ Public policy, laws, and regulations tracked this derogatory rhetoric. For example, in the 1950s, the federal government fired five thousand government employees that it suspected or knew were LGBT.²⁷ In response to this “Lavender Scare,” Congress issued a report with language mirroring the Religious Right’s rhetoric: it asserted that LGBT people “engage in overt acts of perversion” and “lack the emotional stability of normal persons.”²⁸ The executive branch followed suit: in 1953, President Eisenhower issued an executive order banning LGBT people from federal employment, as well as from employment with federal government contractors because LGBT people—along with alcoholics and neurotics—presented a security risk.²⁹ The American Psychiatric Association fell in line with the Religious Right, Congress, and the President when in 1952 it included homosexuality as a “sociopathic personality disturbance” in the first-ever version of its diagnostic handbook, the Diagnostic and Statistical Manual (DSM).³⁰

Notwithstanding these hateful and discriminatory actions by the public and private sectors alike, or perhaps *because* of them, the modern-day LGBT-rights movement emerged as the 1950s became the 1960s. The riots at the Stonewall Inn sparked the modern LGBT rights movement.³¹ In response, the Religious Right

that gay people are somehow diseased or psychologically/emotionally disordered.” *GLAAD Media Reference Guide—Terms to Avoid*, GLAAD, <http://www.glaad.org/reference/offensive> (last accessed Nov. 21, 2017). Most LGBT people and their allies prefer the term “same-sex” or “LGBT.” *See id.*

26. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 47–48, 76–78 (1997).

27. *See* Susan Donaldson James, *Lavender Scare: U.S. Fired 5,000 Gays in 1953 Witch Hunt*, ABC NEWS (Mar. 5, 2012), <http://abcnews.go.com/Health/lavender-scare-us-fired-thousands-gays-infamous-chapter/story?id=15848947>.

28. *See* SUBCOMM. ON INVESTIGATION, S. COMM. ON EXPENDITURES IN THE EXEC. DEPT’S, *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT*, INTERIM REPORT, 81st Cong., S. Doc. No. 241, at 2, 4 (1950), *reprinted in Employment of Homosexuals and Other Sex Perverts in Government* (1950), FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html> (last accessed Nov. 21, 2017).

29. *See A History of Gay Rights in America*, CBS NEWS, <http://www.cbsnews.com/pictures/a-history-of-gay-rights-in-america/6/> (last accessed Nov. 21, 2017).

30. *See* AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS* 38–39 (1952), <http://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf>. The APA did not remove this language until 1973. *See Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> (last accessed Nov. 22, 2017).

31. *See This Day in History: 1969 The Stonewall Riot*, HISTORY.COM, <http://www.history.com/this-day-in-history/the-stonewall-riot> (last accessed Nov. 7, 2017); *see also* Jasmine Foo, “*In Sickness and in Health, Until Death Do Us Part*”:

redoubled its efforts to demonize LGBT Americans. For example, the 1960s saw the Religious Right repeatedly link the LGBT rights movement with a propensity to commit sexual crimes;³² it suggested that the movement planned to place LGBT teachers in schools to sexually molest or force their “lifestyle” on schoolchildren.³³

As the 1960s faded into the 1970s, the Religious Right became a potent political force.³⁴ Anita Bryant, a national celebrity, launched a campaign to repeal an antidiscrimination ordinance in Dade County, Florida, that prohibited sexual orientation discrimination.³⁵ A cornerstone of her “Save Our Children” campaign was an expressly homophobic claim that homosexuals intended to recruit children into a gay life and then molest them.³⁶ The campaign succeeded and reached beyond Dade County: two days after the vote repealing the county ordinance, Florida’s governor signed a law banning adoption by LGBT people.³⁷

Notably, the Religious Right’s rhetoric in this era did *not* focus on the status-conduct argument. Rather, anti-LGBT laws, regulations, and court decisions were grounded in an understanding of homosexuality as immoral, deviant, and unhealthy.³⁸ These anti-LGBT laws were buttressed by the fact that sodomy was a crime in all fifty states through the 1950s.³⁹

An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on Obergefell v. Hodges, 36 J. NAT’L ASS’N ADMIN. L. JUDGES 638, 642 (2016).

32. See Southern Poverty Law Center, *History of the Anti-Gay Movement Since 1977*, INTELLIGENCE REP., Spring 2005, at 117, <https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977> (noting that “gay people commit more serial murders, molest more children, and intentionally spread diseases.”).

33. HERMAN, *supra* note 26, at 48, 50. See Southern Poverty Law Center, *supra* note 32 (noting California State Sen. John Briggs stated: “One third of San Francisco teachers are homosexual,” and “I assume most of them are seducing young boys in toilets.”).

34. See HERMAN, *supra* note 26, at 50.

35. See Anita Bryant and the Save Our Children Campaign, GAY HISTORY (Aug. 13, 2009, 9:44 AM), <http://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html>.

36. *Id.*

37. Rebecca M. Solokar, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 FLA. INT’L U. L. REV. 473, 477–78 (2009). See generally FLA. STAT. § 63.042(3) (2006) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”), *invalidated by* Florida Dep’t of Children & Families v. X.X.G. (*In re* Matter of Adoption of X.X.G. and N.R.G.), 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

38. See Williams Institute, *Chapter 5: The Legacy of State Laws, Policies, and Practices, 1945–Present*, at 5-12–13, http://williamsinstitute.law.ucla.edu/wp-content/uploads/5_History.pdf (last accessed Nov. 15, 2017).

39. See *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, ACLU, <https://www.aclu.org/other/getting-rid-sodomy-laws->

The criminalization of homosexuality through sodomy laws worked in tandem with the Religious Right's homophobic rhetoric to stymie efforts to secure LGBT civil rights in areas such as employment and public accommodations.⁴⁰ The criminalization of sodomy bolstered the narrative that LGBT people were pathological, deviant, and criminals.

b. The Middle Years (1980 Through 1992): Sodomy Is Conduct Separate from Status

By the 1980s, several states had repealed their sodomy laws.⁴¹ In 1986, the Court handed the LGBT community a devastating loss when it upheld Georgia's sodomy law as a constitutional exercise of legislative power in *Bowers v. Hardwick*.⁴²

The merits and amici briefs in *Bowers* highlight the emergence of the status-conduct argument.⁴³ That argument, coupled with morality arguments, was the *primary* argument in the Religious Right's anti-equality campaign.⁴⁴ The State and its amici insisted that the conduct—"homosexual sodomy"—was the *only* issue,⁴⁵ and turned to morality as defined by Judeo-Christian values to resolve that issue, resulting in an erasure of LGBT identity (status). The merits brief argued that the court of appeals, which struck down the statute, took an "*activity* which for hundreds of years, if not thousands, has been uniformly condemned as immoral, and labeled that activity as a fundamental liberty protected by the Constitution."⁴⁶

Various amici reiterated the status-conduct argument. One framed the issue as whether "the *practice* of sodomy play[s] the same or a similar role to that served by monogamous marriage and family life."⁴⁷ Another concluded that the right sought by Michael

history-and-strategy-led-lawrence-decision (last accessed Nov. 30, 2017).

40. See Williams Institute, *supra* note 38, at 5-2.

41. See *Getting Rid of Sodomy Laws*, *supra* note 39.

42. 478 U.S. 186 (1986).

43. While there is pre-*Bowers* precedent that utilizes the status-conduct distinction, I focus on *Bowers* because it was the first U.S. Supreme Court case on this issue and thus had national impact that was felt for many years. See, e.g., Cain *supra* note 20, at 1568-1572 (reviewing pre-*Bowers* cases utilizing the status-conduct divide).

44. See Cain, *supra* note 20, at 1566.

45. Brief for Petitioner at 5, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939.

46. *Id.* at 19 (emphasis added).

47. Brief for the Rutherford Inst. and the Rutherford Insts. of Alabama et al. as Amici Curiae Supporting the Petitioner at 12-13, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667943 (emphasis added).

Hardwick—which it described solely in terms of conduct—was “flatly contrary to centuries of Anglo-American tradition”⁴⁸ and “an *activity* which has been traditionally condemned rather than considered a foundation of our society.”⁴⁹

Bowers adopted a rhetorical tone consistent with the briefs. It separated conduct from status in framing the issue: “whether the Federal Constitution confers a fundamental right upon homosexuals *to engage in sodomy* and hence invalidates the laws of the many States that still make such conduct illegal.”⁵⁰ It imbued its conduct-based analysis with morality, religion, and tradition, holding that no characterization of the right to privacy “would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.”⁵¹

Bowers had devastating consequences for LGBT people for the seventeen years that it remained binding precedent. Despite being a criminal law case, it was used in numerous civil cases to deny LGBT people protection from discrimination in housing,⁵² employment,⁵³ the military,⁵⁴ and parenting.⁵⁵ The argument went like this: if the state could legally criminalize the *conduct* of LGBT people, it was permissible to deny them *status-based* protections from discrimination in adoption, parenting, employment, and public accommodations.⁵⁶ If the state may criminalize the conduct, it had

48. Brief for the Catholic League of Religious and Civil Rights as Amicus Curiae Supporting the Petitioner at 2, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667940 (emphasis added).

49. *Id.* (emphasis added).

50. 478 U.S. 186, 190 (1986) (emphasis added).

51. *Id.* at 192.

52. See Cain, *supra* note 20, at 1588 (“So long as gay men and lesbians were presumed to engage in acts of criminal sodomy . . . landlords could argue that they should not be forced to rent to criminals.”) (citing *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (noting how homosexuals “suffer discrimination in housing, employment and other areas”)).

53. See Williams Institute, *supra* note 38, at 5-36 (noting LGBT people were often denied professional licenses based on the presumption that they would engage in criminal conduct).

54. In 1993, the Pentagon’s “don’t ask, don’t tell” policy took effect, under which members of the military would not be asked about their sexual orientation and would not be discharged simply because they were gay; however, engaging in same-sex sexual *conduct* would be grounds for discharge. Cain, *supra* note 20, at 1623 n.385. The policy “pushe[d] the [status-conduct] dichotomy further than any court . . .” *Id.* at 1623. It was repealed in 2011. See Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html?mcubz=3>.

55. See Cain, *supra* note 20, at 1624–1625 (noting a case in which the court denied a lesbian mother custody based on a presumption that she would engage in criminal conduct).

56. See Williams Institute, *supra* note 38, at 5-2.

no obligation to protect the status. *Bowers* thus promoted and expedited the Religious Right's anti-equality agenda, built on moral disapproval of LGBT people and a status-conduct divide;⁵⁷ in so doing, it created the "bedrock of legal discrimination against gay men and lesbians."⁵⁸

Seventeen years after it was decided, the Court overruled *Bowers* in *Lawrence v. Texas*.⁵⁹ The Court struck down a Texas statute that criminalized same-sex sodomy⁶⁰ and thus closed the book on one chapter of the LGBT civil rights movement. With the sodomy fight concluded, the marriage equality fight took center stage, as did a new rhetoric.

*c. The Marriage Equality Years (1993 Through 2015):
Children Take Center Stage*

The national marriage equality debate began in earnest in 1995, when Utah passed a law prohibiting same-sex marriage, followed by thirty other states and Congress.⁶¹ These so-called Defense of Marriage Acts (DOMA) defined marriage as between one man and one woman and permitted states to refuse to recognize same-sex marriages performed in other states.⁶²

Twelve years passed between the first state (Massachusetts) legalizing same-sex marriage and the Court declaring it a nationwide right in 2015.⁶³ The Religious Right actively fought

57. *Id.*

58. Cain, *supra* note 20, at 1587.

59. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

60. *Id.* at 562. As discussed in more detail below, the *Lawrence* Court collapsed the distinction—drawn in *Bowers*—between LGBT status and the conduct of same-sex sodomy.

61. See Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 862 (1998).

62. See Samuel Yaggy, *A Tale of Two Cases: Baehr v. Miike, Perry v. Schwarzenegger, and the Future of Same-Sex Marriage Litigation*, 10 CARDOZO PUB. L. POL'Y & ETHICS 217, 241 (2011). The Congressional debates on DOMA paralleled the "protect the children" rhetoric that the Religious Right used in litigation. See Butler, *supra* note 61, at 864. Members of Congress articulated a "responsible procreation" justification for DOMA—because LGBT couples cannot reproduce with each other, marriage is unnecessary. *Id.* at 867. Others harnessed a rhetoric about the health and welfare of children: "[C]hildren will suffer because family will lose its very essence" and "we know that to deliberately create motherless or fatherless families is not in the best interest of children" and "it is far better for a child to be raised by a mother and a father than by, say, two male homosexuals." *Id.* at 873–74.

63. See *Looking Back at the Legalization of Gay Marriage in Mass.*, BOSTON GLOBE (June 26, 2015), <https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html> (last accessed Jan. 4, 2017).

against marriage equality, primarily through litigation.⁶⁴ It adopted a very different rhetoric than the one it used in the early years and sodomy era. The status-conduct argument fell into disuse, replaced by a rhetoric centered on children, though still grounded in a narrative of morality and tradition.⁶⁵

The Religious Right's role in litigation is through non-profit legal organizations like the Alliance Defending Freedom ("ADF"),⁶⁶ Liberty Counsel,⁶⁷ Advocates for Faith & Freedom,⁶⁸ and the Becket Fund for Religious Liberty,⁶⁹ which provide counsel for anti-LGBT agendas.⁷⁰ If not lead counsel, attorneys trained by these organizations typically file an amicus brief in these cases.⁷¹ Their rhetoric in marriage equality litigation illustrates the movement away from the status-conduct argument toward an argument about children.

For example, attorneys with the ADF and Advocates for Faith & Freedom appeared as counsel for one of the parties in California's marriage equality case, *In re Marriage Cases*.⁷² Instead of focusing on the status-conduct divide, their brief emphasized procreation

64. See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 U.C.L.A. L. REV. 1235, 1308 (2010); see also Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1182 (2012).

65. Butler, *supra* note 61, at 864.

66. The Southern Poverty Law Center has designated the ADF a "hate group" because it has "supported the recriminalization of homosexuality in the U.S. . . . defended state-sanctioned sterilization of trans people abroad [and] has linked homosexuality to pedophilia ADF also works to develop 'religious liberty' legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion." See *Alliance Defending Freedom*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last accessed Oct. 30, 2017); see also Sarah Posner, *The Christian Legal Army Behind 'Masterpiece Cakeshop'*, THE NATION (Nov. 28, 2017), <https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/> (noting that the ADF "has mushroomed over the past few years into a Christian-right powerhouse" and that, since marriage equality, the ADF "has positioned itself at the very center of the efforts to curtail LGBTQ rights under the guise of religious freedom.").

67. See *About Liberty Counsel*, LIBERTY COUNSEL, <https://www.lc.org/about> (last accessed Nov. 15, 2017).

68. See *Our Mission*, ADVOCATES FOR FAITH & FREEDOM, <http://www.faith-freedom.com/about/our-mission/> (last accessed Nov. 21, 2017).

69. See *Our Mission*, BECKET, <http://www.becketlaw.org/about-us/mission> (last accessed Nov. 7, 2017).

70. See *Who We Are*, ALLIANCE DEFENDING FREEDOM, <https://www.adflegal.org/about-us> (last accessed Nov. 7, 2017).

71. See, e.g., Brief for The Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners, *Varnum v. Brien*, 763 N.W.2d 862 (Dist. Ct. Iowa 2007) (No. CV5968), 2007 WL 2809775.

72. 183 P.3d 384 (Cal. 2008).

and child-rearing. It described the State's interest in banning same-sex marriage as promoting "responsible procreation" to ensure that children conceived through heterosexual intercourse "are raised by both of their biological parents in one household—the optimum setting for child rearing."⁷³ They went further to allege that same-sex parents are detrimental to children.⁷⁴

The California Supreme Court rejected these arguments, holding that the California Constitution required the State to license same-sex marriages.⁷⁵ Soon after, anti-LGBT activists placed a proposition on the California ballot to amend the California Constitution to ban same-sex marriage.⁷⁶ Proposition 8 passed by a narrow margin in 2008 and was challenged in court.⁷⁷ Attorneys from the ADF represented one of the parties in that case, *Hollingsworth*.⁷⁸ They again argued about the health and moral safety of children, contending that Proposition 8 reflected that "the best situation for a child is to be raised by a married mother and father."⁷⁹

In *United States v. Windsor*, in which the Court struck down one provision of DOMA, Liberty Counsel filed an amicus brief in which it argued that the federal government had an interest in "fostering the optimal environment for procreation and the rearing of children."⁸⁰ The brief further asserted that same-sex parents harm children, contending that if the Court struck down the challenged DOMA provision, it would "be making a powerful statement that our government no longer believes children deserve mothers and fathers. In effect, it would be saying: 'Two fathers or two mothers are not only just as good as a mother and a father, they are just the same.'"⁸¹

73. Brief for Petitioner-Appellant at 31, Proposition 22 Legal Defense and Education Fund v. City of San Francisco, No. 503943, 2004 Cal. Super. LEXIS 1110 (No. A110651), 2005 WL 3955027 ("Every child raised in a same-sex home has been deliberately made to be motherless or fatherless [T]here is no generally applicable, generally accepted social science evidence that children raised by a same-sex couple do as well as children raised by their own biological parents.").

74. *Id.* at 31–32.

75. *In re Marriage Cases*, 183 P.3d at 385.

76. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

77. *Id.*

78. *Id.* at 2658.

79. Brief for Petitioners at 15, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 1143553 (internal citation omitted).

80. Brief for Liberty Counsel as Amicus Curiae Supporting Respondent (Merits Brief) at 3–4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390994.

81. *Id.* at 37–38. The brief also stated, "[b]y destroying the traditional definition of marriage, the family structure will be dramatically transformed. Many boys will

The Manhattan Declaration⁸² and the Family Research Council also filed amicus briefs, echoing the “protect the children” narrative exemplified by the Liberty Counsel’s brief.⁸³

The Religious Right continued its “protect the children” theme in *Obergefell*. The ADF filed an amicus brief arguing that the Court should reject same-sex marriage because married opposite-sex parents create the “optimal” environment in which to raise children.⁸⁴

When the Kentucky marriage equality case—later consolidated with *Obergefell*—was in the Sixth Circuit, the ADF filed an amicus brief arguing that “the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage.”⁸⁵ It went on to assert that children born via anonymous sperm donors—the method most commonly used by lesbian couples to conceive a child—“experience profound struggles with their origins and identities.”⁸⁶ Finally, the brief asserted that children would be harmed by being raised by same-sex couples because “gender-differentiated parenting is important for human development.”⁸⁷ It concluded that redefining marriage as a “genderless” institution would “pose a significant risk of negatively affecting children and society.”⁸⁸

grow up without any positive male influence in their lives to show them what it means to be a man, and many girls will grow up without any female influence to show them what it means to be a lady.” *Id.* at 38.

82. The Manhattan Declaration is a non-profit organization that seeks to “uphold Christian values respecting life, marriage and family, and religious liberty.” Brief for Manhattan Declaration as Amici Curiae Supporting Respondent (Merits Brief) at 1, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390995.

83. *See id.* at 9, 15 (arguing marriage equality would have “predictably deleterious consequences for children and society at large”); Brief for Family Research Council as Amici Curiae Supporting Respondent (Merits Brief) at 21, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 315235 (“[M]arriage exists for the primary purpose of ‘ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated.’”).

84. *See* Brief for State of Alabama as Amici Curiae Supporting Respondents at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 12-556, 14-562, 14-571 & 14-574), 2015 WL 1534344.

85. Brief of Individual Tennessee Legislators as Amici Curiae Supporting Defendants-Appellants at 16, *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (No. 14-5297), 2014 WL 2154833.

86. *Id.* at 17 (internal citations omitted).

87. *Id.* at 19.

88. *Id.* at 25–26. Identical arguments were made by ADF attorneys in its amicus brief in the Tennessee marriage equality case that was consolidated with *Obergefell*, as well as in the Sixth Circuit in *Obergefell* itself. *See* Brief for Individual Tennessee Legislators as Amici Curiae Supporting Defendants-Appellants, *Tanco v. Haslam* 135 S. Ct. 1040 (2015), (No. 14-5297), 2014 WL 2154833; Brief for Citizens for

The Foundation for Moral Law, an organization “dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws,”⁸⁹ filed an amicus brief in which it asserted that “statistics . . . show that homosexual parents, as compared to straight parents, were five times more likely to have harmed their children through neglect, seduction, emotional distress, or instability.”⁹⁰ It contended children raised by LGBT parents were “about 35% less likely to graduate from High School on time . . . ‘had poorer emotional health . . . had more learning problems . . . [and received more] therapy or special education’” than children of heterosexual parents.⁹¹

d. Post-Marriage Equality: Marriage Is Separate from LGBT Status

i. The Shifting Rhetoric

In the two years since *Obergefell*, the Religious Right has moved the battle to a quest for exemptions from nondiscrimination laws that prohibit sexual orientation discrimination. To set up its legal argument, it shifted both its rhetoric—positioning itself as a victim of secularism rather than its prior posturing as a savior of children and American morals and values⁹²—and its legal arguments—modernizing and retooling the status-conduct argument. These two moves work in tandem: the Religious Right contends that its members are the victims of secularism—positioned as bigots and social pariahs⁹³—and then leverages that narrative to assert that they actually *are not* bigots or pariahs because they are *not* discriminating based on customers’ sexual orientation. Instead, they are simply (and permissibly) making a choice not to approve *conduct*—the act of same-sex marriage.⁹⁴

Community Values as Amici Curiae Supporting Defendants-Appellants at 4, *Obergefell v. Himes*, No. 14-3057 (6th Cir. Jan. 16, 2014), 2014 WL 1653834.

89. Brief for Foundation for Moral Law as Amicus Curiae Supporting Respondents at 1, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (Nos. 14-556, 15-562, 14-571 & 14-574), 2015 WL 1519044.

90. *Id.* at 25.

91. *Id.* at 26 (alternation in original).

92. See NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2561 (describing, in the face of marriage equality, the narrative shift by the Religious Right “from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity”).

93. See *generally id.* at 2560 (noting that the Religious Right’s older morality-based arguments against marriage equality “now sound[] illegitimate—like ‘bigotry’”).

94. For example, the ADF argued that the application of Minnesota’s antidiscrimination law to a Christian couple who own a videography business—and

ii. New Rhetoric, Old Trope: The Religious Right’s
Modernization of the Status-Conduct Argument in
Antidiscrimination Question Cases

The new narrative has played out across the country as parties have litigated the Antidiscrimination Question. The pleadings reveal a modernized status-conduct argument, one being used to justify religious exemptions from antidiscrimination laws and thus preserves an anti-LGBT status regime. *Masterpiece* gives the Court its first opportunity to weigh in on the Antidiscrimination Question, and the briefs in it illustrate the subordinate use of the status-conduct argument to bolster the primary, First Amendment, arguments.

In its merits brief, the ADF asserts that its client, Jack Phillips, refused to make a wedding cake for a gay wedding “because of [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation.”⁹⁵ It argues that “Phillips did not categorically refuse to serve Craig and Mullins; he only declined to create a custom wedding cake that would celebrate their marriage.”⁹⁶

Amici in *Masterpiece* follow suit. Amicus Liberty Counsel argues that “Mr. Phillips declined to prepare a wedding cake . . . not because of [Craig and Mullins’] sexual orientation, but because of his religious beliefs that provide that marriage is only the union of one man and one woman.”⁹⁷ Amicus Christian Business Owners Supporting Religious Freedom asserted: “Petitioners do not, and have never, wished to discriminate against Respondents based on their sexual orientation.”⁹⁸ Amicus Indiana Family Institute contends that “[w]hat is at issue in same-sex marriage is *conduct*,

who do not want to provide services for same-sex weddings—would “deny [their] self-identity, dignity, liberty, intimate personal choices, and personhood” and would “strip[] them of their of [sic.] dignity, stigmatize[] their very identity as social pariah[s], and punish[] them.” Complaint at 15, *Telescope Media Group v. Lindsey* No. 0:16-CV-04094 (D. Minn. Dec. 6, 2016), 2016 WL 7157607; *see also* NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2560 (noting that in the marriage equality context, the Religious Right “draw[s] on concepts of complicity to seek exemptions for those who object to facilitating or sanctioning another’s sinful *conduct*”) (emphasis added).

95. Brief for Petitioner at 13, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16-111 (S. Ct. filed Aug. 31, 2017), 2017 WL 3913762.

96. *Id.* at 52–53.

97. Brief for Liberty Counsel as Amici Curiae Supporting Petitioner at 31, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16-111 (S. Ct. filed Sept. 7, 2017), 2017 WL 4005663.

98. Brief for Christian Business Owners as Amici Curiae Supporting Petitioners at 21, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16-111 (S. Ct. filed Sept. 7, 2017), 2017 WL 4005666.

yet the lower court decided that . . . refusing expressive services for a same-sex wedding is discrimination based on sexual orientation *status*,”⁹⁹ and “though this Court has found a right to engage in same-sex marriage, refusal to participate is not discrimination based on sexual orientation.”¹⁰⁰ In an amicus brief, the Becket Fund for Religious Liberty argued that “Phillips’ objection was to participating in and facilitating a wedding ceremony, as opposed to any concern about sexual orientation.”¹⁰¹

Masterpiece is just the latest of many cases in which the ADF resurrects a modernized status-conduct argument to achieve preservation-through-transformation.¹⁰²

As further explained below, the Religious Right is attempting to leverage the preservation-through-transformation dynamic: preserving a measure of status hierarchy by transforming its rhetoric to one that is presented as devoid of bias and homophobia

99. Brief for Indiana Family Institute, Inc. et al. as Amici Curiae Supporting Petitioners at 11, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16-111 (S. Ct. filed Aug. 31, 2017), 2017 WL 3913765 (emphasis in original).

100. *Id.* at 14.

101. Brief for the Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners at 25, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16-111 (S. Ct. filed Sept. 7, 2017), 2017 WL 4004526.

102. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (stating the views of a Christian photographer were that refusal to photograph a same-sex wedding was not sexual orientation discrimination but rather a declination to send a message about the *act* of same-sex marriage); *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (stating that a Christian florist refused to sell flowers for a same-sex wedding because of religious beliefs about marriage, rather than sexual orientation); Complaint at 8, *Brush & Nib Studio, LC v. City of Phoenix*, CV 2016-052251 (Ariz. Super. Ct. May 12, 2016) (illustrating arguments by Christian businesswomen that refusal of services for same-sex weddings is not sexual orientation discrimination but rather a declination to support the *act* of marriage); Respondent Hands On Originals’ Verified Statement of Position at 8–9, *Baker v. Hands on Originals, Inc.*, Lexington-Fayette Urban Cty. Human Rights Comm’n, HRC # 03-12-3135 (Apr. 19, 2012) (stating the views of a Christian business owner who argued refusal to print Gay Pride shirts was not “because of the prospective customer’s sexual orientation” but rather a rejection of the message that LGBT people should be “proud’ about engaging in homosexual behavior or same-sex relationships”); *Telescope Media Group v. Lindsey*, No. 16-4094 (JRT/LIB) (D. Minn. Dec. 6, 2016), 2017 WL 4179899 (showcasing arguments by Christian videographers that denial of services for a same-sex wedding is not discrimination based on sexual orientation); Brief for Petitioner, *Klein v. Oregon Bureau Of Labor and Industries*, Nos. 44-14, 45-14 (Or. Ct. App Jul. 17, 2017), 2016 WL 8465675 (detailing a baker’s argument that refusal to make a cake for a same-sex wedding was not based on sexual orientation but on the baker’s religious beliefs about same-sex weddings); Brief for Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amici Curiae Supporting Appellants at 6, *Washington v. Arlene’s Flowers*, 389 P.3d 543 (Wash. 2017) (No. 91615-2) (“She is happy to serve gay and lesbian customers . . . She is simply religiously opposed to participating in a same-sex marriage by providing one particular kind of service namely, designing and creating flower arrangements to celebrate a same-sex wedding.”).

and instead grounded in protecting Christian business owners through the revered principles of the First Amendment.

II. Siegel's Preservation-Through-Transformation Framework

The foregoing overview of the Religious Right's decades-long shifting rhetoric demonstrates that *Masterpiece* is merely the next step in an attempt to maintain a status hierarchy. This Section places the historical overview into a theoretical frame, namely Siegel's preservation-through-transformation frame.

a. Preservation-Through-Transformation and the Dynamism of Status Regimes

Status regimes are dynamic, not static.¹⁰³ Even after a civil rights victory as significant as marriage equality, the status of LGBT people and couples can—and will—continue to be contested, both normatively and legally. Interrogating the narrative of this contestation reveals that it is merely a modern expression of a historical inequity. Siegel posits that while civil rights efforts do in fact create some status changes, the extent of such change is limited.¹⁰⁴ Backlash to the victory, embodied in a deformalized and modernized narrative, works to maintain status hierarchies: “When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend.”¹⁰⁵ As a result, civil rights victories work to “breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom [T]his kind of change in the rules and rhetoric of a status regime [is] ‘preservation through transformation’”¹⁰⁶

The transformation of anti-equality rhetoric results from modernization, which comes about through “diverse political forces” and “evolving social mores.”¹⁰⁷ More specifically, status regimes are modernized when “a legal system enforces social stratification by

103. Siegel, *“Rule of Love”*, *supra* note 9, at 2175.

104. *Id.* at 2119.

105. *Id.*

106. *Id.*

107. *Id.* at 2175.

means that change over time.”¹⁰⁸ The modernization is necessary as a response to “civil rights agitation”—protest that causes the legitimacy of a status regime to be questioned and puts pressure on legislators and “other legal elites” to give up status privileges.¹⁰⁹ In the course of relinquishing some status privileges, these “legal elites” will also defend them, but will need to find new reasons to do so.¹¹⁰ The dynamic of “ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric.”¹¹¹ Thus, “over time, status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom.”¹¹² Put simply, a status regime “chang[es] shape as it is contested.”¹¹³

Those seeking to reconstitute the now-discredited status regime must “reform the contested body of law sufficiently so that the regime that emerges from reform can be differentiated from its contested predecessor.”¹¹⁴ Moreover, for the emerging status regime to restore its legitimacy, it must distribute social goods in ways that differentiate it from the previously-contested regime.¹¹⁵ This is the dynamic of preservation-through-transformation.¹¹⁶

Siegel suggests that the modernization of status hierarchies is the price we must pay for civil rights victories.¹¹⁷ Below, I urge the

108. *Id.* at 2178.

109. *Id.* at 2179.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1280.

116. The preservation-through-transformation dynamic runs both ways. *Id.* at 2185. The rhetoric of a civil rights movement may be coopted by anti-equality advocates to modernize and thus preserve status regimes. *Id.* In the context of race, the Civil Rights Movement argued for colorblindness in the law; today, the rhetoric of colorblindness has been coopted to “supply ‘legitimate,’ ‘nondiscriminatory’ reasons for opposition to affirmative action.” *Id.* at 2185. The cooptation of civil rights rhetoric thus provides justification for anti-equality advocates’ opposition to true racial equality. *Id.* at 2186–87 (noting anti-equality advocates “justify their opposition in terms that can be differentiated from a naked interest in preserving race and gender stratification”).

117. *Id.* at 2179 (“[C]ivil rights reform is an important engine of social change. Yet civil rights reform does not simply abolish a status regime; in important respects, it modernizes the rules and rhetoric through which status relations are enforced and justified.”). It is important to note, however, that the modernization of a status regime “may still bring about perceptible, even significant, changes in status relations.” *Id.* at 2184. It is beyond dispute that the marriage equality movement, culminating in *Obergefell*, brought about significant change in then-existing status regimes. The legal rights, benefits, and obligations to which LGBT people gained access cannot be understated, nor can the dignitary benefits of the decision for LGBT

Court to prove Siegel wrong in the instance of the Antidiscrimination Question by exposing and rejecting the Religious Right's attempt at preservation-through-transformation.

b. Masterpiece and the Evolution of Anti-LGBT Status Regimes

Through its modernization of the status-conduct argument, the Religious Right attempts to chip away at *Obergefell* and thus maintain a status regime that marginalizes and demeans LGBT people.¹¹⁸ As previously noted, the sodomy era saw the first iteration of the status-conduct argument—as one framed in a rhetoric of pathology, immorality, and criminality¹¹⁹ and wielded assertively to justify widespread discrimination against LGBT Americans.¹²⁰ Characterizing LGBT people as criminals, predators, and mentally ill was an accepted and normalized rhetorical position that resulted in legal regimes that treated them as such.¹²¹

As LGBT Americans came out of the closet, organized, and agitated, they displayed a narrative that they were law-abiding, tax-paying, mentally healthy, family-oriented people with inherent human worth and dignity, thus contesting the Religious Right's sodomy era rhetoric. This rendered the status-conduct argument, cloaked as it was in a deeply negative rhetoric about LGBT people, into a “controversial, social idiom”¹²² that could no longer survive. In fact, it was rejected—at least in the sodomy context—in *Lawrence v. Texas*, where the Court held that LGBT people “are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”¹²³

people. See Kyle C. Velte, *Obergefell's Expressive Promise*, 6 HOUSTON L. REV.: OFF THE RECORD 157 (2015).

118. As NeJaime and Siegel note, “social conservatives long used arguments from traditional morality to oppose recognizing same-sex relationships. But these arguments about lesbians and gay men now sound illegitimate—like ‘bigotry.’ In response, advocates have changed the secular rationale for their position in ways that give increasingly uninhibited expression to its religious logic . . . [T]hey argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.” NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2559, 2561.

119. See *supra* Part I(b).

120. *Id.*

121. *Id.*

122. Siegel, “Rule of Love”, *supra* note 9, at 2119.

123. 539 U.S. 558, 578.

After *Lawrence* rendered its status-conduct argument controversial, and arguably dead, the Religious Right was forced to rationalize its continued opposition in a rhetoric that could be “differentiated from a naked interest in preserving”¹²⁴ the anti-LGBT status regime. It did so by shifting its narrative to one of “protecting children” during the marriage equality years.¹²⁵ It lost that fight in *Obergefell*.

Today, the Religious Right must again modernize its justifications for preserving a sexual orientation status regime and do so in a way that can be “differentiated from a naked interest in preserving”¹²⁶ that stratification. Although several justifications might suffice, “claiming fidelity to principles of equality would seem to provide an unimpeachable reason”¹²⁷ for opposing true formal equality for LGBT people. In other words, if the modernized rhetoric is framed within a righteous reason, one grounded in uncontested American values and principles, it will come across not as trying to dismantle civil rights gains but as a neutral reaction to those gains.

In *Masterpiece*, the Religious Right makes a valiant attempt to present a righteous reason to limit the reach of *Obergefell*: it modernizes its rhetoric into one grounded in American values and legal principles as revered as the principle of equality—religious freedom and free expression. Using these “unimpeachable reason[s],” the Religious Right has modernized the status-conduct argument; this is the “modern expression[] of [a] putatively discredited doctrine.”¹²⁸ This modernization of the status-conduct rhetoric proves Siegel’s point that “[s]tatus talk is mutable, and remarkably adaptable: it will evolve as the rule structure of a status regime evolves.”¹²⁹

In sum, by resurrecting and modernizing the status-conduct argument in the context of “unimpeachable reason[ing],”¹³⁰ the Religious Right is attempting to operationalize the preservation-through-transformation dynamic.¹³¹

124. Siegel, “*Rule of Love*,” *supra* note 9, at 2186.

125. *See supra* Part I(c).

126. Siegel, “*Rule of Love*,” *supra* note 9, at 2186.

127. *Id.* at 2187.

128. *Id.* at 2175, 2187.

129. *Id.* at 2175.

130. *Id.* at 2187.

131. *See, e.g.,* NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2565 (“With growing acceptance of the contested conduct, appeals to religious liberty offer a more persuasive secular ground on which to base persisting objections to the conduct. The goal may be not only to restrict the legal recognition of same-sex marriage, but also

III. Breaking Through the Preservation-Through-Transformation Dynamic

In *Masterpiece*, the Court should reject the Religious Right's subordinate status-conduct argument for three reasons: (a) legal precedent directs that outcome, (b) well-established concepts of identity undermine the notion that it is possible to separate conduct from sexual orientation, and (c) the necessity of breaking the preservation-through-transformation dynamic to achieve meaningful formal equality for LGBT Americans.

*a. The Doctrinal Basis for Rejecting the Status-Conduct Distinction*¹³²

There have been seven significant LGBT-rights cases decided by the Court since *Bowers*.¹³³ Five of these—*Romer*, *Lawrence*, *Christian Legal Society* (“CLS”), *Windsor*, and *Obergefell*—provide a strong, if not dispositive, precedent to reject outright the Religious Right's modernized status-conduct argument.

Romer and *Lawrence*, considered together, reveal the Court's belief that LGBT status cannot be separated from LGBT conduct when analyzing antidiscrimination laws under the Constitution. In *Romer*, the Court struck down an amendment to the Colorado Constitution, known as Amendment 2, which repealed all local and municipal antidiscrimination laws that prohibited discrimination based on sexual orientation and prohibited the future passage of any such laws.¹³⁴ The Court held that Amendment 2 violated the Equal Protection Clause because it was grounded in anti-LGBT animus, as evidenced by the fact that it “identifies persons by a single trait and then denies them protection across the board.”¹³⁵

to forestall or restrict an antidiscrimination regime that includes sexual orientation. In states with antidiscrimination laws that cover sexual orientation, religious objections to same-sex marriage have provided a basis on which to seek the expansion of already-existing exemptions in the laws.”)

132. For deeper discussions of this issue, see, e.g., Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and the Law's Social Meaning*, 97 VA. L. REV. 1267 (2011); Diane S. Meier, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. C.R. & SOC. JUST. 147 (2008); Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 139–46 (2013).

133. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *CLS v. Martinez*, 561 U.S. 661 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Romer v. Evans*, 517 U.S. 620 (1995); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995).

134. 517 U.S. at 624–26.

135. *Id.* at 633.

Thus, *Romer* held that laws which classify on the basis of sexual orientation *as a status* may be unconstitutional. In *Lawrence*, the Court ended the sodomy era when it declared Texas's sodomy law to be unconstitutional—holding that LGBT *conduct* is entitled to constitutional protection because the Due Process Clause gives LGBT people “the full right to engage in their conduct without intervention of the government.”¹³⁶ The *Lawrence* Court spoke openly about the connection between criminalizing LGBT conduct and the dignitary and legal harms to LGBT people in all spheres of life.¹³⁷ Taken together, *Romer* and *Lawrence* establish that status and conduct cannot be disentangled when analyzing laws that classify based on sexual orientation.¹³⁸

CLS involved Hastings College of Law's antidiscrimination policy.¹³⁹ The policy was invoked to deny the Christian Legal Society (“CLS”) official recognition as a student group, based on CLS's requirement that students seeking membership adopt a statement of faith that required any LGBT students seeking membership to disavow their “unrepentant homosexual conduct.”¹⁴⁰ The Court upheld the application of the antidiscrimination policy to CLS, uniting its holdings in *Romer* and *Lawrence* to expressly recognize that LGBT status and conduct cannot be separated when considering antidiscrimination policies, laws, and the Constitution.¹⁴¹ CLS argued that Hastings should allow CLS to exclude students based on the potential members' beliefs but not permit such exclusion based on status.¹⁴² Specifically, it asserted that it did not exclude potential members “because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’”¹⁴³ The Court rejected this and, citing *Lawrence*, addressed the status-conduct argument: “Our decisions have declined to distinguish between status and conduct in this context.”¹⁴⁴

136. 539 U.S. at 578.

137. *Id.* at 575.

138. Max Kanin, *Christian Legal Society v. Martinez: How an Obscure First Amendment Case Inadvertently and Unexpectedly Created a Significant Fourteenth Amendment Advance for LGBT Rights Advocates*, 19 AM. U. J. GENDER & SOC. POL'Y & L. 1317, 1324–25 (2011).

139. *CLS v. Martinez*, 561 U.S. 661, 671 (2010) (noting that the policy is formally called its “Nondiscrimination Policy”).

140. *Id.* at 672.

141. Kanin, *supra* note 134, at 1324–1326.

142. *CLS*, 561 U.S. at 688.

143. *Id.* at 689.

144. *Id.*

In *Windsor*, the Court acknowledged the link between LGBT status and the conduct of marriage. Specifically, it recognized the important social and legal connection between sexual orientation and same-sex marriage:

Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” . . . For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.¹⁴⁵

The Court held that DOMA’s exclusion of state same-sex marriages from federal recognition imposed a “disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by . . . the States” and had “the purpose and effect of disapproval of that class”—implicitly recognizing that LGBT status (sexual orientation) is fundamentally connected with conduct, such as same-sex marriage, that relates to that status.¹⁴⁶ It more explicitly wed status and conduct when it cited *Lawrence* for the proposition that “DOMA undermines both the public and private significance of state-sanctioned same-sex marriages” because it “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition” and “places same-sex couples in an unstable position of being in a second-tier marriage.”¹⁴⁷ Finally, the Court again tied LGBT status to the conduct of same-sex marriage when it noted that “[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out *a class of persons* deemed by a State entitled to recognition and protection to enhance their own liberty.”¹⁴⁸

Most recently, *Obergefell* made clear that the Court believes LGBT status and conduct are so interconnected that the essence of LGBT identity encompasses conduct.¹⁴⁹ For example, speaking of the sodomy era, the Court noted that for many years, LGBT Americans could not embrace the entirety of their identity (status)

145. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Lawrence*, 539 U.S. at 567).

146. *Id.* at 2693.

147. *Id.* at 2694.

148. *Id.* at 2695 (emphasis added).

149. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

because sodomy was criminalized.¹⁵⁰ It noted that “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choice[.]”¹⁵¹ suggesting that the conduct of getting married is intimately linked to one’s autonomy as an LGBT individual (status). The Court quoted *Lawrence* for the proposition that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring” and went on to explain that *Lawrence* did not go far enough: “[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”¹⁵² Finally, the Court’s connection of LGBT “personhood” to the act of marrying makes explicit the Court’s disapproval of the status-conduct argument: “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”¹⁵³

The majority of the lower courts that have considered the Antidiscrimination Question have agreed that the Court’s LGBT jurisprudence directs that sexual orientation as a status and the conduct of marriage simply cannot be separated from each other.¹⁵⁴ The Court should confirm these lower court holdings and expressly reject the status-conduct argument once and for all.

b. The Social-Identity Basis for Rejecting the Status-Conduct Distinction

In addition to legal precedent, concepts of identity also compel the rejection of the modernized status-conduct argument. Professor

150. *Id.* at 2596.

151. *Id.*

152. *Id.* at 2600.

153. *Id.* at 2602.

154. *See, e.g.,* *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (holding it is impossible and inappropriate “to distinguish between an individual’s status of being homosexual and his or her conduct in openly committing to a person of the same sex”); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281 (Colo. App. 2015) (“[W]hen the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status,” the status-conduct distinction becomes “one without a difference.”); *Barrett v. Fontbonne Acad.*, No. NOCV2014–751 (Mass. Super. Ct. Dec. 16, 2015), 2015 WL 9682042, at 2 (unpublished decision) (denying employment on the basis that the individual was in a same-sex marriage constituted sexual orientation discrimination).

Douglas NeJaime argues that the Antidiscrimination Question goes well beyond same-sex marriage, implicating a much larger sexual orientation-based identity claim.¹⁵⁵ He posits that the fact that LGBT people “enact their sexual orientation through same-sex relationships”¹⁵⁶ spurs the Religious Right to seek exemptions from antidiscrimination law, and same-sex marriage simply provides the most logical vehicle through which to challenge that enactment of identity.¹⁵⁷ To achieve a sexual orientation antidiscrimination regime that is meaningful and robust, he argues, we must include a relationship-based understanding of LGBT identity.¹⁵⁸

NeJaime contends that the essence of sexual orientation is relational and grounded in conduct.¹⁵⁹ Performing sexual orientation by engaging in a relationship is a highly salient characteristic of one’s sexual orientation.¹⁶⁰ In his theorizing about “covering,” Professor Kenji Yoshino posits that sexual orientation is performative, arguing that “homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status.”¹⁶¹

When LGBT people appear single, others can avoid visualizing the same-sex sexual conduct that largely defines that status of being LGBT.¹⁶² Thus, conduct *is constitutive of* LGBT status; the two cannot be separated without stripping LGBT status (identity) of its core component.¹⁶³ While it is true that “an individual’s sexual interests are internal,”¹⁶⁴ those interests are directed externally toward another person, thus rendering sexual orientation inherently relational;¹⁶⁵ relationships are conduct-based.¹⁶⁶ As

155. See NeJaime, *Marriage Inequality*, *supra* note 64, at 1176.

156. *Id.* at 1175.

157. *Id.* at 1175–76.

158. *Id.* at 1176.

159. *Id.* at 1196.

160. *Id.*

161. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 778 (2002).

162. *Id.* at 847.

163. See Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 60–61 (2003).

164. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1286 (2006).

165. *Id.*

166. See NeJaime, *Marriage Inequality*, *supra* note 64, at 1198; see also Janet E. Halley, “Like Race” Arguments, in WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY 41, 41 (Judith Butler et al. eds., 2000) (“[I]t takes two women, or at least one woman and the imagination of another, to make a lesbian.”); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1650 (1993) (“[A]most definitionally, coupling or the desire to couple must figure in same-

NeJaime observes, “[e]ntering, performing, and publicly showing a same-sex relationship serves as a central way of embracing and maintaining one’s lesbian or gay identity.”¹⁶⁷

Conceptualizing LGBT identity (status) in this way underscores the importance of collapsing the status-conduct divide in antidiscrimination law. Accepting that LGBT status and conduct can be separated would mean dissolving the core of what it means to be LGBT, rendering antidiscrimination protections based only on “status” useless. The Court should embrace this conduct-constitutive conception of LGBT status (identity) as it considers the status-conduct arguments being asserted by the Religious Right in *Masterpiece*.

c. The Court Should Seize the Opportunity to Break the Preservation-Through-Transformation Dynamic

While the Court has solid doctrinal and identity-theory grounds on which to reject the status-conduct arguments presented in *Masterpiece*, the most important reason for it to do so is to break the preservation-through-transformation dynamic. Disrupting this cycle would be a breakthrough in formal equality for LGBT Americans.

If the Court fails to expose and reject this attempt at preservation-through-transformation, it will cooperate in naturalizing the Religious Right’s modernized status regime as “just and reasonable”¹⁶⁸ by giving credence to (and placing the imprimatur of the Court upon) the subtextual message, embodied in the modernized status-conduct argument, that such argument is “formally and substantively distinguishable from its contested predecessor.”¹⁶⁹ More specifically, the Court would be complicit in the Religious Right’s effort to justify its modernized status regime by accepting the notion that the justificatory social values embodied in the current status-conduct argument are distinct from the “orthodox, hierarchy-based norms that characterized its predecessor”¹⁷⁰ (sodomy and expressly homophobic law) “as a regime of mastery.”¹⁷¹ If the Court does not expose and reject the Religious Right’s modernized status-conduct argument, it will participate in the enhancement of “the legal system’s capacity to

sex orientation.”).

167. NeJaime, *Marriage Inequality*, *supra* note 64, at 1199.

168. Siegel, “*Rule of Love*”, *supra* note 9, at 2184.

169. *Id.*

170. *Id.*

171. *Id.*

legitimate residual social inequalities among status-differentiated groups.”¹⁷²

The Court simply cannot take part in this effort to re-legitimize and reestablish an anti-LGBT regime such that it is “once again . . . justified as ‘reasonable.’”¹⁷³ Doing so would allow our legal system to continue to enforce a social stratification that it has previously rejected,¹⁷⁴ but by “a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups, although not necessarily to the same degree.”¹⁷⁵ It will be formally distinguishable because it will be grounded in the Free Exercise and Free Speech (rather than express animus and outright homophobia), which on their face appear neutral and non-discriminatory and which speak to core American values. The Court simply cannot permit the Religious Right to harness and co-opt the First Amendment to modernize unequal status regimes to permit discrimination against LGBT Americans. The harm that will result would be the denial of full equality for LGBT people and, thus, the creation of second-class citizenship for LGBT Americans.

To hold otherwise would cast doubt on the strength and legitimacy of the Court’s precedent. If groups that disagree with the Court’s decision are permitted to undermine established precedent by merely updating previously-rejected arguments, the Court appears weak at best. At worst, the Court might appear incompetent, inconsistent, or even hypocritical as it would be an active participant in sustaining status hierarchies in the face of (and in contradiction to) its own precedent.

Moreover, the Court’s express rejection of preservation-through-transformation in *Masterpiece* will have a positive ripple effect in future civil rights cases. There is a power in naming and claiming: once the Court exposes and rejects this dynamic as an

172. *Id.*

173. *Id.* at 2180.

174. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1995).

175. Siegel, “*Rule of Love*”, *supra* note 9, at 2180; see also NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2563 (“[I]t is important to recognize that accommodating religious objections may also enable the conflict to persist in a new, revitalized form. The claim to exemption may not be a simple claim to withdraw, conceding a new consensus in favor of same-sex marriage while preserving space for faith groups to maintain their religious views. Instead, . . . complicity-based conscience claims can function as part of a long-term effort to contest society-wide norms.”).

equality-eroding, hierarchy-preserving mechanism, future civil rights victories will have the potential for true transformation.

Conclusion

History's lessons will be illustrated in their most salient and pronounced form by recognizing recurring patterns—like the modernization of the status-conduct argument in *Masterpiece*. The Court should heed the lessons of history, the lessons of precedent, and the reality of human identity and reject the status-conduct argument once and for all.

Siegel notes that the judges who participate in perpetuation of the preservation-through-transformation dynamic do not do so consciously or with nefarious intent.¹⁷⁶ She goes so far as to presume that they are acting in good faith.¹⁷⁷ As such, operation of the preservation-through-transformation dynamic tracks the operation of implicit bias—the phenomenon by which “people who genuinely believe that they are behaving equitably [] unintentionally act in ways that are not.”¹⁷⁸ Both phenomena must be explained, revealed, contextualized, and denounced so that courts can break the cycles of discrimination that such phenomena cause.¹⁷⁹

Siegel has done the work of explaining, revealing, and denouncing the preservation-through-transformation dynamic in both the domestic violence, race discrimination, and pre-*Obergefell* marriage contexts.¹⁸⁰ Here, I have attempted to take that explanation, and to reveal and renounce its use in *Masterpiece* and other Antidiscrimination Question cases to continue a status regime that marginalizes LGBT people. It is now up to the Court to seize on the opportunity to do so.

176. See Siegel, “*Rule of Love*”, *supra* note 9, at 2180.

177. *Id.* In contrast, neither she nor NeJaime contend that the Religious Right is acting unintentionally or in good faith in its attempt to modernize status hierarchies, noting that “since the era of Ronald Reagan’s election . . . a conservative, cross-denominational coalition of Christians has pursued self-consciously traditional and conservative ends” and that “Christians mobilize across religious denominations to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality.” NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2544, 2548.

178. Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. CIV. R. L.J. 1, 7 (2015).

179. *Id.* at 12–14.

180. See Siegel, “*Rule of Love*”, note 9, at 2121, 2134; NeJaime & Siegel, *Conscience Wars*, *supra* note 9, at 2558–2565.