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# THE GEOGRAPHY OF BIGOTRY

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\* Frederick I. and Grace Stokes Professor of Law, New York University School of Law. This Essay reflects upon and is inspired by themes surfaced in Linda McClain's excellent book, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*. I am grateful to Linda for inviting me to participate in this broader discussion of her book and these issues. My fellow symposium participants, John Corvino, James Fleming, Imer Flores, Stephen Macedo, and Doug NeJaime, were wonderful interlocutors. Caitlin Millat provided excellent research assistance. Dante Spurlock and the staff of the *Boston University Law Review* offered terrific editorial assistance. All mistakes are my own.

## INTRODUCTION

In April 2009, *New York Times* columnist Frank Rich penned an essay entitled *The Bigots' Last Hurrah*,<sup>1</sup> which considered the contours of the same-sex marriage debate. The essay focused on *Gathering Storm*,<sup>2</sup> a commercial created and publicized by the National Organization for Marriage. The commercial made the case that the issue of same-sex marriage went “far beyond same-sex couples.”<sup>3</sup> Indeed, the decision to recognize same-sex marriage would “bring the issue into [the] li[ves]” of ordinary citizens who, for various reasons, objected to same-sex marriage.<sup>4</sup> To this end, the commercial featured statements from, among others, a California doctor “who must choose between [her] faith and [her] job,” a member of a New Jersey church group “punished . . . because [he] can’t support same-sex marriage,” and a Massachusetts parent “helplessly watching public schools teach [her] son that gay marriage is okay.”<sup>5</sup> The underlying point was clear; those pushing same-sex marriage are “not content with same-sex couples living as they wish.”<sup>6</sup> Instead, they wish to change the way others live by requiring everyone to accept—at least as a matter of legal recognition—same-sex marriages.<sup>7</sup>

For Rich, *Gathering Storm* was little more than an “[i]nternet camp classic,” right down to its menacing music and “cheesy” effects.<sup>8</sup> As he noted, the commercial inspired “countless homemade parodies,”<sup>9</sup> including one from comedian Stephen Colbert in which “lightning from ‘the homo storm’ strikes an Arkansas teacher, turning him gay.”<sup>10</sup> Far from reflecting widespread sentiment, *Gathering Storm* was instead a rear-guard effort to shore up support for “traditional” marriage in the face of growing public acceptance of same-sex couples and same-sex intimacy. As Rich put it, *Gathering Storm* was a “historic turning point in the demise of America’s anti-gay movement.”<sup>11</sup>

*Gathering Storm* aired in the throes of the same-sex marriage debate. In May 2008, the California Supreme Court issued a decision holding that the exclusion of same-sex couples from civil marriage violated various provisions of the state

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<sup>1</sup> See Frank Rich, Opinion, *The Bigots' Last Hurrah*, N.Y. TIMES, Apr. 18, 2009, at WK10.

<sup>2</sup> Nat'l Org. for Marriage, *Gathering Storm*, YOUTUBE (Feb. 28, 2011), <https://www.youtube.com/watch?v=OOoXRBzHgds>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *id.*

<sup>8</sup> Rich, *supra* note 1, at WK10.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see also *The Colbert Report: The Colbert Coalition's Anti-Gay Marriage Ad* (Comedy Central television broadcast Apr. 16, 2009), <http://www.cc.com/video-clips/ippmoa/the-colbert-report-the-colbert-coalition-s-anti-gay-marriage-ad>.

<sup>11</sup> Rich, *supra* note 1, at WK10.

constitution.<sup>12</sup> The following November, just as Barack Obama was elected the nation's first African American president, a slim majority of California voters passed Proposition 8, a ballot initiative that amended the California Constitution to prohibit legal recognition of same-sex marriages, effectively overruling the high court's decision.<sup>13</sup> As I noted in an essay written in the wake of the vote, the campaign in favor of Proposition 8 struck notes that were eerily similar to those in *Gathering Storm*, including concerns about religious liberty; parental autonomy to inculcate traditional family values; and the desire to live as one wished, free of state imposition of particular values.<sup>14</sup> If California was any indication, *Gathering Storm* found a receptive audience.

Rich's essay took note of Proposition 8 but ultimately continued to press a more optimistic outlook. Proposition 8 and *Gathering Storm* were dark moments, but the broader political and social landscape suggested growing support for legal recognition of same-sex couples, whether through marriage or civil unions.<sup>15</sup> Support for same-sex marriage and lesbian, gay, bisexual, transgender, and queer ("LGBTQ") rights more generally was especially pronounced among younger voters, and it seemed likely that same-sex marriage would become a reality across the country "at some point in the 2010s."<sup>16</sup> Indeed, Rich speculated that "[a]s the case against equal rights for gay families gets harder and harder to argue on any nonreligious or legal grounds, no wonder so many conservatives are dropping the cause."<sup>17</sup> As examples of this phenomenon, Rich cited a range of rock-ribbed Republicans, most of whom

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<sup>12</sup> *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) ("Accordingly, insofar as the provisions of sections 300 and 308.5 draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are unconstitutional.").

<sup>13</sup> See DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), [https://elections.cdn.sos.ca.gov/sov/2008-general/sov\\_complete.pdf](https://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf) [<https://perma.cc/7HKZ-XJKF>] (showing that constitutional amendment passed with 52.30% of vote); League of Women Voters of Cal. Educ. Fund, *Proposition 8 Eliminates Right of Same-Sex Couples to Marry*, SMART VOTER (Jan. 24, 2009), <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/> [<https://perma.cc/42PN-V3FM>] (same).

<sup>14</sup> See generally Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 366-90 (2009).

<sup>15</sup> Rich, *supra* note 1, at WK10 ("As the polls attest, the majority of Americans who support civil unions for gay couples has been steadily growing.").

<sup>16</sup> *Id.* ("Younger voters are fine with marriage. Generational changeover will seal the deal. Crunching all the numbers, the poll maven Nate Silver sees same-sex marriage achieving majority support 'at some point in the 2010s.'" (quoting Nate Silver, *Fact and Fiction on Gay Marriage Polling*, FIVETHIRTYEIGHT (Apr. 9, 2009, 11:11 AM), <https://fivethirtyeight.com/features/gay-marriage-by-numbers/> [<https://perma.cc/UVL2-6697>])).

<sup>17</sup> *Id.*

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appeared relatively sanguine about the issue of same-sex marriage and, indeed, appeared to endorse the prospect of equality for LGBTQ persons.<sup>18</sup>

In many ways, Rich's essay was prescient. The Supreme Court would not decide *Obergefell v. Hodges*<sup>19</sup>—legalizing same-sex marriage throughout the United States—for another six years, yet public opinion seemed to be shifting on the issue of same-sex marriage and LGBTQ rights.

And in mirroring the religious rights and parental autonomy themes voiced in *Gathering Storm*, the campaign in favor of Proposition 8 reflected this changing political and social climate—a climate in which it would have been considered distasteful and indeed bigoted to object to same-sex marriage in terms that publicly expressed homophobia or antigay animus. As I observed, the Yes on 8 campaign was notable in that even as it sought to rescind marriage rights, “it did not express public[] distaste for gays and lesbians” as earlier anti-LGBT rights campaigns had done.<sup>20</sup> Instead, the Yes on 8 campaign's objections to same-sex marriage were framed in terms of *other* rights, specifically parental autonomy and religious liberty.<sup>21</sup> The proponents of Proposition 8 did not oppose LGBTQ people or the prospect of marriage equality per se; as they explained, they sought only to vindicate their own rights as parents and persons of faith.<sup>22</sup> In this regard, the proponents of Proposition 8 “circled the wagons and attempted to shore up protections for the family and the home—*private* spaces where dissenting views may be freely espoused.”<sup>23</sup>

When I made this argument, I understood the retreat to the private sphere to be a net positive. As I explained, as public support for LGBTQ rights mounted, those opposed to LGBTQ equality were literally forced to abandon the public commons in favor of the privacy of the home, family, and church—an implicit acknowledgement that those opposed to LGBTQ equality were literally and figuratively losing ground in the public sphere.<sup>24</sup> Like Rich, I thought that Proposition 8 and *Gathering Storm* were truly “the bigots' last hurrah.”

Today, I am not so sure. In recent years, claims for religion-based exemptions from antidiscrimination laws that protect LGBTQ persons in the public sphere

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<sup>18</sup> *Id.* (citing Glenn Beck, John Huntsman Jr., Dr. Laura Schlessinger, Steve Schmidt, Kyle Smith, and Rev. Rick Warren for their tolerance or support of same-sex marriage and LGBTQ rights).

<sup>19</sup> 135 S. Ct. 2584 (2015).

<sup>20</sup> Murray, *supra* note 14, at 407.

<sup>21</sup> *Id.* at 407-08 (discussing Proposition 8 campaign's rhetorical shift from language of disgust and distaste to invocation of religious and parental rights).

<sup>22</sup> *Id.* (discussing strategies of Yes on 8 campaign).

<sup>23</sup> *Id.* at 407.

<sup>24</sup> *Id.* at 408 (“In campaigning for Proposition 8, the Yes on 8 campaign sounded a retreat from the public common to the privacy of the home and family.”).

have proliferated.<sup>25</sup> Now, as then, those seeking accommodations and exemptions frame their requests as efforts to secure space for legitimate dissent, rather than as raw objections to same-sex marriage or LGBTQ rights.<sup>26</sup> Many take these requests at face value—expressions of sincere religious belief. Others, however, argue that requests for religious accommodations are wolves in sheep’s clothing—bigotry trussed up as religious freedom claims.<sup>27</sup>

My concerns about religious accommodations, by contrast, center on their implications for public and private space. Regardless of whether requests for religious accommodations reflect sincerely held faith commitments or are simply masking intolerance and discrimination, they are, as a practical matter, transforming the public sphere into private space where dissenting viewpoints—and indeed, bigotry—may be expressed.<sup>28</sup> Far from retreating from the public sphere, those opposed to same-sex marriage and LGBTQ rights are stealthily remaking it. With each successful accommodation claim and conscience objection, those opposed to LGBTQ equality can transform the public sphere bit

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<sup>25</sup> See Olivia Brown et al., *Religious Exemptions*, 20 GEO. J. GENDER & L. 397, 397 (2019) (discussing development of religious exemptions to LGBTQ protections in public accommodations, employment, healthcare, and housing); Leslie C. Griffin, *A Word of Warning from a Woman: Arbitrary, Categorical, and Hidden Religious Exemptions Threaten LGBTQ Rights*, 7 ALA. C.R. & C.L. L. REV. 97, 97-98 (2015) (arguing that increasing religious exemptions threaten LGBTQ rights in employment and public accommodations); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518-19 (2015) (discussing conscience exemptions in same-sex marriage context).

<sup>26</sup> Many of the amicus briefs submitted to the Supreme Court in *Masterpiece Cakeshop* raised this point. See, e.g., Brief of Amicus Curiae Agudath Israel of America in Support of Petitioners at 6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004519, at \*6 (arguing that, although one’s religious values may be “out of sync with those of 2017 America,” conscientious objections are necessary to allow individuals to live according to their personal religious codes); Brief of Amicus Curiae Christian Business Owners Supporting Religious Freedom in Support of Petitioners at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005666, at \*6 (arguing that “Petitioners’ religious objection is, and always has been, based solely on religious grounds, and not on any animosity toward Respondents or their sexual orientation”).

<sup>27</sup> See, e.g., Brief of 211 Members of Congress as Amici Curiae in Support of Respondents at 16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5127304, at \*16 [hereinafter Brief of 211 Members of Congress] (arguing that “discrimination under CADA would affect far more than cakeshops in Colorado. . . . Examples of how this exemption could operate to circumvent the Civil Rights Act of 1964 abound”).

<sup>28</sup> Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 878 (2019) (“The grant of an accommodation is essentially the recharacterization of public space, where the state and its laws hold sway, into private space, where private actors may regulate their own vision of appropriate sex and sexuality.”).

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by bit, stitching together in a quilt-like fashion a newly expanded private sphere where their own views may be freely espoused.<sup>29</sup>

Using the recent *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>30</sup> case and early contests over LGBTQ rights and same-sex marriage as points of entry, this brief Essay explores this claim. As it explains, today, objections to same-sex marriage and LGBTQ rights are rarely framed in terms of homophobia or bigotry, as they once were. Instead, such objections are rooted in other rights claims—namely, religious freedom and parental rights. Much of our society regards both the family and religion as integral to the creation and maintenance of a diverse and pluralistic society, making this appeal to religious freedom profoundly resonant.<sup>31</sup> On this account, the request for accommodation is not understood as a license to baldly discriminate but rather as a limited effort to create private spaces where individuals can dissent from prevailing norms and resist the imposition of what some view as the state's orthodoxy.

Rather than viewing these claims as benign efforts to foster pluralism, I maintain that such accommodations pose a threat to antidiscrimination laws and other efforts to secure equal protection and liberty rights for LGBTQ persons. As I explain, in transforming slivers of the public sphere into private space, accommodations expand the private sphere, where dissent from minority rights can be expressed without fear of state repercussions, while simultaneously shrinking the public sphere, where protections for minority groups are available.

This Essay proceeds in four parts. Part I briefly rehearses the rhetorical evolution of objections to same-sex marriage and LGBTQ rights, noting particularly how objectors have invoked their “private” rights in opposition. As it explains, although objections to LGBTQ rights and same-sex marriage were initially framed explicitly in discriminatory terms, over time, the rhetoric shifted to more neutral terms, and specifically to appeals to parental rights and religious liberty. Part II focuses on the rise of religious accommodation claims. It argues that that religious accommodations recharacterize the challenged portions of the public sphere as *private* space where dissenting views—and rank bigotry—may be safely expressed. Part III considers the practical and normative impact of transmuting the public sphere into private space. Part IV briefly concludes.

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<sup>29</sup> *Id.* (“It is this transmutation of the public sphere into private space that allows the private actor’s vision of appropriate sexuality to be vindicated—even over the majority’s preference for more liberalized sexual norms.”).

<sup>30</sup> 138 S. Ct. 1719 (2018).

<sup>31</sup> For a broader discussion of the antistatist function of religion and the family in democratic theory, see generally Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 *YALE L.J.* 1236, 1238-70 (2010).

## I. THE RHETORICAL EVOLUTION OF OBJECTIONS TO LGBTQ RIGHTS

Only a generation ago, it was acceptable for someone to express their objections to same-sex marriage and LGBTQ rights in terms that were explicitly homophobic. After all, state policy explicitly singled out LGBTQ persons for discriminatory treatment.<sup>32</sup> Their sexual lives were subject to criminal punishment and civil regulation.<sup>33</sup> They were excluded from civil marriage and other conduits to legal family formation in all American jurisdictions.<sup>34</sup> The confluence of legal rules and social norms drove many to live closeted lives, out of view of mainstream society.<sup>35</sup>

Efforts to ensure LGBTQ civil rights were often met with spirited objections. In Colorado, when progressive cities like Aspen, Boulder, and Denver introduced municipal-level antidiscrimination protections based on sexual orientation, opponents launched a voter referendum campaign to prevent any unit of the state from providing antidiscrimination protections to gay and bisexual persons.<sup>36</sup> Meaningfully, the campaign in support of the referendum known as Amendment 2 relied on bigoted tropes about LGBTQ persons, including claims that homosexuals were pedophiles intent on recruiting children and that gay men and women ate feces and drank blood.<sup>37</sup>

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<sup>32</sup> See generally Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016) (analyzing state regulation of private sexual conduct before and after *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>33</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595-97 (2015) (explaining historical regulation of same-sex sexual conduct); *Lawrence*, 539 U.S. at 562 (noting Texas statute criminalizing homosexual sexual conduct); Murray, *supra* note 32, at 578-84 (historicizing civil and criminal regulation of LGBTQ persons).

<sup>34</sup> New Jersey was the first state with a written policy allowing same-sex couples to adopt children, enacted in 1997. David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 540 (1999). The first state to allow civil unions between same-sex partners was Vermont in 2000. *Civil Unions and Same-Sex Marriage*, OFF. VT. SEC'Y STATE, [https://www.sec.state.vt.us/media/759955/civilunions\\_samesexmarriage.pdf](https://www.sec.state.vt.us/media/759955/civilunions_samesexmarriage.pdf) [<https://perma.cc/8EL9-F947>] (last visited Nov. 21, 2019). The Supreme Court struck down state laws prohibiting same-sex marriages in 2015. *Obergefell*, 135 S. Ct. at 2607.

<sup>35</sup> See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1510 (1992) (noting that LGBTQ persons were forced “to remain hidden and underground” due to social norms regarding privacy).

<sup>36</sup> See *Romer v. Evans*, 572 U.S. 620, 623-24 (1996) (noting that antigay referendum arose in response to municipal bans on LGBTQ discrimination).

<sup>37</sup> See LINDA C. McCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2020) (manuscript at 166) (on file with the Boston University Law Review). Page references to *Who's the Bigot?* in this Essay refer to the penultimate version of the book (indicated as “manuscript”). See also MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 93 (2004) (explaining that proponents of Amendment 2 relied on both disgust-based and reason-based tactics to

By the time support for marriage equality began to build in the late 2000s, the landscape was dramatically altered. In 1966, the Supreme Court in *Romer v. Evans*<sup>38</sup> invalidated Colorado's Amendment 2.<sup>39</sup> Only a few years later, the Court in *Lawrence v. Texas*<sup>40</sup> invalidated state laws criminalizing same-sex sexual intercourse.<sup>41</sup> In addition to these legal changes, gay men and women became part of mainstream popular culture, dotting the landscape of television in shows like *Ellen* and *Will and Grace*.<sup>42</sup> A number of jurisdictions allowed gay men and lesbians to adopt children, while others permitted same-sex marriage or used alternative statuses like domestic partnership to provide legal recognition for same-sex relationships.<sup>43</sup>

In this changed climate, voicing one's objections to same-sex marriage or LGBTQ persons in homophobic terms was far less prevalent than it had been in years past. Indeed, doing so would easily draw accusations of bigotry. Instead, when objections to same-sex marriage and LGBTQ civil rights were lodged, they were framed in terms that were seemingly more benign.<sup>44</sup> The campaign for Proposition 8—the voter referendum that amended the California Constitution to preclude civil recognition of same-sex marriage—exemplifies this shift.

Critically, the campaign in favor of Proposition 8 was markedly different from the campaign waged in support of Amendment 2 just fifteen years earlier. Instead of claims that gay men and lesbians drank blood or were child molesters, Proposition 8 proponents focused on the degree to which state recognition of same-sex marriage imposed upon the individual rights of those opposed to same-

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encourage its passage); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 270-72 (2019) (discussing claims made in support of Amendment 2).

<sup>38</sup> 517 U.S. 620 (1966).

<sup>39</sup> *Id.* at 635-36 (holding that Amendment 2 violates Fourteenth Amendment's Equal Protection Clause).

<sup>40</sup> 539 U.S. 558 (2003).

<sup>41</sup> *Id.* at 578 (explaining that Petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government").

<sup>42</sup> See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 25 (2007) (discussing "rise of the gay citizen" in popular culture during 1990s).

<sup>43</sup> See Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294-96 (2013) (discussing proliferation of alternative statuses as vehicles for legal recognition of same-sex couples).

<sup>44</sup> See Murray, *supra* note 14, at 366-67 (explaining Proposition 8 campaign's efforts "to make opposition to same-sex marriage appear less like homophobia and discrimination and more like reasonable dissent").

sex marriage.<sup>45</sup> As they explained, their opposition to same-sex marriage in California was rooted in antistatist values. For example, state recognition of same-sex marriage would mean that any discussions of marriage within school curricula, which are subject to state oversight and authority, would include gay marriage.<sup>46</sup> “In this way, the state would not only redefine marriage to permit same-sex marriage, it would teach children that marriage includes same-sex unions, perhaps challenging personal and religious beliefs instilled by parents in the home.”<sup>47</sup> Likewise, as Proposition 8 supporters noted, churches or faith-based organizations that refused to perform or accommodate same-sex marriages would risk losing important government benefits, including favorable tax treatment.<sup>48</sup>

The campaign in favor of Proposition 8 did not trade in disgust or distaste for same-sex marriage but rather expressed a desire for reasonable dissent in a diverse and pluralistic society.<sup>49</sup> Critically, in its invocation of parental rights and religious liberty, the campaign in favor of Proposition 8 explicitly fashioned itself as part of a “broader effort to protect and defend the home[,] . . . the family,” and religious communities as “private spaces” where traditional (heterosexual) family values could be “voiced without fear of censure or state intervention.”<sup>50</sup>

The campaign in favor of Proposition 8 was enormously successful in shifting the rhetoric around opposition to same-sex marriage. Although the LGBTQ rights community attempted to frame support for Proposition 8 in terms of discrimination and antipathy for civil rights,<sup>51</sup> the interest in parental rights and

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<sup>45</sup> *Id.* at 371 (examining commercials endorsing Proposition 8, which advised viewers that expanding marriage to include same-sex couples would lead to impositions on parental autonomy and religious freedom).

<sup>46</sup> *See id.* at 381-85 (discussing Yes on 8 campaign’s “trio of ads” discussing same-sex marriage’s impact on school curricula).

<sup>47</sup> *Id.* at 371.

<sup>48</sup> *Id.* (noting that Yes on 8 campaign emphasized loss of tax-exempt status for religious institutions as likely consequence of civil recognition of same-sex marriage).

<sup>49</sup> *Id.* at 407 (noting that Yes on 8 campaign “was not figured in the language of discrimination or distaste” and instead “consciously invoked individual rights”).

<sup>50</sup> *Id.*

<sup>51</sup> Two of the television ads aired in support of the No on 8 campaign explicitly focused on the issue of discrimination against LGBTQ persons. *See* NoOnProp8dotcom, *Conversation - No on Prop 8*, YOUTUBE (Oct. 8, 2008), <http://www.youtube.com/watch?v=vB0lZ8XbmJM> (characterizing Proposition 8 as eliminating rights for gay couples); NoOnProp8dotcom, *Discrimination*, YOUTUBE (Oct. 30, 2008), <http://www.youtube.com/watch?v=Oj-0xMrsyxE> (comparing Proposition 8 to Japanese internment, restrictive covenants, and laws against interracial marriage). For further discussion of these advertisements, see Murray, *supra* note 14, at 391 (“Rather than responding to the challenge of the new individual rights frame by debunking its claims and revealing the inconsistencies of its rights logic, the No on Prop 8

religious freedom proved remarkably appealing. On November 4, 2008, a majority of California voters enacted Proposition 8.<sup>52</sup>

The Proposition 8 campaign's successful appeal to individual rights paved the way for the proliferation of religious accommodation claims that arose in tandem with the legalization of same-sex marriage. By 2012, when Charlie Craig and David Mullins visited the Masterpiece Cakeshop in Lakewood, Colorado, to order a wedding cake for a party celebrating their Massachusetts marriage,<sup>53</sup> claims for religious accommodations were relatively commonplace.<sup>54</sup> In states like Colorado, where public accommodations law precluded discrimination on the basis of sexual orientation, purveyors of wedding-related goods and services often sought exemptions from the operation of antidiscrimination law on the ground that providing goods and services for a same-sex wedding or commitment ceremony contradicted their religious beliefs.<sup>55</sup>

Indeed, when Craig and Mullins requested a wedding cake of Jack Phillips, Phillips explained that, as a devout Christian, making a cake intended for the celebration of a same-sex union would contradict his religious convictions, which specified that marriage was a union between a man and a woman.<sup>56</sup> In Phillips's view, there was nothing untoward or discriminatory about his response.<sup>57</sup> After all, in 2012, Colorado did not even recognize same-sex marriages, clearly communicating that the marriage itself was unlawful in the

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campaign focused initially on resurrecting the civil rights and equality frame—a strategy that yielded mixed results.”).

<sup>52</sup> BOWEN, *supra* note 13, at 7.

<sup>53</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018). Because same-sex couples were ineligible for civil marriage in Colorado, the couple planned to travel to Massachusetts to marry. *Id.* The cake was intended for a reception that they would host for friends and family in Denver upon their return. *Id.*

<sup>54</sup> See Murray, *supra* note 28, at 865 n.185 (compiling cases and noting that “[v]arious wedding providers have brought religious exemption claims in an attempt to avoid servicing same-sex couples”).

<sup>55</sup> See *id.*

<sup>56</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (“Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage.”).

<sup>57</sup> See *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 30, 370 P.3d 272, 280 (“Masterpiece asserts that it did not decline to make Craig’s and Mullins’ wedding cake ‘because of’ their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake.”), *rev’d sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

eyes of the state.<sup>58</sup> As importantly, he claimed that his refusal stemmed from sincerely held religious views, not from homophobia or discriminatory intent.<sup>59</sup>

Mullins and Craig, however, viewed Phillips's refusal as discrimination. The pair filed complaints with the Colorado Civil Rights Division charging Phillips and Masterpiece Cakeshop with sexual orientation discrimination in violation of the Colorado Anti-Discrimination Act ("CADA"),<sup>60</sup> which prohibits discrimination, including discrimination on the basis of sexual orientation, in places of public accommodation.<sup>61</sup>

The dispute proceeded through the Colorado administrative<sup>62</sup> and state court systems, where Mullins and Craig ultimately prevailed.<sup>63</sup> Subsequently, Phillips appealed the decision to the United States Supreme Court.<sup>64</sup> Critically, the Court

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<sup>58</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (noting that Phillips's refusal to sell Craig and Mullins a wedding cake was in part because "Colorado (at that time) did not recognize same-sex marriages").

<sup>59</sup> *See Craig*, 2015 COA 115, ¶ 30, 370 P.3d at 280.

<sup>60</sup> Joint Appendix at 127, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4232758, at \*127.

<sup>61</sup> COLO. REV. STAT. § 24-34-601(2)(a) (2019) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . ."). CADA defines "place of public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." *Id.* § 24-34-601(1).

<sup>62</sup> CADA establishes an administrative system for the resolution of discrimination claims. *See id.* § 24-34-306. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. *Id.* § 24-34-306(2)(a). The Division investigates each claim, and if it finds probable cause that CADA has been violated, it refers the matter to the Colorado Civil Rights Commission. *Id.* § 24-34-306(4). The Commission then decides whether to initiate a formal hearing before the Commission, a commissioner, or a state Administrative Law Judge, who will hear evidence and argument before issuing a written decision. *Id.* § 24-34-306. The initial decision may be appealed to the full Commission, a seven-member appointed body. *Id.* § 24-4-105(14). If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. *Id.* § 24-34-306(9). Available remedies include, inter alia, orders to cease and desist a discriminatory policy, *id.*, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." *Id.* § 24-34-605. The Commission is not permitted to assess money damages or fines. *See id.* §§ 24-34-306, -605.

<sup>63</sup> *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15-SC-00738, 2016 WL 1645027, at \*1 (Colo. Apr. 25, 2016) (en banc) (denying Phillips's petition for certiorari).

<sup>64</sup> Petition for Writ of Certiorari at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2016 WL 3971309, at \*1.

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avoided ruling on the broader questions presented: whether baking a cake constituted speech for purposes of the First Amendment and, if so, whether the state's efforts to protect the rights and dignity of LGBTQ persons should be prioritized ahead of First Amendment claims of free speech and free exercise of religion.<sup>65</sup> Instead, a majority of the Court concluded that “[w]hatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”<sup>66</sup>

In many ways, the campaign in favor of Amendment 2 and *Masterpiece Cakeshop* stand as bookends, framing one state’s experience with the evolving discourse of objections to LGBTQ rights. As this Part recounted, the campaign in favor of Amendment 2 was marked by explicitly discriminatory—indeed, bigoted—rhetoric about gay men and lesbians. However, just twenty-six years later, Jack Phillips’s objections to providing a cake for the celebration of a same-sex marriage were framed in terms of religious freedom and free speech.

As I have discussed elsewhere, the rhetorical shift in these objections reflect changing public policies as well as shifting norms about what kinds of sentiments may be expressed in the public sphere.<sup>67</sup> While the campaign for Amendment 2 felt free to explicitly contest LGBTQ civil rights in discriminatory terms, the campaign in favor of Proposition 8 was much more circumspect. Rather than engage in homophobic or discriminatory language, the proponents of Proposition 8 framed their objections to same-sex marriage in more neutral terms—parental rights and religious freedom. In doing so, they disclaimed a desire to object to LGBTQ rights in terms of public policy or in the public sphere. Instead, they sought to maintain their particular views about LGBTQ rights in the private sphere—within their families or their faith communities.

The proliferation of religious accommodation claims, like that seen in *Masterpiece Cakeshop*, reflects yet another shift in the evolution of objections to LGBTQ rights. Although claims for religious accommodations grew out of the retreat to individual rights glimpsed in the Proposition 8 campaign, the terms and impact of this development are meaningfully different. The Proposition 8 campaign reflected an effort to “circle[] the wagons and . . . shore up protections for the family and the home—*private* spaces where dissenting views may be freely espoused.”<sup>68</sup> In contrast, the proliferation of religious accommodation claims reflects a different dynamic. As the following Part explains, the claims for religious accommodations involve transmuting slivers of the public sphere into private spaces for dissent. But critically, the imminent threat is not simply that the public sphere will, over time, be overwhelmed by private carveouts but that, when considered in the aggregate, religious accommodations can

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<sup>65</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., Murray, *supra* note 14, at 367-68 (noting shifting rhetoric in challenges to LGBTQ rights).

<sup>68</sup> *Id.* at 407.

effectively roll back public protections for civil rights, thereby undermining the public policies in favor of civil rights and entrenching for all the values and views of religious dissenters.

## II. RECASTING THE PUBLIC SPHERE

To support his request for an exemption from CADA, Jack Phillips claimed that the antidiscrimination law, which required him to serve all customers, impermissibly infringed upon his religious beliefs. Specifically, the statute's mandate to serve all customers compelled him to reiterate Colorado's pro-LGBTQ rights message.<sup>69</sup> Phillips's request for accommodation was not simply a request to be exempt from the law's ambit; it was a request to carve out a space of seclusion within the public sphere where he, a religious believer, could safely dissent from the state's embrace of same-sex marriage and other issues of LGBTQ equality.<sup>70</sup>

But so what? Jack Phillips is one person. If he refuses to serve a gay couple, the couple can simply go to the next bakery, and the next, and so on.<sup>71</sup> But this kind of individualistic thinking misses the point—and the harm—implicit in Phillips's claim. The danger lies not in one person's request for space to dissent but in the aggregation of multiple claims for accommodation.<sup>72</sup> It is worth noting that claims of this sort have proliferated in recent years among those who furnish

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<sup>69</sup> Transcript of Oral Argument at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing that in requiring Phillips's compliance with CADA, Colorado compelled him to express a viewpoint that contradicted his religious convictions).

<sup>70</sup> See Murray, *supra* note 28, at 862 (suggesting that Phillips's claim for exemption carved out space within existing regulatory landscape to accommodate dissenting viewpoints). To wit, Phillips's brief to the Supreme Court expressed fears that laws like CADA would "crush those who hold unpopular views, pushing them from the public square." Brief for Petitioners at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762, at \*3.

<sup>71</sup> Phillips himself raised this point to the Court, asking it to reject Mullins and Craig's "slippery-slope" argument that granting an exemption would "open the floodgates to other people of faith seeking similar freedom." Brief for Petitioners, *supra* note 70, at 60 (rebutting claims that providing Phillips with exemption would lead to proliferation of similar requests); see also Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 32, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662, at \*32 (arguing that couples denied goods or services via religious exemptions can seek remedies by simply choosing another provider, while provider forced to provide goods or services in violation of their religious beliefs must "repeatedly violate his conscience").

<sup>72</sup> This recalls the logic of *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Supreme Court articulated what has since been termed the "aggregation principle" to hold that because an individual's production of wheat could, in the aggregate, have a "substantial effect" on interstate commerce, the federal government was permitted to regulate such individual production under its commerce power. *Id.* at 128-29.

goods and services for weddings,<sup>73</sup> as well as those who provide other services like dispensing contraception or performing abortions.<sup>74</sup>

Relatedly, although private actors like Phillips request religious accommodations as individuals, their requests are often part of a coordinated effort by religious liberty groups to test the limits of free exercise rights and construct a network of accommodations that extend to all aspects of civil society.<sup>75</sup> In short, we might understand these claims not as bespoke, individualized claims for space for religious dissenters but rather as a coordinated effort to deploy principles of religious freedom for the purpose of recreating an earlier epoch where sex was confined to heterosexual marriage and homosexuality was condemned.<sup>76</sup>

With this in mind, *Masterpiece Cakeshop* is not simply about Jack Phillips and his bakery. It is about the aggregated threat of religious accommodations. By himself, Jack Phillips is merely a single dissenter—and *Masterpiece Cakeshop* is merely one shop where gay men and lesbians will not be able to seek wedding-related services. But consider the aggregate impact of one thousand Jack Phillipses, all armed with the authority to refuse goods and services on religious grounds. Together, those who have been granted religious accommodations have the capacity to collectively construct a broader network of persons and businesses from which certain groups may not receive goods and services. In this regard, the collective impact of religious accommodations has the potential to undermine—and indeed, overtake—the civil rights protections that exist as a matter of public policy.<sup>77</sup>

But it is not simply that religious accommodations, viewed collectively, can effectively eviscerate public policies in favor of civil rights and LGBTQ equality. It is that the collective impact of religious accommodations can effectively transform the public sphere into a broad private enclave for religious dissenters. The carved-out space that religious dissenters seek is not necessarily

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<sup>73</sup> Murray, *supra* note 28, at 865 n.185 (collecting cases in which “[v]arious wedding providers have brought religious exemption claims in an attempt to avoid servicing same-sex couples”).

<sup>74</sup> See NeJaime & Siegel, *supra* note 25, at 2534-35 (discussing healthcare refusal laws, which provide religious exemptions for healthcare providers who assert that abortion, sterilization, and contraception contradict their religious beliefs).

<sup>75</sup> Sarah Posner, *The Christian Legal Army Behind ‘Masterpiece Cakeshop,’* THE NATION (Nov. 28, 2017), <https://www.thenation.com/article/the-christian-legal-army-behind-master-piece-cakeshop/> [<https://perma.cc/FM5W-6WGQ>] (explaining how conservative nonprofit organization Alliance Defending Freedom spearheaded series of religious accommodation claims throughout the country).

<sup>76</sup> See NeJaime & Siegel, *supra* note 25, at 2556 (“[C]onscience provisions allow advocates to rework a traditional norm that was once enforced through the criminal law into a norm that is now enforced through a web of exemptions in the civil law.”).

<sup>77</sup> See Brief of 211 Members of Congress, *supra* note 27, at 16 (arguing that allowing certain businesses to discriminate would frustrate purpose of federal antidiscrimination laws).

*new* space. Indeed, it is part of the existing terrain that the state once regulated sex and sexuality as a matter of public policy.

Reconceptualized in this way, the request for an accommodation is a request for the state to cede a portion of the public sphere to these private actors, who may subsequently recharacterize that space as a private zone suitable for imposing and enforcing their (once-prevailing) views about same-sex marriage and LGBTQ civil rights. In this regard, the request for religious accommodation sounds in the register of the responses to *Buchanan v. Warley*<sup>78</sup> and *Brown v. Board of Education*.<sup>79</sup> In the wake of those landmark cases prohibiting de jure segregation in residential housing (*Warley*) and public education (*Brown*), white Southerners resisted the mandate to integrate by appealing to the private sphere. In response to the Court's directive to dismantle state policies encouraging residential segregation, white property owners turned to restrictive covenants that prevented property from being sold to racial minorities. Put differently, when faced with a public mandate to integrate, the dissenters resisted the mandate by resorting to private ordering. Likewise, white southerners responded to *Brown* by, inter alia, establishing "segregation academies" that provided a segregated alternative to integrated public schools.<sup>80</sup>

There are many parallels between the Southern response to integration and the social conservative response to same-sex marriage. In both contexts, a change in the public policy landscape prompted a retreat to the private sphere—restrictive covenants, private schools, and religious exemptions. Importantly, in appealing to the private sphere, these dissenters insisted that their claims upon the state were minimal. To maintain segregation, the South did not require the state's endorsement—just its passive participation in enforcing restrictive covenants and providing tax subsidies to segregation academies. Today, religious dissenters insist that they do not require the state's active involvement or endorsement in seeking an exemption.<sup>81</sup> All they require is the state's "accommodation" of their dissenting views.<sup>82</sup>

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<sup>78</sup> 245 U.S. 60 (1917).

<sup>79</sup> 347 U.S. 483 (1954).

<sup>80</sup> See Murray, *supra* note 28, at 845-46, 877-78 (comparing past resistance to residential and school integration with claims for religious accommodation and arguing that private regulation is often used to resist civil rights progress).

<sup>81</sup> See *id.* at 878 ("[R]eligious conservatives do not require the state's active engagement in the effort to reentrench traditional sexual mores."); see also William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 675-77 (2011) (discussing ways religious fundamentalists attempted to persuade government to give segregation academies tax-exempt status); Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1, 6-8 (1992) (discussing variety of ways states passively supported segregation academies).

<sup>82</sup> See Brief for Petitioners, *supra* note 70, at 14 (framing issue as Phillips "seek[ing] to live his life, pursue his profession, and craft his art consistently with his religious identity,"

But then as now, the distinction that dissenters draw between state accommodation of dissent and state endorsement of private discrimination is not so cut and dried. In 1948's *Shelley v. Kraemer*,<sup>83</sup> the Supreme Court considered the constitutionality of restrictive covenants. While the Court conceded that "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth Amendment,"<sup>84</sup> it nonetheless concluded that judicial enforcement of such private agreements was neither passive nor constitutionally permissible. "These [we]re not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit."<sup>85</sup> By enforcing such discriminatory contracts, the state had deployed "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."<sup>86</sup>

In a similar vein, at least one member of the Supreme Court recognized that the state's provision of tax-exempt status to segregation academies actively facilitated the continued segregation of southern schools. In *Allen v. Wright*,<sup>87</sup> Justice John Paul Stevens dissented from the majority's decision concluding that African American parents challenging a federal tax subsidy to segregation academies lacked standing to sue. As Justice Stevens explained, even the majority agreed that the petitioners had clearly alleged an injury—"their children's diminished ability to receive an education in a racially integrated school."<sup>88</sup> The only question was whether their injury was fairly traceable to the tax subsidy that the federal government provided to the private schools.<sup>89</sup> In Stevens's view, the provision of tax-exempt status to the private schools played an active role in discouraging desegregation because it allowed white parents an attractive and affordable option to integration. "[W]ithout tax-exempt status, private schools will either not be competitive in terms of cost, or have to change their admissions policies, hence reducing their competitiveness for parents

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away from governmental compulsion to act counter to his beliefs). Prominent religious organizations have also taken pains to frame these accommodations as minor intrusions on public life. See, e.g., Mark David Hall, *Religious Accommodations and the Common Good*, HERITAGE FOUND. (Oct. 26, 2015), <https://www.heritage.org/civil-society/report/religious-accommodations-and-the-common-good> [<https://perma.cc/5TYU-XDK2>] ("[T]here is little evidence that . . . accommodations have harmed other individuals or kept either the states or the nation from meeting significant policy objectives.").

<sup>83</sup> 334 U.S. 1 (1948).

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.* at 19.

<sup>86</sup> *Id.*

<sup>87</sup> 468 U.S. 737 (1984), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

<sup>88</sup> *Id.* at 783 (Stevens, J., dissenting).

<sup>89</sup> *Id.*

seeking ‘a racially segregated alternative’ to public schools, which is what respondents have alleged many white parents in desegregating school districts seek.”<sup>90</sup> On this account, despite its professed commitment to antidiscrimination norms and values, in using federal tax policies to accommodate private citizens’ dissenting views, the federal government actively facilitated continued segregation.

When viewed through this historical lens, the implications of religious accommodation seem more obvious—and more troubling. The state’s grant of an accommodation is not a passive act, as religious objectors insist. Indeed, the grant of an accommodation assents to the recharacterization of public space, where the state and its laws hold sway, into private space, where private actors may continue to espouse their objections to same-sex marriage and LGBTQ civil rights without fear of the enforcement of antidiscrimination laws. It is this transmutation of the public sphere into private space where actors are exempt from the force of antidiscrimination laws that allows the private actor’s particular views to be vindicated—even over the majority’s (and the state’s) preference for same-sex marriage and gay rights.<sup>91</sup> And meaningfully, in the contemporary context of *Masterpiece Cakeshop*, it remains to be seen whether the state will resist dissenters’ efforts to seek cover in the expanded private sphere, as the federal government did during the Civil Rights Movement.<sup>92</sup>

In this regard, the aggregate impact of religious accommodations is more alarming. The aggregative effect of religious accommodations is to *shrink* the public sphere—and the domain of state-endorsed laws and norms—and *expand* the private sphere and the authority of private actors who operate outside of the state’s reach.<sup>93</sup>

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<sup>90</sup> *Id.* at 788.

<sup>91</sup> See Frank Newport, *Americans Continue to Shift Left on Key Moral Issues*, GALLUP (May 26, 2015), <https://news.gallup.com/poll/183413/americans-continue-shift-left-key-moral-issues.aspx> [<https://perma.cc/B2Z3-ZKTB>] (reporting in 2015 that “clear majority” of Americans supported gay and lesbian relationships).

<sup>92</sup> See Murray, *supra* note 28, at 845-48 (discussing examples from Civil Rights Movement of when state defended its regulatory authority against pro-segregation private actors).

<sup>93</sup> Some scholars view the interplay between religious accommodations and the public/private divide in ways that are distinct from but nonetheless related to the view I offer here. As Professor Joseph Singer argues, litigation of the sort seen in *Masterpiece Cakeshop* is an attempt to unsettle—and contest—the public understanding of markets that emerged in the wake of the Civil Rights Act of 1964. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, NW. U. L. REV. 1283, 1293 (1996) (“In 1964, it was still plausible to argue that businesses had a right to exclude African-American customers simply because the businesses were property owners and because one of the rights associated with property was the right to exclude. Today . . . this argument is no longer acceptable . . .”); Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 930-32 (2015) [hereinafter Singer, *We Don’t Serve Your Kind Here*] (noting that arguments used by segregationists to

In this way, state-granted religious accommodations have the potential to undermine not only antidiscrimination laws but also an entire public apparatus structured to vindicate the public values of liberty and equality.

### III. BIGOTS' LAST HURRAH?

Let me return to Frank Rich's essay on Proposition 8, *The Bigots' Last Hurrah*. In that piece from 2009, Rich seemed convinced that public support for same-sex marriage and gay rights was so firmly established—and rising—that Proposition 8 was merely the last gasp of a dying breed.<sup>94</sup> Bigotry, he confidently asserted, was losing ground and under siege.<sup>95</sup> I agreed, musing that the Proposition 8 campaign's invocation of parental rights and religious liberty was an implicit acknowledgement that bigotry against gays and lesbians was no longer welcome in the public sphere.<sup>96</sup> Cast out of the public sphere, those opposed to same-sex marriage and gay rights had retreated to the private sphere,

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exclude customers before passage of Civil Rights Act of 1964 have “been revived by businesses seeking to deny services to LGBT customers” (footnote omitted)). Likewise, Professors NeJaime and Siegel argue that *Masterpiece Cakeshop* represents an effort to reinvigorate and reintegrate religion in the public sphere. See Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 213 (2018) (“Indeed, one way to understand the wave of recent wedding-cake litigation is as an insurgent challenge to the public settlement, dating to the lunch-counter sit-ins of the Civil Rights Era, that limited the prerogatives of business owners on the understanding that equal citizenship includes a customer’s equal right to participate in commerce.”). These views are not inconsistent with my view that *Masterpiece Cakeshop*—and religious accommodations more generally—are an attempt to recast portions of the public sphere as private space. All three understandings underscore the tension between private property, markets, and public accommodation laws. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 564 (2000) (“Critical legal scholars, building on legal realism, successfully exposed the incoherence of the public/private divide, revealing that a purely private realm exists only as a legal construct.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 13 (1991) (“The familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a ‘neutral’ distinction are then criticized as ‘political.’”); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993) (“The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions. Even in conduct in which no state official participates, it is possible to discern some decision of the state.” (footnote omitted)).

<sup>94</sup> Rich, *supra* note 1, at WK10 (“As the case against equal rights for gay families gets harder and harder to argue on any nonreligious or legal grounds, no wonder so many conservatives are dropping the cause.”).

<sup>95</sup> *Id.* (“Only those who have spread the poisons of bigotry and fear have any reason to be afraid.”).

<sup>96</sup> See Murray, *supra* note 14, at 407-08.

where they could quietly espouse their views in the confines of their families and faith communities with little impact on the wider society.<sup>97</sup>

In our zeal to consign sexual orientation discrimination to the dustbin of history, both Rich and I overlooked something even more fundamental: the inherent instability of the public-private divide. Ironically, in Proposition 8's success, both Rich and I saw failure—the inability of those opposed to same-sex marriage and LGBTQ rights to maintain control of the public sphere and public policy. The very fact that opponents of same-sex marriage defended their views by invoking religious liberty and parental rights signaled that rank homophobia would not be tolerated as an explicit rationale for restricting gay rights. Because the public sphere was a less hospitable place for antigay sentiment, those opposed to gay rights were forced to seek refuge in the private sphere, where the impact of their views was more limited.

What Rich and I failed to appreciate was that in reframing their objections in terms of other rights, namely religious rights, those opposed to same-sex marriage and LGBTQ civil rights could effectively refigure the discursive and legal landscape. Through religious accommodations, those opposed to gay rights could reconceive the geography of bigotry, effectively colonizing the public sphere to make it more hospitable to their “private” views. And in securing individual slivers of the public sphere for the vindication of their private beliefs, these believers have the capacity to link their claims *together*, creating a more expansive private sphere where antidiscrimination protections can be avoided altogether.

The aggregate effect of religious accommodations is by itself an alarming prospect. But the dangers of an expanded private sphere where public policy protections against discrimination do not apply is further amplified in the current political moment, where it seems public expressions of bigotry are once again accepted and acceptable.<sup>98</sup> In this climate, the fact that individual slivers of the

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<sup>97</sup> *Id.* at 408 (“In campaigning for Proposition 8, the Yes on 8 campaign sounded a retreat from the public common to the privacy of the home and family.”).

<sup>98</sup> Many have argued that the Trump presidency has brought with it a resurgence of openly bigoted rhetoric, leading in turn to more overt acts of bigotry. *See, e.g.,* Jamelle Bouie, *Trump's Embrace of Racial Bigotry Has Shifted What Is Acceptable in America*, SLATE (Oct. 30, 2018, 1:00 PM), <https://slate.com/news-and-politics/2018/10/racial-violence-trump-bigotry.html> [<https://perma.cc/87YH-VHVT>] (asserting that Trump is both product and amplifier of racial backlash); Tom Jacobs, *Trump's Election Made Bigotry More Acceptable*, PAC. STANDARD (Feb. 21, 2018), <https://psmag.com/social-justice/trumps-election-made-bigotry-more-acceptable> [<https://perma.cc/MA5S-N6KC>] (citing study showing that rise in hate crimes is due in part to “increase in the acceptability of prejudice towards groups Trump targeted”); Michael Kunzelman & Astrid Galvan, *Trump Words Linked to More Hate Crime? Some Experts Think So*, AP (Aug. 7, 2019), <https://www.apnews.com/7d0949974b1648a2bb592cab1f85aa16> [<https://perma.cc/E532-AB4K>] (“[H]istorical data suggests a link between heated rhetoric from top political leaders and ensuing reports of hate crimes.”); David Lohr, *Report Shows Massive Increase in Anti-LGBTQ Violence Since Trump Took Office*,

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public sphere have been transmuted into private space where antidiscrimination norms are not enforced, coupled with increasing hospitality toward expressions of disgust and disdain in the public sphere, means that there are fewer safe havens for those wishing to avoid bigotry, whether express or implied. This turn of events is unfortunate—particularly in light of the scope and trajectory of the Civil Rights Movement.

When the Civil Rights Act of 1964 was first enacted, it was almost immediately challenged as a gross imposition on the rights of private citizens. In two companion cases, *Heart of Atlanta Motel, Inc. v. United States*<sup>99</sup> and *Katzenbach v. McClung*,<sup>100</sup> the Supreme Court upheld Title II of the Act as a permissible exercise of the commerce power. In reaching its decision in both cases, the Court focused on whether the two businesses—a motel and a local barbeque restaurant—were participating in interstate commerce (and therefore properly the subject of congressional regulation).<sup>101</sup>

However, in considering the interstate character of the two operations, the Court specifically invoked the prospect of African American mobility and movement.<sup>102</sup> As the Court observed, “Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations, and have had to call upon friends to put them up overnight.”<sup>103</sup> Indeed, discrimination’s impact on African American mobility was so profound that African Americans resorted to compiling a “special guidebook” with a “listing of available lodging.”<sup>104</sup>

The Court’s reference was, of course, to *The Green Book*, an annual guide compiled by and for African Americans that provided the names and contact information for hotels, restaurants, and even private homes that would

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HUFFPOST (Jan. 22, 2018, 9:00 AM), [https://www.huffpost.com/entry/lgbtq-violence-trump\\_n\\_5a625035e4b002283002897b](https://www.huffpost.com/entry/lgbtq-violence-trump_n_5a625035e4b002283002897b) [<https://perma.cc/YLS6-6GUY>] (discussing results from New York City Anti-Violence Project’s annual Crisis of Hate report that found “remarkable upsurge of hate-based killings of LGBTQ people” in 2017).

<sup>99</sup> 379 U.S. 241 (1964).

<sup>100</sup> 379 U.S. 294 (1964).

<sup>101</sup> See *Heart of Atlanta Motel*, 379 U.S. at 258 (“[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof . . . which might have a substantial and harmful effect upon that commerce.”); see also *Katzenbach*, 379 U.S. at 304 (“Congress acted well within its power to protect and foster commerce in extending coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.”).

<sup>102</sup> See *Heart of Atlanta Motel*, 379 U.S. at 252-53.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 241 (“[T]hese conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself ‘dramatic testimony to the difficulties’ Negroes encounter in travel.”).

accommodate African American travelers throughout the country.<sup>105</sup> I raise this history to emphasize the high stakes involved in the current debate over same-sex marriage and religious accommodations. One of the signal successes of the Civil Rights Act of 1964 was to allow African Americans greater mobility in the public sphere.<sup>106</sup> Indeed, in prohibiting discrimination in public accommodations, the Civil Rights Act reshaped the geography of bigotry to make the public sphere more welcoming to all.<sup>107</sup>

Today, the prospect of religious accommodations, coupled with a more vituperative public discourse, threatens to once again reshape the landscape, hobbling the mobility and access of LGBTQ persons. And to be clear, if this project is successful, it will not only transform the public sphere for LGBTQ persons but also, in time, reshape the public landscape in ways that are inhospitable to a wide range of groups and views.

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<sup>105</sup> For an in-depth discussion of *The Green Book*, see generally Meagen K. Monahan, *The Green Book: Safely Navigating Jim Crow America*, 20 GREEN BAG 2D 43 (2016).

<sup>106</sup> See *id.* at 47-48 (observing that because Civil Rights Act required accommodations to serve all races, *The Green Book* was published for last time soon after the Act became effective).

<sup>107</sup> See Singer, *We Don't Serve Your Kind Here*, *supra* note 93, at 1293 (finding that "civil rights statutes passed in the 1960s had a revolutionary impact on public attitudes").