

MASTERPIECE CAKESHOP AND ASHERS BAKING COMPANY: A COMPARATIVE ANALYSIS OF CONSTITUTIONAL CONFECTIONS

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The Supreme Court's decision in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission has been roundly criticized for its failure to engage with difficult questions of constitutional law and for its absence of analytical clarity. While the Court reiterated that states have the authority to prohibit discrimination on the basis of sexual orientation, the Court also held that states must treat religious objectors' claims with an ill-defined degree of neutrality and respect under the Free Exercise Clause. The combination of the majority opinion's analytical shortcomings and Justice Kennedy's departure from the bench has left the doctrinal landscape in a state of uncertainty, even as controversies between service providers and same-sex couples continue to arise.

But Masterpiece Cakeshop is not the only recent high court case that can provide insights into how to resolve tensions between religious liberty and anti-discrimination principles. In 2018, the U.K. Supreme Court decided Lee v. Ashers Baking Company Ltd., which similarly arose out of a shop's refusal to provide a cake to a customer because of the owners' religious objections to same-sex marriage. Like its American counterpart, the British Supreme Court reversed the decisions of lower tribunals and ruled in favor of the bakery. Yet despite these commonalities, there are important differences between the two cases. Most notably, the analysis in Ashers Baking Company improves upon the analysis in Masterpiece Cakeshop by drawing sharper distinctions between permissible and impermissible refusals to serve patrons, and by providing clearer indications that respect for freedoms of speech and religion need not imperil the viability of laws prohibiting discrimination. Ashers Baking Company thus has the potential to enrich the ongoing process of resolving the doctrinal uncertainty that persists under American constitutional law, and to highlight the benefits of transatlantic dialogue regarding questions of liberty and equality.

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INTRODUCTION

The U.S. Supreme Court’s decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*¹ has been strongly criticized for its failure to engage with difficult constitutional questions and for its absence of analytical clarity.² The case involved free exercise and free speech challenges brought by a baker who refused to create a wedding cake for two men on the basis that to provide the cake “would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.”³ The Colorado Civil Rights Commission rejected these arguments and ordered the baker to “cease and desist from discriminating against . . . same-sex couples.”⁴ The Supreme Court reversed. While the majority opinion reiterated that states have the authority to prohibit discrimination on the basis of sexual orientation, and that religious objectors are not necessarily exempt from such prohibitions, the Court also held that the Commission failed to treat the baker’s religious claims with the degree of neutrality and respect that the Free Exercise Clause demands.⁵

Commentators have found the Court’s emphasis on respect and etiquette in *Masterpiece Cakeshop* to be problematic in a number of ways. In addition to faulting the majority for misreading the record, Leslie Kendrick and Micah Schwartzman argue that the Court “introduced various distortions” into animus doctrine and “provided insufficient guidance about the principles governing

1. 138 S. Ct. 1719 (2018).

2. See, e.g., Chad Flanders & Sean Olivera, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISC. 154 (2019); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018); Elizabeth Clark, *Symposium: and the Winner Is . . . Pluralism?*, SCOTUSBLOG (June 6, 2018), <https://perma.cc/RJ8Y-CF9P>; Robert W. Tuttle & Ira C. Lupu, *Masterpiece Cakeshop—A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions*, TAKE CARE (June 7, 2018), <https://perma.cc/677C-WV3J>.

3. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

4. *Id.* at 1726 (quoting Brief for Petitioners at 57a, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111)).

5. *Id.* at 1728-29.

religious exemptions from antidiscrimination laws.”⁶ These analytical shortcomings, combined with the retirement of Justice Anthony Kennedy, have left the doctrinal landscape “deeply uncertain.”⁷ The persistence of this uncertainty is significant: controversies between service providers and same-sex couples continue to arise, and lower courts remain in need of more definitive guidance as to the constitutional questions presented.⁸

But *Masterpiece Cakeshop* was not the only recent high court case involving a bakery’s claim of religious freedom clashing with anti-discrimination principles. In October 2018, the U.K. Supreme Court issued its opinion in *Lee v. Ashers Baking Company Ltd.*,⁹ which similarly arose out of a shop’s refusal to provide a cake to a customer “because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God.”¹⁰ Like its American counterpart, the British Supreme Court reversed the decisions of lower tribunals and ruled in favor of the bakery. Yet there are important differences between the two cases, and the way in which each country’s Supreme Court resolved them. Most notably, *Ashers Baking Company* offers considerably more engagement with several issues left unresolved in *Masterpiece Cakeshop*, making the U.S. Supreme Court’s analysis look all the more “massively under-proved”¹¹ by comparison.

This is not to say that *Ashers Baking Company* presents a more satisfying decision in all respects. To the contrary, many advocates of LGBTQ equality are likely disappointed with the U.K. Supreme Court’s opinion insofar as it ultimately rejects the customer’s sexual orientation discrimination claim. Nevertheless, the analysis in *Ashers Baking Company* improves upon the analysis in *Masterpiece Cakeshop* by drawing sharper distinctions between permissible and impermissible refusals to serve patrons, and by providing

6. See Kendrick & Schwartzman, *supra* note 2, at 135.

7. *Id.* Of course, the retirement of Justice Kennedy may also have implications in a wide range of other doctrinal areas. See Justice Ruth Bader Ginsburg, Remarks for the Second Circuit Judicial Conference (June 7, 2019), <https://perma.cc/D33E-VQP2> (suggesting that Justice Kennedy’s retirement was “the event of greatest consequence for the current Term, and perhaps for many Terms ahead”).

8. See, e.g., Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017) (upholding finding by administrative agency that bakery owners’ refusal to provide wedding cake to same-sex couple violated state civil rights statute and rejecting owners’ First Amendment claims), *cert. granted, judgment vacated and remanded for further consideration in light of Masterpiece Cakeshop*, 139 S. Ct. 2713 (2019) (mem.); Washington v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017) (holding that flower shop violated state anti-discrimination law by refusing to provide wedding flowers to same-sex couple and rejecting owner’s First Amendment claims), *cert. granted, judgment vacated and remanded for further consideration in light of Masterpiece Cakeshop*, 138 S. Ct. 2671 (2018) (mem.).

9. [2018] UKSC 49 (appeal taken from N. Ir.), <https://perma.cc/5GXS-B5PG>.

10. *Id.* at [1].

11. This is a term borrowed from another British baking context. See *The Great British Bake Off: Advanced Dough* (BBC One television broadcast Sept. 24, 2014).

clearer indications that freedoms of speech and religion need not be interpreted so as to imperil the viability of laws prohibiting discrimination in the market for goods and services. *Ashers Baking Company* thus has the potential to inform the ongoing process of resolving the doctrinal uncertainty that persists in American constitutional law.

This Article illustrates this potential by providing a comparative analysis of *Ashers Baking Company* and placing it in conversation with *Masterpiece Cakeshop*. Part I situates each case in its respective constitutional context. Particular attention is paid to the factual similarities and differences between the cases, and to the constitutional and statutory laws that underlie the decisions. Part II assays the U.S. and U.K. Supreme Courts' analytic approaches in *Masterpiece Cakeshop* and *Ashers Baking Company* to identify their essential elements and scrutinizes the roles played by freedom of speech and freedom of religion principles in each case. It argues that the treatment of compelled speech doctrine that appears in *Ashers Baking Company* offers more clarity and subtlety than similar passages in *Masterpiece Cakeshop*, despite the more extensive role of the doctrine in American constitutional law. Part III emphasizes the benefits of transatlantic dialogue regarding questions of liberty and equality. The Article concludes by arguing that American courts should draw upon the insights from such constitutional conversations in future cases involving religious and expressive objections to anti-discrimination legislation.

I. COMPARATIVE CONSTITUTIONAL CONTEXT

A preliminary perusal of *Masterpiece Cakeshop* and *Ashers Baking Company* suggests striking similarities between the cases. Both involved refusals by bakeshops to provide cakes to customers because of the owners' religious objections to same-sex marriage;¹² both involved successful claims by customers before lower adjudicative bodies;¹³ and both involved reversals of those lower judgments and ultimate Supreme Court rulings in favor of the bakeshops.¹⁴ These similarities provide an initial motivation for comparing the two decisions. But a closer reading reveals equally notable differences in their factual, statutory, and constitutional contexts. This Part identifies and explores several of these differences. The factual and legal background of *Masterpiece Cakeshop* has already generated significant commentary in the academic literature,¹⁵ and will therefore be discussed here only briefly. More attention

12. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018); *Ashers* [2018] UKSC 49 at [12].

13. See *Masterpiece Cakeshop*, 138 S. Ct. at 1725-27; *Ashers* [2018] UKSC 49 at [14-16].

14. See *Masterpiece Cakeshop*, 138 S. Ct. at 1731-32; *Ashers* [2018] UKSC 49 at [35, 54-56].

15. See sources cited *supra* note 2; see also Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171 (2019); Douglas NeJaime & Reva Siegel,

will be devoted to the factual and constitutional context of *Ashers Baking Company*, which is less familiar to American audiences.

A. Factual Settings

The controversy in *Masterpiece Cakeshop* arose in 2012, when Charlie Craig and Dave Mullins visited Jack Phillips' bakery in Colorado, and expressed an interest in ordering a wedding cake.¹⁶ Because the state did not yet afford legal recognition to same-sex marriages performed in the state, Craig and Mullins planned to wed out of state and then return home to the Denver area to celebrate with family and friends.¹⁷ Phillips declined to provide a cake for their celebration. The record did not indicate that Craig and Mullins requested that he provide a cake of any particular design or with any specific inscription or decoration.¹⁸ Rather, the facts suggest that Phillips had a more general objection to providing the requested service: Phillips told the couple that he would provide Craig and Mullins with other baked goods, but that he would not create a cake for a same-sex wedding. Phillips subsequently explained that he believed that “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.”¹⁹

The *Ashers Baking Company* dispute similarly arose out of a visit to a bakery and a request for a cake. In this case, however, the request was not made by a couple who wanted to celebrate their same-sex marriage, but by an individual who supported same-sex marriage more broadly. The customer, Mr. Lee, was a gay man who was a volunteer with QueerSpace, an organization that supported the LGBTQ community and the campaign for marriage equality in Northern Ireland.²⁰ Although he had shopped at an Ashers bakeshop location on previous occasions, the staff and the proprietors did not know Lee personally and were not aware of his sexual orientation.²¹

In 2014, Lee wanted to bring a cake to a QueerSpace function to mark the end of Northern Ireland Anti-Homophobia Week.²² He stopped into an Ashers location to place an order through the shop's “Build-a-Cake” service, which

Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop, 128 YALE L.J. FORUM 201 (2018).

16. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

17. *Id.*

18. *Id.*

19. *Id.* (quoting Brief for Petitioner at 153, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (emphasis deleted)).

20. *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [10] (appeal taken from N. Ir.), <https://perma.cc/AV6T-GB9Y>.

21. *Id.* at [11].

22. *Id.* at [10].

allowed customers to purchase baked goods decorated with particular images or inscriptions of their own design.²³ Lee's order consisted of a cake iced with a colored picture of the Sesame Street characters Ernie and Bert along with the QueerSpace logo and the words "Support Gay Marriage."²⁴ One of the shop's proprietors, Mrs. McArthur, took the order without objection and accepted payment.²⁵ Later, however, McArthur telephoned Lee to explain that she and her husband had decided to cancel Lee's order because "they could not in conscience produce a cake with that slogan."²⁶ McArthur issued an apology and a refund, and Lee obtained his cake elsewhere.²⁷

There are several important factual distinctions to be drawn between *Masterpiece Cakeshop* and *Ashers Baking Company*. One distinction involves the bakeshop owners' perceptions about their customers' sexual orientations. In *Masterpiece Cakeshop*, the Court's recitation of the facts indicates that Craig and Mullins told Phillips that they were interested in purchasing a cake for their own wedding.²⁸ Craig and Mullins therefore had an obvious basis for concluding that Phillips understood them to be gay. By contrast, in *Ashers Baking Company*, Lee did not have the same basis for concluding that the McArthurs knew that he himself was gay. He did not request a cake for his own wedding, and he did not directly communicate his sexual orientation in any other way. Again, the facts of the opinion state that "neither [the McArthurs] nor their staff knew of his sexual orientation."²⁹

A second set of distinctions relates to the kinds of cakes that were requested in each case, and the reasons why those requests were declined. Recall that in *Masterpiece Cakeshop*, Craig and Mullins never discussed the design of their cake with Phillips.³⁰ Phillips' refusal to accept their order apparently was not based on the design or decoration of the cake, but on its purpose: he simply would not create a cake of any description for their same-sex wedding celebration. On the other hand, in *Ashers Baking Company*, the McArthurs' reasons for declining to provide Lee's cake focused almost exclusively on the specific details of the decoration—in particular, on their conclusion the "order could not be fulfilled because they were a Christian business and could not print the slogan requested."³¹ Indeed, there is some

23. *Id.* at [11-12].

24. *Id.* at [12]. For an illustration of the requested image, see 'Gay Cake' Case: *Ashers Baking Company Says Making Slogan Cake 'Would Be Sinful,'* BBC NEWS (May 9, 2016), <https://perma.cc/E47L-6LAM>.

25. *Ashers* [2018] UKSC 49 at [12].

26. *Id.*

27. *Id.* at [12, 14].

28. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

29. *Ashers* [2018] UKSC 49 at [11].

30. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

31. *Ashers* [2018] UKSC 49 at [12].

indication in the record that the McArthurs would have supplied the cake with the rest of Lee’s requested design if the words “Support Gay Marriage” had been omitted.³² The literal, rather than symbolic, message associated with creating a cake thus plays a more prominent role in *Ashers Baking Company* than it does in *Masterpiece Cakeshop*.

B. Legal Frameworks

Shortly after they were denied service at Phillips’ bakeshop, Craig and Mullins filed a complaint with the Colorado Civil Rights Division.³³ The Division found probable cause that Phillips had violated the state’s anti-discrimination statute and referred the matter to the Colorado Civil Rights Commission, the subdivision charged with investigating claims of discriminatory practices.³⁴ The Commission then referred the matter for a hearing before a state administrative law judge (ALJ), who rejected Phillips’ free speech and free exercise claims and found his actions to constitute unlawful discrimination on the basis of sexual orientation.³⁵ The ALJ’s decision was affirmed by the Civil Rights Commission, and the Commission’s findings and enforcement orders were in turn affirmed by the Colorado Court of Appeals.³⁶ The U.S. Supreme Court granted Phillips’ petition for review after the state’s highest court declined to hear the appeal.³⁷

The Supreme Court framed the *Masterpiece Cakeshop* case as a clash between two competing principles: “the authority of a [s]tate . . . to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services” and “the right of all persons to exercise fundamental freedoms under the First Amendment.”³⁸ The state’s authority to protect the rights of gay people was manifested through the Colorado Anti-Discrimination Act. The Act made it unlawful to “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,” and applied to any “place of business engaged in any sales to the public.”³⁹

The general constitutionality of statutory protections against discrimination on the basis of sexual orientation did not appear to be in serious question. The majority emphasized that “society has come to the recognition that gay persons

32. *Id.* at [22].

33. *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

34. *Id.* at 1726. *See also* COLO. REV. STAT. § 24-34-306 (2017).

35. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

36. *Id.* at 1726-27.

37. *Id.* at 1727.

38. *Id.* at 1723.

39. *Id.* at 1725 (quoting COLO. REV. STAT. § 24-34-601 (2017)).

and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.”⁴⁰ The Court went on to characterize it as “unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”⁴¹ But the Court also noted that despite the existence of this statute, protections for the rights of gay individuals and couples were limited in important ways when the instant case began. The state of Colorado did not recognize same-sex marriages performed in-state at the time that Craig and Mullins planned to wed, nor had the Supreme Court yet held that marriage equality for same-sex couples was constitutionally required.⁴² Given these limitations, the Court opined that Phillips’ dilemma about whether to create a cake for Craig and Mullins may have been “particularly understandable.”⁴³

Regarding fundamental First Amendment freedoms, Phillips raised arguments sounding both in freedom of speech and freedom of religion. He asserted that to create a cake would constitute an expression of a statement with which he did not agree (a violation of the Free Speech Clause), and would be inconsistent with his sincerely held religious beliefs (a violation of the Free Exercise Clause).⁴⁴ Doctrinally, the Free Exercise Clause argument would appear to have been the more challenging one to maintain in light the Court’s decision in 1990 in *Employment Division v. Smith*.⁴⁵ The *Smith* Court held that the Free Exercise Clause does not require the government to exempt religious objectors from compliance with neutral and generally applicable laws.⁴⁶ The Colorado tribunals in *Masterpiece Cakeshop* had upheld the state’s Anti-Discrimination Act under *Smith* against Phillips’ challenge,⁴⁷ and on appeal the Supreme Court reiterated that while “religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal

40. *Id.* at 1727.

41. *Id.* at 1728.

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”).

43. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

44. *See id.*

45. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

46. *See id.* (rejecting claim by members of Native American Church that Free Exercise Clause required exemption from controlled substance law for religious use of peyote). For an analysis of the declining doctrinal significance of the Free Exercise Clause in the years since the *Smith* decision, see René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725 (2011).

47. *See Masterpiece Cakeshop*, 138 S. Ct. at 1726-27.

access to goods and services under a neutral and generally applicable public accommodations law.”⁴⁸ Phillips accordingly faced the task of demonstrating that the Colorado law was not actually neutral and generally applicable, at least as applied to his case.

Perhaps as a reflection of the doctrinal difficulties posed by the Court’s Free Exercise Clause jurisprudence, a greater proportion of Phillips’ brief was devoted to his Free Speech Clause claim.⁴⁹ Phillips argued that his wedding cakes should be regarded as constitutionally protected artistic expression or expressive conduct.⁵⁰ To require him to create a cake would therefore be to require him to express a message in contravention of compelled speech doctrine. As framed in Phillips’ brief, this doctrine “forbids the government from forcing citizens (or businesses) to express messages that they deem objectionable or from punishing them for declining to convey such messages.”⁵¹ The brief placed substantial weight on *Hurley*, in which the Court unanimously held that the First Amendment prevented the state from requiring private parties organizing a parade to include a gay, lesbian and bisexual organization “imparting a message the organizers [did] not wish to convey.”⁵² In contrast to the apparent difficulties of establishing an entitlement to an exemption under free exercise doctrine, commentators have suggested that “compelled speech doctrine has offered the best prospect of success” for those seeking immunity from anti-discrimination laws.⁵³

Such was the legal context for *Masterpiece Cakeshop*: statutory protection for freedom from discrimination on the basis of sexual orientation allegedly coming into conflict with constitutional protections for freedoms of speech and religion.

The legal context for *Ashers Baking Company* was somewhat parallel, rising from an administrative complaint to the U.K. Supreme Court. After Mrs. McArthur cancelled his order, Lee brought a complaint of discrimination to the Equality Commission for Northern Ireland.⁵⁴ Although the Commission is not charged with making determinations as to whether unlawful discrimination occurred, it is empowered to assist individuals in pursuing their claims in court.⁵⁵ The Commission supported Lee in filing a case under several

48. *Id.* at 1727.

49. See Brief for Petitioners at 16-37, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111); see also Kendrick & Schwartzman, *supra* note 2, at 136 (discussing same).

50. See Brief for Petitioners, *supra* note 49, at 18-25.

51. *Id.* at 25 (omitting internal formatting).

52. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 559 (1995). See also Brief for Petitioners, *supra* note 49, at 23-29.

53. Kendrick & Schwartzman, *supra* note 2, at 163.

54. *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [14] (appeal taken from N. Ir.), <https://perma.cc/WR8F-R8WF>.

55. See Employment Equality (Sexual Orientation) Regulations (NI) 2003, No. 497 Part VI.

legislative enactments, and the District Judge in the County Court in Northern Ireland found that the bakeshop's refusal to process the order constituted direct discrimination in violation of the law.⁵⁶ The Northern Ireland Court of Appeal affirmed on modified grounds,⁵⁷ and the defendants sought further review in the U.K. Supreme Court, asserting that the judgments below were inconsistent with their freedoms of religion and expression.⁵⁸

But while *Ashers Baking Company* resembles *Masterpiece Cakeshop* insofar as it posed an apparent clash between statutory anti-discrimination protections and constitutional religious and expressive liberties, the British legal context differs in significant ways that merit further examination and explanation. Consider first the status of Northern Ireland within the United Kingdom. Unlike Colorado, Northern Ireland is not a state that retains a certain degree of sovereignty that cannot be invaded by the national legislature in a federalist system of government;⁵⁹ it is instead a region of the United Kingdom that is subject to the plenary authority of Parliament.⁶⁰ However, under the system of devolution, Northern Ireland does have a local Assembly with delegated or devolved authority to legislate in some areas.⁶¹ These areas include health, education, economic development, and "equal opportunities."⁶²

There is also a Northern Ireland Executive Committee chaired by the First Minister and Deputy First Minister.⁶³ The Executive Committee is empowered to issue certain regulations for the region, and in this way plays a role

56. *Lee v. Ashers Baking Co.* [2015] NICty 2 at [46].

57. *Lee v. Ashers Baking Co.* [2016] NICA 39 at [57-58].

58. *See Lee v. Ashers Baking Co.* [2018] UKSC 49 at [1].

59. *See* Brigid Hadfield, *The Nature of Devolution in Scotland and Northern Ireland: Key Issues of Responsibility and Control*, 3 EDIN. L. REV. 3, 4 (1999) ("[B]ecause devolution is being wrought by Act of the Westminster Parliament, rather than through a written constitution, and because the legislation and government statements emphasise the retention of Westminster's 'sovereign powers,' the relevant legislation cannot be regarded as introducing any 'pure' form of federalism."); *cf.* *Printz v. United States*, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty.").

60. *See* Northern Ireland Act 1998, 1998 c. 47 § 5(6) (granting authority to local assembly to make laws but noting that "[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland"); *see also* Hadfield, *supra* note 59; Brigid Hadfield, *The Belfast Agreement, Sovereignty and the State of the Union*, 1998 PUB. L. 599 (1998).

61. *See* Northern Ireland Act 1998, c. 47 § 5; *see also* David Torrance, *Introduction to Devolution in the UK*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER No. 8599 (June 19, 2019), <https://perma.cc/D4EH-7HKL>. The devolved Northern Ireland government has not been fully functioning since 2017, and so the U.K. Parliament has been legislating on behalf of Northern Ireland when necessary in the meanwhile. *See* David Torrance, *Devolution in Northern Ireland, 1998-2018*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER No. 08439 (Nov. 19, 2018), <https://perma.cc/E34B-US7F> [hereinafter Torrance, *Devolution in Northern Ireland*].

62. *See* Torrance, *Devolution in Northern Ireland*, *supra* note 61, at 6.

63. *See* Northern Ireland Act 1998, c. 47 § 20; *see also* Torrance, *Devolution in Northern Ireland*, *supra* note 61, at 9-10.

analogous to that played by administrative agencies and commissions in the United States. For example, the Colorado Civil Rights Commission is authorized by state legislation to “adopt, publish, amend, and rescind rules . . . that are consistent with and for the implementation of” anti-discrimination laws.⁶⁴ Likewise, the Northern Ireland Executive Committee is authorized by Parliamentary legislation to issue regulations to “make provision about discrimination or harassment on grounds of sexual orientation.”⁶⁵

Lawmaking by the Northern Ireland Assembly and Executive Committee may be complemented by Acts of Parliament or by Orders in Council.⁶⁶ The latter form of lawmaking consists of orders issued “by and with the advice of Her Majesty’s Privy Council” pursuant to an authorizing statute.⁶⁷ In less majestic language, Orders in Council are a form of secondary legislation prepared by the office of the government minister responsible for the subject matter in question, which may be subject to approval in draft form by Parliament prior to taking effect.⁶⁸ As will be seen, regulations issued by the Northern Ireland Executive and Orders in Council both play an important role in the *Ashers Baking Company* litigation.

Now consider the scope of the legislative frameworks against discrimination in the two cases. The applicable laws in Colorado and in Northern Ireland both included statutory prohibitions against discrimination on the basis of sexual orientation. The Colorado provisions appear in the state’s Anti-Discrimination Act discussed above, and the Northern Ireland provisions are set forth in Sexual Orientation Regulations issued by the Office of the First Minister pursuant to the U.K.’s Equality Act of 2006.⁶⁹ These regulations broadly define direct discrimination to include situations in which, “on the grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons.”⁷⁰ The regulations go on to specifically declare it “unlawful for any person concerned with the provision . . . of goods, facilities or services to the public . . . to discriminate against a person who seeks to obtain or use those goods, facilities or services by refusing or deliberately omitting to

64. COLO. REV. STAT. § 24-34-305(1)(a) (2017).

65. See Equality Act 2006, c. 3 § 82.

66. See Northern Ireland Act 1998, c. 47 §§ 5, 84-86; see also Torrance, *Devolution in Northern Ireland*, *supra* note 61, at 5, 15, 21.

67. Richard Kelly, *Statutory Instruments*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER NO. 06509 at 22 (Dec. 15, 2016), <https://perma.cc/YCP7-96MP>. See also Stephanie Pywell, *Something Old, Something New: Busting Some Myths About Statutory Instruments and Brexit*, 2019 PUB. L. 102 (2019) (analyzing Orders in Council and comparing them to other forms of statutory instruments).

68. See National Archives, *Statutory Instrument Practice* 1.4.9 (5th ed. 2017); Kelly, *supra* note 67, at 4.

69. See Equality Act (Sexual Orientation) Regulations (NI) 2006, No. 439. See also *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [3, 20].

70. Equality Act (Sexual Orientation) Regulations (NI) 2006 at 3(1). See also *Ashers* [2018] UKSC 49 at [20].

provide him with any of them.”⁷¹

Like the Anti-Discrimination Act at issue in *Masterpiece Cakeshop*, the Sexual Orientation Regulations in *Ashers Baking Company* operated in a context in which protection for same-sex marriage was limited in the relevant jurisdiction when the case arose. Although Parliament legalized same-sex civil partnerships throughout the United Kingdom in 2004,⁷² legalization of same-sex marriage has proceeded more slowly. Marriage equality was achieved in England and Wales in 2013⁷³ and in Scotland in 2014,⁷⁴ but remains highly contested and as yet unrealized in Northern Ireland.⁷⁵ The Northern Ireland Assembly had debated the issue three times in a span of eighteen months and had narrowly voted down a motion in favor of legalization only a week before Lee’s visit to the McArthurs’ bakeshop.⁷⁶

While the contemporary legal and political debate surrounding same-sex marriage suggests a commonality between *Masterpiece Cakeshop* and *Ashers Baking Company*, it also highlights an important difference in the statutory context for the two cases. Whereas the law in Colorado prohibited discrimination on the basis of such characteristics as disability, race, creed sex, and sexual orientation,⁷⁷ the law in Northern Ireland went further in at least one respect: an Order issued by Her Majesty in Council prohibited discrimination in the provision of goods or services on the basis of political opinion.⁷⁸ In light of the controversy surrounding marital equality in Northern Ireland, it was no surprise that both the district court and the U.K. Supreme Court saw “no reason

71. Equality Act (Sexual Orientation) Regulations (NI) 2006 at 5(1) (formatting omitted). *See also Ashers* [2018] UKSC 49 at [20].

72. *See* Civil Partnership Act 2004, c. 33. For a comparative overview of the different paths taken toward legalization of same-sex marriage in the United Kingdom and the United States, see René Reyes, *The Mixed Blessings of (Non-) Establishment*, 80 ALB. L. REV. 405, 421-22 (2016).

73. *See* Marriage (Same Sex Couples) Act 2013, c. 30.

74. *See* Marriage and Civil Partnership (Scotland) Act 2014, 2014 asp 5.

75. Peter Walker, *Government Pressed on Same-Sex Marriage for Northern Ireland*, GUARDIAN (July 18, 2018), <https://perma.cc/XB28-XFH2>; Eve Rosato, *NI Same-Sex Couples Marry in Ireland and Great Britain*, BBC NEWS (June 4, 2018), <https://perma.cc/Q6BZ-3D96>. In July 2019, the U.K. House of Commons passed a measure requiring the government to legalize same-sex marriage and expand abortion rights in Northern Ireland if the local devolved assembly (which has not been functioning since 2017) was not restored by October 21. *See* Peter Walker, *No. 10 Vows to Deliver on Landmark Northern Ireland Votes*, GUARDIAN (July 10, 2019), <https://perma.cc/86JK-M3DM>; Jayne McCormack, *What Does Vote on Northern Ireland Bill Mean?*, BBC NEWS (July 10, 2019), <https://perma.cc/ZY7C-P6GT>. For further discussion of the circumstances surrounding the interruption in the functioning of the Northern Ireland Assembly, see Torrance, *Devolution in Northern Ireland*, *supra* note 61, at 29-34.

76. *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [10, 41] (appeal taken from N. Ir.), <https://perma.cc/6SGN-QQB7>.

77. *See supra* note 39 and accompanying text.

78. Fair Employment and Treatment (Northern Ireland) Order 1998, 1998 No. 3162 (NI 21). *See also Ashers* [2018] UKSC 49 at [3, 39].

to doubt that support for gay marriage is indeed a political opinion” for purposes of this provision.⁷⁹ This element distinguishes the statutory context in *Ashers Baking Company* from that in *Masterpiece Cakeshop* in a potentially significant way. While Craig and Mullins limited their claim against Phillips for refusing to provide a cake for their same-sex wedding to an allegation of discrimination on the basis of sexual orientation, Lee was in a position to allege that the McArthurs’ refusal to fill his order for a cake bearing the inscription “support gay marriage” constituted unlawful discrimination on multiple bases: sexual orientation and political opinion.

Balanced against these statutory protections from discrimination are constitutional commitments to freedom of religion and expression. Understanding these specific constitutional commitments requires a basic understanding of U.K. constitutional law and structure more broadly. The constitutional claims in *Masterpiece Cakeshop* were rooted in the First Amendment to the U.S. Constitution, but there is no textual equivalent to the First Amendment in the U.K. Constitution—indeed, there is no written U.K. Constitution.⁸⁰ It would be more accurate to say that there is no codified U.K. Constitution, in the sense that there is no single document that contains the entire deposit of British constitutional sources.⁸¹ Rather, the U.K. Constitution is embodied in a range of written and unwritten sources. As described by the U.K. Supreme Court, “[o]ur constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.”⁸²

One of the fundamental principles that has emerged from this process of constitutional development is Parliamentary sovereignty.⁸³ Unlike American legislatures, which are constrained by constitutional limitations that are enforced through judicial review,⁸⁴ the U.K. Parliament has the authority “to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation.”⁸⁵ Nevertheless, the combination of the sweeping scope of

79. *Ashers* [2018] UKSC 49 at [41].

80. See, e.g., ANTHONY KING, *THE BRITISH CONSTITUTION* 5 (2007).

81. See *id.*; see also *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 at [40] (appeal taken from N. Ir., Eng., and Wales), <https://perma.cc/5VAJ-QUUP>.

82. *Miller* [2017] UKSC 5 at [40].

83. See *id.* at [43] (“Parliamentary sovereignty is a fundamental principle of the UK constitution”); see also René Reyes, *Legislative Sovereignty, Executive Power, and Judicial Review: Comparative Insights from Brexit*, 115 MICH. L. REV. ONLINE 91 (2017) (analyzing relationship between parliamentary sovereignty and judicial review in the context of Brexit); René Reyes, *Nondelegation Doctrine in Comparative Context: Britain’s Great Repeal Bill and the Shadow of Henry VIII*, 166 U. PA. L. REV. ONLINE 71 (2017) (discussing parliamentary sovereignty, delegations of legislative authority, and the Brexit process).

84. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

85. *Miller* [2017] UKSC 5 at [43] (quoting A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 38 (8th ed. 1915)).

Parliamentary power with the limited role for judicial review has not resulted in a system in which British citizens have enjoyed fewer civil rights and liberties than their American counterparts in general. Arguably, quite the opposite is true: there are a number of ways in which the United Kingdom has been quicker than the United States to expand the scope of individual freedoms and to safeguard the rights of those who may lack political power.⁸⁶ Abolishing slavery, eliminating capital punishment, and recognizing a universal right to healthcare are but a few examples.⁸⁷

Nor have parliamentary sovereignty and the absence of a First Amendment analogue resulted in a lack of commitment to religious and expressive freedoms in particular. To be sure, there continues to be an established Church of England whose clergy enjoy certain privileges.⁸⁸ But notwithstanding the persistence of a religious establishment, “British citizens of all denominations have enjoyed religious freedom rivaling that of the United States” at least since the mid-1800s.⁸⁹ There may even be a greater degree of separation between church and state in the modern United Kingdom than there is in the United States, especially with respect to the role of religious self-identification and religious language in political debates and campaigns for public office.⁹⁰

In the specific setting of *Ashers Baking Company*, the Court made clear that protection for religious belief and political expression “has constitutional status in Northern Ireland.”⁹¹ One source of this constitutional status is a series of Parliamentary Acts relating to Northern Ireland’s governance. In particular, the Northern Ireland Constitution Act of 1973⁹² and the Northern Ireland Act of 1998⁹³ prohibited local legislation that discriminates on the basis of religious belief or political opinion.⁹⁴ The Attorney General for Northern Ireland, who intervened in the proceedings at the appellate level, argued that to impose civil liability upon the McArthurs under the legislative provisions invoked by Lee would run afoul of these constitutional sources, as it would penalize the bakeshop owners “for the refusal to express a political opinion or express a view on a matter of public policy contrary to [their] religious belief.”⁹⁵ In other

86. See René Reyes, *May Britain Trump America When It Comes to Democracy?*, 58 VA. J. INT’L LAW DIGEST 1 (2017).

87. See *id.* at 11-12.

88. See Reyes, *supra* note 72, at 413 (noting that senior bishops of Church of England are entitled to sit in the House of Lords, and that only clergy of the Church of England serve as chaplains to the House of Commons).

89. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 88 (3d ed. 2011).

90. See Reyes, *supra* note 72, at 417-22.

91. *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [37] (appeal taken from N. Ir.), <https://perma.cc/Y2V7-BAGG>.

92. 1973 c. 36 § 17.

93. 1998 c. 47 §§ 6(2)(e), 24(1)(c).

94. *Ashers* [2018] UKSC 49 at [37].

95. *Id.* at [3].

words, the local provisions protecting Lee from private discrimination on the basis of his sexual orientation and political opinions were arguably trumped as a constitutional matter by Parliamentary provisions protecting the McArthurs from discrimination on the basis of their own religious and political beliefs.

A second source of constitutional protection for the McArthurs' religious commitments and political opinions was the Human Rights Act of 1998.⁹⁶ The U.K. Parliament adopted the Human Rights Act in order "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights,"⁹⁷ which include freedoms of thought, conscience, religion, and expression.⁹⁸ In *Ashers Baking Company*, the Supreme Court noted that these Convention freedoms "permit[] limitations on the freedom to manifest one's religion or beliefs but not on the freedom to hold them,"⁹⁹ and further noted that "obliging a person to manifest a belief which he does not hold has been held to be a limitation on his . . . rights."¹⁰⁰ These observations may be reminiscent of some of the legal doctrines applicable in *Masterpiece Cakeshop*—for in both cases, the governing constitutional law makes distinctions between action and belief in the context of religion,¹⁰¹ and also guards against compelled manifestation of opinion in the context of political expression.¹⁰²

But once more, there are also important differences in the constitutional principles at play. The Human Rights Act and the European Convention do not limit Parliament to the same degree that the First Amendment limits U.S. lawmakers; Parliament retains its sovereign power to legislate in a manner that is incompatible with the Convention. Indeed, the Act itself provides that a judicial declaration that primary legislation is incompatible with Convention rights "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceeding[] in which it is made."¹⁰³ However, this does not mean that the Convention rights lack importance. A declaration that legislation is

96. 1998 c. 42.

97. *Id.* at Preamble.

98. *See Ashers* [2018] UKSC 49 at [49-52]; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9-10, Nov. 4, 1950, 213 U.N.T.S. 221.

99. *Ashers* [2018] UKSC 49 at [49].

100. *Id.* at [50].

101. *See* discussion of U.S. free exercise doctrine *supra* notes 45-48 and accompanying text.

102. *See* discussion of U.S. compelled speech doctrine *supra* notes 49-53 and accompanying text.

103. Human Rights Act 1998 c. 42 § 4(6). *See also, e.g.,* Neil Duxbury, *Reading Down*, 20 GREEN BAG 2D 155, 161 (2017) ("Parliament is under no duty to enact remedying legislation in response to a finding of incompatibility, and, in the case at hand, the court issuing the declaration will still have to apply the reprobate statute on its plain meaning."); Dominic McGoldrick, *The United Kingdom's Human Rights Act 1998 in Theory and Practice*, 50 INT'L & COMP. L.Q. 901, 920 (2001) (noting that the Act "does not give the courts the power to strike down primary legislation").

incompatible with Convention rights may well put political pressure on the government to revise the law in question.¹⁰⁴ In addition, the Act provides that “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”¹⁰⁵ The process of interpreting legislation in this manner is known as “reading down.”¹⁰⁶ This interpretive method effectively creates a “presumption of compatibility,”¹⁰⁷ and “allows the court to bring legislation into conformity with the Convention . . . by adopting a narrow or modified interpretation.”¹⁰⁸

Bringing these principles together, the inquiry before the U.K. Supreme Court in *Ashers Baking Company* was thus at least threefold.¹⁰⁹ One question was whether Lee was the victim of discrimination on the basis of sexual orientation or political opinion under the applicable Northern Ireland orders and regulations. If so, then a subsequent question was whether those orders and regulations were incompatible with constitutional protections for freedom of religious and political belief afforded to the McArthurs under Parliamentary legislation governing Northern Ireland or under the European Convention on Human Rights. A related question was whether any such incompatibility could be avoided by reading down the legislation invoked by Lee—that is, by interpreting the legislation in a narrow manner that would not result in the imposition of civil liability against the McArthurs under the facts of the case at hand. The ways in which the U.K. Supreme Court analyzed those questions in *Ashers Baking Company*—and the ways in which that analysis differed from the approach taken by the U.S. Supreme Court in *Masterpiece Cakeshop*—are discussed in the next Part.

II. OPINIONS OF MANY LAYERS

The opinions in *Masterpiece Cakeshop* and *Ashers Baking Company* are constitutional confections of many layers. Each case arose in a unique context, but both involved overlapping issues of discrimination, religious exercise, and speech. This Part cuts through the layers of each Court’s analysis and compares their respective treatments of these issues. The U.S. and U.K. Supreme Courts both sought to strike a balance between freedom from discrimination on the one hand and freedoms of religion and expression on the other—but the British high court did so in language that casts fewer doubts on the viability of

104. See McGoldrick, *supra* note 103, at 924.

105. Human Rights Act 1998, c. 42 § 3(1).

106. See, e.g., Duxbury, *supra* note 103; Richard A. Edwards, *Reading Down Legislation Under the Human Rights Act*, 20 LEGAL STUD. 353 (2000).

107. Edwards, *supra* note 106, at 355.

108. *Id.* at 356.

109. See *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [1, 40] (appeal taken from N. Ir.), <https://perma.cc/8PTL-426N>.

statutory efforts to assure equal treatment for LGBTQ persons in markets for goods and services and in other places of public accommodation.

A. *Masterpiece Cakeshop*

Beginning with the issue of discrimination, the Colorado tribunals found that Phillips' refusal to make a cake for Craig and Mullins amounted to discrimination on the basis of sexual orientation.¹¹⁰ The U.S. Supreme Court did not directly disturb this finding on appeal. To be sure, the Court did note that there was disagreement among the parties as to the scope of Phillips' unwillingness to serve Craig and Mullins,¹¹¹ and suggested that a baker's refusal to "create" a cake for same-sex weddings might be legally different than a categorical refusal to provide any goods at all for such events.¹¹² These observations could possibly be read to imply that further facts about Phillips' business practices would be necessary before a finding of discrimination on the basis of sexual orientation would be in order.¹¹³ Nevertheless, the Court did not so hold, and did not rest its judgment in Phillips' favor on that ground.

The Court instead rooted its judgment in the Free Exercise Clause and notions of religious respect and neutrality. This focus on free exercise doctrine was somewhat surprising, given the emphasis placed on other arguments in the parties' briefs and the challenges associated with claiming a religious exemption from generally applicable laws.¹¹⁴ But even when ruling in Phillips' favor under the Free Exercise Clause, the majority did not go so far as to hold that the baker was entitled to an exemption from the state's Anti-Discrimination Act. Rather, the Court held that Phillips was entitled to a "neutral and respectful consideration of his claims in all the circumstances of the case,"¹¹⁵ and that the Colorado Civil Rights Commission was correspondingly "obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs."¹¹⁶ On the Court's reading of the facts, the Commission failed to meet this obligation.

Specifically, the Court found evidence of hostility toward Phillips' religious beliefs in comments by several commissioners during public hearings on the case. One commissioner expressed the view that the baker was entitled to his beliefs, but "if a businessman wants to do business in the state and he's

110. *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1726-27 (2018).

111. *See id.* at 1723.

112. *See id.* at 1728.

113. Phillips had argued to the Colorado Administrative Law Judge his conduct did not amount to discrimination on the basis of sexual orientation, but rather to opposition to same-sex marriage. *See id.* at 1726.

114. *See supra* notes 45-49 and accompanying text.

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

116. *Id.* at 1731.

got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.”¹¹⁷ Another commissioner noted that “religion has been used to justify all kinds of discrimination throughout history,” and referenced slavery and the Holocaust as examples.¹¹⁸ Although the Court acknowledged that the import of some of these comments was open to different interpretations,¹¹⁹ it discerned further indications of hostility from other sources—in particular, the Court noted that in a handful of cases in which bakers refused to create cakes with religious words and images that they deemed to be derogatory toward same-sex couples, the Commission declined to find unlawful discrimination.¹²⁰ In light of these facts, the Court concluded that it “must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.”¹²¹

The majority’s analysis did not break any new ground under the Free Exercise Clause. The Court did not question the ongoing validity of the *Smith* rule relating to religious exemptions, and reminded readers that if a broader right to decline to serve on the basis of sexual orientation were recognized, “then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws.”¹²² But nor did the majority’s analysis provide much clarity about its implications going forward. The decision in Phillips’ favor was highly fact-specific, turning as it did on perceptions of animus in his particular case. The Court’s finding of hostility toward religion in the commissioners’ remarks is itself debatable¹²³—and even if this finding were accurate, it would seem to leave open the possibility of a renewed finding of unlawful discrimination by an unbiased panel in the future.¹²⁴

Perhaps as a result of these ambiguities in the Court’s analysis, scholars and advocates have offered competing arguments about how the decision should be interpreted and applied. Douglas NeJaime and Reva Siegel challenge the view that *Masterpiece Cakeshop* is a narrow opinion, and argue that it is

117. *Id.* at 1729 (internal quotation marks omitted).

118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. *Id.* at 1730.

121. *Id.* at 1731.

122. *Id.* at 1727.

123. See Kendrick & Schwartzman, *supra* note 2, at 139, 141 (arguing that the alleged ambiguity in one commissioner’s remarks was “entirely manufactured,” and that the potential hostility perceived in other commissioner’s remark “was not sufficient to demonstrate that the Commission was biased in its application of civil rights law”).

124. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (“In this case the adjudication concerned a context that may well be different going forward in the respects noted above.”). See also Kendrick & Schwartzman, *supra* note 2, at 150-51 (arguing that even if the Commission were tainted by prejudice, the case could have been remanded for rehearing with the biased commissioners recused).

actually “a resounding answer to a full-bore challenge to public accommodations law”¹²⁵ that “affirm[s] an approach . . . that limits religious accommodation to prevent harm to other citizens who do not share the objector’s beliefs.”¹²⁶ Lawrence Sager and Nelson Tebbe similarly argue that the decision “promises several advances in the law governing conflicts between religious freedom and equality guarantees, not only for LGBTQ citizens . . . but in the broad constitutional project of protecting those vulnerable to structural injustice.”¹²⁷ But at the same time, Sager and Tebbe also warn of other interpretations of the Court’s opinion that should be “strenuously resisted.”¹²⁸ These interpretations “suggest that the basic structure of Colorado’s civil rights law . . . was unconstitutionally hostile to religion.”¹²⁹ The authors argue that this sort of reading of the case “is both wrong and dangerous, but it is already being promoted by scholars and activists in the aftermath of the decision.”¹³⁰

There are indications that such arguments may be received favorably by at least some members of the Court. For example, while Justice Gorsuch joined the majority opinion in *Masterpiece Cakeshop*, he also wrote separately to note that the *Smith* regime of limited exemptions “remains controversial in many quarters.”¹³¹ It remains to be seen whether Justice Kennedy’s retirement and replacement by Justice Kavanaugh will lead to further expressions of skepticism about *Smith*, or even to a retreat from *Smith* and a shift toward broader rights for religious objectors under the Free Exercise Clause.¹³²

There are likewise questions about how the Free Speech Clause will be applied to future cases involving claims of discrimination on the basis of sexual orientation. Despite the fact that the petitioner prioritized free speech arguments in its brief,¹³³ the Court devoted little attention to the issue in its opinion. The majority’s short opening reference to freedom of speech suggests that the merits of the claim were far from clear—for the Court remarked that “few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.”¹³⁴ The remainder of the Court’s opinion explains the nature of Phillips’ free speech claim at several points but

125. NeJaime & Siegel, *supra* note 15, at 203.

126. *Id.* at 202.

127. Sager & Tebbe, *supra* note 15, at 178.

128. *Id.* at 172.

129. *Id.*

130. *Id.*

131. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring). Justice Gorsuch’s concurrence was joined by Justice Alito. *Id.* For examples of criticisms of *Smith* from various perspectives, see, for example, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); René Reyes, *Common Cause in the Culture Wars?*, 27 J.L. & RELIG. 231 (2012).

132. See Kendrick & Schwartzman, *supra* note 2, at 162.

133. See *supra* note 49 and accompanying text.

134. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

does not engage with it in significant detail, other than to note that the Commission’s treatment of other cases in which bakers refused to create cakes with words and images disapproving of same-sex marriage “could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished.”¹³⁵

But while the Free Speech Clause does not play a significant role in the majority opinion, it features much more prominently in Justice Thomas’s concurrence. Justice Thomas noted that Phillips considers himself an artist, and highlighted the steps that Phillips takes during the process of creating a wedding cake.¹³⁶ He further noted Phillips’ belief that wedding cakes are inherently communicative of a message of celebration, and maintained that such cakes “do, in fact, communicate this message,”¹³⁷ asserting that “[i]f an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding.”¹³⁸ The creation of a wedding cake was therefore expressive conduct that was entitled to constitutional protection.¹³⁹ In Justice Thomas’s view, to require Phillips to create wedding cakes for same-sex marriages would require him to suggest that those marriages should be celebrated and to “affirm a belief with which he disagrees” in violation of free speech principles.¹⁴⁰

There are several questions and objections that could be raised in response to Justice Thomas’s free speech argument. For one, even if it were true that traditional wedding cakes communicate a message of celebration by the couple, it does not follow that such cakes communicate a message of celebration by the baker.¹⁴¹ For another, the record did not indicate that Craig and Mullins requested a classic white, multi-tiered cake of the sort that Justice Thomas deems so communicative of a message of celebration—instead, the facts state that Phillips declined to provide them with a wedding cake before any design was ever discussed.¹⁴² Further, as noted by Justice Ginsburg in her dissent, “Phillips point[ed] to no case in which this Court has suggested the provision of a baked good might be expressive conduct.”¹⁴³

Despite these counterarguments and the fact that Justice Thomas was

135. *Id.* at 1730.

136. *Id.* at 1742 (Thomas, J., concurring in part and concurring in the judgment).

137. *Id.* at 1743.

138. *Id.*

139. *See id.* at 1742-44.

140. *Id.* at 1744 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)).

141. *See id.* at 1748 n.1 (Ginsburg, J., dissenting) (“Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker’s, rather than the marrying couple’s.”).

142. *See id.* at 1724 (majority opinion).

143. *Id.* at 1748 n.1 (Ginsburg, J., dissenting).

joined only by Justice Gorsuch on the compelled speech point,¹⁴⁴ this line of analysis may gain more traction in the wake of Justice Kennedy’s departure. The potential consequences associated with classifying the provision of goods and services to same-sex couples as protected speech are far-reaching. As framed by Leslie Kendrick and Micah Schwartzman, “[e]xtending free speech in this way threatens to undo longstanding settlements—to reopen the Supreme Court’s definitive rejection of constitutional challenges to civil rights laws in the 1960s and to revive the deregulatory project of the *Lochner* era under the guise of the First Amendment.”¹⁴⁵

The uncertainty surrounding these questions is all the more significant given that controversies involving religious refusals by vendors to serve LGBTQ customers continue to come before the courts. The facts of some of these cases are remarkably similar to the facts of *Masterpiece Cakeshop*. In one case, for example, a bakery in Oregon declined to provide a wedding cake to a same-sex couple on religious grounds.¹⁴⁶ The state Bureau of Labor and Industries found that the bakery’s refusal constituted a violation of an Oregon public accommodations statute prohibiting discrimination on the basis of sexual orientation, and the state Court of Appeals affirmed. In another case, a florist raised religious objections to selling flowers for a same-sex wedding.¹⁴⁷ The state of Washington brought a complaint alleging discrimination on the basis of sexual orientation, which was granted and upheld by the state’s courts. The U.S. Supreme Court granted certiorari in both cases, but did little to clarify the issues; it simply remanded the cases “for further consideration in light of *Masterpiece Cakeshop*.”¹⁴⁸ And in another case involving the *Masterpiece Cakeshop* bakery itself, the Colorado Civil Rights Division found that Phillips violated the state’s anti-discrimination law after he refused to fulfill a request for a cake with a blue exterior and a pink interior to celebrate a gender transition.¹⁴⁹ The parties ultimately agreed to terminate the dispute, with Colorado ending its administrative action and Phillips voluntarily dismissing his complaint against the state. Doctrinal ambiguities seemed to play a role in the parties’ decisions: the Colorado Attorney General explained that “both sides agreed it was not in anyone’s best interest to move forward with these cases,” and that while “[t]he larger constitutional issues might well be decided down the road . . . these cases will not be the vehicle for resolving them.”¹⁵⁰

144. *See id.* at 1740 (Gorsuch, J., concurring).

145. Kendrick & Schwartzman, *supra* note 2, at 164.

146. *See Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1057 (Or. Ct. App. 2017).

147. *See Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2017).

148. *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (mem.); *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (mem.).

149. *See First Amended Verified Complaint at 7, Masterpiece Cakeshop v. Elenis*, No. 1:18-cv-02074-WYD-STV, 2018 WL 8265747 (D. Colo. Oct. 23, 2018).

150. COLO. ATT’Y GEN., News Release, *State of Colorado and Masterpiece Cakeshop*

The constitutional questions posed by these cases therefore persist. Justice Kennedy previously opined that “[l]iberty finds no refuge in a jurisprudence of doubt,”¹⁵¹ yet neither his opinion in *Masterpiece Cakeshop* nor subsequent decisions by his colleagues on the Court have provided clear guidance for judges and litigants to follow. So how are these questions to be resolved? The U.K. Supreme Court’s decision in *Ashers Baking Company* may offer some answers.

B. *Ashers Baking Company*

The analysis in *Ashers Baking Company* begins with the issue of discrimination based on sexual orientation. As was the case in *Masterpiece Cakeshop*, the lower courts in *Ashers Baking Company* determined that the bakeshop had engaged in discrimination on the basis of sexual orientation in violation of locally applicable legislation.¹⁵² But whereas the U.S. Supreme Court merely raised questions about that determination based on the record before it, the U.K. Supreme Court expressly reversed.¹⁵³ The Court acknowledged that “[i]t is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics.”¹⁵⁴ Nevertheless, the Court went on to conclude that such a denial of service “is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.”¹⁵⁵

At first glance, this holding may strike advocates of anti-discrimination as deeply troubling—perhaps even more so than some elements of *Masterpiece Cakeshop*, inasmuch as the British court directly rejected the sort of claim that was only indirectly questioned by the American court. But on closer examination, the U.K. Supreme Court’s rejection of the sexual orientation claim need not be understood as a major blow against equality. The Court did not hold that religiously-motivated discrimination on the basis of sexual orientation was outside the scope of the relevant legislation, nor did it hold that religious objectors were entitled to an exemption from anti-discrimination laws when dealing with LGBTQ patrons. In other words, there was no parallel to Justice Gorsuch’s suggestion that refusing to grant such exemptions to religious objectors was constitutionally “controversial.” In addition, the Court took care to note that neither the McArthurs nor their staff at the bakeshop knew of Lee’s

Agree to End All Litigation (Mar. 5, 2015), <https://perma.cc/V479-U3V6>.

151. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

152. *See Lee v. Ashers Baking Co.* [2018] UKSC 49 at [15] (appeal taken from N. Ir.), <https://perma.cc/G3S7-HKWL>.

153. *See id.* at [34-35].

154. *Id.* at [35].

155. *Id.*

sexual orientation.¹⁵⁶ To the extent that the McArthurs may have assumed or perceived that Lee was in fact gay, even the lower court judge who held that discrimination based on sexual orientation had occurred did not find that Lee's order was cancelled because of that perception.¹⁵⁷ Instead, the judge found that the order was not filled because of the McArthurs' religious opposition to same-sex marriage and their corresponding unwillingness to inscribe a message supporting the practice on the cake.¹⁵⁸

The U.K. Supreme Court characterized the McArthurs' refusal to provide the cake as an objection "to the message, not the messenger."¹⁵⁹ To buttress this conclusion, the Court cited portions of the trial court proceedings indicating that the McArthurs would have provided the cake with the other elements requested by Lee if the words "Support Gay Marriage" had not been included.¹⁶⁰ As noted above, this is an important distinction from the *Masterpiece Cakeshop* case. While Phillips apparently refused to create a cake of any design to be used for a same-sex wedding because of his religious convictions,¹⁶¹ the McArthurs seem to have been willing to create a cake that would be used at an event promoting same-sex marriage, as long as they were not required to literally write a message of support. The Court further cited indications that the McArthurs would have refused to provide a cake inscribed with the message to anyone, regardless of their sexual orientation.¹⁶² This reflects another distinction from *Masterpiece Cakeshop*, where Phillips' refusal to create a wedding cake was directly dependent upon the sexual orientation of the customers.¹⁶³

Read in this light, the U.K. Court's opinion preserves protections for LGBTQ customers and does not license religiously-motivated discrimination. Moreover, the Court's approach in *Ashers Baking Company* provides a way to distinguish some of the other cases cited in *Masterpiece Cakeshop* as evidence of hostility toward religion on the part of the Colorado Civil Rights Commission. As alluded to above,¹⁶⁴ the Commission found no violation of the state's Anti-Discrimination Act in several cases wherein bakers refused to create cakes depicting a same-sex couple covered by a red "X" and

156. *See id.* at [11].

157. *See id.* at [13, 22].

158. *See id.* at [22].

159. *Id.* at [22].

160. *Id.*

161. *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

162. *Ashers* [2018] UKSC 49 at [22].

163. *See Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring) ("[T]he same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple."); *see also id.* at 1750 (Ginsburg, J., dissenting) ("What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.").

164. *See supra* note 120.

accompanied by language such as “Homosexuality is a detestable sin.”¹⁶⁵ Justice Kennedy’s majority opinion and Justice Gorsuch’s concurring opinion suggest that the Commission’s treatment of these cases may be inconsistent with its treatment of Phillips’ case to a degree that could indicate an absence of neutrality toward those who object to same-sex marriage on religious grounds.¹⁶⁶ Justice Kagan’s concurrence rejects this suggestion of inconsistency; she points out that the bakers in these cases “did not single out [the customer] because of his religion, but instead treated him in the same way they would have treated anyone else.”¹⁶⁷ Some commentators have credited Justice Kagan’s distinction as “deft” while cautioning that “without more it could be dismissed as facile.”¹⁶⁸ The U.K. Supreme Court’s detailed analysis in *Ashers Baking Company* provides the missing “more,” and demonstrates that the distinction is not merely deft, but also principled. Refusals to provide cakes inscribed with messages that the baker finds disagreeable are different in kind from refusals to provide cakes to members of a class of individuals the baker finds disagreeable. “In a nutshell, the objection [is] to the message and not to any particular person or persons.”¹⁶⁹

Of course, to say that the proprietors in *Ashers Baking Company* objected to the message is to raise the question of discrimination on the basis of political opinion. This question was not necessarily at issue in *Masterpiece Cakeshop*, because the Colorado Anti-Discrimination Act does not extend to political ideology.¹⁷⁰ By contrast, the Northern Ireland Fair Employment Treatment Order extends to discrimination “on the ground of religious belief or political opinion.”¹⁷¹ The district court judge who initially heard the case ruled that the McArthurs’ refusal to fulfill Lee’s order amounted to discrimination on both of these grounds.¹⁷²

The U.K. Supreme Court dealt with the religious belief element of Lee’s claim fairly quickly on appeal. The Court first clarified that the prohibited discrimination had to be on the basis of the religious beliefs held by Lee or those with whom he associated, not merely on the basis of the beliefs held by the McArthurs¹⁷³—that is, Lee had to establish that he had been treated

165. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

166. *See id.* at 1730-31 (majority opinion); *see also id.* at 1734-40 (Gorsuch, J., concurring).

167. *Id.* at 1733 (Kagan, J., concurring).

168. Sager & Tebbe, *supra* note 15, at 183.

169. *Lee v. Ashers Baking Co.* [2018] UKSC 49 at [34] (appeal taken from N. Ir.), <https://perma.cc/C6SR-J2CD>.

170. *See* COLO. REV. STAT. § 24-34-601 (2017); *see also* Kendrick & Schwartzman, *supra* note 2, at 154-55 (noting that civil rights laws “apply only to denial of service on the basis of certain protected characteristics, such as race, ethnicity, religion, and sexual orientation” and not to denial on the ground of politics, vulgarity, or aesthetics).

171. Fair Employment Treatment Order 1998, SI 1998/3162 (N. Ir. 21) art. 3, ¶ 1.

172. *See Ashers* [2018] UKSC 49 at [2, 15].

173. *See id.* at [42-45].

differently because of what he believed, not just because of what the McArthurs believed. The Court then held that since there appeared to have been no evidence introduced concerning Lee's own beliefs, the religious discrimination claim could not stand.¹⁷⁴

The political opinion element of the claim was more complex. On this issue, the Court agreed with the district judge that support for same-sex marriage qualified as a political opinion under the applicable legislation.¹⁷⁵ The Court further agreed that the McArthurs were clearly in a position to know about Lee's political opinion in this regard, given the nature of the message he had requested on the cake.¹⁷⁶ And it was because of their disagreement with that message that the McArthurs declined to complete the order as requested. But once again, the Court indicated that this disagreement did not necessarily amount to discrimination against Lee personally. "The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake."¹⁷⁷

However, the Court did not rest its analysis entirely on this point. The Court went on to consider the argument that in this particular context, there was such a close "association between the political opinions of the man and the message that he wishes to promote . . . that they are 'indissociable' for the purpose of direct discrimination on the ground of political opinion."¹⁷⁸ Under this reading of the facts and the law, discrimination against a political position might amount to discrimination against a person for purposes of the legislation. The Court accordingly found it appropriate to consider the applicability of the McArthurs' European Convention rights to Lee's political discrimination claim.¹⁷⁹

The Court noted that the rights of conscience and expression protected under the Convention encompass not only the freedom to believe, but also the freedom not to believe.¹⁸⁰ This latter freedom includes the right not to be compelled to manifest a belief one does not hold.¹⁸¹ This is a clear parallel to the compelled speech claim raised in *Masterpiece Cakeshop*. Indeed, the U.K. Supreme Court acknowledged the argument that compelled speech doctrine was primarily developed in U.S. cases interpreting the First Amendment.¹⁸² But despite the American origins of the doctrine and the absence of the legal

174. *See id.* at [46].

175. *Id.* at [41].

176. *Id.* at [46].

177. *Id.* at [47].

178. *Id.* at [48].

179. *Id.*

180. *Id.* at [49].

181. *Id.* at [50-52].

182. *Id.* at [53].

equivalent of the First Amendment in U.K. constitutional law,¹⁸³ the Court cited British and European cases that reflected a similar commitment against coerced expression.¹⁸⁴ It therefore could not “seriously be suggested that the same principles do not apply in the context . . . of the Convention.”¹⁸⁵

Applying these principles to Lee’s political discrimination claim, the Court rejected the lower courts’ conclusion that the McArthurs were not being required to manifest support for a political position with which they disagreed. The Court of Appeal had suggested that providing the cake as ordered would not indicate support for same-sex marriage, just as “provid[ing] a cake for a particular team or portray[ing] witches on a Halloween cake does not indicate any support for either.”¹⁸⁶ But the U.K. Supreme Court noted that being required to promote a cause and being associated with it were actually two separate issues. While the McArthurs may indeed have been concerned that members of the public would see their logo on the outside of the box and conclude that they supported the cause inscribed on the cake within, this was not the relevant questions—for “there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message.”¹⁸⁷ Instead, the determinative point was that “the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but . . . in which the owners most definitely and sincerely did not.”¹⁸⁸ The Court chose to read down the applicable legislation to avoid this outcome. It concluded that the Fair Employment Treatment Order “should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.”¹⁸⁹

Here, too, this conclusion may initially seem troubling to advocates of marriage equality and LGBTQ rights more broadly. The Court’s reasoning may even appear to be of a piece with Justice Thomas’ concurrence in *Masterpiece Cakeshop*, insofar as both suggest that requiring the bakers to create the specific cakes as requested by their respective customers would run afoul of compelled speech principles. But once more, a closer reading of the U.K. Supreme Court’s opinion reveals important limiting principles that should allay concerns about the scope of its holding. First, the Court consistently placed considerable emphasis on the fact that the requested cake literally expressed the message “Support Gay Marriage.” The Court was unambiguous in stating that the right to refuse service in these circumstances did not amount to a general

183. See *supra* note 80 and accompanying text.

184. *Ashers* [2018] UKSC 49 at [50-52].

185. *Id.* at [53].

186. *Id.* at [54] (quoting *Lee v. Ashers Baking Co.* [2016] NICA 39 at [67] (appeal taken from district court ruling), <https://perma.cc/P4K3-BCHR>).

187. *Id.*

188. *Id.*

189. *Id.* at [56].

right to refuse service to LGBTQ patrons, but was rather a narrow exception:

It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake—or any other of their products—to Mr. Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different—obliging them to supply a cake iced with a message with which they profoundly disagreed.¹⁹⁰

The literal, rather than symbolic, act of expressing support for same-sex marriage was thus essential to the Court’s analysis and holding. It is not sufficient that a product will be used at an event or ceremony of which the supplier does not approve; the fact that others might assume that the purveyor supports the cause is merely “by the way”¹⁹¹ and does not by itself establish a violation of compelled speech doctrine. In sum, cake craft alone is not compelled speech.

Second, the U.K. Supreme Court expressly distinguished *Ashers Baking Company* from *Masterpiece Cakeshop*, and highlighted the differences in the facts and holdings. The Court emphasized that there was “nothing in the reported facts [of *Masterpiece Cakeshop*] to suggest that the couple wanted a particular message or decoration on their cake.”¹⁹² Since it was the particular inscribed message that justified the exemption under compelled speech doctrine in *Ashers Baking Company*, the implication is that no such exemption would have been available on compelled speech grounds if the British Court’s analysis had been applied in the American case. The Court went so far as to make this implication explicit by concluding that the “important message from the *Masterpiece Bakery* [sic] case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics.”¹⁹³

The U.K. Supreme Court’s analysis in *Ashers Baking Company* thus goes a long way toward resolving the ambiguities and unanswered questions raised by the U.S. Supreme Court Justices’ opinions in *Masterpiece Cakeshop*. The British Court’s opinion demonstrates that compelled speech doctrine can strike a balance between protecting the rights of individuals not to literally express a message with which they disagree, and the rights of LGBTQ and other persons to be free from discrimination in the marketplace for goods and services. It further demonstrates that the religious and expressive freedoms of business owners can be respected without undermining anti-discrimination and civil rights legislation protecting politically vulnerable groups and individuals. The next Part argues that constitutional conversations between the U.S. and the

190. *Id.* at [55].

191. *Id.* at [54].

192. *Id.* at [59].

193. *Id.* at [62].

U.K. on such issues can help advance the cause of liberty and equality in both nations.

III. THE VALUE OF CONSTITUTIONAL CONVERSATIONS

Ashers Baking Company illustrates the value of constitutional conversations on matters of common concern in the United States and the United Kingdom. The U.K. Supreme Court directly engaged with American compelled speech doctrine and with the facts and holding of *Masterpiece Cakeshop*—not because those sources were in any sense binding on the British court, but because of their potential to illuminate the issues and to deepen understandings of how to reconcile competing claims to liberty and equality. Americans would be well-served if the U.S. Supreme Court were willing to do likewise. Constitutional commitments to religious and expressive liberty are not uniquely American principles, nor are legislative guarantees against discrimination on the basis of sexual orientation. Yet American courts have clearly continued to struggle with how to harmonize those principles, as demonstrated by the number of ongoing cases that present issues involving denials of service to LGBTQ customers on religious grounds.¹⁹⁴ The doctrinal uncertainty surrounding these cases persists largely as a result of the analytical ambiguities in *Masterpiece Cakeshop*. Many of those ambiguities could be addressed if the U.S. Supreme Court were open to engaging with—and perhaps even learning from—the U.K. doctrinal developments reflected in *Ashers Baking Company*.

For instance, the U.K. Supreme Court drew a sharp distinction between literally expressing a message of support or approval on the one hand, and merely providing a good or service on the other. U.S. courts could rely on this same distinction to resolve many of the current disputes wending their way through the American judicial system: an Oregon baker would not be entitled to refuse to provide a cake simply because it is to be used by a couple to celebrate their same-sex wedding,¹⁹⁵ nor would a Washington florist be able to refuse to provide flowers for a similar celebration.¹⁹⁶ In neither case would the vendor's opposition to same-sex marriage be a sufficient basis for declining to provide the requested service—for in neither case would the vendor be required to literally express a message with which they disagreed. This kind of ruling would respect both religious liberty and LGBTQ equality, while also drawing a principled line between permissible and impermissible refusals to serve patrons. And while it might be possible to envision cases in which the distinction between compelled expression and mere service is blurred,¹⁹⁷ the

194. See discussion of recent cases *supra* notes 146-50 and accompanying text.

195. Cf. *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017).

196. Cf. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

197. See *Ashers* [2018] UKSC 49 at [62] (acknowledging that “[o]ne can debate which

standard drawn by the U.K. Supreme Court in *Ashers Baking Company* is surely clearer and more administrable than the vague notions of neutrality invoked by the U.S. Supreme Court in *Masterpiece Cakeshop*.

Resolving cases by engaging in this sort of transatlantic jurisprudential dialogue would require a heightened degree of humility and a lessened exceptionalism than has sometimes been expressed in U.S. Supreme Court jurisprudence.¹⁹⁸ Historically, the Court's relationship with international comparisons has been conflicted and controversial. Steven Calabresi has identified approximately three dozen instances in which the Court has considered or relied upon foreign law since the early 1800s, and deemed it "indisputable that the Supreme Court's practice of relying on foreign law is deeply rooted in our history and traditions."¹⁹⁹ But notwithstanding its historical pedigree, this practice has been subject to considerable criticism as it has increased in frequency and prominence in recent decades.²⁰⁰ Two landmark opinions written for the Court by Justice Kennedy provide illustrative examples. In *Lawrence v. Texas*,²⁰¹ the Court held that a state law criminalizing same-sex intimate conduct violated the Due Process Clause of the Fourteenth Amendment.²⁰² Justice Kennedy's majority opinion included a reference to decisions by the European Court of Human Rights and an observation that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."²⁰³ This passing reference was sufficient to draw a strong objection from Justice Scalia, who characterized the majority's discussion of foreign law as "[d]angerous dicta" and insisted that the Court "should not impose foreign moods, fads, or fashions on Americans."²⁰⁴

side of the line particular factual scenarios fall").

198. See Reyes, *supra* note 86 (critiquing traditional notions of American exceptionalism); cf. Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1338 (2006) (arguing that "a conventionalist ought to reject Supreme Court citation of foreign law on the grounds that . . . the American people, whose Constitution is at issue, think America is an exceptional place, which by definition should have exceptional laws").

199. Calabresi, *supra* note 198, at 1344. See also Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

200. See Calabresi, *supra* note 198, at 1344 (noting that reliance on foreign law has been especially prominent since the mid-twentieth century, but arguing that Court should align itself with that segment of American culture "which looks dimly on American courts following foreign legal fashions and moods").

201. 539 U.S. 558 (2003).

202. *Id.* at 578 ("[Petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

203. *Id.* at 577.

204. *Id.* at 598 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 470 n.* (2000) (Thomas, J., concurring in denial of certiorari)). See also Joan L. Larsen, *Importing Constitutional Norms From a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO

A second prominent example is Justice Kennedy's majority opinion in *Roper v. Simmons*.²⁰⁵ There, the Court held that the Eighth Amendment's bar against "cruel and unusual punishments"²⁰⁶ prohibited the imposition of the death penalty upon an individual who was younger than 18 years of age at the time that they committed their offense.²⁰⁷ The majority found confirmation for this holding "in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."²⁰⁸ The Court also found it "instructive" that the United Kingdom abolished the juvenile death penalty several decades ago, and noted the "historic ties between our countries."²⁰⁹ Justice Kennedy emphasized that these international practices and attitudes did not control the outcome in the instant case, and that "the task of interpreting the Eight Amendment remains [the Court's] responsibility."²¹⁰ Yet the majority opinion's reference to foreign law even for instructive purposes once again elicited strong opposition. Justice Scalia lamented the role that "the views of other countries and the so-called international community"²¹¹ played in the Court's analysis, and contended that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."²¹² Justice Scalia raised particular objection to the majority's references to practices in the United Kingdom. In his view, such references were "indefensible" insofar as the U.K. "has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own."²¹³

To be sure, there are some ways in which the American constitutional order has developed out of self-conscious efforts to depart from the British model of government.²¹⁴ At a broad level, the Framers drafted a written constitution with enumerated governmental powers in a break from the British tradition of an uncodified constitution.²¹⁵ This document called for an elected president instead of a hereditary monarch,²¹⁶ and Federalist voices in the

St. L.J. 1283 (2004) (arguing that much of the Court's reliance on foreign law is without constitutional justification).

205. 543 U.S. 551 (2005).

206. U.S. CONST. amend. VIII.

207. See *Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

208. *Id.* at 575.

209. *Id.* at 577.

210. *Id.* at 575.

211. *Id.* at 622 (Scalia, J., dissenting).

212. *Id.* at 624.

213. *Id.* at 626-27.

214. See *Reyes*, *supra* note 86, at 1-2.

215. See discussion of the U.K.'s uncodified constitution *supra* notes 80-82 and accompanying text.

216. See U.S. CONST. ART. II.

ratification debates emphasized the ways in which the President of the United States would be less powerful than the King of England.²¹⁷ In a like vein, the Framers opted for an upper legislative chamber of Senators rather than Lords.²¹⁸ Some Federalist proponents of the Constitution again highlighted the differences between the American and British institutions, with the latter being described as “an hereditary assembly of opulent nobles.”²¹⁹ Certain provisions of the Bill of Rights were also said to reflect breaks from existing models with regard to individual liberties. The First Amendment’s Religion Clauses, for instance, were described by Thomas Jefferson as a “novel experiment” in religious freedom compared to prevailing European approaches that tended to assume that some form of Christianity should be established and defended by the state.²²⁰

But these American innovations in constitutional structure and liberties should not be overstated. As noted above, the United Kingdom has long afforded constitutional protection for religious freedom to a degree that is comparable to the United States—and in some respects, the British approach may even go further than the American Establishment Clause in separating church and state.²²¹ More generally, “[c]oncepts like liberty, equality, and privacy are not exclusively American constitutional ideas but, rather, part and parcel of the global human rights movement.”²²² Further, as has been amply documented by Steven Calabresi and others, there is a long history of engagement with foreign and international law in Supreme Court decisions.²²³ Vicki Jackson, for example, has noted that “references to foreign and international sources occur episodically in constitutional decisions throughout the Court’s history,”²²⁴ while Harold Koh has argued that since the early days of the Republic, “American courts regularly took judicial notice of both

217. See, e.g., THE FEDERALIST NOS. 67, 69 (Alexander Hamilton); Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 323-28 (2009) (discussing emphasis on rejection of monarchy during ratification debates); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 602 (2004) (highlighting arguments in the Federalist Papers that the president would be less powerful than a monarch).

218. U.S. CONST. ART. I.

219. THE FEDERALIST NO. 63 (James Madison); cf. Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 23 (noting that others in the founding era “believed that the Senate should emulate the House of Lords”).

220. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 372 (1996). See also Reyes, *supra* note 72, at 425.

221. See *supra* notes 88-90 and accompanying text.

222. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 54 (2004).

223. See Calabresi, *supra* note 198; Calabresi & Zimdahl, *supra* note 199.

224. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 110 (2005).

international law and foreign law . . . when construing American law.”²²⁵

And even critics like Justice Scalia have written or joined opinions that make reference to foreign law when it supports their positions.²²⁶ In his *Roper* dissent, Justice Scalia conceded that “[i]t is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought.”²²⁷ Justice Scalia likewise made several references to English law when offering his interpretation of the Second Amendment in *District of Columbia v. Heller*.²²⁸ His opinion for the Court included discussions of the Stuart monarchy and the English Bill of Rights,²²⁹ which he drew upon to support the conclusion that the Second Amendment was meant to codify “a right inherited from our English ancestors.”²³⁰ Nor have such references been limited to attempts to determine the original meaning of U.S. constitutional provisions. For example, when considering the question of whether a ban on anonymous pamphleteering enhanced democratic elections, Justice Scalia made comparisons to the practices in Australia, Canada, and England, and suggested that the practices in these countries was a relevant factor in assessing the strength of the Court’s analysis.²³¹ Finally, Justice Scalia joined the Court’s opinion holding that there was no constitutional right to physician-assisted suicide in *Washington v. Glucksberg*.²³² This opinion noted that “in almost every western democracy . . . it is a crime to assist a suicide,”²³³ and drew support for its analysis from a study on euthanasia practices in the Netherlands.²³⁴ Despite these references to contemporary practices in other countries, Justice Scalia did not write separately to express any disagreement with the majority’s analysis.²³⁵

It is unclear how receptive the current U.S. Supreme Court will be to foreign and international constitutional conversations. On the one hand, Justice

225. Koh, *supra* note 222, at 45.

226. *See id.* at 47 (“Scalia himself has been far from consistent in insisting upon the irrelevance of foreign and international law.”).

227. *Roper v. Simmons*, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting).

228. 554 U.S. 570 (2008) (holding that the Second Amendment includes an individual right to bear arms unconnected to service in a militia).

229. *See id.* at 592-94.

230. *Id.* at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

231. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) (disagreeing with Court’s holding that statute prohibiting distribution of anonymous campaign literature violated First Amendment).

232. 521 U.S. 702 (1997).

233. *Id.* at 710.

234. *Id.* at 734-35.

235. Justice Scalia subsequently explained that he has “no problem with reciting such interesting background, so long as the laws of those countries are not asserted to be relevant to the interpretation of our Constitution.” Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305, 307 (2004).

Scalia was one of the most fervent critics of those conversations and is no longer on the Court. But on the other hand, Justice Kennedy is also no longer on the Court—and it was Justice Kennedy who wrote the opinions in *Lawrence* and *Roper* that drew Justice Scalia’s ire for their engagement with foreign sources. Such engagement need not amount to an outsourcing of U.S. constitutional interpretation to other countries’ courts. Rather, foreign sources may be “seen as interlocutors, offering a way of testing understanding of one’s own traditions and possibilities by examining them in the reflection of others’.”²³⁶ Or, framed a bit more bluntly, “[w]hile the ‘American perspective’ must always be our focus . . . it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders.”²³⁷

The U.K. Supreme Court’s decision in *Ashers Baking Company* offers a particularly apt opportunity for the U.S. Supreme Court to engage with an interlocutor and to learn from those beyond our borders. The factual and constitutional contexts of *Ashers Baking Company* and *Masterpiece Cakeshop* are similar enough demonstrate that the challenge of harmonizing these legal commitments is one faced by both nations. At the same time, the analyses and outcomes in the two cases are sufficiently different to provide opportunities to reflect more deeply on the strengths and weaknesses of each Court’s jurisprudential approach. The U.K. Supreme Court has already recognized the value of transatlantic conversation, as reflected in its explicit engagement with American compelled speech doctrine and the facts and holding of *Masterpiece Cakeshop*. Given the evident need for further doctrinal guidance in ongoing American disputes, the U.S. Supreme Court should likewise take advantage of such dialectic opportunities as it seeks to address the questions left open by *Masterpiece Cakeshop* in future cases.

CONCLUSION

This Article has presented a comparative analysis of the U.S. Supreme Court’s decision in *Masterpiece Cakeshop* and the U.K. Supreme Court’s decision in *Ashers Baking Company*. Both cases involved refusals by bakeshops to provide cakes on the basis of their owners’ religious opposition to same-sex marriage, and both involved tensions between legislative prohibitions against discrimination on the basis of sexual orientation and constitutional commitments to religious and expressive freedom. But while both Supreme Courts ultimately ruled in favor of the baker, they did so in different ways. The U.S. Supreme Court focused on highly fact-specific indications of hostility

236. Jackson, *supra* note 226, at 114.

237. *McDonald v. City of Chicago*, 561 U.S. 742, 896 (2010) (Stevens, J., dissenting) (rejecting the Court’s conclusion that individual right to keep and bear arms recognized under the Second Amendment is applicable against the states under the Fourteenth Amendment).

toward religion on the part of the state's Civil Rights Commission, and offered little guidance as to how its decision should inform future cases. In light of the ambiguity in the majority opinion and the positions taken in some of the concurring opinions, commentators have voiced concern that *Masterpiece Cakeshop* may be used to undermine a broad range of anti-discrimination and other regulatory laws in the name of freedom of expression.

By contrast, the U.K. Supreme Court's opinion in *Ashers Baking Company* avoids these concerns. The British Court distinguished much more clearly between refusals to provide service on the basis of opposition to a particular message and on opposition to a particular person's status or identity. Just as importantly, the U.K. Supreme Court drew a much brighter line between the kinds of services that would and would not implicate a vendor's rights of expressive freedom. Under the British Court's analysis, the mere fact that the bakeshop was asked to provide a product that would be used in connection with a cause or event that the owners did not support was not sufficient to establish a violation of compelled speech principles. Instead, the determinative fact was that the owners were required to literally express a message by inscribing "Support Gay Marriage" on the cake. Drawing this kind of doctrinal line limits the range of circumstances in which a religious or ideological objector would be excused from providing a particular good or service. This distinction also provides a principled basis for distinguishing the cases cited by the U.S. Supreme Court in which the Colorado Commission found no discrimination when bakers refused to ice cakes with religious language condemning same-sex marriage. Rather than reflecting religious animus as suggested by the *Masterpiece Cakeshop* majority, those refusals simply reflect respect for the baker's rights not to be compelled to literally express a viewpoint that they did not hold.

These insights from *Ashers Baking Company* should inform ongoing American jurisprudential efforts to grapple with questions left open by *Masterpiece Cakeshop* itself. This is not to say that British law should displace American law; rather, it is to acknowledge that British constitutional principles can enrich and inform applications of American constitutional principles to matters of common concern in both countries. The American and British legal traditions spring from the same sources, as has been conceded by even the strongest critics of the Court's engagement with foreign legal sources.²³⁸ Dialogue with British law is thus an important part of our constitutional past. It should also be a part of our constitutional future.

238. See *supra* notes 226-35 and accompanying text.