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Second-Tier Marriages

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SECOND-TIER MARRIAGES

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ABSTRACT

This Essay interrogates the reasoning behind the retrenchment toward LGBTQ rights progress that has taken place since marriage equality. With marriage rights for same-sex couples now "on the books," the Supreme Court's treatment of same-sex couples in both Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n *and* 303 Creative LLC v. Elenis *reveals the status quo's hesitancy to recognize same-sex relationships on equal footing. Retrenchment, however, only describes the moment itself; it alludes to but offers no comprehensive or satisfying theory that identifies the motives behind the moves. This Essay theorizes from within the context of the Supreme Court's LGBTQ rights advancement cases why such diminishment has occurred in* Masterpiece *and* 303 Creative *and what these recent decisions mean for sexual minorities.*

Retrenchment is not an unexpected halt to the LGBTQ rights progress of the early 2010s because of some new grievance from the status quo; rather, retrenchment is part of the ongoing establishment's maneuverings involving group rights and identities that have always been at play in our democratic commitments—particularly as a settler colonial state. Specifically, from a historical-political perspective, this Essay anchors Masterpiece *and* 303 Creative *within our American settler colonial experience to explain the persistence of retrenchment. From this anchoring, the Court's motivations in* 303 Creative *become clearer. Ultimately, the American settler colonial experience informs the Court's normative vision of queer people and relationships post-*Obergefell*. As this Essay reveals, these post-*Obergefell

* Associate Professor, Saint Louis University School of Law. A quick web search should reveal why I've purposefully titled this essay, Second-Tier Marriages, rather than Second-Class Marriages. The reference is specific and significant. Thanks to Ryan Brooks, Sam Jordan, and the student editors at the Saint Louis University Law Journal who offered editorial assistance to this piece and also organized the Richard J. Childress Memorial Lecture at SLU Law, where these thoughts originally flourished. I also want to extend gratitude separately to Timothy Trocchio and Tory Davidson for their excellent research support. Across town from the SLU Law campus, Frank Lovett and Clarissa Hayward at Washington University in St. Louis allowed me to test out this piece at their Workshop in Politics, Ethics, and Society during the fall of 2023—a rousing discussion! I'm grateful to them and the workshop's participants. And finally, thanks to Chad Flanders, whose generosity is boundless, and Emma Wood, for being Emma.

decisions that involve same-sex couples allow the Court to normatively envision same-sex relationships after marriage equality—putting an imprimatur on same-sex relationships as second-tier to opposite-sex relationships as a way to ultimately preserve or privilege a discriminatory, heteronormative status quo.

INTRODUCTION

"Retrenchment" has become the academic term of art for the state of things in American culture wars at the moment.[1] Colloquially, it sometimes characterizes the conservative and/or religiously-minded backsliding from Obama-era politics.[2] Connoting a firm stance of "digging in," retrenchment labels the substantive halt to any prior momentum to resolve the pressing social justice issues of our times, including civil rights progress for marginalized sexualities.

But retrenchment only describes the moment itself. It alludes but offers no comprehensive or satisfying theory as to why, for instance, certain decisions have been determined at the Supreme Court recently—for instance, in regards to reproductive health and abortion with *Dobbs v. Jackson Women's Health Org.*,[3] and also sexuality in the post-marriage equality decisions involving married same-sex couples, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[4] and *303 Creative LLC v. Elenis*.[5] Specifically, with marriage rights for same-sex couples now on the books, the recent post-*Obergefell* treatment of same-sex couples in both *Masterpiece* and *303 Creative* makes retrenchment seem almost like buyer's remorse: *Gay couples, you're fine to get married at the clerk's office, but don't get too carried away. If you're at odds with our traditional Christian beliefs, we'll reserve the right to refuse you service. Know your place.*

A colleague of mine, Chad Flanders, has recently critiqued the Court's doctrinal scrimmaging that effectively communicates this message to queer couples.[6] Flanders notes the Court dodging its First Amendment strict scrutiny approaches in *Masterpiece* and *303 Creative* even when, according to the

1. *See, e.g.*, Paul Waldman, *Why Republicans Are Excited About a Culture War They Know They're Losing*, WASH. POST (Mar. 18, 2022), https://www.washingtonpost.com/opinions/2022/03/18/republicans-losing-culture-war/ [https://perma.cc/7A7J-VH2K] (mentioning that "[t]he entire history of the culture war is one of conservative loss, retreat and retrenchment").

2. *E.g.*, Jason E. Whitehead, *Tool or Lens? Worldview Theory and Christian Conservative Legal Activism*, 36 J.L. & RELIGION 29, 31 (2021), noting that

> Especially after the election of Donald Trump and his successful nomination of three socially conservative Supreme Court Justices, Christian conservatives have pursued new avenues in the culture wars, such as engaging in civil disobedience against laws protecting same-sex marriage and providing access to contraception or abortion, discrediting and defunding Planned Parenthood, and fighting against legal protections for the transgender community.

(citations omitted).

3. 142 S.Ct. 2228, 2242 (2022).

4. 138 S.Ct. 1719, 1731 (2018).

5. 143 S.Ct. 2298, 2321 (2023).

6. Chad W. Flanders, *Compelling Interests and Compelled Speech*, Wayne St. L. Rev. (forthcoming 2024) (manuscript at 13) (on file with author).

Court's own doctrinal scaffolding, the approach was compellingly warranted.[7] He points out the dubiousness of this from a doctrinal perspective and worries what the world will be like without strict scrutiny—with rigor abandoned.[8] That's a major concern. With it, Flanders poses three hypotheses why the Court is presently abandoning its own First Amendment methodology:

> The first hypothesis says that compelled speech is just different—different enough so that we don't have to go through the two steps of strict scrutiny. The second hypothesis posits that the Court generally is avoiding any kind of doctrinal "balancing tests" these days (as part of its shift to originalism or the "text and history" method) and so *303 Creative* (and, perhaps, *Masterpiece Cakeshop*) should be seen as just part of this larger trend. The third hypothesis is that Court was deliberately obfuscatory about the interests in *303 Creative* because it wanted to avoid talking about how avoiding one type of discrimination (*viz.*, racial discrimination) might be a compelling interest, but not avoiding another type of discrimination (*viz.*, against gay and lesbians).[9]

Perhaps showing his own preferences of favor toward his first two hypotheses, Flanders notes that his third hypothesis, "of course, is more speculative, and is more about the Court's motives than about any doctrinal moves it may (or may not) be making."[10] As a First Amendment scholar, Flanders casts his attention rightfully and more heavily on the doctrinal moves that impinge upon the saga of the First Amendment rather than motives.[11]

But as a crit scholar, with perhaps less faith than Flanders exhibits toward the Court's doctrinal earnestness or integrity, I do want to contemplate the possible motives behind the moves. So to extend Flander's third hypothesis, I theorize here from within the context of the Court's LGBTQ rights advancement cases why these doctrinal shifts in the scrutiny tests have occurred in *Masterpiece* and *303 Creative*. This critical lens prompts me to notice the retrenchment again, to extend the inquiry beyond the continuing doctrinal tensions, and to locate these two decisions within the context of discrimination against sexual minorities. Ultimately, from a historical-political perspective, my inquiry anchors these two cases in our American settler colonial experience—

7. *Id.* at 2.

8. *Id.* at 17-18.

> That is the problem with cutting short strict scrutiny as a political theory matter: it doesn't do a good job of working through plural and conflicting values in a transparent manner. It pretends the conflict doesn't exist on the constitutional level, because all of the important balancing has been done already, and it is something that courts are not within their powers to disturb. But when values conflict and one side's values have to lose, the *process* matters even more. It matters because you want to be able to say that the losing side's values really were considered by the court, and that in many cases they really were values.

(emphasis added) (citations omitted).

9. *Id.* at 8.

10. *Id.*

11. *See generally id.*

back to how these cases seem to signal "buyer's remorse" to marriage equality. Although *Masterpiece* and *303 Creative* do not directly tinker with the Fourteenth Amendment Due Process considerations that extended marriage rights to same-sex couples in *Obergefell*, I argue how these cases are shaping the Court's normative vision of queer people and relationships post-*Obergefell*. Then in turn, this normative vision explains the retrenchment (at least on the Court's level) and fleshes out Flanders's last hypothesis. Retrenchment isn't an unexpected halt to the progress of the early 2010s because of some new grievance from the status quo; rather, retrenchment is part of the establishment's ongoing maneuverings involving group rights and identities that have always been at play in our democratic commitments.

In LGBTQ rights cases, specifically, *Masterpiece* and *303 Creative* are not the first and only opportunities where the Court circumvented seemingly enshrined doctrinal approaches to effectuate its will. One could argue that Justice Anthony Kennedy's animus jurisprudence in *Romer v. Evans*[12] and *United States v. Windsor*,[13] his equalizing of marriage between same-sex and opposite-sex couples through *Obergefell*'s fundamental rights rationale, and Justice Neil Gorsuch's textualist approach for reading sexual orientation into Title VII sex discrimination protections in *Bostock v. Clayton County*[14] have all been ways in which the Court have protected sexual minorities while effectively avoiding traditional scrutiny tests and the creation of new quasi-suspect or suspect classifications. Why would a difference exist in the First Amendment realm when the rights of married same-sex couples challenge the rights of those holding sincere religious beliefs? These doctrinal shifts appear consonant with Kenji Yoshino's observation more than a decade ago that the Court has moved from its formalist ordering in equality cases to a "new equal protection" that doesn't require the need for elevating sexual orientation into the realm of suspect or quasi-suspect classification.[15] The Court has fashioned other doctrinal means—or can make up new ones—to protect sexual minorities. Meanwhile, discrimination claims based on other identity categories, such as race and sex/gender, continue, for now, to have their designated places within the doctrinal scaffolding. So what's the subtext?

In that endeavor, the First Amendment here has instrumentality beyond speech; it can—dare I say it—allow the Court to "do politics." I think the

12. 517 U.S. 620, 682 (1996).

13. 570 U.S. 744, 770 (2013).

14. 140 S.Ct. 1731 (2020).

15. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748-49 (2011) ("[T]he Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments. This move reflects what academic commentary has long apprehended — that constitutional equality and liberty claims are often intertwined.") (citations omitted).

doctrinal moves here further the status quo's civilizing mission to include or exclude queer people in the form of advancing American law and democracy. So then the question isn't whether the First Amendment can help or not help LGBTQ identities; the question is when and why the Court will use the First Amendment to protect or not protect them: does the First Amendment's invocation serve the American settler state's colonizing objectives? In the short-run, I think the First Amendment is either being used complicitly in the Court's discriminatory maneuverings, or is short-shrifted by the powers that be (which invariably makes it seem hollow). In the long-run, its recent uses in cases that touch upon same-sex marriage post-*Obergefell* appear to be the Court normatively envisioning same-sex relationships after legalizing them within the establishment's institution of marriage—putting an imprimatur on same-sex relationships as second-tier to opposite-sex relationships as a way to ultimately preserve or privilege a discriminatory, heteronormative status quo. From a colonial studies perspective, the Court is trying to colonize queer identities.

This essay proceeds as follows: Part I briefly introduces American settler colonialism, exploring how the settler colonial project includes within it a civilizing mission in regard to sexualities and how it exists as an ongoing structure despite our current historical notions of having surpassed our historical colonial era. Part II then brings us presently to examine how the Court's abandonment of First Amendment strict scrutiny in both *Masterpiece Cakeshop* and *303 Creative* results in privileging heteronormative values in spite of the legalization of same-sex marriages. By importing the interest convergence thesis from critical race theory to demonstrate how and why the Court abandoned constitutional rigor in order to decide for the Christian wedding vendors in both decisions, I argue that these cases exemplify the American settler state's sexuality project. Finally, Part III ends the essay by asserting a few takeaways about the challenges for litigating queer rights after marriage equality—challenges that are now very apparent from *Masterpiece* and *303 Creative.*

I SETTLER'S SEXUALITY PROJECT

When we theorize about queer legal advancements, we ought to keep in mind that American queer lived experiences are part of the United State's settler colonial legacy, and that legacy is a condition to how we organize modern sexualities. From some historians' perspectives, the premise that the United States is an ongoing settler colonial state is becoming harder to deny.[16] Our legacy differs from the postcolonial experiences of former extractive colonies, where colonization took place in prior centuries but have been decolonized since then. Unlike the British occupiers in India, during the 18th and 19th centuries, for instance, the Europeans who came to settle on the eastern shores of North

16. WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 1-2 (2013).

America have remained on the land, continue to occupy it, and have self-legitimized through the use of law and norms.[17] In this way, our American colonial legacy is a "settler colonial" experience rather than a postcolonial one. The liberation or decolonization of Indigenous people here has never taken place. Along this vein, Canada and Australia exemplify other settler colonial states where Europeans took over land that was occupied by someone else and never left.

This fundamental difference between extractive and settler colonial experiences typically leads to greater distinctions between the motivations of colonizers in extractive colonies and those in settler colonies. In decolonized extractive colonial states, the occupiers had been using the natural and human resources of the occupied spaces for their own gain without the firm idea of separating from their homelands.[18] In contrast, in settler colonial circumstances, because settlers are often those leaving permanently from the metropole, the settlers desire the land itself to live on indefinitely and want to replace those who already occupy that space.[19] This motivation to replace creates a collective drive to eliminate non-settlers, particularly as they appear as competitors for spaces to occupy and call home.[20] Historically, this drive to eliminate has been externalized through warfare and genocide.[21] But other examples of elimination have existed—such as displacement and assimilation.[22]

The underlying psychological narrative that led American settlers to believe in a manifest destiny to colonize their newly-found continent has implications for modern-day structural racism, queer- and trans-phobia, and misogyny.[23] According to historians, to cultivate this settler mindset, settlers had to believe they were on a "civilizing mission" that justified dehumanizing Indigenous people in order to wipe them out, set up a property regime, and bring over enslaved people as chattel property.[24] Once there was control over Indigenous populations, this civilizing mission justified forms of forced assimilation—folding or colonizing others into society under settler values and norms. So that's the logic of elimination at work. Beyond the survival motivations to conquer land, what drives that logic and permits settlers to civilize the landscape and the

17. *See id.* at 4-5.

18. *Id*.

19. Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. RACE & ETHNICITY 52, 57 (2015).

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 63; SCOTT LAURIA MORGENSEN, SPACES BETWEEN US: QUEER SETTLER COLONIALISM AND INDIGENOUS DECOLONIZATION 42 (2011).

24. *See* Glenn, *supra* note 19, at 57.

non-settlers on it was cultural supremacy. In the American context, this supremacy was sustained by white heteropatriarchy.[25]

One distinct example of early American settlers using heteropatriarchy to "other" Indigenous groups was through sexuality and gender. Settler family structures prioritized white men above women as father figures, protectors, and leaders; and procreative sex was vitally important to the stability and survival of settler family units;[26] whereas Indigenous groups seemed more fluid in their concepts of gender and sexualities, and many Indigenous family units were organized matrilineally.[27] All of these differences challenged white settlers' normative identities, allowing them to render Indigenous people and their sexual practices as "primitive" and then ripe for elimination.[28]

Several important scholarly take-aways emerge from this historical observation that the United States is a settler colonial state. First, American settler colonialism is, indeed, a race-gender-and-sexuality project.[29] Thus, some scholars contend that Indigenous people were "queered" by white settlers through white heteropatriarchy.[30] Secondly, heteropatriarchy was also used on white settlers themselves as a collective self-policing framework.[31] We see this in the way that sodomy and other non-procreative and also non-marital sexual behaviors were punished under colonial laws.[32] Finally, the way we conceive of gender and sexuality modernly is inherently tied to settler heteropatriarchy and thus connected to American settler colonialism.

The other important thing to note about settler colonialism here is that the American version of it is still perpetuating. Even if the idea of a modern colonial state is not manifesting presently in our national consciousness, this legacy continues, but perhaps only visible in more subtle and fragmented forms. Unlike postcolonial states, since liberation or formal decolonization of Indigenous peoples has not occurred here in the United States, technically the colonial era extends to present day. As historian Patrick Wolfe remarked, within settler colonialism, settler invasion is a structure, not a historical, one-off event.[33] That invasion is still happening presently; it's not in our collective rear-view mirror. White settlers have never left North America but stayed; they became the status

25. *See* LORENZO VERACINI, SETTLER COLONIALISM 28-29, 33 (2010).

26. Glenn, *supra* note 19, at 60.

27. *See* HIXSON, *supra* note 16, at 10-11.

28. *See id.*

29. *See* Glenn, *supra* note 19, at 60-61; *see also* MORGENSEN, *supra* note 23, at 42.

30. *See* MORGENSEN, *supra* note 23, at 32.

31. *See* Glenn, *supra* note 19, at 60.

32. MORGENSEN, *supra* note 23, at 37; *see, e.g.*, JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 37 (1995) (noting that sodomy crimes were connected to the "reproductive imperative" of colonial life).

33. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

quo and reinvented themselves within the framework of white heteropatriarchy. Democratic progress, which is a perceived goal of the American settler state, thus operates and is accomplished within the settler timeline, paradigm, and civilizing mission.[34] Progress is occurring but it's always occurring as a reflection of how the modern settler state conceptualizes democracy, justice, liberty, and equality. This is the ongoing civilizing mission and how colonization persists. When we talk about systemic or structural inequality, that structure takes root in settler colonialism's continuance in the United States.

And thus, any chase toward decolonialization is illusory. We talk about the end of oppression and discrimination, signaling decolonization. But such a moment is illusory and always deferred because while our civil rights progress occurs, white supremacy and heteropatriarchy continue to drive identitarian hierarchy. Thus, marginalization persists—and sometimes in the form of "retrenchment." Historians who study settler colonialism call this back-and-forth deferment of progress, "the vanishing endpoint of settler colonialism."[35] In American law, Reva Siegal has noticed this recursive, plodding trajectory as well, exclusively calling it "preservation through transformation" but not connecting it to our colonial experience.[36] Legal theorists and historians are not necessarily talking to each other here, but they should. Progress, legally speaking, is contained within our settler history. It is status quo controlled and because of this control, even with legal inclusion of different groups, covert ways of othering exist. Colonization, indeed, persists.

II. SECOND-TIER MARRIAGES IN *MASTERPIECE* AND *303 CREATIVE*

To recapitulate my thesis, I ask: when and why will the Court use the First Amendment to protect or not protect LGBTQ identities? My answer is whenever doing so serves the settler state's civilizing mission. One could argue that the Court has always had a hand in the matter of regulating sexual identities; from cases in which the Court refused to recognize rights of sexual minorities to recent post-*Obergefell* cases that touch upon same-sex marriages indirectly because they involved married same-sex couples, the Court has always been involved in granting or denying rights to sexual minorities but has always done so to preserve or privilege a discriminatory, heteronormative status quo. We've seen this goal of self-preservation overtly with *Bowers v. Hardwick*.[37] But we also see this goal with the Court when same-sex relationships are being

34. *Id*.

35. *See generally* Alissa Macoun & Elizabeth Strakosch, *The Vanishing Endpoint of Settler Colonialism*, 37/38 ARENA J. 40, 40-53 (2012) (observing that the narrative of settler colonial discourse as not having a point of decolonization as compared to other classical models of colonialism and that such "vanishing endpoint" is the teleological timeline of settler colonialism).

36. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

37. Bowers v. Hardwick, 478 U.S. 186 (1986).

recognized. In *Lawrence*, the overturning of sodomy laws was done in the context of the Court's regard for consensual same-sex sodomy as a representative impetus to forming longstanding monogamous relationships—notwithstanding that the *Lawrence* defendants were not in any long-term relationship.[38] They were engaging in casual, "hook-up" sex.[39] Nonetheless, the Court imbues the values of monogamous relationships into same-sex intimacy so that the Court would project something familiar, assimilative, and (arguably) heteronormative in consensual same-sex sodomy that would then justify a pro-LGBTQ holding. And yet in doing so, Justice Kennedy's decision to protect same-sex sexual behavior seems to make an equivalence argument that recognizes how same-sex relationships could resemble traditional long-term opposite-sex relationships.[40] This is one of the observations of the *Lawrence* majority that triggers Justice Scalia's alarm toward same-sex marriages in his dissent.[41] In my view, this equivalence argument is a nuanced recognition of improvability the Court sees in both queer sex and relationships—that sexual minorities are now capable of long-term, loving, monogamous behavior as opposed to some prior degeneracy. This sudden perception of improvability is an instrumental set-up of eventually welcoming sexual minorities into the settler state (i.e., colonization). As Jasbir Puar and Katherine Franke have noted, *Lawrence* justifies overturning sodomy laws by domesticating or sanitizing queer sex so that the idea of sex between two men wouldn't offend mainstream "wholesome" sensibilities while simultaneously normalizing consensual same-

38. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 45 (2012).

39. *Id*.

40. In likening consensual same-sex sodomy to heterosexual sex, Justice Kennedy extrapolates toward the heteronormative. First, Justice Kennedy invokes the reproduction considerations of heterosexual conduct and how such considerations were constitutionally protected: "The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (referencing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Secondly, he links such considerations to autonomy and dignity interests: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* (citing *Casey*, 505 U.S. at 851). Justice Kennedy then broadens these choices to reflect self-determination: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* Finally, implying that consensual same-sex conduct is similar in various respects, Justice Kennedy completes the analogy between same-sex sodomy and heterosexual conduct by declaring that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right." *Id.*

41. *Id*. at 586–87.

sex intimacy in that domestication.[42] The sex here that is illustrated is selectively male-oriented, white-centric, cabined into the home, and monogamous.[43] Moreover, all of this domestication of same-sex behavior ultimately serves to craft an autonomy-based due process rationale in *Lawrence* that, as others have already noted, results in a minoritizing discourse borrowed or continued from the sympathetic dissents from *Bowers*.[44]

With the marriage equality cases later on, the Court's line of pro-LGBTQ decisions similarly colonizes because the cases are a series of moments where the Court incrementally envisions same-sex couples in the institution of marriage by being able to associate them with aspects of traditional heteronormative relationships. This recognition was marshalled by carefully selected same-sex plaintiff couples put forth before state courts.[45] Thus, the Court could more readily extend marriage rights by now finding that same-sex couples appeared to be so similar to opposite-sex couples that denying marriage rights had led to profound dignitary harms under a fundamental rights paradigm; whereas decades before, ironically, the Court had never thought of same-sex couples and marriages as a question with merit.[46] They were outsiders to the American settler state then—seen as disruptive to settler family values or pathologically unfit for normal societal inclusion.[47] By 2003 and the time of *Lawrence*, something had changed. But making similarities has its drawbacks for extending marriage rights to same-sex couples because it also normalized queer relationships within the contours of heteronormative relationships. I find the consequences of drawing similarities in the way it was done in *Lawrence* quite "civilizing," and both the Court and those behind the marriage equality litigation were playing into what Frank Valdez has described as "[t]he law and logic of formal equality"—requiring claimants through the use of sameness arguments "to ascribe and assert a legally cognizable identity in conventional terms—race, gender, sexual orientation—and then allege injury to that identity

42. JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 123 (2007); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. Rev. 1399, 1407 (2004).

43. *See id.* at 1416; *see also* Ruthann Robson, *The Missing Word in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 397, 399 (2004).

44. *See* Jean L. Cohen, *Is There a Duty of Privacy? Law, Sexual Orientation, and the Construction of Identity*, 6 TEX. J. WOMEN & L. 47, 80 (1996) (discussing the minoritizing discourse of Justice Blackmun's dissent in *Bowers*).

45. *See* Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 Calif. L. REV. CIR. 117, 122-24 (2015); *see also* Neo Khuu, Obergefell v. Hodges: *Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 217 (2017).

46. *See, e.g.*, *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing an appeal by a male same-sex couple to find a constitutional right to same-sex marriage "for want of a substantial federal question").

47. *See* Khuu, *supra* note 45, at 217–18.

as such."[48] This strategy got us marriage. But because progress unfolds within the settler paradigm, marriage rights were given by the status quo at the expense of bringing same-sex couples and their inherent dignity into the settler state rather than a more inherent, atomistic protection of same-sex couples in a pluralistic society at large.[49] Consequently, same-sex couples live within the protection of marriage laws dependent on a mainstream recognition that they are so similar to straight couples.

So what happens when same-sex couples don't look so straight? As queer relationships now have more visibility, the Court is overlaying its visions for same-sex couples in these First Amendment speech and religious protections decisions as a form of regulation. Whether the Court, in reality, aligns with popular political consensus is another matter; but the Court seems to presume that it is at the apex of the body politic and with that assumption, the Court wields its power and authority within the settler state as a colonizing entity.[50] So on the one hand, the Court continues to promulgate a normative vision of same-sex couples through an assimilation imperative that civilizes and colonizes them in these post-marriage equality cases, perpetuating the work done in *Obergefell* and *Windsor*. But at the same time, these First Amendment cases are helping the Court's conservative majority take bites out of the dignitary reverence imbued in LGBTQ identities in the marriage and sex decisions—in the 14th Amendment Due Process arena. What happens to all of the dignitary harms that Justice Kennedy conjured in *Obergefell* when assimilated same-sex couples aren't treated equally? The consequences are now clearer; the harms are secondary to First Amendment religious protections in *Masterpiece* and *303 Creative*.

As subjects within the American settler colonial state, same-sex couples are being regulated by the Court. Here is where I see an overlap between settler colonial studies and critical race theory, and this overlap helps theorize how *Masterpiece Cakeshop* and *303 Creative* serves to further the settler state in regards to same-sex marriages and couples. Again, in settler colonial theory, when outsiders are brought into the settler state's protection, the settler state does so by recognizing that outsiders are redeemable—improvable in some way.[51]

48. Francisco Valdes, *From Law Reform to Lived Justice: Marriage Equality, Personal Praxis, and Queer Normativity in the United States*, 26 TUL. J.L. & SEXUALITY 1, 19 (2017).

49. *See* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 260-61 (2020).

50. *See, e.g.*, Nadine El-Bawab, *Supreme Court's Dramatic Rightward Turn May Undermine Its Political Distance*, ABC NEWS (Sept. 6, 2022), https://abcnews.go.com/Politics/supreme-courts-dramatic-rightward-turn-undermine-political-distance/story?id=85460463 [https://perma.cc/39SH-YTYY] (observing that, "especially in recent decades, critics argue that the Supreme Court's current trajectory is running outside the American mainstream").

51. Veracini notes that "as the indigenous/exogenous opposition becomes meaningless, the representational regimes of settler colonialism see either 'improvable' or 'non-improvable.'" VERACINI, *supra* note 25, at 28-29. In this way, outsiders from the settler state "would access the

The drive to exterminate them outright is tempered but never completely gone; and so some type of regulation occurs usually through mainstream social or political norms at large.[52] Thus, the settler status quo will protect outsiders, if they are redeemable in some way, but once protected, the status quo will also "civilize" them by placing status quo values and norms on them.

The same civilizing or colonizing phenomenon can be explained through Derek Bell's interest convergence thesis in critical race theory. Under classic CRT paradigm, when a minority racial group obtains legal progress from the majority, it is done through the minority group's interests converging with the majority status quo.[53] Often, this convergence involves the majority group no longer viewing the racial group as a threat, and thus the majority can entertain the racial group's desires for certain legal or political progress as part of fulfilling its own democratic obligations.[54] I have argued that in settler colonial theory this convergence could be viewed as the outsider group appearing "improved" or "improvable" in some way to the status quo.[55] So separate interests now converge. Progress is made but on the status quo's terms.

But of course, because the settler state's elimination drive is ongoing, the settler state will continually seek to regulate non-settler groups that it has folded into its own borders and choose the preservation of its own interests, norms, and values over fully accepting and protecting non-settler groups even when doing so could contradict the value systems, political processes, and laws that the settler state espouses.[56] Again, this regulatory aspect of colonization can be articulated within critical race theory—also within Bell's interest convergence

population system . . . provided that they are deemed capable of eventual admission within the settler sector of the population economy." *Id.* at 29.

52. *See* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U.L. REV. 1, 28 (2014).

> On the one hand, settler society is presumed sacrosanct and the inclusion of Others cannot be allowed to corrupt it; on the other, it needs to demonstrate, continuously, that humanity at large will benefit from accepting its social and political structures and internalizing its worldview. This tension is mediated by the dynamic of difference—i.e., the construction of racial identities in a manner that ensures that the assimilationist vision proffered by the settlers will remain just out of reach—and this explains much about the construction and perpetuation of racialized hierarchy in the United States.

(footnote omitted).

53. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

54. *Id.*

55. *See* Jeremiah A. Ho, *Colonizing Queerness*, 95 Colo. L. Rev. (forthcoming 2024) (manuscript at 54, 63) (on file with author).

56. *See* Saito, *supra* note 52, at 27-28.

thesis. As Bell's thesis continues, once the minority racial group's interest no longer converges with the status quo, then the status quo will not advance progress *even* when a legitimate legal remedy exists.[57] The status quo will see the minority group as a threat and will find some seemingly rational excuse to refuse the legitimate legal remedy. This is the inverse of interest convergence. In the context of race, Bell had called it "racial sacrifice."[58] I've argued that this sacrifice theory applies equally to the inclusion and exclusion of non-heteronormative sexualities as well as racial minorities.

A. Masterpiece Cakeshop v. Colorado Civil Rights Commission

In writing previously about *Masterpiece Cakeshop*, I imported this theory to highlight why Justice Kennedy's majority decision denied relief for Charlie Craig and David Mullins, the married same-sex couple in Colorado who went to baker Jack Phillips to buy a custom-made cake that celebrated their marriage.[59] The case was just three years after Justice Kennedy's marriage equality decision in *Obergefell*. The tone shift between *Obergefell* and *Masterpiece* was quite drastic—from the full-throated sermonizing that characteristically defines all of Justice Kennedy's pro-LGBTQ decisions to one that is very sparse and unsympathetic when it comes to denying relief to the litigating couple even when Colorado's public accommodations law would have granted relief otherwise. Because the Court denied relief based on a finding of religious hostility from the prior administrative proceedings rather than weighing the merits against Colorado public accommodations law, which would have favored the couple, it dispensed with the free speech/compelling interest debate that dominated commentary and discussion prior to the ruling.[60]

The *Masterpiece* Court's move to sideline the free speech issues for a finding of religious hostility is an instance of "queer" sacrifice. It essentially prioritized the baker's religious identity and affiliation over the public accommodation interests of the same-sex couple because the requisite interest convergence was missing in *Masterpiece*. According to Cynthia Godsoe, there were four distinct attributes of assimilation and respectability shared amongst

57. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 69 (Oxford Univ. Press 2004) ("Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.").

58. *Id.*

59. *See generally* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249 (2020).

60. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (holding that "[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion" and as a result, "the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated").

the same-sex couples vying for marriage rights in *Obergefell*—four combined ways to produce interest convergence.[61] In Godsoe's study, a majority of the *Obergefell* couples were: (1) seemingly all-American in racial, professional, and economic statuses; (2) involved in child-rearing or family caretaking; (3) non-sexualized in their public appearances; and (4) non-political except for marriage litigation.[62] These were characteristics that would position the idea of same-sex couples in the mainstream as non-threatening and, indeed, very similar—equally identical—to the mainstream status quo. So similar that they ought to be given marriage rights; otherwise, severe dignitary harms would ensue.

Likewise, I have argued that in *Windsor*, the Supreme Court's same-sex marriage case that preceeded *Obergefell*, the plaintiff Edith Windsor and her deceased wife Thea Spyer also embodied the same assimilated categories that projected them as aligning with mainstream status quo values. But here in *Masterpiece*, Craig and Mullins, the same-sex couple who was denied a custom-made wedding cake by the Christian baker, Jack Phillips, lacked the requisite presentation. They did not exhibit any of the four characteristics of assimilation and respectability that Godsoe had identified with the *Obergefell* couples. As I've observed elsewhere, Craig and Mullins did not have professions or economic status that would render them typically all-American;[63] they did not have children or took care of ailing family members;[64] they displayed their sexuality in the media;[65] and they appeared stereotypically militant and politically emphatic about their denial of service.[66] Whether this was the reality of the couple is unknown. But before the Court, their appearances likely prevented their interests from converging with the interests of the status quo (*vis-à-vis* the Court). Perhaps their differences made them less sympathetic in the Court's imagination; or perhaps they seemed harmful to the institution of marriage. From a settler colonial perspective, they could not be improved. Add in the fact that they were seeking service from a vendor who invoked his Christian faith as a reason to deny service and the gap in sympathy could have been replaced by a sense of threat. To short-hand this idea, I posited that they seemed less conventionally "gay" and more stereotypically "queer." Thus, even when the Colorado public accommodations law could have remedied their situation—as the lower decisions did—the *Masterpiece* Court found some seemingly rational excuse to deny relief and deny progress here: suggestions of religious hostility by the administrative bodies who had vindicated Craig and

61. *See generally* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 145 (2015).
62. *Id.* at 145-50.
63. Ho, *supra* note 59, at 289.
64. *Id.* at 294-95.
65. *Id.* at 292.
66. *Id.* at 295-97.

Mullins on their CADA public accommodations claims below. No need for First Amendment strict scrutiny.

Masterpiece's lack of a thorough First Amendment rationale suggests to me that the Court was distinguishing between "respectable" and "non-respectable" same-sex couples. Here, Justice Kennedy—the master of the Court's dignitary rationales in LGBTQ rights decisions—barely invokes the dignitary interests of the *Masterpiece* couple. What's pernicious to imagine here is that *Masterpiece* itself didn't involve any "respectable" same-sex couples that would have reminded the Court of the *Obergefell* plaintiffs. Rather, combined with a sense that they existed outside the signature of the "respectable queerness" that the *Obergefell* couples exhibited, what the *Masterpiece* couple was asking for was perhaps too much for the Court's conservative Justices. Optics matter. So if the Court were making this distinction, then the majority would be projecting a subconscious value judgment here, inadvertently extrapolating from their recollection and experiences in the prior gay rights cases. After interests had converged in the marriage equality cases, same-sex couples, along with their shared traits and values with the status quo, seemed to have now "improved." So they don't seem to disrupt the status quo's institution of marriage now; rather, they seem to fortify it. But now in *Masterpiece* we have a qualification. Here, even when the public accommodations law stood on Craig and Mullins' side, the Court's denial of relief might seem to telegraph to the couple: *You're not like those other gay couples*. Some queer couples are still threatening to the status quo—especially if they challenge religious beliefs that would not accept same-sex marriages and relationships. Full, hard stop—let's not even run a strict scrutiny test under First Amendment issues. It's too risky and this couple represents a disruption that we must summarily address.

To further complicate this thought, I also wonder whether the decision would have gone differently if Craig and Mullins were swapped and replaced with a different same-sex couple who would have performatively fit the respectability template of the *Obergefell* plaintiffs. Would they have seemed more sympathetic to the Court or avail themselves to the dignitary reasonings from the prior gay rights cases more readily? Would the lawyers have been able to convince the Court to move into the compelling state interest and narrow tailoring rationale that would have reached a different conclusion so that this "respectable" couple could possibly take their cake and eat it too? All of this is speculative; but in equality and antidiscrimination cases, again optics matter. These further complicating questions make me think back to the idea of retrenchment to realize from within critical race theory and settler colonial studies that the settler status quo is always concerned with self-preservation as its foremost interest. In other words, its colonizing mission always animates. I think it's likely that upholding religious beliefs would have been the ultimate result too—though it might have seemed more difficult to justify. Christian religious beliefs in the U.S. have frequently preserved status quo norms of

whiteness and heteropatriarchy.[67] Perhaps a more respectable-seeming or "perfectly" assimilated gay couple who could have more easily articulated dignitary harms would also have made the cake harder to take away. Consequently, mixed messages might have radiated then from the Court. Respectable gay couples can access the traditional institution of marriage because they resemble mainstream straight couples so much that not according them marriage rights seems to violate their human dignity. But respectable gay couples can't be sold a wedding cake if the baker asserts his Christian beliefs against same-sex relationships as the reason for declining to sell. You can step into the clerk's office for a marriage license because you are perceived to be so similar with the status quo; but you can't get a slice of cake at a bakery or access services by some other vendor if religion is implicated. Your dignity and humanity—and money—are no good. That's a risky position to land on with a respectable same-sex couple because it better demonstrates second-tier citizenry. Perhaps this idea threatened to raise further anti-progressive, discriminatory problems that the Roberts Court (with its composition in 2018) would have wanted to avoid.

Of course, the Court's fortunate break here is that Craig and Mullins weren't the *Obergefell* plaintiffs. This couple in *Masterpiece* didn't look like them and could be stereotypically construed to be more "queer." The lack of interest convergence makes it easier to find them threatening and to minimize them—or make them "Others" outside the settler state entirely. So is it that same-sex couples are all second class here; or is it because Craig and Mullins don't fit the mainstream template for couples, and they *deserve* to be second-tier citizens? The Court's message is ambiguous, and taking the latter position affords the Court the ability to fluctuate between the progress accomplished for same-sex couples in *Obergefell* and moral judgments about what maintains that progress and protection for same-sex couples.

The other lucky break for the *Masterpiece* Court was that there were some comments about the baker's Christian beliefs made by the administrative council below who had ruled favorably for Craig and Mullins. Justice Kennedy interpreted them as examples of hostility toward the baker's religion and used this interpretation to resolve *Masterpiece* for the baker rather than by weighing the merits of the baker's First Amendment arguments against CADA's application. It was a curious way to dodge the scrutiny test. The strategy could have served to suggest that same-sex couples are second class without having to do the hard work of balancing state interests with CADA's tailoring in regards to public accommodations and a vendor's religious beliefs. This religious hostility rationale points to the lack of interest convergence in the *Masterpiece* couple while posing as a seemingly rational excuse to deny relief—now *Masterpiece* becomes a "queer sacrifice" case. Religious hostility also

67. *See*, Glenn *supra* note 19, at 60.

prioritizes religion while dodging the possible threat of finding CADA constitutional under First Amendment grounds—that CADA could actually be narrowly tailored for furthering Colorado's compelling nondiscrimination interests. The focus on religious hostility afforded the *Masterpiece* Court a way out that also implies that either Craig and Mullins or all married same-sex couples are second-tier citizens, subject to hierarchies in the American settler state. The Court here takes the cake away and devours it in one bite.

B. 303 Creative LLC v. Elenis

How does one thwart the compelling images of dignity or humanity cultivated by respectable or assimilated same-sex couples from the marriage equality cases and since extended by the ensuing societal visibility of LGBTQ identities? Or phrased more critically, how does one stifle the interest convergence generated from prior LGBTQ rights advocacy now that we're thickly within the retrenchment?

One tactic is to prevent interests from converging altogether. Without an opportunity to establish shared values, the sense of improvability or social redemption in same-sex couples and sexual minorities are tempered. Plaintiff Lorie Smith's First Amendment pre-enforcement review in *303 Creative* seems to accomplish just that. Claiming that CADA posed a First Amendment infringement, the Colorado graphics designer could then sue before being hauled into court by the state for a CADA violation. The crux to doing so depends on Smith's desire to extend her services to wedding website designing. According to Justice Neil Gorsuch's majority opinion in *303 Creative*, Smith has "decided to expand her offerings to include services for couples seeking websites for their weddings."[68] Smith wants to help design websites that feature these couples and the "'details' of their 'unique love story'" in conjunction with their impending weddings.[69] "Expressive in nature" and "designed to communicate a particular message," she asserts her work would be artistic, original, and unique.[70] From this perspective, the Court here attempts to draw out the free speech implications in a scenario that could otherwise be characterized as a commercial business providing tech and graphics services to the general public.[71] Beyond her drive to provide websites that showcases the lived experiences of soon-to-be-wed couples, Smith desires that her websites also convey another message: buoyed by her religious beliefs in marriage, she does not want to design websites for upcoming same-sex weddings.[72] With that in mind, Smith preemptively sued to

68. 303 Creative LLC v. Elenis, 143 S.Ct. 2298, 2308 (2023).

69. *Id.*

70. *Id*. (quotation marks omitted).

71. Such a perspective is reflected in Justice Sonia Sotomayor's dissenting opinion. *See generally 303 Creative*, 143 S.Ct. at 2322 (Sotomayor, J., dissenting).

72. *Id.* at 2308 (majority opinion).

enjoin Colorado "from forcing her to create wedding websites celebrating marriages that defy her beliefs."[73] She invoked a pre-enforcement review, which required her to establish standing.[74] This requirement was necessary because, unlike the Christian baker in *Masterpiece*, Smith had not been visited by any same-sex couple knocking on her business door and refused them service; nor had she then received any corresponding challenges under Colorado's public accommodations law. Essentially the pre-enforcement review would help Smith avert a counter on ripeness grounds.[75] Smith can get right to refusing to design websites for same-sex couples *without ever having refused a real-life same-sex couple.*

There is a standing requirement in pre-enforcement reviews. To show standing without an actual challenge, Smith had to establish "'a credible threat' existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce."[76] Without positioning actual LGBTQ litigants against Smith and her business and without actual personal accounts of being refused service, not only did the nature of this lawsuit circumvent the probability of exposure to the personal indignities of marketplace discrimination based on sexuality. But arguably it dislocated the burden of having to advocate for potential LGBTQ customers from parties who would have a direct interest in litigating this case—same-sex couples themselves—and then relocated it to the state of Colorado. In other words, while shouldering its own interests in enforcing its public accommodations law, Colorado would be speaking on behalf of LGBTQ litigants who did not yet exist. Though Colorado's interests in enforcing its public accommodations law are connected to the potential discriminatory harms inflicted on same-sex couples, the state's interest would not be wholly congruent to the actual interests of litigating same-sex couples—particularly when it comes to harnessing the necessary interest convergence to succeed.

So Smith's pre-enforcement review strategy in *303 Creative* preempts the regular script of LGBTQ rights litigation. Without actual same-sex couples articulating sameness arguments and harnessing the dignity angle of marketplace discrimination, without them attesting to the personal details of being refused service by Smith or cultivating perceptions of improvability to deserve mainstream equal access to the marketplace, Smith has an open and clear path to building her one-sided pitch of why she should be able to pick and choose her clients, which is that the Colorado enforcement of public

73. *Id.*

74. *Id.*

75. *See* Alan B. Morrison, *The Court That Does Not Let Standing Stand in Its Way*, 92 Geo. Wash. L. Rev. Arguendo 1, 13 (2023) (discussing *303 Creative* and noting that "[b]ecause [Smith's] claim was based on the First Amendment, she did not have to wait to be sued by the state to have Article III standing and to avoid a ripeness objection.") (footnote omitted).

76. *303 Creative*, 143 S.Ct. at 2308.

accommodations law is a "credible threat" to her free speech and her religious beliefs.

Siding with Smith, the Court characterizes the threat as governmental interference. The threat is lodged in the negative rights sphere. Justice Gorsuch recapitulates Smith's credible threat as state encroachment on her right to express herself consistently with her religious beliefs.[77] In summarizing the case's prior posture, he highlights that Smith established her credible, looming threat with examples of the past enforcement actions under CADA.[78] He also observed the Tenth Circuit's holding that Smith had established a credible threat necessary for pre-enforcement review standing and in fact "acknowledged that Ms. Smith's planned wedding websites qualify as 'pure speech' protected by the First Amendment."[79] As Justice Gorsuch further narrates, this determination then led the Tenth Circuit to conduct a strict scrutiny analysis that eventually upheld CADA against Smith—that the state had a compelling interest and CADA was narrowly tailored: "As the [Tenth Circuit] majority saw it, Colorado has a compelling interest in ensuring 'equal access to publicly available goods and services,' and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer 'unique services' that are, 'by definition, unavailable elsewhere.'"[80] At this part of Justice Gorsuch's opinion, he seems to cue up a strict scrutiny analysis of his own that would disagree with the Tenth Circuit. But as Flanders points out, the opinion here dispenses with conducting such a test.[81] Instead, the opinion continues to elaborate on Smith's credible threat *all the way to the end*.

From an interest convergence standpoint, perceived threats to the status quo are anathema to progress for a minority group; they halt progress unless the minority group can persuasively dislodge that perception and ameliorate the status quo's feeling of threat. Likewise, in settler colonialism, the settlers' perceived sense of threat is the antithesis of perceived improvability in a non-settler group and fuels the desire to eliminate the group. In both contexts, outsiders suffer if they pose threats that seem credible to the settler status quo. At first, Justice Gorsuch couches the credible threat in *303 Creative* as the likelihood that Smith would be compelled to produce websites contrary to her religious beliefs and analogizes her free speech claim factually to that of *West*

77. *See id.* at 2309 ("In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse.") (citations omitted).

78. *Id.*

79. *Id.* at 2310 ("In that court's judgment, she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse.").

80. *Id.*

81. Flanders, *supra* note 6, at 7-8.

Virginia State Board of Education v. Barnette,[82] where the Court held it was unconstitutional under the First Amendment for West Virginia to "force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance" and "threatened to expel them and fine or jail their parents" had they refused because of their religious views.[83] It's smart of him to raise *Barnette*. But other than this analogy to *Barnette*, the other state interference cases he uses to illustrate how Smith's "credible threats" to her free speech warrant constitutional vigilance are also cases where a majority group is acting based on perceived status quo threats toward a minority outsider group—indeed, sexual minorities—and arguably using free speech as a shield. Both *Boy Scouts of America* and *Hurley* are cases that involve excluding gay people by mainstream groups, whether that's the Boy Scouts or a veteran's group in Boston. Also, both cases of exclusion were sanctioned by the Court under free speech. It's almost as if Justice Gorsuch is turning back the wheels of time to re-visit and apply scenarios that might be socially and contextually viewed differently today.[84]

Justice Gorsuch then narrows his characterization of Smith's credible threat back to state interference. He de-emphasizes the acts of exclusion in *Dale* and *Hurley*, and draws specific focus on the state infringement aspects in all three cases to craft the credible threat as simply state interference with free speech rights, which to him is "more than enough" under constitutional precedents to violate the First Amendment.[85] The anti-gay resonance of *Dale* and *Hurley* in a present case here involving a Christian wedding vendor's refusal to design websites for same-sex marriages cannot go unnoticed. While Justice Gorsuch specifically connects the credible threat to state interference, he also reminds us of the past status quo dispositions toward LGBTQ identities, revealing that such dispositions might continue to lurk presently to project sexual minorities as threats to the settler state. In this vein, he also pays lips service to the goals of public accommodations laws, touting their goals, but then he refers back to *Hurley* and *Dale* as examples in which the Court tempered state public accommodations laws to justify exclusions of gay people in the name of

82. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

83. *303 Creative*, 143 S.Ct. at 2311.

84. *See id*. at 2322 (Sotomayor, J., dissenting). In a nearly-dystopian frame of mind, Justice Sotomayor signals the majority's regressiveness. In noting "[w]hat a difference five years makes," Justice Sotomayor alludes to the changes "not just at the Court" and ventures further:

> Around the country there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

Id. (quoting *Carson* v. *Makin*, 142 S.Ct. 1987 (2022) (Sotomayor, J., dissenting) (internal quotation marks omitted).

85. *Id.* at 2313 (majority opinion).

protected speech—back to historical examples of when the status quo was threatened by sexual minorities. But again, on the surface of his opinion, his use of these cases is merely demonstrative of doctrine and precedents because the focus is still on *Dale* and *Hurley*'s state interference aspects. On the interference angle, Justice Gorsuch's position in *303 Creative* is clear: "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[86]

To add to this, when Justice Gorsuch writes further to extenuate the Tenth Circuit's observation that Smith's services are "unique" and, through a quick sleight of hand, opines that "[i]n some sense, of course, her voice is unique; so is everyone's," the threat of public accommodations laws becomes not just credible to Smith and wedding vendors alike; the threat is *real to everyone*.[87] He effectively turns the state's compelling interests of nondiscrimination in the marketplace into an act to "coopt an individual's voice for its own purposes."[88] With that, he is then able articulate that interference on Smith's speech as a credible threat in a more libertarian sense. Forget that Smith is a wedding vendor who intends to sell services to the public. She and her voice seem, in this small moment in the opinion, omnipotent and imbued with complete agency. At the same time, Justice Gorsuch's characterization of uniqueness in Smith's free speech claim seems fuzzy—is it Smith's voice that is unique or her services that are unique? Or both?

Justice Gorsuch's sleight of hand with "uniqueness" is telling. It permits a hyperbolic dial-up of Smith's circumstances that de-emphasizes her commercial role as a wedding vendor and recalibrates the importance of her own speech as someone who religiously carries a belief against same-sex marriages—and by extension, gay people. Drawing on uniqueness overstates the stakes in Smith's claim and the perceived threat to her free speech. This illusion is done by shifting what is being modified as "unique." Here is where the State's divergence of interests with potential same-sex couples helps Justice Gorsuch assail his points on how credible and threatening state interference is to Smith's speech rights. If uniqueness is being shifted from describing the services Smith provides to describing Smith's personal uniqueness in voice (which is how I read it), then Justice Gorsuch artificially shifts the debate from a public accommodations context involving a wedding web designer who wants to discriminate and relocates it to a more generalized context in which the state is inhibiting an individual's unique voice based on her faith. This shifting is strengthened also by the inconsistencies that Justice Gorsuch points out between the Tenth Circuit's pro-Colorado rationale under strict scrutiny (that Colorado had a compelling state interest to interfere and such interference is narrowly tailored)

86. *Id.* at 2315.
87. *Id.*
88. *Id.*

and what Colorado's amended brief said to the Court here: "Now, the State seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. . . . Instead, Colorado devotes most of its efforts to advancing an alternative theory for affirmance."[89]

Although Colorado's amended brief accesses an alternative theory that Smith's designs are more commercial than unique, the state's back-and-forth seems to equivocate—or at least that's how Justice Gorsuch characterizes it. He doesn't buy the state's amended position but goes back to Colorado's original stipulations that her website designs are unique. This misdirection back to the State's amendments helps Justice Gorsuch continue to emphasize uniqueness—to how her designs, as acknowledged by the state, would be unique. So now uniqueness applies to both.

Simultaneously, it shows that Colorado's interests in defending the case was not completely devoted to the protection of sexual minorities, but to articulating a sensible theory for enforcing its public accommodations law. Justice Gorsuch points out further inconsistencies between Colorado's stipulations at the district court (that Smith is willing to service LGBTQ clients so long as it does not violate her beliefs) and the state's arguments before this Court (that Smith's refusal to design same-sex wedding websites was because she objects to their sexual orientation).[90] All of this is telling about the strategic nature of this pre-enforcement review: the state of Colorado here is a poor substitute for actual same-sex couples who have suffered discriminatory harm.

As a result, the credible threat that Smith raises in her pre-enforcement review ends up underscored and overstated by Justice Gorsuch to a level that, as Flanders points out, perhaps strict scrutiny becomes a non-starter.[91] Where public accommodations law collides with First Amendment free speech and a credible threat is perceived, then full stop. No need for strict scrutiny anymore. From a First Amendment jurisprudential vantage, this possible reading of *303 Creative* is distressing when one thinks about the doctrinal buttressing behind decades of constitutional free speech cases. Justice Gorsuch spends nearly all of his majority reasoning establishing and defending CADA's credible threat to Smith's free speech. He raises the scrutiny tests here and there, but incidentally. His discussion is solely entangled with Smith's credible threat assertion required for her pre-enforcement review, focusing on the threat toward her constitutional rights and how her speech rights animate her business of designing websites—the uniqueness of her work and its originality, and how it is ultimately expressive of her and preserves her sincere religious beliefs. All of this devotion to

89. *Id.* at 2316-17.
90. *See id.* at 2317.
91. Flanders, *supra* note 6, at 8.

evaluating a credible threat is to the exclusion of strict scrutiny while precluding any recognized interest convergence.

Within the subtext, however, the threat is not as narrow as state enforcement. I think it's also credible to suppose the threat is also the presence of same-sex couples and visibility of same-sex marriages—essentially Smith is threatened not just by state interference through CADA but by LGBTQ customers in the mainstream marketplace and in society at large. *She's threatened by the thought of being told that same-sex couples are customers whom she's obliged to serve*. There are multiple layers of threat to Smith here, not just one.

For the most part, except for the *Dale* and *Hurley* references, Justice Gorsuch is careful not to venture deeply into the motivating reasons why this case is at the Court: Smith's religious resistance to accommodating same-sex couples and the desire not to serve them in the face of anti-discrimination law. The intellectual and juridical exercise confines the credible threat to Colorado's enforcement of its public accommodations law versus Smith's unique voice and her religiously backed message. That's all this pre-enforcement review was conveniently asking for. But so far the threat is still hypothetical. It's the thought that counts here; and beyond her pre-enforcement review, that thought involves Smith's aversion to same-sex marriages and queer identities. Although she stipulates that she would serve a gay client to design websites and graphics, this hair splitting makes no sense to Justice Sotomayor in her *303 Creative* dissent: "The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing."[92] Justice Sotomayor then elaborates more seriously in an accompanying footnote: "What is 'embarrassing' about this reasoning is not, as the Court claims, the 'distinction between status and message.' It is petitioners' contrivance, embraced by the Court, that a prohibition on status-based discrimination can be avoided by asserting that a group can always buy services on behalf of others, or else that the group can access a 'separate but equal' subset of the services made available to everyone else."[93] Justice Sotomayor's connections between Smith's stipulations and their actual consequences here access the deeper inner workings behind Smith's pre-enforcement review that Justice Gorsuch paves over with his evaluations of credible threat and his neglect to apply strict scrutiny. Additionally, Justice Sotomayor's observations here also map out how the majority's ruling, which stands behind Smith's stipulations, leads to a second-class category for queer identities in the marketplace. Don't forget that another stipulation Smith made at the district court level mentions that "[s]he will not produce content that 'contradicts biblical truth' regardless of

92. *303 Creative*, 143 S.Ct. at 2339 (Sotomayor, J., dissenting) (citations omitted).

93. *Id.* n.13 (internal quotation marks & citations omitted)

who orders it."[94] Biblical truth, in some Christian circles these days, still does not recognize non-heteronormative sexualities as a subscribed way of being. Through biblical truth, queerness is still subject to the American settler state's sexuality project. Second-tier citizenry, indeed—the settler's civilizing mission persists, and thus, colonization repeats itself.

Without the presence of same-sex couples as litigants here and ability for establishing the kind of interest convergence more typical in recent gay rights cases, Smith's threat and its credibility takes center stage. The lack of opportunity for interest convergence here invites the full discussion of a perceived credible threat. It allows Justice Gorsuch's majority reasoning to precisely match the mechanisms of queer sacrifice because of a perceived lack of interest convergence; like Justice Kennedy in *Masterpiece Cakeshop*, Justice Gorsuch rationalizes a seemingly credible excuse to deny potential same-sex couples relief from Smith's denial of service. On the one hand, that threat can be characterized by state interference to Smith's religious beliefs in the public accommodations context. But it is also likely that, prompted by the recent legalization of same-sex marriages, Smith's legal challenge here emerged, which pins sexual minorities again as a continuing threat to the status quo. Either way or both, without real-life same-sex couples and LGBTQ advocacy, all that we're left with in *303 Creative* is a perception of a threat to the status quo's religious preferences. And that threat, rationalized here by Justice Gorsuch, is anti-libertarian enough that it becomes the seemingly rational excuse for the Court's majority to preemptively deny future relief to real-life same-sex couples. Again, just like what occurred in *Masterpiece*, what we come to in *303 Creative* is another queer sacrifice. The settler state—*vis-à-vis* the Supreme Court—is regulating sexual minorities as second-tier citizens.[95]

Interestingly, Justice Sotomayor's dissent suggests how interest convergence might have worked in this wedding vendor case had Smith not taken the opportunity for pre-enforcement review. Again, Smith's pre-enforcement review strategy makes a difference, and I have no reason to suppose why this lawsuit was not staged without intentional forethought from the lawyers at Alliance Defending Freedom, the same organization that had defended the baker in *Masterpiece*. So instead of sameness arguments that would try to establish the necessary interest convergence to succeed, *303 Creative* was preoccupied with the credible threat issue, which was confined just to establishing the possible state interference with Smith's free speech rights and with all else conveniently ignored—the business context, the dignitary harm to same-sex couples, Smith's animus toward queer identities. Justice Sotomayor, however, does not ignore the potential same-sex couples whom Smith does not

94. *Id.* at 2309 (majority opinion).

95. *See also id.* at 2341 (Sotomayor, J., dissenting) (noting that the majority decision "sends the message that we live in a society with social castes").

want to serve. Besides shifting focus of Smith's case back into the commercial context and doing a quick strict scrutiny analysis that suggests the constitutionality of public accommodations laws like CADA in relation to Smith's religious beliefs,[96] Justice Sotomayor's dissent replicates the litigating script of previous LGBTQ cases that involved actual litigants. First, like the marriage equality cases and in *Lawrence*, where dignitary harms discussions emerged in the sexual orientation antidiscrimination context, her dissent here raises the dignitary stakes of marketplace discrimination. "[A] public accommodations law ensures *equal dignity* in the common market," Justice Sotomayor writes, asserting that preserving dignity as precisely one of the central purposes of public accommodations law.[97] While her examples of anti-Semitism and racial subordination, respectively from Justice Ruth Bader Ginsburg's and Jackie Robinson's lived experiences, might appear to some as symbolic and to others as heavy-handed, they nonetheless dramatize the stigmatizing harm that discrimination inflicts on personal dignity.[98] How's that for countering Smith's uniqueness?

Specifically, within the context of marketplace discrimination based on sexual orientation, Justice Sotomayor reaches for a real-life example again and she substitutes the lived experiences of a married same-sex couple from *Zawadski v. Brewer Funeral Services, Inc.*,[99] a 2017 Mississippi case, for the same-sex couples missing from *303 Creative*. In *Zawadski*, according to Justice Sotomayor's rendition, "a funeral home in rural Mississippi agree[d] to transport and cremate the body of an elderly man who ha[d] passed away, and to host a memorial lunch."[100] But "[u]pon learning that the man's surviving spouse is also a man, however, the funeral home refuses to deal with the family. Grief stricken, and now isolated and humiliated, the family desperately searches for another funeral home that will take the body. They eventually find one more than 70 miles away."[101] She punctuates this example with how "[t]his ostracism, this otherness, is among the most distressing feelings that can be felt by our social species."[102] First, this illustration ought to remind us of Justice Kennedy's real-life examples of married same-sex couples in *Windsor* and *Obergefell*. Often prefacing Justice Kennedy's pro-gay Fourteenth Amendment rationales, real-life examples—such as those from James Obergefell's relationship to his deceased husband John Arthur—help establish the indignities that

96. *Id.* at 2335-37.

97. *Id.* at 2324.

98. *Id.* n.3

99. No. 55CI1–17–cv–00019 (C. C. Pearl River Cty., Miss., Mar. 7, 2017).

100. *303 Creative*, 143 S.Ct. (Sotomayor, J., dissenting).

101. *Id.* (citations omitted).

102. *Id.* at 608 (referencing K. Williams, Ostracism, 58 Ann. Rev. Psychology 425, 432–35 (2007)).

discrimination based on sexual orientation inflict on a personal level.[103] Those examples also play into and reflect the sameness arguments made by gay rights advocates litigating in these marriage equality cases. As discussed above, sameness arguments are necessary for the litigation as presently structured for winning equality cases. In these prior LGBTQ cases, sameness was established through carefully selected plaintiffs who demonstrated the assimilated characteristics that Godsoe has observed—characteristics that ran throughout the identity management in the marriage cases. Moreover, as I and others have argued, this created the kind of respectability that allowed for the eventual legalization of same-sex marriages.[104] In other words, the real-life examples from prior pro-LGBTQ cases reflect the internal interest convergence that allowed same-sex couples to play into the settler state's traditional marriage regime and become normative citizens of the state conditioned upon that sameness, assimilation, and respectability.

In Justice Sotomayor's depiction, the *Zawadski* couple also substantially embodies the assimilated characteristics of the same-sex couples from the marriage cases. As she illustrates:

> The men in this story are Robert 'Bob' Huskey and John 'Jack' Zawadski. Bob and Jack were a loving couple of 52 years. They moved from California to Colorado to care for Bob's mother, then to Wisconsin to farm apples and teach special education, and then to Mississippi to retire. Within weeks of this Court's decision in *Obergefell v. Hodges*, Bob and Jack got married. They were 85 and 81 years old on their wedding day. A few months later, Bob's health took a turn. He died the following spring. When Bob's family was forced to find an alternative funeral home more than an hour from where Bob and Jack lived, the lunch in Bob's memory had to be canceled. Jack died the next year.[105]

The assimilated characteristics that Godsoe observed was common in the *Obergefell* plaintiffs (and as I have previously found, was the case for the couple in *Windsor*) are that these couples typically (1) appear "all-American;" (2) are occupied with caretaking or family rearing; (3) downplay their sexuality or appear "asexual"; and (4) are non-political. Here, the couple seem just as respectable as the couples from the same-sex marriage cases; Justice Sotomayor's dissent projects onto them the four characteristics. With names like "Robert" and "John"—or respectively "Bob" and "Jack"—and apple farming and special education teaching as their prior occupations, they quickly appear quaintly and respectably all-American in Justice Sotomayor's rendering. Further digging would reveal that they also both appeared racially white. Though no

103. *See Obergefell*, 576 U.S. at 658-59.

104. *See e.g.*, Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 Cal. L. Rev. Circuit 117, 122-24 (2015); *see also* Ho, *Queer Sacrifice in* Masterpiece Cakeshop, *supra* note 59, at 260.

105. *303 Creative*, 143 S.Ct. 2324-25 n. 4 (J. Sotomayor, dissenting).

children are mentioned, they took care of other family members—even moving across states to devote themselves to render care to Bob's mother. Nothing in Justice Sotomayor's depiction hints at their sexuality, but we only know that they have been in a "loving" relationship for 52 years and had married right after *Obergefell*. And lastly, nothing here alludes to any involvement in politics; all we know from Justice Sotomayor's excerpt is that both men were retired and were in their 80s when Bob died and when the discriminating events with the funeral took place.

The indignities that the *Zawadski* couple faced cannot be overlooked. It's a heartbreaking story. And Justice Sotomayor's point here with the illustration is to demonstrate how public accommodations laws help prevent such dignitary harms. This demonstration is perhaps why she immediately then launches into a very brief but generalized strict scrutiny analysis of public accommodations laws where the compelling state interests in marketplace nondiscrimination are balanced with the narrow-tailoring of such laws.[106] At the same time, her specific use of the Zawadski couple is both a substitute for the kind of interest convergence that would have taken place had *303 Creative* not proceeded on a pre-enforcement review and had it looked more like *Masterpiece* with a real-life couple. Except that here Bob and Jack from *Zawadski* would have seemed more similar to the *Obergefell* couples than Craig and Mullins did in the actual *Masterpiece* case. I can only assume that Justice Sotomayor relied only on the amended complaint she cites from the *Zawadski* case to insert her depiction here. But if so, she has keenly selected and relied on factual details provided by the litigants and their attorneys (including attorneys from Lambda Legal), details that promulgate sameness and serve to establish interest convergence directly within that dispute. Here, I would argue that Justice Sotomayor is vicariously doing the same thing in *303 Creative*. She is analogizing to a possible interest convergence in Smith's refusal to design wedding websites for same-sex couples in *303 Creative*. Beyond the pre-enforcement requirements for credible threat, if the ultimate threat in this circumstance is externalized in Smith's aversion to same-sex couples or more broadly the status quo's aversion to nonheteronormative sexualities, then how's this for countering a credible threat? I'm not sure what the outcome of *303 Creative* would have been with that change-up, but again, the script for settler colonialism is deferring justice for continuing self-preservation. Queer sacrifice again? I'm not sure—probably in some other form. But I can see how it would have changed the contours of the case while it unfolded in that way.

Ultimately, in the way the decision was actually determined, *303 Creative* exemplifies queer sacrifice. Interests between the status quo and sexual minorities were prevented from converging, and the Court finds a seemingly rational excuse (i.e., state enforcement of public accommodations law as a

106. *Id.* at 2310.

credible threat to speech motivated by sincere religious beliefs) to deny the kind of progress that same-sex couples deserve as a protected class under Colorado's public accommodations law and the progress that *Obergefell* had seemingly promised. Smith's pre-enforcement review strategy in *303 Creative* was an effective strategy used here and if it were used in the aggregate. Between *Masterpiece* and *303 Creative*, I think the meaning is clear in these otherwise First Amendment cases. It's not the Court just solely refashioning First Amendment doctrine for doctrine's sake. I think it's the Court doing so because it is also carving out the place for sexual minorities as normative citizens of the settler state. Same-sex couples can enter traditional institutions such as marriage but must exist in the settler state under settler norms that demonstrate that they fortify that institution. Assimilation provides the contingent access to that fortification. But same-sex couples—and by extension, non-heteronormative sexualities—are always going to be placed within some boundary if they must co-exist with the settler mainstream. In *Masterpiece* and *303 Creative*, that boundary isn't *per se* the First Amendment, it isn't even religion, but rather, settler self-preservation.

III. CONCLUDING THOUGHTS

My speculation is that the scrutiny tests will come back when the Court finds a use for it, but in these gay rights cases, where there's a lack of interest convergence, the Court will defer to sacrificing gay couples based on a seemingly rational excuse even when there's a legitimate remedy to find against the discriminating entity (here, the Christian vendor). The more this happens, the more same-sex couples will be told how they are imagined normatively by a discriminatory status quo—what are the expectations of their identities and places in mainstream American society? These cases are the initial establishment of a second-tier citizenry. Even in pro-LGBTQ cases during this "retrenchment," such as *Bostock*, heteronormativity is still privileged, as I have remarked elsewhere.[107] This is what the retrenchment is about: *recalibration*. And within this recalibration, some takeaways are clear. First, siding with some of Justice Sotomayor's larger points in her *303 Creative* dissent, I think that antidiscrimination should be about the inherent respect and acceptance of individuals. But secondly, where I might differ from Justice Sotomayor is that the process of equality litigation should not involve the game where traditionally marginalized and excluded groups must "play up" to the status quo through assimilated versions of themselves that reflect status quo norms (i.e., sameness), ameliorate perceived threats, generate improvability, and necessitate some interest convergence. Indeed, this reality of equality litigation is how the American settler state advances its civilizing mission in the name of democratic

107. *See* Jeremiah A. Ho, *Queering* Bostock, 29 AM. U. J. GENDER SOC. POL'Y & L. 283, 288 (2021).

progress and continues to colonize. And thirdly, if recognition of our settler colonial experience does not persist, then we are less likely to self-correct in this retrenchment or otherwise in the future; we will be more likely to self-preserve than understand any alternatives that would engender substantive equality more fully. So circumstances like this political and cultural retrenchment will facilitate the abandonment of doctrinal scaffolding by courts. Until otherwise, we should look past our surprise at the Supreme Court's abandonment of rigor in the First Amendment here. We should, rather, acknowledge the hard truth that the Court does effectuate politics and ask critically in every case why that is.