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No Cake for You: Discrimination, Dignity, and Refusals to Serve

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NO CAKE FOR YOU: DISCRIMINATION, DIGNITY, AND REFUSALS TO SERVE

William D. Araiza*

TABLE OF CONTENTS

I. INTRODUCTION	116
II. STIGMA, CASTE, AND DIGNITY IN CONSTITUTIONAL LAW ..	118
III. DIGNITY IN MASTERPIECE CAKESHOP	124
IV. NO CAKE FOR YOU	131
V. CONCLUSION.....	135

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I. INTRODUCTION

The Supreme Court oral argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*¹ illustrated the extraordinary difficulty that the case presents. The justices debated whether Jack Phillips's denial of cake-creation services for Charlie Craig and David Mullins's wedding reception was constitutionally protected expression;² the implications for other service providers if they decided that it was;³ how one could determine whether his denial of service to the same-sex couple constituted speech or the type of class-based discrimination Colorado's public accommodations law condemned;⁴ whether the law was applied discriminatorily to burden religiously-motivated refusals to serve;⁵ how narrowly, and with what effect on that law, an accommodation for someone like Phillips could be drawn;⁶ and whether it mattered if the couple could have procured an adequate cake elsewhere and how one could make that determination.⁷ At least on some views, these are all difficult questions,⁸ many of which require delicate line-drawing.

How such line-drawing should come out and, indeed, whether such analysis should even be necessary given the expressive or non-expressive nature of Phillips's conduct, present complex questions that cannot be fairly addressed in the short space this Essay allows. Instead, this Essay focuses on one facet of the case: the couple's (and the Civil Rights Commission's)⁹ claim that application of Colorado's public accommodations law to this case vindicates an important

1. 370 P.3rd 272, Colo. App., (2015), *cert. granted*, 137 S. Ct. 2290 (2017) No. 16-111 (2017 term).

2. See Transcript of Oral Argument, *Masterpiece Cakeshop Ltd., et al. v. Colo. Civil Rights Comm'n, et al.*, (2017) (No. 16-111) [hereinafter *Oral Argument*].

3. *Id.* at 11-16.

4. *Id.* at 17-19.

5. *Id.* at 52-56.

6. *Id.* at 25-30.

7. *Id.* at 28-30.

8. To be sure, some scholars believe that at least some of these questions are not difficult. See, e.g., Steve Sanders, *Even the Bernini of Buttercream Has to Serve Gay Couples*, N.Y. TIMES, Dec. 2, 2017, https://www.nytimes.com/2017/12/02/opinion/even-the-bernini-of-buttercream-has-to-serve-gay-couples.html?_r=0 [https://perma.cc/3NEA-52K5].

9. For ease of reference, arguments in favor of applying the Colorado law in this case will be attributed to the couple or, when noted, to the *amici* who support that result.

interest in the couple's dignity.¹⁰ Scholars of public accommodations laws generally agree that, in addition to ensuring that all Americans enjoy equal access to goods and services in the marketplace, such laws also seek to vindicate the dignitary interest in not being turned away at a place of business.¹¹

These interests, in addition to a more general anti-discrimination goal, are at issue in *Masterpiece Cakeshop*.¹² The parties in this case, and their *amici*, devoted considerable space in their briefs to the goals served by the Colorado law whose application is at issue in that case.¹³ For their part, Phillips and his *amici* stressed how accommodating Phillips's expressive and religious preferences would not impair the gay couple's access to the goods they desired.¹⁴ Phillips also questioned the strength of the couple's dignity interest in light of the alleged majority support for the couple's equality status.¹⁵ He also asserted his own dignity claim, based on the alleged compulsion of expression in which he preferred not to engage, the alleged compulsion of conduct that violated his religious beliefs, and, finally, the stigma of being branded a violator of anti-discrimination laws.¹⁶ Unsurprisingly, the couple and their *amici* took a different view, in particular with regard to Phillips's claim about the availability of alternative suppliers of the desired good.¹⁷ In

10. Brief for Colorado Civil Rights Commission as Amici Curiae Supporting Respondents at 1-2, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111) [hereinafter "Brief for Civil Rights Commission as Amici Curiae"].

11. *Id.* at 27-31; *see, e.g.*, Brief of Scholars of Public Accommodations Laws in No. 16-111, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, at 27-31.

12. Oral Argument, *supra* note 2, at 73; Brief for Civil Rights Commission as Amici Curiae, *supra* note 10, at 3-4.

13. Brief for Civil Rights Commission as Amici Curiae, *supra* note 10, at 26-31; Brief for Masterpiece Cakeshop, Ltd. at 52-56, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111) [hereinafter "Brief for Masterpiece Cakeshop"].

14. Indeed, one of the baker's *amici* went so far as to include in its brief a map of Denver showing the area's gay friendly bakeries that the plaintiffs could have engaged to create their wedding cake. Brief for Masterpiece Cakeshop, Ltd., et al. as Amici Curiae Supporting Petitioners at 15-16, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111) [hereinafter "Brief for Masterpiece Cakeshop as Amici Curiae"].

15. Brief for Masterpiece Cakeshop, *supra* note 13, at 54.

16. *Id.* at 52-55; *see also* Oral Argument, *supra* note 2, at 28 (United States Solicitor General recognizing the couple's dignity claims but urging the Court also to recognize Phillips's dignity claims).

17. Brief for Civil Rights Commission as Amici Curiae, *supra* note 10, at 33.

addition to questioning the workability of a legal rule that turned on such availability, they also argued that such claims were beside the point, to the extent public accommodations laws sought to vindicate more broadly-applicable dignity goals that did not depend on the happenstance of how many gay-friendly bakeries existed within a reasonable driving radius of the couple's home.¹⁸

The centrality of dignity to Craig and Mullins's claim and its importance as a justification for public accommodations laws more generally raise puzzles. What does the concept of dignity mean in the context of denials of service in public accommodations? Can such an amorphous concept support legal claims without additional claims of more material interests? Does the law recognize such values in other contexts? In order to consider these questions this Essay examines two disparate sources: constitutional law and a canonical artifact of modern popular culture: the "Soup Nazi" episode from the television series *Seinfeld*. After Part II considers these questions from the perspective of constitutional doctrine, Part III applies the lessons it teaches to *Masterpiece Cakeshop*. Part IV illustrates those lessons by considering the story of the Soup Nazi. Part V offers a brief conclusion.

II. STIGMA, CASTE, AND DIGNITY IN CONSTITUTIONAL LAW

It is well-known that in recent years Justice Kennedy has written individual rights opinions that emphasize the dignity to which the plaintiffs have a constitutional entitlement.¹⁹ Thus, one might think that the advocates defending application of the Colorado public accommodations law in *Masterpiece Cakeshop* are simply pitching their arguments to the perceived swing vote in the case. Indeed, that is likely part of the answer. But this argument assumes that the deprivation of dignity in and of itself constitutes harm that both states a claim under the Constitution and satisfies Article III's requirement that a plaintiff have a judicially-cognizable injury. Justice Kennedy's most important

18. *Id.* at 33-35.

19. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (describing the dignity-conferring status of marriage); *U.S. v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting the dignity harm that follows from a criminal conviction). Justice Kennedy has also employed this term when considering the constitutional prerogatives of state governments in the federal system. See *Alden v. Maine*, 527 U.S. 706 (1999) (noting the dignity states retain under our federal system); *Bond v. U.S.*, 564 U.S. 211 (2011).

opinions focusing on individual dignity did not have to reach this issue, since in those cases the challenged government action was clearly imposing material harms on the plaintiffs.²⁰

According to the Court, such non-material injuries do cause the requisite harm.²¹ Indeed, a concern with non-material harms pervades the Supreme Court's race discrimination jurisprudence, and has done so since the early years of the Fourteenth Amendment.²² In *Strauder v. West Virginia*, for example, the Court struck down a state law excluding African-Americans from jury service.²³ The Court reached this decision based not only on the equal protection rights of the African-American criminal defendant who was denied a trial by a cross-section of the community, but also on the more general equal protection rights of African-Americans to be free of what Justice Strong described as "practically a brand upon them . . . an assertion of their inferiority."²⁴ *Strauder's* recognition of such a non-material component remained a fundamental part of the Court's understanding of the equality the Fourteenth Amendment guaranteed.²⁵ Even the Court's acceptance of Jim Crow in *Plessy v. Ferguson*²⁶ acknowledged that a law which "stamps" a racial group "with a badge of inferiority" would violate the Equal Protection Clause—it simply concluded that the Louisiana train segregation law was not the source of any such messaging.²⁷ Nearly sixty years later the Court, in *Brown*

20. See *Obergefell*, 135 S. Ct. at 2590-2601 (noting "the constellation of benefits," some material, that accrue from the marital status that was denied the plaintiffs); *Windsor*, 570 U.S. at 771 (noting that over one thousand federal statutes allocate benefits and responsibilities depending on the person's status of being married for purposes of federal law); *Lawrence*, 539 U.S. at 576 (noting the "consequential" nature of the implications of a conviction under the challenged sodomy law).

21. See *Obergefell*, 135 S. Ct. at 2590-2607.

22. *Strauder v. W. Va.*, 100 U.S. 303, 306-10 (1880).

23. *Id.* at 310-12.

24. *Id.* at 308.

25. *Id.* at 306-10.

26. 163 U.S. 537 (1896).

27. *Id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."). Compare *id.* at 556-57 (Harlan, J., dissenting) ("It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars

v. Board of Education,²⁸ reached a different conclusion about the message segregation sent.²⁹ But *Brown* did not so much as change the law of segregation as apply it differently—presumably, far more accurately.³⁰

More recent cases, dealing with more modern racial equality questions, reflect the same willingness to dispense with a requirement that a plaintiff demonstrate a concrete harm from a governmental race classification.³¹ These cases have reflected that willingness both in terms of judging the ultimate merits of the claim and determining whether the plaintiff had suffered an injury that gave her standing to sue.³² Perhaps the clearest examples of this phenomenon are the Voting Rights Act cases involving white plaintiffs who challenged states' creation of majority-minority electoral districts that state officials argued were mandated by the Voting Rights Act.³³

Both sides in these cases acknowledged that the plaintiffs suffered no obvious material harm from being placed in a majority-minority district.³⁴ Most importantly, those voters retained the right to cast a non-diluted vote.³⁵ Nevertheless, the Court concluded in *Shaw v. Reno* that plaintiffs living in such a district had stated a cognizable claim under the Equal Protection Clause.³⁶ That opinion failed to discuss, or indeed, even mention, standing.³⁷ Instead, it focused on the harm to persons'

occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

28. 347 U.S. 483 (1954).

29. *Id.* at 494 ("To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

30. Charles L. Black, Jr., *The Lawfulness of Segregation Decisions*, 69 YALE L. J. 421, 421-22 (1960). ("There is in [*Plessy*] no denial of the . . . *Strauder* principle [that the Fourteenth Amendment prohibited 'legal discriminations, implying inferiority in civil society']; the fault of *Plessy* is in the psychology and sociology of its minor premise" that the Louisiana train segregation law did not imply the inferiority of African-Americans).

31. *U.S. v. Hays*, 515 U.S. 737, 744-45 (1995); *Miller v. Johnson*, 515 U.S. 900, 911-13 (1995); *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

32. *Hays*, 515 U.S. at 738-39; *Miller*, 515 U.S. at 917.

33. *Hays*, 515 U.S. at 739-41; *Shaw*, 509 U.S. at 638-39. See also *Miller*, 515 U.S. 906-10.

34. *Hays*, 515 U.S. at 744-45; *Shaw*, 509 U.S. at 670.

35. *Miller*, 515 U.S. at 945 n. 11; *Shaw*, 509 U.S. at 638-641.

36. *Shaw*, 509 U.S. at 642.

37. The state raised the standing issue, but only in a footnote. See State Appellees' Brief in No. 92-357, *Shaw v. Barr*, 1993 WL 476425, at *10 n. 11.

equal protection rights of being assigned to an electoral district based on race.³⁸ According to the *Shaw* majority, such race-based assignments “reinforce[] racial stereotypes” and “threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”³⁹ Two years later, in *Miller v. Johnson*, the Court explained that “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”⁴⁰ On the same day it decided *Miller*, the Court in *United States v. Hays* directly confronted the standing question.⁴¹ In *Hays* the Court concluded that plaintiffs who lived in districts other than the gerrymandered ones lacked standing, since they were not subject to the “representational harms”⁴² the earlier cases had concluded were imposed on white voters in the gerrymandered district.

The Court in these cases was forced to default to such vague expressions of harm exactly because racial gerrymanders did not cause a material harm such as the deprivation or the dilution of the right to vote.⁴³ The lack of such a material harm meant that the harm—whether required for purposes of standing or the merits of the plaintiff’s equal protection claim—had to be understood, as scholars have suggested,⁴⁴ in more expressive terms. In particular, the Court understood the harm as the message that race-based districting sent to politicians about the intended or favored constituency in that district, and, perhaps

38. See *Shaw*, 509 U.S. at 649, 658.

39. *Id.* at 650. Two scholars commenting on *Shaw* concluded that that case reflects the Court’s concern with what they call “expressive harm,” which they define as a harm “that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.” Richard H. Pildes & Richard G. Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

40. The Court also argued that racial gerrymanders “may cause society serious harm” by encouraging the idea that the representative of a racially-gerrymandered district represents only the voters of the race for which the district was created. *Miller*, 515 U.S. at 912.

41. *U.S. v. Hays*, 515 U.S. 737, 744-47 (1995).

42. *Id.* at 745.

43. *Miller*, 515 U.S. at 930-31 (distinguishing between a “*Shaw* claim” and a vote dilution claim); Pildes & Niemi, *supra* note 39, at 487.

44. Pildes & Niemi, *supra* note 39, at 508-14.

even more abstractly, the message it sent to the voters themselves about the state's assumptions about their voting behavior.⁴⁵ It was only the existence of such messaging that allowed the state to apply the strict scrutiny that by that time it had decreed should apply anytime government used race as a classifying tool.⁴⁶

In other race cases the Court has been less willing to do what it takes to subject seemingly obviously race-motivated government decisions to the heightened scrutiny that generally accompanies race-based government action. For example, in *Palmer v. Thompson*,⁴⁷ the Court ruled against black plaintiffs challenging the City of Jackson, Mississippi's, decision to close down its swimming pools rather than comply with a court order to integrate them.⁴⁸ After observing, in effect, that the City was not doing anything racially-based when it washed its hands of all responsibility for operating municipal pools,⁴⁹ the Court then rejected the plaintiffs' argument that the City was violating the Constitution by abandoning that function because of its opposition to integrated swimming pools.⁵⁰ The Court pled the impossibility of judges discerning invidious government motivations,⁵¹ although, as scholars have noted, precedent surely existed in 1971 for an opposite conclusion.⁵² That rejection of basing a decision on governmental motivation ultimately led to the Court's insistence that "the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike."⁵³ So posed, the Court had no difficulty concluding that the answer to that question was no.⁵⁴

Palmer was a five-to-four decision.⁵⁵ Writing for three of

45. *Id.*

46. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (justifying the use of strict scrutiny even when the racial classification was alleged to be benign); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying that rule to federal, as well as to state, uses of race).

47. 403 U.S. 217 (1971).

48. *Id.* at 219.

49. *Id.* at 218-19.

50. *Id.* at 223-24.

51. *Id.* at 224.

52. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136-38 (Harv. Univ. Press, 1980) (critiquing *Palmer*'s rejection of a judicial inquiry into governmental motivations).

53. *Palmer*, 403 U.S. at 226.

54. *Id.*

55. See *Palmer*, 403 U.S. 217.

those dissenters, Justice White was more willing to find a constitutional violation in the motivation underlying the City's decision to close its pools.⁵⁶ He wrote:

The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.⁵⁷

For Justice White, then, the City's "expression of official policy that Negroes are unfit to associate with whites" and its "official denigration" of African-Americans constituted a violation of the Fourteenth Amendment.⁵⁸

Thus, a majority of the Court in the districting cases and either three or four dissenters in *Palmer* were willing to accept the idea that a non-material harm could suffice either to grant standing to an equal protection plaintiff⁵⁹ or constitute the sort of harm that on the merits violated the Equal Protection Clause. In that sense, the modern Court's understanding of the harm caused by discrimination mirrors the understanding expressed by the Court in *Strauder* and *Plessy*.⁶⁰

In recent years, the Court has deployed these concepts of stigma and implied inferiority in their reverse form—that is, in

56. *Id.* at 240 (White, J., joined by Brennan and Marshall, JJ., dissenting).

57. *Id.* at 240-41 (White, J., joined by Brennan and Marshall, JJ., dissenting) (internal citations omitted).

58. *See also id.* ("I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing apartheid or because it finds life in a multi-racial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.") *Id.* at 239 (Douglas, J., dissenting).

59. To be sure, the black plaintiffs in *Palmer* would have had standing because of their loss of access to swimming pools. However, the effect of the majority decision was that those plaintiffs were not the victim of an equal protection violation because they were not (or the Court could not discern that they were) the victim of race-based government action. *Id.* at 231-40 (Douglas, J., dissenting); *id.* at 240-60 (White, J., joined by Brennan and Marshall, JJ., dissenting).

60. *See Strauder v. W. Va.*, 100 U.S. 303 (1896); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

support of an affirmative constitutional right to dignity. In the gay rights cases since *Romer v. Evans*,⁶¹ the Court, in each case speaking through Justice Kennedy, has insisted on the rights of gays and lesbians not to be stigmatized or to be relegated to a caste-like inferiority.⁶² In *Romer*, the anti-caste idea was paramount, both in Justice Kennedy's conclusion that Amendment 2 violated the Constitution by making gays and lesbians literal strangers to Colorado law and in his explicit invocation of Justice Harlan's insistence in *Plessy* that the Fourteenth Amendment outlawed such caste legislation.⁶³ In the succeeding cases—*Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, Justice Kennedy shifted focus, toward a positive insistence on the dignity of gays and lesbians to make their own intimate choices (*Lawrence*)⁶⁴ and to claim the dignity-conferring status of marriage (*Windsor* and *Obergefell*).⁶⁵ To be sure, in all of these cases the challenged laws imposed significant material harms on gays and lesbians.⁶⁶ But in all these cases the underlying constitutional entitlement was to dignity—something that Texas's sodomy prohibition, Section 3 of the Defense of Marriage Act (DOMA), and state bans on same-sex marriage denied to the gay and lesbian plaintiffs.⁶⁷ Craig and Mullins, the same-sex couple in *Masterpiece Cakeshop*, have claimed a similar denial of dignity in Phillips's refusal to provide them with a wedding cake.⁶⁸

III. DIGNITY IN MASTERPIECE CAKESHOP

What do the Court's statements about stigma, caste, and

61. 517 U.S. 620 (1996).

62. See, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

63. *Romer*, 517 U.S. at 635. "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Id.* at 623 ("One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting opinion)") (parallel citation omitted).

64. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

65. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-96 (2015); *U.S. v. Windsor*, 570 U.S. 744, 768 (2013).

66. *Obergefell*, 135 S. Ct. at 2593; *Windsor*, 570 U.S. at 744; *Lawrence*, 539 U.S. at 2475.

67. *Obergefell*, 135 S. Ct. at 2599; *Windsor*, 570 U.S. at 744; *Lawrence*, 539 U.S. at 2478.

68. Oral Argument, *supra* note 2, at 28.

dignity mean for Craig's and Mullins's claim in *Masterpiece Cakeshop* that Phillips's denial of their service request impaired their dignity? In his brief to the Court, Phillips cast his decision not in terms of identity discrimination, but instead in terms of his speech and religion rights: "[Phillips] will create his custom art for everyone, including LGBT patrons, but he declines all requests (regardless of the requester's identity) to create custom artistic expression that conflicts with his faith."⁶⁹ His brief's discussion of the dignity interests asserted by the state on behalf of the couple disclaimed animosity toward any particular group of persons, asserted that the same-sex couple's underlying ideology reflected majoritarian views, and expressed confidence that persons in the couple's position could easily access the desired services.⁷⁰ It also insisted on acknowledging the baker's own dignity interests—in this case, his interest in not having his religious beliefs "brand[ed] as discriminatory," in not being "compel[led] . . . to stop creating his cake designs," and in not being "ostracize[d] . . . as a member of the community"—all of which, he noted, were government-imposed burdens, as compared with the dignity harms raised by the couple.⁷¹ These claims implicate several facets of the dignity idea, and merit serious consideration in light of the picture of dignity painted by the Court's jurisprudence.

In his brief Phillips insisted that he harbored no "animosity" toward gays and lesbians, and indeed, stated that he would not discriminate against them in the sale of any item he would otherwise sell—presumably, any item that either contained no expressive element or reflected expression with which he was comfortable.⁷² This first argument raises the question whether dignity denials can arise from actions that are not maliciously motivated (however one defines "malicious").

Presumably this argument can only succeed if something about the non-governmental nature of Phillip's conduct distinguishes it from government-imposed stigma. In *Obergefell v. Hodges*, Justice Kennedy went out of his way to avoid

69. Brief for Masterpiece Cakeshop, *supra* note 13, at 52; see also Brief for Masterpiece Cakeshop, *supra* note 13, at 41 ("Phillips's concern is about the integrity of his own expression—not the inquiring individual's protected status.").

70. *Id.* at 53-55.

71. *Id.* at 55. He also argued that the Civil Rights Commission's attempt to protect the couple's dignity interests were severely under-inclusive, and that less intrusive alternatives would safeguard either all or most of those interests. See *id.* at 56-61.

72. *Id.* at 53.

criticizing the views of those who opposed same-sex marriage on moral or religious grounds, but he nevertheless concluded that such views could not be written into government policy if doing so impaired the dignity interests of same-sex couples who wished to wed.⁷³ Bad intent—whether constructed or explicit—may matter if the question is the constitutionality of discrimination shorn of any claim of dignity denial.⁷⁴ But *Obergefell* means that, at least in the realm of government action, it is unacceptable to instantiate deprivations of dignity into public policy, even when the deprivation is not grounded in animus.⁷⁵

Does the private nature of Phillips's conduct change that result, rendering dignity deprivations non-judicially cognizable if imposed without bad intent? This question implicates broad and difficult questions about the reach of anti-discrimination principles intended to promote dignity, and, relatedly, the force of any countervailing personal autonomy rights that might shelter private discrimination.⁷⁶ Phillips's brief implicitly acknowledges the public/private distinction⁷⁷ when he insists that application of the public accommodations law in this situation impairs his own dignity by "brand[ing]" his "core religious beliefs . . . as discriminatory," "compel[ing] him to stop creating his cake designs," and "ostracize[ing him] as a member of the community."⁷⁸ Indeed, he further notes that, unlike any

73. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

74. See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 527 (1989) (explaining that strict scrutiny was necessary in order to "smoke out" any "invidious" uses of race); WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (NYU Press 2017) (offering an understanding of the Supreme Court's "animus" doctrine that relies heavily on the Court's discriminatory intent jurisprudence).

75. This conclusion is reinforced by scholars' observations that the dignity Justice Kennedy spoke of in *Obergefell* sounded, at least in large part, in claims of substantive right rather than equal protection *simpliciter*. See, e.g., Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015-2016). ("I argue that *Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity Equal dignity . . . lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality.").

76. See generally, ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (Yale U.P. 1996) (examining whether and the extent to which American society's commitment to equality should entail regulation of private discriminatory choices); James Oleske, *Doric Columns are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142 (2015) (considering the same question through the lens of the distinction between public and private spheres in American law and society).

77. See Oleske, *supra* note 76.

78. Brief for Masterpiece Cakeshop, *supra* note 13, at 55.

dignity impairment suffered by the couple, the alleged impairment of his own dignity is being perpetrated by government action rather than private choices.⁷⁹ These arguments reveal the structure of the situation in *Masterpiece Cakeshop*: rather than presenting the asymmetrical structure of government action allegedly impairing the dignity interests of a regulated party (the situation facing the Court, for example, in *Obergefell*), *Masterpiece Cakeshop* presents a symmetrical structure featuring two incompatible private dignity claims, with government (in the form of Colorado's public accommodations law) coming down on one side of the conflict to the detriment of the other side's claim.

That structure, and Phillips's argument illustrating it, requires us to consider whether dignity interests can be impaired by private conduct as much as by government. This does not seem to present a difficult question. To be sure, Fourteenth Amendment cases involve government action alleged to impair a person's dignity interests.⁸⁰ However, the wide acceptance of the principle underlying public accommodations laws—that such dignity interests can also be impaired by private action—seems to settle the matter, at least as a matter of principle, bracketing for now any difficult issues that might arise when countervailing private interests are brought into the mix.

Seen in this light, one can lament the fact that the public accommodations provisions of the 1964 Civil Rights Act were not primarily defended, or upheld, as legislation enforcing the Fourteenth Amendment.⁸¹ Such a conclusion would have solidified the concept that the right to freedom from dignity impairments imposed at the hands of private actors was a principle of constitutional dimension (or at least could be legitimately so viewed by Congress). Nevertheless, the Court's easy rejection of constitutional individual rights attacks on such laws strongly suggests that those laws furthered important public interests beyond constituting reasonable applications of

79. *Id.* at 44-45.

80. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

81. See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 250 (1964) (acknowledging Congress's decision to base that part of the statute partially on its power to enforce the Fourteenth Amendment but declining to consider that possibility); see also Christopher Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 802-23 (2010) (discussing the political branches' and the justices' deliberations on Congress's potential influence over the Fourteenth Amendment's state action requirement).

Congress's power to regulate interstate commerce.⁸²

Indeed, the institutions responsible for enacting and upholding those laws explicitly recognized that those interests included dignity.⁸³ As Elizabeth Sepper notes, the Congress considering the Civil Rights Act of 1964 explicitly identified the protection of dignity interests as an important goal of the statute's public accommodations provisions,⁸⁴ as did the Court's decision upholding those provisions.⁸⁵ In light of this history, it is difficult to see how, as a matter of principle, the private nature of the dignity invasion renders that harm non-cognizable.

But perhaps then the idea is that such interests, while worthwhile as a general matter, do not outweigh countervailing private interests—including a countervailing interest in the dignity of the alleged discriminator.⁸⁶ It is in this light that we can understand Phillips's argument that the couple's dignity claims should be defeated in light of their alleged relatively trivial status as compared to Phillips's own dignity claims.⁸⁷

Begin with Phillips's countervailing dignity claim. His brief refers to his dignity interests in terms of both social opprobrium and ostracism (his religious beliefs being "brand[ed] as discriminatory," and being "ostracize[d] . . . as a member of the community") and limits on his constitutionally-protected expression (being "compel[led] . . . to stop creating his cake designs").⁸⁸ This first set of interests constitutes a remarkably weak foundation for a dignitary interest claim that might outweigh the couple's dignitary interest in full access to the marketplace—an interest that, as noted earlier, has been recognized by Congress (indeed, recognized as having constitutional stature) and whose importance has been acknowledged by the Court.⁸⁹

To be sure, such arguments are not trivial in the larger

82. *Heart of Atlanta Motel*, 379 U.S. at 258-60 (rejecting due process attacks on the public accommodations provisions of the Civil Rights Act of 1964).

83. Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. J.C.R. & C.L.L. REV. 129, 154 (2015).

84. *Id.* at 153-54.

85. *Heart of Atlanta Motel*, 379 U.S. at 250; Sepper, *supra* note 83, at 154.

86. Brief for Masterpiece Cakeshop, *supra* note 13, at 55. ("The Commission seems to think that it will eliminate dignitary harms through this and similar applications of [the state public accommodations law], but that ignores the dignitary interests on Phillips's side of the case.").

87. *Id.* at 50.

88. *Id.* at 55.

89. *Id.* at 50; Sepper, *supra* note 83, at 153-54.

scheme of questions about the wisdom of public accommodations laws and their breadth. Theorists thinking about this issue have struggled over the liberal state's power essentially to take sides in the struggle between such conflicting private interests.⁹⁰ More generally, scholars have strenuously argued that tarring one side of a political debate with opprobrious language or labels—in the case of these scholars, the label of “animus,” and in Phillips’s brief, having one’s religious beliefs being “brand[ed] as discriminatory”⁹¹—corrodes the good will and trust that makes possible political and social compromises on contested matters of public policy and morality.⁹²

Nevertheless, these concerns should not carry the day for Phillips. Whatever one might think as a matter of liberal theory, it is well-accepted today that government can in fact take sides when individual rights conflict. Phillips’s more focused argument—that it impairs his dignity interests to have his religious beliefs “brand[ed] as discriminatory” and to be “ostracize[d] . . . from the community”—effectively amounts to an argument that being labelled guilty of violating a public accommodations law itself constitutes a sufficient impairment of one’s dignity to justify not applying the law in that case.⁹³ Such a label may well sting—as, for example, it may sting to be held to have engaged in intentional discrimination.⁹⁴ But by itself that surely cannot suffice to warrant an exemption from the law in that case, unless there is something so trivial about the couple’s dignitary interests that such a “brand” and such “ostracism” constitute arbitrary deprivations of his liberty interest in his reputation.⁹⁵

Perhaps, then, the dignity impairment flows from the alleged impact the application of this law will have on the baker’s speech—recall that in his catalog of dignity concerns

90. See generally Koppelman, *supra* note 76.

91. Brief for Masterpiece Cakeshop, *supra* note 13, at 55.

92. Brief for Steven Calabresi et al. as Amici Curiae Supporting Petitioners, *Herbert v. Kitchen*, 571 U.S. 1116 (2014) (No. 14-124) (urging the Supreme Court to grant cert. in a same-sex marriage case in order to reject an animus-based rationale for striking down bans on same-sex marriage); see Steven Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 683-85 (2014) (making this argument).

93. Brief for Masterpiece Cakeshop, *supra* note 13, at 55.

94. Koppelman, *supra* note 76, at 63 (“Stigma is often, and appropriately, inflicted by the law itself—most pertinently, by a legal finding that a defendant has engaged in purposeful discrimination.”).

95. But see *Paul v. Davis*, 424 U.S. 693, 734 (1976) (holding that an individual’s reputational interest, by itself, does not constitute a liberty or property interest protected by the Due Process Clause).

Phillips included being “compel[led] . . . to stop creating his cake designs.”⁹⁶ This threat to dignity is not trivial. If being denied the right to speak impairs an individual’s autonomy by removing her agency in making the type of decision that in many ways most marks us as human—the decision to express oneself⁹⁷—then presumably being compelled to speak has the same deleterious effect on one’s dignity.⁹⁸ But this claim, like his claim that application of the law to him violates his rights to free religious exercise, is accounted for by his First Amendment arguments, which this Essay does not consider.

Phillips’s remaining dignity claim turns on the relative social positions of his claim as compared with that of the couple’s.⁹⁹ Phillips’s statement on this point raises the relevant issues: the couple’s point of view is the majoritarian one (or so he alleges), the couple would find few obstacles getting its material needs met in the marketplace, and his (Phillips’s) dignity interest is impaired by the government, as compared with the couple’s which, if it exists at all, is being impaired by Phillips’s private choices.¹⁰⁰ The picture these allegations paint is one in which the government puts its thumb on the scale on the side of the majority-favored dignitary interest, to the detriment of a dissenting/minority-based interest, in a context in which the material harm to the majoritarian interest is alleged to be minimal.

Again, though, as with broader claims about government’s lack of authority to choose between conflicting private interests, such allegations prove too much. By 1964, disfavoring segregation in public accommodations was a majoritarian position,¹⁰¹ in many areas of the nation African-Americans had at least some ability to access goods and services (even if doing

96. Brief for Masterpiece Cakeshop, *supra* note 13, at 55.

97. See Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1259-60 (2014) (setting forth the autonomy theory of free speech).

98. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

99. Brief for Masterpiece Cakeshop, *supra* note 13, at 52.

100. *Id.* at 50.

101. Andrew Kohut, *50 years Ago: Mixed Views About Civil Rights but Support for Selma Demonstrators*, PEW RES. CTR. (Mar. 5, 2015), <http://www.pewresearch.org/fact-tank/2015/03/05/50-years-ago-mixed-views-about-civil-rights-but-support-for-selma-demonstrators/> [<https://perma.cc/JA4A-NQDD>] (noting that in October 1964 polling showed the Civil Rights Act of 1964 being favored by a 58% to 31% margin).

so required searching, or at least the assistance of guides such as *The Green Book*),¹⁰² and, of course, by that date the power and prestige of the federal government had been placed decisively on the side of non-discrimination rather than private autonomy to discriminate. None of this is intended to minimize the difficulties African-Americans faced in 1964, and continued to face for years thereafter, in ensuring equal access to public accommodations. But it does cast doubt on Phillips's claim that the Craig and Mullins's dignity interests should give way in light of the majoritarian and governmental support enjoyed by the non-discrimination imperative as well as the relative ease with which the protected group could locate goods and services.

IV. NO CAKE FOR YOU

One way to illustrate the issues in *Masterpiece Cakeshop*, and in particular to consider the dignity claims the litigants raised and that this Essay discussed earlier, is to examine a well-known popular culture reference to a situation that echoes (perhaps only very distantly) the one in that case. In Season Six of the 1990s situation comedy *Seinfeld*, the recurring characters become aware of a soup shop that sells excellent soup.¹⁰³ The only problem is that the proprietor—who the characters call “the Soup Nazi”—insists on a rigid code of conduct within his shop.¹⁰⁴ One mistake—requesting the same free bread other customers received (George), tapping one's fingers on the counter and making unwelcome small talk (Elaine), or (evocatively in light of the basis for the discrimination in *Masterpiece Cakeshop*) engaging in affectionate conduct with an intimate partner (Jerry)—and the Soup Nazi exiles the hapless would-be diner with the epithet “No soup for you!”¹⁰⁵

The parallels between this situation and *Masterpiece Cakeshop* are obvious enough;¹⁰⁶ as, it should be immediately

102. Meaghan Monahan, *The Green Book: Safely Navigating Jim Crow America*, 20 GREEN BAG 2D 43 (2016).

103. WIKIPEDIA, *The Soup Nazi*, https://en.wikipedia.org/wiki/The_Soup_Nazi [<https://perma.cc/2RM7-8WS9>] (last visited Apr. 1, 2018) (explaining the plot of the episode).

104. *Id.*

105. *Id.*; Brett Cohen, *The Best of The Soup Nazi*, YOUTUBE, <https://www.youtube.com/watch?v=M2lfZg-apSA> (last visited Feb. 9, 2018) at 1:15-1:52 (interaction with Elaine), 1:52-2:26 (affectionate conduct between Jerry and his girlfriend).

106. One parallel that is not immediately obvious is that one of the characters (Jerry) refrains from affectionate behavior with his girlfriend while in the shop, in

noted, are the differences. But it's illuminating to think about the motivations of the characters affected by either their actual or threatened exclusion from the public accommodation of the soup shop. Why do the characters care about their exclusion? It's not enough to give the obvious answer—that they have to care because otherwise there wouldn't exist the conflict that creates the comedy. Of course, the characters have to care in order to create the comedy. But why does their anxiety about being denied service resonate with viewers in a way that creates comedy? In other words, what is it about that exclusion that makes their anxiety about it relatable—so relatable, in fact, that the episode is now considered a classic, and the term “soup Nazi” has now become an all-purpose term for an overly-rigid dispenser of some product (with “soup” replaced by the particular product in question)?¹⁰⁷

Begin with the most obvious answer: the characters care about their exclusion from the shop because the soup is so good. Indeed, the episode is built on this foundation: the reason the characters flock to the shop is because of the quality of the soup. Nevertheless, their exclusion from the shop triggers other motivations. Elaine's response is particularly noteworthy. She is incredulous at having been banned, and, after gaining leverage against him by accidentally obtaining his recipes, she returns, eager to avenge her humiliation.¹⁰⁸

Why did Elaine come back? To get soup? No, in fact she explicitly (and triumphantly) tells the proprietor that that's not the reason she's returned.¹⁰⁹ Instead, her goal is to ruin him, and to make clear that it's she who's doing it, by ostentatiously reading out loud, in his presence, from the soup recipes she has come to possess.¹¹⁰ Thus, what is motivating Elaine is not a simple desire to obtain soup—or even in particular the excellent soup offered by the proprietor.¹¹¹ Instead, her goal is to assuage the damage to her ego by inflicting a grievous injury, not just or

order to avoid what he fears will be the proprietor's negative reaction. *The Soup Nazi*, *supra* note 103. It should also be noted that Elaine's first reaction to her experience of the proprietor's conduct is to complain that it must be discriminatory. See *Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995).

107. See, e.g., *The Whistler's Wood Shop*, *The Candy Nazi*, YOUTUBE, <https://www.youtube.com/watch?v=LJB2a-GZcsQ> (last visited Feb. 9, 2018) (comical appropriation of the Soup Nazi story using a candy distributor at Halloween).

108. See *Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995).

109. *Id.*

110. *Id.*

111. *Id.*

even primarily on the proprietor's business,¹¹² but by making it clear that he no longer has power over her.¹¹³

But Elaine is merely the conduit by which all the characters' dignity injuries are assuaged. Other than Kramer, who served as the initial connection between the group and the soup shop, all three main characters experience humiliation at being refused service.¹¹⁴ George suffers the indignity of not being served. Indeed, the episode graphically illustrates, through physical comedy, the indignity he suffers of having his soup snatched back and his money roughly handed back to him.¹¹⁵ When he returns he is forced to grovel, rigidly following the ordering protocol and sycophantically thanking him for receiving what, by rights, he was due for his money (and even then having to endure a warning from the proprietor).¹¹⁶ Jerry, when criticized by the proprietor for his public display of affection inside the shop, was put to the Saint Peter-like choice of denying his beloved or losing access to the material benefit promised by the authority figure—choosing, through language deeply resonant of Saint Peter, to renounce his human affections.¹¹⁷ Finally, the wound Elaine feels to her ego is so deep—and is presumably understood by viewers as such—that her avenging of that injury becomes the dramatic highlight of the episode.

These dynamics are funny, but they're funny because they illustrate the pain and insult people feel when they believe themselves to have been humiliated. They're also funny because the characters' reactions—ranging from George's defeated, sycophantic compliance to Jerry's abandonment of his beloved to Elaine's defiant return once she obtains game-winning leverage—are those that are well-understood when humans are confronted with this sort of humiliation threat: abase yourself

112. Even though she succeeds in running him out of the country (at the end of the episode it is revealed that he is closing the business and returning to Argentina), Elaine discloses no plans to open a soup shop of her own, and very quickly rejects the option of ruining him by publicly disseminating the recipes. Instead, she chooses to use her leverage more directly, by confronting him face to face. *Id.*

113. *Id.* (Elaine: "You're through, soup Nazi.")

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (Jerry, to his girlfriend when she returns to the shop after he fails to follow her out when she leaves in protest: "Do I know you?"). *Compare with Matthew* 26:71-72 ("71 When [Peter] went out to the gateway another servant-girl saw him and said to the people there, 'This man was with Jesus the Nazarene.' 72 And again, with an oath, he denied it, 'I do not know the man.'").

and comply, thus abandoning your principles (respectively, George and Jerry), or, alternatively, resist (Elaine). As such, they illustrate the harm of such proprietors' refusal to serve. To paraphrase the Senate Commerce Committee's report on the Civil Rights Act of 1964: "Discrimination is not simply Mulligatawny, turkey chili, and Jambalaya; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public."¹¹⁸ Note that no character responds to the proprietor's exclusion by finding soup somewhere else. That would not be funny, because it would be anti-climactic. And it would be anti-climactic because it would not resolve the fundamental tension driving the episode.

To repeat, the dramatic driver of the episode is the excellence of the soup the "soup Nazi" offers; as noted earlier, the episode would not make any sense, and thus would not be funny, if his soup was nothing special. But this inescapable fact does not prove the argument, made by Phillips and some of his *amici* in *Masterpiece Cakeshop*, that the availability of similar goods removes any meaningful harm from his denial of service. Indeed, if that was the only harm at issue from the Soup Nazi's conduct, then the episode would have ended differently: perhaps with Elaine opening up a rival soup shop, printing out the recipes and handing them out to customers waiting in line, or perhaps simply cooking up a pot of Mulligatawny herself for her and her friends. Or perhaps one of the characters would have found another shop with soup that was just as good. But instead Elaine needs to confront the proprietor. Again, the dramatics of the episode require that final confrontation; we all would have felt let down if she simply started procuring the same excellent soup in some other way. But the dramatics require that confrontation because only that confrontation assuages what we know instinctively to be the harm Elaine suffers: the harm of being a willing customer, ready to pay the posted rate for the good in question, only to be told, "No soup for you!"¹¹⁹

118. Compare Sepper, *supra* note 83, at 153-154 ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.") (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring) (internal quotations omitted)).

119. See *Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995).

V. CONCLUSION

Masterpiece Cakeshop raises several very difficult questions. What constitutes constitutionally-protected expression? What constitutes discrimination against religiously-motivated conduct in the application of a facially-neutral law? Perhaps most troublingly, how should the balance be struck between interests in free expression and religiously-motivated conduct on the one hand, and non-discriminatory access to the marketplace, on the other?

One issue that is not difficult, however, is the existence of dignity interests in such non-discriminatory access. This interest exists even when a good or service would be otherwise available in the marketplace. As Part I noted, the Court's constitutional law jurisprudence makes clear that such non-material harms are properly cognizable by courts, whether expressed as a matter of substantive law or as a matter of the harm a plaintiff needs to demonstrate in order to establish standing to sue. As Part II discussed, Phillips's own arguments on this point reveal the weakness of any argument to the contrary and the similar weakness of any claims of his own dignitary interest except, possibly, those that are wrapped up in his speech and religion rights arguments the existence and weighing of which this Essay has bracketed. Finally, Part III illustrates the cultural understanding of the non-material, stigma-creating harm that, among other harms, accompanies discriminatory refusals to serve.

In the context of a challenging case like *Masterpiece Cakeshop*, one should be thankful for even such limited clarity.

