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Religious Challenges to Anti-Discrimination Law: The Mobilization of the "Minority Label"

Léa Brière-Godbout and Marie-Andrée Plante

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See table of contents

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Article abstract

In 2018, the American and Canadian supreme courts released two high-profile decisions: the case of a Christian baker from Colorado who refused to create a cake for the celebration of a same-sex couple's union, and the case of an evangelical Christian law school in British Columbia whose code of conduct prohibiting same-sex intimacy led to accreditation refusals by three provincial law societies. In both cases, religious believers argued that modern LGBTQ2+ anti-discrimination protections required them to act in ways that proved incompatible with their religious beliefs. While such "conflict of rights" are familiar to liberal democracies, this article demonstrates how these cases operate within a new paradigm in which religious actors, seeking exemptions from legal protections accorded to a vulnerable minority, claim minority status for themselves. Hoping to have their policy agenda seen in a new light, such opponents of LGBTQ2+ rights have replaced their discourse defending traditional mores with one arguing that the broadly cherished value of pluralism guarantees them a religious right to "dissent" from anti-discrimination protections. We dub this discursive process the mobilization of the "minority label."

In this article, we retrace the emergence of this new discourse by turning to the narratives crafted by parties, courts, and media in the two cases. We discuss the three main argumentative strategies through which the minority label manifests in discourses: language framing, moral symmetry arguments, and respectability claims.

We then offer a comparative analysis which explores the different ways both courts reacted to this discourse. We conclude with a brief discussion of some of the long-term risks that the rise of such a discourse implies for LGBTQ2+ rights.

Religious Challenges to Anti-Discrimination Law: The Mobilization of the "Minority Label"

*Léa Brière-Godbout and Marie-Andrée Plante**

In 2018, the American and Canadian supreme courts released two high-profile decisions: the case of a Christian baker from Colorado who refused to create a cake for the celebration of a same-sex couple's union, and the case of an evangelical Christian law school in British Columbia whose code of conduct prohibiting same-sex intimacy led to accreditation refusals by three provincial law societies. In both cases, religious believers argued that modern LGBTQ2+ anti-discrimination protections required them to act in ways that proved incompatible with their religious beliefs. While such "conflict of rights" are familiar to liberal democracies, this article demonstrates how these cases operate within a new paradigm in which religious actors, seeking exemptions from legal protections accorded to a vulnerable minority, claim minority status for themselves. Hoping to have their policy agenda seen in a new light, such opponents of LGBTQ2+ rights have replaced their discourse defending traditional mores with one arguing that the broadly cherished value of pluralism guarantees them a religious right to "dissent" from anti-discrimination protections. We dub this discursive process the mobilization of the "minority label."

In this article, we retrace the emergence of this new discourse by turning to the narratives crafted by parties, courts, and media in the two cases. We discuss the three main argumentative strategies through which the minority label manifests in discourses: language framing, moral symmetry arguments, and respectability claims.

We then offer a comparative analysis which explores the different ways both courts reacted to this discourse. We conclude with a brief discussion of some of the long-term risks that the rise of such a discourse implies for LGBTQ2+ rights.

En 2018, les cours suprêmes états-unienne et canadienne ont rendu deux importantes décisions. La première concernait un pâtissier chrétien du Colorado ayant refusé de préparer un gâteau pour célébrer l'union d'un couple gai. La seconde visait une faculté de droit chrétienne évangélique de Colombie-Britannique munie d'un code de conduite interdisant les rapports intimes entre personnes de même sexe, code ayant poussé trois barreaux provinciaux à refuser son accréditation. Dans ces deux décisions, des personnes et institutions religieuses ont soutenu que les garanties juridiques contre la discrimination dont bénéficient aujourd'hui les personnes LGBTQ2+ les contraignaient à agir d'une manière incompatible avec leurs croyances religieuses. Bien que de tels « conflits de droits » soient usuels dans les démocraties libérales, cet article démontre que ces décisions s'inscrivent dans un nouveau paradigme. Ici, des justiciables croyants souhaitant se soustraire à des obligations juridiques visant la protection d'une minorité vulnérable, revendiquent maintenant le statut de minorité pour eux-mêmes. Ainsi, notamment dans l'espoir que leur agenda politique soit vu sous un nouveau jour, ces justiciables s'opposant aux droits des personnes LGBTQ2+ ont troqué leur discours défendant des mœurs conservatrices pour un discours affirmant que la valeur largement prisée du pluralisme leur garantit un droit religieux à la « dissidence » quant aux dispositions juridiques anti-discrimination. Nous nommons ce procédé rhétorique la mobilisation de l'« étiquette de minorité ».

Dans cet article, nous retraçons l'émergence de ce nouveau discours en nous penchant sur les narratifs mis de l'avant par les parties, les tribunaux et les médias dans les deux décisions. Nous traitons des trois principales stratégies argumentatives à travers desquelles l'étiquette de minorité se manifeste dans les discours : l'adoption d'un certain champ langagier, les arguments de symétrie morale et les revendications ayant trait à la respectabilité.

Nous proposons ensuite une analyse comparative qui explore les différentes manières par lesquelles les deux cours ont réagi à ce discours. Nous concluons par une brève discussion concernant certains des risques à long terme que la montée d'un tel discours implique pour les droits des personnes LGBTQ2+.

* Léa Brière-Godbout, S.J.D. Candidate, Vanier Scholar, Viscount Bennett Fellow, Faculty of Law, University of Toronto (she/elle). Marie-Andrée Plante, D.C.L. Candidate, Faculty of Law, McGill University (she/elle). This paper was first presented at the Younger Scholars Forum at the General Congress of the International Academy of Comparative Law in 2018, in Fukuoka, Japan and at the 13th Summer Institute of Jurilinguistics in 2019, at the Paul-André Crépeau Centre for Private and Comparative Law, McGill University, Montreal, Canada. We would like to thank the participants for their helpful comments. All errors are our own.

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Introduction

In the American state of Colorado, a Christian baker refuses to create a cake for the celebration of a same-sex union.[1] Meanwhile, in the Canadian province of British Columbia, a Christian evangelical university imposes a code of conduct prohibiting same-sex sexual intimacy, leading the law societies of British Columbia, Ontario, and Nova Scotia to refuse to accredit its proposed law school. The three law societies justify their refusal by pointing to the discriminatory nature of the code.[2] For some, these two high-profile cases, decided by the highest American and Canadian courts in 2018, simply embody the "irresolvable" tension between liberty and equality confronting liberal democracies. While they are indeed intelligible through this lens, we submit in this article that the complexity of these two cases extends far beyond it.

Indeed, these cases are part of a larger legal trend in which religious actors—here, a "devout Christian"[3] and an evangelical institution—argue that the equality rights of others conflict with their own religious freedom. For them, complying with modern LGBTQ2+[4] anti-discrimination protections would compel them to act in ways that contravene their beliefs.[5] Exemptions from anti-discrimination laws are thus sought by such believers in areas such as housing, education, employment, health care, adoption, and marriage-related provision of goods and services. Such cases, particularly in the United States, are litigated by highly organized and long-standing opponents to LGBTQ2+ rights, such as the Alliance Defending Freedom.[6] The point of interest of this legal trend is that, in

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1 See *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US ___ (2018) [*Masterpiece Cakeshop*].

2 See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU I*]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*TWU II*].

3 *Masterpiece Cakeship*, *supra* note 1 at 3, Kennedy J, for the Court.

4 Throughout the article, we use the acronym LGBTQ2+ (lesbian, gay, bisexual, transgender, queer/questioning, two-spirit, and others) or the word "queer" to refer to those of diverse sexualities, gender identities, and expressions. However, we recognize the ongoing lively debates about definitions within these communities.

5 According to Andrew Koppelman, the burden of abiding by anti-discrimination laws "has become one of the premier concerns of conservative Christians" ("You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions" (2006) 72:1 Brook L Rev 125 at 135).

6 Indeed, the Alliance Defending Freedom, who represented the petitioner in the Colorado bakery case, was previously involved in the defense of Proposition 8 in the Californian context (see *Perry v Schwarzenegger*, 704 F Supp (2d) 921 (ND Cal 2010)), as well as in the cases of a photographer, a florist, and a clerk refusing to work for same-sex civil commitment ceremonies (see *Elane Photography, LLC v Willock*, 309 P.3d 53 (NM Sup Ct 2013) [*Elane Photography*]; *State v Arlene's Flowers, Inc*, 441 P.3d 1203 (Wash

claiming minority status for themselves and arguing that they have become a disadvantaged group in need of protection, religious actors opposing LGBTQ2+ rights are upending equality rights jurisprudence in the United States and Canada in a discursive process we term the "minority label."[7]

In this new paradigm,[8] religious believers refusing to comply with LGBTQ2+ anti-discrimination protections are no longer members of an

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2019), petition for a writ of certiorari filed at the US Supreme Court, No 19-333 (2019); *Bishop v Smith*, 760 F.3d 1070 (10th Cir 2014)), as well as countless other similar exemption seekers. Recently, they have also been involved in the landmark case about Title VII protection's of LGBTQ2+ workers (see *RG & GR Harris Funeral Homes, Inc v Equal Employment Opportunity Commission*, 590 US ___ (2020)). The Alliance Defending Freedom has also been active in many cases seeking exemptions related to abortion and contraception, such as the seminal case of *Hobby Lobby* (see *Burwell v Hobby Lobby Stores, Inc*, 573 US 682 (2014)). For a more complete list of cases in which Alliance Defending Freedom has been involved, see "View Our Cases" (last visited 14 May 2021), online: *Alliance Defending Freedom* <adflegal.org> [perma.cc/45GM-8HJ5].

7 It is important to note that we do not doubt the sincerity of the religious opponents' beliefs regarding both the fact that their opposition to LBGTQ2+ rights stems from their subjective understanding of their faiths, and the fact that they have become a minority in need of legal protection. For an example of members of conservative Christian communities explaining how they feel they are turning into a minority, see Elizabeth Dias, "'Christianity Will Have Power'", *The New York Times* (9 August 2020), online: <www.nytimes.com> [perma.cc/7B5S-XKUA]. Nevertheless, their sincerity is insufficient to persuade us. First, as will be discussed later, their situation is not on par with the one facing traditionally vulnerable minorities. This is in part because these believers equate a loss of hegemonic status in society with being minoritized. In addition, what distinguishes these believers from other minorities is the peculiar fact that their stance against others' equality rights is at the core of what they believe makes them a minority in need of protection.

Finally, the sincerity of these believers does not void the observation that their cases are part of a trend where religious groups defending traditional morality are strategically and in a concerted manner using this type of rhetoric—among other legal and political strategies—to mobilize against laws authorizing same-sex marriage. On the concerted mobilization of conservative religious groups to enforce traditional morality in the law on abortion, contraception, and marriage, see Douglas NeJaime & Reva B Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics" (2015) 124:7 Yale LJ 2516 at 2544–51. On the strategic lessons religious believers can learn from the pro-life movement in order to oppose same-sex marriage, see Ryan T Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery, 2015).

8 The analysis we conduct here is in line with a current of legal scholarship seeking to contextualize case law and to produce new understandings through a focus on claimants' articulation of their reality, on the dialectic process existing between the parties and the court, as well as on the ever-changing and contested meaning of key legal concepts. See e.g. Reva B Siegel, "*Roe*'s Roots: The Women's Rights Claims that Engendered *Roe*" (2010) 90:4 BUL Rev 1875 at 1875, 1877 (about the forgotten role feminist advocates played in the years preceding *Roe v Wade*, and how the possibility of an equality rationale for abortion rights shaped the legal debate); Cary Franklin, "The An-

oppressive majority seeking to impose traditional morality norms upon others. Rather, they depict themselves as lone dissenters who have lost the culture war on morality,[9] and who simply seek to protect "what is left" of their religious freedom. This is a value which, they argue, "has been relegated to a narrow, private sphere [and] which must be 'closeted' from public display."[10] In other words, these religious believers are recast as a minority requiring protection from "liberal orthodoxy," where equality rights constantly trump religious freedom. Hence, while their beliefs have not changed, conservative religious groups invoking the minority label contend they no longer speak as a majority: they rather speak as a new minority seeking exemptions from anti-discrimination laws to be able to protect their freedom of religion.[11]

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ti-Stereotyping Principle in Constitutional Sex Discrimination Law" (2010) 85:1 NYUL Rev 83 at 86 (contextualizing gender equality cases brought by male plaintiffs in order to show that these cases stand for a much more robust understanding of equality than they have been credited for); Reva B Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*" (2004) 117:5 Harv L Rev 1470 at 1473–74 [Siegel, "Equality Talk"] (analyzing how the seminal *Brown v Board of Education*, 347 US 483 (1954) [*Brown*] decision came to be understood as promoting an "anti-classification" understanding of equality over one concerned with subordination, and examining which social groups stand to benefit from this discursive shift).

9 See generally NeJaime & Siegel, *supra* note 7.

10 Carl F Stychin, "Closet Cases: 'Conscientious Objection' to Lesbian and Gay Legal Equality" (2009) 18:1 Griffith L Rev 17 at 24.

11 This idea of an inversion has been put forward by a few scholars in recent years. In his book, *Religious Freedom in an Egalitarian Age*, Nelson Tebbe observes that the recent advances in equality law—including LGBTQ2+ rights—"[have] contributed to a sense among some religious traditionalists that there has been an inversion. They feel they now are the minorities who require protection from an overweening liberal orthodoxy." (*Religious Freedom in an Egalitarian Age* (Cambridge, Mass: Harvard University Press, 2017) at 1). For Douglas Laycock, as "sexual revolution has swept away the former religious majority on sexual matters," "[r]eligious conservatives make the individual-rights arguments of a minority group because they are a minority group." Even when they are still local majorities, he contends, they are "constitutionally disabled from enforcing their views on disputed issues of sexual morality" ("Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel" (2016) 125 Yale LJ Forum 369 at 370). Melissa Murray has also raised a similar point in a recent article discussing the *Masterpiece Cakeshop* decision, in which she argues that this case is a prime example of religious believers seeking accommodation recasting themselves as a minority in a majoritarian culture. She notes that *Masterpiece Cakeshop* is in line with recent anti-discrimination challenges brought by litigants who are not the "imagined subjects" of anti-discrimination norms, but who "vindicate their claims against those who *are* the imagined subjects of antidiscrimination law's protections" ("Inverting Animus: Masterpiece Cakeshop and the New Minorities" (2019) 2018 Sup Ct Rev 257 at 259). Examples of such challenges include various gender discrimination lawsuits brought by men's rights groups against events, programs, and benefits addressed to women. For Murray, *Masterpiece Cakeshop* and these other cases should not simply be

The use of the minority label by these religious groups can be seen as an attempt to achieve what Reva Siegel calls "preservation through transformation."[12] This expression designates a dynamic through which actors resist contemporary discarding of conservative legal rules by trading arguments that have lost their mainstream appeal for others that better echo modern sensibilities. Their hope is to have these former legal rules reached though an alternative path that is more credible, which would relegitimize their unchanged policy preferences.[13] The use of the minority label to oppose LGBTQ2+ rights follows this logic: conservative religious believers have set aside a discourse focused on the preservation of traditional mores in favour of arguing that opposition to queer unions is a respectable, minoritarian religious belief warranting protection in the name of the right to religious freedom and equality.

This discourse differs from prior legal claims to minority status in the context of religious freedom in at least two important and interrelated ways. First, claims for protection on the basis of minority status have spread from discrete and insular communities often holding uncommon beliefs to claimants whose beliefs have long held a mainstream legal and social status and which continue to be shared by many.[14] This makes the mobilization of the minority label appear counterintuitive—as Melissa Murray points out, these claimants are not the traditional "imagined subjects" of anti-discrimination protections.[15] Second, the concept of "minority" is now deployed to contest anti-discrimination law norms by framing disputes as consisting of conflicting claims between the rights of two minorities equally in need of protection. Subjects and detractors of anti-discrimination protections are thus placed on par with one another.

This novel argumentative strategy is at the heart of the two aforementioned recent LGBTQ2+ rights-related decisions: *Masterpiece Cakeshop v.*

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discussed through the lens of the collision between religious freedom and anti-discrimination norms, but rather as part of a trend where anti-discrimination law is "weaponized" by powerful constituencies against those who were once the objects of its protections (see *ibid* at 257, 296).

12 Reva B Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105:8 Yale LJ 2117 at 2178 [Siegel, "Rule of Love"]; NeJaime & Siegel, *supra* note 7 at 2553.

13 See generally Paul A Djupe et al, "Rights Talk: The Opinion Dynamics of Rights Framing" (2014) 95:3 Soc Science Quarterly 652 (for the argument that support for conservative positions grows when framed in terms of rights rather than morality).

14 See e.g. *United States v Carolene Products Company*, 304 US 144 (1938) at paras 147–52. This expression was also imported in Canadian equality jurisprudence through Wilson and La Forest JJ's reasons in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

15 See Murray, *supra* note 11 at 259.

Colorado Civil Rights Commission[16] (*Masterpiece Cakeshop*), from the US Supreme Court, and *Law Society of British Columbia v. Trinity Western University*[17] and its sister case *Trinity Western University v. Law Society of Upper Canada*[18] (hereinafter referred to together as "*TWU*"), from the Supreme Court of Canada. The efforts of members of conservative Christian groups to claim minority status to justify their non-compliance with anti-discrimination laws in these cases inform us of the persuasive potential of the minority label. It also highlights what is at stake in accepting or rejecting the believers' non-compliance requests.

This article thus seeks to shine a light on the minority label and to dissect its persuasive mechanics by studying the judicial narratives crafted by parties, courts, and media around these two decisions. In our discussion, we retrace how religious believers opposing LBGTQ2+ anti-discrimination protections innovate by depicting themselves as a new minority, claiming a vulnerability usually reserved for traditional subjects of discrimination. We lay out the argumentative strategies supporting this discursive shift, converging toward one main goal: to anchor their religious claims on the ethical terrain occupied by discriminated individuals. We examine the common features in the rise of this discourse in the American and Canadian settings and how the two supreme courts react differently to the minority label contention.

The article proceeds in two parts. Part I presents the conditions of possibility of this discourse by listing the various elements accounting for the development of the minority label rhetoric among religious opponents to LGBTQ2+ rights. In Part II, we examine how the minority label operates as a rhetorical process in the discourse of parties, courts, and media. Three main argumentative strategies will be discussed: language framing, moral symmetry arguments, and respectability claims. For each strategy, we compare the reasons of the American and Canadian supreme court justices who adopted them in order to better understand how the minority label is received in each specific national context. We conclude by offering brief thoughts on the risks that the rise of such a discourse carry in the long term for LGBTQ2+ rights.

I. The Conditions of Possibility of the Discourse of the "Minority Label"

Various circumstances and factors contribute to the emergence and development of a discourse in which religious opponents to LGBTQ2+

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16 *Masterpiece Cakeshop*, *supra* note 1.

17 *TWU I*, *supra* note 2.

18 *TWU II*, *supra* note 2.

rights can mobilize the minority label to demand exemptions from anti-discrimination protections. While exploring these circumstances and factors in detail goes beyond the purpose of this article, we wish to highlight their existence in order to lay the basis of an explanation of how this discourse became *possible*. Its emergence is grounded in a combination of socio-historical factors and doctrinal elements extracted from the legal understanding of religious freedom. Together, these preconditions opened a space for the minority label discourse to develop. The main elements of this "perfect storm" are outlined below.

A. A Changing Socio-Historical Context

Such a use of the minority label by religious groups is uniquely modern in that it owes its emergence to at least three main socio-historical phenomena: advances in LGBTQ2+ rights, a shift in demographics, and the normalization of reverse discrimination claims.

1. The Advances in LGBTQ2+ Rights

The new discourse studied here is a direct response to recent LGBTQ2+ rights mobilization and victories. Simply put, LGBTQ2+ discrimination first needed to be largely prohibited in the private sphere for opponents to be able to claim that such prohibitions interfered with their right to live according to their private religious beliefs. Indeed, when the debate pertained mostly to the public sphere, it was impossible for opponents of same-sex unions to portray themselves as a "targeted" minority, as nothing was yet being directly asked of them as individuals.[19] Hence, as the LGBTQ2+ rights movement progressed from public sphere victories (outlawing overt hostility and unequal treatment from state laws)[20] to secular private sphere issues (banning private discrimination in com-

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[19] We should note that the trajectory of LGBTQ2+ rights in Canada and the United States has not been the same, and that the progression from the public to the private sphere was not always linear in either country. For instance, in Canada, the Quebec *Charter of Human Rights and Freedom*s, CQLR c C-12 outlawed discrimination on the basis of sexual orientation in some private sphere domains as early as 1977, more than two decades before same-sex marriage was recognized in Canada (see *ibid* at s 10, as amended by *An Act to amend the Charter of human rights and freedoms*, SQ 1977, c 6, s 1).

[20] One can think, for instance, of the decriminalization of sodomy and the recognition of same-sex unions (see *Lawrence v Texas*, 539 US 558 (2003); *Obergefell v Hodges*, 576 US 644 (2015) [*Obergefell*]).

merce and services), the discourse of opponents adapted accordingly.[21] The old rhetorical tropes appealing to traditional morality,[22] which formed the main counter-discourse of conservative religious believers in public sphere debates, soon became of limited use. This is so not only because the ultimate failure to stop LGBTQ2+ rights advancement in the public sphere confirmed the decreased effectiveness of arguments rooted in traditional morality, but also because these arguments fail to resonate with what is at stake in the private sphere debate.

Indeed, the fact that LGBTQ2+ activists invoked their own right to individual freedom and personal privacy to counter traditional morality arguments during public sphere debates was seldom lost on their opponents. Now engaged in the private sphere terrain, these arguments were accessible to opponents of LGBTQ2+ rights, and presented significant rhetorical benefits. Chief among these advantages was that their claims could be situated on par with those of the LGBTQ2+ community. This is especially significant as these religious groups are now of the view that the legal recognition of same-sex marriage makes *their* stance on the issue the unpopular one, leading them to consider themselves a new minority. In that sense, the 2015 US Supreme Court decision in *Obergefell v. Hodges*, granting marriage equality to same-sex couples, is perceived by American religious opponents to LGBTQ2+ rights as clear confirmation of their new minority status, springing the minority label rhetoric into action.[23]

Hence, the advent of anti-discrimination protections for LGBTQ2+ citizens in the private sphere was a necessary precondition of the emergence of the discourse we study here.

2. The Shift in Demographics

The fact that certain Christian religious groups are now appealing to the minority label may also be explained by the apparent decline in Christian identity occurring in many Western democracies.[24] A recent

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21 See generally Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?" (2002) 1:2 JL & Equality 125 (on the different spheres in which religious hostility manifests toward LGBTQ2+ rights).

22 See e.g. *Bowers v Hardwick*, 478 US 186 (1986).

23 Calvin R. Coker has noted the emergence of a rhetoric in *Obergefell* in which religious liberty is "rearticulated to recast a culturally dominant group, conservative Christians, as a set-upon class" ("From Exemptions to Censorship: Religious Liberty and Victimhood in Obergefell v. Hodges" (2018) 15:1 Communication & Critical/Cultural Studies 35 at 36).

24 See Pew Research Center, "America's Changing Religious Landscape" (12 May 2015), online (pdf): *Pew Research* <assets.pewresearch.org> [perma.cc/U3KK-D3CE]. In the

survey indicated that the percentage of Americans identifying as Christians went from 78.4% in 2007 to 70.6% in 2014.[25] In Canada, national surveys indicate that 77.1% of Canadians identified as Christians in 2001, as compared to 67.3% in 2011.[26]

As demographics shift around them, conservative Christians might feel that they will lose the political power they once had to set the political agendas over moral issues. This is especially so given the fact that a section of the Christian population has come to support same-sex marriage. These changes thus call for new strategies not only in the political sphere, but also in the legal one. The mobilization of the minority label to support their demands for anti-discrimination exceptions is one such new strategy. The use of the minority label in the context of a demographic shift is of interest because Christians can still be said to be close to the centre of religious hegemony in the United States and in Canada, for the most part. The deeply held beliefs they seek legal recognition for—that is, their religious opposition to same-sex marriage[27]—were until fairly recently the law of the land in both the United States and Canada. Today, these beliefs continue to be shared by many—including other religious believers and non-believers. For this reason, their mobilization of the minority label in these circumstances appears counterintuitive.[28]

United States, a recent report shows that white Christians, who once formed the cultural majority of the country, now account for 43% of the population. In 1976, they formed an overwhelming 81% of the American population (see Robert P Jones & Daniel Cox, "America's Changing Religious Identity: Findings from the 2016 American Values Atlas" (September 2017) at 18, online (pdf): *Public Religion Research Institute* <www.prri.org> [perma.cc/ZN5P-PLHM]). See also Robert P Jones, *The End of White Christian America* (New York: Simon & Schuster, 2016).

25 See Pew Research Center, *supra* note 24 at 20.

26 See Statistics Canada, *2001 Census of Population*, Catalogue No 95F0450XCB2001001 (Ottawa: Statistics Canada, 13 May 2003); Statistics Canada, *2011 National Household Survey*, Catalogue No 99-004-XWE (Ottawa: Statistics Canada, 11 September 2013).

27 It should be noted that we refer here to Christian litigants who specifically hold such beliefs, as many believers who identify with the Christian faith welcome queer relationships. For a directory of "gay-affirming" Christian congregations, see The GALIP Foundation, "Find an Affirming Church," online: *Gay Church* <www.gaychurch.org> [perma.cc/L7SA-8KRC].

28 Indeed, Christians—like the petitioners in *Masterpiece Cakeshop* and *TWU*—are not intuitively thought of as a minority that would fit the idea of the traditional "imagined subject" of anti-discrimination norms (Murray, *supra* note 11 at 259). As previously mentioned, in the United States and Canada, Christians are rather a dominant religious group, accounting respectively for 70.6% and 67.3% of the population. Christians have historically wielded incredible political, social, and cultural power in these countries, and their values greatly influenced public policy and legislation. As Calvin R. Coker argues, quoting Walter Blumenfeld, "[t]hough individual sects may face criticism or skepticism when brought into national conversations, Christianity is afforded a

large degree of cultural power, acting ... to actualize 'Christian privilege' through policies and social goals that either overtly or inadvertently promote Christianity" (*supra* note 23 at 46). As Christians fit within the mainstream, they are not one of these religious groups anti-discrimination norms are thought to protect, that is, groups that suffer and have suffered abiding, pervasive, and substantial disadvantage—whether that disadvantage be material, political, social, cultural, etc. (for criteria about what makes a group disadvantaged beyond numerical minority, see Tarunabh Khaitan, *A Theory of Discrimination Law* (New York: Oxford University Press, 2015) at 23–43). For an account of the notion of social subordination that constitutes, according to Sophia Moreau, one of the facets of the experience of disadvantaged groups to which anti-discrimination protections are addressed, see Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (New York: Oxford University Press, 2020) at 50–63. For instance, Santería adherents in the United States (see *Church of the Lukumi Babalu Aye Inc v Hialeah*, 508 US 520 (1993)), Jehovah's Witnesses (see *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689) or Hutterites in Canada (see *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37) are examples of religious groups subject to prejudice which anti-discrimination provisions are understood to tackle.

In the United States, evangelical Protestant Christians may also be considered a dominant religious group. Accounting for 25.4% of the American population (see Pew Research Center, *supra* note 24 at 31), evangelicals are an influential cultural and political force. Indeed, while they form a numerical minority (when distinguished from other Christians), Evangelicalism—and the Christian right in general—has been a successful social movement in influencing party politics and elections over the last decades in the United States. Republican political priorities still reflect this influence. For a discussion of how evangelicals' success in shaping American politics was primarily a result of their ability to link their political agenda to the Republican Party, see Daniel K Williams, *God's Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010). On the relationship between evangelical Christians and Donald Trump in the recent years, see e.g. Philip Gorski, "Why Evangelicals Voted for Trump: A Critical Cultural Sociology" (2017) 5:3 American J Cultural Sociology 338; Ted G Jelen & Kenneth D Wald, "Evangelicals and President Trump: The Not So Odd Couple" in Mark J Rozell & Clyde Wilcox, eds, *God at the Grassroots 2016: The Christian Right in American Politics* (Lanham, MD: Roman & Littlefield, 2017) 19; Michele F Margolis, "Who Wants to Make America Great Again? Understanding Evangelical Support for Donald Trump" (2020) 13:1 Politics & Religion 89; Sarah Posner, *Unholy: Why White Evangelicals Worship at the Altar of Donald Trump* (New York: Random House, 2020).

While evangelicals' public reputation might be on the decline—as their views on social issues such as marriage, sexuality, or gender have grown less popular in majoritarian culture—it's hard to argue that they face abiding, pervasive, and substantial disadvantage in the political, cultural, or economic spheres. As Clyde Wilcox and Carin Robinson put it, they "are not being denied jobs, promotions, housing, credit, or the chance to run for higher office—indeed, numerous leaders in Congress are evangelical. Moreover, ... conservative Christians are free to worship in America as they choose and are in no danger of losing that right. In a country that is overwhelmingly Christian, many Americans regard claims that Christians face serious bias as unbelievable." (*Onward Christian Soldiers?: The Religious Right in American Politics*, 4th ed (Boulder, Colo: Westview Press, 2011) at 200); on how Conservative Christians are incorrectly asserting that Christian hostility recently dramatically increased, see George Yancey, "Has Society Grown More Hostile Towards Conservative Christians? Evidence from ANES Surveys" (2018) 60 Rev Religious Research 71. To say the least, the Christian right's

3. The Normalization of Reverse Discrimination Claims

The adoption of a rhetoric defending the right of opponents to same-sex marriage to "religiously dissent" as a new minority was also facilitat-

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status contrasts sharply with that of the LGBTQ2+ community, who has faced historic powerlessness and oppressions and continues to suffer from both today.

The situation is more nuanced in Canada. According to a 2003 Ipsos-Reid survey, evangelical Protestant Christians account for approximately 12% of Canadians, while another 7% identify as "Catholic evangelical" (see Aileen Van Ginkel, "Evangelical Beliefs & Practices: A Summary of the 2003 Ipsos-Reid Survey Results" (December 2003) at 1, online (pdf): *World Evangelical Alliance* <www.worldevangelicals.org> [perma.cc/8KAA-H3BS]).

It seems clear that evangelical communities do not assume in Canada a decisive role in politics paralleling that of the American evangelicals or, more generally, that of the American Christian right. According to Lori G. Beaman, "evangelicalism is a decidedly minority variant of Canadian religiosity," that could not sustain a "national 'politics of morality' on the American model, given the essentially dualistic and segmented character of Canadian society" (*Religion and Canadian Society: Contexts, Identities, and Strategies*, 2d ed (Toronto: CSPI, 2012) at 23). We agree with that position. In Canada, the Christian right seems to be less responsive to political mobilization around moral issues and more distanced from political parties than in the United States (see Lydia Bean, Marco Gonzalez & Jason Kaufman, "Why Doesn't Canada Have an American-style Christian Right? A Comparative Framework for Analyzing the Political Effects of Evangelical Subcultural Identity" (2008) 33:4 Can J Sociology 899). While evangelicals have had a certain cultural and political influence regionally (e.g., the Baptist movement in the Maritimes or the evangelical congregations in the Fraser and Okanagan valleys in British Columbia), for the most part, they remain a marginal force. However, it is worth mentioning that their morally conservative concerns are quite integrated into the agenda of the Conservative Party of Canada, which was in power from 2006 to 2015. Their conservative stances may become even more integrated, as the collaboration between religious conservatives and economic conservatives continue to shape the development of the Conservative Party and since they may find "new opportunities for political mobilization, especially in the increasingly disgruntled Western province of Alberta, where new money, a vital evangelical minority, and 'western alienation' provide a fertile mix of resources and resentment" (*ibid* at 933). See generally Jonathan Malloy, "The Relationship between the Conservative Party of Canada and Evangelicals and Social Conservatives" in David Rayside & James Farney, eds, *Conservatism in Canada* (Toronto: University of Toronto Press, 2013) 184 (on the relationship between evangelicals in Canada and the Conservative Party).

Thus, in a sense, the use of the "minority label" by the Canadian evangelical communities such as Trinity Western appears somewhat closer to their factual situation in terms of numbers and limited political influence, at least when compared to their American counterparts. However, it should be noted that just like evangelicals in the United States, the beliefs they seek to protect have long been the beliefs of the majority and, despite advances in the rights of sexual minorities, they do continue to prevail among the population, in other religious and non-religious communities alike. Furthermore, they do not face in Canada abiding, pervasive, and substantial disadvantage in the political, cultural, or economic spheres, an important fact which distinguishes them from other protected groups such as the LGBTQ2+ community. For this reason, the mobilization of the minority label by the Canadian evangelical community, in these circumstances, may likewise appear counterintuitive.

ed by the American and Canadian legal orders' familiarity with the idea of "reverse discrimination." Indeed, precedents supporting the idea that a non-disadvantaged group can claim discrimination existed before the phenomenon studied here emerged. For instance, white people that constitute the racial majority in the United States have by now grown accustomed to finding ways to make use of anti-discrimination law protections for themselves.[29] Notably, they have argued that affirmative action policies discriminate against them on the basis of race in the context of college admission and employment.[30] At first glance, Canadian constitutional law appears protected against such a fate, as the formal entrenchment of section 15(2) of the *Canadian Charter of Rights and Freedoms*[31] (*Charter*) ensures the legal viability of Canadian affirmative action policies. This is noteworthy because remedial programs are the first obvious targets for reverse discrimination claims, as demonstrated by the many challenges launched against them in the United States.

Yet, while section 15(2)'s protection of remedial programs does make reverse discrimination claims less prevalent in the Canadian context,[32]

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[29] See Siegel, "Equality Talk", *supra* note 8; Reva B Siegel, "Equality Divided" (2013) 127:1 Harv L Rev 1 [Siegel, "Equality Divided"].

[30] See *Fisher v University of Texas*, 579 US ___ (2016) [*Fisher*]; *Adarand Constructors Inc v Peña*, 515 US 200 (1995); *Regents of the University of California v Bakke*, 438 US 265 (1978). A recent legal challenge to affirmative action, featuring Asian American plaintiffs suing Harvard University for racially discriminating against them in the admissions process (see Anemona Hartocollis, "Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained", *The New York Times* (15 October 2018), online: <www.nytimes.com> [perma.cc/QMQ8-A6E3]), is not at first glance squarely within the realm of reverse discrimination cases, although some commentators point out it has been framed in such a way (see e.g. Iris Kuo, "The 'Whitening' of Asian Americans", *The Atlantic* (31 August 2018), online: <www.theatlantic.com> [perma.cc/9A33-UV9N]). In September 2019, a federal judge reached a decision on that case and ruled that Harvard University's admissions policies do not discriminate against Asian American applicants (see *Students for Fair Admissions, Inc v Harvard Corp*, 397 F.3d 126 at 126 (D Mass 2019)). This decision has been upheld by the US Court of Appeals for the First Circuit in November 2020 (see *Students for Fair Admissions, Inc v President and Fellows of Harvard College* 980 F.3d 157 (1st Cir 2020)). In February 2021, the *Students for Fair Admissions* have filed a petition for a writ of certiorari with the US Supreme Court (No 20-1199 (2021)).

[31] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[32] It is worth noting that section 15(2) of the *Charter* (see *ibid*) refers to "disadvantaged individuals or groups" and that, as such, it offers no discursive support for the "minority label" rhetoric. Indeed, not only is the concept of "disadvantage" narrower than the idea of "minority"; it is precisely the disadvantage-related portion of the "discrete and insular" understanding of the idea of "minority" which this new rhetoric takes great care to avoid. While those claimants cannot invoke section 15(2), they can nonetheless enjoy a strong footing in Canadian constitutional law, as respect for minorities is at the

the ambiguous doctrinal framework that governs section 15(1) of the *Charter* has allowed some reverse discrimination cases to thread their way in.[33] Thus, even though the Canadian Supreme Court has rarely sided with these plaintiffs, it is nevertheless familiar with the paradigm in which such cases are being argued. As such, reverse discrimination claims are intelligible in the Canadian context as well and might have paved the way for the minority label.[34]

The existence of such precedents lays the groundwork for the articulation of a discourse in support of religious exemptions from anti-discrimination laws which protect LGBTQ2+ rights through the frame and language mobilized in equality rights cases. Indeed, some reverse discrimination cases bear similarities with the process described here. In both of them, opponents of the equality rights of groups traditionally covered by anti-discrimination laws are not depicted as discriminators, but as "minorities" who are victims of discrimination themselves.[35] They want to situate their claims on par with the ones of the people whose rights they believe to be incompatible with theirs. Echoing the reverse discrimination framework, the minority label discourse benefits from intuitive legal intelligibility. As such, the normalization of reverse discrimination claims operates as a rhetorical precedent for the phenomenon we study here.

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heart of its concerns and has been recognized as an unwritten constitutional principle (see especially *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385).

33 See e.g. *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906, 59 CCC (3d) 161; *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1; *Weatherall v Canada (AG)*, [1993] 2 SCR 872, 105 DLR (4th) 210; *Trociuk v British Columbia (AG)*, 2003 SCC 34; *Gosselin (Tutor of) v Quebec (AG)*, 2005 SCC 15; *R v Kapp*, 2008 SCC 41. By citing these Canadian cases as examples of reverse discrimination, we only mean to point out that they are the result of a symmetrical interpretation of grounds, one where members of both "cognate" as well as "protected" groups are protected by section 15 of the *Charter* (see Khaitan, *supra* note 28 at 29–31). We do not mean to imply that none of them legitimately constitute discrimination. While the Supreme Court has yet to articulate principled guidlines on this matter, some authors offer helpful criteria to identify legitimate reverse discrimination claims, such as association with a member of a disadvantged group (see *ibid* at 31–38), a disparaged value (see Mary Anne C Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence" (1995) 105:1 Yale LJ 1), or a social role (see Cary Franklin, "The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law" (2010) 85:1 NYUL Rev 83).

34 The Canadian legal system's acquaintance with reverse discrimination claims is also evidenced by certain cases brought under provincial human rights legislation and in the *Canadian Human Rights Act*, RSC 1985, c H-6. See e.g. *HMTQ v Crockford*, 2005 BCSC 663; *Preiss v BC (AG) (No 3)*, 2006 BCHRT 587; *Bate v Canada Revenue Agency (AG)*, 2016 FC 89.

35 At least for the majority of reverse discrimination claims, which present themselves as adversarial (see e.g. *Fisher*, *supra* note 30; *R v Kapp*, 2008 SCC 41).

B. A Fertile Legal Landscape

In addition to a changing socio-historical landscape, certain key legal doctrines contribute to the "perfect storm" leading to the development of the minority label discourse: the courts' conceptions of religion and religious freedom, the doctrine of complicity, as well as the place of pluralism and tolerance in the judiciary's set of values.

1. The Courts' Conceptions of Religion and Freedom of Religion

The courts' conception of religion and freedom of religion are two interwoven elements that offer religious believers contesting anti-discrimination law norms a solid legal apparatus. Inspired by the importance given to freedom of religion by their respective constitutional texts, American and Canadian courts consider religion to be a moral good: something that is worth protecting for its own sake. Indeed, whether this commitment is implicit (as in decisions where courts equate religion to an individual's place in the universe in relation to a divine power[36] or to human dignity[37]) or explicit (as in cases where religion is recognized as an integral part of one's identity[38] or as a social tool instilling moral character and values[39]), a positive view of religion prevails.[40]

Partly for this reason, both the American and Canadian supreme courts have long adopted a subjective, personal, and deferential definition

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[36] See e.g. *Syndicat Northcrest v Amselem*, 2004 SCC 47 ("Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith" at para 39) [*Amselem*].

[37] See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94, 18 DLR (4th) 321 [*Big M Drug Mart*].

[38] See e.g. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 73 (citing Richard Moon) [*Saguenay*]; *R v NS*, 2012 SCC 72 at para 62; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 759, 35 DLR (4th) 1.

[39] In his dissenting opinion in *McCreary County v American Civil Liberties Union of Kentucky*, Justice Scalia asserted that the original intent of the Establishment Clause of the US constitution did not preclude government from recognizing the civic importance of religion and argued that "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality." (125 S Ct 2722 (2005) at 2749).

[40] For a discussion on the importance of religion to one's sense of self, community, and relationships, see also *TWU I*, *supra* note 2 at para 263.

of religious freedom which focuses on sincerely held beliefs.[41] In other words, the content of religious beliefs is not assessed with regard to its "objective" validity as to official religious doctrine; the fact that the claimant sincerely believes they have a religious obligation is sufficient.[42] Among other concerns, this approach reflects the view that religion is in itself a common good, and one that courts should avoid tampering with. It also seeks to protect religious believers who might not adhere to the "official" interpretation of religious texts, and to promote debate between diverse members of the same faith.

An important implication of this approach is that the restraint of a "validity" inquiry extends not only to the source of the belief (e.g., interpretation of text, adherence with a specific sub-current within the faith), but also to its content. Courts thus refrain from deciding whether a belief is "good" or "bad," "discriminatory" or not. This approach has clear advantages, such as promoting a diversity of religious understandings, as well as of being useful in cases where courts are unfamiliar with the specific religion practiced by a claimant. But this doctrine also serves the judiciary's own interests, as it allows courts to steer clear of complex moral and religious doctrinal debates. Indeed, by not discarding anyone's beliefs at the outset, the courts can comfortably claim neutrality on these sensitive matters.[43]

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41 See *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751 (2014) at 2753; *Thomas v Review Board of the Indiana Employment Security Division*, 101 S Ct 1425 (1981); *Amselem*, *supra* note 36.

42 See e.g. *ibid* (The majority of the Court, *per* Iacobucci J., concluded that claimants invoking freedom of religion "should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion" at para 43). All that must be shown is a sincerity of belief. However, an inquiry into the sincerity of a claimant's belief "must be as limited as possible": it is intended "only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*ibid* at para 52). Indeed, in the view of the Court, "the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion" (*ibid* at para 50). In a recent case concerning how the governmental approval of a project of ski resort infringed on the Ktunaxa Nation's freedom of religion because such development would drive a spirit central to their religious beliefs away from their traditional territory, the Supreme Court of Canada reiterated its refusal to assess the content and merits of religious beliefs (see *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 72).

43 The same logic of content neutrality also guides doctrinal choices in the field of freedom of speech, where the content of one's speech is deemed largely irrelevant to decide whether it ought to be constitutionally protected, although the Canadian approach al-

The courts thus tend to take the substance of claimants' sincere religious beliefs outside the scope of legal debate and critique. Since religion is understood as a common good worth protecting in itself, and since religious claims are assessed only on the basis of sincerity,[44] courts avoid discussion of the content of claimants' beliefs. This is a comfortable standpoint for them, from which they retain "neutrality." However, the shortcomings of this approach become apparent in cases such as the ones discussed here: it is much harder for courts to avoid the content of religious beliefs when this content is precisely what is at stake. Such cases put courts in a deeply uncomfortable position.

Falling back on prior doctrinal commitments to avoid examining the content of religious beliefs can relieve some of that tension for courts, as religious claimants insist that the debate is only about the value of religious freedom itself. This creates an ideal playing field for them: as religion is deemed a broad moral good, attention is placed on its abstract, universal value, and is thus drawn away from the negative discriminatory content and effects of the specific religious beliefs at hand. The case then becomes solely about the tension between two rights—religious freedom and equality—that are placed on the same footing. Conservative religious claimants opposing LGBTQ2+ rights are likely to attract greater sympathy from courts with such a framework than they would if they were faced with doctrinal tests diving into the content of their beliefs, which would leave their discriminatory aspects open to critical probing.

2. The Doctrine of Complicity

Another doctrinal understanding which supports the development of the minority label rhetoric is the question of the degree of state interference required to constitute a religious freedom infringement. Coercion

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lows for greater examination of the content of speech than the American one does. See *Matal v Tam*, 137 S Ct 1744 (2017) (plurality opinion) ("But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'" at 1764). For a description of the Canadian approach in contrast to the American approach, see e.g. *R v Keegstra*, [1990] 3 SCR 697 at 738–44, 61 CCC (3d) 1.

44 It should be noted, however, that religious "conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected" (*Amselem*, *supra* note 36 at para 62). Where the exercise of religious freedom comes into conflict with the rights of others, a balancing of the competing rights in context will be required, thus extending the inquiry beyond the sincerity of beliefs (*ibid*).

and impact are familiar types of "burdens"[45] that the law can impose on believers. But a third emerging kind, "ratification,"[46] is behind the opposition to anti-discrimination law statutes. This burden is grounded in the doctrine of "complicity," which asserts that the state cannot force religious believers to ratify or be complicit in a practice they believe to be contradictory to the precepts of their religion.

Believers invoking this doctrine claim that various degrees of "compelled participation" in the contested practices constitute impermissible ratification. From "direct" participation such as celebrating a wedding, to "indirect" participation such as creating a wedding cake, the factual situations that can constitute complicity abound. This doctrine's elasticity is most apparent in cases such as *Wheaton College v. Burwell*,[47] where the fact that a religious organization was exempt from providing contraception was deemed insufficient to ensure they were not made complicit in a practice they oppose. Since triggering that exemption would result in someone else providing the service, the organization argued that this legal scheme still made them complicit. This is an important effect of the complicity doctrine: because it gives rise to claims which have a peculiar focus on the conduct of others,[48] it poses a greater risk of harm for other individuals than the more traditional freedom of religion claims.[49] Indeed, part of what makes ratification claims so complicated is that they are about the religious believer's relationship with a third party.[50] While still

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45 See generally Anna Su, "Varieties of Burden in Religious Accommodations" (2019) 34:1 JL & Religion 42 (for an analysis comparing the differing conceptions of "burden" demonstrated in American, Canadian, and European jurisprudence on religious accommodations).

46 *Ibid* at 58–60.

47 *Wheaton College v Burwell*, 134 S Ct 2806 (2014).

48 The *TWU* case under review here provides a prime example of a religious freedom claim which implies the regulation of third parties' conduct. As explained by Côté and Brown JJ in dissent, the university requires that students and staff adhere to the Covenant in order to interact with them: "Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post-secondary educational environment where all participants covenant with those around them—regardless of their personal beliefs—subjectively engenders their personal connection with the divine" (see *TWU I*, *supra* note 2 at para 319). Thus, the fact that one adheres to the Covenant's way of life is deemed insufficient: everyone at the university must adhere as well in order for one to achieve one's "personal connection with the divine" (*ibid*).

49 This appears as a very problematic type of complicity claim, as the only way it is resolved is if others do not get the service the religious believers oppose (see NeJaime & Siegel, *supra* note 7 at 2532).

50 See *ibid* at 2519.

in its early stages and not always invoked successfully,[51] the doctrine of complicity neatly translates religious opposition to LGBTQ2+ rights into the language of the law.

While the doctrine of complicity is familiar to Catholic theology, other religious groups also rely on this notion when seeking exemptions.[52] In the United States, a broad "conservative, cross-denominational coalition of Christians"[53] has emerged around the idea of preserving traditional morality. One of the strategies adopted by this coalition is to rely on the notion of complicity to obtain religious exemptions from anti-discrimination statutes protecting LGBTQ2+ people.[54]

3. The Importance of Pluralism and Tolerance

A final element worth mentioning that facilitates recourse to the minority label is the prominent place that pluralism and tolerance holds in the judiciary's set of values. Indeed, Canada particularly prides itself—both in judicial and political discourses—in its pluralist, tolerant, and multicultural society, in which ethnic, religious, and cultural differences are acknowledged, respected, and celebrated.[55] The same is true of the United States, where the values of pluralism and diversity have been stressed by the courts numerous times.[56] There is no doubt that pluralism and tolerance are essential values in diverse societies. Yet, the exact outcomes they dictate in a given case are often a contested matter.

Freedom of religion is often explained as an essential means to promote pluralism.[57] Likewise, the promotion of pluralism is frequently deployed by equality rights advocates as a core principle around which to

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51 See e.g. *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (the referral duty for medical assistance in dying, abortion, and reproductive health services was affirmed despite the objection of religious physicians who argued that such a duty would "oblige them to be complicit in procedures that offend their religious beliefs" at para 4).

52 See NeJaime & Siegel, *supra* note 7 at 2522–23.

53 *Ibid* at 2544.

54 See *ibid* at 2544–51.

55 See e.g. *Bruker v Marcovitz*, 2007 SCC 54 at para 1; *TWU I*, *supra* note 2 at paras 328, 331.

56 See e.g. *Walz v Tax Commission of City of NY*, 397 US 664 (1970) at 689, 692, Brennan J, concurring; *Wisconsin v Yoder*, 406 US 205 (1972) at 226 Burger CJ, for the Court.

57 On how arguments on pluralism do not succeed in providing support for religious exemptions or religious liberty in general, see Steven D Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse" (1991) 140:1 U Pa L Rev 149 at 204–07; William P Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption" (1989) 7:2 JL & Religion 363 at 384–86.

articulate anti-discrimination strategies. The fact that both rights share this core justification provides the ideal confluence of values for conservative religious claimants to draw on equality rhetoric to obtain religious-based exemptions from anti-discrimination provisions.

In sum, various socio-historical and doctrinal elements account for the emergence of the minority label discourse studied here. Advances in LGBTQ2+ rights such as the recognition of same-sex marriage lend credibility to the idea that formal legal victories transformed pro-LGBTQ2+ views into a mainstream affair, relegating its opposition to a minority status. The settling of such "public sphere issues" also confined the debate to the private sphere, where opponents of LGBTQ2+ rights adapted to the different values in play by embracing the individual freedom and privacy arguments that they used to face. The normalization of reverse discrimination claims in contexts such as affirmative action debates confers intuitive appeal to their position, thus serving as a rhetorical precedent. The judicial desire to claim "neutrality" on sensitive issues, as well as the accompanying doctrine of subjective sincere beliefs and the idea that religion is a general common good, allows the minority label proponents to avoid having to defend the content of their (discriminatory) beliefs and practices. At the same time, the complicity framework neatly articulates the impact on their protected right. Finally, the ability to appeal to the deeply rooted ideals of pluralism and tolerance increases the minority label's compelling character. Together, these main factors made the emergence of the minority label discourse possible.

II. The Operation of the "Minority Label"

With this context in mind, we now turn to the two cases under analysis. As we will see, the reasoning applied in these cases reached markedly different results and—more importantly—demonstrates very different ways of assessing the minority label. Indeed, while this new discourse was openly embraced by many American Supreme Court justices, it attracted sympathy from only two of their Canadian counterparts.

Following a brief presentation of the facts of the two cases, we will shine a light on the three main argumentative strategies through which the minority label operates in these cases: language framing, moral symmetry arguments, and respectability claims.

Firstly, we will examine how religious believers presenting themselves as a minority in need of protection now frame their legal claims by explicitly using the language of equality and evoking its ethos.

Secondly, we will take a step back to consider the moral assumptions that this linguistic shift promotes. We will show that the minority label rests on a premise of "moral symmetry," that is, the idea that all distinc-

tions are equally condemnable discrimination, regardless of context or power differentials at play. This presumed equivalence opens up the possibility of drawing on implicit associations existing between the term "minority" and experiences of oppression and social subordination. The central role played by this strategy will be apparent when we consider with whom these conservative religious claimants choose to equate themselves in their analogies. Indeed, claimants compare themselves with "traditional" victims of discrimination in order to construct a narrative in which there is a commensurability between anti-discrimination laws imposing standards of conduct on conservative Christians and discrimination against the LGBTQ2+ community.

The final characteristic of the rhetorical apparatus of the minority label consists in reclaiming the respectability of the believers' views. By branding their views on subjects such as queer love as, at least, respectable, conservative religious believers curtail the process through which LGBTQ2+ rights advances could cement as an incontestable "new normal." This ensures that the widespread adoption and maintenance of these anti-discrimination norms remains a live issue in the coming years.

A. The Cases Under Analysis: Masterpiece Cakeshop *&* TWU

Before turning to the ways in which language framing, moral symmetry, and respectability claims unfold, let us briefly outline the two decisions under consideration.

1. *Masterpiece Cakeshop*

In 2012, before same-sex marriage was legal in Colorado, Jack Phillips, a Christian baker, refused to create a wedding cake for a same-sex couple. The couple filed a complaint with the Colorado Civil Rights Commission pursuant to the *Colorado Anti-Discrimination Act*, which protects citizens against discrimination on the basis of sexual orientation in the enjoyment of public accommodations.[58] Phillips argued that his faith prohibited him from creating a wedding cake for a same-sex wedding, as the expressive act of baking the cake would make him complicit in a practice he deeply opposes on religious grounds. He thus invoked his right to free exercise of religion and to free speech to justify his refusal of service. The Colorado Civil Rights Commission ruled in the couple's favour, determining that, if Mr. Phillips offered wedding cake baking services to heterosexual couples, he ought to provide the same services to same-sex cou-

[58] Colo Rev Stat §24-34-601(2) (2014). This is another example of a jurisdiction where discrimination on the basis of sexual orientation was outlawed in a subset of private law relations before marriage equality was recognized by the state.

ples.[59] In addition to directing him to cease and desist from discriminating, the Commission also imposed training and compliance exigencies. The Colorado Court of Appeals affirmed the Commission's decision,[60] and the Colorado Supreme Court declined to hear the appeal.[61]

For its part, the US Supreme Court sidestepped the main issue of the conflict between freedom of religion and equality rights, and limited itself to reversing the Commission's decision on a question of process. The Court opined that the Commission's members did not judge the case with sufficient religious neutrality. The decision on the issue which captivated Americans for many months—namely, whether Mr. Phillips was allowed to refuse service to a same-sex couple on religious grounds—was thus left open.

2. *TWU*

Trinity Western University (Trinity Western), a private evangelical post-secondary institution located in British Columbia, attracted attention in 2014 over its proposal to establish and operate a law school. At the heart of the debate was Trinity Western's Community Covenant Agreement. This code of conduct embodied Trinity Western's evangelical Christian values and prohibited certain activities, including "sexual intimacy that violates the sacredness of marriage between a man and a woman."[62] Although Trinity Western did not formally ban or prohibit admission to LGBTQ2+ students, all students seeking admission had to accept the terms and comply with the Covenant. Expulsion was one of the possible punishments for students found in contravention of it.[63]

Because this mandatory code of conduct was deemed discriminatory toward members of the LGBTQ2+ community, the law societies of British

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59 See *Craig v Masterpiece Cakeshop, Inc*, CR 2013-0008 (Colo Civil Rights Commission 2013).

60 See *Craig v Masterpiece Cakeshop, Inc*, 370 P (3d) 272 (Colo Ct App 2015) [*Masterpiece Cakeshop* CA].

61 See *Masterpiece Cakeshop, Inc v Colorado Civil Rights Commission*, No 15SC738 2016, WL 1645027 (Colo Sup Ct 2016).

62 The Community Covenant has since been updated, but still refers to "sexual intimacy that violates the sacredness of marriage between a man and a woman" ("Community Covenant Agreement" (25 June 2019) at 3, online (pdf): *Trinity Western University* <www.twu.ca> [perma.cc/5LTY-Q96G]).

63 It should be noted that as of the 2018–2019 academic year, the Covenant is no longer mandatory with respect to the admission to, or continuation of studies at, Trinity Western (see Trinity Western University, "Frequently Asked Questions," online: *Trinity Western University* <www.twu.ca> [perma.cc/S2BS-6YA6]).

Columbia,[64] Ontario,[65] and Nova Scotia[66] decided not to accredit Trinity Western's proposed law school. As a result of these decisions, the qualifications of future graduates of Trinity Western's proposed law school would not be recognized by these law societies and they would be unable to apply for a licence to practice law in these provinces.

In response, Trinity Western brought separate legal challenges against the three law societies. They argued, among other things, that the denial of accreditation violated religious rights protected by the *Charter*. Trinity Western was successful in its application for judicial review in front of the supreme courts of British Columbia and Nova Scotia and in the subsequent appeals to their respective courts of appeals.[67] However, the decision of the Law Society of Upper Canada to deny accreditation was upheld by both the Ontario Divisional Court and the Ontario Court of Appeal.[68] Only the decisions from British Columbia and Ontario were appealed to the Supreme Court of Canada, where a majority of justices found, in a pair of decisions, that the law societies were entitled to deny accreditation of the proposed law school.[69] The two dissenting justices held that the law societies could only validly refuse accreditation because of concerns about candidates' competence and ethics—concerns which were admittedly absent here.[70] Alternatively, they were of the view that even if public interest was to form a valid refusal basis generally, the refusal in this case unduly restricted Trinity Western's freedom of religion

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64 See Law Society of British Columbia, News Release, "Proposed TWU Law School Not Approved for Law Society's Admission Program" (31 October 2014), online: *Law Society of British Columbia* <www.lawsociety.bc.ca> [perma.cc/EQ3D-DLBQ].

65 See Law Society of Upper Canada, "Treasurer's Statement Regarding Vote on TWU Law School" (24 April 2014), online: *Law Society of Ontario* <www.lso.ca> [perma.cc/P5MF-6GHB].

66 See James Bradshaw & Jane Taber, "Nova Scotia Law Society Also Refuses to Accredit Faith-Based School", *The Globe and Mail* (25 April 2014), online: <www.theglobeandmail.com> [perma.cc/X7J8-C9LY].

67 See *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 [*TWU* BCSC]; *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 [*TWU* BCCA]; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU* NSSC]; *The Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59.

68 See *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 [*TWU* ONSC]; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518.

69 See *TWU I*, *supra* note 2; *TWU II*, *supra* note 2.

70 See *TWU I*, *supra* note 2 at paras 267, 284, 289–91.

and infringed upon the state's duty of religious neutrality, so that public interest was not served by denying accreditation.[71]

It is worth pointing out that, unlike *Masterpiece Cakeshop*, the *TWU* case did not squarely present itself as a direct contest between rights. This would have been the case if, for example, a student was denied admission to Trinity Western for refusing to sign the Covenant. It rather involved administrative law issues, and the question of the balance between religious freedom and equality rights was brought forward when examining whether the law societies' decisions reflected a proportionate balancing of their statutory mandates with the *Charter* protections at play.[72] Given these particularities, the *TWU* case was not an ideal case for the Canadian Supreme Court to make a transformative decision on the balance between religious freedom and equality. Nonetheless, as we will discuss below, it still provided an opportunity to move beyond the legal issues raised by the case and to engage with the discourse used by the parties regarding the minority label.

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71 See *ibid* ("Tolerance and accommodation of difference serve the public interest and foster pluralism" at para 269). According to Côté and Brown JJ, it is the law societies that owe Trinity Western tolerance, not Trinity Western that owes LGBTQ2+ individuals tolerance. They offer a legal argument in support of this unilateral duty, namely that the law societies are subject to the *Charter*, while Trinity Western is not (*ibid* at para 261). Moreover, Trinity Western is exempt from provincial human rights legislation (*ibid*).

72 It should also be mentioned that contrary to *Masterpiece Cakeshop* where the issue of the religious freedom rights of an *individual* were considered, the Trinity Western cases rather involved a question about the "institutional" aspect of religious freedom that is, whether Trinity Western, *qua* institution, possessed religious freedom rights under the *Charter*. In a separate opinion, Rowe J declined to find that Trinity Western possessed such rights. He further noted that "even if TWU did possess such rights, these would not extend beyond those held by the individual members of the faith community" (*TWU I*, *supra* note 2 at para 219). The position that Trinity Western did not possess religious freedom rights under the *Charter* was shared by some of the interveners, that is, the Faith, Fealty & Creed Society (*TWU I*, *supra* note 2; *TWU II*, *supra* note 2 (Factum of the Intervener Faith, Fealty & Creed Society at paras 1–3, 17–24, 34)), the British Columbia Humanist Association (*TWU I*, *supra* note 2 (Factum of the Intervener British Columbia Humanist Association at paras 1–27)), the Canadian Secular Alliance (*TWU II*, *supra* note 2 (Factum of the Intervener Canadian Secular Alliance at paras 20–21)), and the United Church of Canada (*TWU II*, *supra* note 2 (Factum of the Intervener United Church of Canada at paras 1–5, 16–40)). The intervener Canadian Council of Christian Charities (*TWU I*, *supra* note 2; *TWU II*, *supra* note 2 (Factum of the Intervener Canadian Council of Christian Charities at paras 23–36)) and the intervener Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance explicitly argued, for their part, that Trinity Western possessed institutional freedom of religion rights (*TWU I*, *supra* note 2; *TWU II*, *supra* note 2 (Factum of the Interveners Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance at paras 21–23)).

B. Framing Through Language

The first strategy through which the minority label operates in these two cases is language framing. The paradigmatic language used to frame the claims of religious believers shifted from arguing that their views represent common morality to presenting themselves as a minority in need of protection. This is evident in the vocabulary used in the legal proceedings and communication strategies of the parties. Instead of presenting themselves as a "majority" claiming to enforce traditional values shared by a multitude—as would have been typical in earlier debates—believers in these two cases have *explicitly* recast themselves as a "minority" seeking exemptions from laws that offend their mores. While it might appear inconsequential at first glance, this change of language is strategic. Assuredly, presenting themselves as a new minority sets in motion the rhetoric which draws questionable parallels between them as "minoritarian" believers and other vulnerable minorities. Eventually, this leads to the presentation of their anti-LGBTQ2+ rights beliefs as worthy of paramount protection, even to the detriment of other parties' rights.

The two cases under consideration are rife with references to the religious believers involved—here, conservative Christians—as forming a minority group. Indeed, in their written submissions, the petitioning believers in both cases present themselves as part of a lone dissenting group subject to majoritarian impositions, and words like "minority"[73] or "subculture"[74] are used to characterize their reality.[75] In addition, the petitioning believers refer to the opposing side as the "majority."[76] This terminology is generally employed without specifying the exact basis for assuming

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[73] See *TWU I*, *supra* note 2 (Factum of the Respondents at paras 5, 7, 116) [*TWU I* (FOR)]; *TWU II*, *supra* note 2 (Factum of the Appellants at paras 5, 8, 12, 80, 113) [*TWU II* (FOA)], citing in part *TWU* BCCA, *supra* note 67 at para 193; *TWU II*, *supra* note 2 (Reply Factum of the Appellants at paras 2, 18 [*TWU II* (RFOA)].

[74] See *TWU II* (FOA), *supra* note 73 at para 8.

[75] Of course, religious freedom is no stranger to the concept of minority. After all, freedom of religion, as well as protections against discrimination, present interrelated justifications, as one of the goals shared by these rights is to protect minorities (may they be ethnic, sexual, political, of views, etc.), albeit in different ways. Nonetheless, the claimants in these two cases invoke the idea of minority to defend relatively mainstream ideas—opposition to same-sex marriage—which have long enjoyed official approval and enforcement by the state. Their situation thus greatly differs from religious minorities who hold truly uncommon religious beliefs and who have historically been the target of state oppression.

[76] See *Masterpiece Cakeshop*, *supra* note 1 (Brief for Petitioners at 3, 54) [*Brief for Petitioners in Masterpiece Cakeshop*]; *TWU I* (FOR), *supra* note 73 at para 5; *TWU II* (FOA), *supra* note 73 at paras 5, 80, citing in part *TWU* BCCA, *supra* note 67 at para 193 and *Big M Drug Mart*, *supra* note 37 at 336–37; *TWU II* (RFOA), *supra* note 73 at paras 18, 63, citing in part *Big M Drug Mart*, *supra* note 37 at 337.

minority status. Does the use of these words refer to a minority defined in terms of size? In terms of power or socio-economic status? Does it refer to a minority within a specific geographical area or in a specific context? We do not know. And this is not surprising: it is precisely the fluidity of the notion that makes the use of a label normally associated with equality rights cases not only possible, but also highly strategic and compelling.[77] By using the minority label to defend their beliefs, conservative religious believers in *Masterpiece Cakeshop* and *TWU* rely on its amorphousness to credibly recast themselves as the groups in need of protection.[78]

Expectedly, the minority label is also invoked indirectly in these cases, through the use of vocabulary often mobilized in equality rights cases: language of perpetuation of serious disadvantage,[79] exclusion,[80] stigmati-

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77 Many authors have highlighted how the variety of meanings attributed to this notion in scholarly literature creates confusion over its relevance and usefulness as an analytical tool. See e.g. Doris Wilkinson, "Rethinking the Concept of 'Minority': A Task for Social Scientists and Practitioners" (2000) 27:1 J Sociology & Soc Welfare 115 ("The clarity and logic of concepts is a critical area in the social and behavioral sciences. While 'minority' is applied incessantly, the category lacks concrete indicators and its miscellaneous attributes tend to be flawed and conflicting. Thus, given the wide variability among the diverse groups to whom the label refers, problems emerge with its application in social science paradigms" at 119); Hans van Amersfoort, "'Minority' as a Sociological Concept" (1978) 1:2 Ethnic & Racial Studies 218 ("The term minority or minority group is widely used in the sociological literature. It appears to be a word with a broad, diffuse meaning and an emotional appeal, exactly the qualities to make it a candidate for political debate. Unfortunately, almost the opposite properties are required if the term is to be used in scholarly analysis. In fact, there are such a variety of meanings and contradictory properties attributed to the term in the scholarly literature that we can hardly speak of a concept that can serve as an analytical tool." at 218).

78 There are, of course, exceptions to this vagueness in the use of the minority label in the cases examined. For example, in *Masterpiece Cakeshop*, the petitioner refers to supporters of same-sex marriage as holding the "majority cultural position ... with 62% of Americans favoring it" and thus, as a corollary, places himself in the minority cultural position with regard to this specific issue (*Brief for Petitioners in Masterpiece Cakeshop*, supra note 76 at 54). In *TWU*, the label is once invoked explicitly in the sense of a demographic minority. Indeed, Trinity Western speaks of the evangelical community as a "a minority religious subculture in Canada" that represents 11%–12% of the population and that has distinctive religious beliefs (*TWU II* (FOA), *supra* note 73 at para 8). While the size of a group is, undoubtedly, one of the variables that allows to qualify it as having a majority or minority status, the way in which the notion of minority is defined here tends to occult other variables that are also worthy of attention, such as the economic, social, and cultural dominance of certain groups as compared to others. This is especially significant in the present cases, where a group presenting itself as a minority is seeking to exclude another.

79 See *TWU II* (FOA), *supra* note 73 at para 99.

80 See *Brief for Petitioners in Masterpiece Cakeshop*, *supra* note 76 at 44; *TWU I* (FOR), *supra* note 73 at para 91; *TWU II* (FOA), *supra* note 73 at paras 88, 150.

zation,[81] marginalization,[82] ostracization,[83] isolation,[84] harm to dignity,[85] and of being systematically overlooked[86] is employed to refer to the believers' situation. A similar language is also used by interveners in both cases to refer to the religious believers.[87] Here, such vocabulary is intended to highlight the sense of dire "risk" posed to religious freedom by further progress in the realm of equality rights.

This is apparent in a *Washington Post* op-ed authored by the *Masterpiece Cakeshop* petitioner himself, published during the American Supreme Court deliberations. In this piece, Mr. Phillips writes that a decision in favour of the Colorado Civil Rights Commission's decision would confirm that he deserves social ostracization for his beliefs and that he does not belong in the polity.[88] Hence, contrary to the traditional usage of this language in defence of discriminated groups, these notions are invoked here to justify the exclusion of people who are part of such a group from a given service (the Masterpiece Cakeshop custom wedding cakes service). Such a feature becomes part of a rhetorical strategy aimed at capitalizing on the power of the minority label to convince the Court.

The premise that religious believers opposing same-sex marriage have minority status was generally adopted at face value in the *Masterpiece Cakeshop* case. Many passages of the US Supreme Court's majority's reasons implicitly rely on this premise, while some sections of the concurring reasons explicitly employ this vocabulary. The majority opinion penned by Justice Kennedy turns on the determination that the Colorado Civil

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81 See *TWU II* (FOA), *supra* note 73 at para 86, citing *Saguenay*, *supra* note 38 at para 120.

82 See *Brief for Petitioners in Masterpiece Cakeshop*, *supra* note 76 at 3; *TWU I* (FOR), *supra* note 73 at paras 72, 108, 123.

83 See *Brief for Petitioners in Masterpiece Cakeshop*, *supra* note 76 at 37, 55.

84 See *TWU II* (FOA), supra note 73 at para 86, citing *Saguenay*, *supra* note 38 at para 120.

85 See *Brief for Petitioners in Masterpiece Cakeshop*, *supra* note 76 at 44, 52, 55–56; *TWU I* (FOR), *supra* note 73 at paras 123, 160.

86 See *Brief for Petitioners in Masterpiece Cakeshop*, *supra* note 76 at 15, 42.

87 See e.g. *Masterpiece Cakeshop*, *supra* note 1 (Brief of *Amicus Curiae* Christian Business Owners Supporting Religious Freedom in Support of Petitioners); *Masterpiece Cakeshop*, *supra* note 1 (Brief of Christian Legal Society et al as Amici Curiae in Support of Petitioners); *TWU II*, *supra* note 2 (Factum of the Intervener Evangelical Fellowship of Canada and Christian Higher Education Canada at paras 3, 33) [*TWU II* (FOI Evangelical Fellowship)]; *TWU II*, *supra* note 2 (Factum of the Intervener Christian Legal Fellowship at para 29) [*TWU II* (FOI Christian Fellowship)].

88 See Jack Phillips, "I'm the Masterpiece Cakeshop Baker. Will the Supreme Court Uphold My Freedom?", *The Washington Post* (26 April 2018), online: <washingtonpost.com> [perma.cc/Q7H2-5CY6].

Rights Commission showed "impermissible hostility toward the sincere religious beliefs"[89] of the defendant, a concept that conjures the systemic, state-led discriminatory treatment once endured by minority faiths. Justice Kennedy also writes that comments made during the hearing about the separation of commerce and religious beliefs implied that believers "are less than fully welcome in Colorado's business community,"[90] an argument that embraces the idea that religious opponents of LGBTQ2+ rights are a minority in need of protection.

Justice Gorsuch is even more explicit in his endorsement of the "minority label" idea in his concurring reasons. He writes that labelling Mr. Phillips's opposition to gay marriage as offensive is an impermissibly "judgmental" stance, adding that "the Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all."[91] Finally, Justice Thomas, writing about the freedom of speech issue in his concurring reasons, writes that "if Phillips' continued adherence to that understanding [opposing same-sex marriage] makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected."[92]

In the *TWU* case, the minority qualification is never questioned by lower courts.[93] However, the rhetoric was not adopted at all by the majority of the Supreme Court of Canada. Indeed, Trinity Western is confined to being designated simply as a "private religious institution created to support the collective religious practices of its members."[94] Words like "minority" or "subculture" are notably absent from the majority opinion.

However, the strategy was received favourably by the two dissenting justices. Indeed, it is interesting to point out that Justices Côté and Brown refer indirectly to Trinity Western as a minority by quoting the British Columbia Court of Appeal.[95] Furthermore, they write that the Trinity Western community's religious experience is so unique that it can be difficult to understand for adjudicators who do not share it,[96] and that

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89 *Masterpiece Cakeshop*, *supra* note 1 at 12, Kennedy J, for the Court.

90 *Ibid*.

91 *Ibid* at 2, Gorsuch J, concurring.

92 *Ibid* at 14, Thomas J, concurring in part and concurring in the judgment.

93 The trial and appeal courts actually use the vocabulary of "minority religious subculture," referring to demographic statistics and emphasizing the distinctiveness of the group (see *TWU* BCSC, *supra* note 67 at para 24; *TWU* BCCA, *supra* note 67 at paras 104, 178; *TWU* ONSC, *supra* note 68 at para 10).

94 *TWU I*, *supra* note 2 at para 61.

95 See *ibid* at para 331.

96 See *ibid* at para 264.

it is particularly vulnerable to the "culturally forceful hand of the law."[97] They also write that Trinity Western ought to be protected from the imposition of "values which a state actor deems to be 'shared,'"[98] and argue that accommodating Trinity Western's religious difference could be commanded by both equality[99] and dignity.[100] The repeated use of concepts such as the "imposition" of "culturally forceful" views to describe requests that Trinity Western respect LGBTQ2+ equality rights makes clear that the two Canadian dissenters have accepted the premise on which the minority label rests.

C. Invoking Moral Symmetry

We have seen that the process by which conservative religious believers explicitly describe themselves as a minority can lend credibility to their claims for exemptions, as the fluidity of the notion of minority allows them to recast themselves as a group in need of protection. This strategy further compels favourable implicit moral assumptions. As such, a feature of this discourse which we will now examine can be called "moral symmetry."[101]

In the context of discrimination, moral symmetry contends that two harms suffered are, in every relevant respect, equivalent. A moral symmetry framework can be used to support the idea that any discrimination on the basis of a ground (e.g., race), is equally harmful, notwithstanding whom it targets (e.g., Blacks or whites).[102] As we will see, the contention of symmetry is here extended beyond groups of the same ground to equate "protected" and "cognate" groups defined by different grounds (sexual orientation and religion).[103] This cross-grounds symmetry further complicates the picture.

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97 *Ibid* at 264, citing Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 181.

98 *TWU I*, *supra* note 2 at para 265.

99 See *ibid* at para 310.

100 See *ibid* at para 334.

101 See Lawrence Blum, "Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-discrimination Thought" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford, UK: Oxford University Press, 2013) 182 (Blum describes the invocation of moral symmetry as "the claim that ... the moral valence of an act of discrimination is not differentiated by the subclass of the category discriminated against" at 183).

102 See *ibid*.

103 See Khaitan, *supra* note 28 at 29–31. Khaitan explains that grounds of discrimination (e.g., "race") encompass groups who differ in terms of their relative (dis)advantage. Within one given ground, the relatively disadvantaged ones are called the "protected"

In the two cases examined here, religious believers build on this idea of moral symmetry and construct a narrative in which the harm experienced by conservative Christians (because of the anti-discrimination duties imposed on them) and the harm faced by the LGBTQ2+ community (because of discriminatory practices such as the refusal of services) are commensurable. As a result of this equation, the cases are presented with not *one* but *two* "equivalent" minorities in need of protection who suffer "equal" harm. In our view, this appeal to moral symmetry is a necessary step for conservative religious believers to invoke further arguments that are only cognizable when understood to be flowing from their pre-identification as a vulnerable religious minority that is *on the same footing* as other minorities. This will become apparent in our discussion of the remaining tool through which the minority label operates: the claims to respectability.

Of course, the conservative religious believers in question may very well genuinely perceive themselves as minorities. But such symmetrical depictions obscure the facts that each group or subgroup is differently positioned socially, has a unique history, and has varying levels of access to valuable goods and status, all of which leaves them differently vulnerable to discrimination. Inevitably, this symmetrical thinking abstracts discrimination based on sexual orientation and gender identity from the history of persecution of the LGBTQ2+ community—as well as from the persecution the community still faces. Furthermore, it obscures the legacy of political, social, and economic power held by Christians and Christian organisations as the consequence of the historical domination of Christian values and their hegemony in American and Canadian societies.[104]

As we will see, once this equivalence is established, the minority label can then be taken a step further. From a minority that is *on par* with others in terms of its vulnerability to discrimination, conservative religious claimants can become *the* minority most in need of protection. While such statements might appear to contradict the symmetrical logic they invoke, they can be reconciled as two separate but complementary elements essential for obtaining a favourable ruling. This is so because symmetry alone cannot point the court's ruling in any one direction. Thus, the believers must add that, in the present social context, LGBTQ2+ people are indistinguishable from the majority of straight people who are in favour

group (e.g., Black people), while the relatively advantaged ones (e.g., white people) are called the "cognate" group (*ibid*). Hence, the symmetry argument is complicated by the fact that here, the situation of protected groups defined by the ground of sexual orientation (LGBTQ2+ people) is equated with that of a cognate group defined by the ground of religion (Christian believers).

[104] See *supra* note 28.

of same-sex marriage. As such, LGBTQ2+ people are not a vulnerable minority in this regard, while conservative religious opponents of same-sex marriage are. This second step is most visible, we will see, in Trinity Western's systematic attempts to minimize the harm its Covenant caused to LGBTQ2+ people, as well as in the constant reminders in both the American majority reasons and the Canadian dissenting opinion that a majority of citizens now support same-sex marriage.

1. How Moral Symmetry Is Invoked in *Masterpiece Cakeshop*

In *Masterpiece Cakeshop*, the moral symmetry framework is put to work through the use of analogies. As we will see, Mr. Phillips's counsel brings moral symmetry to the table by drawing parallels between his case and those of minorities who experience patterns of disadvantage, inequality, and disenfranchisement from the political process.[105] The distinctive limitation of analogies, namely that they obscure crucial differences between two objects by overly magnifying their similarities,[106] works here to bolster the persuasiveness of the minority label.

Indeed, Mr. Phillips's counsel's arguments at the hearing—as well as the ones presented by the US Solicitor General who defended the same position—framed the issue as symmetrical. They did so by contending that the situation was hard to resolve precisely because constraining Mr. Phillips would mean eventually constraining other minorities—including LGBTQ2+ people themselves—to be complicit in the creation of oppressive symbols. As Mr. Phillips's counsel put it in rebuttal:

> The record is clear on that. Demeaning Mr. Phillips' honorable and decent religious beliefs about marriage, when he has served everyone and has a history of declining all kinds of cakes unaffiliated with sexual orientation because of the message, he should receive protection here as well. *This law protects the lesbian graphic designer who doesn't want to design for the Westboro Baptist Church, as much as it protects Mr. Phillips*.[107]

Here, Mr. Phillips's situation was equated with the one of a lesbian graphic designer refusing to work for a church whose website domain

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[105] For criteria about what makes a group disadvantaged beyond numerical minority, see Khaitan, *supra* note 28 at 23–43.

[106] See Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Butterworths, 2006) 115. For a discussion on the various forms of analogical reasoning in the common law, see generally Grant Lamond, "Analogical Reasoning in the Common Law" (2014) 34:3 Oxford J Leg Stud 567.

[107] *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, Petitioner) [emphasis added].

name is "godhatesfags.com" and which advocates for capital punishment for homosexuality.[108] This analogy successfully confers a minority status upon Mr. Phillips, as the hate and persecution endured by the comparative actor (the lesbian graphic designer) successfully rubs off on the actor she is being compared with (Mr. Phillips).

The Solicitor General employed a similar analytical framework in his oral argument. He drew parallels not only with the case of the gay graphic designer refusing to work for the Westboro Baptist Church, but also with the one of a Black artisan forced to craft a cross for a Ku Klux Klan reunion.[109] In both submissions, the cases are stripped of their highly different contexts to allow an intense focus on one bare similarity: opposition to participation in an "expressive event" one "disagrees" with. Hence, both counsels equated forcing Mr. Phillips to be "complicit" against his religious beliefs in the same-sex wedding he would prepare a cake for, with forcing a gay or a Black person to be complicit in events and speech directly promoting their very own oppression, suffering, and death. That the two can be credibly equated in a court of law is cause for deep concern.

How did Mr. Phillips manage to associate himself more closely with LGBTQ2+ people persecuted by the Westboro Baptist Church than with the persecutors within that church? That is quite fascinating considering that, although the extremism of their positions and tactics surely differs, they are both religious opponents of same-sex marriage. It is possible that Mr. Phillips's calm demeanour and polite discourse (in his op-ed, he refers to the couple to whom he denied service as "the gentlemen" and says that they are welcome in his shop)[110] contributed to distance him from groups who resort to hate speech.

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[108] See Ben Leach, "US Church Which Calls for Homosexuals to Be Killed Banned from UK", *The Telegraph* (19 February 2009), online: <www.telegraph.co.uk> [perma.cc/KRA8-CU52].

[109] See *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, Petitioner).

[110] See Phillips, *supra* note 88. Further attesting of his good character and sincere religious belief is Justice Thomas's description of Mr. Phillips's habit of prioritizing faith over profits: "Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries." (*Masterpiece Cakeshop*, *supra* note 1 at 10, Thomas J, concurring in part and concurring in the judgement).

But Mr. Phillips's restrained demeanour and general "perfect defender" quality is in itself insufficient. It is only by successfully laying the foundation that Mr. Phillips's religious identity put him at risk of discrimination and persecution that his advocates were able to associate him with more "traditional" victims of discrimination. As we have alluded to previously, the increasing prevalence of reverse discrimination claims in the American context makes this stupefying symmetrical portrayal nonetheless appear legally intuitive. Moreover, the courts' desire to remain "neutral" in cases involving freedoms of religion and speech makes them receptive to such symmetrical arguments, which can be branded as emerging from a "neutral principle"[111] framework.[112]

2. How Moral Symmetry Is Invoked in *TWU*

The notion of moral symmetry is also present in the *TWU* case, albeit in a different way. The appeal to symmetry in *Masterpiece Cakeshop* focuses on "comparable" complicity in a practice one "opposes." In *TWU*, however, symmetry is deployed through the idea of equivalent harm suffered by the protagonists.

Indeed, the harm suffered by the LGBTQ2+ community because of the Covenant is not only considered equivalent to that of the religious believers, but is also actually constantly minimized. For instance, in the Nova Scotia Supreme Court decision, this harm is reduced to an "element of stress" inherent to living in a multicultural society.[113] The Court also uses the term "homophobic" between quotation marks to describe the Covenant,[114] seemingly indicating that the discriminatory nature of the code of conduct, which prohibits same-sex sexual intimacy, is a matter of interpretation.

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111 See Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv L Rev 1 (for a discussion on the debate in the aftermath of the *Brown* decision, *supra* note 8, about the existence of neutral principles in the United States). See also, in *Masterpiece*, the paramount importance given to the absence of a "neutral principle" which would distinguish between the opposite rulings of the Civil Rights Commission on the matter: *Masterpiece Cakeshop*, *supra* note 1, Kennedy J, for the Court at 11–12; Kagan J, concurring at 1–4; Gorsuch J, concurring at 2–5.

112 The US Solicitor General seemed to espouse the symmetrical logic completely when, in response to a question from Justice Kagan during the hearing, he conceded that an atheist baker who does the same kind of highly artful cakes as Mr. Phillips could refuse to produce cakes for bar mitzvahs, first communions, or other religious ceremonies. *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, Petitioner).

113 See *TWU* NSSC, *supra* note 67 at para 14.

114 See *ibid*.

As the Ontario Divisional Court points out, attempting to minimize the concerns arising from the harmful effects of the Covenant, Trinity Western also strategically portrays itself as a safe and welcoming institution that accommodates everyone, including LGBTQ2+ students.[115] They insist that homophobic or discriminatory conduct is not tolerated and is a violation of their Covenant.[116] Again, this type of rhetoric seeks to diminish the actual harm caused by the discriminatory code of conduct.

Trinity Western thus goes further than implying a symmetrical harm for religious believers and LGBTQ2+ individuals. Indeed, Trinity Western argues that, in this case, the *real* harm is caused to the dignity of evangelical Christians.[117] Here, positions are reversed, and Trinity Western appears as the one harmed group, discriminated against by the law societies that rejected them. Just like Mr. Phillips's dignity was harmed by the Colorado Civil Rights Commission in *Masterpiece Cakeshop* (as it disrespected his beliefs), the Trinity Western students' dignity "is harmed when they are 'marginalized, ignored, or devalued' by the LSBC."[118] In both cases, the focus is placed on the relationship between a public body and the conservative believers, keeping the harm endured by the LGBTQ2+ community, whose rights are defended by said public bodies, just out of the frame. This narrative is also echoed by the intervener Christian Legal Fellowship:

> The Law Societies have, throughout these proceedings, expressed concern about the "harmful message" they would send if they were to approve TWU. But in rejecting TWU, they have done exactly that. They have sent the harmful message that the evangelical Christian community's lawful view of marriage is "abhorrent," "archaic" and "hypocritical."[119]

Despite appeals to moral symmetry and an attempt to reverse the roles, the majority of the Supreme Court of Canada was not convinced by Trinity Western's strategy. The majority decision focused on harms caused to LGBTQ2+ individuals, writing that the refusal to accredit Trinity Western's law faculty furthers the objective of "protecting the public interest in the administration of justice ... by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school."[120] Indeed, according to the majority, "LGBTQ students enrolled at TWU's

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115 See *TWU* ONSC, *supra* note 68 at para 111.

116 *TWU* NSSC, *supra* note 67 at para 35.

117 *TWU I* (FOR), *supra* note 73 at para 160.

118 *Ibid* at para 123.

119 *TWU II* (FOI Christian Fellowship), *supra* note 87 at para 30.

120 *TWU I*, *supra* note 2 at para 96.

law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation."[121]

The dissenting justices, however, very much echoed the view that Trinity Western was the injured party in the case. Indeed, they contended that while one of the law societies "purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds."[122] They argued that there is no "legally cognizable injury"[123] here and described the contested Covenant as representing "so-called 'discriminatory' ... practices."[124]

Furthermore, the dissenting justices go as far as to lump in anti-LGBTQ2+ rights beliefs with inoffensive if peculiar religious beliefs that might be hard to understand for justices, but to which they should turn "an unconcerned shoulder, satisfied that the practice or commitment at stake simply does not offend the culture of Canadian constitutionalism."[125] They further argued that the exclusion of LGBTQ2+ candidates from the proposed law school is justified, as "the unequal access resulting from the Covenant is a function of accommodating religious freedom."[126]

Finally, it is especially noteworthy that the dissenters take great care to highlight that conservative religious believers have an experience which members of the judiciary might be unable to easily relate to. This unique demonstration of empathy is reserved for Trinity Western, but is not extended either to LGBTQ2+ students attending the school or to those who are part of the larger Canadian legal community.[127]

In addition to minimizing the harm suffered by the LGBTQ2+ community and emphasizing the harm caused to Trinity Western's community, the dissenters also directly invoke symmetry. They do so by citing a

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[121] *Ibid* at para 98.

[122] *Ibid* at para 261.

[123] *Ibid* at para 332.

[124] *Ibid* at para 340.

[125] *Ibid* at para 264, citing Berger, *supra* note 97 at 181. This is also highly strategic because, by casting the beliefs at hand as "incomprehensible," they present themselves as individuals who do not share those beliefs, as done in Justice Gorsuch's reasons in *Masterpiece Cakeshop* (see *Masterpiece Cakeshop*, *supra* note 1 at 1–12, Gorsuch J, concurring). They cast themselves in the role of the "objective" outsider, who does not agree with the religious believer but is deeply concerned with safeguarding the freedoms of those they disagree with. This very noble role is a familiar one for the judiciary, because, as mentioned, its members are most comfortable when they can present themselves as keeping a safe distance from the issues they are called upon to decide.

[126] *TWU I*, *supra* note 2 at para 327.

[127] For a discussion of uneven empathy shown by justices toward anti-discrimination law claimants, see generally Siegel, "Equality Divided", *supra* note 29.

South African LGBTQ2+ landmark victory in support of their plea for tolerance toward Trinity Western. The case referenced, *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, struck down the criminalization of same-sex sexual intimacy. The dissenters in *TWU* point to the idea brought forward in this case, namely that equality should not mean conformity but rather respect for differences.[128] Of course, the difference for which they seek respect here is not queerness, but religious opposition to it. This symmetrical appeal very much resembles the ones brought forward by counsels in *Masterpiece Cakeshop*, where the same rhetorical technique was used to equate Mr. Phillips's situation to that of the lesbian graphic designer refusing to work for the Westboro Baptist Church.

The American and Canadian cases thus diverge significantly. The *Masterpiece Cakeshop* decision contains clear signals of agreement with the assertion that there is a symmetry between the situation of religious opponents to queer love and that of the LGBTQ2+ community. This is most notable in its inability to find a "neutral principle" distinguishing between the victory of bakers refusing to prepare cakes bearing anti-LGBTQ2+ messages and the defeat of Mr. Phillips in front of the Commission.[129] In contrast, the *TWU* majority decision appears to close the door on this possibility. In sum, while the parties have deployed similar rhetorical devices to support their religious claims, the responses of the majorities of each court have gone in opposite directions.

D. Reclaiming Respectability

We have seen that employing terms associated with vulnerable minorities as well as invoking moral symmetry allows conservative religious believers to craft a narrative in which they are a new vulnerable minority either on par with others, or in need of an even greater degree of protection.

Once these two elements have been established, the minority label discourse moves on to its final goal: reclaiming the *respectability* of views opposing LGBTQ2+ rights. As recent defeats preclude openly advocating for the rightness of traditional morality in the legal realm, respectability, as a gateway to tolerance requests, becomes of paramount concern. The hope is to get traditional morality proponents' views as close as possible to moral rehabilitation in the eyes of the public by finding a place for them

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[128] See *National Coalition for Gay and Lesbian Equality v Minister of Justice*, [1998] ZACC 15, 1999 (1) SA 6 at para 132, cited in *TWU I*, *supra* note 2 at para 310.

[129] See *Masterpiece Cakeshop*, *supra* note 1, Kennedy J, for the Court at 11–12; Kagan J, concurring at 1–4; Gorsuch J, concurring, at 2–5.

within the bounds of modern legal values such as tolerance and the protection of minorities.

Presenting opposition to LGBTQ2+ rights as a minoritarian belief held by a vulnerable religious minority eases the path to respectability. This is manifest in the two cases under consideration, where religious believers plead for tolerance for diverse beliefs held by minorities—including, of course, theirs—in the name of pluralism. In other words, in *Masterpiece Cakeshop* and *TWU*, religious believers are not arguing for the moral validity of their beliefs. Rather, they are asking society to tolerate their viewpoints, which, albeit having perhaps become unpopular, are still respectable.

This rhetoric allows conservative religious believers to build a strong case for the exemptions they seek, as tolerance is an important modern social good. Indeed, as previously explained, not only is tolerance among the very reasons for protecting religious freedom in the first place, it is also a core principle around which equality rights advocates build strategies for eliminating discrimination. As we will see, tolerance is at play in both the *Masterpiece Cakeshop* and *TWU* cases, where it is mobilized by both the parties and the courts.

1. How Respectability Is Reclaimed in *Masterpiece Cakeshop*

In the *Masterpiece Cakeshop* case, the Alliance Defending Freedom asserts the respectability[130] of Mr. Phillips's beliefs and emphasizes tolerance and pluralism. Indeed, the Alliance features an interview with Mr. Phillips's counsel on its website, where the narrator explains why she shares his cause: "Jack represents what a pluralistic society looks like."[131] In this interview, she asks—and that is a recurring theme in the Alliance's promotional material—for tolerance, not *from* Jack (like LGBTQ2+ advocates do), but *for* Jack and his belief against same-sex marriage.

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[130] By "respectability," we mean here views which the courts believe are sufficiently reasonable and devoid of hatred to belong in the marketplace of ideas. This is especially crucial in Canada, where certain types of speech are legally deemed unworthy of the public sphere and are criminalized as hate speech. While such actors do not face the same criminalization in the United States, as we have seen, religious opponents of same-sex marriage stand to make substantial gains by distancing themselves from hateful groups such as the Westboro Baptist Church. In fact, contrasting oneself with another, "non-respectable" group, is often a key strategy to achieve respectability. For a discussion of such distancing strategies in the immigration context, see Rebecca Sharpless, "'Immigrants Are Not Criminals': Respectability, Immigration Reform, and Hyperincarceration" (2016) 53:3 Hous L Rev 691.

[131] Alliance Defending Freedom, "Client Story: Jack Phillips" at 06m:48s, online (video): *Alliance Defending Freedom* <www.adflegal.org> [https://perma.cc/TLF8-2G3Y].

Mr. Phillips's counsel also mobilized the idea of tolerance during her rebuttal at the US Supreme Court: "[P]olitical, religious, and moral opinions shift. We know that. And this Court's dedication to Compelled Speech Doctrine and to free exercise should not shift."[132] The message being sent to the Court and the broader public here is that the popularity of Mr. Phillips's beliefs is declining, and that, as a person holding unpopular but respectable religious beliefs, he now especially needs the tolerance and protection of the Court.

This plea for the tolerance of Mr. Phillips's respectable beliefs was well received by the American Supreme Court. Indeed, the attempt to foster tolerance for unpopular views and to ease social tension was very visibly displayed. In fact, the majority of the Court showed so much concern for the protection of Mr. Phillips's religious views that it formed the primary basis for judgment. Indeed, the majority refused to settle the core issue of the conflict between religious freedom and equality rights directly. It rather chose to focus on the less controversial idea of judicial neutrality, interpreting it to mean that adjudicators must express respect for both proponents and opponents of same-sex marriage. They overturned the initial decision against Mr. Phillips, writing that the Commission failed to treat his beliefs with sufficient respect, thus displaying unacceptable bias.[133] This is so because of comments uttered by a panel member which "disparage his religion."[134] Furthermore, by labelling anti-same-sex marriage messages as "offensive" in another case, "the Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."[135]

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[132] *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, Petitioner).

[133] During the hearing, Justice Kennedy had pressed Colorado's Solicitor General to disavow the following statement made by one of the commissioners of the Colorado Civil Rights Commission: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others" (*ibid* at 13, Kennedy J, for the Court). It is to be noted that Mr. Phillips's calm and measured speech and demeanour likely played a role in convincing the Court that this statement was not acceptable. Indeed, one can doubt whether the same statement, uttered in response to the Westboro Church's same beliefs, would have equally struck the Court as a failure of neutrality and a display of judicial hostility against religion.

[134] *Ibid*.

[135] *Ibid* at 16.

In his concurring reasons, Justice Gorsuch also stresses the importance of tolerance, building on a free speech idea deeply ingrained in the American psyche:

> Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. ... Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom.[136]

The majority also makes clear that Mr. Phillips, the "expert baker" and "devout Christian,"[137] is precisely one of the "reasonable and sincere people" opposing gay marriage "in good faith" whom Justice Kennedy acknowledged in his *Obergefell* opinion.[138] Justice Kennedy's opinion in *Masterpiece* thus reads like a moral rehabilitation of opponents of same-sex marriage. Even though he stresses the importance of the dignity interest of LGBTQ2+ citizens,[139] it is clear that the opinion seeks first and foremost to convince the judiciary and the broader public of the respectability of Mr. Phillips's views. When Mr. Phillips was asked to craft a cake for a same-sex union celebration, he faced, according to Justice Kennedy, a "dilemma" that was "particularly understandable" in the 2012 context.[140]

Since in the Court's view Mr. Phillips's beliefs are respectable, they must be taken seriously if the Court is to remain neutral on the content of citizens' beliefs and to treat everyone "the same." As Justice Kennedy expressed during the hearing: "Tolerance is essential in a free society. And tolerance is most meaningful when it's mutual. It seems to me that the state in its position here, has been neither tolerant nor respectful of Mr.

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136 *Ibid* at 7, Gorsuch J, concurring. It is worth noting that, by the strategic use of the "we," Justice Gorsuch distances himself from opponents of same-sex marriage, while crafting an opinion even more favourable to them than the majority opinion penned by Justice Kennedy.

137 *Ibid* at 3, Kennedy J, for the Court.

138 *Obergefell*, *supra* note 20 at 4, Kennedy J, for the Court. Justice Roberts, who did not concur with Justice Kennedy in *Obergefell* but who also strongly believes in the respectability of such a view, was careful to remind Justice Kennedy of his own prior commitment in that regard during the *Masterpiece Cakeshop* hearing (see *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, Respondent)).

139 For a summary of all the pro-LGBTQ2+ rights excerpts of Justice Kennedy's reasons, see *Masterpiece Cakeshop*, *supra* note 1 at 1, Ginsburg J, dissenting.

140 *Ibid* at 11, Kennedy J, for the Court.

Phillips' religious beliefs."[141] This indignation on the part of the US Supreme Court, denouncing hostility toward religion, is reminiscent of Trinity Western's argument that the law societies have exercised a form of moral condemnation over them, by targeting them and qualifying evangelical views as "harmful,"[142] "highly problematic,"[143] "offensive,"[144] "disrespectful,"[145] and "derogatory,"[146] among others.

The opportunity for rehabilitation that the *Masterpiece Cakeshop* decision represents for conservative religious opponents to LGBTQ2+ rights was not lost on the Alliance Defending Freedom. Indeed, they proudly displayed three key "takeaways" from the judgment on their website:

> Jack's case brought liberals and conservatives together because we should all agree:
>
> (1) Government hostility toward religious beliefs has no place in our pluralistic society;
>
> (2) We all should have the right to live and work consistent with our deeply held beliefs;
>
> (3) Countless people of good will—from faith traditions as diverse as Islam and Christianity—believe that marriage is the union of a man and a woman.[147]

We can see how the new trope is at play in their depiction of their victory. Interestingly, by portraying themselves as a minority, they are able to make universalist appeals. Not because the content of their belief is shared by a majority of Americans like it once was, but rather because

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141 *Ibid* (Oral argument, Respondent). For further discussion of Justice Kennedy's commitment to social harmony (in the racial context), see Reva B Siegel, "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases" (2011) 120:6 Yale LJ 1278.

142 *TWU II* (FOA), *supra* note 73 at paras 83–84, citing in part *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (Factum of the Respondent) at paras 95–98.

143 *Ibid*.

144 *Ibid*.

145 *TWU I* (FOR), *supra* note 73 at para 120.

146 *Ibid*.

147 Alliance Defending Freedom, "Justice for Jack," online: *Alliance Defending Freedom* <www.adflegal.org> [perma.cc/T3MJ-5BP3?type=image]. In comparison, the American Civil Liberties Union only added the following sentence to their page dedicated to the case: "The Supreme Court reversed the decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, based on concerns specific to the case" ("Masterpiece Cakeshop v. Colorado Civil Rights Commission" (last modified 4 June 2018), online: *American Civil Liberties Union* <www.aclu.org> [perma.cc/R2DL-6Z34]). This very succinct mention of the Supreme Court decision reveals that they perceive the Supreme Court decision as a loss.

many other minorities are at risk of persecution by the state, to whom they equate themselves by association. In other words, they are defending a cause that is greater than themselves. That is why the Alliance Defending Freedom noted the fact that "liberal" justices sided with them;[148] it gives credibility to their defence of a "neutral" idea. Finally, we see that reclaiming their respectability is an important part of the process, one they highlight with their third takeaway: "Countless people of good will—from faith traditions as diverse as Islam and Christianity—believe that marriage is the union of a man and a woman."

In sum, the majority of the justices of the US Supreme Court accepted the respectability arguments presented by Mr. Phillips and his supporters, situating the dispute within the minority label framework. The decision sidestepped the core issue by declaring that the Colorado Civil Rights Commission lacked basic neutrality in its consideration of Mr. Phillips's beliefs. Nonetheless, it sent a strong message about the respectability of Mr. Phillips's views, and about the fact that LGBTQ2+ rights are still up for debate.

2. How Respectability Is Reclaimed in *TWU*

In *TWU*, pluralism and tolerance are also central pieces of the rhetorical strategy deployed by the university, in its quest to reclaim the respectability of its position. Indeed, Trinity Western defined the debate at the outset as one where the majority, in an "intolerant and illiberal" manner, seeks to impose its views on a minority.[149] Trinity Western invoked the risk of the "tyranny of the majority" prevailing "to the detriment of all of Canada's diverse communities."[150] They also argued that the distinctive beliefs of the evangelical community can put them "in tension with broader societal norms and popular opinion."[151] In this case, their beliefs clash with the current popular opinion which is favourable to same-

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148 See Alliance Defending Freedom, "Justice for Jack", *supra* note 147.

149 See *TWU II* (FOA), *supra* note 73 at para 5.

150 *TWU II* (RFOA), *supra* note 73 at para 63, citing in part *Big M Drug Mart*, *supra* note 37 at 337.

151 *TWU II* (FOA), *supra* note 73 at para 12. Interestingly, when arguing that Trinity Western's evangelical beliefs on marriage are not comparable to the segregationist ethos reflected in cases such as *Bob Jones University v United States* (461 US 574 (1983), in which the US Supreme Court held that the tax exempt status of a racially discriminatory religious university could be revoked), Trinity Western pointed out that their beliefs on marriage were "widely held and have been inherent in the Christian and Western legal tradition for thousands of years" (*TWU I* (FOR), *supra* note 73 at para 166). The old trope that allowed Trinity Western to advocate for the moral validity of their beliefs here resurfaces, as we are not talking about unpopular beliefs anymore, but rather traditional and "widely held" beliefs.

sex marriage, thus leading them to direct their arguments on the necessary tolerance which society must now demonstrate toward them.

Trial and appeal courts who heard the case echoed this view. "Who tolerates whom?", asked the Nova Scotia Supreme Court, arguing that "[m]ainstream values no longer stigmatize LGBT people. Those who do are now the dissident and dissonant voices."[152] The British Columbia Court of Appeal similarly stated:

> In the context of this case, the members of the TWU community constitute a minority. A clear majority of Canadians support the marriage rights of the LGBTQ community, and those rights enjoy constitutional protection. The majority must not, however, be allowed to subvert the rights of the minority TWU community to pursue its own values. Members of that community are entitled to establish a space in which to exercise their religious freedom.[153]

Certain interveners and media followed in the same narrative vein. "A 'free and democratic society' is ... robustly pluralistic," the Evangelical Fellowship of Canada and Christian Higher Education wrote.[154] The theme of diversity was also echoed in the media after the final decision was released, with some commentators expressing the view that Trinity Western's defeat was a "blow to diversity."[155] Upon learning of the outcome, the following message appeared on a Trinity Western website: "Until now, Canada has always encouraged the rich mosaic created by the diversity of views, race, gender and belief systems in this country. Regrettably, the Supreme Court's decision limits the contribution of faith communities to Canadian society."[156]

Like the strategy of invoking moral symmetry, these pleas for tolerance emphasizing the respectability of the religious believers' viewpoints were not endorsed by the majority judgment. No reference is made to a necessary need to show tolerance for the minoritarian beliefs of the religious opponents to LGBTQ2+ rights. On the contrary, the majority argues

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[152] *TWU* NSSC, *supra* note 67 at para 22.

[153] *TWU* BCCA, *supra* note 67 at para 178.

[154] *TWU II* (FOI Evangelical Fellowship), *supra* note 87 at para 19.

[155] See e.g. Margaret Wente, "The TWU Decision Is a Blow to Diversity", *The Globe and Mail* (18 June 2018), online: <www.theglobeandmail.com> [perma.cc/EA9J-KCCU]. See also Ray Pennings, "The Supreme Court Decides that Faith Is Now Banned from Canada's Public Spaces", *National Post* (15 June 2018), online: <nationalpost.com> [perma.cc/GGL2-7K9Y] ("Even the diversity that has been celebrated so exuberantly for the past two decades has now become a monoculture where sexual identity thrives and all other social considerations such as religious faith fall behind").

[156] "Trinity Western University Disappointed With Supreme Court Decision Signalling Loss of Support For Diversity in Canada" (15 June 2018), online: *Trinity Western University* <www.twu.ca> [perma.cc/JH4C-VMMQ].

that in this case, "more is at stake ... than simply 'disagreement and discomfort'" with the potentially offensive views of others in a free, democratic, and plural society.[157] Here, according to the majority, the minor interference with Trinity Western's religious freedom is justified because of the significant concrete harm that Trinity Western's beliefs and practices cause to LGBTQ2+ people.[158]

Had the pleas for tolerance been endorsed by the Canadian Supreme Court, it would have allowed Trinity Western to successfully reverse the roles. From a historically oppressed group, the LGBTQ2+ community would have become part of the majority that contributes to impairing the rights of the new religious minority. Thus, the harm they might suffer by their exclusion because of the Covenant would seem less substantial, and the potential for success of religious claims for exemptions from anti-discrimination laws would have greatly improved.

Despite the outcome, it should be noted that the theme of pluralism was relied upon by the two dissenting justices, for whom this case required the Court to decide "who controls the door to 'the public square'"[159] in a secular state where pluralism is intrinsically valuable and should be fostered:[160]

> Properly understood, secularism connotes pluralism and respect for diversity, not the suppression of full participation in society by imposing a forced choice between conformity with a single majoritarian norm and withdrawal from the public square. Secularism does not exclude religious beliefs, even discriminatory religious beliefs, from the public square. Rather, it guarantees an inclusive public square by neither privileging nor silencing any single view.[161]

This seemingly "content neutral" approach to freedom of religion and belonging, where one does not have to stop excluding others to demand inclusion, implicitly acknowledges that Trinity Western's religious opposition to queer love is respectable enough to warrant protection.

Furthermore, the argumentative strategies of the dissenters analyzed above—namely, minimizing the discriminatory nature of the Covenant and the forceful appeals to tolerance for Trinity Western through a sym-

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157 *TWU I* at para 101, citing in part *TWU BCCA*, *supra* note 67 at para 188.

158 See *TWU I*, *supra* note 2 at paras 100–101.

159 *Ibid* at para 260.

160 See *ibid* at para 328.

161 *Ibid* at para 332. See also *ibid* at paras 264, 269; *TWU II*, *supra* note 2 at para 81. Trial and appeal courts also discussed pluralism extensively (see e.g. *TWU* NSSC, *supra* note 67 at paras 11, 185, 198, 211, 271; *TWU* BCCA, *supra* note 67 at paras 1, 131–32, 184–85).

metrical framework—work together to present Trinity Western's views as respectable. Indeed, they argue that Trinity Western is simply showing a lawful preference for members of its own faith, and that "[t]he purpose of TWU's admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community."[162]

Finally, the dissenters echo the American plurality's reasoning by asserting that the law societies' requests that Trinity Western modify its Covenant constitute a breach of state religious neutrality. Indeed, they write that the law societies failed to uphold their duty to accommodate diverse religious beliefs "without scrutinizing their content."[163] In their view, making accreditation conditional on the removal of the discriminatory section of the Covenant is a violation of state neutrality, as it "represented an expression by the state of religious preference which promote[d] the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU."[164] This assertion is especially in line with the minority label, for it approves the idea that merely asking a religious group not to discriminate constitutes a failure of religious neutrality. As the Canadian case of *TWU* did not involve forceful comments by a decision-maker of the kind uttered by the member of the Colorado Civil Rights Commission in *Masterpiece Cakeshop*, one could say that the dissenters take the duty of religious neutrality even further than their American counterparts. The law societies did not have to express any animus against the belief at hand; the mere request to remove the Covenant's contested clause was enough to violate religious neutrality.

However, Trinity Western's plea for the respectability of their discriminatory beliefs was not accepted by the majority of the Canadian Supreme Court justices. As we saw, their decision focused on the important harm that Trinity Western's Covenant caused to LGBTQ2+ people, rather than on the need to tolerate Trinity Western's newly minoritarian beliefs in a pluralistic society. Here again, the two cases diverge, leading us to believe that in the future, similar claims by religious groups seeking exemptions from anti-discrimination law duties may be facilitated in the American context, while the minority label may not be a winning strategy in the Canadian context.

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162 *TWU I*, *supra* note 2 at para 335.

163 *Ibid* at para 340.

164 *Ibid* at para 324.

Conclusion

In conclusion, it appears that the recourse to the minority label strategy was far from fruitful for all the parties involved. As we have seen, this rhetoric mixes explicit linguistic claims and implicit equation between the subjects and detractors of anti-discrimination laws through a moral symmetry framework. It also seeks to reclaim the respectability of opposition to LGBTQ2+ rights. Still, while a majority of Canadian Supreme Court justices remained unmoved, this rhetoric was echoed on the American side.

In recasting religious believers as a new vulnerable minority, proponents hoped to secure a more modern legal argument to support their opposition to same-sex marriage, and lay the ground work for an eventual precedent reversal by ensuring the issue remains a live one. In the meantime, should exemption requests be successful, they would provide "piecemeal gains" for the new "minority" pending a complete victory. As described earlier, this strategy evolved out of the defeat of their former rhetorical trope of choice that offered the latitude to defend and advocate for the validity and rightness of their beliefs. This is something they did openly until recent advances in LGBTQ2+ rights issues, including the *Obergefell* decision in the United States.[165] After being defeated on this terrain, they now seek "preservation through transformation"[166] with the new trope of "minoritization," where, rather than trying to prove the *validity* of their beliefs, they limit themselves to defending their *respectability*. In a sense, this is a notable rhetorical setback for them, as a judicial victory based on the old trope would have gotten them much closer to their ultimate objective of having traditional morality norms enforced by the state. In contrast, the new trope can only get them so far: respectability may yield exemptions, but cannot, on its own, provide complete victory.

However, the many ways in which decisions such as the one by the US Supreme Court in *Masterpiece Cakeshop* are nonetheless a victory for opponents to LGBTQ2+ rights should not be underestimated. First, even if victories based on the new trope bring forth more incremental gains in the "culture war," they nonetheless have the power to eventually lead to a web of exceptions that could come to indirectly regulate the issue.[167] In-

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[165] For a fuller account of the process through which the arguments against same-sex marriage progressively shifted toward a more "respectful" tone over time in the United States, see Reva B Siegel, "Community in Conflict: Same-Sex Marriage and Backlash" (2017) 64:6 UCLA L Rev 1728.

[166] Siegel, "Rule of Love", *supra* note 12 at 2178; NeJaime & Siegel, *supra* note 7 at 2553.

[167] For the complete working of these exception webs, see NeJaime & Siegel, *supra* note 7.

deed, according to Douglas NeJaime and Reva Siegel, such a phenomenon is already occurring in the American context regarding reproductive rights: exemption claims are invoked with such regularity and have such an expanded scope that they end up significantly influencing the regulation of the contested conduct itself.[168]

Citing health care exemptions laws as a cautionary tale, their analysis shows how individual demands—for exemption from any involvement in procedures such as abortion, sterilization, and contraception—originally presented in the name of settling social conflict, soon aggregated into a broader strategy on the part of conservatives to make incremental gains in the "culture war."[169] Indeed, NeJaime and Siegel worry about the potential of complicity-based claims to stretch well beyond the confines of individual conscience, as they progressively expand upon two axes.[170] Firstly, on who can request an exemption: from doctors to receptionists, hospitals, insurance companies, and even employers providing health insurance.[171] Secondly, on how much "complicity" is deemed too much: from practicing the procedure, to assistance, referrals, or even simply providing information about the existence of the service elsewhere. Alive to this type of risk, Justice Sotomayor asked during the *Masterpiece Cakeshop* hearing whether siding with Mr. Phillips could lead to obstacles in access to same-sex marriage related services in remote regions, such as near military bases.[172]

Second, there is much to be said about the importance of having one's religious and political views labelled as respectable by courts of last resort. Not only do such decisions sever, in the collective imagination, citizens like Jack Phillips from other, hateful opponents of same-sex marriage such as the Westboro Baptist Church, but they also affirm that same-sex marriage is still a live issue. That the *Masterpiece Cakeshop* decision contributes to keeping same-sex marriage in the realm of accepta-

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168 See *ibid* at 2572–73, 2588.

169 NeJaime and Siegel further discuss how such a broad understanding of complicity is likely to bring claimants to oppose any provisions that ensure their objection of conscience does not interfere with the rights of others to get the service, as it is precisely the fact that the service exists that they object (see *ibid* at 2532). It is also important to note another form of expansion, which took place in the American context. The original versions of conscience exemption laws offered a two-way protection where refusing to perform and performing such procedures were equally protected (see *ibid* at 2537). This "neutral" approach did not last as today "performers" are no longer covered (see *ibid* at n 102, citing Elizabeth Sepper, "Taking Conscience Seriously" (2012) 98 Va L Rev 1501 at 1512).

170 See *ibid* at 2538–40.

171 See *ibid* at 2540.

172 See *Masterpiece Cakeshop*, *supra* note 1 (Oral argument, *amicus curiae*).

ble disagreements is made plain by Justice Thomas's reasons. Speaking of opposing same-sex marriage in the United States in the post-*Obergefell* era, he writes:

> This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage.[173]

Much like with abortion, in the United States, keeping same-sex marriage a live issue is crucial for any hopes of eventual judicial or political reversal. And this is precisely what the minority label seeks to accomplish. When courts decide such delicate questions on grounds such as equality and dignity, time can cement their decision as being the only reasonable—and respectable—one to be reached.[174] Yet, as decades of debates in the wake of *Roe v. Wade*[175] have shown, Supreme Court decisions in the American context can also very much be the beginning of public debate and controversies rather than their conclusion. By branding opposition to same-sex marriage as respectable, the Supreme Court's decision augments the chances that *Obergefell* will follow a trajectory similar to the one of *Roe*.[176]

That respectability can directly pave the way for a reversal of *Obergefell* is evident in a recent statement penned by Justice Thomas and joined

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[173] *Ibid* at 14, Thomas J, concurring in part and concurring in the judgment.

[174] On the concept of negative precedent, see Jack M Balkin & Reva B Siegel, "Remembering How to Do Equality" in Jack M Balkin & Reva B Siegel, eds, *The Constitution in 2020* (Oxford, UK: Oxford University Press, 2009) 93.

[175] *Roe v Wade*, *supra* note 8.

[176] It should however be noted that the US Supreme Court recently handed a decision that is considered one of the most consequential legal victory of the LGBTQ2+ rights movement. Indeed, in June 2020, the Court held that Title VII of the *Civil Rights Act* protects employees against discrimination because of their sexual orientation or gender identity (*Bostock v Clayton County*, 590 US ___ (2020) [*Bostock v Clayton*]). This decision has implications that can affect the lives of more LGBTQ2+ individuals than any queer rights decisions by the US Supreme Court so far. This continuing expansion of LGBTQ2+ rights must nonetheless be read alongside another recent decision of the US Supreme Court in *Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania*, 591 US ___ (2020), which granted extensive legal exemptions to religious believers concerning the provision of health insurance for contraceptive coverage. While this decision concerns reproductive rights, it is relevant to the LGBTQ2+ rights movement as it affirmed the notion of perceived complicity as sufficient to warrant a religious exemption. As previously mentioned, claims of complicity are similarly raised in the LGBTQ2+ rights context: religious believers seek exemptions, for instance, in cases of provision of services to queer individuals, arguing that it makes them complicit in the sinful conduct they object to. As such, while the *Bostock v Clayton* decision constitutes an important victory, the possibility that it will come to be severely undermined by a growing web of individual religious exemptions should not be underestimated.

by Justice Alito respecting the denial of a petition of certiorari by the US Supreme Court in the case of Kim Davis, a Kentucky county clerk seeking an exemption from her duty to issue marriage licences to gay couples. In Justices Thomas and Alito's view, the rights recognized in *Obergefell* stigmatize same-sex marriage opponents, such that "the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have 'ruinous consequences for religious liberty.'"[177] The horizon they evoke is one in which *Obergefell* is reversed, a course of action mandated by the fact that these justices believe it is more important to avoid casting respectable anti-LGBTQ2+ beliefs in an unfavourable light than it is to guarantee rights to LGBTQ2+ individuals.

Some interveners in these cases have expressed their views on the impact of this rhetoric, describing it as far-reaching, even dangerous. For example, in the *TWU* case, the intervener BC LGBTQ Coalition argued:

> The notion that the TWU community is the victim of too much equality and dignity for LGBTQ persons is preposterous and dangerous. It turns history on its head and undermines the meaning of discrimination. ... [It] masks the reality that sexual minorities have faced historical social, political and economic disadvantage, and face such disadvantage to this day.[178]

Thus, notwithstanding material impediments to access to services, and even in the absence of the reversal of precedents such as *Obergefell*, there is also the broad risk of dignitary harms.[179] Not only can granting such exemptions send a hurtful and demeaning[180] message to members of the LGBTQ2+ community, it can also pressure them to "cover"[181] their sexual or gender identity. As the New Mexico Supreme Court pointed out in a case similar to *Masterpiece Cakeshop*, granting such exemptions means interpreting public accommodation laws "[a]s protecting same-gender couples against discriminatory treatment, *but only to the extent that they do not openly display their same-gender sexual orientation*."[182]

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[177] *Davis v Ermold*, 592 US ___ (2020) at 4, statement of Thomas J, joined by Alito J, respecting the denial of certiorari..

[178] *TWU I*, *supra* note 2 (Factum of the Intervener BC LGBTQ Coalition at para 25).

[179] On dignitary harm, see generally NeJaime & Siegel, *supra* note 7 at 2574–78.

[180] For a theory of demeaning social messages as discrimination, see Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, Mass: Harvard University Press, 2008).

[181] See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006).

[182] *Elane Photography, supra* note 6 at 62, cited in *Masterpiece Cakeshop* CA, *supra* note 60 at para 35 [emphasis added].

Another risk is identified by members of religious minorities who sided against *Masterpiece Cakeshop*,[183] as they believed such exemptions would soon be used against them.[184] In the same vein, the whole exemption scheme relies on a vision that certain religious beliefs and LGBTQ2+ rights are incompatible. Yet, many individuals live at that intersection:[185] siding with majorities within religious groups can leave such LGBTQ2+ believers vulnerable to discrimination from their co-religionists.[186]

The coming years will prove decisive with respect to the materialization of these risks. The refusal of the Canadian majority decision to echo moral symmetry and respectability will likely hinder future claims for religious exemptions to anti-discrimination laws based on the minority label. Conversely, this emerging counter-discourse is likely to thrive in the United States, thanks to the encouragement given by the *Masterpiece Cakeshop* decision. As such, the opposite paths the American and Canadian supreme courts have decided to follow regarding these decisions of June 2018 will allow us to more precisely circumscribe the consequences of adopting or rejecting such a rhetoric, where conservative religious groups are said to be the new minorities requiring protection from a liberal orthodoxy where religious freedom is constantly trumped by equality.

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[183] See Public Rights/Private Conscience Project, "In Masterpiece Cakeshop Case, Diverse Organizations Argue Antidiscrimination Laws Protect, Not Burden, Religious Liberty" (31 October 2017), online (pdf): *Columbia Law School* <www.law.columbia.edu> [perma.cc/PUJ3-T4RT].

[184] It is to be noted that evidence points toward the fact that religious minorities, such as Muslims, tend to lose exceptions claims more often than dominant faith groups (see NeJaime & Siegel, *supra* note 7 at 2587, n 288).

[185] The University of Toronto student group Qu(e)erying Religion is such an example (see "Home" (last visited 23 October 2020), online: *Que(e)rying Religion* <queeryingreligion.weebly.com> [perma.cc/N5G2-7HBZ]).

[186] On the problem of "minorities within minorities," see generally Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, UK: Oxford University Press, 1995).