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## Bigotry, Civil Rights, and LGBTQ Child Welfare

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# BIGOTRY, CIVIL RIGHTS, AND LGBTQ CHILD WELFARE

*Jordan Blair Woods\**

WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW. By *Linda C. McClain*. New York: Oxford University Press. 2020. Pp. 230. \$39.95.

## INTRODUCTION

On November 12, 2020, Justice Samuel Alito delivered a keynote address at the Federalist Society's annual convention<sup>1</sup> that caught the attention of national media.<sup>2</sup> Justice Alito warned that individual liberty was in danger.<sup>3</sup> His remarks covered several topics, including COVID-19 and religious liberty, freedom of speech, the Second Amendment, and conflicts between religious liberty and same-sex marriage,<sup>4</sup> with notable mention of the Court's recent

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\* Associate Professor of Law, University of Arkansas School of Law. I am grateful for the helpful comments from Meghan Boone, Lisa Martin, and participants in the 2020 Child Law & Rights Writers' Workshop. I am thankful for the valuable research assistance from Martin Arroyo. Finally, thank you to Brooke Simone, Aditya Vedapudi, and the editors of the *Michigan Law Review* for valuable suggestions and edits.

1. Justice Samuel Alito, Address at the 2020 FEDERALIST SOC. *National Lawyers Convention*, (Nov. 12, 2020), <https://fedsoc.org/conferences/2020-national-lawyers-convention#agenda-item-address-8>.

2. See Robert Barnes, *Justice Alito Says Pandemic Has Resulted in 'Unimaginable' Restrictions on Individual Liberty*, WASH. POST (Nov. 12, 2020, 10:51 PM), <https://www.washingtonpost.com/nation/2020/11/12/samuel-alito-federalist-society-speech> [perma.cc/J85Z-YDX3]; Jess Bravin, *Justice Alito Responds to Liberal Critics, Says Covid-19 Is 'Constitutional Stress Test'*, WALL ST. J. (Nov. 13, 2020, 10:35 AM), <https://www.wsj.com/articles/justice-alito-responds-to-liberal-critics-says-covid-19-is-constitutional-stress-test-11605244977> [perma.cc/KNR4-YEAP]; Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html> [perma.cc/9UBK-J29D]; Ariane de Vogue, *Alito Raises Religious Liberty Concerns About Covid Restrictions and Same-Sex Marriage Ruling*, CNN (Nov. 13, 2020, 10:18 AM), <https://www.cnn.com/2020/11/12/politics/samuel-alito-religious-freedom-federalist-society/index.html> [perma.cc/B5K9-29KA].

3. For a transcript of Justice Alito's remarks at the 2020 Federalist Society National Lawyers Convention, see Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: VOLOKH CONSPIRACY (Nov. 12, 2020, 11:18 PM), <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society> [perma.cc/JRT4-YPBV].

4. *Id.*

decisions in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*<sup>5</sup> and *Obergefell v. Hodges*.<sup>6</sup>

In his comments on religion and same-sex marriage, Justice Alito emphasized the value of tolerance and rejected charges of bigotry. For instance, in discussing *Masterpiece Cakeshop*, Justice Alito stressed, “For many today, religious liberty is not a cherished freedom. It’s often just an excuse for bigotry, and it can’t be tolerated, even when there is no evidence that anybody has been harmed.”<sup>7</sup> He continued, “The question we face is whether our society will be inclusive enough to tolerate people with unpopular religious beliefs.”<sup>8</sup> Discussing *Obergefell*, Justice Alito stated, “You can’t say that marriage is the union between one man and one woman. Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”<sup>9</sup>

The timing of Justice Alito’s keynote address is noteworthy. It was delivered the week after Election Day, the same week that Justice Amy Coney Barrett took part in her first oral argument after joining the high court.<sup>10</sup> It was also one week after the Court heard oral arguments in *Fulton v. City of Philadelphia*, in which a faith-based child placement agency that refuses to license same-sex couples as foster parents challenged the city’s refusal to renew the agency’s contract.<sup>11</sup> In the leadup to the *Fulton* decision, scholars and commentators warned that the case could have major consequences for the balance between religious liberty claims and antidiscrimination protections for LGBTQ people.<sup>12</sup> Although the Court in *Fulton* ultimately ruled against the

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5. 138 S. Ct. 1719 (2018).

6. 576 U.S. 644 (2015).

7. Blackman, *supra* note 3.

8. *Id.*

9. *Id.*

10. See Jessica Gresko, *Newly Confirmed Supreme Court Justice Amy Coney Barrett to Hear Arguments for the First Time*, CHI. TRIB. (Nov. 2, 2020, 1:02 PM), <https://www.chicagotribune.com/nation-world/ct-nw-amy-coney-barrett-supreme-court-20201102-wkdhgrip-mjdmvojirxt5sttny-story.html> [perma.cc/B8W6-68SN].

11. See Transcript of Oral Argument, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123).

12. See, e.g., Julie Moreau, *Supreme Court Adoption Case Could Have Broad Nondiscrimination Impact*, NBC NEWS (Mar. 4, 2020, 6:56 PM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-adoption-case-could-have-broad-nondiscrimination-impact-n1150041> [perma.cc/PH7T-6Q38] (“[L]egal experts say the case could have a significant impact on not just parental rights but also nondiscrimination protections more broadly.”); MOVEMENT ADVANCEMENT PROJECT, *THE HIGH STAKES IN THE FULTON CASE* (2020), <https://www.lgbtmap.org/file/2020-fulton-report.pdf> [perma.cc/QDA8-YX2G] (“The stakes for the children and families who are involved in the child welfare system could not be higher.”); Daniel Summers, *Discrimination Is Never in Kids’ Best Interest*, SLATE (Mar. 5, 2020, 3:54 PM), <https://slate.com/human-interest/2020/03/supreme-court-foster-care-fulton-philadelphia.html> [perma.cc/2AE9-7P9E] (“The broad implications of the case, should the conservative majority side with Catholic Social Services, could be disastrous for antidiscrimination laws writ large.”). In January 2022, the *Family Court Review* published a collection of articles and essays authored by scholars on the *Fulton* case, including its implications for the balance between religious liberty claims and antidiscrimination protections on the basis of sexual orientation and gender identity. See 60 *Fam. Ct. Rev.* 1 (2022).

city on narrower grounds,<sup>13</sup> the trajectory of the case offers important lessons for the future.

Professor Linda McClain's<sup>14</sup> excellent new book, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*, provides valuable insight into the use of the rhetoric of bigotry in conflicts over marriage and civil rights law, like those in Justice Alito's remarks. The heart of the book ambitiously traces how people understood and discussed bigotry in various struggles over marriage and civil rights dating back to the mid-twentieth century, including interfaith marriage, segregation and integration, the Civil Rights Act of 1964, antimiscegenation laws, and the Court's evolving approach to constitutional rights for lesbians and gays, including same-sex marriage. McClain's analysis draws on a wide range of sources, including congressional debates and testimony, judicial opinions, arguments made by advocates and litigants, social science literature, and newspapers, magazines, and other media (p. 13). Her analysis reveals recurring patterns in arguments regarding marriage and civil rights, including appeals to conscience and sincere beliefs meant to rebut charges of bigotry (p. 5). The book offers meaningful lessons about the rhetoric of bigotry and its puzzles for civil rights struggles, especially in this uniquely polarized period in United States history.<sup>15</sup> Overall, McClain's book makes an original contribution to our understanding of bigotry, especially in struggles at the intersection of family law and civil rights.

In this Review, I aim to highlight the strengths of Professor McClain's rich and insightful book while also calling attention to the ways in which McClain's framework helps us understand the pattern of arguments in *Fulton*, the latest conflict over marriage and the scope of civil rights before the Supreme Court. *Fulton* provides a fresh lens through which to view McClain's arguments, the book's publication having preceded the Court's grant of certiorari in *Fulton* by one week.<sup>16</sup> McClain's unique perspective also has much to offer in enhancing our understanding of LGBTQ child welfare issues as civil rights struggles. Although the child welfare system has long been the target of full-throated critiques,<sup>17</sup> problems in child welfare have not been historically framed as civil

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13. *Fulton*, 141 S. Ct. at 1877, 1882 (explaining the Court's decision not to revisit ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

14. Robert Kent Professor of Law, Boston University School of Law.

15. See ch. 9; Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide> [perma.cc/RH8N-HCL7] ("Americans have rarely been as polarized as they are today.").

16. Compare *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (granting certiorari on February 24, 2020), with *Who's the Bigot?*, OXFORD UNIV. PRESS, <https://global.oup.com/academic/product/whos-the-bigot-9780190877200> [perma.cc/CJ77-Y8G7] (noting publication date of March 2, 2020).

17. See, e.g., Robert H. Mnookin, *Foster Care—in Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973) (proposing new standards to limit removing children from their homes and placing them into foster care); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in*

rights issues.<sup>18</sup> In the past two decades, however, scholars have increasingly turned to civil rights discourse in order to frame child welfare problems, in both LGBTQ and non-LGBTQ contexts.<sup>19</sup> In connecting McClain's book to legal scholarship on LGBTQ child welfare and the *Fulton* controversy, this Review illustrates the importance of viewing LGBTQ child welfare issues through a civil rights lens. Many of the themes discussed in McClain's book reemerge in *Fulton*, especially in briefs and oral argument.<sup>20</sup> As a result, McClain's important work provides a framework for understanding how rhetoric involving bigotry is being harnessed by both sides of the ongoing legal battles over broad religious exemptions and LGBTQ child welfare.

This Review proceeds in three Parts. Part I articulates the book's thesis and core arguments. Part II situates LGBTQ child welfare literature in the conflict between civil rights and religious liberty. Part III then extends McClain's analysis to trace the rhetoric of bigotry in the *Fulton* controversy.

## I. EXAMINING BIGOTRY

### A. Sites of Contestation over Bigotry

Early in the book, McClain lays a foundation for her core arguments by introducing four puzzles about bigotry. First, does a charge of bigotry concern the motivation behind a belief or an act? (p. 6). Second, does the content of a belief, as opposed to its motivation, invite the label of bigotry? (p. 8). Third, how does time factor into judgments about bigotry, and more specifically, how does the scope of what is considered bigotry change with societal shifts about what is unreasonable or unacceptable? (p. 9). Fourth, does the label of "bigot" suggest a type of character with distinct psychological or moral traits? (p. 11). After these puzzles are situated in relation to social science research on prejudice in chapter 2, the heart of the book examines these puzzles by tracing the rhetoric of bigotry in past and present controversies over marriage and civil rights.

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*Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976) (discussing the inadequacies of laws regarding the removal of children from their homes).

18. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172; see also Annette R. Appell, "Bad" Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 759 (2007) ("[T]here is very little discussion about child welfare in civil rights . . . studies.").

19. See, e.g., Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141 (2004) (using the Indian Child Welfare Act as a lens to discuss the opposition between, and intersection of, children's rights and civil rights); Roberts, *supra* note 18, at 182 ("Viewing the racial disparity in the child welfare system as a group-based civil rights violation suggests an unorthodox form of redress."); Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2418–19 (2019) (framing challenges of LGBTQ youth in the child welfare system as civil rights problems).

20. See *infra* Part III.

### 1. Interfaith Marriage

The first controversy that McClain examines is the debate over interfaith marriage in the 1950s and 1960s (chapter 3). Looking to prominent secular and religious writings, McClain focuses on whether opposition to interfaith marriage was framed in terms of bigotry or other considerations (p. 48). McClain describes how many secular and religious commentators explained the growth of interfaith marriage as the inevitable outcome of increased immigration, assimilation, and social contact in colleges and the workplace (p. 51). Bigotry was also relevant to young people's motivations to enter into interfaith marriages (p. 50), which some commentators surmised was a form of protest against bigotry (pp. 56–57).

Some commentators, however, pushed against the view that opposition to interfaith marriage was solely based on “intolerance at odds with the American creed” (p. 59). Instead, many objectors rested their opposition on “legitimate” claims that interfaith marriage threatened marital happiness, the preservation of religious and ethnic heritage, duties of conscience, and children's well-being (p. 50). At the same time, McClain explains that not all objections to interfaith marriage were necessarily benign, and prejudice often played a role in animating objections to interfaith marriage (pp. 63–64).

### 2. Theologies of Segregation and Integration

Next, McClain turns to the debate over racial segregation, focusing primarily on the years after the Supreme Court's 1954 landmark decision in *Brown v. Board of Education*.<sup>21</sup> Looking to political speeches, official positions taken by religious groups, sermons, public addresses, and writings by clergy (p. 77), McClain illustrates how religious and political leaders who opposed desegregation often grounded their views in biblical, scientific, and historical sources, rather than language of bigotry and prejudice (p. 79, 82). For instance, opponents of desegregation appealed to scripture to justify ideas of racial difference and attempts to preserve racial purity (p. 83). They also relied on scientific ideas based on eugenic premises to rationalize white supremacy and frame racial mixing as a threat to the white race (pp. 84–85). In doing so, opponents of desegregation framed race consciousness, and thus segregation, as a necessary virtue rather than as a bigoted belief (p. 80).

Conversely, religious and political leaders who opposed segregation often looked to biblical, scientific, and historical sources to condemn racial bigotry. Specifically, McClain describes how leaders stressed the universal nature of the Christian faith and appealed to religious conscience to reject myths of racial difference (pp. 87–88). They further denounced the idea that science supports racial segregation or racial prejudice and supported their views with updated

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21. Ch. 4; see 347 U.S. 483, 495 (1954).

scientific studies (p. 91). Leaders who opposed segregation expressed concerns about being on the wrong side of history and emphasized that racial discrimination was inconsistent with American constitutional ideals (pp. 89–90).

At the same time, the discourse of “bigotry” was not entirely absent from these debates over racial segregation. As McClain discusses, many religious and political leaders who opposed desegregation emphasized the need to respond to frequent charges of bigotry (p. 81). Conversely, some leaders who opposed segregation invoked language of bigotry at times to interrogate their own racial prejudices (pp. 91–92). Other leaders who opposed segregation placed primacy on the environmental causes of intolerance and discrimination to advance the view that their opponents needed to be “rescued from bigotry and prejudice.” (pp. 92–93).

McClain argues that competing theological views on segregation and integration persisted in the political domain as Congress considered federal civil rights legislation in the 1960s—the next major controversy examined in the book.

### 3. The Civil Rights Act of 1964

McClain’s examination of the Civil Rights Act of 1964 in chapter 5 uncovers the diversity of rhetorical strategies involving bigotry deployed in the civil rights struggles of the past.<sup>22</sup> McClain begins by tracing the various ways in which legislators and civil rights leaders appealed to both conscience and the rhetoric of bigotry (pp. 106–15). Proponents of the Civil Rights Act argued that conscience and morality demanded a repudiation of bigotry through federal legislation (p. 106). They further argued that precedent supported Congress’s authority to address moral issues, including racial discrimination, through legislation (p. 111). Legislators who opposed the Act also appealed to conscience while refuting and reversing allegations of bigotry (pp. 115–26). Some opponents defended segregation as rooted in morality and of divine origin, arguing that racial difference derived from natural law (pp. 115–18). Others rejected the idea that equality was a natural feature of humanity, arguing instead that racial difference and racial inequality derived from “nature and natural law” (p. 118).

McClain’s close reading of the debates reveals differences in how legislators and civil rights leaders viewed the function and effect of law. Some proponents took more of a realist stance by claiming that even if federal legislation could not change racist attitudes, it could regulate behavior and prohibit discriminatory conduct (p. 112). Other supporters, however, stressed the educative function of law and pointed to the acceptance of state and local antidiscrimination laws as indicating that the Civil Rights Act could eventually change racist beliefs and attitudes (pp. 112–13). Conversely, some of the Act’s opponents argued that individuals had a right to discriminate and that

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22. McClain focuses primarily on evidence from the debates over Title II of the Act, which prohibits discrimination based on race, among other characteristics, in places of public accommodations. See 42 U.S.C. § 2000a(a).

it was not the government's role to legislate morality (p. 120). Others argued that the Act would exacerbate bigotry and that state, local, and nonlegal solutions would better address racial discrimination (p. 123). These debates over the function and effect of law continued in future controversies over marriage and the scope of civil rights, including interracial marriage.

#### 4. Interracial Marriage

In chapter 6, McClain evaluates the rhetoric of bigotry surrounding *Loving v. Virginia*, the landmark 1967 Supreme Court decision striking down prohibitions on interracial marriage.<sup>23</sup> McClain's compelling analysis uses *Loving* to demonstrate the backward- and forward-looking dimensions of bigotry (p. 128). The analysis also traces recurring ways in which relevant actors invoked the notion of bigotry to frame legal arguments in the controversy.

One example McClain gives of backward-looking bigotry is the similarity between arguments against interfaith marriage and those the Commonwealth of Virginia and its amici raised in defense of the antimiscegenation law challenged in *Loving*. Like the religious and political leaders McClain discusses in chapter 3, the commonwealth argued that its stance was rooted in a reasonable desire to prevent marital problems, avoid harm to children, and preserve religious and ethnic identity and heritage (pp. 130–35). The commonwealth also invoked scientific sources that purported to support those ideas (p. 131). In stressing interests other than bigotry, Virginia and its amici rejected allegations that prejudice motivated their positions (pp. 130–35).

Although the Lovings and their amici did not explicitly use the term “bigotry,” they claimed that racial intolerance motivated Virginia's antimiscegenation law (pp. 135–36). To counter the scientific authority cited by Virginia, the Lovings and their amici referenced updated scientific research discounting the idea that interracial marriage was harmful to spouses and their children (p. 137). They also stressed the immense social harm that the law engendered, including deeming the children of interracial married couples illegitimate, preventing spouses from inheriting from one another, and enabling husbands to desert their families without any consequences (pp. 136–38). The Lovings identified society's racial prejudice, and not interracial marriage itself, as the root cause of any potential harms related to interracial marriage (p. 138).

As McClain discusses, other arguments that the Lovings advanced illustrate the forward-looking dimensions of bigotry. Specifically, the Lovings argued that invalidating Virginia's antimiscegenation law would send an important signal of constitutional and moral progress (p. 136). Consistent with this view, McClain characterizes *Loving* as a symbol of generational moral progress.<sup>24</sup>

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23. Pp. 127–53; 388 U.S. 1 (1967).

24. P. 139. McClain describes the societal shift in framing marriage as a private choice that should be free from governmental interference as one potential explanation for the differing aftermaths of *Loving* and *Brown*. P. 140.



To illustrate this point, McClain looks ahead to the role of *Loving* in litigation challenging Virginia's ban on same-sex marriage some fifty years later in 2014.<sup>25</sup> McClain persuasively traces how, in this subsequent litigation, *Loving* animated ideas of constitutional moral progress and the desire to avoid being on the wrong side of history (p. 141). At the same time, McClain carefully recognizes contested interpretations of *Loving* and uses *Obergefell v. Hodges* to explore this point.<sup>26</sup> Defenders of restrictive marriage laws in *Obergefell* distinguished *Loving*, a rightful denouncement of a relic of slavery, from laws prohibiting same-sex marriage, which they held to be grounded in common sense and children's well-being (p. 148). These competing views of *Loving* set the stage for the next civil rights controversy evaluated in the book: the Court's evolving constitutional approach to lesbian and gay rights and same-sex marriage.

### 5. Lesbian and Gay Rights and Same-Sex Marriage

Chapter 7, perhaps the most ambitious chapter of McClain's book, examines the rhetoric of bigotry and appeals to conscience in the briefing and opinions between the Court's 1986 decision in *Bowers v. Hardwick*<sup>27</sup> and its 2015 decision in *Obergefell*. As McClain's analysis shows, early defenders of laws denying lesbian and gay rights rejected allegations that their positions were rooted in animus or bigotry and emphasized sincere beliefs and moral judgments instead (pp. 156–57). In *Bowers*, the Court infamously upheld the constitutionality of Georgia's sodomy ban.<sup>28</sup> The state argued that the Eleventh Circuit's decision invalidating the law ignored "the traditions and collective conscience of our nation."<sup>29</sup> In reversing the Eleventh Circuit's decision, Justice White's majority opinion in *Bowers* affirmed the state's view of morality as constitutional justification for law, stressing that the law "is constantly based on notions of morality."<sup>30</sup>

The status of morality as a sufficient constitutional justification for law, however, became more uncertain over time. On this point, McClain looks to the briefing and opinions in two key cases. The first is *Romer v. Evans*, the 1996 decision in which the Court held that an amendment to Colorado's constitution that would have prohibited state and local antidiscrimination protections for lesbians, gays, and bisexuals in Colorado violated the Equal Protection Clause.<sup>31</sup> The second is *Lawrence v. Texas*, the 2003 decision in

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25. Pp. 141–47; see *Bostic v. Rainey*, 970 F. Supp. 2d 456, 461 (E.D. Va.), *aff'd sub nom.* *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

26. 576 U.S. 644 (2015).

27. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

28. *Bowers*, 478 U.S. at 196.

29. P. 158; Brief of Petitioner at 25, *Bowers*, 478 U.S. 186 (No. 85-140).

30. *Bowers*, 478 U.S. at 196.

31. 517 U.S. 620, 635–36 (1996).

which the Court overruled *Bowers* and invalidated Texas's "homosexual conduct" law on due process grounds.<sup>32</sup>

Notably, Justice Kennedy wrote the majority opinion in both cases. In *Romer*, Justice Kennedy concluded that "the amendment seems inexplicable by anything but animus toward the class it affects."<sup>33</sup> In so concluding, Justice Kennedy relied on the Court's prior decision in *Department of Agriculture v. Moreno* as support for the illegitimacy of grounding law in the "bare . . . desire to harm a politically unpopular group."<sup>34</sup> In *Lawrence*, however, Justice Kennedy stressed that the criminal law cannot be used to enforce the beliefs of individuals who morally disagree with same-sex sex, but he did so without labelling those beliefs as animus or bigotry.<sup>35</sup>

Justice Scalia, by contrast, dissented in both cases. In *Romer*, Justice Scalia denied the claims of animus leveled in Justice Kennedy's majority opinion and lodged countercharges of bigotry, stating that "[t]he only sort of 'animus' at issue here [is] moral disapproval of homosexual conduct."<sup>36</sup> Justice Scalia did not use explicit language of bigotry in his dissent in *Lawrence* (pp. 162–63). Instead, he emphasized the legitimacy of morality in justifying criminal law and warned that the majority's approach "effectively decrees the end of all morals legislation."<sup>37</sup>

McClain explains that with the declining status of morality as a constitutional justification for law, defenders of laws denying lesbian and gay rights modified their positions to place greater emphasis on other public-policy interests, such as preserving marriage and families (p. 156–57). Such arguments were made by supporters of the Defense of Marriage Act (DOMA), section 3 of which was struck down in the Court's landmark 2013 decision, *United States v. Windsor*.<sup>38</sup> Defenders of DOMA emphasized state interests other than moral disapproval, such as responsible procreation and childrearing (p. 171). Some amici, however, still relied on Justice Scalia's dissents in *Romer* and *Lawrence* to claim that moral disapproval was a legitimate basis for a law (p. 171). On the other side of the controversy, opponents of DOMA drew on Justice Kennedy's majority opinions in *Romer* and *Lawrence* to argue that DOMA's restrictive marriage definition was rooted in animus and moral disapproval (p. 172).

This important chapter of the book also foreshadows the role of rhetoric involving bigotry in conflicts between same-sex marriage and religious-liberty claims (pp. 173–74). The clash between same-sex marriage and religious-liberty claims would play a greater role in Justice Kennedy's majority opinion in

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32. 539 U.S. 558, 578–79 (2003).

33. *Romer*, 517 U.S. at 622.

34. P. 167; *Romer*, 517 U.S. at 634–35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

35. P. 161; *Lawrence*, 539 U.S. at 571.

36. P. 168; *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

37. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

38. 1 U.S.C. § 7 (2012), *invalidated by United States v. Windsor*, 570 U.S. 744 (2013).

*Obergefell*, which recognized a constitutional right for same-sex couples to marry.<sup>39</sup> McClain traces Justice Kennedy's several references to *Loving* in his majority opinion but notes that he did not go so far as to denounce the endorsement of traditional definitions of marriage as comparable to the endorsement of racist ideas (p. 180). Rather, Justice Kennedy struck a different tone, eschewing a rhetoric of bigotry and instead stressing that many people disapprove of same-sex marriage based on "decent and honorable religious or philosophical premises."<sup>40</sup> This language would become critical in post-*Obergefell* conflicts between same-sex marriage and religious-liberty claims.

## 6. Conflicts Between Same-Sex Marriage and Religious Liberty Claims

The conflict between same-sex marriage and religious-liberty claims in public accommodations law is the last civil rights struggle examined in McClain's book (chapter 8). A centerpiece of McClain's analysis is a close reading of the rhetoric of bigotry used by the participants in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>41</sup> The case involved Jack Phillips, a business owner and devout Christian who refused to design and bake a cake for a same-sex couple's wedding celebration.<sup>42</sup> The Colorado Civil Rights Commission (CCRC) found that Phillips violated a Colorado public accommodations law prohibiting businesses from discriminating on the basis of sexual orientation, a finding that the Colorado Court of Appeals affirmed.<sup>43</sup>

McClain's analysis illuminates three key themes that, as described later in this Review, recur in the *Fulton* controversy.<sup>44</sup> First, only some of the briefs on either side explicitly used the rhetoric of bigotry (p. 192). Phillips and his amici argued that the CRCC acted with hostility and animosity toward his religion, pointing to a comment that a commissioner made during a hearing as evidence.<sup>45</sup> They also referred to Phillips's conscience and religious sincerity, at times drawing on language from Justice Kennedy's majority opinion in *Obergefell* to describe Phillips's beliefs as "decent and honorable" (p. 196). McClain describes how this strategy distinguished Phillips from society's typical image of a bigot (p. 196). Sensitive to this point, the respondents and their

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39. 576 U.S. 644, 681 (2015).

40. *Id.* at 672.

41. Pp. 191–209; 138 S. Ct. 1719 (2018).

42. 138 S. Ct. at 1724.

43. *Id.* at 1725–27.

44. *See infra* Part III.

45. P. 194. Specifically, the Commissioner said:

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.

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

amici also refrained from labeling Phillips a bigot or making claims that Phillips's actions were motivated by animus or hostility (p. 199). Instead, they emphasized that the Colorado public accommodation law in dispute focused on conduct—namely, sexual-orientation discrimination (pp. 199–200).

The second important theme involves competing interpretations of how past challenges to landmark civil rights laws compare to current challenges to public accommodation laws affording sexual-orientation protection (p. 192). For instance, Phillips's amici contrasted bigoted underpinnings of past opposition to interracial marriage with Phillips's adherence to traditionally “decent and honorable” views of marriage (p. 196). Conversely, the respondents and their amici stressed the value of learning from past civil rights struggles, noting courts' previous rejection of attempts to justify race and sex discrimination on First Amendment religious-liberty grounds (pp. 201–03).

The third important theme is the participants' agreement on the value of civility, tolerance, and pluralism, as contrasted with their disagreement over what those values require (p. 193). Phillips and his amici argued that ruling against his religious-liberty claim would undermine efforts to “promote tolerance and mutual respect in a pluralistic national community,”<sup>46</sup> whereas the respondents and their amici stressed that civility and tolerance sometimes demand that people be restrained from acting on their beliefs—even sincerely held religious beliefs—in businesses and other places of public accommodation (p. 193).

These themes reappeared during oral argument and in the opinions in *Masterpiece Cakeshop*, leading McClain to conclude that rhetoric matters in how participants approach conflicts between marriage and civil rights law (p. 205). For instance, Justice Kennedy's majority opinion, joined by Chief Justice Roberts and Justices Alito, Breyer, Kagan, and Gorsuch, held that the CRCC violated Phillips's free-exercise rights by failing to consider his religiously motivated claims in a “neutral and respectful” way.<sup>47</sup> As McClain notes, Justice Kennedy's majority opinion did not refer to language of bigotry, animosity, or hostility to describe the stakes for the same-sex couple involved in the case (p. 205). Rather, it only used such language to condemn the actions of CRCC in enforcing Colorado's antidiscrimination law against Phillips (p. 205).

McClain stresses that the reasoning in Justice Kennedy's majority opinion poses an important question for future cases: “How should public officials talk about religion when they consider whether a religiously motivated refusal of service violated civil rights law?” (p. 206). McClain views Justice Kagan's separate concurrence as providing a potential path (p. 205). The Justice posits that although state actors cannot show hostility towards a person's religious

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46. P. 199; Brief of Amici Curiae 34 Legal Scholars in Support of Petitioners at 27, *Masterpiece Cakeshop*, 138 S. Ct. 1718 (No. 16-111), 2017 WL 4005667.

47. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Importantly, the majority opinion in *Masterpiece Cakeshop* did not go so far as to conclude that the CRCC had violated Phillips's free-exercise rights by refusing to grant him an exemption from Colorado's antidiscrimination law. See Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 202 (2018).

views, state law can protect members of social groups from discrimination in receiving goods and services under a general and neutral public accommodations law.<sup>48</sup> However, Justice Thomas's concurring opinion, joined by Justice Gorsuch, demonstrates that countercharges of bigotry are likely to persist from public accommodation law opponents (p. 208). Justice Thomas's concurrence not only fully embraced Phillips's First Amendment argument but also quoted Chief Justice Roberts's dissent in *Obergefell* that warned against "portray[ing] everyone who does not share" the view that the Constitution protects same-sex couples' right to marry "as bigoted" and unentitled to express a different view.<sup>49</sup> As McClain notes, this was the only time that explicit language of bigotry was used in any of the opinions in *Masterpiece Cakeshop* (p. 208).

### B. *Bigotry's Lessons*

In the book's final chapter, Professor McClain returns to the four puzzles about bigotry and sketches several valuable lessons that emerge from her analysis. Revisiting the first puzzle (Does a charge of bigotry concern the motivation behind a belief or an act? (p. 6)), McClain warns that defining bigotry solely in terms of hateful motives or acts overlooks the historical importance of religious intolerance as a form of bigotry (p. 212). For this reason, McClain argues that the tendency to frame current struggles over marriage and the scope of civil rights in terms of "bigotry versus conscience" misses the mark (p. 213). McClain contends that the legal question in these struggles should focus on whether discrimination exists and causes harm, not whether sincere beliefs or appeals to conscience deserve moral condemnation as bigotry (p. 213).

McClain emphasizes the importance of time regarding the second puzzle (Does the content of a belief, as opposed to its motivation, invite the label of bigotry? (p. 8)). McClain underscores that bigoted beliefs are generally viewed as unreasonable in society, whereas denials of bigotry commonly invoke the reasonableness of the underlying beliefs (p. 213). What is considered reasonable or unreasonable in society, however, changes over time, especially in the wake of social movements. Accordingly, what is or is not considered bigoted also changes over time (p. 213).

Revisiting the third puzzle (How does what is considered bigotry change with what is considered unreasonable or unacceptable? (p. 9)), McClain emphasizes both the backward-looking and forward-looking dimensions of bigotry (p. 215). Thinking backward, McClain identifies two lessons: First, it may not be possible to condemn beliefs or practices as bigotry before society has already moved significantly away from them (p. 215). Second, while repudiating bigotry appears to be a shared value, the United States has not always lived

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48. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (Kagan, J., concurring).

49. *Id.* at 1747 (Thomas, J., dissenting) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting)).

up to that ideal (p. 215). McClain concludes that the forward-looking dimension of bigotry is relevant when people warn about the flaring up of old forms of bigotry or draw analogies from old forms of bigotry to identify new forms (p. 215). McClain stresses that learning from the past is relevant to both, but that people do not always agree on what lessons to take from history (p. 215).

Finally, McClain offers some lessons on the fourth puzzle (Does the label of “bigot” suggest a type of character with distinct psychological or moral traits? (p. 11)). McClain emphasizes that describing bigotry in terms of something that is in everyone’s brain can deflate the strong negative moral judgment tied to being called a bigot (p. 216). This may prove challenging, as even discussion of implicit bias can be associated with charges of bigotry in today’s polarized society (p. 217).

## II. LGBTQ CHILD WELFARE AS CIVIL RIGHTS

*Who’s the Bigot?* has much to offer for understanding the rhetoric of bigotry in current conflicts over religious liberty claims and same-sex marriage in the child welfare space. But we must first understand the landscape of LGBTQ child welfare as one of civil rights. Although the public child welfare system has existed for over a century,<sup>50</sup> scholars have not historically approached problems in child welfare as civil rights issues.<sup>51</sup> In the past two decades, however, an increasing number of scholars have turned to civil rights discourse to frame child welfare problems, both in LGBTQ and non-LGBTQ contexts.<sup>52</sup>

Looking back to history is instructive for understanding the conflict between religious liberty claims and LGBTQ equality in the child welfare space as a civil rights issue. Until the early 1970s, almost every state criminalized same-sex sex,<sup>53</sup> and the dominant view in the mental health profession stigmatized homosexuality as a mental disease.<sup>54</sup> These attitudes made it virtually impossible for lesbians or gay men to openly foster or adopt.<sup>55</sup> In family courts, judges embraced stereotypes of lesbian and gay adults as sexual predators and threats to children in order to deem them unfit parents; they often

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50. Cf. James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 805 (2009) (“Throughout the twentieth century, the federal government played an expanding role in child welfare.”).

51. Appell, *supra* note 19, at 759; Roberts, *supra* note 18, at 172.

52. See, e.g., Appell, *supra* note 18, at 141; Roberts, *supra* note 18, at 182; Woods, *supra* note 18, at 2418–19.

53. See WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 136–94 (2008) (discussing sodomy-law reform starting in the 1960s).

54. RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 15–40 (1981).

55. See David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 535 (1999) (noting that issues of lesbian and gay adoption and foster parenting first surfaced in the 1970s).

relied on sodomy statutes and stigmatizing notions of mental illness to rationalize those views.<sup>56</sup> LGBTQ youth had to hide their LGBTQ identities to receive help from the child welfare system and were often kicked out of child welfare placements upon discovery of their LGBTQ identities.<sup>57</sup>

In the early 1970s, nonprofit organizations and public child welfare agencies started to place LGBTQ teenagers who had no other viable placement options with openly lesbian and gay foster parents.<sup>58</sup> Two currents facilitated these new arrangements. First, during the 1960s and 1970s, the number of youth in foster care nearly doubled to almost 500,000.<sup>59</sup> Overburdened child welfare agencies started to seek different solutions to address the foster-care crisis, especially for youth like LGBTQ teenagers who had a much more difficult time finding out-of-home placement in foster care.<sup>60</sup> Second, a wave of states in the early 1970s decriminalized private consensual same-sex sex, and the view of homosexuality as a mental disease began to lose force, as illustrated by the American Psychiatric Association's removal of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders in 1973.<sup>61</sup> These shifts created room for mental-health professionals to conceive of lesbians and gays as suitable foster and adoptive parents rather than as sexual predators.<sup>62</sup> Looking ahead, these new arrangements paved the way for child welfare agencies to expand placements with lesbian and gay parents to include non-LGBTQ youth.<sup>63</sup>

In the 1980s and 1990s, however, public backlash and media attention descended on new foster arrangements that welcomed lesbian and gay parents, engendering a wave of legal restrictions on lesbian and gay foster and adoptive

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56. Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 831 (2001) ("The assumption that a gay parent is committing the crime of sodomy motivates many decisions concerning custody."); see also Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976) (discussing legal challenges surrounding custody for lesbian mothers).

57. Woods, *supra* note 18, at 2369.

58. Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the United States*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 153, 157 (Robert Wintemute & Mads Andenæs eds., 2001) (describing how the National Gay Task Force worked with New York City child welfare agencies to develop a network of gay foster homes for homeless gay teenagers).

59. Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1488 (1999).

60. Woods, *supra* note 18, at 2373 & n.175.

61. BAYER, *supra* note 54, at 40 (discussing the repeal of sexual psychopath laws); see ESKRIDGE, *supra* note 53, at 136–94.

62. Illustrating this point, the American Psychological Association adopted a resolution in 1976 that took the position that sexual orientation should not be the "sole or primary variable considered in custody or placement cases." John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1976: Minutes of the Annual Meeting of the Council of Representatives*, 32 AM. PSYCH. 408, 432 (1977).

63. Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363, 378 (2016).

parenting.<sup>64</sup> For instance, in 1985 the Massachusetts Department of Social Services adopted a new policy that significantly limited the ability of lesbians and gay men to become foster or adoptive parents.<sup>65</sup> Two years later, New Hampshire became the first state to pass a statute banning such possibilities.<sup>66</sup> As these restrictions grew, other states took the opposite approach by adopting the first antidiscrimination policies in child welfare that included protection based on sexual orientation.<sup>67</sup> In 1982, New York issued the first statewide agency policy that prohibited denying prospective parents adoption solely on the basis of their sexual orientation.<sup>68</sup> Soon after, New Jersey, New Mexico, and Vermont adopted similar policies.<sup>69</sup> These protections increased possibilities for LGBTQ teenagers to find supportive out-of-home placements in the child welfare system.<sup>70</sup>

In the early 2000s, comprehensive child welfare reform emerged as a priority among national LGBTQ advocacy organizations.<sup>71</sup> Calls for child welfare reform went beyond sexual-orientation matching for difficult-to-place LGBTQ teenagers to tackle the systemic and cultural obstacles that LGBTQ youth commonly experienced in child welfare settings.<sup>72</sup> As a result of these mobilization efforts, over twenty-five states adopted new measures that provided antidiscrimination protections to youth in the child welfare system based on sexual orientation or gender identity between 2003 and 2015.<sup>73</sup>

Religious exemption laws in LGBTQ child welfare operate against the backdrop of these growing antidiscrimination measures. Currently, eleven states have broad religious exemption laws involving LGBTQ child welfare, and more states could introduce new measures.<sup>74</sup> These laws “allow the religious or moral views of key actors in the child welfare system (for example,

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64. CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 148–50 (2012); Woods, *supra* note 18, at 2378–79.

65. WENDELL RICKETTS, *LESBIANS AND GAY MEN AS FOSTER PARENTS* 42–50 (photo. reprt. 2008) (1991).

66. Act of May 27, 1987, ch. 343, 1987 N.H. Laws 379 (amended 1999); Chambers & Polikoff, *supra* note 55, at 537.

67. Woods, *supra* note 18, at 2383.

68. N.Y. DEP’T OF SOC. SERVS., *STANDARD OF PRACTICE FOR ADOPTION SERVICES* 15 (1982), <https://ocfs.ny.gov/main/policies/external/1982/ADMs/1982%20ADM-50%20part%201%20Standards%20of%20Practice%20for%20Adoption%20Services.pdf> [perma.cc/9RLG-G943].

69. See Beverly A. Uhl, Note, *A New Issue in Foster Parenting—Gays*, 25 J. FAM. L. 577, 581 & n.33 (1986).

70. Woods, *supra* note 18, at 2384.

71. Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 416–18 (2006).

72. Woods, *supra* note 18, at 2385–86.

73. *Id.* at 2390 n.311.

74. ALA. CODE § 26-10D-5 (LexisNexis Supp. 2020); KAN. STAT. ANN. § 60-5322 (Supp. 2019); MICH. COMP. LAWS ANN. § 722.124e(2)–(3) (2019); MISS. CODE ANN. § 11-62-5(2)–(3) (2019); N.D. CENT. CODE § 50-12-07.1 (2018); OKLA. STAT. ANN. tit. 10A, § 1-8-112 (Supp. 2021); Act of June 29, 2018, No. 264, § 38.29, 2018 S.C. Acts 1905, 2265; S.D. CODIFIED LAWS



private child welfare providers, caseworkers, or foster or adoptive parents) to guide the nature of the child welfare services they provide, even if their views denounce LGBTQ people.”<sup>75</sup>

The push for these broad exemptions primarily emerged after the Supreme Court’s 2015 decision in *Obergefell* recognizing a constitutional right of same-sex couples to marry.<sup>76</sup> In fact, nine of the eleven states that currently have broad religious exemption laws involving LGBTQ child welfare passed those laws after *Obergefell*.<sup>77</sup> Viewing this push through the historical lens above, however, reveals deeper civil rights consequences of granting broad religious exemptions in LGBTQ child welfare. As I argue in prior work, these exemptions function as “a vehicle for long-enduring anxieties about sexual ‘deviance’” regarding individuals (both adults and youth) “who veer from traditional norms of sex, sexuality, and gender.”<sup>78</sup> These broad exemptions also “sustain and propagate sexual deviance concepts by substituting and equating the religious or moral views of child welfare actors with the best interests of youth regarding appropriate sexual orientation and gender identity development and expression.”<sup>79</sup>

The relatively recent and growing body of research on LGBTQ foster youth illustrates these deeper civil rights consequences. For instance, research shows that LGBTQ youth, especially LGBTQ youth of color, are overrepresented in the foster care system.<sup>80</sup> LGBTQ youth frequently enter foster care as a result of family rejection related to their LGBTQ identities.<sup>81</sup> After entering the child welfare system, LGBTQ youth are also at greater risk for experiencing instability and mistreatment for reasons related to their LGBTQ

§ 26-6-38 (Supp. 2020); TENN. CODE ANN. § 36-1-147 (Supp. 2020); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019); VA. CODE ANN. § 63.2-1709.3 (2017).

75. Woods, *supra* note 18, at 2347.

76. *See id.* at 2392; *Obergefell v. Hodges*, 576 U.S. 644 (2015).

77. *See supra* note 74.

78. Woods, *supra* note 18, at 2354.

79. *Id.* at 2350.

80. Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS art. e20174211, at 4 (2019), <https://doi.org/10.1542/peds.2017-4211> (“[T]he proportion of LGBTQ youth in foster care and unstable housing is 2.3 to 2.7 times larger than would be expected from estimates of LGBTQ youth in nationally representative adolescent samples.”); Jessica N. Fish, Laura Baams, Armeda Stevenson Wojciak & Stephen T. Russell, *Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-of-Home Placement? Findings from Nationally Representative Data*, 89 CHILD ABUSE & NEGLECT 203 (2019); BIANCA D.M. WILSON, KHUSH COOPER, ANGELIKI KASTANIS & SHEILA NEZHAD, WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 6, 22 (2014), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf) [perma.cc/72QP-R8E7] (reporting findings that 19.1 percent of youth in the Los Angeles County foster system identified as LGBTQ and that over 80 percent of those foster youth identified as youth of color).

81. Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R.L. REV. 307, 322 (2014) (“Family conflict over a youth’s sexual orientation and gender identity is a significant element that leads to . . . the need to enter the child welfare system.”).

identities.<sup>82</sup> These common failures lead many LGBTQ youth to disengage with the child welfare system entirely, thereby fueling an epidemic of LGBTQ youth homelessness in the United States.<sup>83</sup>

### III. THE RHETORIC OF BIGOTRY IN *FULTON*

McClain's framework offers insight into the role that the rhetoric of bigotry plays when conflicts over religious-liberty claims and LGBTQ child welfare are approached from a civil rights perspective. As this Part discusses, many of the patterns that McClain identifies in the book recur in *Fulton v. City of Philadelphia*—the latest controversy over marriage and the scope of civil rights before the Supreme Court.<sup>84</sup>

For context, it is instructive to summarize the facts and holding of the *Fulton* case. The issue in *Fulton* focused on whether the government violates the First Amendment by denying private, faith-based agencies an exemption from compliance with antidiscrimination laws when they contract with the government and receive taxpayer funds to provide child welfare services.<sup>85</sup> The underlying dispute involved Catholic Social Services (CSS), a private faith-based organization that was one of thirty organizations that contracted with the City of Philadelphia to provide foster care and adoption services.<sup>86</sup> CSS refused to work with same-sex couples seeking to become foster parents, in violation of a City of Philadelphia nondiscrimination ordinance prohibiting sexual orientation discrimination in public accommodations.<sup>87</sup> After CSS refused to comply with the city's public accommodation law, the city decided not to renew CSS's contract.<sup>88</sup> CSS then filed suit and sought a temporary restraining order and preliminary injunction requiring the city to continue providing foster care referrals to CSS without requiring the agency to certify same-sex couples.<sup>89</sup>

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82. Adam McCormick, Kathryn Schmidt & Samuel R. Terrazas, *Foster Family Acceptance: Understanding the Role of Foster Family Acceptance in the Lives of LGBTQ Youth*, 61 CHILD. & YOUTH SERVS. REV. 69, 73–74 (2016) (listing the challenges faced by LGBTQ youth in the child welfare system); see also Woods, *supra* note 18, at 2405–06.

83. See LES WHITBECK, MELISSA WELCH LAZORITZ, DEVAN CRAWFORD & DANE HAUTALA, U.S. DEP'T OF HEALTH & HUM. SERVS., DATA COLLECTION STUDY FINAL REPORT 9, 11 (2016), [https://www.acf.hhs.gov/sites/default/files/documents/fysb/data\\_collection\\_study\\_final\\_report\\_street\\_outreach\\_program.pdf](https://www.acf.hhs.gov/sites/default/files/documents/fysb/data_collection_study_final_report_street_outreach_program.pdf) [perma.cc/MH56-6TEB] (“The percentage of youth experiencing homelessness who self-identify as LGBT is reported on average as between 20 to 40 percent, a proportion that is quite high compared to the 3 to 5 percent of the nation's general population who self-identify as LGBT.”).

84. See *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

85. *Fulton*, 922 F.3d at 153–54.

86. *Id.* at 147–51.

87. *Id.* at 148.

88. *Id.* at 150.

89. *Id.* at 151.

The district court ruled in favor of the City of Philadelphia, and the Third Circuit affirmed.<sup>90</sup> In a 9–0 decision, the Supreme Court ruled in favor of CSS.<sup>91</sup> Chief Justice Roberts, writing for the Court, held that Philadelphia violated the Free Exercise Clause of the First Amendment by refusing to contract with CSS for foster-care services unless CSS agreed to certify same-sex couples as foster parents.<sup>92</sup> Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett joined the Court’s opinion.<sup>93</sup> Justices Barrett, Alito, and Gorsuch each wrote separate concurring opinions.<sup>94</sup>

Notably, the participants’ arguments in *Fulton* align perfectly with the three key themes that McClain’s analysis exposes about the rhetoric of bigotry in *Masterpiece Cakeshop*.<sup>95</sup> First, similar to what McClain’s analysis revealed about the briefing in the *Masterpiece Cakeshop* case, very few of the briefs submitted to the Court on either side in *Fulton* explicitly used the rhetoric of bigotry.<sup>96</sup> More commonly, CSS and their amici argued that the City of Philadelphia acted with hostility or animosity towards CSS’s religion.<sup>97</sup> They also refer to CSS’s conscience and religious sincerity, at times invoking language from Justice Kennedy’s majority opinion in *Obergefell* to describe CSS’s beliefs as “decent and honorable,” which also appeared in the briefing for *Masterpiece Cakeshop*.<sup>98</sup> As for the other side, the respondents and their amici denied claims that the city acted with animus or hostility towards CSS’s religion,<sup>99</sup> instead emphasizing that the city’s public accommodations law prohibits discriminatory conduct, not speech or religion.<sup>100</sup> They also refrained from using the rhetoric of bigotry to describe CSS’s policy.

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90. *Id.* at 146–47.

91. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1873 (2021).

92. *Id.* at 1868.

93. *Id.* at 1873.

94. *Id.* at 1882 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring in the judgment); *id.* at 1926 (Gorsuch, J., concurring in the judgment).

95. *See supra* Section I.A.6.

96. A Westlaw search using the term “bigot!” in the briefs submitted to the Court in *Fulton* reveals that only the petitioners’ brief and five of the seventy-nine amicus briefs explicitly referenced the rhetoric of bigotry (for instance, “bigotry,” “bigoted,” or “bigot”).

97. A Westlaw search using the term “hostil!” or “anim!” in the briefs submitted to the Court in *Fulton* reveals that the petitioners and eight of the petitioners’ amici argued that the city acted with hostility or animosity towards CSS.

98. A Westlaw search using the term “decent and honorable” reveals that the petitioners and five of the petitioners’ amici quoted this language in *Obergefell* to describe CSS’s conscience and religious sincerity.

99. A Westlaw search using the term “hostil!” or “anim!” in the briefs submitted to the Court in *Fulton* reveals that the city respondents, the intervenor-respondents, and seven of the respondents’ amici denied allegations that the city acted with hostility or animosity towards CSS.

100. *See, e.g.*, Brief for City Respondents at 13, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 4819956 (“The non-discrimination requirement . . . is directed at conduct, not speech.”); Brief for Lee C. Bollinger et al. as *Amici Curiae* in Support of Respondents at 12 n.4, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5020362 (“[A] ban on discrimination has been viewed by the Court as a prohibition on conduct, and not on speech.”).

Second, the participants in the *Fulton* controversy advanced competing interpretations of the relevance of historical challenges to landmark civil rights laws that offer protection based on race, ethnicity, and sex. For instance, the parties and their amici disagreed over whether the Court's prior decision in *Newman v. Piggie Park Enterprises* was analogous to or controlling of the case.<sup>101</sup> *Piggie Park* rejected a business owner's free-exercise challenge to Title II of the Civil Rights Act of 1964 after patrons filed a class action against the business owner for refusing to serve Black customers based on his religious beliefs opposing racial integration.<sup>102</sup> In its briefing, CSS stressed that "race discrimination has a unique history,"<sup>103</sup> and their amici rejected the idea that the government interests involved in prohibiting race discrimination are of the same significance as sexual orientation.<sup>104</sup> Conversely, the respondents and their amici emphasized the similarities between the race and sex discrimination rebuked in past civil rights cases, such as *Piggie Park*, and the sexual orientation discrimination at issue in *Fulton*.<sup>105</sup>

Third, similar to what McClain traces in the briefing in *Masterpiece Cakeshop*, the participants in *Fulton* emphasized values of civility, tolerance, and pluralism but disagreed over what those values require. Over a dozen briefs filed on behalf of CSS mention the importance of civility, tolerance, or pluralism with respect to recognizing CSS's free-exercise claim.<sup>106</sup> On the

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101. 390 U.S. 400 (1968). A Westlaw search using the term "Piggie Park" revealed that the petitioners' brief, the brief for the intervenor-respondents, and eight of the respondents' amici briefs cited to *Piggie Park*.

102. *Piggie Park*, 390 U.S. at 402 n.5.

103. Reply Brief for Petitioners at 22, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5578834.

104. See Brief *Amici Curiae* of Concerned Women for Am. et al. Supporting Petitioners at 17-19, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3065263; Brief for Nebraska et al. as *Amici Curiae* in Support of Petitioners at 33-34, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3078490; Brief of *Amici Curiae* the Inst. for Faith & Fam. & the Int'l Conf. of Evangelical Chaplain Endorsers in Support of Petitioners at 11, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3001610.

105. See Brief for Intervenor-Respondents at 45-46, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 4820032; Brief of GLBTQ Legal Advocs. & Defs. et al. as *Amici Curiae* in Support of Respondents at 24, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5027317; Brief of the Leadership Conf. on Civ. & Hum. Rts. et al. as *Amici Curiae* in Support of Respondents at 20-21, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5044629; Brief for *Amici Curiae* President of the House of Deputies of the Episcopal Church et al. in Support of Respondents and Affirmance at 31, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5076843; Brief of *Amici Curiae* Scholars of the Const. Rts. & Ints. of Child. in Support of Respondents at 20-21, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5027315; Brief *Amici Curiae* of Miguel H. Diaz et al. in Support of Respondents at 9-13, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5044725; Brief of *Amici Curiae* Legal Scholars in Support of Equal. in Support of Respondents at 28-32, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 4939184; Brief of Amicus Curiae Lawrence G. Sager Supporting Respondents at 9-10, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5027321.

106. A Westlaw search using the algorithm (civility OR toleran! OR plural OR pluralism OR pluralistic) in the briefs submitted to the Court in *Fulton*, and then searching for those terms in each of the results, reveals that the reply brief for petitioners and sixteen of petitioners' amici briefs referred to terms like civility, tolerance, or pluralism.

other hand, several of the respondents' amici reject the notion that enforcing the city's public accommodations law threatens these values. If anything, they argue, it promotes them.<sup>107</sup>

These rhetorical strategies reappeared during the oral argument in *Fulton*.<sup>108</sup> None of the advocates or the justices explicitly used the rhetoric of bigotry.<sup>109</sup> Justice Alito, however, asked pointed questions to the city respondents' counsel about whether the city acted with hostility or animosity towards CSS's religion.<sup>110</sup> The Solicitor General's Office, arguing as an amicus in support of CSS and the other petitioners, referred to CSS's religious sincerity several times<sup>111</sup> and also invoked Justice Kennedy's "decent and honorable" language.<sup>112</sup> CSS's counsel and the Solicitor General's Office appealed to values of tolerance and pluralism at multiple points during oral argument.<sup>113</sup>

One of the most pronounced issues during oral argument centered on analogies to interracial marriage and race discrimination more generally. Five of the justices (Justices Barrett, Breyer, Alito, Sotomayor, and Kagan) asked questions on the topic.<sup>114</sup> The exchanges lend further support to McClain's claim that people do not always agree on the lessons of the past when drawing analogies to old forms of bigotry in order to identify new forms (p. 215). Justice Barrett, for instance, asked CSS's counsel whether deciding the case in its favor would mean that faith-based agencies would be entitled to an exemption if they refused to certify interracial married couples.<sup>115</sup> In response, CSS's counsel referred to *Loving* and distinguished the government's compelling interest in eradicating racial discrimination from the case at hand.<sup>116</sup>

The Solicitor General's Office made the same argument in response to Justice Breyer's question about interracial marriage, emphasizing "how race is unique in this country's constitutional history."<sup>117</sup> It also agreed with Justice Alito's characterization that the Court in *Obergefell* said that there were "honorable and respectable" reasons for opposing same-sex marriage and that the

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107. A Westlaw search using the algorithm (civility OR toleran! OR plural OR pluralism OR pluralistic) in the briefs submitted to the Court in *Fulton*, followed by a search for those terms in each of the results, reveals that the reply brief for petitioners and sixteen of petitioners' amici briefs referred to terms like civility, tolerance, or pluralism.

108. Linda McClain, *The Fulton v. City of Philadelphia Oral Argument: Interracial Marriage as a Constitutional Lodestar—or Third Rail?—in Reasoning about Religiously-Motivated Discrimination*, BALKINIZATION (Nov. 17, 2020), <https://balkin.blogspot.com/2020/11/the-fulton-v-city-of-philadelphia-oral.html> [perma.cc/K9Q9-TH4B].

109. Transcript of Oral Argument, *supra* note 11.

110. *See id.* at 68–70.

111. *Id.* at 34, 40, 44.

112. *Id.* at 57.

113. *Id.* at 33, 40, 55, 57 (tolerance); 5–6, 33, 40, 118 (pluralism).

114. *Id.* at 31 (Justice Barrett); *id.* at 38–39 (Justice Breyer); *id.* at 39 (Justice Alito); *id.* at 42 (Justice Sotomayor); *id.* at 47–48 (Justice Kagan).

115. *Id.* at 31.

116. *Id.* at 31–32.

117. *Id.* at 39.

Court “didn’t say . . . and never would have said that” about interracial marriage.<sup>118</sup> Soon after, Justice Sotomayor appeared to challenge the idea that the government’s compelling interest in eradicating race discrimination is exceptional and could not apply to other protected classes that are vulnerable to discrimination.<sup>119</sup> The Solicitor General’s Office again responded that the government’s interest in addressing discrimination was different in the sexual-orientation context because of CSS’s sincere religious objection to same-sex marriage.<sup>120</sup>

Although these key themes about bigotry were prominent in the briefs and oral argument, they were not a focus of Chief Justice Roberts’ majority opinion in *Fulton*. Deciding the case on narrower terms, the majority concentrated on a provision in the city’s contract with CSS that incorporated a system of individual exemptions at the “sole discretion” of the Commissioner.<sup>121</sup> According to the majority, this provision rendered the nondiscrimination requirement in the city’s contract with CSS not generally applicable, triggering strict scrutiny.<sup>122</sup> The majority concluded that the city could not offer a compelling reason why it could deny CSS an exemption while granting it to others, in violation of the Free Exercise Clause.<sup>123</sup>

Key themes about bigotry, however, do appear in Justice Alito’s lengthy concurrence.<sup>124</sup> In his concurrence, Justice Alito urged a far broader ruling that would have overruled the Court’s 1990 decision in *Employment Division v. Smith*<sup>125</sup> to afford greater protection for religion against government regulation and interference under the Free Exercise Clause.<sup>126</sup> After devoting dozens of pages to explaining why *Smith* should be overruled, Justice Alito returned to the facts of *Fulton* and stressed important themes about bigotry that were focal points in his questioning during oral argument and remarks at the Federalist Society’s 2020 convention.<sup>127</sup> Specifically, Justice Alito appealed to the value of “an open, pluralistic, self-governing society” to stress that the fact that many would find opposition to same-sex marriage “not only objectionable but hurtful” does not justify curtailing First Amendment rights.<sup>128</sup> Distancing the issues at stake in *Fulton* from past civil rights challenges, Justice Alito also emphasized that “lumping those who hold traditional beliefs about

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118. *Id.* at 39–40.

119. *Id.* at 42.

120. *Id.* at 44.

121. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

122. *Id.*

123. *Id.* at 1882.

124. *Id.* at 1883 (Alito, J., concurring in the judgment).

125. 494 U.S. 872 (1990).

126. *Fulton*, 141 S. Ct. at 1883.

127. *Id.* at 1924. Notably, these themes also appeared in Justice Alito’s dissent in *Obergefell v. Hodges*. 576 U.S. 644, 736, 741–42 (2015) (Alito, J., dissenting).

128. *Fulton*, 141 S. Ct. at 1924.

marriage together with racial bigots is insulting to those who retain such beliefs.”<sup>129</sup> In addition, Justice Alito quoted the “decent and honorable” language in Justice Kennedy’s majority opinion in *Obergefell* to underscore that the Court had committed itself to “refusing to equate traditional beliefs about marriage . . . with racism.”<sup>130</sup>

*Fulton* ultimately left many questions unanswered about the struggle over marriage and the scope of civil rights, both in the context of LGBTQ child welfare and antidiscrimination protection for LGBTQ people more broadly. The arguments in the *Fulton* case, however, are instructive for legal battles ahead and illustrate several key points McClain makes about the rhetoric of bigotry in *Who’s the Bigot?* As McClain describes, a key lesson that readers should take away from the four puzzles about bigotry articulated early in the book is that in conflicts over marriage and the scope of civil rights, the legal question should focus on whether discrimination exists and causes harm, not on whether sincere religious beliefs or appeals to conscience deserve moral condemnation as bigotry (p. 213).

The differences in how the opposing sides in the *Fulton* controversy acknowledge LGBTQ foster youth illuminate the high stakes of this key lesson for LGBTQ child welfare. In the briefing for the CSS petitioners and their amici, LGBTQ youth are very rarely discussed and are only mentioned when characterizing the city respondent’s arguments.<sup>131</sup> LGBTQ foster youth, however, are a much greater focal point in the briefing for the city respondents and their amici. In addition to the city respondent’s brief, almost one-third of the respondent’s amici’s briefs recognize, and discuss to various degrees, how granting broad religious exemptions in the child welfare domain stigmatizes and harms LGBTQ youth.<sup>132</sup> McClain’s important work demonstrates that framing the legal question in terms of harm rather than relief centers the experiences of LGBTQ foster youth in conflicts over marriage and the scope of civil rights that directly affect them.

#### CONCLUSION

McClain’s insightful book builds a persuasive case for why the legal inquiry in struggles over marriage and civil rights should not narrowly focus on whether religious sincerity or appeals to conscience deserve moral condemnation. The book also provides a convincing account for why rhetoric matters in civil rights disputes, particularly in polarized times like the current moment. In sum, *Who’s the Bigot?* makes a meaningful contribution to the literature at the intersection of family law and civil rights.

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129. *Id.* at 1925.

130. *Id.* (quoting *Obergefell*, 576 U.S. at 672).

131. For a comprehensive analysis of different ways that ideas involving “harm to children” are discussed in the *Fulton* briefs, see Jordan Blair Woods, *Framing Harm to Children in the Debate over Religious Exemptions in Child Welfare: Lessons from Fulton*, 60 FAM. CT. REV. 82 (2022).

132. *Id.*