COMMENTS

THE ETIQUETTE OF ANIMUS

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There is a difference between deciding how to talk about a problem and sorting out the principles for resolving it. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] the Supreme Court did the former, but not enough of the latter. The case presented a legal conflict between LGBT rights and religious liberty. But the Court ducked central questions raised by that conflict. Rather than sorting out the principles for determining whether religious liberty authorizes discrimination against gays and lesbians in the marketplace, the Court focused on whether state officials treated religious objections with the proper respect and consideration. The Court turned a matter of constitutional principle into one of adjudicative etiquette.

Masterpiece was the first wedding-vendor case taken up by the Supreme Court. All sorts of businesses in the wedding industry have refused on religious grounds to serve gays and lesbians as they celebrate their marriages. Bakers, photographers, florists, graphic designers, videographers, and the owners of wedding venues have attempted to block the application of state civil rights laws that prohibit them from discriminating on the basis of sexual orientation.[2] They argue that public

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

[2] *See, e.g.*, Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1099–100 (D. Minn. 2017) (videography); 303 Creative LLC v. Elenis, No. 16-CV-02372, slip op. at 3–5 (D. Colo. Sept. 1, 2017) (graphic design); Country Mill Farms, LLC v. City of East Lansing, 280 F. Supp. 3d 1029, 1038 (W.D. Mich. 2017) (venue); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 432–33 (Ariz. Ct. App. 2018) (calligraphy); Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013) (photography); Gifford v. McCarthy, 137 A.D.3d 30, 33–34 (N.Y. App. Div. 2016) (venue); State v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017) (floristry), *vacated and remanded*, 138 S. Ct. 2671 (2018); Wathen v. Walder Vacuflo, Inc., No. 11-0703C, at 10–11 (Ill. Human Rights Comm'n Mar. 22, 2016) (venue); Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008, at 5

accommodation laws violate their freedom of speech by compelling them to express approval of same-sex marriages. And they claim their religious liberty is burdened when the state forces them to be complicit in celebrating relationships to which they are sincerely and conscientiously opposed.[3]

The wedding-vendor cases raise many questions about the scope of civil rights laws and the limits of First Amendment rights, especially as applied to for-profit businesses.[4] But in *Masterpiece*, the Supreme Court avoided the main conflict between LGBT equality and religious liberty. Instead, it found that the Colorado Civil Rights Commission had expressed religious animosity in determining that Jack Phillips, a Christian baker, had violated state civil rights law by refusing to make a cake for Charlie Craig and David Mullins, a gay couple celebrating their wedding. The Court held that because the state failed to provide "neutral and respectful consideration"[5] of Phillips's claim for a religious exemption, it violated his right to free exercise under the First Amendment.[6]

Masterpiece is a heavily fact-bound case about religious animus. The case follows in a line of others that prohibit public officials from acting on the basis of prejudice, hatred, or the "bare . . . desire to harm" others.[7] These animus cases represent, however haltingly or incompletely, a basic principle of constitutional law, namely, that officials act illegitimately when their conduct is based on wrongful intentions.[8]

(N.J. Dep't of Law & Pub. Safety Dec. 29, 2008) (venue); *In re* Klein, 34 BOLI 102, 105 (Or. Bureau of Labor & Indus. 2015) (bakery).

[3] *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 115–41 (2017); Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 62–63 (2018); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2560–65 (2015); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 142–49 (2015).

[4] The conflict between religious freedom and LGBT rights has generated an extensive literature. *See, e.g.*, RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., forthcoming 2018) [hereinafter RELIGIOUS FREEDOM]; SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock et al. eds., 2008); *see also* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 622 n.15 (2015) (collecting popular and academic sources).

[5] *Masterpiece*, 138 S. Ct. at 1729.

[6] *See id.* at 1731–32.

[7] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985) (citing *Moreno* for the proposition that "some objectives — such as 'a bare . . . desire to harm a politically unpopular group' — are not legitimate state interests" (citation omitted)); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (same); United States v. Windsor, 570 U.S. 744, 770 (2013) (same).

[8] *See* Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* NOMOS LXI: POLITICAL LEGITIMACY (Melissa Schwartzberg ed., forthcoming 2019), https://ssrn.com/abstract=3159393 [https://perma.cc/CJF4-KYWS]. A classic work of constitutional

What counts as wrongful may depend on the substantive content of various constitutional provisions, and under the Free Exercise Clause, acts motivated by religious animus are, at least as a prima facie matter, impermissible.[9]

In *Masterpiece*, however, the Court's reliance on animus doctrine was troubling for several reasons. First, the Court misread the facts to find intentional hostility in the application of civil rights law where none existed. Second, the Court failed to address standard objections to judicial inquiries into public officials' intentions or motivations. These objections can be answered, but by ignoring them, or dealing with them *en passant*, the Court introduced various distortions into the doctrine. Third, by focusing on the state's religious hostility, the Court provided insufficient guidance about the principles governing religious exemptions from antidiscrimination laws. To be sure, the Court rejected more radical lines of argument that would have expanded the scope of exemptions and undermined civil rights laws. But with Justice Kennedy's departure from the Court at the end of this past Term, the status of limiting dicta in *Masterpiece* is, at best, deeply uncertain.

These problems of fact, doctrine, and principle point toward a more profound mistake in *Masterpiece*. In our view, the Court erred by elevating matters of etiquette — the importance of appearing respectful and considerate[10] — over giving a reasoned justification for resolving conflicts between religious liberty and antidiscrimination law. While the Court's rhetoric sounds in religious neutrality and toleration, its reasoning falls short of satisfying a "duty of civility,"[11] which requires providing sufficient justifications for legal decisions. When etiquette takes priority over reason-giving, it loses its normative force and obscures the importance of public justification in maintaining respect for religious beliefs in the public sphere. Finally, it is impossible to ignore the obvious inconsistency between the Court's demand for tolerance and respect in *Masterpiece* and its abdication of that demand in *Trump v. Hawaii*,[12]

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law that makes central the wrongfulness of animus and other prejudicial intentions is JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136–47 (1980).

[9] There is a significant literature exploring the concepts of animus and discriminatory intent across a wide range of constitutional doctrines. *See, e.g.*, WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183; Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 105 VA. L. REV. (forthcoming 2019), https://ssrn.com/abstract=3120413 [https://perma.cc/2JEJ-TZWS]; Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. (forthcoming 2018), https://ssrn.com/abstract=3033169 [https://perma.cc/3KP9-LVVP]; Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018).

[10] *See* Sarah Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 ETHICS 795 (1999); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995).

[11] JOHN RAWLS, POLITICAL LIBERALISM 217 (1993).

[12] 138 S. Ct. 2392 (2018).

which upheld President Trump's travel ban.[13] There are many ironies here, but after the travel ban case, we can find no principled application — no integrity — in the etiquette of animus doctrine.

I. MISTAKING RELIGIOUS ANIMUS

The Supreme Court's decision in *Masterpiece* is closely tethered to the particular facts that the majority found indicative of religious hostility. For that reason, we discuss those facts in some detail, but we turn first to providing some background concerning the significance of religious animus in free exercise doctrine.

A. Religious Neutrality and Animus Doctrine

At the outset, *Masterpiece* was an unlikely free exercise case.[14] Most of the briefing focused on Phillips's claim that requiring him to make a wedding cake for same-sex couples amounted to compelled speech.[15] And, at least in terms of litigation strategy, it made sense for Phillips to rely mainly on free speech doctrine, because the Supreme Court has for decades rejected granting special privileges to religion in the form of exemptions under the Free Exercise Clause.

The Supreme Court has never been enthusiastic about allowing religious exemptions under the First Amendment. Even when the Court purported to apply strict scrutiny to laws with the incidental effect of substantially burdening religion, as it did for nearly thirty years after deciding *Sherbert v. Verner*[16] in the early 1960s, the Court rarely provided religious accommodations[17] and never for businesses challenging the regulation of commercial activities.[18] Eventually, in *Employment*

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[13] *See id.* at 2423.

[14] *See* Ira C. Lupu & Robert W. Tuttle, Response, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*: A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions*, GEO. WASH. L. REV.: ON THE DOCKET (June 7, 2018), https://www.gwlr.org/Masterpiece-cakeshop-a-troublesome-application [https://perma.cc/W6WK-BVBA] (reporting that "most observers believed that the Free Exercise Clause issues would not be crucial to the disposition of the case").

[15] *See* Brief for Petitioners at 16–37, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111); Brief for Respondent Colo. Civil Rights Comm'n at 19–49, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Brief for Respondent].

[16] 374 U.S. 398 (1963).

[17] *See* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 48–52 (2015) (showing that during the *Sherbert* era the Court granted few religious exemptions); James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1414–16 (1992) (same).

[18] *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 436 (2016) ("[F]or many decades before *Smith*, the Court never recognized religious exemptions to generally applicable laws regulating the commercial sphere . . . ."); Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 25 (2014) (noting that, prior to *Hobby Lobby*, "[b]oth before *Employment Division v. Smith* and after [RFRA], even religiously affiliated nonprofit businesses did not win

Division v. Smith,[19] which rejected a free exercise challenge to a state law prohibiting the use of peyote,[20] the Court solidified its resistance to mandatory exemptions by rejecting even the pretense of applying heightened review to "neutral law[s] of general applicability."[21] In *Smith*, writing for the Court, Justice Scalia made clear that an otherwise valid law would not violate the Free Exercise Clause unless it had the "object" of prohibiting religiously motivated conduct.[22]

Thus, to make out a free exercise claim under *Smith*, Phillips had to show that Colorado's civil rights law was not neutral or generally applicable, either on its face or as applied to him. In advancing the latter claim, Phillips relied heavily on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[23] which held that a city council had engaged in religious persecution by passing ordinances designed to prohibit religious practices specific to the Santeria faith.[24] Writing for the Court, Justice Kennedy found that public officials had "disclose[d] animosity to Santeria adherents," which violated the requirement of neutrality.[25] Moreover, far from being generally applicable, the challenged ordinances were so underinclusive that they effectively prohibited only Santeria practices.[26] Having determined that the ordinances were neither neutral nor generally applicable, the Court applied strict scrutiny and voided them as violations of the Free Exercise Clause.[27]

Lukumi stands for a basic constitutional principle, which is that the government may not act on the basis of animosity toward religion.[28] This principle has broad appeal, in part because it expresses a core commitment to equal treatment within free exercise doctrine.[29] The principle also accords with a line of constitutional doctrine that prohibits public officials from acting on the basis of discriminatory intent, and more

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exemptions from employee- and consumer-protective laws, including insurance regulations and antidiscrimination laws").

[19] 494 U.S. 872 (1990).

[20] *Id.* at 890.

[21] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[22] *Id.* at 878.

[23] 508 U.S. 520 (1993).

[24] *Id.* at 523–24.

[25] *Id.* at 542.

[26] *Id.* at 545–46.

[27] *Id.* at 546–47.

[28] *See Masterpiece*, 138 S. Ct. at 1731 (citing *Lukumi*, 508 U.S. at 534, for the proposition that "the government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens").

[29] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 56 (2007); TEBBE, *supra* note 3, at 12.

specifically, from acting on the "bare desire to harm" politically vulnerable groups.[30] Significantly, this line includes the Court's gay rights decisions, written by Justice Kennedy, holding that moral disapproval of same-sex relationships is not a legitimate basis for denying the rights of gays and lesbians.[31]

Phillips's most powerful argument in *Masterpiece* was that the same anti-animus principle that protects gays and lesbians must be applied with equal force to protect religious minorities.[32] But while *Lukumi* provides the major premise for this argument — the principle that laws must be religiously neutral — it also casts doubt on the factual minor premise of *Masterpiece*, which is the claim that Colorado officials acted with religious hostility. In *Lukumi*, the Court invalidated laws that were drafted for the purpose of suppressing religion.[33] Justice Kennedy cited clear and extensive evidence of religious hostility in the statements of public officials.[34] And there the ordinances were "gerrymandered" to apply only to Santeria practices, and not to any other religious or secular conduct.[35] As we argue below, however, none of these conditions held with respect to Colorado's application of its civil rights law in *Masterpiece*.

B. Evidence of Animus

Following *Lukumi*, the *Masterpiece* majority relied on two types of evidence to support its finding that the Colorado Civil Rights Commission acted with religious hostility: public statements made by members of the Commission, and the Commission's disparate treatment of Phillips's religious claims. But a careful review of the evidence shows that the Commission acted with appropriate respect for Phillips's sincere religious beliefs and that its application of civil rights law was consistent with the principle of religious neutrality.

1. Official Statements. — The Court found that in considering Phillips's appeal from an administrative law judge's (ALJ's) ruling against him, two members of the Commission made remarks demonstrating hostility toward his religious views.[36] According to Justice Kennedy, transcripts of public hearings revealed that "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious

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[30] *See* cases cited *supra* note 7; *cf.* Carpenter, *supra* note 9, at 183–84 ("The roots of anti-animus doctrine go even deeper, reaching back to political-process concerns famously articulated . . . in *United States v. Carolene Products* . . . .").

[31] *See* United States v. Windsor, 570 U.S. 744, 770–72 (2013); Lawrence v. Texas, 539 U.S. 558, 572–74 (2003); Romer v. Evans, 517 U.S. 620, 634–35 (1996).

[32] *See* Brief for Petitioners, *supra* note 15, at 41–46.

[33] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

[34] *Id.* at 540–42 (opinion of Kennedy, J.).

[35] *Id.* at 542 (majority opinion).

[36] *Masterpiece*, 138 S. Ct. at 1729.

beliefs and persons are less than fully welcome in Colorado's business community."[37] As evidence for this conclusion, Justice Kennedy pointed to statements made by Commissioner Raju Jairam on May 30, 2014.[38] At one point, Jairam said: "I don't think the act necessarily prevents Mr. Phillips from believing what he wants to believe. And — but if he decides to do business in the state, he's got to follow [the law]."[39] And moments later, he remarked:

> I will also, you know, refer . . . to the comments made by Justice (inaudible) in [*Elane Photography, LLC v. Willock*[40]]. And essentially he was saying that if a businessman wants to do business in the state and he's got an issue with the . . . law's impacting his personal belief system, he needs to look at being able to compromise. And I think it was very well said by that judge.[41]

Justice Kennedy claimed that these statements were ambiguous. The Commissioner might have meant "that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views," or his statements "might be seen as . . . showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced."[42]

But given the context, this ambiguity is entirely manufactured. In his remarks, Jairam was referring to the final paragraphs of Justice Bosson's concurring opinion in *Elane Photography*, a high-profile wedding-vendor case decided unanimously by the New Mexico Supreme Court in 2013, less than a year before the Commission's decision in *Masterpiece*.[43] The court held that Elaine Huguenin and her husband, owners of Elane Photography, impermissibly discriminated when they refused to photograph a lesbian couple's commitment ceremony.[44] In his concurring opinion, Justice Bosson affirmed the sincerity of the Huguenins' religious beliefs and declared that "their religious convictions deserve our respect."[45] Then, in a remarkable closing, he wrote:

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[37] *Id.*

[38] *Id.* It is not clear why Justice Kennedy identified Jairam's statements as reflecting religious hostility, especially given that Phillips did not mention them at any point in the litigation below. *See* Bernard Bell, *A Lemon Cake: Ascribing Religious Motivation in Administrative Adjudications — A Comment on* Masterpiece Cakeshop *(Part II)*, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2018), http://yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-Masterpiece-cakeshop-part-ii [https://perma.cc/V2QS-XNRY]; Marty Lederman, *State "Hostility" to Religion Without Religious Discrimination?: The Unexpected Free Exercise Issue Lurking in* Masterpiece Cakeshop, BALKINIZATION (Dec. 19, 2017), https://balkin.blogspot.com/2017/12/state-hostility-to-religion-without.html [https://perma.cc/MSV9-9APF].

[39] Joint Appendix at 205, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111).

[40] 309 P.3d 53 (N.M. 2013).

[41] Joint Appendix, *supra* note 39, at 207.

[42] *Masterpiece*, 138 S. Ct. at 1729.

[43] *See* Bell, *supra* note 38 (discussing Jairam's reference to Justice Bosson's concurring opinion in *Elane Photography*); Lederman, *supra* note 38 (same).

[44] *Elane Photography*, 309 P.3d at 59, 77.

[45] *Id.* at 78 (Bosson, J., specially concurring).

> At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.
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> In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.[46]

This was the view that Jairam was explicitly channeling in his remarks on May 30, 2014. In light of this context, it is difficult to understand how anyone could read the Commissioner's statement as ambiguous or as "inappropriate and dismissive" of Phillips's free exercise claims.[47] On the contrary, Jairam reached for one of the most eloquent statements made in recent years concerning the respect owed to religious believers who must nevertheless make sacrifices and compromises as they interact with others of different beliefs in the public sphere.[48] It is unfortunate that Justice Kennedy and the majority read in such a negative light the words of a Commissioner who was conscientiously performing his duties in applying civil rights law. A more charitable interpretation was not only available but required.

In attributing religious animus to the Commission, Justice Kennedy pointed to one other statement at a public meeting on July 25, 2014, after the Commission had already adopted the ALJ's decision to deny Phillips's claims. Commissioner Diann Rice stated:

> 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

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[46] *Id.* at 79–80.

[47] *See Masterpiece*, 138 S. Ct. at 1729.

[48] *See* Lederman, *supra* note 38 (observing months before the Court issued its decision in *Masterpiece* that "[f]ar from demonstrating *hostility* to religion . . . any fair reader would agree that Justice Bosson's opinion comes about as close to capturing the core lessons of Justice Kennedy's opinion [in *Obergefell*] — including his remarks about respecting the rights of religious believers to continue to adhere to and advocate for their beliefs — as one could possibly hope for").

> to — to use their religion to hurt others. So that's just my personal point of view.[49]

From this statement, Justice Kennedy concluded that Rice had demeaned Phillips's religion in two ways: "by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere."[50]

Although others have also read this statement to reflect religious hostility,[51] in our view, Rice's isolated remark was not sufficient to demonstrate that the Commission was biased in its application of civil rights law. First, her statement did not entail either of the meanings that Justice Kennedy attributed to it. Rice did not describe Phillips's religion as despicable.[52] What she called despicable was the "use" or appeal to religious freedom in justifying discrimination. Nor did Rice deny Phillips's sincerity, and in fact the Commission had already accepted the ALJ's determination that Phillips had acted in good faith — an assumption that no one in the litigation contested.[53]

Rice was also correct that discrimination has been justified in the past on religious grounds. Consider, for example, Justice Kennedy's citation to *Newman v. Piggie Park Enterprises, Inc.*,[54] which rejected the

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[49] Brief for Petitioners, *supra* note 15, app. at 115–16. The transcript of the July meeting incorrectly identified Commissioner Hess, rather than Commissioner Rice, as making this statement. *See* Letter from Frederick R. Yarger, Solicitor Gen., Colo. Civil Rights Comm'n, to Scott S. Harris, Clerk, U.S. Supreme Court (Jan. 8, 2018), https://www.supremecourt.gov/DocketPDF/16/16-111/26984/20180108115658861_No.%2016-111%20-%20Letter%20to%20Clarify%20Record.pdf [https://perma.cc/C884-QBX9] (regarding "*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 — Notice Regarding Clarification of the Record").

[50] *Masterpiece*, 138 S. Ct. at 1729.

[51] *See, e.g.*, Andrew Koppelman, *The Press Is Wrong on* Masterpiece Cakeshop*. The Baker Lost.*, AM. PROSPECT (June 5, 2018), http://prospect.org/article/press-wrong-on-Masterpiece-cakeshop-baker-lost [https://perma.cc/KN2K-CAEX]; Douglas Laycock & Thomas Berg, *Symposium:* Masterpiece Cakeshop — *Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), http://www.scotusblog.com/2018/06/symposium-Masterpiece-cakeshop-not-as-narrow-as-may-first-appear [https://perma.cc/RK3K-MR7D].

[52] *See* Bell, *supra* note 38; Michael Dorf, Masterpiece Cakeshop *Ruling Should (but Probably Won't) Doom the Travel Ban*, DORF ON LAW (June 4, 2018, 11:33 AM), http://www.dorfonlaw.org/2018/06/masterpiece-cakeshop-ruling-should-but.html [https://perma.cc/85YS-WMNK].

[53] *See* Bell, *supra* note 38. Rice closed her statement by saying, "So that's just my personal point of view." Brief for Petitioners, *supra* note 15, app. at 116. Justice Kennedy, who omitted that sentence in his opinion, might not have attributed any significance to it. But the other Commissioners might well have found it to be an indication of a stray remark, one offered at the end of a long series of public interactions, well after the Commission had reached its decision in the case. Even if one is critical of the so-called "stray remarks" doctrine in antidiscrimination law, *see, e.g.*, Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213998 [https://perma.cc/5C4N-9NS6], it is notable that the Court allowed a single remark to influence not only its interpretation of statements by other officials, but also the determinations of independent adjudicatory bodies. We return to this latter point at *infra* pp. 147–48.

[54] 390 U.S. 400 (1968) (per curiam); *Masterpiece*, 138 S. Ct. at 1727 (citing *Piggie Park*, 390 U.S. at 402 n.5).

free exercise claim of a restaurant owner who refused service to racial minorities.[55] No one denied the sincerity of the owner's religious objection to complying with the law, but the Court nevertheless dismissed his claim as "patently frivolous" — "not even a borderline case."[56]

It cannot be constitutionally prohibited animus for public officials to observe that religious believers have made discriminatory claims in the past and that contemporary justifications for violating civil rights might take similar form, even if they are offered sincerely and in good faith. Notably, in *Romer v. Evans*,[57] *Lawrence v. Texas*,[58] and *United States v. Windsor*,[59] Justice Kennedy's opinions for the Court attributed animus to citizens and officials who opposed the recognition of civil and constitutional rights for gays and lesbians.[60] That their opposition was grounded in sincere religious beliefs was deemed irrelevant to the constitutional issues raised in those cases.[61] In *Masterpiece*, public officials could understandably have relied on these decisions in taking a skeptical view toward justifications for discrimination on the basis of sexual orientation, regardless of whether grounded in religion or some other source of belief.

It is worth noting, however, that the Civil Rights Commission did not have the benefit of the Court's decision a year later in *Obergefell v. Hodges*,[62] which both affirmed a constitutional right to same-sex marriage[63] and appeared, at least to some, to depart from animus-based

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[55] *Piggie Park*, 390 U.S. at 402 n.5. Another example comes from *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated Virginia's prohibition on interracial marriage. Chief Justice Warren quoted from the trial court opinion, which stated: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages." *Id.* at 3; *see also* Linda C. McClain, *The Rhetoric of Bigotry and Conscience in Battles over "Religious Liberty v. LGBT Rights," in* RELIGIOUS FREEDOM, *supra* note 4 (manuscript at 12), https://ssrn.com/abstract=3144478 [https://perma.cc/5ER2-NXVR] (discussing the "pervasiveness and sincerity of religious rationales marshaled in the past for racial segregation and against interracial marriage").

[56] *Piggie Park*, 390 U.S. at 402 n.5.

[57] 517 U.S. 620, 632–36 (1996).

[58] 539 U.S. 558, 574–75 (2003).

[59] 570 U.S. 744, 770 (2013).

[60] *See* ARAIZA, *supra* note 9, at 48–75 (discussing animus doctrine in Justice Kennedy's gay rights opinions); Carpenter, *supra* note 9, at 210–21 (same).

[61] *See Lawrence*, 539 U.S. at 571 ("The condemnation [of homosexual conduct] has been shaped by religious beliefs . . . . For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles . . . which thus determine the course of their lives. These considerations do not answer the question before us, however."); *see also* Pollvogt, *supra* note 9, at 923 ("*Lawrence* provides contemporary confirmation . . . that the law cannot be used to enforce private biases, and that the fact that such biases are widely, dearly, and sincerely held is irrelevant to the analysis.").

[62] 135 S. Ct. 2584 (2015).

[63] *Id.* at 2600.

reasoning in the gay rights context.[64] In what seemed to be an effort to address critics who had charged the Court with insulting religious believers in a "discourse of denigration,"[65] Justice Kennedy wrote that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[66]

The Court's treatment of Rice's comments reflects the more conciliatory approach taken in *Obergefell* toward those with traditional views of marriage. In a sense, *Masterpiece* is the retroactive application of *Obergefell*'s etiquette — its softened stance toward those opposed to gay and lesbian relationships. But even if a single Commissioner breached this standard of public discourse, a fair reading of the entire record in *Masterpiece* shows that the Commission met its adjudicative obligations to Phillips by taking seriously his religious claims, reasoning publicly and extensively about them, and generally according them respect.[67]

2. Disparate Treatment. — Aside from statements made by the Commissioners, the only other basis for the Court's finding of religious hostility was Colorado's purportedly disparate treatment of Phillips compared with other bakers who had refused to sell cakes to a customer who wanted to include messages opposing same-sex marriage.[68] In separate litigation, the Colorado Civil Rights Division had rejected claims brought by William Jack, an evangelical Christian who had asked three different Colorado bakers to make cakes that included, variously, depictions of a same-sex couple covered by a red "X," as well as biblical verses such as "God hates sin" and "Homosexuality is a detestable sin."[69] The Division concluded that the bakers who refused Jack's requests had not denied him service on the basis of a characteristic, such as his "creed" or religion, protected by the Colorado Anti-Discrimination Act[70]

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[64] *See, e.g.*, ARAIZA, *supra* note 9, at 165; Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 649 (2016); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 162 (2016); Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1016 (2016).

[65] *See, e.g.*, Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 678 (2014); *see also* Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 40 (2014). *But see* ARAIZA, *supra* note 9, at 129–31 (responding to criticism of animus doctrine as denigrating); Carpenter, *supra* note 9, at 185–86 (same).

[66] *Obergefell*, 135 S. Ct. at 2602.

[67] In her dissent, Justice Ginsburg argued further that even if the comments of one or two Commissioners were infected with animus, the Court failed to explain why their statements were sufficient to undermine the results of a multilevel decisionmaking process, which included a prior and independent determination by an ALJ and a later de novo review by the Colorado Court of Appeals. *See Masterpiece*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting). For reasons discussed below, *see infra* section II.A, pp. 146–48, we agree that the Court had no basis for attributing animus to other decisionmakers in Colorado's adjudicatory process.

[68] *See Masterpiece*, 138 S. Ct. at 1730–31.

[69] *Id.* at 1749 (Ginsburg, J., dissenting) (quoting Joint Appendix, *supra* note 39, at 233, 243, 252).

[70] COLO. REV. STAT. § 24-34-601 (2017); Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4 (Colo. Dep't of Regulatory Agencies, Civil Rights Div. Mar. 24, 2015), http://www.

(CADA). Pointing to these decisions, Phillips argued that the Division's treatment of Jack's claims showed that its application of CADA was not neutral and generally applicable. As he put it, "[c]ake artists who support same-sex marriage may refuse requests to oppose it," but "people of faith who share Phillips's beliefs always lose."[71]

Although some of the Justices made broader claims regarding the significance of this alleged disparate treatment,[72] the Court relied on narrower grounds in accepting that such treatment demonstrated religious hostility. Justice Kennedy reasoned that the Colorado Court of Appeals distinguished Phillips's case from the *Jack* cases based on a determination that anti–gay marriage slogans were offensive. To this, he objected: "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness."[73] In effect, Justice Kennedy charged the Colorado court with impermissible viewpoint discrimination.

Far from engaging in viewpoint discrimination, however, the Colorado Court of Appeals merely reported the Division's finding that the bakers denied Jack's requests because they found his messages offensive, not because of his religion.[74] The court said: "The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message."[75] The court was not saying that it, or the Division, found the messages offensive. It simply reported, and affirmed, the Division's conclusion about the bakers' reasons.

This is no more adjudicating offensiveness than if the state enforced trespass law against an entrant whom a homeowner found offensive. A private homeowner may eject entrants on the basis of offense, even animus. In enforcing trespass law, the state does not thereby acquire the

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adfmedia.org/files/GateauxDecision.pdf [https://perma.cc/JN4U-NE6V]; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X, at 4 (Colo. Dep't of Regulatory Agencies, Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf [https://perma.cc/5DUZ-27ZW]; Jack v. Azucar Bakery, Charge No. P20140069X, at 4 (Colo. Dep't of Regulatory Agencies, Civil Rights Div. Mar. 24, 2015), http://mediaassets.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.0.pdf [https://perma.cc/5K6D-VV8U].

[71] Brief for Petitioners, *supra* note 15, at 15.

[72] *See Masterpiece*, 138 S. Ct. at 1734–37 (Gorsuch, J., concurring); *infra* section III.A, pp. 154–57.

[73] *Masterpiece*, 138 S. Ct. at 1731.

[74] *See, e.g.*, *Gateaux*, Charge No. P20140071X, at 1 ("Respondent [baker] . . . avers that the cake order . . . was denied because the cakes included *what was deemed to contain 'offensive' or 'derogatory' messages and imagery*." (emphasis added)). Note that the Division placed quotation marks around "offensive" and "derogatory," and implied that the baker (not the Division) "deemed" those messages "offensive." *Id.*

[75] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. App. 2015).

motives of the homeowner.[76] Similarly, commercial public accommodations can refuse service on bases not prohibited by law.[77] In enforcing their ability to do so, the state does not acquire their motives.

Civil rights laws by definition require the state to differentiate between permissible denials of service and impermissible discrimination. That is what Colorado was doing here. If distinguishing between lawful denials of service and unlawful discrimination is impermissible, then the Supreme Court has destroyed civil rights law sub silentio. As Justice Ginsburg suggested, the Court would not take so momentous a step implicitly.[78] Instead, the majority must be read as relying on the more modest conclusion that Colorado engaged in viewpoint discrimination by somehow coming too close to saying that Jack's messages were offensive. But because that conclusion was clearly mistaken, the Court had no basis for finding that either the Division or the Colorado court's application of CADA was anything other than neutral and generally applicable.

In *Masterpiece*, the Court mistook the neutral application of civil rights law for what Justice Scalia once called a "fit of spite."[79] The Commission's decision to deny Phillips a religious exemption was not the product of religious hostility, but rather a good faith effort to interpret and apply CADA, which forbids discrimination on the basis of sexual orientation in public accommodations.[80] In holding that the Commission failed to treat Phillips's claims with neutrality and respect, the Court improperly applied free exercise doctrine to the facts of the case, finding unconstitutional hostility and intolerance where there were none.

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[76] Of course, there are variations on standard state action doctrine, notably *Shelley v. Kraemer*, 334 U.S. 1 (1948), and the white primary cases, *Smith v. Allwright*, 321 U.S. 649 (1944), and *Nixon v. Condon*, 286 U.S. 73 (1932). But to place the actions of Colorado in *Masterpiece* in the same category as these cases would be a momentous decision.

[77] *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 657 (2016).

[78] *Masterpiece*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting) ("I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive.").

[79] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). In *Romer*, the Court held that a Colorado state constitutional amendment restricting the civil rights of LGBT people violated the Equal Protection Clause because it was based on animus. *See id.* at 634–36 (majority opinion). In dissent, Justice Scalia charged that the Court had "mistaken a Kulturkampf for a fit of spite." *Id.* at 636 (Scalia, J., dissenting). His point was that the Court incorrectly attributed animus to Colorado voters, who had acted "to preserve traditional sexual mores." *Id.* In our view, Justice Scalia was wrong in *Romer*, because Colorado voters had no legitimate justification for prohibiting the extension of civil rights protections to cover sexual orientation. *See* Carpenter, *supra* note 9, at 188.

[80] *See Masterpiece*, 138 S. Ct. at 1725.

II. RESCUING ANIMUS DOCTRINE

The Court in *Masterpiece* not only misread the facts, but it also distorted animus doctrine in various ways, emphasizing matters of etiquette and the appearance of impropriety over the actual justifications for the government's application of civil rights law. The Court was able to avoid the government's reasons for action, in part because it failed to address some standard objections to intent-based inquiries. The principle prohibiting religious animus, like principles prohibiting discriminatory intent with respect to other protected characteristics, focuses on whether officials acted for the wrong reasons. This principle is what might be called *intention-sensitive*.[81] It directs courts to ask whether public officials had a forbidden intention, motivation, or purpose. And any principle that requires courts to conduct inquiries into official intentions is subject to a number of standard objections, all of which apply to the Supreme Court's reliance on animus doctrine in *Masterpiece*. In our view, although none of these objections is generally persuasive, the Court either ignored or mishandled them in order to reach its conclusion that public officials acted without appropriate respect for religion.

A. Does Intent Exist?

When animus doctrine focuses on the subjective intentions of state actors, it invites an immediate objection, which is that the relevant intentions simply do not exist. We can call this the ontological objection.[82] Ontology is the study of what exists, and the objection is that the intentions that are supposed to be the subject of judicial inquiry are simply not there to be found.

In some cases, the ontological objection is easily refuted. Where a single person has legal authority — for example, the President of the United States issuing a travel ban — courts can proceed on the plausible assumption that the person exercises that authority on the basis of some intention (or set of intentions).[83] But the objection has greater force in cases involving the ascription of intentions to collective entities, such as legislatures and multimember courts. There are well-known problems involved with aggregating the intentions of individuals to form collective or group intentions.[84] In recent years, a significant body of work in moral philosophy and decision theory has addressed these problems and

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[81] Schwartzman, *supra* note 8, at 7.

[82] *See id.* at 4.

[83] *See id.*

[84] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 317–33 (1986); ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–23 (Amy Gutmann ed., 1997); JEREMY WALDRON, LAW AND DISAGREEMENT 119–46 (1999); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 6–18 (1993).

attempted to show that collective intentions are possible.[85] But even if such intentions might exist under some conditions — for example, where all the members of a group share the same intention — there is no guarantee that those conditions will hold in any particular case.

The ontological objection presents an obvious problem in *Masterpiece*. The majority held that the Civil Rights Commission and the appellate court that reviewed the Commission's decision were motivated by religious hostility.[86] As evidence of that hostility, Justice Kennedy pointed to the statements of two Commissioners.[87] But even if those statements proved that those Commissioners had wrongful intentions,[88] it is not clear that the other Commissioners shared their intentions. Nor do those statements provide evidence about the view of the Colorado Court of Appeals, which reviewed the Civil Rights Commission's decision de novo.[89]

The Court solved this problem by adopting a radical assumption about the intentions of the various decisionmakers in Colorado's administrative and judicial hierarchy. Justice Kennedy emphasized that none of the other Commissioners objected to the statements in question and that the appellate court ignored those statements.[90] From this observation, he concluded that all of the other adjudicators in the process had acquiesced in the hostile intentions of the two Commissioners.[91] But this conclusion is unwarranted and indeed quite surprising.[92] The ontological objection — the problem of establishing the existence of shared intentions — would be easily dissolved if the intentions of one member of a group could be ascribed to all the others, like a drop of ink changing the color of water in a bottle. But if the other adjudicators — Commissioners and appellate court judges — had intentions of their

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[85] *See, e.g.*, CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 39–79 (2011); Scott J. Shapiro, *Massively Shared Agency*, *in* RATIONAL AND SOCIAL AGENCY 257, 257–93 (Manuel Vargas & Gideon Yaffe eds., 2014).

[86] *See Masterpiece*, 138 S. Ct. at 1731.

[87] *See id.* at 1729–31.

[88] This is a claim we dispute. *See supra* section I.B.1, pp. 138–39.

[89] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 277 (Colo. App. 2015); *see also Masterpiece*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting) ("What prejudice infected the determinations of the adjudicators in the case before and after the Commission?").

[90] *Masterpiece*, 138 S. Ct. at 1729–30.

[91] *See id.* at 1730.

[92] Justice Kennedy's argument assumes that the two statements in question were so clearly antireligious in nature that no reasonable Commissioners or reviewing courts would ignore them. As Professor Michael Dorf points out, however, the "obvious reason for that lack of disavowal . . . is that none of those people read these comments in the improbable way that the SCOTUS did, and so probably saw no need to disavow them." Dorf, *supra* note 52.

own, then the Court was not entitled to attribute any collective intention to the Civil Rights Commission, let alone to the state appellate court.[93]

B. Determining Intent

Even if officials have intentions that are, in principle, discoverable, it may be difficult to determine what they are.[94] This problem gives rise to an epistemic objection to intention-based inquiries in animus cases. Courts may not be able to know with any reliability what reasons motivated a particular action or decision.[95] They may find animus where there is none, or fail to find it where it exists.

In *Masterpiece*, the Court handled this objection implicitly — and correctly, in our view — by adopting a totality-of-the-circumstances approach to determining whether officials have acted with animus. Justice Kennedy explained that a number of factors are relevant in evaluating the state's neutrality, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[96]

With little fanfare, the majority in *Masterpiece* adopted this holistic approach to determining the subjective intentions of government actors. Justice Kennedy noted that there had been disagreement among Justices in the past about whether courts could examine statements by legislators as evidence of intentional discrimination.[97] Here, he was referring to a dispute in *Lukumi*. In that case, writing only for himself and Justice Stevens, Justice Kennedy had invoked equal protection doctrine as support for considering circumstantial evidence of official intent.[98] Justice

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[93] Here one might respond that the Court did not need to establish that the other Commissioners were motivated by animus. It was sufficient that they did not correct the appearance of hostility, and that allowing this impression to persist is what violated the constitutional requirement of religious neutrality. Yet, if this is the Court's theory, then its decision turns not on a collective intention of animus, but rather on the appearance of such an intention. The distinction is important. If the Commission was, in fact, motivated by legitimate reasons, then the Court should have addressed those reasons and weighed them *alongside* the importance of the Commission appearing principled. We return to this point below. *See infra* Part IV, pp. 165–69.

[94] *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." (citing United States v. O'Brien, 391 U.S. 367, 383–84 (1968))).

[95] This objection is pervasive in the literature. *See, e.g.*, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212–17 (1970); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1097–107 (1978); Huq, *supra* note 9, at 40–41.

[96] *Masterpiece*, 138 S. Ct. at 1731 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.)).

[97] *See id.* at 1730.

[98] *See Lukumi*, 508 U.S. at 540–42 (opinion of Kennedy, J.).

Scalia wrote separately to reject this inquiry into the subjective motivations of legislators, at least for purposes of finding violations of the Free Exercise Clause.[99] But in *Masterpiece*, seven Justices agreed that the statements of individual members of a quasi-judicial administrative body are reviewable.[100]

It is not clear, however, whether the Court's adoption of this approach will have significance beyond the facts of *Masterpiece*. Had Justice Kennedy remained on the bench, this aspect of the Court's decision might have had more reach. First, Justice Kennedy recognized that the holistic approach to determining discriminatory intent was borrowed from equal protection jurisprudence in the race context. In *Lukumi*, Justice Kennedy had relied explicitly on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[101] a case involving racial discrimination in residential housing, to conclude that courts could take into account "both direct and circumstantial evidence" of discriminatory intent on the part of government actors.[102] Second, both *Lukumi* and *Arlington Heights* involved legislative decisions.[103] Justice Kennedy's view about the proper evidentiary approach to ascertaining animus was not limited to administrative or judicial actors. Without Justice Kennedy, however, the possibility that *Masterpiece*'s epistemic commitments will apply outside of its narrow doctrinal boundaries seems diminished.

C. Futility and Taint

Another standard objection to intention-based inquiries is that they are an exercise in futility.[104] If a court invalidates some action because it was based on wrongful intentions, the government can respond by repeating the action on the basis of permissible intentions. If a court were to prohibit the later action because it was tainted by the animus of the earlier one, then public officials would be barred from taking actions that are otherwise justified by legitimate governmental purposes. Courts thus face a dilemma: either their decisions will be circumvented

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[99] *Id.* at 558–59 (Scalia, J., concurring in part and concurring in the judgment).

[100] And Justices Ginsburg and Sotomayor no doubt agree on this point, which makes support for it unanimous. *Cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2439 (Sotomayor, J., dissenting) (relying on *Masterpiece* in claiming that the Court should have found the President's "official expressions of hostility and the failure to disavow them to be constitutionally significant").

[101] 429 U.S. 252 (1977).

[102] *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*, 429 U.S. at 266).

[103] *See id.* at 526–28 (majority opinion); *Arlington Heights*, 429 U.S. at 257–59.

[104] *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); Ely, *supra* note 95, at 1214–16 (discussing the futility objection).

by later government actions, or they will be forced to engage in perpetual obstruction of legitimately motivated policies. The first option is futile, and the second seems absurd.

The answer to this objection, and the way to unravel the dilemma, is to note that not all government policies or decisions can be repeated on the basis of legitimate purposes. In some cases, courts may invalidate a government policy, and there may be no permissible grounds for reenacting it.[105] And if there are such grounds, then a court can recognize as much by stepping aside and allowing the policy to take effect.[106]

In *Masterpiece*, the Court did not so much respond to this futility objection as trade on it. The minimalism of the majority's decision — that it found religious animus only on these facts — suggests that future decisions by civil rights commissions could be rendered in a neutral fashion. Provided those commissions are respectful and tolerant of religion, and provided they advance viewpoint-neutral justifications for applying civil rights laws, their decisions can be affirmed. Justice Kennedy recognized this possibility, writing that "the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality."[107] And importantly, he did not say that such a commission must therefore grant a religious exemption from state civil rights laws. The question was left open to "await further elaboration in the courts."[108]

The *Masterpiece* majority makes a virtue of the futility objection. Going forward, state civil rights enforcement agencies have the chance to try again, while avoiding the mistakes of the Commission. And indeed, there is a question about whether, given its decision, the Supreme Court should have remanded in *Masterpiece*.[109] Some prominent scholars argue that because the Commission was tainted by prejudice, it

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[105] The policy challenged in *Lukumi* is a good example. There was simply no reason other than religious animus that could justify prohibiting animal sacrifices in the manner adopted by the City of Hialeah. *See Lukumi*, 508 U.S. at 546–47 (discussing why there was no legitimate purpose for the ordinance).

[106] *See* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 125–27; Schwartzman, *supra* note 8, at 20–22.

[107] *Masterpiece*, 138 S. Ct. at 1732.

[108] *Id.*

[109] The Supreme Court reversed without remanding, *id.* at 1732, but did not explain why this remedy was appropriate. To see the problem with this result, consider the following hypothetical: Al and Betty are two runners in a race. Betty is the winner, but the referee has a personal grudge against Al and disqualifies him. What should happen here? If Betty is the winner, we might say: harmless error. Betty should win anyway. Or, to avoid any appearance of impropriety, perhaps Al and Betty should have to rerun the race with a fair referee. But why should Al be declared the winner of this race (even if not of future ones)? *Ex hypothesi*, it is no fault of Betty's that the referee was biased against Al, and she should not be penalized for the referee's misconduct. *Cf.* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding that remand to a new adjudicator is the appropriate remedy to "cure the constitutional error" of adjudication tainted by an improperly appointed ALJ).

could not have fairly adjudicated Phillips's case on remand.[110] But the Supreme Court did not address that issue, and regardless, the proper remedy would have been to seek recusal of biased Commissioners.[111] It was not to prevent the Commission, whose composition had in any event completely turned over,[112] from rehearing the case.

D. Intentions, Permissibility, and Mixed Motives

A final objection to focusing on the intentions of government actors is that even if those actors had wrongful intentions or were motivated by improper reasons, they might nevertheless have acted justifiably. In recent years, a number of philosophers and legal scholars have argued that subjective intentions are never directly relevant to the moral and legal permissibility of an action.[113] Whether an action is permissible, or allowed, turns on whether that action is justified, not on whether the officials who carried it out believed it was justified. Justification and motivation can come apart. And if they do, what matters is whether there are sufficient reasons for an action and not whether officials were motivated by those reasons. We can call this the permissibility objection to the relevance of wrongful intentions.

To see the force of the permissibility objection, consider a legislature that enacts a murder prohibition solely for the purpose of enforcing the Sixth Commandment.[114] Suppose that it is impermissible under the Establishment Clause to pass a law only to advance a religious purpose. Proponents of the permissibility objection argue that courts should uphold this law, even if the legislature that enacted it was improperly motivated. And the reason is clear: the law is justified on grounds independent of its motivation.

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[110] *See, e.g.*, Laycock & Berg, *supra* note 51 ("[I]t would not have helped to remand this case for a decision without the hostile statements. To remove the taint of those statements would require a wholly different set of decisionmakers.").

[111] *See* Bell, *supra* note 38 (arguing that Phillips failed to exhaust administrative remedies, including seeking recusal of Commissioners on grounds of bias).

[112] None of the Commissioners active at the time of the Court's decision held their offices when the Commission decided Phillips's case in 2014. *Compare* COLO. CIVIL RIGHTS COMM'N, ANNUAL REPORT 2014, at 2 (2014), https://www.colorado.gov/pacific/dora/civil-rights/reports [https://perma.cc/QEE6-VTCN] (listing the sitting Commissioners in 2014), *with* Colo. Dep't of Regulatory Agencies, *Civil Rights Commission*, COLO. OFFICIAL ST. WEB PORTAL, https://www.colorado.gov/pacific/dora/civil-rights/commission [https://perma.cc/233C-8FDU] (listing the current Commissioners).

[113] *See* T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 8–88 (2008); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 138–68 (2008); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 563–69 (2016); F.M. Kamm, *Failures of Just War Theory: Terror, Harm, and Justice*, 114 ETHICS 650, 666–69 (2004); Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 ETHICS 497, 517 (1999).

[114] This example is Professor Richard Fallon's. *See* Fallon, *supra* note 113, at 569.

In the context of *Masterpiece*, it might be tempting to apply the permissibility objection to the Court's decision by arguing that the Commission's decision was justified even if it was motivated by religious hostility. That was, in effect, the strategy adopted by the Court in *Trump v. Hawaii*, which upheld President Trump's travel ban despite overwhelming evidence that it was motivated by religious animus.[115] The Court held that the President's motivations were irrelevant because the ban could have been justified on a rational basis, namely, on grounds of national security.[116] Similarly, one might argue that the Commission's application of state civil rights law was justified, even if we assume, arguendo, that some of those who applied the law did so for the wrong reasons.

In our view, however, there are reasons to be skeptical about the permissibility objection. The objection is inconsistent with much of commonsense morality, in which intentions matter for evaluating the permissibility of actions. Elsewhere, one of us has pursued this argument in the context of the travel ban litigation, concluding that intentions can be directly relevant to whether state action is morally and constitutionally legitimate.[117]

Yet, even if intentions are relevant in this way, there is still a question about how to resolve cases in which officials have mixed motives. Should the presence of an improper motive control the outcome, or should courts take into consideration the fact that officials were also motivated by legitimate purposes?

In *Masterpiece*, the Court failed to address this issue and indeed departed from free exercise doctrine in avoiding it. When courts find potential violations of the Free Exercise Clause, they apply strict scrutiny to determine whether the state adopted the least restrictive means of achieving a compelling state interest.[118] But in *Masterpiece*, the Court did not perform this analysis. Perhaps the majority believed that it was

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115 *See* 138 S. Ct. 2392, 2423 (2018) (reversing the Ninth Circuit's preliminary injunction of the travel ban).

116 *Id.* at 2420–23.

117 Schwartzman, *supra* note 8, at 15–19; *see also* Micah Schwartzman, *Must Laws Be Motivated by Public Reasons?*, *in* PUBLIC REASON AND COURTS (Silje Langvatn et al. eds., forthcoming 2019). The permissibility objection has received forceful criticism in the philosophical literature. *See* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 139–66 (2011); S. Matthew Liao, *Intentions and Moral Permissibility: The Case of Acting Permissibly with Bad Intentions*, 31 LAW & PHIL. 703, 712–21 (2012); Jeff McMahan, *Intention, Permissibility, Terrorism, and War*, 23 PHIL. PERSP. 345, 352–56 (2009); Dana Kay Nelkin & Samuel C. Rickless, *Three Cheers for Double Effect*, 89 PHIL. & PHENOMENOLOGICAL RES. 125, 141–47 (2014).

118 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

unnecessary because acting with religious animus can never be justified.[119] If so, that was a mistake, because what needed justifying was not only the Commission's intent but also its conduct, which was to deny Phillips an exemption.[120] And, as we have argued above, the denial of the exemption was justified by a compelling interest, namely, the enforcement of the purposes of Colorado's antidiscrimination law.

The Court might have reached a similar conclusion if it had followed equal protection doctrine in mixed-motive cases. As we saw above, in deciding what evidence is relevant to determinations of animus, the Court borrowed a totality-of-the-circumstances approach adopted in *Arlington Heights*.[121] But in that case, the Court also noted that a finding of "racially discriminatory purpose would not necessarily have required invalidation of the challenged decision."[122] Instead, consistent with its reasoning under the First and Fourteenth Amendments in *Mt. Healthy City School District Board of Education v. Doyle*,[123] the Court adopted a burden-shifting framework for mixed motives. If a plaintiff proved that the government was motivated by a discriminatory purpose, the government would then have "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[124]

In *Masterpiece*, however, the Court did not apply either strict scrutiny or a burden-shifting framework. And it is not difficult to see why. Had the Court pursued either inquiry, it would have been forced to confront the very substantive questions that its animus determination had avoided. It would have been required to evaluate the government's reasons — the justifications for its decisions — and not only its (purported) improper motivations.

The *Masterpiece* majority implicitly rejected the permissibility objection by holding that it is impermissible for officials to act on the basis of hostile intentions.[125] We agree that the Commission's intentions were

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[119] Another explanation might rest on distinguishing between animus in legislative action and animus, or the appearance of it, in adjudication. But the Court did not invoke such a distinction for this purpose, and even if it had, there would have remained questions about the need for mixed-motive analysis and the nature of appropriate remedies. *See* Bell, *supra* note 38 (on remedies for adjudicative bias).

[120] Our claim here, which is that a finding of animus does not end judicial inquiry into the permissibility of a government action, is consistent with our skepticism about the permissibility objection. If that objection is mistaken, as we believe, then intentions can be directly relevant to whether an action is morally permissible. But the wrongness of an intention can be *relevant* and yet not *conclusive* in determining the wrongness of an action. If there are other intentions in play, as in mixed-motive cases, or if an act is justified by interests sufficient to outweigh the wrongness of acting from an improper intention, then an act might nevertheless be justified, all things considered. *See* Schwartzman, *supra* note 8, at 16.

[121] *See supra* pp. 148–49.

[122] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[123] 429 U.S. 274, 287 (1977).

[124] *Arlington Heights*, 429 U.S. at 270 n.21.

[125] *See Masterpiece*, 138 S. Ct. at 1731.

relevant to the legitimacy of its actions, even if we disagree with the Court's finding that the Commission was, in fact, improperly motivated. But even if the Court correctly determined that religious animus was part of the Commission's motivation, that should not have ended the Court's inquiry. It should have asked whether other motives were in play, and if so, whether they were sufficient to justify the Commission's application of Colorado's civil rights laws. Alternatively, the Court should have remanded the case to allow adjudication of these issues.

III. THE FUTURE OF RELIGIOUS EXEMPTIONS

Although *Masterpiece* has mixed implications for animus doctrine, at least this much is clear: in deciding the case on fact-specific grounds, the Court either avoided or rejected various arguments that would have worked broader, and perhaps even radical, changes in free exercise and free speech doctrine. At one level, these arguments were advanced to support religious claims against the demands of antidiscrimination law, especially in the context of recognizing LGBT rights. But at another level, these arguments fit within the broader trend of using the First Amendment to block commercial regulation.[126] While the Court did not embrace these arguments, and importantly rejected some of them, it did not provide sufficient guidance for resolving the central conflict presented in *Masterpiece*.

A. The Neutrality of Civil Rights

The main question unanswered in *Masterpiece* is whether it is possible to apply civil rights laws in a manner that is neutral and generally applicable without also granting religious exemptions for those who object to serving LGBT people. Resolving this issue was left to the dueling concurring opinions of Justices Kagan and Gorsuch. Justice Gorsuch argued that the disparate outcomes in Phillips's case and in the *Jack* cases were inherently discriminatory under *Lukumi*.[127] In his view, Phillips's refusal to make a cake for a same-sex wedding was no different from other bakers' refusals to make Jack's cakes,[128] leading him to conclude that the Commission had impermissibly denied Phillips an exemption.[129]

The problem with Justice Gorsuch's argument is that it requires determining that the alleged disparity is actually a disparity — differential treatment of the same type of conduct. But here there was no disparity, because civil rights laws do not apply to all denials of service. They

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[126] *See infra* section III.E, pp. 163–64.

[127] *Masterpiece*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[128] *Id.* at 1734.

[129] *Id.* at 1740.

apply only to denial of service on the basis of certain protected characteristics, such as race, ethnicity, religion, and sexual orientation.[130] They do not prohibit a baker from refusing to make a cake on grounds of politics (for example, Nazi cakes), vulgarity (penis-shaped cakes), or aesthetics (red velvet armadillo cakes). The differing outcomes in Jack and Phillips's cases mean nothing if both situations are not covered by the principles of nondiscrimination embodied in the Colorado law.

The majority in *Masterpiece* did not equate these cases, presumably because they are not equivalent. As Justice Kagan noted, Phillips would make wedding cakes for purchase or use by opposite-sex couples but not for same-sex couples.[131] This constitutes discrimination on the basis of sexual orientation. The other bakers, meanwhile, would not make cakes with Jack's anti–gay marriage slogans for anyone, whether the customers were religious or not.[132] Thus, whereas Phillips engaged in discrimination on the basis of a forbidden ground, the bakers in the *Jack* cases did not — different outcomes, but no equivalence.[133]

Justice Gorsuch attempted to elide this distinction in two ways. First, he claimed there is a reference class problem. He argued that the relevant class of cakes in Phillips's case is "a wedding cake celebrating a same-sex wedding," which Phillips would not make for any customer, regardless of sexual orientation.[134] Thus, this denial of service is the same as that in the *Jack* cases, where the bakers also would not make the requested cakes for anyone. But in *Masterpiece*, Phillips simply refused to bake a wedding cake for the same-sex couple and did so before any particulars of design or message could be discussed.[135] Furthermore, as Justice Kagan noted, the fact that Phillips viewed the cake as inherently religious, or as having an inherently different message from a heterosexual wedding cake, does not put his claim in a different category for purposes of civil rights law.[136] Otherwise, Piggie Park could

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[130] *See* Romer v. Evans, 517 U.S. 620, 628 (1996) ("Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.").

[131] *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring).

[132] *See* Brief of Church-State Scholars as *Amici Curiae* in Support of Respondents at 14, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Brief of Church-State Scholars] ("[T]he bakers in Jack's cases would have refused *any* customer's request to create cakes with anti-gay messages 'regardless of creed.' Jack's religion, and his religious motive for seeking these cakes, had *nothing* to do with the bakers' refusal." (quoting Joint Appendix, *supra* note 39, at 231)).

[133] *See* Dorf, *supra* note 52; Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in* Masterpiece Cakeshop, TAKE CARE BLOG (June 19, 2018), https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-Masterpiece-cakeshop [https://perma.cc/4QWM-N75K].

[134] *Masterpiece*, 138 S. Ct. at 1738 (Gorsuch, J., concurring).

[135] *Id.* at 1733 n.* (Kagan, J., concurring).

[136] *Id.*

have argued that barbeque for consumption by African American patrons was a different product from barbeque for white customers — a product that it categorically refused to sell to anyone.[137]

Second, Justice Gorsuch suggested, in effect, that because the Supreme Court has abolished the status/conduct distinction for sexual orientation,[138] the same reasoning must hold for religious adherents.[139] As one amicus brief argued: "Status and conduct are equally intertwined for the religious believer."[140] The implication is that bakers could not have refused Jack's request for cakes with anti–gay marriage slogans without also acting on the basis of his status as a Christian, in violation of Colorado's prohibition on religious discrimination. According to Justice Gorsuch, applying civil rights law neutrally required holding the bakers in the *Jack* cases as liable as Phillips for status-based discrimination, or exempting both. And since Colorado found no discrimination in the *Jack* cases, it could not have done so in *Masterpiece* either.[141]

Yet, to create parity between "both sides" of bakers, not only would Christian bakers need a right to discriminate against same-sex couples, but gay and lesbian bakers would also need a right to discriminate against Christian customers. It is implausible, however, to imagine that civil rights law would permit a gay baker to refuse to make a cake for a Christian wedding. The fact that the status/conduct distinction has been abolished with regard to sexual orientation does not give gay and lesbian bakers immunity from civil rights laws. Eliminating the status/conduct distinction for religious adherents should not yield similar immunity. Religious advocates are seeking immunity that elimination of the status/conduct distinction does not currently provide, and they are seeking it exclusively for businesspeople of particular religious views. This is not liberty for "both sides." This is preferential treatment for religion.

Furthermore, the claim that bakers in the *Jack* cases were allowed to discriminate against a religious customer because of his religion rests on a mistaken premise, which is that only religious people would want

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137 *See id.* (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam)).

138 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 689 (2010); Lawrence v. Texas, 539 U.S. 558, 575 (2003); *see also* Elane Photography v. Willock, 309 P.3d 53, 62 (N.M. 2013); State v. Arlene's Flowers, Inc., 389 P.3d 543, 553 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2671 (2018).

139 *See Masterpiece*, 138 S. Ct. at 1735–36 (Gorsuch, J., concurring).

140 Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 10, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Brief of Christian Legal Society] ("[B]elievers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians." (quoting Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 4 (2013))).

141 *Masterpiece*, 138 S. Ct. at 1740 (Gorsuch, J., concurring).

cakes depicting anti–gay marriage slogans.[142] The obvious response here is that discrimination against gays and lesbians is not limited to religious believers. People discriminate on the basis of sexual orientation for many different reasons, some religious and some not.[143]

The Court in *Masterpiece* did not pursue these reference class and status/conduct arguments. Its decision did not rest on the conclusion that differential treatment is always unjustifiable, only on the claim that the Colorado court did not offer a neutral justification for its treatment of the *Jack* cases. Nevertheless, Justice Kennedy's invocation of those cases will no doubt provide encouragement for the use of testers like William Jack to show that civil rights laws are not applied neutrally and that they have unstated exceptions that can serve as analogues for religious objections.[144] These attempts, and subsequent claims of purported disparities, should be regarded critically.[145]

B. Third-Party Harms

Under *Smith* and *Lukumi*, the determination of whether laws are neutral and generally applicable largely controls the standard of review courts apply to free exercise claims.[146] But if courts determine that heightened review is required, they face a further question about how to balance the rights of religious believers against the rights and interests of others.[147]

At least since the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,[148] which greatly expanded the scope of religious exemptions to include commercial actors in the marketplace,[149] courts and scholars have focused more attention on whether, or to what extent, the state can grant religious exemptions that impose harms on other people.[150] In

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[142] *See id.* at 1736.

[143] *See* Brief of Church-State Scholars, *supra* note 132, at 17 ("[P]eople who object to same-sex marriage may do so for many reasons."); Oleske, *supra* note 133 (arguing that "discrimination against Jews and gays is *not* inextricably tied to any particular creed").

[144] *See* Laycock & Berg, *supra* note 51.

[145] *See* Lawrence G. Sager & Nelson Tebbe, The Reality Principle (unpublished manuscript) (on file with authors) (arguing that religious exemptions to civil rights laws should be resisted because they perpetuate structural injustices against LGBT people).

[146] See sources cited *supra* note 18 and pp. 136–37.

[147] Though, as noted above in section II.D, *supra* pp. 151–53, the Court ignored this question in *Masterpiece*.

[148] 134 S. Ct. 2751 (2014).

[149] *See generally* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

[150] *See Hobby Lobby*, 134 S. Ct. at 2781 n.37; Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). *Compare, e.g.*, TEBBE, *supra* note 3, at 49–70 (interpreting the Religion Clauses to include a third-party harm doctrine limiting religious exemptions), *and* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357–71 (2014) (same), *with* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 140–44

addressing that question, some scholars — one of us among them — have argued that the Free Exercise Clause and the Establishment Clause place significant limits on exemptions that burden third parties.[151]

In the debate over third-party harms, an important question is whether dignitary harms count when courts balance the rights of religious believers against the rights of those who might be burdened by their exercise of religious liberty. In *Masterpiece*, Colorado argued that it had a compelling interest in applying its civil rights laws in part to protect against the dignitary harms that follow from denials of service based on a protected trait, including sexual orientation.[152] In contrast, Phillips claimed that the state's interest in preventing dignitary harms was not compelling.[153] This argument was also advanced by amici, who asserted that "[t]he argument from dignitary harm to individuals is, at bottom, an argument that petitioner's religious practice must be suppressed because it offends the customer turned away. That argument is at odds with the whole First Amendment tradition."[154]

Amici claimed that this argument applied not only to Phillips's free speech rights but also to his free exercise claim.[155] They argued that if the offensiveness of speech to an audience is not a compelling reason to suppress speech — which it clearly is not — then offensiveness of conduct to those denied service in public accommodations cannot be a compelling reason to discriminate on the basis of religion.[156] If the state has a compelling interest, it can only be in material access to goods and services and not in preventing dignitary harms.[157]

This line of argument attacks a fundamental aspect of civil rights doctrine and rejects decades of experience with public accommodations laws.[158] The Supreme Court has long held that the purpose of civil

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(2015) (criticizing the third-party harm doctrine), *and* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. (forthcoming 2019) (same).

151 *See* Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 107 KY. L.J. (forthcoming 2018), https://ssrn.com/abstract=3133075 [https://perma.cc/2XBQ-U9M4]; Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328 (Susanna Mancini & Michel Rosenfeld eds., 2018); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215 (Holly Fernandez Lynch et al. eds., 2017).

152 Brief for Respondent, *supra* note 15, at 56.

153 Brief for Petitioners, *supra* note 15, at 52–56.

154 Brief of Christian Legal Society, *supra* note 140, at 31.

155 *Id.* at 32; *see also* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 376–78 (2016).

156 Brief of Christian Legal Society, *supra* note 140, at 31–32.

157 *Id.* at 30.

158 *See* Sepper, *supra* note 77, at 662–68 (surveying purposes of state antidiscrimination laws and showing that such laws historically have aimed at protecting dignitary interests); Robert Post,

rights laws includes protecting against dignitary harms[159] and that the government has a compelling interest in enforcing such laws in the commercial context despite religious objections.[160]

Masterpiece is no exception to this rule. According to the majority, the state has authority "to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services."[161] That authority extends to enacting and enforcing civil rights laws, even over the objection of those who face conflicts of conscience in commercial markets. The Court emphasized that "while those religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[162]

And here Justice Kennedy relied on *Piggie Park*, a case decided two decades before *Employment Division v. Smith*, when the Court would have applied strict scrutiny to free exercise claims under *Sherbert v. Verner*.[163] Even under that heightened standard, the Court found the restaurant's claim frivolous.[164] And it is not difficult to understand why. In describing the significance of public accommodation laws for protecting gays and lesbians, Justice Kennedy explained that if exceptions to those laws are not narrowly drawn, then "a long list of persons who provide goods and services . . . might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[165] *Masterpiece* thus supports the

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RFRA and First Amendment Freedom of Expression, 125 YALE L.J.F. 387, 396 (2016) (arguing that the rejection of dignity harms as compelling "would suggest that our entire tradition of antidiscrimination law is suspect under the First Amendment"); Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 715 (2014) ("In short, American jurisprudence amply recognizes the harm to dignity resulting from discrimination.").

159 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (holding that a purpose of federal antidiscrimination law is to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'" (quoting S. REP. NO. 88-872, at 15 (1964))).

160 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam); *see also* Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 1–3, 27–31, *Masterpiece*, 138 S. Ct. 1719 (No. 16–111).

161 *Masterpiece*, 138 S. Ct. at 1723.

162 *Id.* at 1727.

163 *See supra* pp. 136–37.

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

165 *Masterpiece*, 138 S. Ct. at 1727.

claim that states have a compelling interest in avoiding third-party harms and protecting dignitary interests.[166]

Here, critics might be tempted to rely on the Court's holding that the Colorado Court of Appeals acted improperly when it justified the rejection of Jack's claims on the grounds that his messages were offensive. Justice Kennedy invoked Justice Jackson's famous lines from *West Virginia State Board of Education v. Barnette*[167] in declaring that state officials cannot "prescribe what shall be offensive."[168] But as we have already explained, the Court's understanding of the state court's justification was mistaken. And even if it was not, no one could plausibly read Justice Kennedy as claiming that in protecting the dignity of those covered under civil rights laws, the state was therefore engaged in viewpoint discrimination.[169]

C. The Race Analogy

There is a large question lurking in the background of *Masterpiece*, which is whether the analogy to race discrimination holds for discrimination against gays and lesbians, at least with respect to public accommodations. Had Phillips refused service to an interracial couple, it is difficult to imagine that the Court would have granted his claim based on the evidence of religious animus proffered in *Masterpiece*. That case is *Piggie Park*, and Justice Kennedy did not pause to wonder whether the Court's description of the restaurant's claims as "patently frivolous" treated the owner's religious views with "neutral and respectful consideration."[170]

Some prominent voices have argued that with respect to the application of civil rights laws, including protections for dignity interests, race is sui generis. For example, Professor Douglas Laycock rejects the claim that "exemptions from gay-rights laws should be no broader than exemptions from race-discrimination laws."[171] He writes that because

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166 *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 214–15 (2018); Nelson Tebbe & Larry Sager, *The Supreme Court's Upside-Down Decision in* Masterpiece, TAKE CARE BLOG (June 7, 2018), https://takecareblog.com/blog/the-supreme-court-s-upside-down-decision-in-Masterpiece [https://perma.cc/Y536-V98F] ("[T]he Court removed any doubt that invidious discrimination in the marketplace imposes a harm far more profound than the hassle of finding another cake.").

167 319 U.S. 624 (1943).

168 *Masterpiece*, 138 S. Ct. at 1731 (citing *Barnette*, 319 U.S. at 642).

169 *See supra* p. 145.

170 *Masterpiece*, 138 S. Ct. at 1729; *see supra* p. 152.

171 Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 149, at 231, 252; *see also* Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 4, at 77, 101; Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 113–14 (2013). *But cf.* Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J.C.R. & ECON.

of the history of slavery, the Civil War, the Reconstruction Amendments, and the struggle for civil rights in the last century, "[r]ace is constitutionally unique in our history, which is why every other identity group tries to free ride on the black experience."[172]

Far from "free riding," however, gays and lesbians have struggled for decades to obtain protection under civil rights laws.[173] And where they have achieved those protections — which they still have not in many states[174] — courts have treated them with the same respect owed to others.[175] That is why no state supreme court or federal court of appeals has granted a religious exemption from a public accommodations law protecting against sexual orientation discrimination in the commercial context.[176]

Although the finding of religious animus in *Masterpiece* might raise suspicions about the Supreme Court's commitment to protecting gays and lesbians from discrimination in the market, there is no support in the language of the opinion for the claim that racial minorities should receive more favorable treatment than gays and lesbians in the application of public accommodations law. On the contrary, the Court held that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,"[177] and that "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts."[178] Indeed, as Justice Kennedy wrote, "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[179]

In the future, it is possible that courts will grant religious exemptions from public accommodation laws. But if they do, they will find no cover in Justice Kennedy's opinion for distinguishing between protections

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DEV. 233, 239–42 (2018) (criticizing arguments against the analogy to racial discrimination in the context of granting religious exemptions).

172 Laycock, *supra* note 171, at 253.

173 *See generally* DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA (1999); LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE (2015); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013).

174 *See* TEBBE, *supra* note 3, at 1; Ira C. Lupu, *Moving Targets:* Obergefell*,* Hobby Lobby*, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 48–49 (2015); Sepper, *supra* note 3, at 148.

175 *See supra* note 2 (collecting cases).

176 *See* Sepper, *supra* note 77, at 652–62 (discussing religious exemptions from public accommodation laws and finding narrow legislative exemptions, mostly for religious nonprofit organizations, but none mandated by courts).

177 *Masterpiece*, 138 S. Ct. at 1727.

178 *Id.*

179 *Id.* at 1728.

against sexual orientation discrimination and other grounds of discrimination commonly forbidden under civil rights laws.

D. Overturning Smith

Existing free exercise doctrine makes it difficult to challenge civil rights laws, which the Court recognized as "unexceptional"[180] and, as a general matter, neutral and generally applicable.[181] For this reason, some amici called for the overruling of *Employment Division v. Smith*,[182] which requires the application of deferential review to such laws.[183] But the Court did not reconsider its basic understanding of the Free Exercise Clause. This was not surprising. Justice Kennedy was part of the Court's majority in *Smith*[184] and had relied on its narrow interpretation of the Free Exercise Clause in *City of Boerne v. Flores*,[185] which invalidated the Religious Freedom Restoration Act as applied to state laws.[186] Moreover, despite early and pervasive opposition to *Smith*,[187] the Court has shown no signs of interest in revisiting its landmark decision.[188] The majority in *Masterpiece* ignored the issue entirely.

As the composition of the Court changes, however, there are indications that at least some of the conservative Justices, who were not on the bench when *Smith* was decided, are unhappy with the Court's interpretation of the Free Exercise Clause and would be open to revising it. In a rather less than subtle hint, Justice Gorsuch, joined by Justice Alito, opened his concurring opinion by citing the rule in *Smith* and noting that it "remains controversial in many quarters."[189] If Justice Kennedy is replaced by a Justice who shares the views of Justices Gorsuch and Alito, we would expect a growing faction of the Court to express more vocal opposition to *Smith*, with the aim of broadening the scope of constitutionally mandated religious exemptions.

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[180] *Id.*

[181] *Id.* at 1727.

[182] *See* Brief of Christian Legal Society, *supra* note 140, at 34–36.

[183] 494 U.S. 872, 885–90 (1990).

[184] *Id.* at 873.

[185] 521 U.S. 507, 512–14 (1997).

[186] *Id.* at 536.

[187] *See, e.g.*, Lupu, *supra* note 17, at 54 (discussing *Smith*'s critical reception); Ryan, *supra* note 17, at 1409–10 (same).

[188] *Cf.* Richard Schragger, *The Politics of Free Exercise After* Employment Division v. Smith*: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2028–29 (2011) (noting that Justice Kennedy "is holding the line on *Smith*," but that "[t]he gay and lesbian civil rights struggle is putting *Smith* under pressure").

[189] *Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

E. Free Speech Opportunism

Finally, the free speech questions raised by *Masterpiece* remain unanswered. To wedding vendors and religious objectors seeking immunity from civil rights laws, compelled speech doctrine has offered the best prospect of success.[190] The Court in *Masterpiece* chose not to address free speech, with the result that such claims will persist — as will the quandaries they raise.

One problem is what counts as "speech." The cases involve photographers, bakers, florists, owners of wedding venues, and more.[191] Which of these is "speech"? If all are, what about limousine driving or catering? Is baking "speech" only when the cake is custom made or for any baked good? If the wedding venue is a hotel or restaurant, can it deny service to same-sex couples only for their weddings, or all the time? The Supreme Court majority acknowledged these problems and showed no desire to address them.[192]

These questions are vexing in themselves and underscore a larger problem: recognizing compelled speech claims for the many activities that might be characterized as "speech" would effectively immunize large swaths of the economy from regulation. In this regard, the wedding vendors' claims are consistent with efforts to use free speech doctrine as a means of deregulation.[193] This strategy has succeeded in a wide range of cases, including search engines' claims of immunity from fair competition and business tort rules,[194] producers' opposition

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[190] *Cf.* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

[191] *See* cases collected *supra* note 2.

[192] *Masterpiece*, 138 S. Ct. at 1723, 1727.

[193] On this phenomenon, see generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1228–40 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207–09 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198–203 (2014); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; and Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421 (2006). For earlier contributions on the same theme, see generally J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987); and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For similar observations in the context of free exercise doctrine, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1513–18 (2015).

[194] *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4–5 (W.D. Okla. May 27, 2003) (holding that Google's website rankings were opinions protected by the First Amendment); Order Granting Defendant Google Inc. to Strike Plaintiff's Complaint Pursuant to Civil Procedure Code § 425.16, Martin v. Google Inc., 2014 WL 6478416 (Cal. Super. Ct. Nov. 13, 2014) (No. CGC-14-539972).

to labeling and disclosure laws,[195] and corporations' objections to posting labor laws on their premises.[196] Extending free speech in this way threatens to undo longstanding settlements — to reopen the Supreme Court's definitive rejection of constitutional challenges to civil rights laws in the 1960s and to revive the deregulatory project of the *Lochner* era under the guise of the First Amendment. In *Masterpiece*, only Justice Thomas, joined by Justice Gorsuch, embraced the compelled speech argument.[197] But as with calls to revisit *Smith*, the future of this argument is undetermined.

IV. ETIQUETTE, CIVILITY, AND INTEGRITY

We have criticized the Court's decision in *Masterpiece* for finding religious animus where there was none, for distorting free exercise and animus doctrine to reach its conclusions, and for failing to provide sufficient guidance in determining the limits of religious exemptions. But these errors reflect a deeper and more profound mistake on the part of the Court, which was to confuse a matter of etiquette with the demands of civility incumbent on public officials.

A. Etiquette and Civility

The ideas of etiquette and civility are often closely associated. Rules of etiquette tell us how to behave properly, instruct us on good manners, and teach us how to show respect for others. In this sense, etiquette may be seen as an aspect of civility, which refers to treating others with dignity and respect, especially in our public interactions. But in our view, etiquette is the shallower of the two concepts. It involves protocols of politeness — how to refer to someone of status, what clothes to wear on different occasions, which utensils to use and how to use them, and so on. In a more elevated form, etiquette might refer to customary norms of conduct that help to sustain social and professional relationships. But these norms nevertheless have a certain superficiality about them. One can observe the rules of etiquette and quite politely go about treating others unjustly.

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[195] *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (striking conflict mineral disclosure requirement); CTIA-Wireless Ass'n v. City and County of San Francisco, 494 F. App'x 752, 754 (9th Cir. 2012) (striking cell phone radiation warning requirement); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (striking growth hormone labeling requirement for milk); Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 645–46 (D. Vt. 2015) (allowing challenge to GMO labeling to proceed).

[196] *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 956–58 (D.C. Cir. 2013).

[197] *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment).

The demands of civility are distinct from those of etiquette.[198] In the political domain, civility requires that we respect citizens and others subject to political authority as reasonable and rational people, who are capable of understanding and responding to public justifications for the exercise of that authority. Public officials — and especially judges — have a "duty of civility," to borrow a phrase from John Rawls, which requires them to give reasons for their actions.[199] Those reasons must appeal to public values — including the values of freedom and equality — that form the basis of our constitutional system. This idea of civility, which is associated with a broader tradition of liberal thought, emphasizes the importance of reason-giving.[200] To treat someone with civility is to offer them reasons that they can, in principle, understand and accept for how the state has treated them.[201]

In *Masterpiece*, the Court focused on etiquette to the detriment of civility. Justice Kennedy found the Colorado Commissioners to be "neither tolerant nor respectful of Phillips' religious beliefs."[202] But in making that determination, he relied on concededly ambiguous interpretations and impressions of isolated remarks. In one part of his opinion, Justice Kennedy wrote that a Commissioner's statements "might be seen as inappropriate and dismissive,"[203] and later he claimed that "[t]he Commission gave 'every appearance' of adjudicating Phillips' religious objection based on a negative normative 'evaluation of the particular justification' for his objection and the religious grounds for it."[204] The focus here was on the appearance of impropriety, from which Justice

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198 *Cf.* Michael J. Meyer, *Liberal Civility and the Civility of Etiquette: Public Ideals and Personal Lives*, 26 SOC. THEORY & PRAC. 69, 71–73 (2000) (distinguishing between the "civility of etiquette," which is related to norms of respect in polite society, and "liberal civility," which is focused on norms of justification in public discourse). We draw a sharper distinction between etiquette and civility than Professor Michael Meyer does, but he also observes an important difference between norms of politeness and norms of justification.

199 RAWLS, *supra* note 11, at 217; JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* COLLECTED PAPERS 573, 576 (Samuel Freeman ed., 1999). On the duty of judges to give sufficient reasons for their decisions, see, for example, Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1001–05 (2008); and David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 178–79 (1984).

200 *See* Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 134–35 (1987) (discussing the importance of reason-giving in the liberal tradition); Stephen Macedo, *The Politics of Justification*, 18 POL. THEORY 280, 298 (1990).

201 *See* RAWLS, *supra* note 11, at 217; Jonathan Quong, *On the Idea of Public Reason*, *in* A COMPANION TO RAWLS 265, 268–70 (Jon Mandle & David A. Reidy eds., 2014); Schwartzman, *supra* note 117, at 11.

202 *Masterpiece*, 138 S. Ct. at 1731.

203 *Id.* at 1729.

204 *Id.* at 1731 (citations omitted) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537, 545 (1993)).

Kennedy inferred actual impropriety.[205] From a failure of etiquette — from the Commissioners' perceived insensitivity to Phillips's religious beliefs and his legal dilemma — the Court inferred a lack of civility, that the Commission did not provide a neutral justification for its actions.

As we have argued above, the Court's inference of religious hostility was mistaken on the facts. But even if one agrees with Justice Kennedy that the Commissioners were not as sensitive to Phillips's plight as they should have been, the Court's inference of non-neutrality was unwarranted. That is because in addition to the statements that Justice Kennedy quoted, the Commissioners offered extensive reasons for requiring Phillips's compliance with Colorado's civil rights laws.[206] Here, one might respond that hostile statements would taint the rest of the Commission's reasoning. The appearance of hostility can provide evidence that other proffered justifications are merely pretextual rationalizations for decisions motivated by animus.[207] But to draw that inference requires close analysis of those other justifications. And here the Court failed entirely. As noted above, it did not apply a compelling interest test, as required under strict scrutiny, or apply a burden-shifting analysis, as it would in mixed-motive cases in equal protection jurisprudence. *Masterpiece* begins and ends with etiquette, the appearance of impropriety, the lack of consideration, impoliteness, and intolerance. It did not ask whether the Commission, in fact, met its own duty of civility by giving Phillips a public justification for how it treated him.

B. Civility and Religion

Masterpiece can be read as a case about constitutional etiquette that instructs officials on how to talk about religion in public.[208] The ma-

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[205] Or as Justice Kennedy put it: "On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Id.* at 1731.

[206] *See* Joint Appendix, *supra* note 39, at 200–03; Bell, *supra* note 38.

[207] Here we do not mean to imply that appearances of hostility matter only as evidence of wrongful intentions. If public officials express denigration of others, there are independent grounds for moral and legal criticism under expressive theories. *See* Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 654 (2001). Although some expressivists, like Professor Deborah Hellman, reject the relevance of intentions in determining the wrongfulness of discrimination, *id.* at 682, it is not necessary to accept this aspect of expressive theories. The expression of animus may be relevant for multiple reasons: because of the meaning it conveys, and because it provides evidence of impermissible intent. *See* Schwartzman, *supra* note 8, at 12. Even if one adopted an expressive theory, however, the facts of *Masterpiece* do not support the claim that the state denigrated Phillips's religion in denying him an exemption. *See* Sager & Tebbe, *supra* note 145; *supra* section I.B, pp. 138–46.

[208] For other uses of the idea of "constitutional etiquette" in the context of religious freedom, see Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61 (2000); and Paul Horwitz, *Religious Tests in the*

jority said repeatedly that officials must be neutral, tolerant, and respectful. They cannot show "lack of due consideration,"[209] or in a somewhat curious phrase, "undue disrespect" for religion.[210] And officials certainly cannot express hostility toward religion as a justification for their actions.

As a general matter, of course, none of this should be controversial. One might argue, as we have above, about what counts as respectful and considerate in any particular case, but in principle there should be no disagreement about the Court's constitutional premise, which is that officials are forbidden from acting on the basis of religious animus.

Yet the claim that officials must be neutral in their public discussion of religion rests on an important and unstated premise, which is that religious convictions are, in themselves, not sufficient grounds for justifying exercises of political power. If religious convictions could serve as justifications for state action, then officials could not avoid scrutinizing those justifications. And it is difficult to see how they could maintain religious neutrality under those circumstances. The introduction of religious reasons would be no excuse for bigotry or animus, but those reasons could not be insulated from regular norms of public discourse. Officials must be free to challenge the sincerity, validity, and truth of any considerations offered as justifications for political and legal decisionmaking.

The principle that underwrites Justice Kennedy's opinion in *Masterpiece* is the converse of a principle necessary to justify his gay rights decisions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, namely, that the state violates religious neutrality when its policies can be justified only on religious grounds. In these gay rights and same-sex marriage cases, the Court effectively excluded religious convictions as permissible justifications for regulating gay and lesbian sexual relationships.[211] That exclusion was justifiable both as a matter of law and as a matter of political morality: legally, the principle of religious neutrality forbids the state from advancing religious reasons;[212] and

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Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations, 15 WM. & MARY BILL RTS. J. 75, 133–46 (2006).

[209] *Masterpiece*, 138 S. Ct. at 1729.

[210] *Id.* at 1732.

[211] *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, Obergefell *and the End of Religious Reasons for Lawmaking*, RELIGION & POL. (June 29, 2015), http://religionandpolitics.org/2015/06/29/obergefell-and-the-end-of-religious-reasons-for-lawmaking/ [https://perma.cc/CY79-ZXWC]; Corey Brettschneider, Praying for America: The Constitutional Ban on Animus-Based and Theocratic Reasoning in the Establishment, Free Exercise and Equal Protection Clauses 13–16 (Mar. 1, 2017) (unpublished manuscript), https://ssrn.com/abstract=2944711 [https://perma.cc/7HZH-RYKW].

[212] *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005); Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1359–61 (2012) (discussing

morally, the duty of civility requires public officials to provide reasons others can accept solely in virtue of their status as free and equal citizens, and not as adherents of particular religious faiths.[213] But if neutrality and civility require officials to refrain from justifying their actions on the basis of religious convictions, then fairness and reciprocity require refraining from criticizing or expressing hostility toward those convictions.

To clarify, our claim is not that the principle of religious neutrality implicitly at work in *Obergefell* justifies the outcome in *Masterpiece*. In our view, the Colorado Commission and appellate court did not act with religious hostility. But the prohibition on religious hostility, and especially the extension of it to include an etiquette of official discourse, is sustained by a more general commitment to religious neutrality. If the state cannot criticize religious reasons, it also cannot favor them.

C. Civility and Integrity

The principle of religious neutrality, along with the duty of civility as we have described it, forbids public officials from acting on the basis of hostility toward religion. But if there was a clear case involving religious animus this past Term, it was not *Masterpiece*, but *Trump v. Hawaii*, in which the Supreme Court upheld the third iteration of President Trump's travel ban.[214] There has never been a case in which the Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker.[215] Here there were no epistemic or ontological objections to lean on, no issue about the continuity of official hostility, and no question about the wrongfulness of

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the secular purpose requirement under the Establishment Clause); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002).

[213] *See* RAWLS, *supra* note 199, at 576–77; JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 41–43 (2011); Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 385–86 (2011).

[214] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[215] *See id.* at 2439 (Sotomayor, J., dissenting) (noting that rather than disclaim his prejudicial statements, the President "continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers"); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 264 (4th Cir. 2018) (en banc) ("Plaintiffs here do not just plausibly allege with particularity that the Proclamation's purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of the President."), *vacated and remanded*, 138 S. Ct. 2710 (2018) (mem.); *id.* at 352 (Harris, J., concurring) ("This case is remarkable because it features just that: a governmental decisionmaker using his own direct communications with the public to broadcast — repeatedly, and throughout the course of this litigation — an anti-Muslim purpose tied specifically to the challenged action. . . . [T]his is not a case in which we need indulge in 'judicial psychoanalysis' of motive. It is all out in the open." (quoting *McCreary County*, 545 U.S. at 862)); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) (en banc) (describing an "Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination"), *vacated and remanded*, 138 S. Ct. 353 (2018) (mem.).

the intent to discriminate against Muslims.[216] Yet the Court could not bring itself to describe as religious animus statements by the President that make the remarks of the Colorado Commissioners pale in comparison. The Chief Justice swept aside the President's overt hostility, claiming that "the issue before us is not whether to denounce the statements."[217] And in a three-paragraph concurring opinion — the last of his career — Justice Kennedy offered a parting "observation."[218] He admonished that public officials who are not subject to judicial review must nevertheless "adhere to the Constitution and to its meaning and its promise."[219]

This was an empty gesture to a President who has shown no respect for the principle of religious neutrality. By failing to criticize, even in dicta, some of the grossest public statements made by any President in recent memory, Justice Kennedy undermined the credibility of the principles articulated in *Masterpiece*. If there is a rule of constitutional etiquette that bars expressions of religious animus, it applies to petty state officials, but not to those who are sworn at the highest level to protect the freedom of religion. That is the message Justice Kennedy sent in his concurring opinion in *Trump v. Hawaii*. It was an expression of defeat and a loss of integrity — the requirement that judges apply legal principles consistently[220] — at precisely the moment that it was most needed.

V. CONCLUSION

Masterpiece had the makings of a momentous case. For the first time since the Civil Rights era, the Court addressed a free exercise challenge to civil rights laws in the commercial context. The stakes were high. A decision allowing religious exemptions would have been a setback for LGBT rights and a blow to civil rights law more generally. The Court avoided that result and firmly rejected a number of sweeping arguments that would have undermined public accommodations law, especially as applied to gays and lesbians. But the Court also left open the central question in the case, which was whether civil rights laws can be applied in a manner consistent with the principle of religious neutrality. A free speech challenge also remains for future determination.[221]

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[216] *See* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (manuscript at 48–50), https://ssrn.com/abstract=3200695 [https://perma.cc/LKL7-XKF6] (arguing that the Court should have examined the President's statements as evidence of wrongful intent in determining the constitutionality of his Proclamation).

[217] Trump v. Hawaii, 138 S. Ct. at 2418.

[218] *Id.* at 2424 (Kennedy, J., concurring).

[219] *Id.*

[220] *See* DWORKIN, *supra* note 84, at 255.

[221] Some may be tempted to justify the Court's avoidance of these free exercise and free speech questions on grounds of judicial minimalism or as an exercise of the passive virtues. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); CASS R. SUNSTEIN, ONE

Masterpiece is an ambivalent decision — not momentous, but rather transitional. The clearest message from the Court's opinion is that, in the future, public officials must treat religious believers who oppose LGBT rights with respect. It is unfortunate that in turning this case into one about constitutional etiquette, the Court misread the facts, distorted animus doctrine, and failed to apply that doctrine with principled consistency.

The normative significance of etiquette lies in showing respect to others. But respect requires more than politeness and consideration. It demands that public officials, especially judges, comply with a duty of civility, which requires giving principled justifications for their decisions and applying those justifications with integrity. Those demands of civility were not satisfied by the Supreme Court in *Masterpiece*, with uncertain implications for the future of civil rights law and the First Amendment.

CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). But if the Court was inclined to minimalism, then, if anything, it was not minimal enough. There was no conflict in the circuits or among state courts of last resort in applying civil rights laws to prohibit sexual orientation discrimination in public accommodations. *See* cases collected *supra* note 2. The Court easily could have denied certiorari. But having granted it and then avoided important questions of principle, the Court failed to satisfy its duty of civility and in the process distorted the development of free exercise doctrine and undermined its integrity.