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Masterpiece of Misdirection?

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Masterpiece of Misdirection?

Mark Strasser*

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I. Introduction

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹ the United States Supreme Court overruled a finding that a religious baker had violated a state antidiscrimination law when refusing to create a wedding cake for a same-sex couple.² The decision might seem to have been a masterful resolution of an extremely difficult case because the Court issued a narrow opinion that seemed to affirm free exercise rights while at the same time affirming the right of same-sex couples to marry.³ Yet, the opinion, along with the accompanying

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

2. *See id.* at 1748 (Thomas, J., concurring) (“If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals’ must be rejected.”).

3. *See id.* at 1747–48 (Thomas, J., concurring) (stating that the right for same-sex couples to marry had and will continue to conflict with individuals’ right

concurrences and dissent, may well destabilize various settled areas of constitutional law and, in any event, likely represents shots across the bow with respect to a number of issues that will make their way before the Court.

Part II of this Article discusses *Masterpiece Cakeshop*, explaining some of the contradictory signals contained within it and why this opinion may prove to be much more significant than many commentators seem to appreciate. Part III discusses some of the ways that the decision may modify First Amendment law and may undermine antidiscrimination protections as a general matter. The Article concludes that the *Masterpiece Cakeshop* holding permitted the Court to put off for another day resolution of some of the very thorny issues that may arise when sincere religious convictions are in conflict with antidiscrimination laws. Many of the implicit views and approaches contained within *Masterpiece Cakeshop* suggest that future opinions will be at best quite contentious and at worst insupportable as a matter of reason or precedent.⁴

II. *Masterpiece and Mixed Messaging*

Masterpiece Cakeshop is a narrow opinion that seems to affirm free exercise rights while at the same time affirming the right of same-sex couples to marry.⁵ Yet, the opinion has the potential to help bring about significant changes in existing law—the bases for these important deviations are found not in the holding itself but in the factors that the Court implicitly endorses for consideration and in the implicit roles that these factors should play in future cases.⁶ While the *Masterpiece Cakeshop* opinion does not change

to freedom of speech and expression).

4. See *infra* Part IV (discussing potential dystopian results of the case).

5. See *Masterpiece Cakeshop*, 138 S. Ct. at 1747–48 (Thomas, J., concurring) (stating that the Court’s previous decision granting same-sex couples the right to marry has inevitably come into conflict with religious liberty).

6. See *id.* at 1723 (noting certain factors that might be different from a refusal to sell a cake).

current law, it nonetheless bodes poorly for a reasoned resolution of the difficult issues such cases may present.

A. Background

When Charlie Craig and Dave Mullins asked Jack Phillips about creating a cake to help them celebrate their wedding, he refused, citing religious opposition to same-sex marriage.⁷ Phillips, a devout Christian,⁸ believes that “creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.”⁹ Craig and Mullins then filed a complaint with the Colorado Civil Rights Commission against Masterpiece Cakeshop and Phillips, alleging that that the bakery had denied them “‘full and equal service’ . . . because of their sexual orientation.”¹⁰

Colorado has an ordinance prohibiting discrimination in places of public accommodation.¹¹ The act defines “‘public accommodation’ broadly to include any ‘place of business engaged in any sales to the public and any place offering services . . . to the public,’ but excludes ‘a church, synagogue, mosque, or other place that is principally used for religious purposes.’”¹²

An investigator found that Phillips had refused to make wedding cakes for six other same-sex couples¹³ because “his

7. *See id.* at 1723 (“In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop’s owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages . . .”).

8. *See id.* at 1724 (explaining that Phillips’s main goal in life is to be obedient to Jesus Christ).

9. *Id.*

10. *Id.* at 1725.

11. *See* COLO. REV. STAT. § 24–34–601(2)(a) (2017)

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .

12. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1725 (2018) (citing COLO. REV. STAT. § 24–34–601(1)).

13. *See id.* at 1726 (“The investigation found that Phillips had declined to

religious beliefs prohibited it and because the potential customers ‘were doing something illegal’ at that time.”¹⁴ The investigator also found that Phillips had refused to sell cupcakes to two lesbians who were going to celebrate a commitment ceremony¹⁵ because the shop “had a policy of not selling baked goods to same-sex couples for this type of event.”¹⁶ Thus, the bakery represented itself as having a policy of refusing to sell to those celebrating same-sex unions, because of the bakery’s religious beliefs that such unions merited disapprobation and, perhaps, because such unions were “illegal.”¹⁷

Craig and Mullins were doing something illegal only in the sense that Colorado did not recognize same-sex marriage at that time.¹⁸ It was not against Colorado law for the couple to go to Massachusetts to marry and then to have a subsequent reception in Denver,¹⁹ just as it was not illegal for the unnamed lesbian couple to have a commitment ceremony in Colorado.²⁰ Nonetheless, Colorado, at that time, did have a constitutional provision barring recognition of same-sex unions.²¹

It is not clear why the *Masterpiece Cakeshop* Court expressly noted that such marriages were not recognized at the time that Phillips refused to make the cake.²² The Court may have done so

sell custom wedding cakes to about six other same-sex couples.”).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.* at 1725–26 (describing that Phillips explained to multiple potential customers that he could not sell cakes to them because their sexual orientation and lifestyle was illegal and against his religious beliefs).

18. *See id.* at 1723 (“[T]he State of Colorado itself did not recognize [same-sex marriages] at that time.”).

19. *See id.* at 1724 (“At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver.”).

20. *See id.* at 1723 (noting that Colorado did not recognize same-sex marriages).

21. *See* COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”), *held unconstitutional by* Brinkman v. Long, No. 2013-CV-032572, 2014 WL 7722910 (Colo. Dist. Ct. July 9, 2014).

22. *Masterpiece Cakeshop*, 138 S. Ct. at 1721 (“His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay

because Phillips implied that the state's refusal to recognize such unions played a role in his refusal²³ or, perhaps, because the Court believed that the state's refusal to recognize same-sex unions undercut the claim that Phillips was motivated by impermissible animus and supported his belief that his refusal was not precluded by law.²⁴ Whether or not the existence of such a law would in fact negate the presence of animus,²⁵ same-sex marriage is now recognized in Colorado and all of the other states,²⁶ so this factor would not operate in the same way if a bakery were to deny such services now.

B. First Amendment Implications?

The *Masterpiece Cakeshop* Court explained that the case “presents difficult questions as to the proper reconciliation of at least two principles.”²⁷ The first of the named principles involved “the authority of a State and its governmental entities 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.”²⁸ The second principle involved “the right of all persons to exercise fundamental freedoms under the First Amendment, as

marriages . . .”).

23. *See id.* at 1724 (“Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, *and also because* Colorado (at that time) did not recognize same-sex marriages.” (emphasis added)).

24. *See id.* at 1728

Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs . . .

25. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down Colorado's state constitutional amendment barring antidiscrimination protections on the basis of sexual orientation because the amendment “seem[ed] inexplicable by anything but animus toward the class it affects”).

26. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (striking down same-sex marriage bans as a violation of 14th Amendment guarantees).

27. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

28. *Id.*

applied to the States through the Fourteenth Amendment.”²⁹ Yet, this was a somewhat misleading way to begin for at least two distinct reasons: first, it was not even clear whether or how the First Amendment was triggered in this case, and, second, because the Court did not offer a helpful way to reconcile these principles besides offering some factors that “might”³⁰ be considered and instead decided the case based on the unobjectionable principle that those ultimately adjudicating rights must not be blinded by hostility towards one of the parties.³¹

The First Amendment freedoms include speech and free exercise of religion.³² Speech was arguably implicated in this case, even though “few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.”³³ If speech can be implicated in cake-making, then an important issue involves how to determine when cake-making qualifies as protected speech. The Court noted that the general failure to appreciate the possible speech elements of cake-making might be attributable to the failure to appreciate that “the application of constitutional freedoms in new contexts can deepen our understanding of their meaning,”³⁴ but did little to flesh out the conditions under which the creation of baked goods would trigger First Amendment scrutiny.³⁵

Certainly, our understanding of constitutional protections may evolve across generations—“[T]imes can blind us to certain

29. *Id.*

30. *Id.*

31. *See id.* at 1732

Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided . . . [T]he rulings of the Commission and of the state court that enforced the Commission’s order must be invalidated.

32. *See id.* at 1723 (“The freedoms asserted here are both the freedom of speech and the free exercise of religion.”).

33. *Id.*

34. *Id.*

35. *See id.* (stating factors that “might” be different from refusal to sell a cake with no further explanation).

truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”³⁶ Yet, it is also true that some “new” contexts may in fact be less novel than initially thought and may well be readily analyzed in light of well accepted principles and criteria.³⁷ Regrettably, the Court did not make clear or even mention whether this “new” understanding of what constitutes political speech was compatible with *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,³⁸ although that case was addressed in Justice Thomas’ concurrence.³⁹

The *Masterpiece Cakeshop* Court illustrated how thorny some of the implicated constitutional issues might be in a case involving a baker who claimed that he could not in good conscience bake a particular cake⁴⁰—the Court mentioned several different scenarios and then suggested that certain salient features *might* make a constitutional difference.⁴¹ “If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all.”⁴² This example was offered in the context of explaining that “[i]n defining whether a baker’s *creation* can be protected, these details might make a difference.”⁴³

Regrettably, it is not entirely clear which details of the Court’s example might make a difference. Is it that the baker does not want to design a special cake with celebratory words or images or

36. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

37. *Cf. Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (“The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria.”).

38. 547 U.S. 47 (2006).

39. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring) (“[A] reasonable observer would not view Phillips’ conduct as ‘an endorsement of same-sex marriage,’ but rather as mere ‘compliance’ with Colorado’s public-accommodations law.” (citing *Rumsfeld*, 547 U.S. at 64–65)).

40. *See id.* at 1723 (“The shop’s owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriage . . .”).

41. *See id.* (noting a scenario that “*might* be different from a refusal to sell any cake at all.” (emphasis added)).

42. *Id.*

43. *Id.* (emphasis added).

is it simply that the baker does not have to design a special cake? Does it matter that the special cake would be celebrating a marriage? Perhaps the baker's being asked "to use his artistic skills to make an expressive statement"⁴⁴ sufficed to trigger First Amendment guarantees. The Court made the proper analysis even more confusing when illustrating its speech point by talking about words with religious meaning, as if those words might trigger more speech protection than other non-religious words that Phillips would refuse to endorse.⁴⁵

Ironically, after mentioning particular factors that *might* be constitutionally relevant,⁴⁶ the Court implied that some of those very factors were not constitutionally relevant.⁴⁷ Apparently, the fact that Phillips was being asked to bake a cake did not alone immunize his refusal, since the articulated factors might make a difference when deciding whether a baker's "creation" is protected.⁴⁸ But if the presence or absence of additional factors would determine whether a creation was protected,⁴⁹ then the mere fact that it was being commissioned or created would not alone immunize a refusal to bake a cake from prosecution under an antidiscrimination law.

The Court's mixed messaging was not limited to its discussion of which factors might make a difference. The Court seemed to undercut its own implicit position about how to analyze these

44. *Id.* at 1728.

45. *See id.* at 1723 (noting that refusal to design a cake showing words with religious meaning might be different from Phillips's instance).

46. *See id.* at 1723

A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or refusal to put certain religious words or decoration on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

47. *See id.* (stating that the Colorado Civil Rights Commission's consideration of the case was faulty because "[t]he reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions").

48. *See id.* ("In defining whether a baker's creation can be protected, these details might make a difference.").

49. *See id.* (noting that the presence of certain factors might distinguish future cases).

kinds of cases when one considers the Court's reasoning in light of the underlying facts.

Phillips had refused to bake a cake when he understood what Craig and Mullins were celebrating⁵⁰—there had been no exploration of what would be on the cake,⁵¹ which means that none of the possibly significant factors such as celebratory words or images⁵² played a role in this case. Further, there is reason to believe that Phillips would have been unwilling to provide any kind of cake, e.g., a large sheet cake, for the celebration of Craig and Mullins's marriage, "because the shop 'had a policy of not selling baked goods to same-sex couples for this type of event.'"⁵³

The Court noted Phillips's admission that "if a baker refused to sell any goods or any cakes for gay weddings, . . . the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public."⁵⁴ Yet, the bakery did have such a policy,⁵⁵ so it would seem that Phillips admitted that the State had a strong case that Masterpiece Cakeshop's practices were in violation of Colorado law.

A case involving a bakery with a blanket policy against providing baked goods for same-sex weddings might be contrasted with a narrower case involving a baker who refuses to provide a specially designed cake "us[ing] his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation."⁵⁶ The Court's having mentioned these differing scenarios implicitly distinguishes between an

50. *See id.* (explaining that Phillips refused to bake the case when he learned it was for a same-sex wedding).

51. *See id.* at 1749 (Ginsburg, J., dissenting) ("Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.").

52. *See id.* at 1723 (noting potentially distinguishable factors of a refusal to attend the wedding to cut the cake, lace religious words on the cake, or sell an already created cake displaying religious symbols).

53. *Id.* at 1725.

54. *Id.* at 1728.

55. *See id.* at 1726 (noting that the shop "had a policy of not selling baked goods to same-sex couples for this type of event").

56. *Id.* at 1728.

impermissible refusal to provide any goods or cakes with a *possibly* permissible refusal to make an expressive statement with which one disagrees.

Assume for purposes of illustration that the following accurately represents current law. The Constitution protects Baker's conscience-based refusal to create a wedding cake that includes the writing: "God blesses the union of Charles and David." However, a blanket refusal to bake any cake for a same-sex union is not constitutionally protected.

Charles and David approach Baker seeking a cake with "God blesses the union of Charles and David" written on it. Baker refuses pursuant to the bakery's general policy of refusing to provide any baked goods for same-sex unions. At least one question would be whether Baker's refusal would be permissible because a different baker would be constitutionally protected in refusing to provide such a cake, given her willingness to provide other baked goods for Charles and David; for example, a wedding cake with no writing on it, or whether instead Baker's refusal would not be constitutionally protected because pursuant to a policy of refusing to provide any baked goods for same-sex weddings.

In the hypothesized example where Charles and David supply the words that they would like Baker to incorporate, it is unclear whether this counts as an example of a refusal to "use his artistic skills to make an expressive statement, *a wedding endorsement in his own voice* and of his own creation."⁵⁷ The words would not be Baker's, but the design of the cake would be and, further, Baker would be using his own artistic skills to make the cake. It is simply unclear whether this should count as Baker's expressive statement—if a baker is asked to design a cake with the words, "Happy Birthday, Grandma," those seeing the cake would be unlikely to attribute the message to the baker rather than to family members.⁵⁸ Perhaps Baker's being asked to write someone

57. *Id.* (emphasis added).

58. *Cf.* Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 243 n.27 (2016) ("Whatever communicative content is found in 'happy birthday' in frosting is quite obviously attributable to the person who bought and gave the cake, not to the baker . . .").

else's words would nonetheless count as a wedding endorsement in his own voice. Suppose, however, that Charles and David request a wedding cake with no symbols or writing—that, presumably, would be less likely to qualify as an endorsement in Baker's own voice.

There are numerous ways to modify the hypothetical about Charles and David's wedding cake to tease out the (possibly) relevant point along the continuum past the blanket refusal to create baked goods for a same-sex wedding where the refusal would be constitutionally protected. However, regardless of where that point along the continuum might be, the Court implied that a baker would *not* be protected merely because he, himself, believed that "creating a wedding cake for a same-sex wedding [regardless of what letters or symbols it contained] would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."⁵⁹

It may be that the Court did not believe that the Masterpiece Cakeshop had a blanket policy of refusing to provide baked goods for same-sex unions statement to that effect notwithstanding,⁶⁰ because Phillips had told Mullins and Craig, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."⁶¹ Phillips's comment when taken in light of the articulated refusal to provide baked goods for same-sex unions "reads more naturally"⁶² as a suggestion that Craig and Mullins should come back when they want baked goods for a different occasion.⁶³ But it is not at all clear why the bakery's willingness to provide baked goods for another occasion would be relevant to whether their refusal to provide baked goods

59. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

60. *See id.* at 1726 (noting that the shop had a policy of not selling to same-sex couples).

61. *Id.* at 1724.

62. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

63. Presumably, the bakery's willingness to provide cakes for a shower referred to a baby shower. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (explaining Phillips's offer to make the couple "shower cakes"). If the bakery was unwilling to provide baked goods for a commitment ceremony, it was likely unwilling to provide a cake for a bridal shower or grooms cake, although these possibilities were not discussed in the opinion. *See id.* (stating that Phillips "just [doesn't] make cakes for same sex weddings").

to Mullins and Craig for their wedding was in violation of law. Nonetheless, the Court took issue with the Colorado Civil Rights Commission for its conclusion that the bakery's willingness to provide Craig and Mullins a birthday cake was somehow irrelevant.⁶⁴

The *Masterpiece Cakeshop* Court seemed to be trying to find some kind of compromise position. The Court noted that “[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.”⁶⁵ Such a “refusal would be well understood in our constitutional order as an exercise of religion.”⁶⁶ However, the Court cautioned that

[I]f that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings 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.⁶⁷

In a case addressing a baker's conscience-based refusal on the merits,

any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’ something that would impose a serious stigma on gay persons.⁶⁸

Regrettably, the Court did not provide a helpful way to limit the exemption claims that might be made by any number of commercial entities, besides offering the bald statement that “there are no doubt innumerable goods and services that no one

64. *See id.* at 1730 (“[T]he Commission dismissed Phillips’ willingness to sell ‘birthday cakes, shower cakes, [and] cookies and brownies,’ . . . to gay and lesbian customers as irrelevant.”).

65. *Id.* at 1727.

66. *Id.*

67. *Id.*

68. *Id.* at 1728–29.

could argue implicate the First Amendment.”⁶⁹ Ironically, the Court offered a way for almost anyone to argue that the First Amendment was triggered by their refusal to provide goods or services for a same-sex wedding.⁷⁰

The Court mentioned Phillips’s claim that he was being asked “to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation,”⁷¹ which Phillips alleged was in effect “a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.”⁷² But many different types of individuals commissioned to perform a service requiring some kind of skill might claim, even sincerely, that they were being asked to use their creative talents to provide services for a wedding in a way that would be inconsistent with their religious beliefs⁷³—the Court offered nothing to limit the “purveyors of goods and services who object to gay marriages for moral and religious reasons . . . [who must] be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’”⁷⁴

Nor did the Court’s suggestive comments⁷⁵ imply that the envisioned exception would only apply to those providing commissioned services. Suppose that a bakery makes several cakes each morning with the expression, “May God’s countenance shine upon you,”⁷⁶ because the bakery has enough demand for such cakes

69. *Id.* at 1728.

70. *See id.* (determining that Phillips was not required to use his personal expression to spread a message inconsistent with his religious beliefs).

71. *Id.*

72. *Id.*

73. *See, e.g.,* Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (discussing that a photographer refused to provide service for a couple celebrating a same-sex union); State v. Arlene’s Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017) (stating that a florist refused to provide floral arrangement for a same-sex union), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018).

74. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1728–29 (2018).

75. *See id.* at 1728 (refusing to demand that Phillips use his right to expression to promote a belief he does not hold).

76. *See id.* at 1723 (offering the example of a baker who refuses “to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it”).

that it does not need to wait for special orders. Suppose further that the bakery has a policy of refusing to sell such cakes to those celebrating same-sex unions or, perhaps, to those in same-sex relationships. It is simply unclear whether the Court would consider this religious message to be a factor in favor of those asserting a conscientious objection when refusing a sale, even though the cake had not been specially ordered. Nor is it clear that this exception would be limited to those in same-sex relationships. Those with conscientious objections to interracial unions or interreligious unions would presumably be entitled to invoke the same kind of exception.⁷⁷

Suppose that the cakes do not have religious writing or symbols on them. Even so, the baker might believe that her selling cakes (or other baked goods) to be used at a celebration of a disfavored union would be incompatible with her religious beliefs. While the Court suggested that such a refusal would be contrary to law,⁷⁸ the Court offered no way to distinguish between this sincere refusal to allow baked goods to be used in a disapproved celebration and the sincere religious claim of the individual who did not want her artistic skills to be used on a way contrary to conscience.

Masterpiece Cakeshop suggested that it could not sell baked goods to those celebrating same-sex unions⁷⁹ because doing so would somehow make the bakery a participant in a celebration in violation of conscience. Individuals who disapprove of a variety of kinds of families or groups (whether defined in terms of sex, race, religion, national origin, or some other category) might analogously suggest that their promotion of those families/groups in a variety of contexts would be a violation of conscience. Perhaps

77. Cf. Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 145 (2010) (noting that individuals “might have religious qualms about helping any number of couples marry, such as interracial, interreligious, or intergenerational couples,” and others “might have religious objections to facilitating marriages where the parties could not produce children through their union”).

78. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (distinguishing certain instances of refusing to bake or sell cakes bearing religious symbols).

79. See *id.* at 1726 (noting that the bakery had a policy of refusing to sell to same-sex couples).

some of those claims could be rejected because the beliefs were not sincerely held,⁸⁰ but many individuals might in fact sincerely hold such beliefs. If the Court stands by its claim that “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,”⁸¹ then the Court will have to do much more to limit the conditions under which individuals who refuse to serve particular families or groups because of religious beliefs are immunized from prosecution under antidiscrimination laws.⁸² Otherwise, the exception (namely, whenever an individual has sincere religious compunctions about providing the good or service)⁸³ would swallow the rule.

C. Decisionmaker Bias

After suggesting a variety of factors that might be considered in some future case implicating conscience and the appropriate application of an antidiscrimination law,⁸⁴ the *Masterpiece Cakeshop* Court made clear that it would not address how these factors should be applied.⁸⁵ Instead, the Court focused on whether the Commission had possessed the “requisite religious neutrality that must be strictly observed”⁸⁶ when assessing whether Phillips had indeed violated the Colorado antidiscrimination law.

Several factors convinced the Court that Phillips’s claims had not been examined with the required neutrality.⁸⁷ Commission

80. *But see id.* at 1729 (criticizing the commissioner for implying that a particular religious belief might not have been sincerely held).

81. *Id.* at 1727.

82. *See id.* at 1723 (providing a range of scenarios that might allow immunization from prosecution).

83. *See id.* at 1732 (noting that disputes must be resolved with tolerance and without undue disrespect to sincere religious beliefs).

84. *See id.* at 1723 (distinguishing situations involving cakes with religious symbols that “might” be different).

85. *See id.* at 1732 (“However later cases raising these or similar concerns are resolved in the future . . .”).

86. *Id.*

87. *See id.* (stating that the State’s interest could have been weighed against Phillips’s sincere religious belief in a way consistent with religious neutrality).

members had, in the Court's view, "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."⁸⁸ One Commission member in particular had suggested that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'"⁸⁹

The Court understood that the comments were ambiguous and that the commissioner might merely have meant that "a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."⁹⁰ Or, the comments "might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced."⁹¹

Perhaps the commissioners were biased against Phillips.⁹² However, the Court's claim that the Commission members did not manifest "due consideration for Phillips' free exercise rights and the dilemma he faced"⁹³ was not entirely persuasive. It is an open question whether Phillips had a free exercise right to refuse to provide a cake in the circumstances, so it is at best an open question whether any free exercise rights were ignored or undervalued. Indeed, the free exercise right that the *Masterpiece Cakeshop* Court seems to be recognizing is the right to have one's claim heard by a neutral decisionmaker⁹⁴ and to have decisions

88. *Id.* at 1729.

89. *Id.*

90. *Id.* ("Standing alone, these statements are susceptible of different interpretations.")

91. *Id.*

92. *See id.* at 1732 (Kagan, J., concurring) ("[S]tate actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration.' . . . I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation.")

93. *Id.* at 1729.

94. *Cf. Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975)

[A] "fair trial in a fair tribunal is a basic requirement of due process." This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally

about one's rights not be based on improper considerations such as bias against one's religion.⁹⁵ But the question at hand is whether in fact the Commissioners had been motivated by bias in reaching the decision rather than in having come to an adverse decision on appropriate grounds.⁹⁶

What of the dilemma Phillips faced? Nothing is included within the opinion that suggests that Phillips was conflicted—he believed he had a religious duty to refuse to provide the baked goods and may in addition have believed that such a decision was in accord with the law because Colorado at the time did not recognize same-sex unions.⁹⁷ It simply is not clear what dilemma the Court was envisioning.

A dilemma might be posed when religious dictates require one action and the law requires another, but that dilemma did not seem to be present at the time this occurred.⁹⁸ Perhaps the dilemma posed is that religious dictates might later be found to be in violation of law, although that kind of dilemma is posed whenever one does what one believes right (for religious or non-religious reasons) and that decision is subsequently found to be in violation of law.

Depending upon how Phillips's beliefs were construed, the commissioner might merely have been offering the view that Phillips himself seemed to have conceded, namely, that Colorado law precluded Phillips from issuing a blanket refusal to sell any

unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

(citations omitted).

95. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.").

96. See *id.* ("[T]he Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs.").

97. See *id.* at 1723 (explaining that the motivation for Phillips's refusal was based on his "sincere religious beliefs and convictions").

98. See *supra* notes 13–14 and accompanying text (noting that Phillips believed the wedding illegal).

baked goods to those wishing to celebrate a same-sex union.⁹⁹ Yet, the questionable commissioner comments were not limited to those already mentioned, and it may well be that some of the other comments ultimately convinced the Court that the Commission members were biased.

The Court seemed especially affronted¹⁰⁰ by the following remarks:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.¹⁰¹

It is not clear whether the Court rejected that religious views had been used throughout history to justify discrimination¹⁰² or whether, instead, the Court believed that religious views had been used to justify discrimination¹⁰³ but that those uses of religion were

99. See *Masterpiece Cakeshop*, 138 S. Ct. at 1728

Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, . . . the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

100. See *id.* at 1729 (“To describe a man's faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”).

101. *Id.*

102. See, for example, the *Loving* Court's description of the views of the trial court judge:

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. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. Virginia, 388 U.S. 1, 3 (1967).

103. See Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 773 n.150 (2003) (“[R]eligion has been used to justify discrimination in all forms.”).

not appropriately compared to the use of religion before the commission. The Court noted: “The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.”¹⁰⁴ Such a comment suggests that religion has sometimes been used to justify indefensible practices but that it is unfair or inappropriate to analogize the refusal to provide baked goods to practices involving slavery and genocide.¹⁰⁵

The commissioner may not have meant that the practice before the Commission was of the same magnitude as slavery and genocide but merely that religious beliefs had been used to justify a whole host of discriminatory practices. The commissioner said as much when suggesting that there were “hundreds of situations where freedom of religion has been used to justify discrimination.”¹⁰⁶

Suppose that the commissioner had not mentioned slavery or the Holocaust but instead had noted that religion had been used in the past to justify the refusal to recognize interracial marriage.¹⁰⁷ Presumably, such a comment would not trigger images of the horrors of slavery or of gas chambers. However, given the broader societal acceptance of interracial marriage,¹⁰⁸ such a comment might still have been thought prejudicial if, for example, interracial marriage were thought religiously acceptable and same-sex marriage religiously unacceptable.

The Court responded to the observation that religion had been used to justify discrimination including slavery and the Holocaust by saying: “This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral

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

105. Cf. W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 571 (2011) (“It does not help to compare some present injustice with some historical norms that we now universally acknowledge as an evil, like slavery.”).

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

107. Cf. Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 263 (2002) (“Opponents of mixed-race marriages, like opponents of same-sex marriages today, cited religion and natural law to block acceptance of those relationships.”).

108. See Kevin Brown, *The Enduring Integration School Desegregation Helped to Produce*, 67 CASE W. RES. L. REV. 1055, 1064 (2017) (“American society’s acceptance of interracial dating and marriage has increased significantly.”).

enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”¹⁰⁹ But the Court's response here suggests that the difficulty may not have been in comparing the horrors of slavery or of the Holocaust to the indignity of having to go to a different bakery to get baked goods for one's wedding celebration, but in a commissioner's having the sentiment that religion may have played a role in promoting slavery or the Holocaust. But religion has been used to promote slavery,¹¹⁰ although it has been used to undermine slavery as well.¹¹¹ Religion also was used to promote the Holocaust,¹¹² although religion may also have inspired individuals to oppose the Holocaust.¹¹³

Part of the difficulty for the Court was in determining whether the commissioner(s) had an anti-religious bias that caused them to find Phillips in violation of Colorado law or whether, instead, the commissioners had reached that conclusion based on appropriate considerations. Perhaps the Court is suggesting that a commissioner's having the sentiment that religion has sometimes played a negative role in history should be a basis for recusal,

109. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018)

110. See Marsha B. Freeman, *Holier Than You and Me: 'Religious Liberty' Is the New Bully Pulpit and Its New Meaning Is Endangering Our Way of Life*, 69 ARK. L. REV. 881, 895 (2017) (noting that “[r]eligion . . . [was] traditionally used to justify such abhorrent social platforms as slavery”).

111. See Alfred L. Brophy, *Harriet Beecher Stowe's Critique of Slave Law in Uncle Tom's Cabin*, 12 J.L. & RELIGION 457, 504 (1995) (discussing “antislavery evangelical religion”).

112. Cf. Jocelyn Hellig, *Antisemitism in Sub-Saharan Africa with a Focus on South Africa*, 14 EMORY INT'L L. REV. 1197, 1202 (2000) (“The Holocaust of the Second World War was thus ‘the terminal expression of Christian anti-Semitism.’” (quoting RICHARD L. RUBENSTEIN, *AFTER AUSCHWITZ: RADICAL THEOLOGY AND CONTEMPORARY JUDAISM* 20 (1966))).

113. See Douglas L. Colbert, *The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 42 (1986)

During World War II, Jewish people fleeing the holocaust found refuge in monasteries where they were given food, shelter, and protective identification. One Protestant parish in Southern France, Le Chambon, declared itself a sanctuary and is credited with saving the lives of over three thousand Jewish people who found shelter there.

although one would wonder whether a commissioner who had the sentiment that religion has sometimes played a very positive role in history should also be a basis for recusal.¹¹⁴

The commissioner's comment that "it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others"¹¹⁵ received a sharp rebuke from the Court.¹¹⁶ It was not clear whether the term "rhetoric" was used to suggest that the belief was "insincere."¹¹⁷ Nor was it clear whether the use of "despicable" was intended to communicate that the religious beliefs themselves were despicable. Perhaps the commissioner was expressing his frustration because he believed that religion was in this case resulting in harm¹¹⁸ when it often has beneficial effects,¹¹⁹ although use of the term "despicable" would not inspire public confidence in the commissioner's objectivity.¹²⁰ In any event, as someone adjudicating rights, the commissioner simply should not be announcing that particular religious beliefs are good or bad, right or wrong.¹²¹

The Court noted that the other commissioners did not object to those comments.¹²² Based on that failure to object, the Court

114. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1729 ("The neutral . . . consideration to which Phillips was entitled was compromised here.").

115. *Id.*

116. *See id.* ("To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways . . .").

117. *Id.*

118. *Cf. Molly A. Gerratt, Closing A Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 182 (2011) ("[A] religion can cause harm to its own adherents or third parties . . .").

119. *Cf. William P. Marshall, Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 386–87 (1996) ("[R]eligion is one of the most positive influences in society.").

120. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (suggesting that the commissioner's comments reflected "a clear and impermissible hostility").

121. *Cf. Douglas Laycock, Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 261 (1982) ("A few churches conscientiously believe that God commands racial discrimination But such churches are protected in their beliefs; the free exercise clause protects unpopular churches as well as popular ones.").

122. *Masterpiece Cakeshop*, 138 S. Ct. at 1729 ("The record shows no objection to these comments from other commissioners.").

either attributed the same views to the Commission more generally or at least believed that the fairness and impartiality of the Commission was thereby seriously impugned.¹²³ Needless to say, the Court has not always believed that an asserted view, if uncorrected by others, might reasonably be thought to reflect animus on the part of those making the assertion and those not complaining about it.¹²⁴

Members of civil rights commissions are on notice that such pronouncements will not be tolerated, and that they should not make comments that would create an appearance (or reflect an actuality) of partiality, especially in the context of rendering a decision.¹²⁵ But the Court offered additional evidence of alleged partiality.

After the administrative law judge (ALJ) had ruled in favor of Craig and Mullins, William Jack approached three different bakeries¹²⁶ and asked them to make cakes with messages

123. *See id.* at 1730 (“[T]he Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.”).

124. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (“To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”). *Compare Bowers*, 478 U.S. at 191 (suggesting that there is “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other”), *with Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”). The Court’s apparent willingness to condone orientation animus did not go unnoticed. *See Watkins v. U.S. Army*, 837 F.2d 1428, 1453 (9th Cir.), *superseded*, 847 F.2d 1329 (9th Cir. 1988), *withdrawn on reh’g*, 875 F.2d 699 (9th Cir. 1989) (Reinhardt, J., dissenting) (“The anti-homosexual thrust of *Hardwick*, and the Court’s willingness to condone anti-homosexual animus in the actions of the government, are clear.”).

125. *Cf. Mississippi Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004) (refusing to sanction a judge who had expressed his views on the rights of gays and lesbians). The judge suggested that “homosexuals belong in mental institutions.” *See id.* at 1008. The court suggested that after this public pronouncement the judge might well face recusal motions. *See id.* at 1015 (“Judge Wilkerson will doubtless face a recusal motion from every gay and lesbian citizen who visits his court.”).

126. *See Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting) (“On March 13, 2014—approximately three months after the ALJ ruled in favor

conveying disapproval of same-sex unions.¹²⁷ Justice Ginsburg explained in her dissent:

He requested two cakes “made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ died for us. Romans 5:8.’”¹²⁸

The bakers refused to make the cakes. Jack filed a complaint with the Civil Rights Commission and the Commission sided with the bakers.¹²⁹ The Commission justified its decisions by noting that “the requested cake included ‘wording and images [the baker] deemed derogatory,’ featured ‘language and images [the baker] deemed hateful,’ or displayed a message the baker ‘deemed as discriminatory.’”¹³⁰

The Court believed that the Commission’s treatment of the bakers refusing Jack’s request provided a sharp contrast with the commission’s treatment of Phillips,¹³¹ and that the Commission’s siding with the bakers in Jack’s case was “[a]nother indication of hostility.”¹³² For example, the Court noted that the “Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the

of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips’ appeal from that decision—William Jack visited three Colorado bakeries.”).

127. *See id.* at 1730 (“[O]n at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text.”).

128. *Id.* at 1749 (Ginsburg, J., dissenting) (alterations in original).

129. *See id.* at 1730 (“Each time, the Division found that the baker acted lawfully in refusing service.”).

130. *Id.* (citations omitted).

131. *See id.* (“The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection.”).

132. *Id.* at 1730.

customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism.”¹³³

Regrettably, the Court did not spell out what the Commission was doing or why the Court found it objectionable. When ruling against Phillips, the Commission had said that the message on the cake, if any, would be attributed to those who bought the cake rather than the baker.¹³⁴ For example, if the cake had said, “Congratulations,” “Best Wishes,” or “Health and Happiness,” those seeing the cake would not think that Phillips was saying this but, instead, that the customer had commissioned it, perhaps assuming that those attending the wedding or reception had these positive thoughts in mind. If the cake did not have any words or symbols on it, the cake’s message of celebration would be attributed to those attending the wedding rather than to Phillips. The Commission’s identification of the individuals to whom the message would be attributed was likely in response to the (actual or anticipated) claim that Phillips did not want attributed to him these good wishes for the couple, because he did not approve of same-sex unions.¹³⁵

The Commission did not tell the bakers who refused to bake the cakes for Jack that the message of the cakes would not be attributed to them but, instead, to Jack. Yet, the bakers did not justify their refusal by saying that they feared that the message on the cake would be attributed to them but, instead, defended their refusals by saying that the message on the cake was “derogatory,” “hateful,” or “discriminatory.”¹³⁶ But if the bakers refusing to bake

133. *Id.*

134. *Id.* at 1738 (Gorsuch, J., concurring) (noting that the Commission denied Mr. Phillips the choice of withholding his approval of the message the cake would send).

135. Brief for Petitioners at 15, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762 (“This Court’s compelled-speech doctrine forbids the Commission from demanding that artists design custom expression that conveys ideas they deem objectionable.”).

136. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018) (citations omitted). It might be noted that Phillips claimed that he would refuse to make a cake that was derogatory to gays and lesbians. *See id.* at 1745 (Thomas, J., concurring) (“Phillips also refuses to bake cakes containing .

Jack's cakes were not basing their refusals on their right not to be forced to send a message of which they disapproved but instead on their right not to create something offensive, then the Commission would of course not need to address the forced speech argument.

The Commission might reasonably omit discussion of forced speech when that issue was not even raised, which means that the Commission had a reasonable, non-animus-based reason for including that discussion in the case involving Phillips but not in the cases involving Jack. But if there was a reasonable explanation for the Commission's action, then the Court should not have treated this difference as an additional reason to attribute animus to the Commission.¹³⁷ The Court suggested that "[a]t the time, state law also afforded shopkeepers some latitude to decline to create specific messages the storekeeper considered offensive."¹³⁸ But the Commission should not be accused of bias simply because it applied state law in good faith, exempting individuals who refused to create objects containing specific, offensive messages but not exempting individuals who refused to create objects that did not contain messages at all, much less offensive ones.

The Court offered another reason to believe that the Commission had an anti-religious bias. The Commission had found speech to have been involved in one case but not the other.¹³⁹ Yet, Jack had requested cakes with particular words and symbols,¹⁴⁰ and Phillips had refused to make a cake even before any words or symbols had been discussed.¹⁴¹ For all Phillips knew, Craig and Mullins would not even have wanted a cake with words or symbols

. . . racist or homophobic messages.”).

137. See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (“[W]e infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.”).

138. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

139. See *id.* at 1730 (“The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished.”).

140. *Supra* note 52 and accompanying text.

141. See Brief for Petitioners at 12, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762 (“Craig and Mullins did not specify whether they wanted words or designs on their wedding cake . . .”).

or even one that looked like a traditional wedding cake.¹⁴²

Suppose that a customer saw one of the cakes that Jack had requested in a bakery window. Next to it was a sheet cake with flowers on it. Might a reasonable person suggest that Jack's cake was communicating a particular message while the other cake was not? It would seem difficult to miss the disapproval conveyed by Jack's cake and difficult to impute a particular conveyed message by the sheet cake. Because a sheet cake without words or symbols "lack[s] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper,"¹⁴³ it would be reasonable to differentiate such a cake from Jack's cake.

Perhaps, though, baking a sheet cake (or selling one that has already made) for a wedding should at least be treated as expressive conduct.¹⁴⁴ But someone who provided a sheet cake without symbols or writing for a same-sex wedding would not thereby be expressing a particular message—one would not even know whether the baker even knew that it was for a wedding.¹⁴⁵ But if that is so, then the Commission might rightly believe "that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."¹⁴⁶ The Court has "rejected the

142. Phillips might have had a suspicion about what Craig and Mullins might want, but Phillips did not bother to find out. *Cf. id.* at 22

Evidence indicates that Craig and Mullins intended to ask Phillips to design 'a rainbow-layered [wedding] cake' for them. In fact, that is the very cake that another cake artist later created for their wedding. Given the rainbow's status as the preeminent symbol of gay pride, Craig and Mullins's wedding cake undeniably expressed support for same-sex marriage.

143. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 64 (2006).

144. See Brief for Petitioners at 23, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762 ("Phillips's creation of custom wedding cakes at least qualifies as a form of expressive conduct.").

145. *Cf. Rumsfeld*, 547 U.S. at 66

An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

146. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

view that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”¹⁴⁷ Further, even if it were known that the baker had understood that the cake would be used for a wedding, that would not justify imputing a view about the wedding to the baker, since the baker might be providing the cake so as to abide by the antidiscrimination law rather than because he approves of the wedding.¹⁴⁸

There was ample reason for the Civil Rights Commission to treat Jack’s cake as implicating speech and Phillip’s refusal to make any cake as not implicating speech, because for all Phillips knew the requested cake would have been indistinguishable from a cake that might have been served on any occasion. Suppose, though, that the Commission erred when treating Jack’s cake as expressive but not saying the same thing about the cake that Phillips refused to bake (even if it might merely have been a sheet cake with flowers). Even so, the Court went a step farther and imputed anti-religious bias to the Commission because it distinguished the cakes for First Amendment purposes.¹⁴⁹ Here, too, such an imputation is inappropriate when there is a reasonable, nonbiased explanation for such differential treatment, even if ultimately the Commission should have decided these matters differently.

The Court imputed animus to the Commission for yet another reason. The Commission had approved the ALJ’s finding that the bakers who had refused to bake the requested cake for Jacks were

147. *Id.* at 65–66 (citing *United States v. O’Brien*, 391 U.S. 367 (1968)).

148. *Cf. id.* at 65 (“We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.” (citing *Board of Ed. of Westside Community Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990))). Apparently, Justice Thomas has a different reading of *Rumsfeld*. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring) (“The Colorado Court of Appeals was wrong to conclude that Phillips’ conduct was not expressive because a reasonable observer would think he is merely complying with Colorado’s public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it.”).

149. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018) (“The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished.”).

justified because the requested cake was “offensive,”¹⁵⁰ whereas the Commission did not suggest that the cake requested of Phillips was also offensive. The Colorado Court of Appeals distinguished the Phillips case and the Jack cases by noting that “the Division found that the bakeries . . . refuse[d] the patron’s request . . . because of the offensive nature of the requested message.”¹⁵¹ Such a statement might mean that the message on the cake (the words and symbols) was objectively offensive or it might mean that the bakers themselves found the words and symbols offensive. If the intermediate appellate court was saying the former, then the court was committing error. “[T]he difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness,”¹⁵² because “it is not . . . the role of the State or its officials to prescribe what shall be offensive.”¹⁵³

Suppose, however, that the intermediate appellate court was simply saying that the bakers found the requested symbols or writing offensive and thus were refusing to bake such cakes for anyone.¹⁵⁴ Phillips was saying that he found it offensive to make a wedding cake for Craig and Mullins, even though he might have made the same cake for someone else.¹⁵⁵ If the intermediate

150. *See id.* at 1731 (“In those cases, the court continued, there was no impermissible discrimination because ‘the Division found that the bakeries . . . refuse[d] the patron’s request . . . because of the offensive nature of the requested message.’”).

151. *Id.*

152. *Id.*

153. *Id.* (citing *Matal v. Tam*, 137 S. Ct. 1744, 1762–64 (2017)). It is simply unclear whether the Court’s pronouncement has any implications for application of the Miller obscenity standard which requires a determination of “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.” *Miller v. California*, 413 U.S. 15, 24 (1973).

154. *See Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring)

Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer.

In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires.

155. *See id.* (Kagan, J., concurring) (“[T]he same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple.”).

appellate court was suggesting that the bakers viewed the Jack cakes, themselves, as offensive (and they would not make them for anyone) but that Phillips did not view the cake itself as offensive (because he would have made it for a different-sex couple), then the intermediate appellate court does not seem to be guilty of bias. Or, if the Commission is guilty of bias by suggesting that Phillips did not view the cake itself as offensive because he would not have objected to making it for a different-sex couple, then the Court also seems to be accusing Justices Kagan and Breyer of bias.¹⁵⁶

The *Masterpiece Cakeshop* Court concluded: “The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”¹⁵⁷ It is of course true that the jurisprudence will have to be worked out in the courts. However, due respect for sincerely held beliefs may require giving weight to a whole host of beliefs about the offensiveness of providing goods or services to *particular* people.¹⁵⁸ Giving weight to such beliefs need not subject gay persons in particular to various indignities.¹⁵⁹ Different people might find it offensive to provide goods or services to individuals of various races, nationalities, religions, etcetera.¹⁶⁰ The Court seems to be opening the door to the imposition of indignities on a whole host of groups.

Justice Gorsuch argues that the bakers’ refusal of Jack’s request and Phillips’s refusal of Craig and Mullins’s request were

156. *See id.* (Kagan, J. concurring) (making this distinction).

157. *Id.* at 1732.

158. *Cf. id.* at 1739 (Gorsuch, J., concurring) (suggesting that religious beliefs about the offensiveness of providing wedding cakes to particular types of people must be given weight).

159. *See id.* at 1732 (discussing the need to resolve these disputes without “subjecting gay persons to indignities when they seek goods and services in an open market”).

160. *See* Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 549 (2015) (“[A] significant portion of Americans have biases based upon a wide range of cultural factors such as race, ethnicity, religion, gender, age, and sexual orientation.”).

comparable.¹⁶¹ Jack was refused service “because the cakes he sought were offensive to [the bakers’] own moral convictions.”¹⁶² The bakers claimed that they “didn’t deny Mr. Jack service because of his religious faith,”¹⁶³ offering two distinct reasons to support that claim: (1) “they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion,” and (2) “they were happy to provide religious persons with other cakes expressing other ideas.”¹⁶⁴ But, Justice Gorsuch believed, Phillips could have made the analogous claim.¹⁶⁵ (1) “Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation,”¹⁶⁶ and (2) “Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions.”¹⁶⁷ Indeed, Justice Gorsuch argued that “the two cases share all legally salient features.”¹⁶⁸ The customer was affected the same way in both cases: “bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction.”¹⁶⁹

Yet, Justice Gorsuch’s gloss obscures some possibly important facets. Jack requested a cake with particular words and symbols but did not request it for a particular occasion.¹⁷⁰ The bakers responded that they would make cakes with other religious words and symbols, which might have been appropriate for whatever

161. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring) (concluding that the customer received the same result in both cases).

162. *Id.* (Gorsuch, J., concurring).

163. *Id.* (Gorsuch, J., concurring).

164. *Id.* (Gorsuch, J., concurring).

165. See *id.* (Gorsuch, J., concurring) (discussing a lack of distinction in the two sets of facts).

166. *Id.* (Gorsuch, J., concurring).

167. *Id.* (Gorsuch, J., concurring).

168. *Id.* (Gorsuch, J., concurring).

169. *Id.* (Gorsuch, J., concurring).

170. See *id.* at 1734–35 (Gorsuch, J., concurring) (describing how William Jack approached three separate bakers asking them to prepare cakes with anti same-sex messages).

occasion Jack wished to celebrate. Phillips refused to make *any* cake celebrating a same-sex union, so his offer to make other cakes for a *different* occasion would not be of much help.¹⁷¹ Indeed, it is a little surprising that Justice Gorsuch wrote a concurring opinion rather than an opinion concurring in the judgment. The *Masterpiece Cakeshop* Court suggested that it would be a violation of the Colorado antidiscrimination law for a baker to refuse to bake any cake for a same-sex wedding,¹⁷² and Justice Gorsuch basically confirmed that Phillips would not bake any cake for a same-sex wedding.¹⁷³ But if indeed the Court is correct about Colorado law and Justice Gorsuch is correct about Phillips's policy, then the Court should have affirmed the decision below¹⁷⁴ as harmless error,¹⁷⁵ while chastising the Commission member(s) for having made inappropriate comments.¹⁷⁶

Suppose that Brittany comes into a bakery because she wants a wedding cake to be made. She will make all decisions about the cake because her betrothed, Lee, is out of the country (or otherwise

171. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring) (discussing Mr. Phillips interactions with Craig and Mullins and his offer to make the cakes celebrating something other than a same-sex wedding).

172. See *id.* at 1728 (discussing how a total denial of service would likely go beyond “any protected rights of a baker who offers goods and services to the general public”).

173. See *id.* at 1751 (Ginsburg, J., dissenting) (“Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins.”).

174. See *id.* at 1752 (Ginsburg, J., dissenting) (“[S]ensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals’ judgment. I would so rule.”).

175. Cf. *United States v. Hasting*, 461 U.S. 499, 506 (1983)

Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless error doctrine that a judgment may stand only when there is no “reasonable possibility that the [practice] complained of might have contributed to the conviction.” (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963)).

176. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1749 (2018) (Ginsburg, J., dissenting) (“[N]or do the comments by one or two members of one of the four decision-making entities considering this case justify reversing the judgment below.”).

occupied). The baker might refuse to make the cake under these conditions, believing in the importance of talking to both of the parties so that just the right cake could be made.¹⁷⁷ But another baker might be willing to make such a cake without consulting both parties.

Suppose that the requested cake is not to have writing or symbols. It is to be a traditional, three-tiered cake¹⁷⁸ but there are to be no people on it, e.g., a bride and groom.¹⁷⁹ The baker makes the cake and delivers it to the appropriate place on the appropriate day.

What would this cake communicate? Justice Gorsuch writes that a “wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.”¹⁸⁰ In the hypothesized case, the traditional wedding cake might be taken to communicate “celebration,”¹⁸¹ although one cannot tell whether this celebration involves a same-sex wedding or a different-sex wedding unless one knows whether Lee is a man or a woman.

Consider a different-sex couple, Carla and David, who commission a three-tier, rainbow wedding cake. Here, the wedding cake is for a different-sex couple and thus (according to Justice Gorsuch) celebrates a different-sex wedding, although Phillips

177. See *id.* at 1742–43 (Thomas, J., concurring in part and concurring in the judgment) (“Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it.”).

178. See Haley Holik, *You Have the Right to Speak by Remaining Silent: Why a State Sanction to Create a Wedding Cake Is Compelled Speech*, 28 REGENT U.L. REV. 299, 303 (2016) (discussing the tradition of a three-tiered wedding cake).

179. See Laura Krugman Ray, *From the Bench to the Screen: The Woman Judge in Film*, 60 CLEV. ST. L. REV. 681, 713 (2012) (discussing “the wedding cake, complete with bride and groom”).

180. *Masterpiece Cakeshop*, 138 S. Ct. at 1738 (Gorsuch, J., concurring).

181. See *id.* at 1750 (Ginsburg, J., dissenting) (“When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings.”).

might have refused to make the cake because he believed it communicated support for same-sex couples.¹⁸² Indeed, Carla and David might have ordered such a cake because they wished to communicate solidarity with same-sex couples who wished to marry, although they also might have ordered such a cake because they thought rainbow cakes were pretty.

An individual who saw the rainbow cake in a bakery window might reasonably assume that the cake was communicating support for same-sex couples (even if in fact it was ordered because the couple believed that it would be pretty). This kind of cake might be thought analogous to the cakes requested by Jack in that those looking at the cakes might infer a message without knowing who ordered it, although the messages themselves are quite different. Both the rainbow cake and the cakes ordered by Jack are distinguishable from the possibly nondescript cake that Craig and Mullins might have requested.¹⁸³

A separate issue involves which of the cake-baking refusals either implicates the Colorado antidiscrimination law or triggers First Amendment protections. That issue should be resolved in light of a variety of factors. But it is a disservice to all to claim that there are no “legally salient” differences between a baker’s refusal to make a particular cake for anyone and a baker’s refusal to make a particular cake for some people even though he would have made that identical cake for someone else.¹⁸⁴

182. See Brief for Petitioners at 22, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), 2017 WL 3913762 (“Given the rainbow’s status as the preeminent symbol of gay pride, Craig and Mullins’s wedding cake undeniably expressed support for same-sex marriage.”); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1735 (Gorsuch, J., concurring) (noting that Phillips would not create a wedding cake celebrating a same-sex marriage for any customer). Of course, using Justice Gorsuch’s analysis, such a cake would not be celebrating a same-sex marriage because it was made for a different-sex wedding. *Cf. id.* at 1738 (Gorsuch, J., concurring) (arguing that a wedding cake “celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding”).

183. Justice Gorsuch does not seem to appreciate this. See *Masterpiece Cakeshop*, 138 S. Ct. at 1738–39 (Gorsuch, J., concurring) (“[T]he Commission accepted the bakers’ view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.”).

184. *Id.* at 1735 (Gorsuch, J., concurring).

III. *The Future Implications of Masterpiece Cakeshop*

The *Masterpiece Cakeshop* holding is quite narrow, which means that the decision might not play a significant role in the development of the subsequent caselaw.¹⁸⁵ However, the opinion includes numerous implicit and explicit suggestions about which factors might be relevant and how those factors might be treated in other cases involving claims of conscience.¹⁸⁶ Further, some of the implicit doctrinal claims, if accepted, would have important implications in a variety of areas. It is thus important to explore some of the implicit and explicit arguments made in the opinion.

A. *What Constitutes Bias?*

There are several ways to read the *Masterpiece Cakeshop* analysis. On some readings, the opinion changes nothing. On others, however, there may be great changes in what counts as a neutral and respectful treatment of parties.

Suppose that the *Masterpiece Cakeshop* Court was not confident that Phillips had refused to provide any baked goods for Craig and Mullins, possibly interpreting the offer to provide other baked goods (instead of a wedding cake) as intended to apply to goods for the reception rather than as an offer to sell baked goods for some other occasion.¹⁸⁷ Suppose further that the “despicable” comment along with some of the other comments about religion and the marketplace sufficed to establish bias.¹⁸⁸ In that event, the Commission decision might be thought appropriately vacated because of bias, and the rest of the opinion discussing factors that might be relevant¹⁸⁹ could be dismissed as “random

185. *See id.* at 1732 (holding that the ruling of the Commission must be invalidated).

186. *See id.* at 1731–32 (discussing conscience-based objections).

187. *See id.* at 1724 (describing how Phillips offered several times to bake goods for any other type of event).

188. *See id.* at 1734 (Kagan, J., concurring) (“[T]he only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips’s religious beliefs ‘offensive.’”).

189. *See id.* at 1723–24 (discussing the lack of neutrality in the Colorado Civil

judicial musing.”¹⁹⁰ However, the decision need not be taken that way at all.

The Court suggested that the “treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished.”¹⁹¹ Because such an interpretation would be reasonable even if in fact incorrect, bias could be imputed.¹⁹² But this is a very low bar for imputing bias.

Consider the cakes. One had writing and symbols on it while the other might have been a “generic cake.”¹⁹³ The Court itself has compared cases where one case but not the other has “the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.”¹⁹⁴ No one denied the expressive quality of Jack’s requested cakes,¹⁹⁵ whereas it might be much more difficult to attribute a particular message to a generic cake. But if that is so and it is nonetheless reasonable to impute bias, then many commission or judicial decisions will be subject to a charge of bias.

Suppose that a three-tiered cake were used for a birthday celebration. Would such a cake nonetheless communicate celebration of a wedding?¹⁹⁶ Would the cake’s message change if it had “Happy Birthday” written on the cake?¹⁹⁷

Rights Commission decision).

190. See *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1643 (2014) (Scalia, J., concurring in the judgment) (saying “[n]o good can come of such random judicial musing”).

191. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018).

192. See *id.* (“In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.”).

193. See *supra* notes 177–181 and accompanying text (discussing Brittany and Lee’s generic cake).

194. *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 64 (2006).

195. See *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (“[T]he Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text.”).

196. See *id.* at 1743 (Gorsuch, J., concurring) (“If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding.”).

197. See *Gilreath & Ward, supra* note 58, at 243 n.27 (discussing the “communicative content . . . found in ‘happy birthday’ in frosting”).

Even if one accepts that a traditional, three-tiered wedding cake has inherent symbolism,¹⁹⁸ that does not mean that a generic sheet cake used for a wedding would have that same symbolism. Just as cupcakes presumably do not have the inherent symbolism of a wedding cake, Masterpiece Cakeshop's refusal to provide such baked goods for a same-sex couple notwithstanding,¹⁹⁹ a generic sheet cake would not have that inherent meaning.

If the Colorado intermediate appellate court was simply trying to follow Supreme Court precedent because the generic cake would require additional explanation for an observer to know its meaning while Jack's requested cake would require no additional explanation,²⁰⁰ then it is difficult to understand why animus may reasonably be imputed to the court making that differentiation. Further, the Court has suggested in other contexts that when there is a charge of bias, the question that should be asked is whether there is a reasonable non-invidious explanation for what was done in which case animus would not be presumed.²⁰¹

After the Court's issuance of its *Masterpiece Cakeshop* opinion, one hopes that fewer commission members will comment about whether they approve of particular religious beliefs. But if that is so, then the Court's discussion of other bias indicators will be more important because it will be much more unlikely that there will be a "smoking gun"²⁰² like the commissioner's "despicable" comments.²⁰³

198. See *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Gorsuch, J., concurring) (discussing "the inherent symbolism in wedding cakes").

199. See *id.* at 1726 (discussing the shop's policy of not selling cakes for same-sex weddings).

200. See *Rumsfeld*, 547 U.S. at 66 ("The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*.").

201. See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978) ("[W]e infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.").

202. See *Amadeo v. Zant*, 486 U.S. 214, 226 (1988) (discussing "the 'smoking gun' of the memorandum or some other direct evidence of discrimination").

203. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) ("To describe a man's faith as 'one of the most despicable pieces

The Court suggested that the Commission's willingness to find that the bakers refusing to bake Jack's requested cakes did not violate the antidiscrimination law coupled with the commission's unwillingness to treat the Phillips case in the same way constituted bias, even though the bakers were objecting to the wording and images on the cake while Phillips was not.²⁰⁴ But the Court's suggestion may be taken to suggest that a commission's treating *different cases differently*²⁰⁵ may nonetheless reasonably be viewed as reflecting bias.

The commissioners' comments may have provided enough of a basis for a finding of bias that the Court's other, more questionable bases for attribution of bias should be considered harmless error. But many cases in the future will likely not include prejudicial comments, and the Court's suggestion that the application of current law is itself a basis for attributing bias is regrettable and must be disavowed at the earliest opportunity.

B. Speech

An important issue raised in *Masterpiece Cakeshop* involves the conditions, if any, under which a refusal to provide goods or services constitutes speech.²⁰⁶ The Court mentioned Phillips's "belief that 'to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.'"²⁰⁷ While the Court did not say whether Phillips's making such a cake would in fact constitute compelled speech,²⁰⁸ the Court did comment:

of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”).

204. *See id.* at 1730 (“For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.”).

205. *See id.* at 1733 (Kagan, J., concurring) (“[A] proper basis for distinguishing the cases was available—in fact, was obvious.”).

206. *See id.* at 1723 (discussing the free speech difficulties in this case).

207. *Id.* at 1724.

208. *See id.* at 1726 (“[Phillips] first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his

The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.²⁰⁹

Regrettably, the Court gave little direction about whether or why this case constitutes a new context or in what ways our understanding of speech could or should be deepened.²¹⁰ Many individuals may sincerely believe that certain actions would send a message that they are unwilling to send whether or not a reasonable person would infer that such a message was being sent.²¹¹ If the sincere belief that performance of a particular action would send a message suffices to make the action trigger First Amendment guarantees, then the state may well have a very difficult time requiring individuals to perform or, perhaps, refrain from performing a whole host of actions. For example, individuals might object to paying (some of) their taxes lest they be understood to be sending a message in favor of an immoral war.²¹² In any event, the Court has expressly rejected that one's sincerely believing that the performance of an action would constitute sending a message will alone suffice to make such an action speech or even expressive conduct.²¹³ Even one's intending to send a

First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed.”).

209. *Id.* at 1723.

210. *See id.* at 1726 (discussing the constitutional speech claim Phillips made before a state administrative law judge).

211. *But see* Texas v. Johnson, 491 U.S. 397, 404 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974))).

212. *See* Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245, 268 (1934) (“The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral.”).

213. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (failing to allow for such a subjective approach to First Amendment analysis).

message by performing an action is not alone enough to make such an action speech or expressive conduct.²¹⁴

The Court does not provide a helpful way to limit what constitutes speech. Consider *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,²¹⁵ which involved law schools who did not want to host military recruiters at a time when there was a ban on gays serving in the military.²¹⁶ The *Rumsfeld* Court rejected that the law schools were being compelled to speak by hosting the military, reasoning that “accommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions.”²¹⁷ But the law schools believed that they were being forced to speak, even though “a law school’s decision to allow recruiters on campus is not inherently expressive.”²¹⁸

To make matters more confusing, the law schools did speak in an inherently expressive way by posting the time and place that the recruiters would meet with job-seekers.²¹⁹ However, the Court reasoned, the law schools accommodating the military recruiters “does not affect the law schools’ speech,”²²⁰ in part because the law schools were not themselves restricted in what they “may say about the military’s policies”²²¹ and in part because the law schools’ hosting the military (including saying where and when the recruiters would meet with students) did not constitute an endorsement of the military policy. “[S]tudents can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.”²²²

214. *See id.* (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

215. 547 U.S. 47 (2006).

216. *Id.* at 51 (discussing Congress’s response to law schools’ restriction of military recruiters’ access to their campuses).

217. *Id.* at 64.

218. *Id.*

219. *See id.* at 61 (discussing emails and notices on notice boards).

220. *Id.* at 64.

221. *Id.* at 65.

222. *Id.*

Even if making a cake is inherently expressive,²²³ making a cake need not express the baker's own view about the marriage or the suitability of the parties for each other. The baker can post signs that he does not approve of same-sex marriage if he is worried that the public might misunderstand his view.²²⁴ In any event, the public at large would presumably understand that the baker would not be giving his imprimatur of approval just by baking a cake if indeed he were legally required to do so.²²⁵

In subsequent cases, the Court will have to decide which refusals to provide goods or services are expressive and therefore triggering First Amendment protections. While the Court rejects that the First Amendment requires "all purveyors of goods and services who object to gay marriages for moral and religious reasons . . . [to] be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,'"²²⁶ the Court nowhere provides any way to limit the (possible) speech rights implicated and seems to reject one of the possible limiting principles.²²⁷ Many commercial entities might believe that providing goods or services for a wedding they do not support is offensive and communicates condonation or endorsement,²²⁸ even

223. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("[C]reating and designing custom wedding cakes . . . is expressive.").

224. See Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 13 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 147, 161 (2018) ("[A] baker could declare his moral opposition to same-sex unions by placing a sign in the shop window or stating his view to customers, while still baking cakes for those weddings.").

225. See *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he Court of Appeals . . . reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message.").

226. *Id.* at 1728–29.

227. See *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 65 (2006) (discussing how the analysis changes when the conduct is required by law).

228. See Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 249–50 (2015) ("Every objecting baker, florist, and photographer who refuses to provide services for a same-sex ceremony resists sending a particular message, namely, 'I endorse or condone same-sex

if they do not wish to send a message that the participants in the wedding are second-class citizens.²²⁹ The Court neither provides or even suggests a way to distinguish among such claims so that only certain providers would be able to refuse to sell their goods or services without violating antidiscrimination laws. On the contrary, the Court's attribution of bias to the Commission when it accepted one offensiveness defense but not another illustrates that attempts to justify preferring some refusals over others would be viewed "with skepticism, if not a jaundiced eye."²³⁰

C. Free Exercise

The *Masterpiece Cakeshop* Court suggests that Phillips's free exercise rights were violated.²³¹ That violation involved the commission's allegedly having failed "to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs."²³² But the decision did not "vindicate[] Phillips' right to free exercise," where that would be understood to mean that Phillips would be immunized from prosecution for violating the Colorado antidiscrimination law.²³³ Indeed, were Phillips to refuse to sell any baked goods now to a same-sex couple celebrating their

weddings.' For them, creating a cake or taking a picture . . . conveys approval of that union, an approval they do not wish to bestow."); Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593, 1607 (2017) ("They argue that to require them to provide wedding goods and services to same-sex couples forces them to endorse, even celebrate, same-sex marriage in violation of their right not to be coerced to speak the government's message and their right to religious conscience.").

229. See Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1113 (2017) ("Conservative believers do not necessarily think that they are sending such a message [i.e., that gays and lesbians are not full and equal members of society] when they refuse to provide wedding services to same-sex couples.").

230. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

231. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018) ("[T]he Commission's actions here violated the Free Exercise Clause.").

232. *Id.* at 1731.

233. Justice Thomas seems to obscure this point. See *id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment) ("Phillips rightly prevails on his free-exercise claim . . .").

marriage, the Court implied that he could be prosecuted both because a baker's blanket refuse to provide such products was illegal before²³⁴ and because same-sex marriage is now recognized in Colorado when it was not before.²³⁵

Nonetheless, some parts of the opinion suggest that there may be changes to free exercise jurisprudence. Justice Gorsuch may be suggesting that *Employment Division, Department of Human Resources of Oregon v. Smith*²³⁶ should be revisited.²³⁷ Other justices have suggested the same thing in other decisions in the past.²³⁸ Even if the Court does not reconsider *Smith*, however, *Masterpiece Cakeshop* might be interpreted to undermine *Smith* in important ways.

Smith suggests that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²³⁹ However, the Supreme Court has also made clear that “the government . . . cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”²⁴⁰ In the case before the *Masterpiece Cakeshop* Court, the Commission was “obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs.”²⁴¹

234. *See id.* at 1728.

235. *See supra* notes 18–21 and accompanying text (discussing the change in same-sex marriage law since Phillips refused to sell a cake to Craig and Mullins).

236. 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2012), *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

237. *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) (“*Smith* remains controversial in many quarters.”).

238. *See* *City of Boerne v. Flores*, 521 U.S. 507, 565 (1997) (O’Connor, J., dissenting) (“I believe that it is essential for the Court to reconsider its holding in *Smith* . . .”).

239. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (Stevens, J., concurring) (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

240. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

241. *Id.*

That obligation to proceed neutrally must be unpacked. The Commission treated the cake-baking refusals differently because Jack’s requested cakes had a clear message, whereas Phillips did not even wait to find out whether Craig and Mullins’s cake would have a clear message.²⁴² For all that Phillips knew, the cake that they were requesting would be indistinguishable from any number of cakes that might be requested to celebrate any number of occasions.²⁴³ If treating these different kinds of refusals differently nonetheless constituted a discriminatory application of the Colorado antidiscrimination law,²⁴⁴ then free exercise rights may become quite robust (even if *Smith* is not overruled), because recognition of any exceptions will require recognizing multiple exceptions.²⁴⁵

Consider *Sherbert v. Verner*,²⁴⁶ which involved whether the state of South Carolina could deny unemployment benefits to an individual who could not work on Saturday because of her religious beliefs.²⁴⁷ The *Sherbert* Court held that the denial of unemployment benefits was a violation of free exercise guarantees.²⁴⁸

Suppose that a different South Carolinian is precluded from working on Saturday because she cannot get childcare for her

242. *See id.* 1732–33 (Kagan, J., concurring) (stating that the Commission determined the differences between the two cases were that Jack’s refusals were based on the offensive nature of the cake’s message).

243. *See id.* at 1733 (Kagan, J., concurring) (arguing that Phillips withheld “the full and equal enjoyment” of his business on the basis of sexual orientation).

244. *See id.* at 1740 (Thomas, J., concurring) (“[T]he discriminatory application of Colorado’s public-accommodations law is enough on its own to violate Phillips’ rights.”).

245. *See id.* at 1727 (arguing that a long list of exceptions would result in a possible “community-wide stigma”).

246. 374 U.S. 398 (1963).

247. *See id.* at 399–400 (“When she was unable to obtain other employment because from conscientious scruples, she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.”); *see also id.* at 401 (“The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant’s restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept ‘suitable work when offered’ . . .”).

248. *See id.* at 410 (“Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.”).

children on that day, and she has a moral (and legal) duty to make sure that her children have proper supervision.²⁴⁹ Would the recognition of *Sherbert's* right to receive unemployment compensation also require the state to give unemployment compensation to the parent who is trying to fulfill her parental duties?

The answer might depend upon whether religious duties are viewed as on a par with non-religious duties or, instead, as requiring more protection than non-religious duties.²⁵⁰ If they are on a par, then just as the State cannot punish someone for fulfilling her duty to observe the Sabbath, a state cannot punish someone for fulfilling her duty to supervise her children.²⁵¹ But even if religious duties are preferred, it would be unsurprising for many to believe that they have a religious duty to make sure that their children are adequately supervised.²⁵²

So, too, it is unclear whether the *Masterpiece Cakeshop* Court considers what is religiously offensive as equivalent to what is “offensive to . . . secular convictions,”²⁵³ although the Court cautions against “elevat[ing] one view of what is offensive over another,”²⁵⁴ at least in part because “the role of the State or its

249. See Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 653 (2016) (comparing “those who ‘chose’ not to work for compelling reasons such as the need to be home at certain times to care for children or to avoid working on the Sabbath”).

250. Cf. *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)

[T]he implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance . . . [T]he State, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work no Saturdays) is not religiously motivated.

251. See *id.* at 422–23 (Harlan, J., dissenting) (explaining the concept of constitutional neutrality).

252. See *id.* at 422 (Harlan, J., dissenting) (arguing that the presence of religious motivation creates an exception for behavior that would generally not be eligible for financial assistance).

253. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring).

254. *Id.* at 1731.

officials [is not] to prescribe what shall be offensive.”²⁵⁵ But if what is morally offensive or, perhaps, what is offensive to conscience (whether religious or secular) must be given an exemption if any exemptions are granted (unless strict scrutiny can be met), then *Masterpiece Cakeshop* may be signaling a new day with respect to the kinds of exemptions that the state will have to grant to laws (assuming that any exceptions are granted at all).²⁵⁶

D. Antidiscrimination Laws

The *Masterpiece Cakeshop* Court affirmed that states can have and enforce antidiscrimination laws.²⁵⁷ “It 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.”²⁵⁸ However, the decision may well bode poorly for the application of antidiscrimination laws to refusals to provide goods or services, as long as those refusals qualify as communicating a message.²⁵⁹ Depending upon how the Court delimits the kind of actions (or refusals) that are treated as communicating a message, this limitation on antidiscrimination law may create “the gaping exception that nearly swallows the rule.”²⁶⁰ If a commercial entity is viewed as communicating a message whenever it refuses to provide a good or service because of a sincere desire not to support a particular

255. *Id.*

256. *See id.* at 1745–46 (Thomas, J., concurring) (“Because Phillips’ conduct (as described by the Colorado Court of Appeals) was expressive, Colorado’s public-accommodations law cannot penalize it unless the law withstands strict scrutiny.”).

257. *See id.* at 1728 (implying that states can enact and enforce antidiscrimination laws).

258. *Id.*

259. *See id.* (“In this context the baker likely found it difficult to find a line where the customers’ right to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.”).

260. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal by Any Means Necessary*, 134 S. Ct. 1623, 1646 (2014).

practice or group, then almost any business might qualify for an exemption.²⁶¹

The Masterpiece Cakeshop Court cited *Matal v. Tam*²⁶² with approval.²⁶³ The *Matal* Court suggested, “[S]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”²⁶⁴ The Masterpiece Cakeshop Court’s having pointed to a section of the *Matal* opinion containing the passage above is alarming. The Court may be suggesting that various kinds of refusals to sell products or services qualify as speech and that hateful speech must be permitted, which means that antidiscrimination laws will be easy to circumvent by talking about why one’s refusal to serve particular individuals (of the wrong kind) in the marketplace constitutes speech.²⁶⁵

Many people understand that a refusal to provide goods and services is insulting,²⁶⁶ demeaning,²⁶⁷ and might be taken to mean that the person refused is not a full and equal citizen.²⁶⁸ Further,

261. Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 DENV. U. L. REV. 495, 530 (2014) (“[M]ost if not all businesses would seem permitted to refuse to provide services so that they could avoid sending an undesired message.”).

262. 137 S. Ct. 1744 (2017).

263. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (“A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness.”).

264. *Matal*, 137 S. Ct. at 1764 (citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

265. See *Masterpiece Cakeshop*, 138 S. Ct. at 1737–38 (Gorsuch, J., concurring) (listing examples of what is considered neutral religious treatment).

266. Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 967 (2018) (discussing the “insulting message conveyed by a refusal to serve”).

267. Cf. Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 121 (2015) (“[I]t is demeaning to know that some providers will refuse to serve you because of your identity . . .”).

268. Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social

lest there be any doubt in the would-be buyer's mind about the message communicated by the refusal to sell, the refusing seller could make the message quite clear.

The *Masterpiece Cakeshop* Court may be endorsing a kind of equal opportunity discrimination.²⁶⁹ The government cannot prescribe what is offensive and cannot “elevate[] one view of what is offensive over another, . . . [which would] itself send[] a signal of official disapproval”²⁷⁰ One person's view of offensiveness cannot be given greater weight than another's, and “government has no role in deciding or even suggesting whether . . . [a] ground for . . . conscience-based objection is legitimate or illegitimate.”²⁷¹ Such an approach would suggest that granting one exemption for offensiveness requires granting exemptions to anyone who would be offended by entering into a commercial transaction with a member of a particular group.²⁷² A policy implementing this approach could severely limit, if not “sound[] a potential death knell[,] for a panoply of [antidiscrimination] statutes.”²⁷³

IV. Conclusion

The *Masterpiece Cakeshop* Court issued a narrow holding that seemed to affirm free exercise rights while also affirming the right of same-sex couples to marry.²⁷⁴ However, many of the implicit claims about which factors are relevant and what roles those factors may play in future cases implicating conscience suggest that future decisions about these and related matters will be

outcasts or as inferior in dignity and worth.”).

269. *Id.*; cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).

270. *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

271. *Id.*

272. *See id.* at 1732 (“In this case the adjudication concerned a context that may well be different going forward in the respects noted above.”).

273. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 628 (1974) (Powell, J., concurring).

274. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018) (stating that this case presents difficult questions about governmental entities' authority to prevent discrimination and free speech).

contentious and will lead to the kind of society that many might prefer not to have.²⁷⁵

The Court seems to open the door to discrimination against a variety of groups on the basis of race, religion, orientation, etcetera, as a matter of First Amendment guarantees.²⁷⁶ Individuals who in good conscience (whether religious or secular) do not wish to condone or support a variety of groups may express those sincere convictions in a way that will lead to a less civil society for all. Even if the Court adopts a preferentialist view of religious conscience (privileging religious conscience over secular conscience), many individuals might sincerely claim that their religious or spiritual beliefs require them not to do business with any number of types of individuals, and the Court may have provided a framework for immunizing actions based on such beliefs.²⁷⁷

Masterpiece Cakeshop need not lead to such a dystopian result. The decision may simply be viewed as involving a limited holding that directs decisionmakers not to manifest prejudice towards any of the parties before them.²⁷⁸ However, the decision may also be a harbinger of decisions to come that will make society a less welcoming place for everyone, regardless of race, religion, orientation, gender, nationality, etc. One can only hope that the Court will recognize where some lines of reasoning lead and do its best to prevent adoption of interpretations and practices that are insupportable as a matter of constitutional law or good public policy.

275. *See id.* at 1732 (stating that future similar cases must be resolved individually based on their context).

276. *See id.* (“The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral towards religion.”).

277. *See id.* (stating that full and fair consideration must be given to religious objections).

278. *See id.* (“Phillips was entitled to a neutral decisionmaker . . .”).