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An Incomplete *Masterpiece*

Chad Flanders & Sean Oliveira

ABSTRACT

The recent wave of popular and academic commentary on *Masterpiece Cakeshop* sounded a common theme: disappointment, even frustration. *Masterpiece* was held out as a case that was finally going to explain and resolve the conflicts between free expression, free exercise, and discrimination that were coming up again and again in the lower courts. But Justice Kennedy, the critical consensus went, avoided reaching many of the main First Amendment issues in the case and had instead ruled narrowly, giving us a prime example of "judicial minimalism."

This assessment may be far too generous. In our short Article, we make the case that *Masterpiece* is a flawed decision because of its fundamental incompleteness, not its minimalism. Despite being held out as an opinion on religious liberty, Kennedy's decision is cursory on the baker's religious beliefs and how they have been burdened—a perhaps forgivable sin—but then simply omits any discussion of whether the state interest might outweigh the baker's religious freedom—a less forgivable sin. The failure to do any balancing makes the religious liberty aspect in *Masterpiece* unfinished. Indeed, *Masterpiece* fails to follow the steps that Justice Kennedy himself had set out in his previous opinions on religious liberty. And this leads us to surmise that *Masterpiece* may not be a religious liberty decision at all, but one about the violation of the baker's due process rights. If this was the case, however, the correct resolution would be not a win for the baker, but a remand for a new hearing (as Justice Kennedy had himself suggested in other opinions): a procedural remedy for a procedural flaw. But Kennedy doesn't take this route, either. In essence, *Masterpiece* is not a narrow or minimalist opinion, but rather a collection of false starts, none of which offer much insight or illumination on the areas of law they purport to address.

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INTRODUCTION

In the early commentary on the U.S. Supreme Court's decision in *Masterpiece Cakeshop*,[1] the overwhelming sentiment was one of disappointment: The Court had accepted for decision a case that involved one of the great clashes of contemporary American life—religious freedom and gay rights—and had basically taken a pass.[2] The disappointment stemmed largely from two perceived problems in Justice Kennedy's opinion. First, Justice Kennedy had avoided reaching the merits of the cake shop's *free expression* claim, leaving the question of whether baking cakes amounted to "speech" for another day. Justice Kennedy instead rested his decision on the Free Exercise Clause of the First Amendment rather than on free speech grounds.[3] Second, the Court had not pointed a path forward for resolving future cases involving similar facts. It had only held that in *this* case, there was animus shown toward

1. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). (baker sanctioned by the Colorado Civil Rights Commission for refusing to bake a cake for a same-sex couple appeals to the U.S. Supreme Court, which finds that the Commission has violated the baker's free exercise rights under the U.S. Constitution).
2. For just a taste of the disappointment see, for example, Garrett Epps, *Justice Kennedy's* Masterpiece *Ruling*, ATLANTIC (June 4, 2018), https://www.theatlantic.com/ideas/archive/2018/06/the-court-slices-a-narrow-ruling-out-of-masterpiece-cakeshop/561986 (going so far as to argue that these were not the right facts to take to decide this issue and certiorari should have been denied), Sherrilyn Ifill, *Symposium: The First Amendment Protects Speech and Religion, not Discrimination in Public Spaces*, SCOTUSBLOG (June 5, 2018, 1:13 PM), http://www.scotusblog.com/2018/06/symposium-the-first-amendment-protects-speech-and-religion-not-discrimination-in-public-spaces (expressing joy at the Court's use of famous race discrimination principles, but disappointment that the central questions went unanswered), and Eugene Volokh, *The Masterpiece Cakeshop Decision Leaves Almost All the Big Questions Unanswered*, REASON: THE VOLOKH CONSPIRACY (June 4, 2018, 10:49 AM), https://reason.com/volokh/2018/06/04/the-masterpiece-cakeshop-decision-leaves (expressing dismay at the Court's refusal to take up the free expression issue). *But see* Douglas Laycock & Thomas Berg, *Symposium:* Masterpiece Cakeshop—*Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), http://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear (arguing that Justice Kennedy's opinion, had it gone the other way, would have made federal litigation on any ground under free exercise virtually impossible and would have seriously undercut RFRA claims and claims under state constitutions). *Cf.*, Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J. FORUM 201, 207–208 (2018) (arguing that Justice Kennedy's reference to *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), puts LGBTQ rights squarely in the same category as race when it comes to public accommodations and thereby rejects more conservative approaches).
3. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723–24.

this particular baker, and so the baker should win.[4] The decision was, as the saying goes, a ticket good for "this day and train only."[5] Eugene Volokh put the reigning sentiment well in his blog post the morning of the decision: "[F]or now, the important point is that the free speech debate, as well as the broader religious accommodation debate, remains unresolved."[6]

If these were the only ways in which the Court had disappointed critics, the decision—while still a lost opportunity—would be well in the tradition of respectable Supreme Court jurisprudence.[7] There is, after all, a doctrine of "avoidance" that urges the Court not to reach hard constitutional issues if not necessary to resolve the case.[8] There is also, as the legal scholar Cass Sunstein articulated, a tradition of "minimalist" decision-making, or the idea that it is sometimes better for the Court to decide only the case before it, and leave a larger, principled solution for the political process to work out.[9] Again, if "avoidance" and "minimalism" were the main reasons for the primarily negative reaction to the *Masterpiece* decision, then there would be at least some defense to be made along the lines of these two doctrines. It is not always a bad thing for a court to make narrow decisions.[10]

4. *Id.* at 1732.
5. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).
6. Volokh, *supra* note 2.
7. *But see* Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, CATO SUP. CT. REV. 139, 147–54 (2018) (arguing that *Masterpiece* is a minimalist decision).
8. For an early statement of this doctrine, see *Ex parte Randolph*, 20 F. Cas. 242, 251, 253 (C.C.D. Va. 1833). The most famous statement of the doctrine occurs in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). For a more modern use of it see, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (used as a tool in statutory construction). Finally, for a critical discussion of this practice, see Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 84–85.
9. *See generally*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (Harvard Univ. Press rev. ed. 2001) (1999); Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); *cf.*, Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) [hereinafter *If People Would Be Outraged*] (discussing consequentialist and epistemic reasons for taking into account potential public outrage through judicial minimalism). *But see* Andrew B. Coan, Response, *Well, Should They? A Response to* If People Would be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213 (2007); Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643 (2008); Matthew Steilen, *Minimalism and Deliberative Democracy: A Closer Look at the Virtues of "Shallowness"*, 33 SEATTLE U. L. REV. 391 (2010).
10. For example, as Sunstein points out, a justice, attempting to avoid public outrage on consequentialist grounds may make use of judicial minimalism in order to avoid the possibility of resulting social strife or rebellion. *If People Would be Outraged*, *supra* note 9, at 168–69.

But the problem is that the *Masterpiece* decision is not just a narrow decision, even supposing that its goals were avoidance and minimalism. It is an incomplete decision, even a badly incomplete one.[11] And the disappointment felt by commentators ultimately springs from this incompleteness.[12] In fact, *Masterpiece* is incomplete in two ways, one being more forgivable than the other.

The more forgivable incompleteness of *Masterpiece* is that it does not fully spell out the ways in which the baker's making of a cake is an act of religious expression, or how that religious expression is burdened. While Kennedy wrings his hands about the problem of saying whether making a cake is *speech*,[13] he spends hardly a moment about what makes baking a cake *religious exercise*.[14] Nor does Kennedy say much of anything about how the baker's religious expression is in fact significantly *burdened* by the antidiscrimination law at issue in the case. Upon a closer reading, it turns out that the opinion does have answers to these questions, but they are mostly implicit. Kennedy's sin here is a lack of transparency: He makes the moves he has to make, but he hardly calls any attention to the fact that he is making them. There is a lot going on behind the scenes of *Masterpiece*, and this Article tries to tease out the reasoning behind *Masterpiece*'s largely tacit holding that baking a cake for a wedding could implicate religious exercise, and that the baker's exercise of religion was burdened by the state of Colorado.

11. Perhaps even Kennedy felt this. *See* Mark Walsh, *A "View" From the Courtroom: Justice Kennedy's Master-pièce de Résistance*, SCOTUSBLOG (June 4, 2018, 3:49 PM), http://www.scotusblog.com/2018/06/a-view-from-the-courtroom-justice-kennedys-master-piece-de-resistance (describing Kennedy's description of his opinion to riding a seesaw).

12. Indirect evidence of this felt incompleteness can be found in commentators who add into their summary parts of the Court's analysis that arguably should be there, but are not. *See*, Cynthia Blevins Doll & Lisa A. McGlynn, *Supreme Court's Same-Sex Wedding Cake Decision Does Not Grant Right to Discriminate*, FISHER PHILLIPS (June 4, 2018) https://www.fisherphillips.com/resources-alerts-supreme-courts-same-sex-wedding-cake-decision (adding that the Court remanded the case when it did not); *Supreme Court Spotlight: Court Rules on Whether Business Had Right to Refuse Baking Services to Gay Couple*, 24 HR COMPLIANCE L. BULL. (West), Aug. 10, 2018, at *1 (adding the same); Ifill, *supra* note 2 (adding the same); Laycock & Berg, *supra* note 2 (stating that the Court has an absolute rule against hostility toward religion, such that it would not consider a state interest, compelling or otherwise). This latter addition is highly doubtful since it would seem to conflict with Kennedy's own test for religious exemptions (see *infra* note 53) and would deserve some mention in the holding.

13. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723, 1732 (2018).

14. *Id.* at 1728 ("[Phillips] claims that [he had to] us[e] his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation . . . and [this] implicates his deep and sincere religious beliefs").

Less forgivable, however, is what *Masterpiece* does not do, and which it must do in order to be a complete decision. A major and perhaps even central failing of *Masterpiece*—one which is crippling to its status as good law—is that it does not even pause to consider the state's interest in limiting the baker's free exercise of religion.[15] It is blackletter law that even if the state does restrict and burden an individual's free exercise of religion the state can do so if it has a strong enough countervailing interest.[16] We can stipulate that in this case the state needed a compelling interest, which is traditionally the hardest test to meet. The problem with Kennedy's opinion is *not* that he rules in favor of the baker over the state; the problem is that he does *not analyze the weight of the state's interest at all.* Kennedy's analysis stops before the balancing even occurs: It is as if Kennedy believes that to reach a holding on the issue, it is enough that the state acted with animus against the baker. But this is wrong. The fact that the state burdened the baker's religion only brings us to the state's obligation to prove its interest, and for all we know from the decision, that interest could be compelling. Without any discussion on this point, the analysis is incomplete.

But suppose, on a related note, we generously find that Kennedy was right to stop where he did: after finding the state acted with animus against the baker. This would be a fine place to stop *if* Kennedy then remanded the decision back for another hearing, this time for an animus-free hearing. But he does not. Kennedy stops the case after he has found the baker's religious expression to be burdened, and then holds for the baker.[17] So what may have been an acceptable stopping point for a remand turns out to be a full stop for Kennedy. This renders the decision incomplete on any reading. Either Kennedy needed to weigh the state's interest, or he needed to remand. The result is an incomplete decision—a fragment. It is *this* nature of the decision that justifies the disappointment so many have felt about *Masterpiece*.

This Article looks beyond the narrowness of Kennedy's opinion in *Masterpiece* and examines the ways in which it is not merely minimal, but incomplete. Parts I and II provide discussion on what constitutes an exercise of religion and when that exercise has been burdened. By contrasting the first

15. *Id.* at 1731 ("For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."). The "reasons described" do not include the fact that the state interest was not "compelling."
16. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").
17. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731.

issue against the backdrop of free expression claims, it becomes clear why Kennedy's opinion appears cursory and *less* complete on the issue of whether this was an exercise of religion. That issue, unlike free expression, does not require objective understandability, but mere sincerity. In the same vein, there is also a lower bar for the question of whether religious exercise is burdened: If it can be articulated, it can be counted. As straightforward as they are, these steps are necessary for a complete analysis of the issue. However, Kennedy barely mentions them before moving on (one gets the sense here of an opportunity lost).

In Part III, we take a look at a major missing piece of Kennedy's opinion: the state's interest. Normally, if a law is neutral and generally applicable but burdens an individual's exercise of religion, courts require nothing from the state. In those instances, no free exercise claim exists. On the other hand, if the law is biased, including, as here, in its implementation, then the state's interest faces strict scrutiny. In *Masterpiece*, however, Kennedy recounts the hostility that occurred in the process of the application of the Colorado law before finding in favor of Jack Phillips, the baker, without ever weighing the state's interest. Perhaps this is a mistake, or, as we argue in Part IV, perhaps this is because it is not really a religious freedom case, but actually a procedural due process case. Even so, the appropriate remedy, by the precedent of Kennedy's earlier decisions, would have been a remand rather than a decision for Phillips.

I. FROM FREE EXPRESSION TO FREE EXERCISE

One of the major opportunities missed in the *Masterpiece* decision was in not addressing Phillips's claim that his baking and designing a cake was a form of *free expression*.[18] Some of the better exchanges during oral argument dealt precisely with the question of when a service or product becomes something more than just a service or product—in other words, *speech*.[19] Does a hairstylist express something when she does the bride's hair? What about a tailor? What makes these hypotheticals so important, and so puzzling, is due to the Supreme Court's jurisprudence in the area. Whether something expresses a message involves more than someone simply intending to send a

18. *Id.* at 1723 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.").

19. Transcript of Oral Argument at 10–20, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16–111).

message by his or her words or conduct.[20] What must happen, as well, is that the thing-meant-to-be-a-message must also be understood to be a message by some audience.[21] In other words, there is both a subjective and an objective aspect when it comes to speech. The speaker must intend that his act—making a cake, doing up someone's hair, designing a suit or a dress—be expressive, but an audience must also understand, if not the particular message, at least that a message is trying to be expressed. It is not enough for a free speech claim that one means to send a message by burning the flag; people have to see someone burning the flag and understand that the person is trying to say something by burning it. This key feature of free *speech* claims is what made *Masterpiece* a hard case; avoiding the free speech claim and choosing instead to deal with the baker's free *exercise* claim makes things easier for Kennedy. But even in the early goings, Kennedy is less thorough than one might hope on how making a cake might be religious *expression* at all and how the Commission's sanction might burden Phillips' religious beliefs.

In his extended prologue to the *Masterpiece* decision, Kennedy signals that he is aware of the problems with construing "making a cake" as "expressing a message."[22] He explicitly labels the free speech aspect of the case as "difficult" because, as he puts it, "few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech."[23] Note that the line here has a double meaning. It may go generally to the idea that baking a cake could ever be thought of as "speech." But it may also imply that in a speech case, *what people think* matters. It matters that the intended expression be capable of being understood as a message by an audience—that many people who see a beautiful wedding cake do in fact see it as an exercise of free speech.

This "objective" requirement is addressed directly by Justice Thomas in his concurring opinion.[24] Thomas did want the Court to reach the speech issue because, to Thomas, it was not strange to think of baking a cake as speech.[25] Stating the standard for conduct to be expressive, Thomas quotes the

20. United States. v. O'Brien, 391 U.S. 367, 376 (1968) ("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.").
21. Spence v. Washington, 418 U.S. 405, 410–11 (1974); *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251–52 (1995) (describing the history of this doctrine).
22. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).
23. *Id.*
24. *Id.* at 1743.
25. *Id.* at 1743–44.

Court's decision in *Clark*, which is that to be protected as speech the act must be "in context" and "reasonably be understood by the viewer to be communicative."[26] And for Thomas, the cake here meets that test: It is expressive, by which Thomas means that *in context*, people would see the cake and take it that Phillips at the very least agrees that same-sex weddings are weddings and perhaps that they are to be "celebrated."[27]

But this further objective requirement—that not only must a message be intended, but a message must, to some degree, be understood—does not apply to the free exercise of religion as it does to the free exercise of speech.[28] One can see why. Many religions have traditions and customs and rituals that, to an objective observer, would be perceived as bizarre, even supposing that they were perceived as religious at all.[29] To require that one's exercise of religion be understood as an expression of religion by an outside observer would favor conventional religions—for example, those religions where it is widely known that drinking wine and eating a wafer is a central and vital religious act rather than a midmorning snack. So when we get to Phillips's claim that baking a cake for a same-sex wedding couple made him go against his religious beliefs, and that this act had significance insofar as it made him *violate* his religion, we do not have to go any further than Phillips's own say-so. If we are satisfied that Phillips is telling us that he is invoking his religious beliefs and that he is sincere in those beliefs, then we are pretty much done with the inquiry as to whether a free exercise of religion is at stake. (It does not, of course, answer the question of whether what the state has done in this instance burdens his exercise of religion, a topic we get to in the next Part.[30]) But as straightforward as this inquiry may be, Kennedy provides but a cursory doctrinal treatment of this issue. As pointed out above, this is all done in a single breath and left to the reader to tease out, as we have done here.

Even more, Kennedy may in fact be misconstruing the requirements of religious exercise by directing attention toward considerations that are irrelevant to the analysis. This is apparent when he offers, as a main example,

26. *Id.* at 1742 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)).
27. *Id.* at 1743.
28. Thomas v. Review Bd., 101 S. Ct. 1425, 1430 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").
29. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524–27 (1993).
30. For elaboration on this point, although in the context of the statutory Religious Freedom Restoration Act rather than the Free Exercise Clause, see Chad Flanders, *Substantial Confusion About "Substantial Burdens"*, 2016 U. ILL. L. REV. ONLINE 27, 30.

the refusal of clergy to conduct a same-sex wedding ceremony.[31] Such a rejection, Kennedy says, would be well understood to be an exercise of religion.[32] But protection of religious exercise does not depend on that exercise being well understood. Nor—as Kennedy's words imply—does the exercise of religion have to be so central to religion as when a member of the clergy refuses to perform a sacred ceremony to a group which, the clergy member believes, is not entitled to it.[33] That is why it is enough in this case for Kennedy to really do no more than to quote Phillips *own* understanding of what his religion requires to find that there was an exercise of religion here. Kennedy's gloss that Phillips *himself* "see[s] the case" as "implicat[ing] his deep and sincere religious beliefs" is enough.[34] The issue of *whether* there is an exercise of religion, then, is a deeply subjective one: It is sufficient that the believer himself or herself simply indicates that the exercise of religion is in play (or "implicated") and beyond that, there is no further burden that the believer has to bear. It doesn't matter that Phillips isn't clergy, or that his issue is baking a cake rather than officiating a wedding.

Nor is there even a requirement that the believer's particular understanding of his religious exercise make all that much sense.[35] In a way, this is just an extension of the idea that the religious exercise does not have to be understood by others, for the demand that religious exercise be understandable may also go to whether that exercise strikes as coherent or consistent.[36] This issue comes up in this case in the following way: Phillips claimed he did not want to make a custom cake for same-sex weddings, yet at

31. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).
32. *Id.*
33. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) ("Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." (quoting *Thomas*, 101 S. Ct. at 716)).
34. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1728.
35. The key case here is *Thomas*. *See* Thomas v. Review Bd., 450 U.S. 707, 715 ("But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").
36. Note the contrast with the free speech aspect of the case: For a free speech claim to get off the ground, the message the speaker is intending to speak has to be understood as a message by others. With religious exercise, it is enough that *one* believes one's act or expression to be religious, not whether others do.

the same time, he was perfectly happy to sell same-sex couples cakes that were not custom-made but rather premade and contained the refrigerator or the freezer in his store.[37] Why, we might think, is one okay and not the other? Couldn't selling "Masterpiece Cakes," even premade ones, to a same-sex couple for their wedding ceremony (and *knowing that*) be expressing a kind of acknowledgement or endorsement of that ceremony? Why, in other words, is Phillips drawing the line this way or that? Ultimately, an outsider's view of the coherence of Phillips's religious beliefs is irrelevant. All that matters is that he *has* them.

Kennedy, in a seeming attempt to empathize with Phillips on this point, potentially sows even more confusion. "The baker," Kennedy writes, "likely found it difficult to find a line where the customers' rights 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."[38] Here, Kennedy appears to believe that weighing customers' rights to certain goods and services should play a role in analyzing whether religious beliefs were implicated in this case. But that seems wrong. Though customers' rights may be relevant in analyzing the possible *state* interest in the case, it appears to bear little relevance to whether free exercise of religion is at stake. The religious believer would simply be concerned with what God, for example, asks of the believer, not about what customers have a right to. If God says that Phillips can't bake cakes for certain customers, then it is too bad for those customers; it is not as if what Phillips's religion demands of him can be bent or altered by what kinds of goods or services customers have a right to.

In any event, this becomes a further distraction from the main point, which is that it is Phillips's understanding of his religion that should drive the analysis of what does or does not implicate his religious beliefs. Contrary to what is stated or implied in Kennedy's analysis, it is not what others think; it is not what customers need; it is not what is consistent or even logical. It is what Phillips *believes*.

37. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) ("Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor.").

38. *Id.* at 1728.

II. WHEN IS AN EXERCISE OF RELIGION BURDENED?

We might think that the next step in analysis, namely, whether the religious exercise has been *burdened* or not, should follow the same analysis as the previous step: Just as the question of whether a person has exercised his religion is a subjective question (answerable by the believer), so too, is it a subjective matter whether that religious belief has been burdened by the state's action?[39] After all, similar questions arise in the context of what a belief is and when the state is asking one to do something that violates the belief. Why should other people—or the state—be able to tell *you* when your exercise of religion is being put under some pressure? Isn't that, again, a matter of what one's religion says?

Indeed, the state should not be the one telling someone that it is not a burden to sell a premade cake to a same-sex couple but that it is a burden to have to design one. That should be up to the believer, and his or her understanding of what his or her religion requires—all of which is to say, the question of burden, as with the prior question of whether an act is religious, is and should be answered subjectively.

And this is by and large correct, although it is not made very clear in the *Masterpiece* discussion.[40] For the most part, the decision of whether there is a religious exercise and whether there is a religious burden are decided in the same way, and in the opinion, it is mostly in the same breath. Phillips said that having to bake the cake would implicate his religion, and *also* burden that exercise. Otherwise, why make the complaint at all? His religion said that same-sex marriages weren't marriages, and baking the cake would make him, he thought, go against his religion. Again, there is no further question about whether Phillips's belief is right about what his religion requires, or whether baking a cake for a same-sex wedding ceremony would violate his religious beliefs. One could certainly imagine someone who was also a baker and also religious, but was able to separate out his religion and his business practice so that baking a cake for a same-sex wedding ceremony wouldn't implicate those beliefs. However, as far as Kennedy is concerned—that is, as far as Kennedy understands Phillips's religious beliefs—that is not

39. For more on this issue and related topics see Chad Flanders, *Insubstantial Burdens*, *in* RELIGIOUS EXEMPTIONS 279 (Kevin Vallier & Michael Weber eds., 2017).

40. Justice Sotomayor rejected this position in a dissent in a Religious Freedom Restoration Act (RFRA) case. We believe, however, that it is the correct view. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting) ("But *thinking* one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so.").

this case. Phillips gets to say what his religion requires, and also, just as importantly, when he is being asked to go against his religion.

But we can be more precise about how Phillips's religious beliefs were in fact burdened in the case. Phillips, because of what he believes about baking a cake, faces a dilemma. If he bakes a cake, he goes against his religion. If he *doesn't* bake a cake, he doesn't violate his religion, but he is burdened in another way: He breaks the law and has to pay a fine or undergo training. With one course of action, Phillips has to pay a religious cost—participating (as he sees it) in a same-sex wedding ceremony; with the other course of action, Phillips has to pay a secular cost—in fact, a financial cost. Either way he loses. And in the same way that we cannot tell Phillips what counts as a religious cost, it is probably also the case that we cannot tell Phillips what is too much of a financial cost to pay for living up to his religious beliefs. We say "probably," because the Court has never been entirely clear as to whether a de minimis fine or a slap on the wrist would count as putting someone in a dilemma as to whether to follow his or her religion.[41] In *Hobby Lobby*, Hobby Lobby faced fines in the range of millions of dollars if it failed to follow the contraceptive mandate,[42] but what if the fine for refusing to bake a cake was $5 or 50 cents? What if it was just a sharply worded letter from the state of Colorado? Perhaps we could say that because following one's religion would cost so little (as a secular matter), then one's religion wasn't burdened at all.

But again, these sorts of questions push up against the Court's limits: who is the Court to say what counts as a religious burden or not? The better and more consistent view with regard to religious burden would seem to be that *any* cost—no matter how small—for practicing one's religion should count as putting pressure on the believer to violate their religion. Or, in other words, if the believer thinks it's too high of a price to pay, then they're right: *It is*.

Was there another burden or violation that Phillips's free exercise of religion suffered in the case? Perhaps so, given Kennedy's repeated emphasis on the hostility toward religion that members of the Colorado Commission ostensibly showed toward Phillips's actions. But this seems to be a red herring. The violation is the pressure to violate his faith that Phillips faced and ultimately, the outcome of the Commission's decision-making process. The unfairness of the process would not count as a harm suffered by Phillips

41. Again, on this see Flanders, *Insubstantial Burdens*, *supra* note 39 at 285–88.

42. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies.").

independent of the result of the process. To see the prejudice and bias as itself a burden to Phillips seems strained.[43] For one, it comes at the wrong time to count as a harm to Phillips's exercise of his religion: It either comes too late, because Phillips will already have been induced to act contrary to his religious beliefs by making a cake; or it comes too early, because we do not know whether Phillips has actually been harmed because he refused to bake a cake absent the Commission's final ruling. For suppose that the same remarks had been made during the hearings on Phillips's case, but it decided not to sanction Phillips in any way, not even by making any sort of adverse decision. Is Phillips's exercise of religion violated? Has he been burdened in any way? He *might* have a claim to be burdened by having to go through the process at all, but this seems a weak claim.[44] Still weaker would be a claim that a commissioner had made some unfortunate remarks that violated Phillips's free exercise of religion. This kind of free-floating harm shouldn't count as any sort of burden on Phillips's religion. At this stage in the analysis, it is at most, as Kendrick and Schwartzman have recently argued,[45] a breach of etiquette for which Phillips has no clear remedy.

III. THE STATE'S INTEREST

Where the hostile remarks from the commissioners may tend to matter is in the state's interest in the case, both *what it is* and *how serious it has to be*. For starters, the remarks change this from a religion case involving a neutral and generally applicable law to one where the neutrality of the process is seriously put into question. And this matters greatly to the free exercise analysis. If the process were not tainted by the stray remarks, then the free exercise claims would be a loser. In fact, this may explain why the free exercise issue got comparatively little attention into the run up to the oral argument in the case: Most people thought that the free exercise issue *was* a sure loser. Not many people focused on what the commissioners said, or how the Commission dealt with comparable cases.[46] People (and the lower court) saw the state of

43. An Establishment Clause violation may be more to the point here, where this type of offense shown may be enough to indicate the state's preference for irreligion (or no religion) over religion.

44. *See, e.g.*, United States v. Friday, 525 F.3d 938, 947 (10th Cir. 2008) (considering the possibility that application for an exemption might be a substantially burdensome process).

45. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 165–66 (2018).

46. *See, e.g.*, Ayesha Khan, *The Butcher, the Baker, the Candlestick Maker: When Non-Discrimination Principles Collide With Religious Freedom*, 4 MD. B.J. 42, 46–47 (2017) (predicting Kennedy would come down on the side of LGBTQ rights, but not discussing

Colorado as having passed a neutral and generally applicable law, and saw the Commission enforcing that law.[47] With that set up, Phillips wouldn't have a prayer. Under *Smith*, if a law is neutral and generally applicable, then religious exercise claims don't get a free pass.[48] In fact, they get *no* pass. Religious claimants have to obey the law like everyone else.[49] Absent a state law that changes this equation, there would have been little for Phillips to do against a neutral and general Colorado law—which is why most people thought his free speech claim was the better way to go. When it comes to free exercise, a neutral and generally applicable law trumps.[50]

In any event, the *Masterpiece* case in Kennedy's view gets wholly removed from the neutral and generally applicable analysis. He thought he had evidence that the *process*—not necessarily the law—was not neutral. According to Kennedy, the process showed hostility and discrimination against religion which meant that the law wasn't neutral anymore, if not in substance then in application.[51] This fact, if true,[52] turns the case almost

the commissioner's comments at all). And although this is only a subjective impression, it seemed as if most amicus briefs focused on the free speech and not the free exercise issue.

47. The appeals court opinion section on free exercise is comparatively brief, compared to the lengthy discussion of Phillips's free speech claim. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 292 (Colo. Ct. App. 2015).

48. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 827, 879 (1990).

49. *Id.*

50. It is worth pausing to ask *why* it is that a neutral and generally applicable law trumps any religion claim. One way of looking at the justification of *Smith* is that when religion is affected by a neutral and generally applicable law, it does not really count as a *burden*. Everyone has to obey those laws, they aren't singling anyone out, so anyone who feels aggrieved by that is, well, just mistaken. One does not have a right to their religious exercise as against a law that is general and applies to everyone, and is fair. In other words, no neutral law really burdens a believer's religious exercise—or at least any religious exercise that the state has to recognize. But another way of looking at the neutral and generally applicable laws point is that the state has an interest in such laws that is rather strong—sufficient to defeat any contrary religious claim. So, one *does* have a valid religious claim on this reading, but the problem is that the state wins out in the balance, because of the state's interest. Maybe it is an interest in uniformity, or maybe it is just the importance of the rule of law. On this reading, the state's generic interest in neutral laws is strong enough so that it outweighs a person's religious exercise. *Smith* is unclear on which justification works, but it is important to see how very different the analyses are: One says that there really is no religious claim that exists to be weighed against the state interest; another says that there *is* a religious free exercise claim, but the state's interest wins out, because it is strong enough.

51. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719, 1729 (2018) ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

52. For a discussion of this, see Bernard Bell, *A Lemon Cake: Ascribing Religious Motivation in Administrative Adjudications—A Comment on Masterpiece Cakeshop (Part II)*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 20, 2018), http://yalejreg.com/nc/a-lemon-cake-

completely around, from a sure loser for Phillips to an almost sure winner. When a state does not treat religion neutrally, the case law is clear. The state must show not just an important interest, but a compelling one; it must show that the reason it is picking on and singling out a religion is for some state interest of great, or even overwhelming, importance.[53] And, as the saying goes, when the analysis is strict, the result is usually fatal to the law and the state usually loses. So when we get to this point in the analysis of *Masterpiece*, we know several things. There is a religious exercise claim. The state is burdening the exercise of religion. But most importantly, the state has acted in a way that has discriminated against that religion. We know, that is, that the law in question isn't neutral, or isn't being neutrally applied. This takes us very close to the conclusion of the analysis, because when we know these three things—religious exercise, burden on that exercise, state discrimination—we also know that the state has to show a compelling interest, which is very hard to do.[54] So, with this much as background, we are very close to knowing that the state was going to lose the *Masterpiece* case.

But here we get to the first very real gap in the case, one that makes *Masterpiece* fundamentally incomplete. Kennedy does *not* go on to look at the state interest in the case or assess whether it is compelling. He ends his consideration of the issue with the fact of hostility, and declares Phillips the winner.[55] That should not be the end, though, and Kennedy should know this. In *Lukumi*, in a decision authored by Justice Kennedy, we had a law that was nonneutral in both of the ways that Kennedy saw in *Masterpiece*. The law wasn't applied generally to everybody—there were exceptions and inconsistencies in who got in trouble for killing animals, so much so that it demonstrated that the people who wrote the law really were just picking on the Santeria.[56] What is more, we knew from the legislative history that the people

ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii.

53. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) ("A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").
54. *Id.*
55. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1732 ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips's case compared to the cases of the other bakers suggests the same. *For these reasons, the order must be set aside*." (emphasis added)).
56. *Lukumi*, 508 U.S. at 535–39.

who passed the law really had it out for the religious believers in the case.[57] They passed the law in order to make trouble for those sacrificing animals for religious reasons. These two things—both showing animus against religion—were also present in the *Masterpiece* case. There was evidence of unfair application of the law in a way that disfavored believers, and some remarks that showed hostility toward religion. But in *Lukumi*, after finding animus, Kennedy went on to consider whether the state had a compelling interest in the law and whether the law was narrowly tailored to advance that interest in spite of the animus.[58] Kennedy takes it as a given that this analysis has to be done, even when it appears that the result is a foregone conclusion. In *Lukumi*, the analysis is indeed rather perfunctory. The law banning only some kinds of slaughter didn't show a sufficiently compelling interest on the state's part.[59]

So we might not think there is much of an omission in *Masterpiece* because, once we get to the point where we know strict scrutiny is the test, the result seems foreordained. Phillips will win, Colorado will lose. But the result here is not, in fact, so obvious, and a lot needs to be said even if the religious free exercise claim ultimately will prevail. The compelling interest point has two parts. The first is to simply identify the state interest. This is no easy task, for there is always the issue concerning what level of generality we should identify that interest. Is this a case just about one couple that didn't get a cake? If we put things that way, then the state interest looks very minor indeed: It is just about making sure *this* couple gets *this* cake from *this* baker.[60] But we might imagine the state interest to be something much broader and weightier and more dignified. This could be a case about the state's interest in antidiscrimination and protecting the equal rights of gays and lesbians. So which is it, and how do we decide?

But even after we answer this question, we immediately have to address another pressing issue: Once we have rightly identified the state's interest, we

57. *Id.* at 541 (recording hostile statements made by proponents of the law at issue in *Lukumi*).
58. *Id.* at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.").
59. *See also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022-25 (2017) (following a similar analysis).
60. *See, e.g.*, Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 29, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4005662 ("What is relevant is not the state's general interest in preventing discrimination or protecting same-sex couples, but its interest in compelling this small owner-operated business to participate in weddings in violation of the owner's conscience.").

still have to weigh it against the interest of the baker. Now there is a tricky issue here, because saying how much weight to give to the baker's interest might mean telling him what his religion is worth or what its value is. We will return to this in a few paragraphs. At the same time, however, we can make a preliminary observation: There are a lot of things that still need to be decided even if strict scrutiny is determined to be the right standard. In a way, we are only halfway there. The trouble with Kennedy's opinion is that he ends up spiking the football at the thirty-yard line, not in the end-zone.

Kennedy's opinion—and indeed much of Kennedy's legal career—emphasizes the rights of gays and lesbians to be treated equally. This matters in the state context, as when the state may criminalize same-sex conduct or prevent gays and lesbians from marrying. Kennedy's opinion, though, emphasizes that this equal respect also matters in the commercial context. He repeatedly worries in the *Masterpiece* opinion about the possibility of a community-wide stigma against gays, which may result from discrimination in the marketplace against gays and lesbians.[61] So Kennedy does seem at least alert to the possibility that there may be a compelling interest against discrimination, which would mean that the state could win even if strict scrutiny applied in this case. He notes too that any decision that favors the baker would have to be "sufficiently constrained," again because of the risk of a spillover into a sort of generalized discrimination against gays in commerce.[62]

However, Kennedy does not revisit the point; he apparently thinks that his pro-baker opinion is suitably constrained—perhaps because he is dealing only with the process, not the result. But Kennedy's opinion has the result that the baker is allowed to discriminate and, for reasons that we will explain later, if Kennedy wanted to rest his opinion on process grounds alone, the correct remedy would be a remand, not a win for the baker. Kennedy's opinion has to stand for the proposition that discrimination in this case, and cases like this, is permissible, that is, that the state interest is not compelling enough. He *should* say more about why discrimination in this context does not present a risk of larger, community-wide discrimination against gays. Maybe it can be contained because it is about designing cakes, rather than selling generic goods to gays and lesbians. Does that prevent any sort of generalized stigma? That, certainly, is unclear: Flower arrangers and photographers may think that their services are personalized enough to be more like designing a cake as opposed

61. *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719, 1727 (2018).
62. *Id.*

to selling a premade cake. And then of course, we do have the discrimination in *this* case. Why isn't stopping that a compelling enough interest? We don't know, because Kennedy doesn't say—even worse, Kennedy doesn't even get there.

And now we get to the further question of balancing the state's interest in this case against the burden on the religious believer. This is the point alluded to, above, about weighing the baker's interest in free exercise of religion against the state's interest—whatever that may be. We may have to defer to the baker's idea of what his religion requires and when it is burdened, but it cannot be the case that when we *weigh* his interest against the state's we have to defer to *his* determination of how to balance the interests. This would mean that the religious believer would—or at least could—always win against the state; the believer could always insist that his or her interest was the most important thing in the world.[63] The balancing must assess, from a nonbeliever's perspective, the relative weights of the state's interest and the believer's interest. It may be that a lesser than compelling interest on the part of the state could win out if the religious interest were not that great. So at this point it might not matter much that we are dealing only with one instance of discrimination against one same-sex couple. If we are truly comparing like for like, then we are only really dealing with *one* instance of a baker having to design a cake for a same-sex wedding. Along these lines, the state's interest may have a better shot. Again, we don't know how this would play out, because Kennedy does not go into any of this. But to have a full resolution of the case, he would need to. To say that Phillips wins and not just that the baker should get a fair hearing in front of the Commission, Kennedy must do this balancing. He must also complete the prior step of adequately assessing the state's interest.[64] He does not.[65]

IV. THE REMEDY

Because of the lack of discussion of the state's compelling interest—which, again, is required even if the state has shown a hostility toward religion in passing or administering a law—we might suspect that Kennedy's decision is about

63. Moreover, it would implicate the state in weighing eternal concerns (such as heaven or hell) against secular interests.

64. Of course, if the state's interest is not compelling, the balancing is easy: The state loses. But the point is, Kennedy does not do *any* of this.

65. A useful exercise in these cases is to consider what would happen if this was a matter not of sexual orientation discrimination, but of racial discrimination. Would the state interest be stronger in that case? In what other ways might the opinion be different?

something else. If the decision were truly about the burden on the religious believer, then there should be a discussion of how the compelling interest was not enough to justify that burden, even a perfunctory one. At best, we might be able to piece together what Kennedy should have said on these matters, or maybe even what he implicitly said. This is what many commentators have done, and what many doubtless will do in the future. Maybe subsequent cases will fill in the blanks that Kennedy has left.

But a better analysis might conclude that the blanks are there for a reason. Kennedy in the end is more concerned with the hostility and animus shown toward the religious believer in the *Masterpiece* cake. Earlier in this Article, this was characterized as a "free-floating" harm, something that does not necessarily burden a religious believer absent some concrete harm resulting from the animus. What if Kennedy, however, was most upset by this "free-floating" harm?

To focus on the harm in the *process*—rather than in the result—is to change almost completely how the case should be framed. But the framing seems to work as an explanation of much of Kennedy's opinion, and in particular, what he leaves out. If the problem was with the process, then it does not matter much what the state's interest is, or whether it outweighs the wrong. To focus on the process, we don't care about how the balancing comes out—because the flaw is not in the result, but in what comes before the result. Phillips's claim was not heard fairly. Or, at the very least, there is a real risk that it was not heard fairly. The hearing was not a neutral one, or it could appear to be not neutral. Now, supposing that Kennedy has interpreted the facts correctly,[66] there is a real problem here. An unfair process *is* a problem but, and this is the important point, it is not a problem *yet* of any violation of anyone's religious freedom. This is what was meant, earlier, when the process harm was described as "free-floating." It is free-floating relative to the question of whether anyone's religious freedom has been violated. At the process stage, we don't yet know whether anyone's religious free exercise has been limited. We would have to wait and see what the result of the process is. All of which is to say, if we view this as a process case, we are no longer seeing it as a religious freedom case. We can only see it, at best, as something that might involve a violation of religious freedom depending on how the case comes out. To understand this, consider that Phillips would not have any claim under the free exercise clause

66. *See, e.g.*, Leslie C. Griffin, *Misunderstanding Religion in* Masterpiece, AM. CONST. SOC'Y: ACSBLOG (June 5, 2018), https://www.acslaw.org/acsblog/misunderstanding-religion-in-masterpiece (arguing that Kennedy's interpretations of the statements made by the commissioners was "surprising").

of the First Amendment if the only problem was that some commissioner had disparaged his religious beliefs, but nothing came of it—no sanction, no fine, no nothing.[67]

If *Masterpiece* is not a religious freedom case, then what kind of case is it? It is a due process case. And ironically, there is another Kennedy opinion that can act as our template for how such a case should go: *Williams v. Pennsylvania*.[68] In that case, a District Attorney, Ronald Castille, signed off on a prosecutor's request to seek the death penalty against Williams. Castille then later became an appellate judge, and proceeded to hear an appeal from the exact same case he had signed off on years earlier.[69] The Court found that Castille should have recused himself from that appeal: The risk of bias was too great, Kennedy said. Importantly, the problem was not necessarily that the result would have been different, or that any other judge had been biased in making the decision, as the appeals court ruled against the defendant. But it was enough that there was a real risk that the decision-making process—namely, the deliberation of the panel of judges—had been tainted by the participation of the biased member. The Court found that there was a due process violation, based on the involvement of the biased judge.[70] If we look to *Williams* as our guide, *Masterpiece* looks nearly identical. We have a flawed process, which is a problem quite apart from the result in the case. Indeed, we can determine that the problem exists even if we never know the outcome (although one might only complain of the process if there is an adverse outcome).

Where *Williams* and *Masterpiece* diverge, however, and why the analogy between the two cases only goes so far, concerns the remedy in each case. As discussed in the previous part, *Masterpiece* ends with a *win* for Phillips. The *Williams* case, however, ended with a remand. Due process entitled the plaintiff in *Williams* to "'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'"[71] If the problem with the original process was that it presented either the risk or actuality of bias, the solution is to *run the process again*, this time without the

67. At the very least, it becomes much harder to characterize this harm.
68. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).
69. *Id.* at 1905–06.
70. One might also reference here another Kennedy opinion, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), in which Kennedy ordered a remand in a case in which it was revealed that a juror made a racist comment during deliberations. *See id.* (remanding case). If *Pena-Rodriguez* were read to parallel *Masterpiece*, it would conclude, not with a remand, but an acquittal for the defendant.
71. *Williams*, 136 S. Ct. at 1910.

bias or the risk of bias. A process problem, in other words, doesn't entitle one to a result. It entitles one to *the right process*. Process problems get process solutions, or at least should get them.

Hence the anomaly in the *Masterpiece* case. Kennedy does not end his opinion with a remand—he ends it with a win for Phillips and no remand. Left unexplained is why Kennedy does this. He does not say that the process was so tainted that a remand would be pointless. It is hard to see how that might be so.[72] Nor, as we have seen, is the free-floating process harm taken by itself a violation of Phillips's exercise of religious freedom; for that we would actually need to know the result of the process, not just that the process was tainted. So what happens is that Kennedy takes a case where it seems the main problem is a process one, but which has a result which is more than a process result. It is a kind of windfall for Phillips. He gets the decision he wants without having to suffer through a second hearing on his case.[73]

Kennedy basically saw a fork in the road and took it.[74] The case presented itself as a religious freedom case, but the best lens to look at it may actually be a due process one. So Kennedy starts his analysis—and frames his discussion of most of the case—as if it were a religious freedom case. But then the analysis sputters and ends up being incomplete as a religious freedom case. We do not get to the weighing of interests, or even a clear statement of the state's interest in this case—as opposed to generalities about antidiscrimination. If this case were a religious freedom case, this would be required because we would need an explanation not just of what went wrong in the process, but why the proper result is that Phillips should win on his claim as opposed to winning a remand to get a fairer hearing. We get a hybrid decision, and one that fails to satisfy either as a religious freedom case or a due process case. It is a bit of both. But ultimately, it ends up being neither.

72. One option, suggested to one of the authors by Carl Esbeck, is that the fact that the Commission had previously not sanctioned bakers who rejected making antireligious cakes makes it the case that any subsequent decision by the Commission is tainted by this unequal treatment. On this interpretation, the Commission would have to repudiate those previous decisions.

73. One might think that Colorado administrative law, like federal administrative law, forces Kennedy to set aside the results of an unconstitutional process (*see*, 5 U.S.C. § 706 (2)(B) (2012)), but this is not so. COLO. REV. STAT. § 24-4-106(7) (2014) specifically allows for a remand.

74. YOGI BERRA & DAVE KAPLAN, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES (2001).

CONCLUSION

Is *Masterpiece* a freedom of expression case, a religious exercise case, or a due process case? Justice Kennedy himself appears confused about the issue in his opinion,[75] and so too do the dissents and concurrences. We argue that this overall confusion gives rise to the disappointment felt by commentators, and worse, makes it an incomplete decision in both its failure to apply scrutiny of any kind and its strange, full-stop holding for Phillips. Perhaps it is as Garrett Epps argued in his article for the *Atlantic*: that these were just the wrong set of facts to take to decide any of these questions.[76] But then the appropriate and perhaps even the more honest decision would have been to deny certiorari rather than to trudge forward with an incomplete hybrid decision. This ultimately raises the question of whether, beyond the narrowness or shallowness of judicial minimalism, an incomplete decision has value for our democracy and properly plays the role the judiciary branch is supposed to play. We do not argue for an answer to that question here, and, if that type of decision can play some role and has a proper place, *Masterpiece* does not fit in that box. Minimalism, Sunstein and others argue, can play the role of keeping deliberative democracy where it belongs: with the culture and congress, not in the judiciary.[77] One argument against minimalism is that a minimal decision does not supply the motivation for deliberation.[78] Perhaps this is the virtue of an incomplete decision? Its failure to fill in the expected gaps can motivate scholars, citizens, and congress to do so themselves. One might hope that this could happen and that *Masterpiece* will sow the seeds of future action, rather than seeds of confusion and disappointment.

75. At best, he is displaying a calculated obscurity designed to avoid reaching several main issues.
76. Epps, *supra* note 2.
77. *See Sunstein*, *supra* note 9.
78. *See Steilen*, *supra* note 9.