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Cover Page Footnote

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DISCRIMINATION, *TRUMP V. HAWAII*, AND *MASTERPIECE CAKESHOP*

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This short symposium piece is a comment on two of the Supreme Court's recent religion cases. The first is *Trump v. Hawaii*, the travel ban case, where the Court rejected the claim of unconstitutional religious discrimination against Muslims.[1] The second is *Masterpiece Cakeshop*, the case about the baker who refused to make a cake for a gay wedding, where the Court accepted the claim of unconstitutional religious discrimination against a conservative Christian.[2] One case finds discrimination, while the other rejects it. Yet more fundamentally, the pairing suggests differences in how we perceive or react to evidence of discrimination. Both on the Court and off it, conservatives seemed quicker to find actionable discrimination in *Masterpiece*, and liberals seemed quicker to find actionable discrimination in *Trump v. Hawaii*. This kind of statement should be qualified—we must be careful not to overstate things.[3] But even so, anyone who reads these opinions will notice the trends.

This symposium piece considers the two cases individually (as I was asked to do). Ultimately, it will defend the claim of discrimination in each, probably not straying too far from the Kagan/Breyer position. But this piece tries to offer some novel points, and throughout, it ponders some larger questions about the law's response to cultural polarization.

Perhaps *Trump v. Hawaii* and *Masterpiece Cakeshop* are interesting only in themselves. Or perhaps they signal a coming era where the Supreme Court differentiates sharply between discrimination claims of different kinds. This could happen in a variety of ways. The Court could begin superintending

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[1] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (reversing the lower court's preliminary injunction).

[2] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (reversing the decision of the Colorado Court of Appeals).

[3] This statement should be qualified in three ways. First, Justice Kagan and Justice Breyer found unconstitutional discrimination in both cases. Second, while Justice Ginsburg and Justice Sotomayor voted against the claim in *Masterpiece Cakeshop*, they did not defend the allegedly discriminatory comments of the Commissioners, saying instead that those comments had insufficient bearing on the result. Third, while the conservatives voted against the claim in *Trump v. Hawaii*, they did not defend the allegedly discriminatory comments of the President. Instead, the dominant theme of that opinion was judicial deference to the executive on immigration matters.

discrimination cases more closely—formally reducing the deference given to the discrimination findings of trial courts, or issuing more one-off decisions reversing lower courts failing to find discrimination (in preferred domains) or reversing lower courts finding discrimination (in others). Uniform trans-substantive rules about things like mixed motives, discriminatory taint, or judicial recusal might give way to domain-specific rules on each of these topics—with more protective rules in more protective domains. Finally, and most obviously, individual rights themselves might change. Weaker kinds of antidiscrimination rights might grow stronger, perhaps blossoming eventually into substantive rights—this could be what is about to happen with the Free Exercise Clause. For other rights, it might go the other way. But the past is always more certain than the future, so we start with *Trump v. Hawaii* and *Masterpiece Cakeshop*.

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Trump v. Hawaii was the Supreme Court's 2018 decision upholding President Trump's travel ban. As a presidential candidate, President Trump had made a call for a "total and complete shutdown of Muslims entering the" United States.[4] Shortly after taking office, he signed an executive order suspending entry of foreign nationals from seven countries, all of whom had populations that were more than 90% Muslim.[5] After the courts enjoined his first executive order and its replacement, the President issued a third version that covered four of the old countries and three new ones, claiming these countries had "systems for managing

[4] *Trump*, 138 S. Ct. at 2417.

[5] *See* Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1135 (D. Haw. 2017) (stating that the six countries referenced in the second travel ban have populations "that range from 90.7% to 99.8%" Muslim); *see also Muslims*, PEW-TEMPLETON GLOBAL RELIGIOUS FUTURES PROJECT, http://www.globalreligiousfutures.org/religions/muslims (last visited July 3, 2022) (indicating that Iraq, the seventh country referenced in the first travel ban, has a 99% Muslim population).

and sharing information about their nationals the President deemed inadequate."[6]

Trump v. Hawaii upheld this third version of the travel ban against the claim of intentional religious discrimination. Some might take the Court's decision as saying there was insufficient evidence of discriminatory intent. But this would not be exactly right. Chief Justice Roberts studiously avoided any firm conclusion about whether the President's travel ban was motivated by discriminatory animus.[7] Instead, the Court looked at the issue with so much deference to the President that the Court ended up avoiding the whole question.[8] This is not just some gestalt one gets from reading the case—it is the core of *Trump v. Hawaii*. After unpacking the Court's earlier cases establishing robust presidential authority over immigration, the Court announced it would look beyond the travel ban's facial neutrality only to see if there was some "rational basis" for it.[9]

The Court really could have ended the case there—and for all practical purposes, it did. After all, the hallmark of rational basis review is that it upholds actions on the basis of possible motives, whatever the actual motives.[10] So by deciding on this standard of

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[6] *Trump*, 138 S. Ct. at 2404; *see also* Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161, 45164 (Sept. 24, 2017) (restricting "the entry of nationals" from "Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen").

[7] *See Trump*, 138 S. Ct. at 2418 ("[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.").

[8] *See id.* ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

[9] The Court started off by saying that a "conventional application" of the Court's precedents would ask only if the "policy is facially legitimate and bona fide." *Id.* at 2420. This, the Court said, would "put an end to our review." *Id.* Yet the Court went on: "But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. . . . For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review." *Id.*

[10] *See* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 547 (2016) ("Refusing to look at actual intentions, [the Court typically] asks

review, the Court simultaneously decided the rest of the case. The Court did not say the President lacked a discriminatory motive. Instead, it said that any discriminatory motive on the part of the President did not matter. It is always discouraging when the law does this—when it closes its eyes because it knows the ugly things it will see if it looks. It is reminiscent of the old deference to jury verdicts, where courts would ignore the most horrific defects in jury deliberation—like a jury deciding a case by drawing lots.[11] But four years ago, in *Pena-Rodriguez v. Colorado*, the Court took off the blinders and, for the very first time, allowed impeachment of a jury verdict—creating an exception to the no-impeachment rule for verdicts clearly the product of racial prejudice.[12] *Trump v. Hawaii* could have been decided that way.

As regards the President's actual remarks, even the President's defenders avoided defending them, which makes sense because the task borders on the impossible. One can try, of course. One could say President Trump's true concern was stopping terrorists rather than Muslims. But the President did not say he wanted to stop terrorists; he said he wanted to stop Muslims. And stopping terrorists by stopping Muslims is just a discriminatory stereotype. Sanctioning the President's statements requires an almost relentlessly forgiving attitude. If we were pondering the meaning of statements of a foreign leader or alien civilization, we would instead assume they meant what they said.

Rather than defending the President's actual remarks, the President's defenders attacked the causal connections between

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whether, as an objective matter, there is any rational basis on which the legislature's action could be sustained."); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

[11] *See* Warger v. Shauers, 574 U.S. 40, 45 (2014) (finding that Rule 606(b), the modern federal rule codifying the no-impeachment principle, originally derived from an English common law case "in which Lord Mansfield held inadmissible an affidavit from two jurors claiming that the jury had decided the case through a game of chance").

[12] *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 870 (2017) (holding that "[w]hen jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence").

them and the travel ban.[13] President Trump said improper things as a candidate, but the first Proclamation happened later and went through customary political channels. And even if the first Proclamation was tainted, the argument goes, the third one was not.[14] General rules become surprisingly hard to discover here, but we can already see tensions with *Masterpiece Cakeshop* (which we will discuss in a bit). *Masterpiece* suggested sanitation could only come with repudiation—*Masterpiece* said the taint of previous bias could only be removed if the government openly acknowledges it and then explicitly disavows it.[15] Yet that never happened in *Trump v. Hawaii*.

Let us now fully turn to *Masterpiece Cakeshop*. The two cases are connected both doctrinally and temporally. They both involve allegations of religious discrimination, and they both were decided by the Court in the same month.[16] *Masterpiece Cakeshop* involved a gay couple seeking a wedding cake from a cakeshop owner, Jack Phillips, who refused on religious grounds.[17] In the Colorado courts, the couple successfully sued Phillips for discrimination.[18] But on appeal, the Supreme Court rejected the couple's suit. It was actually Phillips that had been unlawfully discriminated against, the Supreme Court concluded.[19]

Central to the Court's decision were certain comments commissioners made about Phillips when his case was before the Colorado Civil Rights Commission, which the Court said reflected

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[13] Brief of Southeastern Legal Foundation as Amicus Curiae in Support of Petitioners at 10, *Trump*, 138 S. Ct. 2392 (No. 17-965) ("Statements to the media are not 'official acts.' And they are unreliable indicia of purpose.").

[14] Brief for the Petitioners at 68–69, *Trump*, 138 S. Ct. 2392 (No. 17-965) (distancing the instant travel ban from the previous two iterations due to differences "both in process and in substance").

[15] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 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." (emphasis added)).

[16] *See generally id.* (deciding the case on June 4, 2018); *Trump*, 138 S. Ct. 2393 (deciding the case on June 26, 2018).

[17] *Masterpiece*, 138 S. Ct. at 1723.

[18] *Id.*

[19] *Id.* at 1731 ("Phillips' religious objection [to serving the gay couple] was not considered with the neutrality that the Free Exercise Clause requires.").

an impermissible hostility to religion.[20] Made by different commissioners and scattered across different hearings, these comments run the gamut from innocuous to troubling.

Let us start with the innocuous. In the first hearing, a commissioner said that "Philips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'"[21] The commissioner then elaborated: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[22]

Masterpiece saw this as troubling, although the Court did not explain why.[23] In truth, there is nothing troubling here. Even the most devoted fans of free exercise distinguish between freedom of religious belief (which can be virtually absolute) and freedom to act on those religious beliefs (which must necessarily be bounded).[24] Everything the commissioner said here could have been taken from Justice Scalia's opinion in *Smith*, and nobody thinks Justice Scalia

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[20] *See id.* at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."). To be clear, *Masterpiece* actually floated several theories of discrimination. This piece, however, will put aside the wider theories of discrimination—discussed most in Justice Gorsuch's concurrence—premised on the William Jack cases. *See id.* at 1734–35 (Gorsuch, J., concurring). In those cases, the Colorado courts had rejected the discrimination claims of William Jack, who had sued several bakeries after they refused to make cakes for him with visible anti-gay messages. *See id.* at 1735. In essence, Justice Gorsuch said there was no nondiscriminatory rationale under which Colorado could dismiss William Jack's claims but vindicate the claims brought against Jack Phillips. *See id.* at 1734 (noting that some Justices "have written separately to suggest that the Commission acted neutrally toward [Jack Phillips'] faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment," but then concluding, "I do not see how we might rescue the Commission from its error").

[21] *Id.* at 1729 (majority opinion).

[22] *Id.* (alteration in original) (quoting the Commission's language).

[23] *See id.* (recognizing that each of the commissioners' comments standing alone could be "susceptible of different interpretations," but interpreting the comments in the aggregate as "inappropriate and dismissive . . . showing lack of Phillips' free exercise rights").

[24] For a classic statement of this, *see* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (noting that while "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such," governmental regulation of some "overt acts prompted by religious beliefs or principles" is different, "for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions'" (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961))).

was antagonistic toward conservative Christians.[25] *Masterpiece* itself even recognized how this language might be benign; the Court only questioned it because of what came later.[26]

What came later was this statement, made by a different commissioner, Diann Rice:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[27]

Now much of this is unobjectionable. It is undoubtedly true, for example, that religious people have either done terrible things or gone along with terrible things because those things were sanctioned by religious authorities, justified by religious doctrine, or simply taken for granted by a particular religious worldview. And it is also undoubtedly true that the exercise of religion can, and historically has, hurt other people. Nobody expects the Spanish Inquisition; nobody forgets it either.[28]

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[25] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("[W]hile [laws] cannot interfere with mere religious belief and opinions, they may with practices." (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878))), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[26] *Masterpiece*, 138 S. Ct. at 1729 (noting that these comments "might mean simply that a business cannot refuse to provide services based on sexual orientation," or alternatively "might be seen as inappropriate and dismissive," and concluding that, "[i]n view of the comments that followed, the latter seems the more likely").

[27] *Id.*; *see also* P. Solomon Banda, *Ex-Colorado Official: No Bias in Same-Sex Wedding Cake Case*, ASSOCIATED PRESS (June 6, 2018), https://apnews.com/article/021be124ab014dafb72b626721439b04 (identifying Diann Rice as the commissioner quoted in *Masterpiece*).

[28] One commenter failed to get this reference, so the piece should clarify that "[n]obody expects the Spanish inquisition" is a recurring line from a Monty Python sketch. *See Monty Python's Flying Circus: The Spanish Inquisition* (BBC television broadcast Sept. 22, 1970).

What then is wrong with this statement? Justice Kennedy saw the problem as lying in the words "despicable" and "rhetoric."[29] But another problem—and one I think more obscure and more important—lies in the language of "use." One sees it twice in the above statement, both in Commissioner Rice's first sentence ("religion has been used to justify all kinds of discrimination") and in her second ("to use their religion to hurt others").[30]

The language of "use" is just not how we would describe religious commitments with which we have any sympathy. No one sympathetic to the Native American Church in *Smith* would say the church was *using* its religion to get the right to use peyote; no one sympathetic to the Muslim claimant in *Holt v. Hobbs* would say he was *using* his religion to be able to wear a beard in prison.[31] Say I ask a friend to go to the movies one Friday night, and she says she can't because she has to go to Friday services. I respond, "You are using your religion to get out of going to the movies with me." It is clear what I am implying.

Or just change the context from religious exemptions to some other form of hardship accommodation. Take an employer who accuses an employee of *using* their disability or pregnancy to get some kind of accommodation. We now know exactly what that employer really thinks—the employer thinks that the employee is exaggerating (or feigning) the disability or pregnancy and the employer even has the nerve to say that out loud.

This is what is wrong with Commissioner Rice's statements. They amount to a claim that Jack Phillips did not really have a

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[29] *Masterpiece*, 138 S. Ct. at 1729 (emphasizing that the commissioner's comments "disparage[d] [Phillips'] religion . . . by describing it as despicable, and also by characterizing it as merely rhetorical").

[30] This analysis thus differs from that of Leslie Kendrick and Micah Schwartzman, who conclude that "a fair reading of the entire record in *Masterpiece* shows that the Commission met its adjudicative obligations to Phillips by taking seriously his religious claims, reasoning publicly and extensively about them, and generally according them respect." Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 143 (2018). For a similar conclusion, see Mark Satta, *Unclear Hostility: Supreme Court Discussions of "Hostility to Religion" from* Barnette *to* American Legion, 68 BUFF. L. REV. 641, 690 (2020) ("If the Court is going to invalidate a ruling on grounds of hostility to religion, it seems that the Court's standard ought to be much higher than merely that a reasonable interpretation of a lower adjudicative body's actions is that the actions indicate hostility toward religion.").

[31] *See generally* Emp. Div. v. Smith, 494 U.S. 872 (1990); Holt v. Hobbs, 574 U.S. 352 (2015).

religious objection to serving the gay couple. Instead, Jack Phillips decided first to discriminate against the gay couple, then searched around *post hoc* for some religious basis for that decision. This may be what the commissioner actually thinks. And it may even be true, who knows. But if it is true, then it should be defended explicitly, ideally with some support from the record. Otherwise, it looks like a prejudgment about sincerity, the classic fear when people are called upon to judge the authenticity of other peoples' faiths.[32]

Now it is important to keep in mind that Commissioner Rice's statements were made in a judicial hearing rather than in a written opinion.[33] As folks who speak extemporaneously for a living, law professors know that verbal imprecision is inevitable—in countless ways, we depend on our students to be a somewhat forgiving audience. Even so, when you fear you are being discriminated against, you naturally think of these things as Freudian slips or Kinsley gaffes—you take them as linguistic errors that reveal true beliefs underneath.[34]

Part of the problem here is how all this intersects, rather blindly, with a classic and thorny question in the law-and-religion field—the issue of religious voluntarism. Are religious commitments chosen or not? From one point of view, religion is a matter of choice. We *choose* whether to attend religious services; we *choose* what denomination to belong to. We can also *choose* to change our minds—from Christianity to atheism, from an agnostic Judaism to a more theistic version, or what have you. From another point of view, religion is not a matter of choice—or, at least, not everyone sees it that way.

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[32] *See* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) ("When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.").

[33] *See Masterpiece*, 138 S. Ct. at 1729 (stating the remarks occurred during "formal, public hearings").

[34] Moreover, this kind of language is common now; it does not just appear in extemporaneous statements. *See, e.g.*, U.S. COMM'N ON C.R., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016), www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.pdf ("[R]eligion is being used as both a weapon and a shield by those seeking to deny others equality."); DEMOCRATIC PLATFORM COMM., 2020 DEMOCRATIC PARTY PLATFORM 84 (2020), https://perma.cc/9MUS-2V6X ("Democrats believe that freedom of religion and the right to believe—or not to believe—are fundamental human rights. We will never use protection of that right as a cover for discrimination.").

Some religious believers might say they believe in God because they *choose* to do so. But others would say they believe in God because God is real or because the evidence for God's existence is compelling. Indeed, part of what drives the project of religious exemptions is the perceived lack of choice. We have sympathy for religious people in part because we see them as bound by religious principles and obligations that they did not choose and cannot alter. This is what the term "use" denies. Use implies choice; choice implies the ability to do otherwise. You are choosing to use your religion to harm other people. Why can't you just make a different choice?[35]

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No one knows how much of a legacy either *Masterpiece Cakeshop* or *Trump v. Hawaii* will have. The Court decided them both narrowly—each case is tightly circumscribed by its facts. But we might also want to think about broader issues—not just how the two connect to each other, but also how they might fit with cases further afield. After all, *American Legion*, the case about the constitutionality of a government-sponsored WWI memorial cross, is also a case about meanings, discrimination, and exclusion.[36] The display cases are, in some ways, progenitors of cases like *Masterpiece Cakeshop* and *Trump v. Hawaii*—if words are ambiguous (and every lawyer knows they are), symbols seem doubly so. One reason to reject government-sponsored religious symbols is that even if we see only innocuous meanings, we know we live in a pluralistic society and we know others see things quite differently.[37]

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[35] To be clear, none of this defends the ultimate result in *Masterpiece Cakeshop*. As others have rightly pointed out, the Court concluded the case oddly—by simply dismissing the case against Phillips, rather than by remanding for a new trial. *See* Kendrick & Schwartzman, *supra* note 30, at 151 (noting both that "the proper remedy would have been to seek recusal of biased Commissioners" and that the "composition [of the Commission] had in any event completely turned over"); Chad Flanders & Sean Oliveira, *An Incomplete* Masterpiece, 66 UCLA L. REV. DISCOURSE 154, 175 (2019) ("[W]hat 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.").

[36] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[37] In 1995, the Justices almost had a real conversation about the fact that different people could take different messages from religious monuments. *Compare* Capitol Square Rev. &

But in this way then, *Trump v. Hawaii* and *Masterpiece Cakeshop* may just be the newest cases presenting these perpetually reoccurring legal questions.

Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) (phrasing the endorsement inquiry as asking whether *the* reasonable observer *would* see an endorsement of religion), *with id.* at 807 (Stevens, J., dissenting) (asking whether *some* reasonable observer *could* see an endorsement of religion).